



Kenneth J. Pokalsky
Vice President

October 16, 2017

Ms. Carol Quinn
Deputy Director of Lobbying Disclosure
JCOPE
540 Broadway
Albany, NY 12207

Dear Ms. Quinn:

I am submitting these comments on behalf of The Business Council of New York State, Inc.

Our comments are based on input from member companies, as well as our direct experience in filing client statements and lobbyist registrations and periodic reports.

We commend JCOPE for circulating an informal draft rule last fall, and for reaching out to regulated entities and the interested public for input on that initial draft. That process was a productive one, as it helped inform JCOPE commissioners and staff of concerns of the regulated community, and it generate input on proposed language in a setting where concepts and language are more easily amended.

We also commend JCOPE for using this rulemaking process to clarify compliance requirements for clients and lobbyists subject to the Lobbying Act, and to streamline compliance obligations consistent with statutory requirements.

In general, our comments are related to those two general objectives.

In some instances, we express our support for proposed rule language that clarifies or simplifies compliance.

However, in a number of instances, we see this draft rule as proposing language that is inconsistent with statute, or that complicates rather than clarifies compliance standards.

The most significant issue we raise in these comments address the Commission's proposed restrictions on the exemption for %commission salespersons.+ As discussed below, the proposed regulatory language is inconsistent with statute and would result in major compliance uncertainty for affected individuals and employers. Longstanding statutory provisions set a workable standard for dealing with these types of sales positions within the context of the regulation of procurement %lobbying.+We strongly urge the Commission to apply the existing statutory framework in its final rule.

We welcome the opportunity to discuss these comments with Commission staff.

Thank you again for this opportunity to review your informal draft rule and provide comments.

Sincerely,

A handwritten signature in black ink on a light gray background. The signature reads "Kit J. Poley" in a cursive, slightly slanted script. The first name "Kit" is written with a large 'K' and a small 'i'. The middle initial "J." is written with a large 'J' and a period. The last name "Poley" is written with a large 'P' and a long, sweeping tail that extends to the right.

§ 943.3(b) - The draft rule now proposes to define ~~%affiliated+~~as two or more entities with one of several specific legal or organizational relationships, including parent and subsidiary corporations or partnerships, or ~~%national or regional organizations.~~ This is a significant improvement over the initial draft language, which could have applied to entities with no more relationship than having one or more common shareholders. However, this definition needs further amendment. We had previously recommended that JCOPE adopt the full definition of ~~%affiliate relationship+~~set forth in JCOPE's reportable business relationship rule, at §938.2(a)(2); i.e., subsidiaries with the same corporate parent; national or regional organization and their local chapter(s); and local chapters of the same national or regional organization. The current draft rule partially adopts the Part 938 language. We again recommend that JCOPE include in Part 943 its existing definition of ~~%affiliated+~~from Part 938.

§ 943.3(g) - The draft rule would define ~~%designated lobbyist+~~as a ~~%person~~ who lobbies on behalf of a client as a board member, director or officer . . . but does not offer services to other Clients as a Retained Lobbyist.+ We believe this definition is excessively broad, and would impose significant additional reporting requirements on regulated entities. This provision would also raise uncertainty about activities of a member of the board of an entity, where the board member engages in lobbying activities related to the activities of the organization. In either case, the client should not be required to designate these persons as additional lobbyists. It is instructive that the Lobbying Act, when addressing the Statement of Registration, solicits information regarding ~~%any officer or employee of+~~an organization that engages in lobbying activity. See Legislative Law §1-e(c)(1). If the legislative intent was to also cover board members, the statute would have referred to officers, directors and employees.

§ 943.3(i) - The proposed rule defines ~~%individual lobbyists+~~as ~~%one~~ who personally engages . . . in lobbying.+ [Italics added]. The intent is to define this term as applying to a natural person rather than an organization or entity, so we recommend that the term ~~%one+~~be replaced with ~~%person.~~

§ 943.3(q) . The proposed rule would define ~~%Principal Lobbyist+~~as ~~%in~~ the case of a Retained Lobbyist, the entity that has entered into an agreement with a Client to provide Lobbying services,+and ~~%in~~ the case of an Employed Lobbyist, the name of the employer Organizational Lobbyist.+This provision clarifies that an entity can be both the client and lobbyist (e.g., the ~~%principal lobbyist,+)~~ for lobbyist registration purposes, an arrangement already employed by many regulated entities. However, this regulatory proposal appears to mandate that in instances where an organization has employed lobbyists, the entity must be identified as the principal lobbyist. We do not believe that such designation is mandated by statute.

§943.4(f)(2) . The proposed rule would impose limitations on the statutory exemption for responses to requests for comments that are not found in statute. The statute, at Legislative Law § 1-c(c)(E), exempts from the definition of lobbying, ~~%persons~~ who prepare or submit a response to a request for information or comments by the state legislature, the governor, or a state agency or a committee or officer of the legislature or a state agency, or by the unified court system, or by a legislative or executive body or officer of a municipality or a commission, committee or officer of a municipal legislative or executive body.+ The language in the draft rule in subparagraph (f)(1) is generally consistent with statute (other than the reference to a ~~%specific+~~request for information); however, the proposed restrictions in (f)(2) are clearly in

excess of the statutory standard. They say that ~~%~~This exception applies only if: i) The response is pursuant to an explicit request for information; ii) The information contained in the response is not more than what was sought in the request; and iii) The person did not urge the requesting party to make the request. While several other initially proposed restrictions were dropped from the proposed rule, we still recommend that these additional, extra-statutory restrictions be deleted. They propose inappropriate limitations to the statutory exemption. As example, if the commentator added additional information to a response for information, e.g., to provide additional context, that could be seen as ~~%~~more [information] than was sought in the request.+ Where statute provides specific detailed definition of terms, a regulatory agency should refrain from attempting to amend or restrict such terms in rulemaking.

§943.5(b)(1) . The proposed rule states that, ~~%~~All Lobbyists and Clients are subject to the Gift restrictions set forth in Part 934 of this Title;+ Part 934 states that, ~~%~~it is presumptively impermissible for a Lobbyist or Client to offer or give a Gift to any Public Official.+ Actually, neither the current provisions of Part 934 nor the current proposal is consistent with statute. Legislative Law Section 1-m states that ~~%~~No individual or entity required to be *listed on a statement of registration* pursuant to this article shall offer or give a gift to any public official as defined within this article . . .+ [Italics added]. Lobbyists statement of registrations are only required if the lobbyist reasonably expects to receive more than \$5,000 during the year for lobbying. This proposed rule . and, at some point, Part 934 . should be amended to correctly reflect the underlying statute.

§943.6(a)(2)(i) . The draft rule would define ~~%~~preliminary contact+. which would be a component of ~~%~~lobbying by direct contact+. as including “...*scheduling a meeting or telephone call with a Public Official and a Client.*+ [Italics added]. This approach would in effect require persons engaged exclusively in administrative support functions to be designated as lobbyists. We note that the draft rule’s provisions relative to grassroots lobbying provides an exemption for ~~%~~secretaries, clerical and ministerial staff.+ A similar exemption should be provided here.

§943.6(b)(2)(i) and (ii) . The draft rule provides that a person is not engaged in Direct Lobbying when the person ~~%~~attends a meeting with a Public Official simply to provide technical information or address technical question,+provided that the person ~~%~~plays no role in the strategy, planning, messaging or other substantive aspect of the overall lobbying effort.+ [Emphasis added.] We strongly support the effort to provide an exemption for individuals with no substantive role in advocacy efforts, but are concerned that this proposed language is too limiting. We agree that persons providing technical input in such settings are not engaged in lobbying as defined in statute, and this issue should be clarified in both statute and regulation. But there are other circumstances where individuals participate in calls or meetings with public officials, and have no substantive role in the lobbying activity, that fall outside this exemption language. As example, a junior employee or an intern who attends a lobbying meeting or listens in on a lobbying call for the purpose of professional development or training would still arguably be required to be listed on the statement of registration under this proposed regulatory language. Likewise, the utility of clause (i) is further limited by the restrictions in clause (iii) which would negate the exemption if the person had even minimal input into other aspects of an advocacy effort. To address these, we recommend that clause (iii) be deleted, and clause (i) be amended to say ~~%~~attends a meeting or participates in a discussion with a Public Official ~~simply~~

primarily to provide technical information or address technical question, or primarily to observe for training or educational purposes or has any similar non-substantive role, and does not play a significant role in the strategy, planning, messaging or other substantive aspects of the overall lobbying effort.+ In any case, the rule needs provide more clear compliance requirements.

§943.8(b)(1) . This provision of the proposed rule states that with respect to restricted periods applicable to government procurement, %a . a person engaged in Procurement Lobbying shall not contact . . . *in connection with such lobbying* . . .+ anyone in the procuring entity other than the designated contact person, nor any person in any other state agency. [Emphasis added]. This appears to be consistent with the underlying statutory provision at Legislative Law 1-A, §1-n, but in modifying the statutory language, the proposed rule causes uncertainty as to its meaning. For example, it introduces the undefined concept of a communication being %a connection with such lobbying.+ We would recommend that the final rule simply reflect the statutory language. It states,

%During the restricted period, no person or organization required to file a statement or report pursuant to this article shall engage in lobbying activities concerning a governmental procurement . . . by contacting a person within the procuring entity who has not been designated . . .to receive communications relative to the governmental procurement. Further, during the restricted period, no person or organization required to file a statement or report pursuant to this article shall engage in lobbying activities concerning a governmental procurement by contacting any person in a state agency other than the state agency conducting the governmental procurement about that governmental procurement.+

§943.8(c)(2)(b) -- To meet the definition of %commission salesperson,+the proposed rule states that %The person is an employee (as that term is defined for tax purposes) of a vendor, or an independent contractor for a vendor, pursuant to a written contract for a term of not less than six months or an indefinite term.+ This provision needs to be amended to make clear that the statutory requirement for a contract only applies to independent contractors, not employees, as per statute, e.g., %provided that an independent contractor shall have a written contract for a term of not less than six months or for an indefinite term.+ We believe that is JCOPE's intent.

§943.8(c)(2)(d) -- To meet the definition of %commission salesperson,+the proposed rule states that %Commissions paid as portion of sales constitute, or is intended to constitute at least 50% of the person's total annual compensation.+ We have two major concerns. First, this provision is inconsistent with statute, which defines %commission salesperson+as a %person . . . compensated, *in whole or in part*, by the payment of a percentage amount of all or a substantial part of the sales which such person has caused.+ [Emphasis added.] Importantly, the Legislative Law already imposes a significant limitation on this exemption, by further defining a %commission salesperson+as an individual whose %a . primary purpose of whose employment is to cause or promote the sale of . . . an article of procurement.+ Therefore, to the extent that the proposed regulatory language is intended to limit the potential for abuse of this exemption, that concern is already addressed in statute.

Second, as a practical matter, the draft rule's proposed threshold would undoubtedly result in individuals becoming suddenly and unexpectedly subject to the Lobby Act's registration and reporting requirements. This will occur when an individual's level of sales . and therefore the

aggregate amount of their commissions -- falls below expected levels at the end of a calendar year.

The type of amendment being proposed here can only be done through statute. Therefore, this proposed restriction on the definition of commission salesperson should be deleted from the final rule.

§943.9(d)(2) . Under ~~reportable~~ lobbying activity, the proposed rule provides that, ~~a~~ lobbyist or client has a duty to amend a bi-monthly or client semi-annual report after a previously reported payment is written down, written off, or otherwise modified for bookkeeping purposes. Neither Legislative Law §1-H regarding bi-monthly reports of lobbyists nor §1-J regarding semi-annual reports of clients contains a specific ~~duty~~ to amend already filed reports. Moreover, it is unclear what public purpose is provided by mandating the amendment of reports indicating a lower level of payment for lobby activities. This provision seems to be making the over-reporting of lobby expenses a reporting violation. Absent any compelling justification for this extra compliance requirement, we recommend its deletion.

§943.10(j)(9) . The draft rule proposes that lobbyist statement of registration include ~~the~~ identities of other parties to the lobbying . . . [and] . . . *In the case of a Coalition, a list of all members of the Coalition who exceed \$5,000 in cumulative annual lobbying compensation and expenses* . . . + [Emphasis added]. The intent of this provision regarding coalitions is unclear. A lobbyist that is, or intends to be, the part of a coalition during the period covered by a statement of registration would have no data on the actual or expected lobby expenditures of other coalition members. Instead, it would make sense if that provision applied only to cases where the lobbyist statement of registration is being filed on behalf of a coalition. If so, the final rule should be more explicit. Other provisions of the proposed rule, in §943.9(h)(3) set forth specific provisions for the reporting of lobby activities by a coalition; subpart 10 should be harmonized with those provisions.

§943.11(f)(7)(i) and 943.12(f)(9)(i) . These provisions of the draft rule would impose a new requirement that lobbyist bi-monthly reports and client semi-annual reports, respectively, identify ~~a~~ . the name of the Public Official or Public Official's office . . . with whom the Lobbyist engaged in direct communications . . . + In saying that the report must identify the name of either the official or the official's office, this would appear to give the reporting entity the flexibility to identify either. However, to the extent that JCOPE intends to require these filings to identify specific individuals before which the lobbyist has lobbied and with whom the lobbyist engaged in direct communications, this would be a significant expansion of current statutory requirements. Legislative Law §1-h sets forth requirements of lobbyists' bi-monthly reports; its paragraph (b)(3) specifies that such reports shall contain ~~the~~ *the name of the person, organization, or legislative body before which the lobbyist has lobbied*. + [Emphasis added.] Mandating the disclosure of individuals requires a legislative amendment to statute. Similar concerns apply to provisions of §943.12(f)(9)(i) relative to client semi-annual reports.

§943.14(b)(2) and (c)(6) . The proposed rule adopts provisions of JCOPE's reportable business relationship guidance, that provides that in cases where a regulated ~~client~~ is an organization, the term ~~client~~ term includes proprietors, partners, directors, or executive management of the organization. The draft goes on to require that client organizations report

on the business relationships of proprietors, partners, directors, or executive management of the organization. We previously objected to this language when proposed and adopted in the current JCOPE reportable business relationship guidance, and continue to do so. There is no statutory basis for this provision, as it goes well beyond the statutory definition of client found in the Lobbying Act, which is every person or organization who retains, employs or designates any person or organization to carry on lobbying activities on behalf of such client. It adds additional complexity and uncertainty to compliance obligations. It should be excluded from this draft rule.