The Business Council

Testimony to

Joint Commission on Public Ethics

Staff Proposal for Comprehensive Lobbying Regulation

Presented by

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On behalf of The Business Council of New York State, Inc., we appreciate this opportunity to address the Joint Commission on Public Ethics ("Commission") regarding its proposal for "Comprehensive Lobbying Regulations" and for amending your existing source of funding rule.

Previously, we submitted detailed written comments to JCOPE's draft amendments to 19 NYCRR Part 938 and its proposed Part 942.

Today, I would like to highlight and expand upon several issues raised in our written testimony.

The Business Council is in a unique position to provide comment on these regulations. As a state-wide employer advocacy organization, we represent about 2,400 private sector employers of all sizes and in all sectors across New York State, many of whom engage in legislative, regulatory and procurement lobbying and are subject to JCOPE oversight. On behalf of our membership, The Business Council has been long engaged in responding to legislative and regulatory proposals impacting business activities, including those governing advocacy.

In addition, as an advocacy organization, The Business Council is directly subject to the state's Lobbying Act, and has first-hand experience in interpreting and complying with the state's lobbying rules. As a trade association with several thousand members, we also face unique compliance obligations not faced by most clients and lobbyists.

In general, we appreciate and support the sentiment expressed in JCOPE's initial October 13, 2016 email seeking input on these draft rules, which cited, among other things, JCOPE's intent to " . . . streamline reporting requirements, providing more clarity about the requirements related to consultants, grassroots lobbying, sources of funding, and the use of new media for lobbying purposes."

Several provisions of the draft rules are particularly helpful in this regard. For example:

> **- §942.6** proposes 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."

Other provisions of the JCOPE draft rules were of concern to us. These include regulatory proposals that were inconsistent with underlying statutory requirements as well as proposals that failed to provide clear compliance standards – an outcome contrary to one of your main objectives.

Among our most significant concerns were the following:

- In §942.8(c)(ii)(D), the draft rule proposes that, to meet the definition of commission salesperson, "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." As a practical matter, this 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, or other substantive changes to the definition of what constitutes a commission salesperson, would have to be done through legislative amendments. Therefore, this proposed restriction on the definition of commission salesperson should be deleted from any final JCOPE rule.

- In §942.11(e)(vii) and (vii)(1), the draft rule would impose a new requirement that lobbyist bi-monthly reports identify specific individuals 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." Mandating the disclosure of individuals requires a legislative amendment to statute; this proposal should be dropped from the draft rule. The same concern applies to similar to provisions of §942.12(f)(l) relative to client semi-annual reports.

- In several instances, draft §942.4 proposes extra-statutory limitations on exemptions from what constitutes lobbying. For example, §942.4(f) would impose limitations to the statutory exemption for responses to requests for comments, saying that the statutory exception would only apply if "the response is directed only to the requesting party," and "The information contained in the response is not more than what was sought in the request," among other things. Not only are these restrictive provisions not in statute, they make the standard and compliance far more ambiguous.

- While we appreciate the Commission's intent in proposing rules covering "coalitions," we have several major concerns with these specific provisions of draft §942.9.

  * 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." 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.

* The draft rule 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." This provision 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.

* Finally, in its provisions related to "pass-through coalitions", i.e., a coalition that expends more than 90 percent of its expenditures on lobbying activities,), the rule proposes that contributions are considered lobbying expenses of the contributor for purposes of determining whether that contributor is required to file a client semi-annual report. This provision 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.

- In §942.10(k)(i)(1)(D), 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.

In comments on JCOPEs two current regulatory proposals, we also reiterated concerns that we previously raised with JCOPE as to compliance mandates that depart significantly from statutory authority, and in doing so add unnecessary to compliance and reporting requirements:

- In draft §942.14(b)(ii) (page 42) and (c)(vi), JCOPE proposes to adopt provisions of JCOPE's reportable business relationship guidance that provide that in cases where a regulated "client" is an organization, client organizations must report on the business relationships of proprietors, partners, directors, or executive management of the organization We objected to this language when it was initially 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 any revised final rule.

- We continue to express our concerns about JCOPE's implementation of the "source of funding" provisions of the Lobbying Act. In incorporating the new, lower statutory threshold of "each source of funding that has contributed over two thousand five hundred dollars from a single source that were *used to fund the lobbying activities,*" the draft rule carries forward JCOPE's current approach

and requires disclosure of all contributors of that amount in total, regardless of what share of those payments is in fact used to pay for lobby expenses. This language is of particular, if not exclusive, concerns to trade associations and similar organizations. Generally speaking, trade associations receive little or no payments specifically for lobbying. Instead, their lobbying activities are funded from a portion of dues payments and other revenue sources. Our JCOPE filings for 2015 illustrate the incongruous outcome from JCOPE's compliance mandate, as we reported more than $627,292 in reportable source of lobbying fund receipts, but just over $363,000 in actual reportable lobbying expenses – not quite a two to one ratio. More important, since this type of calculation is not automated in our accounting system, our finance staff has to review thousands of separate transactions to identify payers of more than $5,000 in aggregate in order to compile this source of funding report which, for 2015, included less than five hundred transactions and included reported amounts as low as $6. Our compliance efforts will be made even more time consuming as the threshold falls to $2,500. As an alternative, we continue to support a workable, common-sense approach, under which JCOPE would use existing lobby expense data as reported to JCOPE to define the "source of funds" required to be disclosure. Specifically, an entity's ratio of reportable lobby expenses to total expenses would be applied to total payments from a single source. As example, for an organization whose ratio of lobbying expenditures to total expenditures is 25 percent, the organization would disclose the source, amount and date of payments exceeding $10,000 in the aggregate. We urge that approach be adopted in JCOPE's formal rulemaking.

In closing, let me say that The Business Council appreciates the public's interest in meaningful and timely information about, to use JCOPE's language, "the people and entities behind those attempts at influencing decisions that can affect us all."

We devote substantial time and effort to meeting the requirements of the Lobbying Act. In doing so, we ask for clear compliance standards, regulations that are squarely based on statutory provisions, efficient reporting processes and technology, and a focus on meaningful information.

We look forward to working with JCOPE in achieving those objectives.

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