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## **Comments of the New York Civil Liberties Union**

**regarding**

### **Joint Commission on Public Ethics Source of Funding Regulations**

**February 8, 2012**

The following comments are submitted regarding the Joint Commission on Public Ethics (JCOPE) Source of Funding Disclosures on behalf of the New York Civil Liberties Union. Founded in 1951, the New York Civil Liberties Union (NYCLU) is a not-for-profit, nonpartisan organization with eight chapters and 50,000 members across New York State. The NYCLU's mission is to defend and promote the fundamental principles and values embodied in the Bill of Rights, the U.S. Constitution, and the New York Constitution, including freedom of speech and religion, the right to privacy, and equality and due process of law for all New Yorkers. Members of the NYCLU staff are registered lobbyists pursuant to New York's Lobby Act,<sup>1</sup> and the NYCLU reports as a lobbying "client."<sup>2</sup> The NYCLU is thankful for the opportunity to comment on the Source of Funding Disclosures to facilitate the development of JCOPE's regulations.

#### **I. Introduction**

It is well settled that the right to petition the government to take a position on proposed legislation is among the freedoms protected by the First Amendment.<sup>3</sup> In a representative democracy "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."<sup>4</sup>

Equally well established is the right to make contributions in order to advance one's beliefs, and the right of "like-minded persons to pool their resources in furtherance of common political goals."<sup>5</sup> However, the compelled government disclosure of personal information about individuals who make financial contributions to lobbying organizations "can seriously infringe

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<sup>1</sup> N.Y. Leg. Law 1-a, *et seq.*

<sup>2</sup> *See* N.Y. Leg. Law § 1-j(4).

<sup>3</sup> *See, e.g., Eastern R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (U.S. 1961).

<sup>4</sup> *Id.* at 137.

<sup>5</sup> *Buckley v. Valeo*, 424 U.S. 1, 22 (U.S. 1976).

on privacy of association and belief guaranteed by the First Amendment.”<sup>6</sup> Any attempts to compel the disclosure of information about people engaged in protected First Amendment activities must be narrowly tailored in furtherance of a specific government interest, and must minimize any impact on protected speech and associational rights.<sup>7</sup>

Existing New York State law requires organizations engaged in lobbying activities to submit twice-yearly reports on the names, addresses, and compensation provided to individuals who engage in lobbying activities.<sup>8</sup> The Joint Commission on Public Ethics has proposed a new set of disclosure requirements which will additionally require any organization that engages in lobbying activities to disclose the names, addresses, and employer and contribution information for all contributors who have provided at least \$5,000 to a lobbying organization.<sup>9</sup> These mandated disclosures implicate core First Amendment rights to petition the government and to advocate for or against potential government action.

JCOPE’s proposed regulations raise a number of concerns. First, government regulation of lobbying and the imposition of disclosure obligations are consistent with the First Amendment only if they are limited to “direct communication” with elected officials to influence legislation. Second, the JCOPE regulations require the disclosure of information on contributors to organizations that engage in lobbying, even if the contributed funds are never utilized for such a purpose. This provision is overly broad, and as a consequence, infringes upon First Amendment rights. Third, the mandated disclosure of personal information about contributors will undoubtedly have a “chilling effect” on the exercise of protected speech and petition activities. Finally, the First Amendment requires that the proposed regulations provide for exemptions for controversial organizations upon a showing of a “reasonable” likelihood of harm from the disclosures. Each of these will be addressed in turn.

**II. In seeking to regulate all attempts to “influence the passage or defeat of any legislation,” the Lobby Act and the Source of Funding regulations extend beyond the scope of activities the government is constitutionally permitted to regulate.**

As currently written, the Lobby Act and the Source of Funding regulations attempt to regulate any and all attempts to “influence the passage or defeat of any legislation,” even if such efforts do not involve direct communication with lawmakers or a choreographed grassroots campaign. This extends well beyond established constitutional limits. Accordingly, the regulations should be amended to include the constitutionally required, narrow definition of lobbying activities subject to government regulation.

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<sup>6</sup> *Buckley*, 424 U.S. at 64.

<sup>7</sup> *See, id.*

<sup>8</sup> N.Y. Leg. Law §§ 1-h(4), 1-j(4).

<sup>9</sup> *Source of Funding Regulations*, 13 N.Y.C.R.R. 938, *et seq.*

In light of the well-established First Amendment rights to express opinions on government action and to petition the government (both of which may involve lobbying activities), the Supreme Court has noted the necessity of construing disclosure requirements for lobbying activities “narrowly to avoid constitutional doubts.”<sup>10</sup> The Court, in *U.S. v. Harriss*, accordingly concluded that the government can only regulate “lobbying in its commonly accepted sense – [] direct communication with members of [government] on pending or proposed [] legislation.”<sup>11</sup>

The New York Lobby Act is, on its face, considerably overbroad. It is quite similar in this respect to the statute that the Supreme Court in *Harriss* found to be unconstitutional.<sup>12</sup> The Lobby Act defines lobbying as “any attempt to influence the passage or defeat of any legislation” or any of a number of other activities aimed at influencing government actions which carry the force of law.<sup>13</sup> By its terms, New York’s law does not confine itself to “direct communications” with legislators, as is required by the Supreme Court in order to avoid constitutional invalidity. Rather, it seeks to reach any attempt “to influence the passage or defeat” of any legislation.

In order to save the constitutional validity of the statute, the State Lobbying Commission has previously stated in an advisory opinion that it will not apply the New York Statute “in any context outside the definition of lobbying contained in the *Harriss* case.”<sup>14</sup> The State Lobby Act’s constitutional validity thus rests upon the grounds that it seeks to regulate *only* direct communications with lawmakers, and so long as there is “no indication that this New York legislation requires disclosure of indirect lobbying activities.”<sup>15</sup>

The new JCOPE regulations contain no definition of “lobbying” activities which are subject to regulation. To the extent that the regulations rely on the underlying definition of “lobbying” provided in the Lobby Act, they are relying on an unconstitutionally over broad definition. The regulations should therefore be amended to include a definition of “lobbying” that comports with the constitutionally permissible scope of government regulation, reaching only organizational efforts to influence legislation which include direct communications with lawmakers or a choreographed grassroots campaign that makes a direct appeal to public officials.

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<sup>10</sup> *U.S. v. Harriss*, 347 U.S. 612, 613 (1954).

<sup>11</sup> *Harriss*, 347 U.S. at 620.

<sup>12</sup> The Supreme Court in *U.S. v. Harriss*, 347 U.S. at 614, concluded that the federal lobby statute was unconstitutionally overbroad. That statute sought to require disclosures from lobbyists, defined as “any person...[who] receives money or any other thing of value to be used principally to aid (a) [t]he passage or defeat of any legislation by the Congress of the United States.”

<sup>13</sup> N.Y. Leg. Law 1-c(c)(i)-(x).

<sup>14</sup> *Commission of Independent Colleges and Universities v. New York Temporary State Commission on Regulation of Lobbying*, 534 F. Supp. 489, 497 (N.D.N.Y. 1982).

<sup>15</sup> *Id.*

**III. The proposed Source of Funding Regulations are overly broad, requiring the disclosure of information about contributions neither designated for, nor utilized to, support lobbying activities.**

The Supreme Court has held that “contributions and persons having only an incidental purpose of influencing legislation” are excluded from the scope of acceptable government regulation of lobbying activities.<sup>16</sup> Notwithstanding this, JCOPE’s Source of Funding Regulations require organizations that meet the threshold requirements for disclosure to report *both* contributions “specifically designated for lobbying in New York” *as well as* contributions “not specifically designated for lobbying in New York” (the latter of which are reported as a percentage of the actual contribution).<sup>17</sup> The regulations therefore require that organizations disclose information about contributions that are merely *available* for lobbying activities, regardless of whether they are ever utilized for such a purpose.

This regulatory scheme extends beyond lobbying activities, requiring the disclosure of personal information from contributors whose funds will never be used to fund lobbying activities. The compelled disclosure of contributions which may only incidentally support an organization’s attempts to influence legislation is unconstitutionally over broad. The NYCLU therefore objects to the disclosure scheme to the extent that it requires the public sharing of personal donor information related to contributions that are not utilized by organizations to influence legislation.

**IV. In seeking the disclosure of personal information, JCOPE’s regulations will undoubtedly have a “chilling effect” on the willingness of individuals to engage in constitutionally protected expression.**

In assessing compelled government disclosure requirements, “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”<sup>18</sup> Regulations which encroach upon constitutionally protected rights “must be justified by more than a showing of a mere rational or legitimate interest.”<sup>19</sup>

The mandated disclosure of contributors’ names, addresses, employers, and contribution information is likely to result in people either contributing less to advance issues that they believe in (so they do not fall within the scope of the compelled disclosure) or altogether withholding their support from organizations that are required to report on the identity of their donors. As a result, the Single Source Disclosure requirements may inhibit the full and free exercise of the First Amendment right to petition the government, and to associate with likeminded individuals.

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<sup>16</sup> *Harriss*, 347 U.S. at 622 (internal quotation mark omitted).

<sup>17</sup> 13 N.Y.C.R.R. 938.2 (“Amount of Contribution(s)”).

<sup>18</sup> *Doe v. Reed*, 130 S.Ct. 2811, 2818 (2010).

<sup>19</sup> *Commission on Independent Colleges & Universities*, 534 F. Supp. at 494.

Disclosure requirements have been upheld only to the extent that they advance the important government interest in “stemming the reality or appearance of corruption in the electoral process.”<sup>20</sup> Government regulation of campaign finance speech rests upon an interest in preventing any corruption which may be created by the relationship between a contributor and an elected official.

The concerns about corruption in the lobbying context are quite different. While there may be an interest in knowing which organizations are expending resources to influence legislation, there is a more attenuated interest in the personal information of donors who contribute to organizations which then use those funds to hire a lobbyist to take action on a variety of proposed issues. As a matter of policy, it is unclear why the government’s interest in maintaining transparency would not be adequately served in this context by limiting the disclosure requirement to expenditures related to an organization’s lobbying activities.

**V. The standards for granting controversial organizations an exemption from the disclosure requirements deviate impermissibly from the constitutionally mandated standard.**

A government requirement that an organization disclose the identity and personal information of financial supporters “can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”<sup>21</sup> Therefore any government-mandated disclosures of such contributors must provide exemptions for individuals or organizations for whom disclosure could result in harassment or reprisals.<sup>22</sup> The Supreme Court has found that the constitution requires that organizations be granted exemptions from compelled disclosures if they can demonstrate “a *reasonable probability*” that the forced disclosure of their donors or members will “subject them to threats, harassment, or reprisals from either Government officials or private parties.”<sup>23</sup> Organizations must be afforded “sufficient flexibility” in the evidence that they are permitted to offer in demonstrating a likelihood of injury from the disclosures.<sup>24</sup>

JCOPE’s regulations provide that the Commission “may” grant an exemption from the Single Source disclosure requirements for 501(c)(4) organizations, provided that the organization “shows that its primary activities involve areas of public concern that create a *substantial likelihood* that disclosure of its Single Source(s) will cause harm, threats, harassment or reprisals to the Single Source(s) or individuals or property affiliated with the Single Source(s).”<sup>25</sup> This standard deviates from the constitutionally required standard that exemptions are provided whenever there is a “*reasonable probability*” of harm to contributors. Further, the “substantial

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<sup>20</sup> *Citizens United*, 130 S. Ct. at 903.

<sup>21</sup> *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

<sup>22</sup> *See, e.g., Brown et al. v. Socialist Workers’ ’74 Campaign Committee*, 459 U.S. 87 (1982).

<sup>23</sup> *Socialist Workers*, 459 U.S. at 93 (citing *Buckley*, 424 U.S. at 74) (emphasis added); *see also, Citizens United v. F.E.C.*, 130 S. Ct. 876, 914 (2010).

<sup>24</sup> *Socialist Workers*, 459 U.S. at 93.

<sup>25</sup> 13 N.Y.C.R.R. 938.4(b) (emphasis added).

likelihood” standard appears to require a higher evidentiary showing of the likelihood of actual harm. Accordingly, the standard for exemptions should be amended to bring it closer in line with the standard required by the constitution – allowing for the granting of exemptions whenever there is a “reasonable” likelihood that the disclosure will lead to harassment or reprisal.

In order to protect the associational privacy of contributors to organizations that work on controversial issues, the NYCLU urges JCOPE to grant such exemptions upon the showing of a reasonable likelihood that the disclosure will lead to harm. As the Legislature noted in enacting the Lobby Act, “organizations whose primary activities focus on the question of abortion rights, family planning, discrimination or persecution based upon race, ethnicity, gender, sexual orientation or religion, immigrant rights, and the rights of certain criminal defendants are expected to be covered by such an exemption.”<sup>26</sup> Granting exemptions to organizations engaged in such issues will ensure that their financial supporters do not become the targets of harassment, and worse, for their support of controversial work. This will also ensure that organizations are not undermined in their ability to engage in such advocacy.

## **VI. Conclusion**

JCOPE’s Source of Funding Regulations implicate speech and activities at the core of the First Amendment’s protections. The NYCLU encourages JCOPE to narrow its reporting requirements so that they require only the reporting of information that actually advances the State’s interest in promoting transparency, without compromising First Amendment rights. The regulations should define “lobbying” activities consistent with the definition upheld by the Supreme Court: attempts to influence legislation which include direct contact with legislators or a choreographed grassroots campaign. Further, the disclosure requirements should only require reporting on contributions that are actually utilized by an organization to support lobbying activities. As a matter of policy, the NYCLU questions the mandated disclosure of personal information about contributors, given the foreseeable chilling of constitutionally protected activities, and the absence of any clear connection or relationship between such contributions and the effort to contact, or influence, elected officials. Finally, the standard for granting controversial organizations exemptions from the disclosure requirements should be amended so as to be consistent with the constitutionally necessary standard for such exemptions.

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<sup>26</sup> 2011 NYS Legislative Bill and Veto Jackets, S:5679, L 2011, ch. 399, at 10 (2011).