

# NEW YORK TEMPORARY STATE COMMISSION ON LOBBYING

## OPINION NO. 46 (02-1)

### FACTS

A Delaware corporation with its principal place of business in New York (Corporation) is a company that markets services (including equipment) to remove and reclaim harmful mercury pollutants from wastewater at the source of the pollutants. The sources of the pollutants are typically thousands of small corporation offices throughout this nation and in Canada. In order to enhance its nationwide (and Canadian) marketing efforts to these offices, and to bring the attention of opinion leaders and decision makers around the country to recognize the danger of this pollutant, Corporation has engaged a Lobbying Firm (Firm). The contract between Corporation and Firm requires Firm to perform a wide range of services to assist Corporation, including government relations on the federal and state levels, research, press and public relations strategy. To assist its efforts in New York, Firm has engaged an independent contractor to perform lobbying services in New York. Firm and Corporation have the following compensation agreement: (i) upon entering into the agreement, Corporation pays Firm several shares of stock; (ii) Corporation pays Firm a set number of shares each month within the term of the contract, which does not vary from month to month; (iii) in the event that Corporation achieves certain aggressive annual sales goals, anywhere and for any reason, Firm will receive additional stock in Corporation. No award of stock is directly related to legislative or executive lobbying success in New York or any other jurisdiction. Presently, Corporation's stock is not publicly traded. As well, there is no established value for the stock at the present point in time.

### ISSUE

Under the facts set forth, is payment to a Lobbying Firm in stock of the Client an illegal contingency retainer under §1-k of the Lobbying Act?

### OPINION

§ 1-k of the New York State Lobbying Act states the following in regards to contingent retainers:

[n]o client shall retain or employ any lobbyist for compensation, the rate or amount of which compensation **in whole or part** is contingent or dependent upon the passage or defeat of any legislative bill or the approval or rejection of any legislation by the governor, or the adoption or rejection of any code, rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency and no person shall accept such a retainer or employment. A violation of this section shall be a class A misdemeanor.

§13 of the Commission's guidelines further states in pertinent part the following:

[a] Contingent Retainer is **any compensation in whole or in part** which is contingent or dependent upon the success of a lobbying effort. Contingent Retainers include, but are not limited to, fees, including a bonus, **stock options or other equity inducement**...

Compensation under the Lobbying Act in pertinent part means anything of value paid, owed, given, or promised to the lobbyist by the client for lobbying.(1)

Firm's initial receipt of stock and Firm's fixed receipt of stock on a monthly basis is impermissible because the value of received stock is contingent and dependent on the lobbying efforts of Firm. Firm, in a memorandum submitted to the Lobbying Commission, stated that the stock presently does not have a stated value.(2) Firm also stated that the main goal of Corporation is to tighten the restrictions on the amount of mercury pollutant that may be discharged, which will enhance Corporation's services and sales.(3) If Corporation's sales increase, Corporation's stock value may increase accordingly. In essence, Firm's fee for lobbying services will be the difference between worthless stock and any value attached to the stock depending on the degree of Firm's lobbying success. Even though the stock presently has no stated

value, because the stock is being received in return for Firm's lobbying efforts, it is obvious that this stock is a form of compensation under the Act. Accordingly, because the stock is compensation, dependent upon Firm's efforts, it is thus a contingent retainer and forbidden under the statute.

In addition, Firm in its submitted memorandum stated that Firm is entitled to receive additional compensation in stock based on the extent to which Corporation's overall sales throughout the United States exceeds certain preset targets. This additional compensation received in the form of stock constitutes a forbidden contingent retainer under the statute. Because this portion of the compensation agreement between Firm and Corporation would be termed a contingent retainer, the entire compensation agreement would be termed a contingent retainer as well. A contingent retainer, as stated in the guidelines, is **any compensation in whole or in part** which is contingent or dependent upon the success of a lobbying effort.

## CONCLUSION

Thusly, for the above reasons, Firm's receipt of stock and stock options as a result of Firm's lobbying efforts is an impermissible contingent retainer under § 1-k of the Act and under §13 of the Commission's guidelines.

APPROVED BY COMMISSION: MARCH 20, 2002

CONCURRING: PATRICK J. BULGARO, CHAIR; STEWART C. WAGNER, VICE CHAIR; ALBERT S. CALLAN, MEMBER; BARTLEY F. LIVOLSI, MEMBER; JOSEPH A. DUNN, MEMBER; RONALD J. AIELLO, MEMBER.

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PATRICK J. BULGARO  
Chairman

- (1) N.Y. Lobbying Act §1-c(h) (1999).
- (2) Memorandum from McLeod, Watkinson & Miller 1,3 (July 3, 2001).
- (3) Letter from McLeod, Watkinson & Miller page 1 & 2 (July 3, 2001).