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for Government Relations

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June 14, 1999

Mr. John R. McGinley, Jr., Chairman
Independent Regulatory Review Commission
14th Floor, 333 Market Street
Harrisburg, PA 17101

Dear Chairman McGinley,

I am writing on behalf of the Pennsylvania Association for Government Relations (PAGR) to comment on the final form regulations submitted by the Lobbyist Disclosure Committee pursuant to Act 93 of 1998. As you may know, PAGR is the professional organization representing lobbyists in Harrisburg and has approximately 240 members from all aspects of the lobbying community, including those from associations and corporations, as well as lawyer lobbyists, contract lobbyists and legislative liaisons for administrative departments and agencies.

Since it began, PAGR has spoken out on the need to reform Pennsylvania's antiquated and ineffective lobbying law, and we worked closely for two legislative sessions with the sponsors and drafters of what has become Act 93. While we feel there are some problems with the bill as finally enacted, we nevertheless have been working since its passage to achieve smooth and effective implementation in keeping with the law. A full history of our attempts to have input into the process can be found in PAGR's comments submitted on March 1 to the Lobbyist Disclosure Committee (herein "Committee") in reference to the proposed regulations.

While the Committee has made a number of changes since the first draft was released in December, PAGR still has many concerns with the current final form regulations. At a meeting with IRRC staff last week, they urged PAGR to summarize those concerns in written form and submit them to you. This letter is in response to that urging.

Most of the issues raised here were dealt with in greater length in our official March 1 comments to the Committee on the proposed regulations. I will summarize those issues here, and refer you to that earlier document for more lengthy explanations of our positions.

Audits

In spite of some changes made by the Committee in the final form regulations, there is still a major problem with the power given to the Ethics Commission (herein "Commission") under §41.2(d) and (e). Those paragraphs give the Commission the power to expand a random audit by examining the records of any other lobbyist or principal. The only standard that must

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be met is that the records must be "relevant" but no definition of that term is provided. This broad authority is not justified by any provision of the statute, and seems to provide the Commission with the power to audit anyone at any time.

The statute requires the Commission to conduct periodic random annual audits as determined by lottery. We have no objection to that. However, in order for the Commission to expand that audit beyond a registrant determined by lottery, it should have to meet a strictly defined standard of cause. Failing that, the provisions allow for too much flexibility and could lead to abuse.

Investigations

Chapter 43 has been significantly improved by tying much of it to current Commission regulations in Chapter 21. However, some problems remain. In §43.2, for example, a much needed change was made in paragraph (a) to make it clear that a complaint alleging a violation of §1307 of the Act had to meet the same standards as a complaint under Chapter 21 of the commission's regulations. But then in paragraph (b) there is confusing language which allows for an investigation of a violation under §1307 of the Act based on "an alleged negligent violation". The regulations do not define "alleged negligent violation".

The placement of the "alleged negligent violation" language in a separate paragraph from the complaint provisions seems to be intended to make a clear distinction between the two. It is, however, impossible to know what that distinction is without having both terms defined. Those persons and organizations who will be regulated by the Act and the regulations need to know what they can be charged with, and when. The provisions of §43.2 do not provide that knowledge.

Notice of noncompliance

In our discussions over the past three or four months it has become clear that the "notice of noncompliance" language in §43.4 was intended by the Committee to allow the Commission to notify a registrant if there is a problem with a registration, quarterly report, or the failure to file either. While we understand and applaud that intention, we still believe that the language contained in §43.4 does not make that clear. We also understand that the Act in §1309 requires the Commission to send a notice of noncompliance in certain circumstances. However we feel that this requirement is being poorly applied as written in §43.4.

What remains our concern is that the term "notice of noncompliance" implies that the registrant has done something not in compliance with the law, i.e. illegal. This indeed may not be the truth in all cases where the notice is sent. For example, it is possible that an inadvertent transposition of numbers made a quarterly report inaccurate, or it is possible that the alleged noncompliance stems from an error on the part of the Commission or its staff. In neither case does the problem rise to the level of a "failure to register or report" as required by the Act for the issuance of a notice of noncompliance.

We therefore suggest that a preliminary step be inserted in the process, perhaps called something like a "request for clarification", where the Commission asks the registrant for further information to clear up a potential problem. This avoids the negative stigma of the "notice of noncompliance" with its statutorily required explanation of possible penalties, avoids the appearance of the Commission having already determined that a violation has occurred where none may have, and avoids a registrant's file becoming filed with noncompliances that may not

actually have been so. The Committee will no doubt respond that there is no provision in the Act for anything like a "request for clarification", and that is true. However, the Committee has not held to the letter of the law everywhere in the regulations, and this seems like an appropriate place to show some flexibility in the interests of protecting the innocent and averting misunderstandings and tensions between the Commission and the regulated entities.

Wrongful use of Act

There is no provision in the regulations for a registrant to request that the Commission take action against someone who repeatedly files frivolous or harassing complaints against them. In response to PAGR's suggestion that one be added, the Committee said that the Act doesn't provide for it as the Ethics Act does. That is true. It is also true that such a provision is not prohibited by the Act. Therefore, in the interests of fairness and appropriate due process, PAGR believes that language pertaining to wrongful use of the Act, similar to that contained in Chapter 21, should be added to the regulations before they are finally adopted.

Service of papers

In our March 1 comments, PAGR expressed concern that since the regulations often provide for short response times to Commission actions, in some cases twenty days or less, having the clock start on the day the papers are mailed could create problems. It is not difficult to come up with a scenario where a lobbyist would receive an official notice from the Commission when he has insufficient time left to prepare an adequate response, or perhaps not receive it prior to the response deadline at all. This might not be the fault of the Commission or the lobbyist, but merely an accident of timing.

Our proposed solution remains the same. Official papers that require a response should be sent by certified mail, and the date of service should be considered to be the date received and signed for. That way, everyone involved knows that the registrant has received the document and has the proper amount of time in which to respond.

Reporting by contract lobbyists and firms

The Act, in §1305(b)(6), states, "A lobbyist shall submit a separate report if, during the reporting period, the lobbyist engaged in lobbying which was not contained in the reports filed by the principal or principals represented by the lobbyist." In addition, in §1305(b)(4) the Act says, "A lobbyist must sign the reports submitted by each principal represented to attest to the validity and accuracy to the best of the lobbyist's knowledge." Since PAGR was directly involved in the drafting of those sections, we know that their intent was to avoid having a lobbyist file for the same expenses that the principal is filing for, in other words to avoid double reporting of expenses.

The regulations, however, seem to require that double reporting. It occurs in the case of a contract lobbyist who is paid a fee by a principal. The principal reports that fee as what it is, a personnel cost of lobbying. However, the lobbyist uses that money to pay a portion of all of his costs including rent, salaries, equipment, utilities, supplies and much more. All of these are reportable expenses under both the Act and the proposed regulations, and, under the regulations, the lobbyist must report them. That is counting the same dollars twice.

The regulations actually seem to require triple reporting in some situations since lobbying firms are also required to register and report. In the case of a one-lobbyist contract

lobbying firm, of which there are several, the firm and the lobbyist are identical. A dollar paid to the firm by a principal must be reported by the principal, the firm and the lobbyist. It therefore gets counted three times. While this will only happen in a small number of cases, it treats the principals and lobbyists in those cases differently from other registrants.

A solution for this would be to include language saying that a lobbyist is responsible for reporting only those expenses which come out of his own pocket, not those which are paid for either directly or indirectly by a principal. Under this proposal, all the expenses mentioned in the previous paragraphs would be covered by the principal's report. This would also be true for expenses which are billed directly to the principal such as mailing, copying, telephone and legislative entertainment. Anything not paid for by the principal would have to be reported by the firm or lobbyist who made the expenditure. This would ensure that all expenses at all levels are reported, and it would remove the possibility that anything would be reported more than once.

Standard of proof

In the past, PAGR has commented on the vagueness of the regulations with regard to the Commission imposing penalties on registrants. Early drafts did not state what standard of proof or vote of the Commission was necessary. Subsequent drafts have satisfactorily cleared up most of this problem. However, a serious problem remains.

For the most serious sanction the commission can impose, the banning of a registrant from lobbying for up to five years, no standard of proof is required. It is essential that §45.2(13) be amended to specify that the Commission must have "clear and convincing proof" of a serious violation before the banning can be approved. Failing this, lobbyists and organizations that lobby will have insufficient safeguards that they will not be denied access to their state government for frivolous or insubstantial reasons.

Conclusion

As stated at the start, this is only a brief summary of concerns with the final form regulations. Further information was presented in PAGR's comments to the Committee on March 1, and in meetings with IRRC staff.

In view of these serious concerns, PAGR is asking the Independent Regulatory Review Commission to reject the final form regulations of the Lobbyist Disclosure Committee. The deficiencies in the regulations range from conceptual, to structural to functional. They fail to show an understanding of what lobbyists do and how they work. They fail to provide a consistent interpretation of the Act; swinging from an overly rigid adherence to the letter of the Act, particularly in regard to the denial of individual rights and protections; to loose interpretations of language where doing so provides the Commission with powers not granted to it under the Act. And finally, they fail to provide a sufficient framework under which lobbyists and principals can understand what they have to do, when they have to do it, and what can happen if they don't.

If you have any questions prior to the start of the blackout period, please contact PAGR at once. For anything that arises after that time, we will have a spokesman in attendance at both the staff briefing and the full meeting on June 17.

It is my honor and pleasure to submit these comments to you on behalf of PAGR, and to thank you for your consideration. If you need any further information, I can be reached at 717-233-1631. Thank you.

Sincerely,

R. David Tive
Immediate Past President

cc: Sen. David J. Brightbill
Sen. Robert J. Mellow
Rep. Thomas P. Gannon
Rep. Kevin Blaum
Richard M. Sandusky, IRRC