



HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

RECEIVED
99 MAR 16 PM 2:47
INDEPENDENT REGULATORY
REVIEW COMMISSION

March 2, 1999

ORIGINAL: 1997
BUSH

COPIES: Sandusky
Wyatte
Notebook

Original copies sent to:
McGinley, Bush, Coccodrilli, Harbison, Mizner

Austin Lee
Chairman
Lobbying Disclosure Committee
c/o State Ethics Committee
309 Finance Building
Harrisburg, Pa 17120

Re: Proposed Lobbying Disclosure Regulations

Dear Chairman Lee:

In accordance with the provisions of the Independent Regulatory Review Act, I am writing to provide comments on the proposed regulations, and to suggest several enhancements that will aid in facilitating the efficient administration of the newly enacted Lobbying Disclosure Act.

In some cases, the suggestions are offered because the proposed regulations deviate from the statutory authority and legislative intent on which they are to be based. In other cases, the suggestions are offered to eliminate ambiguity, and provide clarification and/ or consistency for the State Ethics Commission's (SEC) administration of the act. We recognize that the promulgation of regulations offers an opportunity to promote the legislative intent of the statute, complement the terms of the statute by supplying an administrative framework for the effective implementation of the statute, and assure consistent treatment by building upon principles of jurisprudence as to fairness and equity.

A statement identifying each of the concerns is listed below, and an explanation of each statement follows in the succeeding pages. References to specific sections of the proposed regulations have been included for ease of review. Suggestions have also been proffered to rectify each of the concerns raised. The concerns are as follows:

Austin Lee
March 2, 1999
Page two

1. The proposed regulations contain several vague and overly broad definitions and inconsistent reporting periods that create a tremendous prospect for discrepancies between an individual's Statement of Financial Interests and a lobbyist's reports. Regs. § 31.1.
2. Lobbyists are given discretion or the option, exclusively, to: a) calculate and attribute the value of certain gifts, transportation, meals and hospitality to one individual, or b) calculate and attribute the "benefit" provided to each person in attendance at an event or occasion. Regs. § 35.1 (k) (6).
3. The proposed audit procedures allow "for cause audits", but the term "for cause" is undefined and devoid of any statutory basis. Regs. § 41.1 (c).
4. It appears the proposed regulations would permit investigations to be triggered without the filing safeguards of a formal complaint, and penalties to be levied without satisfying the clear and convincing proof standards of the Ethics Act. Regs. § 43.3 (a) & (e).
5. It appears the proposed regulations would permit civil penalties for negligent failure to register, or inaccurate reporting, to be imposed by less than a majority of the entire SEC membership. Regs. § 43.3 (e).
6. It appears the proposed regulations would permit a SEC enforcement proceeding (which can result in the imposition of penalties and sanctions) to be commenced through "non-investigative procedures" that are vaguely defined. Regs. § 43.3 (b) & (c).

By copy of this letter, the Independent Regulatory Review Commission is also being advised of the comments expressed herein. We believe that adoption of the suggested changes can avert many of the due process, equal protection and other legal challenges that otherwise may arise and cause delay in the timely implementation of the regulations.

Austin Lee
March 2, 1999
Page three

I offer these comments and suggestions in support of the effective administration of this important statute and public faith in the integrity our government.

Yours truly,

A handwritten signature in black ink, appearing to read "Bill DeWeese", written in a cursive style.

Hon. H. William DeWeese
Democratic Leader
PA House of Representatives

Cc: Independent Regulatory Review Commission ✓
All House and Senate Members

EXPLANATION OF CONCERNS

1. The proposed regulations contain several vague and overly broad definitions and inconsistent reporting periods that create a tremendous prospect for discrepancies between an individual's Statement of Financial Interests and a lobbyist's reports. Regs. § 31.1.

The Lobbyist Disclosure Regulations contain several vague, overly broad and ambiguous definitions. Utilizing these definitions, lobbyists and principals may feel compelled to include in their quarterly reports and designate as "lobbying expenses" expenditures that probably should not be so designated. Compounding the confusion, lobbyist's and principal's quarterly reports are to be filed on a quarterly basis, that includes the year before an individual would file a Statement of Financial Interests for that year. An individual who is listed as the beneficiary of a lobbyist's or principal's expenditures may be compelled to explain, defend or deny the receipt of that benefit repeatedly each year after the filing of each quarterly report.

Generally, members' Statements of Financial Interest are due by May 1st and lobbyists/ principals file quarterly reports. In election years, a member's Ethics Statement would be filed with his/ her nomination petition, probably in March. In election years, under Proposed Regulation § 31.4, lobbyists'/ principals' quarterly reports would include the periods December - February, and June - August. Thus, it is unlikely that a member would have the time and opportunity to review a lobbyist's quarterly report for the December-February period, and insure that discrepancies are clarified, before being required to file his/ her Ethics Statement with their nomination petitions. Confusion in the media or in public opinion at so hectic a time may present a candidate with the impossible task of resolution before the election. Finally, any discrepancy between the reports may trigger an audit.

The definitions that cause the concerns are the following:

"Lobbying" -- it is uncertain whether the term only includes expenditures made to provide gifts, entertainment, meals, transportation or lodging to a State official or employee in an effort to influence legislative or administrative action, or whether it also includes such expenditures made for the purpose of advancing the lobbyist's interest (including maintaining goodwill with legislators). If it is the latter, a lobbyist or principal (in response to a member's request for help for a constituent) may feel compelled to calculate the "cost" of all the professionals and staff involved in rendering that assistance and list it on a report, thereby creating the impression that the lobbyist made a large expenditure on the member's behalf.

"Effort to influence legislative or administrative action" -- this term excludes the provision of purely technical data to a State official, employee or legislative body, at his her, its request. It is unclear what "purely technical data" means and what it encompasses. It may be interpreted to include costly information provided from lawyers, accountants and financial or statistical projections which a lobbyist may choose to include in a report creating the impression that the lobbyist made a large expenditure on the members behalf.

“Gift” and “Anything of value” -- The terms means anything of any nature whatsoever which would not ordinarily be obtainable in the marketplace without consideration, of equal or greater value. These broad definitions includes services not extended free to the general public, complimentary tickets/ passes, discounts not extended to the public generally and entertainment not generally extended free of charge to the general public. Under these broad definitions, lobbyists may feel compelled to calculate the value of services previously extended to members for free and include them in their quarterly reports. A lobbyist may feel compelled to calculate the costs of the services of lawyers and other professionals and semi-professionals utilized in drafting legislation and assisting a member’s constituents (as discussed above) and include them in the lobbyist’s reports.

SUGGESTION.

a) The definitions should include a specific provision exempting from reporting the cost or value of the services of professionals and other staff involved in responding to assist a member’s constituents, made at the request of the member; and

b) The quarterly reporting period should run concurrently with the calendar year, beginning in January and ending in December.

2. Lobbyists are given discretion or the option, exclusively, to a) calculate and attribute the value of certain gifts, transportation, meals, hospitality to one member, or b) calculate and attribute the “benefit” provided to each person in attendance at an event or occasion. Regs. § 35.1 (k) (6).

In the event that a lobbyist or principal provides gift(s), lodging, transportation, or hosts an event (such as a dinner) that may be attended by several members and/ or staff, the lobbyist may determine and report the “benefit” provided by: 1) calculating the actual benefit provided to that individual or 2) dividing the total expenditures common to more than one beneficiary by the number of beneficiaries. Thus, a lobbyist could determine that the full expenditure benefited only one of the individuals (such as the member who invited the others) and report the total expenditure as for that individual, or spread the cost proportionately over all of the invitees.

In addition, the lobbyists can add the proportionate value above to the cost of other gifts, transportation, lodging or hospitality provided to each of the invitees to determine whether the in excess of \$500 quarterly-reporting threshold has been met. Individuals may therefore be surprised by being listed in a lobbyist’s report as the recipients of benefits.

To avoid surprises, invitees may attempt to have a conversation regarding the lobbyist’s prospective treatment and reporting of the expenditures prior to each event. Notwithstanding the conversation, the treatment and reporting of such expenditures is exclusively the decision of the lobbyist, and an understanding between the lobbyist and the invitees may not preclude a subsequent SEC investigation into the event and a determination of who really benefited from the event -- the invitees or the inviting member.

SUGGESTION.

a) Interim notification by a lobbyist or principal to a member that the expenditures attributable to that member are at a certain dollar level (e.g. \$200.00) and approaching the reporting threshold level may allow lobbyists and members to better police and address the rate of expenditures; and

b) eliminate the option of calculating and attributing the benefit in order to maintain consistency among the reports of the benefits provided.

3. The proposed audit procedures allow “for cause audits”, but the term is undefined and devoid of any statutory basis. Regs. 41.1 (c).

Section 41.1 (c) of the proposed regulations permit “for cause” audits. There is no statutory basis for “for cause” audits. There is no definition in the proposed regulations of what constitutes “cause” and, therefore, the application of this proposed provision would be very subjective and could involve violations of due process and equal protection. If the intent is to cover audits conducted as part of an investigation, then that should be made clear by narrowing the scope of the provision to audits conducted as part of an investigation. Otherwise, the SEC’s authority to investigate at its own initiative provides a sufficient basis to uncover violations of the statute.

SUGGESTION. Delete the reference to “for cause audits” and clause (c) in its entirety. Alternatively, if the purpose of clause (c) is to protect against multiple random audits, add a clause which clarifies that no lobbyist shall be subject to a random audit more than once in a biennial period.

4. Investigations can be triggered without the filing requirements of a formal complaint, and penalties can be levied without satisfying the clear and convincing proof standards of the Ethics Act. Regs. 43.3 (a) & (e).

Section 1308 of the Lobbyists Disclosure Act provides that the Ethics Commission may conduct a hearing about negligent conduct of a lobbyist in accordance with Section 1107 and 1108 of the Ethics Act. Section 1108 of the Ethics Act clearly contemplates a two -tiered investigative process. Under 1108 of the Ethics Act, and its regulations at 51 Pa. Code §21.2, the first tier is a preliminary inquiry to determine if there is reason to believe that the Ethics Act has been violated. This inquiry can begin upon receipt of a formal complaint or the motion of the Executive Director. If there is reason to believe that a violation of the Ethics Act has occurred, then there is a full investigation. The Ethics Act regulations establish an investigative process with rules, and requirements of service, confidentiality and timeliness (investigation must be completed within 180 days). §21.5. The SEC must issue a findings report setting forth the pertinent facts and afford the person an opportunity to respond and request a hearing.

Rules are established for the hearing, §21.21-27. When the hearing is concluded, at least four members of the SEC must find a violation by clear and convincing proof. §21.28.

In contrast, the proposed lobbying regulations at Section 43.3, allow proceedings to be initiated on information that does not satisfy the criteria for a formal complaint, (e.g., information such as an anonymous phone call.) The Executive Director may then invoke the non-investigative procedures, which may result in the imposition of penalties and sanctions after the issuance of a notice of compliance.

SUGGESTION. Maintain consistency with the Ethics Act requirements for the filing of a verified complaint to commence an investigation; delete clause (4) and clarify in (5) that information must be “credible”.

5. Civil penalties for negligent failure to register, or inaccurate reporting, can be imposed by less than a majority of the entire SEC membership. Regs. 43.3 (e).

When conducting hearings into alleged violations of the Ethics Act, the Commission can only “find” a violation upon the affirmative vote of at least four members based upon “clear and convincing evidence”. See 1108 (G). Sec. 43.3 (e) of the proposed lobbying regulations empower the SEC to “find” a negligent failure to report or register and impose civil penalties, based upon the “majority vote of the members present” at a meeting. Presumably, the standard is preponderance of the evidence.

As the presence of only four members is required for a quorum, civil penalties could be imposed under the regulations by the affirmative vote of as few as three members of the SEC. Presumably, a lobbyist or principal could also be barred for a period up to 5 years on a similar vote. The regulations thus allow the imposition of a civil penalty and possible deprivation of a property interest upon less than an affirmative vote of the majority of the SEC members. Among other things, that result is inconsistent with the statute which states that a civil penalty can be levied by the SEC “upon majority vote of its members” (Sec. 1309 (C)), and the results also effects a denial of procedural due process.

SUGGESTION. To promote consistency, the Ethics Act requirements regarding finding violations by the affirmative vote of at least four members and “clear and convincing proof” should be set forth in the lobbying regulations.

6. An SEC enforcement proceeding (which results in the imposition of penalties and sanctions) can be commenced through “non-investigative procedures that are vaguely defined. Regs. § 43.3 (b) & (c).

Section 43.3 (b) and (c) of the Proposed Regulations place discretion in the Commission to enforce the provisions of the act by a non-investigative or investigative procedure. The Proposed Regulations list certain factors that the Commission may take into consideration in making a determination on which procedure to follow, but they are not mandatory. Under the Proposed Regulations, the non-investigative process does not require any preliminary inquiry or investigation.

Under the Proposed Regulations, the non-investigative process would begin with the Commission issuing a “notice of noncompliance” and the respondent having 20 days to cure the noncompliance. If the respondent does not cure, the Investigative Division may petition for assessment of civil penalties. At that point, the respondent can request a hearing and contest the matter. Under the non-investigative process, there is no guarantee that an investigation will be conducted into whether the respondent is in compliance. By not requiring a preliminary inquiry or investigation, the non-investigative process allows the Commission to presume noncompliance (shifting the burden to the respondent) and only if the respondent does not cure, must it consider whether an actual violation has occurred.

In any event, once a proceeding moves to the hearing stage, evidence will be presented to establish a violation. Whether the hearing began through the investigative procedure or through the non-investigative procedure, the four-member affirmative vote and clear and convincing proof standards applicable to Ethics Act investigations should apply.

SUGGESTION.

a) Adequate enforcement is ensured through the investigative procedures; the provisions regarding the “non-investigative procedures” should be deleted, or the term clarified to indicate that it refers to the “noncompliance notice” only; and

b) The four member affirmative vote and clear and convincing proof standards should be applied following a hearing for the non-investigative or noncompliance procedures.