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By E-mail and Regular Mail

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*Re: Comments on Proposed Advisory Opinion re: Reporting Obligations of
Consultants*

Dear Mr. Levine:

This firm represents four public affairs/public relations firms—Anat Gerstein, Inc., BerlinRosen, Risa Heller Communications, and Stu Loeser & Co. (collectively, “the Firms”). We write on the Firms’ behalf to offer comments on the Proposed Advisory Opinion (the “PAO”) issued by the New York State Joint Commission on Public Ethics (the “Commission”) regarding the reporting obligations of consultants under the Lobbying Act (Legislative Law Article 1-A).

The PAO provides further texture to the Proposed Guidance that the Commission issued for public comment in May 2015. As you know, the Firms offered detailed written comments on the Proposed Guidance on July 10. A copy of those comments is annexed and incorporated herein by reference, and many of the same concerns that we expressed about the Proposed Guidance apply to the PAO.

That said, certain aspects of the PAO warrant specific comment.

First, the Firms fully support the PAO’s treatment of consultants as it relates to “door-opening” activities and attendance at a meeting. Requiring registration and disclosure under the circumstances where consultants “open doors” to public officials and/or attend lobbying meetings with public officials is, from our perspective, an appropriate transparency measure and good public policy.

Second, to the extent that the PAO requires that, in order to constitute “lobbying,” a “grassroots communication” must include a specific “call to action,” we view the PAO as an important step in the right direction. While the PAO does not specify that only activity that amounts to “initiating propaganda” could, constitutionally, rise to the level of “lobbying” subject to a disclosure regime,¹ the Commission’s express reaffirmation of the “call to action” requirement in this context provides greater clarity to those who seek to comply with the registration requirements of the Lobbying Act.

Unfortunately, the PAO muddies the waters with the phrase “substantive and strategic input on the content of the message.” The PAO defines this phrase to mean a consultant’s involvement with a client’s message beyond “mere editing,” but short of “full decision-making authority” over content. What is not discussed in the PAO is the raft of activities that may fall *between* those two poles, and that are at the heart of what public relations and communications firms do. These include: drafting talking points for client communications with members of the press; drafting letters to the editor and op-eds; scripting television and radio ads; issuing press releases; and interfacing with reporters to encourage coverage of their clients’ activities (*i.e.*, to win “earned media”).

Respectfully, we submit that a regime that sweeps activities of these sorts within its ambit would be both impractical and constitutionally infirm. It would be impractical because it would require the Commission to investigate and “draw lines” with respect to every turn of phrase or statement uttered by a client or its representative, to determine whether a particular consultant did or did not have a “meaningful role in either the creation or approval of [a particular] message.” PAO at 8. At the same time, the PAO standard would be unconstitutionally vague because consultants who assist their clients to develop or distribute messages would have no way of knowing if their roles were or were not “meaningful.” More importantly, no matter how the term “meaningful role” might ultimately be construed, such a regime would constitute an unconstitutional intrusion upon and scrutiny of political speech in the absence of the narrow justifications required by the Supreme Court, namely, unmasking the “*sources* of pressure on government officials”² when such pressure “masquerad[es]” as “the voice of the people” but in truth originates with “special interest groups seeking favored treatment.”³

The PAO attempts to minimize the impact of these overbreadth and vagueness problems by articulating ten specific exceptions to the concept of content and delivery control. PAO at 9. But the list of exempted activities only highlights the inadequacy of such an approach. Absent from the list are countless types of consultants who “participat[e] in both the content and delivery” of campaign messages, and who arguably engage in more than “mere editing,” but whose First Amendment activities cannot constitutionally be regulated as the Commission proposes. Included among these are speaking coaches, graphic designers, and marketing experts, to cite but a few examples. Traditional PR/comms firms like those described above likewise merely facilitate the creation and delivery of their *clients’* messages; they in no way “own” or

¹ See *Comm’n on Indep. Colls. & Univs. v. N.Y. Temp. State Comm’n on Regulation of Lobbying*, 354 F.Supp. 489, 496-97 (N.D.N.Y. 1982)

² *Id.* at 494-95 (emphasis added).

³ *United States v. Harriss*, 347 U.S. 612, 625 (1954).

control the message themselves. Accordingly, the Commission's capacious and vague definition of "control" reaches conduct outside the scope of permitted inquiry, and deep into the heart of protected free speech, and its list of exceptions does not cure the PAO's constitutional defects.

The approach suggested in our July 10, 2015 letter stands on firm constitutional and practical ground. We submit that the Commission should revise the definition of an individual or entity that "controls" relevant communications to the public to include *only* individuals at whose **direction, by whose authority, and on whose behalf** such communications are made. This definition conforms with the only valid government purpose in regulating grassroots lobbying—to "help[] the public to understand the constituencies behind legislative or regulatory proposals"⁴—and it creates a much-needed bright-line rule in the arena of grassroots lobbying. It is also far more in line with a common-sense definition of the word "control," the Commission's own touchstone.

Lastly, a word should be said about "earned media," the critical public relations function of communicating a client's message to members of the press in hopes of generating "a story." It is difficult to see how a PR professional seeking to persuade a reporter or editor to write or broadcast something about the professional's client or its position could ever constitute "delivery" of a client's message to a public official. In this most-common of scenarios, the reporter acts as a filter and a decision-maker: s/he decides whether to report the message, how to report or characterize it, what to include in the story (or opinion piece), and how to contextualize the message. The PR professional does not control, and often does not even know, whether the message will be reported, much less precisely how or to whom. This is entirely different from what the "content and delivery" prongs in the PAO seem designed to capture, namely specific statements made directly to an audience ("speak to a group and actually physically deliver the message") or paid mailings or media (TV, radio, internet or print advertisements for which one must "purchase media time or space") directed at specific geographic areas or groups of people ("target markets").

Moreover, in the "earned media" scenario, in addition to determining whether and how the message will be reported, the press performs the function of evaluating any biases held by the "source" of information. Journalists do not consider the remarks or perspective communicated by a PR professional on behalf of a client without first asking who the client is and then weighing the client's interest in the issue. Given the strictures of the First Amendment, governmental bodies should steer clear of conduct that amounts to oversight of the press in this critical role. The fourth estate's ability to maintain a wariness of its sources, and to avoid being "spun," is healthy and well-developed; there simply is no need for government involvement in this arena, and the prospect of same raises serious constitutional concerns.

⁴ *Nat'l Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 14 (D.C. Cir. 2009); see also *id.* at 9 (lobbying regulations allowed to help public understand who is truly "endeavoring to influence the political system"); *Buckley v. Valeo*, 424 U.S. 1, 67-68 (disclosure requirements' purpose is to allow voters to understand which persons and entities drive political initiatives).

For all of these reasons, we believe that traditional public-relation efforts to secure "earned media" categorically fall outside the scope of the PAO's definition of grassroots lobbying.

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On behalf of the Firms, we thank the Commission for its consideration of these comments and we invite any questions that the Commission may have.

Respectfully submitted,



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Hayley Horowitz

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