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November 21, 2016

Via Email

Martin Levine
Director of Lobbying
NYS Joint Commission on Public Ethics
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Albany, NY 12207
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Re: Comment on Proposed Comprehensive Lobbying Regulations

Dear Mr. Levine:

We write on behalf of our firm, Emery Celli Brinckerhoff & Abady LLP, to offer some comments on JCOPE's proposed comprehensive lobbying regulations (N.Y.C.R.R., Title 19, Part 942).

Overall, we appreciate JCOPE's thorough attention to detail that is exhibited throughout the proposed regulations. We believe that these regulations will provide much-needed clarity. We write therefore only with the limited purpose of drawing JCOPE's attention to two areas that we believe could be further clarified to provide more concrete guidance.

First, on the issue of grassroots lobbying, we urge JCOPE to clarify that merely listing contact information on a press release is not sufficient to constitute participation in the delivery of a Grassroots Lobbying Communication and trigger lobbying registration. *Second*, we suggest that JCOPE clarify that personal social media activities by an employee are only attributable to the employer when that employer has required or "expressly encouraged" the employee to engage in such activities.

Including Contact Information on Press Releases Is Not Lobbying

It is our understanding that a person only "participates in the delivery of a Grassroots Lobbying Communication" if that person is "identifiable as a representative of or

agent for a Client." Part 942.7(d). Thus, a public relations adviser or media consultant who works purely "behind the scenes" to assist a Client with developing a Grassroots Lobbying Communication that is ultimately made solely in the Client's name (*e.g.*, by assisting the client with writing a communication that may contain a call to action, developing a website, producing a pamphlet, drafting social media communications or advertising for the client, etc.) is not engaged in the "participation in delivery" of a "Grassroots Lobbying Communication" so long as that communication is not attributed to the consultant and the consultant is not publicly identified in the communication.

On the other hand, a person who is publicly identifiable as a public "spokesperson for the Client" or who publicly associates himself or herself in some other way with the Grassroots Lobbying Communication, could be participating in the delivery of a Grassroots Lobbying Communication (assuming the other factors are also satisfied). This distinction makes sense because a person who works purely behind the scenes to assist a Client is not trading on his or her name or otherwise conferring any benefit on the Client by virtue of their working relationship in a way akin to the role traditionally played by a lobbyist. Rather, such a person is like the copy editor, photographer, and website manager who all assist the Client behind the scenes in forming and delivering the Client's communication, but have no message or public persona that is distinct from the Client's, and who are all explicitly exempt from registration. Part 942.7(f)(ii).

Our comment is focused on one task that is frequently performed by the public relations adviser or media consultant who assists the Client behind the scenes: the writing and distribution of press releases. A "press release," as we use that term, is a written communication drafted by a communications professional in consultation with a client and distributed to journalists, editorial writers, and other members of the press. It is common to identify the consultant/adviser as the point of contact should a member of the press wish to obtain further information, materials, or quotations from the Client in whose name the press release is issued. Listing such a person as the point of contact to handle follow-up requests makes sense for the Client, who may not be equipped or accustomed to handling such matters and therefore needs an agent to do so on its behalf.

Clearly, any subsequent communications with a journalist that are prompted by such a press release would not constitute lobbying because of the statutory exception for "communications with a professional journalist." Part 942.4(c). For the same reason, sending a press release to a professional journalist cannot be lobbying. *Id.* Listing contact information on a press release is often the only practical way of advising journalists whom they can contact in order to engage in those statutorily-protected communications.

But it is not clear that press releases will always fall within this exception, because it is not possible to ensure that only professional journalists receive press releases. Although the vast majority of recipients of a press release are professional journalists, a press release is a freestanding document that can be forwarded by third parties, distributed inadvertently to non-journalist recipients, or made available to the general public at a press conference or on a website. As a result, there is no way to ensure that a press release will, in all instances, only be distributed to, or received by, professional journalists.

Accordingly, one can envision a press release which contains a call to action but which ends up being available to persons other than "professional journalists," including to the public. In such circumstances, the mere listing of contact information on the press release, and any response to an ensuing inquiry from the public, is not intended, and should not be sufficient, to turn the consultant in charge of managing media inquiries into a "spokesperson" for the Client. Unlike a spokesperson who stands up in front of a crowd at a rally or appears on television and might, in either instance, be quoted *in their own name*, the contact person on a press release generally does not have a voice or role that is independent from the Client. Rather, when people reach out to such a "contact person" listed on a press release, they are doing so in order to receive additional quotations *from the Client* or to obtain relevant material or background information *from the Client*. The "contact person" who provides that information is merely the conduit for the Client's voice, not a substantive participant in the conversation. This is the case whether the requester is a journalist or a member of the public who happens upon the press release and is looking to contact someone who can provide information on behalf of the Client.

For all these reasons, we urge JCOPE to specifically exempt the contact information listed on press releases from the scope of Part 942.7, by adding it to the list of examples set forth in section (f)(ii).

Personal Social Media Activities Should Only Be Attributable if Required or "Expressly" Encouraged by the Employer

On a separate issue, we suggest that JCOPE clarify that "personal social media activities" by an employee can only be "attributable" to the employer if the employer has *expressly* "encouraged" the person to engage in such social media activities. Part 942.7(g)(i)(2). Given the wide use of multiple and diverse social media platforms by an increasingly large number of people, it is difficult—as a practical matter, impossible—for an employer to actually monitor all such activities by all of its employees.

There is a concern that, as currently written, the phrase "encouraged by the organization" is too vague. It could allow attribution of social media activities without the employer ever intending to encourage (much less require) that its employee engage in any such activities. For example, an employee might feel "encouraged" to post on social media because she has become personally inspired through her work on a particular campaign and is now personally motivated to care about the issue. It is not hard to imagine that some employees might already be deeply invested in an issue (and already posting on social media about it) and sought work with a particular employer precisely in order to be able to work on that issue. It is also not hard to imagine a more self-interested employee, who might feel "encouraged" to post because he knows that the success of a particular campaign is important to a major client and, as a result, important to his employer's revenue stream and therefore important to the continued existence of his own job.

We suggest therefore that the modifier "expressly" is needed to clarify that an employer must "*expressly* encourage" such personal social media activities before they can be fairly attributable to the employer. This minor modification would not in any way dilute the force of the regulation, but would make it more manageable for employers to ensure compliance with it.

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We thank JCOPE for the opportunity to offer these comments on the proposed regulations. We are available to provide any further information that may assist you.

Respectfully submitted,

Andrew G. Celli, Jr.
Zoe Salzman