Kenneth J. Pokalsky
Vice President

November 21, 2016

Mr. Martin Levine
Director of Lobbying
JCOPE
540 Broadway
Albany, NY 12207

Dear Mr. Levine:

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 reaching out to regulated entities and the interested public for input on this informal draft rule. This approach will help inform JCOPE's development of a formal rulemaking by generating comments on proposed language in a setting where concepts and language are more easily amended.

We also commend JCOPE for trying to clarify compliance requirements for clients and lobbyists subject to the Lobbying Act, and for attempting 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.

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.

§ 942.3(a) (page 4) - The draft rule would define "affiliated" as *"two or more entities that are related by common shareholders, officers, or other means of ownership or control. Affiliations may be formed among parent, subsidiary, and sibling corporations."* The definition is excessively broad and would defy efforts to comply. In effect, any two organizations with any common shareholders would be considered to be "affiliated." Many publicly traded companies have common shareholders, but that tenuous relationship is not sufficient to define such companies as "affiliated." The definition of "affiliate relationship" set forth in JCOPE's draft reportable business relationship rule, at § 938.2(a)(2) is a more workable approach; 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. Likewise, New York State Tax Law §210-C establishes a standard for related entities based on direct or

indirect ownership of more than fifty percent of the voting power of the capital stock of one or more other corporations. Either of these alternative approaches would be more workable.

§ 942.3(f) (page 4) - The draft rule would define "designated lobbyist" as a *"person who lobbies on behalf of a client as an internal board member, volunteer, or by virtue of some other affiliated but non-employed status, 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. As example, under this provision, an employee of a member of a membership organization participating in an organized lobby day could be considered as a "designated lobbyist" of the lobby day's organizer. 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.

§ 942.3(o) (page 5) – The draft rule would define "P*rincipal 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 designation is mandated by statute.

§942.4(d) (page 9) – The draft rule would impose several limitations to the statutory exemption for participation in public proceedings. The statute, at Legislative Law § 1-c(c)(C), exempts from the definition of lobbying, *"persons who participate as witnesses, attorneys or other representatives in public proceedings of a state or municipal agency with respect to all participation by such persons which is part of the public record thereof and all preparation by such persons for such participation."* The draft rule would preclude from this exemption instances where a *"person otherwise engages in Lobbying in connection with the subject of the person's participation in the public proceeding."* The statute is clear in that a person engaging in certain public proceedings is exempt from the Lobbying Act, regardless of other activities in which a person engages. Determinations of compliance obligations should be based on the nature of the activity in question. Therefore, this proposed limitation on the statutory exemption should be dropped.

§942.4(f) (page 9) – The draft rule would also impose limitations to the statutory exemption for responses to requests for comments. 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: 1. The response is pursuant to an*

explicit request for information; 2. The response is directed only to the requesting party; 3. The information contained in the response is not more than what was sought in the request; 4. The person did not urge the requesting party to make the request; and 5. The person is not otherwise engaged in Lobbying in connection with the subject of the request or the response." We believe these restrictions should be deleted. They propose inappropriate limitations to the statutory exemption. As example, requiring that a response be "directed only to the requesting party," would invalidate the exemption if an entity shared its comments with any other governmental or non-governmental party.

§942.6(a)(ii)(1) (page 12) – 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*." This approach would in effect designate as lobbyists persons engaged exclusively in administrative support functions. 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.

§942.6(c)(ii)(1) and (2) (page 12) – 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." We strongly support the first clause of this provision; we believe 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. However, the utility of clause 1 is limited by the restrictions in clause 2, which would negate the exemption if the person had even minimal input into other aspects of an advocacy effort. We recommend that clause 2 be deleted, and clause 1 be amended to say "attends a meeting with a Public Official ~~simply~~ primarily to provide technical information or address technical question, and does not play a significant role in the strategy, planning, messaging or other substantive aspects of the overall lobbying effort."

§942.7(d) (1) (page 14) – In addressing "grass roots lobbying," the draft rule proposes that **"**a person who participates in the delivery of a Grassroots Lobbying Communication must be identifiable as a representative of or agent for a Client." The meaning of this provision is unclear. We assume that the intent is to require that any grass roots lobbying communication identify the client on whose behalf the communicator is working. If so, the draft rule should be clarified. The draft rule also provides that, *"A person acting on behalf of a Client may participate in the delivery of a Grassroots Communication if the person: 1. Serves as a spokesperson for the Client; 2. Speaks to the public or a segment of the public; 3. Participates in a social media campaign as defined in subpart 942.7(f); 4. Exhorts, encourages, or otherwise solicits a municipal official to contact a state Public Official on a matter covered by §1-c(c); or 5. Exhorts, encourages, or otherwise solicits state official to contact a municipal public official on a matter covered by §1-c(c)."* As written, the meaning of this provision is unclear as well. The sentence structure suggests that the rule is making these activities permissive. Our assumption here is that JCOPE is attempting to define actions that constitute the delivery of a grass roots lobbying communication. In any case, the rule needs provide more clear compliance requirements.

§942.7(e) (page 15) – The draft rule proposes that *"A person acting on behalf of a Client is*

engaged in Grassroots Lobbying through social media if the person is participating in . . . shaping the substantive message expressed in the communication." The draft rule further provides in §942.7(e) entitled "Shaping the message," that "*A person must serve more than a clerical function but need not have full or final decision-making authority over the communication to qualify as a Grassroots Lobbyist*." While we appreciate the effort to establish parameters around conduct that constitutes engagement in grass roots lobbying, this proposed criteria is so broad and vague as to provide no real guidance to the regulated community. §947(c) provides a detailed definition of what it means to participate in grass roots lobbying. §942.7(e) simply adds uncertainty. We recommend its deletion.

§942.7(g) (page 16) -- For purposes of determining whether grass roots/social media activities constitute reportable lobbying by an organization, the draft rule proposes that "*the personal social media activities of an individual member or employee of the organization are attributable to that organization only when those Activities . . . are encouraged by the organization as part of a Social Media Campaign.*" While it is reasonable that mandated employer participation be included in an organization's reportable lobbying activities, the second part of this provision, relative to participation "encouraged by the organization as part of a social media campaign," would impose unreasonable compliance burdens. It would require an organization to review records of all participates in a grass roots campaign to identify any participating employees. If such participation is not required by the employer, it should not be part of this reporting requirement.

§942.8(a)(ix) (page 17) – With regard to the draft rule's definition of "restricted period," the underlying provision of Legislative Law § 1-c (m) should be amended to be consistent with 2016 amendments to the State Finance Law §139-k and §139-j. Those amendments were adopted to provide a more specific threshold for commencement of restricted periods related to a specific act of procurement, and were supported by the vendor community and were adopted with broad legislative and administration support. This new definition is as follows:

> *"Restricted period"* shall mean the period of time commencing with the earliest posting, on a governmental entity's website, in a newspaper of general circulation, or in the procurement opportunities newsletter in accordance with article four-C of the economic development law of written notice, advertisement or solicitation of a request for proposal, invitation for bids, or solicitation of proposals, or any other method provided for by law or regulation for soliciting a response from offerers intending to result in a procurement contract with a governmental entity and ending with the final contract award and approval by the governmental entity and, where applicable, the state comptroller.

§942.8(c)(ii)(B) (page 20) -- To meet the definition of "commission salesperson," the draft rule proposes 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.

§942.8(c)(ii)(D) (page 20) To meet the definition of "commission salesperson," the draft rule also proposes that "*Commissions paid as portion of sales constitute at least 50% of the person's total annual compensation*." 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.] As a practical matter, the draft rule's proposed threshold could result in individuals becoming suddenly and unexpectedly subject to the Lobby Act's registration and reporting requirements if their level of sales – and therefore amount of commission -- falls below expected levels at the end of a calendar year. Any establishment of a fixed percentage should be done thru statute. Therefore, this proposed restriction on the definition of commission salesperson should be deleted.

§942.9(d)(i) (page 26) – Under "reportable lobbying activity," the draft rule proposes 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.

§942.9(h)(iii) (1)(A) and (2) (page 29) – The draft rule provides that a "*Coalition is formed when a group of otherwise-unaffiliated entities or members agree to engage in common activities which include, but are not limited to, acting as or engaging a Lobbyist on behalf of all members of the Coalition*." It would also require that any "*coalition shall file a Lobbying report with the Commission identifying itself as a Lobbyist and/or a Client, provided the Coalition maintains an up-to-date written instrument with the Commission disclosing all Coalition members.*" We have a number of concerns regarding these provisions. First, the proposed definition is excessively broad, and under the provisions of this draft rule, would trigger additional unnecessary compliance and reporting requirements. "Unaffiliated" entities engage in many forms of joint advocacy actions, ranging from joint meetings, sign-on letters, multi-party testimonies and bill memos, and others. Often, these joint activities have little in the way of formal arrangements – even when such activities are specifically referred to as "coalitions." We are concern that this definition, combined with other provisions of this draft rule, would create significant new compliance requirements. Second, the draft rule would subject all such coalitions to Lobby Law filing requirements, regardless of whether the coalition otherwise met the Act's regulatory thresholds. In general, we believe that no additional regulatory requirements should be imposed on a "coalition" unless that entity meets the expenditure requirements set forth in the Lobbying Act.

§942.9(h)(iii) (4) (page 29) – The draft rule proposes that for "pass-through coalitions", i.e., a coalition that expends more than 90 percent of its expenditures on lobbying activities,), contributions are considered lobbying expenses of the contributor for purposes of determining whether that contributor is required to file a client semi-annual report. While the definition of

"pass through coalition" may render this provision a non-issue in many instances, this provisions is contrary to statute, which provides that an entity's contribution to a lobbyist becomes a reportable lobby expense of the lobbyist that engages in lobbying activities, not of the contributor. Regardless of the intent of proposed language, it is not allowed by statute.

§942.10(k)(i)(1)(D) (page 33) – The draft rule proposes that a lobbyist statement of registration include, in addition those provisions specified in statute, "any services to be provided in addition to Lobbying." This provision would require a lobbyist to provide JCOPE with a description of services other than lobbying provided to a specific client. This disclosure is not required in statute, and its purpose is unclear, as JCOPE has no oversight authority over non-lobbying activities. It should be deleted.

§942.10(k)(i)(2) (page 33) – The draft rule proposes that, in a lobbyist statement of registration, *"if an individual Lobbyist is an employee or partner of a lobbying firm, the lobbying firm should always be identified as the Principal Lobbyist unless the individual has been retained in his individual capacity."* The focus of this proposal is unclear, as the draft rule provides no definition of what constitutes a "lobbying firm." Does this apply to all entities that employ a person who is a retained lobbyist? Either a definition should be presented for public comment, or this proposed mandate should be dropped.

§942.10(k)(i)(9) (page 34) – The draft rule proposes that lobbyist statement of registration include "*the identities of any third parties to the Lobbying, as described in Part 942.9, including all Lobbyists, Clients, and Coalitions*" and "*In the case of a Coalition, a list of all members of the Coalition.*" This illustrates the impact of the draft rule's definition of "coalition," as it could be applied to require that lobbyist registrations be amended each time a lobbyist participates in some form of joint advocacy. Likewise, this would require the lobbyist to provide JCOPE with a list of all members of any coalition of which it is a member. Not only is it unclear whether a lobbyist participating in a coalition would be privy to an updated coalition member list, this also suggests registration amendment upon each change in coalition membership. Unless a more workable definition of "coalition" is adopted, no requirement related to coalitions should be inserted into the registration requirements.

§942.11(e)(vii) and (vii)(1) (page 37) – These provisions of the draft rule would impose a new requirement that lobbyist bi-monthly reports identify specific individuals before which the lobbyist has lobbied and with whom the lobbyist engaged in direct communications. This is an 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 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; this proposal should be dropped from the draft rule. Similar concerns apply to provisions of §942.12(f)(l) relative to client semi-annual reports.

§942.14(b)(ii) (page 42) and (c)(vi) – The draft rule proposes to adopt 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 is 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.

Sincerely,