House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

March 17, 1999

John J. Contino, Executive Director
Pennsylvania State Ethics Commission
309 Finance Building, P.O. Box 11470
Harrisburg, PA 17108-1470

ORIGINAL: 1997
BUSH
COPIES: McGinley
Sandusky
Wyatte
Notebook

Dear Mr. Contino:

The purpose of this letter is to raise several issues based upon the discussions and public hearing conducted by the Judiciary Committee of the House of Representatives that the Act 93 committee should address as part of the comment period in regard to the proposed regulations implementing the Lobbying Disclosure Act.

As you know this committee conducted a public hearing concerning these proposed regulation on Thursday, February 25, 1999. Testifying at this public hearing were: yourself, R. David Tive, Immediate Past President, Pennsylvania Association for Government Relations; the Honorable Mark Cohen, 202nd Legislative District; Travis J. Tu, Assistant Executive Director, American Civil Liberties Union; Ms. Jean Becker, Common Cause; Franklin Curry, Esquire, Reed, Smith, Shaw and McClay; and David Sheppard, President, Pennsylvania Society of Association Executives. It is the sense of the committee that this public hearing raised many issues that should be addressed by the Act 93 Committee and, accordingly, wishes to incorporate the testimony received by the committee at this public hearing by reference here as if it was fully set forth fully herein.

Also, this committee has received written comments concerning these proposed regulations from: H. William DeWeese, Democratic Leader, Correspondence of March 2, 1999; Phillip J. Murren on behalf of the Pennsylvania Catholic Conference; Raymond P. Pepe, Esquire, Kirkpatrick and Lockhart, LLP; and Franklin L. Kury, Esquire, Reed, Smith, Shaw and McClay. It is the sense of the committee that these letters raise issues that should be addressed by the Act 93 Committee and, accordingly, wishes to incorporate them by reference here as if it was fully set forth herein.

After discussing the proposed regulations within the committee, the following discussion sets forth some of the concerns raised by the committee members. It is the sense of the committee that these concerns should be brought to the attention of the Act 93 committee for consideration during this commentary period.

(1) **The proposed regulations establish timetables for the filing of quarterly expense reports that are at variance with the standard usage for this term and which are inconsistent with the clear statutory intent of the Lobbyist Disclosure Act.**

Section 1305 of the act simply requires that lobbyists/principals file their prescribed quarterly expenses with the Commission. Rather than adhering to the normal and expected standard of January 1 as the beginning of the first quarter, the proposed regulations fix December 1 as the starting date (see § 31.4). If the General Assembly had wished to prescribe a unique quarterly reporting scheme that varies so sharply from nearly universal practice, it would have expressly provided for such an anomaly within the four corners of the act itself.

The proposed regulation not only departs from the commonly accepted understanding of "quarterly report," it also undermines the express intent of the General Assembly, which is to require that lobbyists/principals report the identities of public officials/employees receiving gift/travel/hospitality benefits before such recipients are required to file their ethics statements. In election years, legislators must file their ethics statements when they file their nomination petitions. In presidential election years, legislators will be required to file their ethics statements, which must include the previous December, before lobbyists/principals will have to file their quarterly reports. In 1996, for instance, the filing deadline for legislators' ethics statements was February 13 (if they were seeking reelection) while the lobbyist/principal report would not have been due until the end of February.

Thus, the proposed regulation contradicts the clear legislative intent of the act which is set out in § 1305(3)(ii). Therein, the act stipulates that a lobbyist/principal must give written notice to each public official/employee of their inclusion in the expense report within 7 days of its submission to the Commission in order to enable such officials/employees to comply with their reporting requirements under the State Ethics Act. The use of a traditional January through March reporting period more readily accords with the clear legislative intent embodied in § 1305(3)(ii) since this will assure that members are aware of the lobbyist/principal filing for the prior December before members must submit their ethics statements which must include December information.

SUGGESTION

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

(2) **Ambiguities in the proposed definitions of "lobbying" and "gift" could lead to an erroneous interpretation that lobbyist/principal responses to legislator inquiries on behalf of constituents is reportable on the lobbyist/principal expense report and as a gift on the public official ethics statement.**

Ambiguities in the proposed definitions of "lobbying" and "gift" could lead to an erroneous interpretation of the act which could require that: (a) lobbyists/principals include the cost of responding to legislator inquiries on behalf of a constituent in calculating their single aggregate estimates of total amounts spent for personnel/office expenses and in computing the total costs for gifts provided to state

officials; and (b) lobbyist/principals disclose the identities of legislators making inquiries on behalf of their constituents on the dubious theory that such constituent assistance somehow qualifies as a gift to the legislator.

It is clear from the following statement of House Majority Leader John Perzel during the course of Floor debate on the act that constituent related services were never intended for inclusion within the scope of this law. In this regard, Majority Leader Perzel made the following comments during Floor debate on S.B. 254 which became Act 93 of 1998 (see Legislative Journal - House, Oct. 6, 1998, page 1666):

> Mr. PERZEL. Thank you, Mr. Speaker.
>
> This is really just a clarifying statement that I wanted to make, Mr. Speaker.
>
> The term "Lobbying" defined in the bill on page 27, section 1303, does not include actions taken and pursuant to customer service performed in the ordinary conduct of business including but not limited to constituent requests relayed by public officials. That really is just meant, Mr. Speaker, if you were to go to one of your utilities and ask them to trim some trees in your neighborhood, that amount of money that would be assigned to trimming the trees would not be counted against your limit of the $650. Thank you.

SUGGESTION

Regulations should codify legislative intent by expressly exempting from reporting the cost or value of the services of professionals and other staff involved in responding to members' inquiries on behalf of constituents. Moreover, the regulations should also clarify that such responses to constituent inquiries do not come within the definition of "gift" or "thing of value."

(3) The proposed regulations should be modified to assure that legislative and constituent related information provided by a lobbyist/principal to a legislator, at the latter's request or insistence, does not come within the definition of an effort to influence legislative or administrative action.

Proposed regulations take a significant step in the right direction in specifically excluding "purely technical data" provided to a public official, at the official's request or insistence, from its definition of an "effort to influence legislative or administrative action" (which, in turn, is part of the definition of "lobbying"). However, it is unclear what "purely technical" data means and what it encompasses. This will lead to unnecessary speculation and confusion as to whether any information provided in response to a legislator's request will fall within the exempt category of "purely technical data" or whether it will come within some reportable category.

SUGGESTION

The definition of effort to influence legislative administrative action should be amended to include "any legislative and constituent related information" rather than merely "purely technical" data.

(4) Proposed regulations give lobbyists/principals the option of either: (a) calculating the actual benefit provided to each legislator when lobbyists provide a service to a group of legislators; or (b) dividing the total expenditures by the number of legislator-recipients and adding the resulting figure to the value of other services provided to that legislator.

There is nothing in the Lobbying Disclosure Act which gives lobbyists/principals the right to simply pro-rate the costs of services equally among a group of legislators without regard to each participant's individual benefit. Under this proposal, a lobbyist can divide the service equally between legislators. This proposed regulation is unfair and it places the convenience of lobbyists ahead of the equities of legislators in that it will cause some legislators to be falsely perceived as reaching the disclosure threshold when they have not.

SUGGESTION

(a) The regulations should require or, at the very least, encourage lobbyists/principals to provide interim notification to members and to other public officials/employees that the expenditures attributable to that official all are at a certain dollar level (e.g., $2; $5) and may be approaching the reporting threshold level; and

(b) The regulations should eliminate the option of dividing the total expenditure by the number of officials. Reporting should be based on the actual service received by the official.

(5) Proposed audit procedures allow "for cause" audits but the term is devoid of any statutory basis and is inconsistent with clear legislative intent. 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. In fact, a review of the legislative history of Act 93 makes it clear that the legislature intended to limit the Commission to random audits. In this regard, S.B. 254 had broadly empowered the Commission to conduct audits. However, the House amendments restricted this broad power by confining the Commission's scope of authority to random audits. By providing for random audits without authorizing "for cause" audits, the General Assembly struck a careful balance between the need to have a system which will deter inappropriate reporting practices and the need to guard against abuse. It would be inappropriate for the regulations to expand the audit power to encompass "for cause" audits after the Legislature specifically restricted the broad grant of audit power in the Senate-passed version of the bill by expressly confining this power to the conduct of random audits.

It is important to emphasize that this change will not impair the Commission's power to conduct thorough investigations of any specific wrongdoing that is uncovered pursuant to a complaint, an audit or other credible information received.

SUGGESTION

Delete the reference to "for cause" audits.

(6) The proposed regulations need to be clarified in order to assure that Commission proceedings are based upon sufficient cause.

The proposed regulations allow for the initiation of Commission proceedings under any one of 5 circumstances:

(1) receipt of a complaint;

(2) an audit;

(3) reviews of filings by Commission staff;

(4) information received that does not satisfy the criteria for a formal complaint; and

(5) when motion of the executive director, which may be based upon information received.

While the first 3 categories seem appropriate, there is a need to revise the 4th and 5th categories.

In this regard, the 4th category allows for the initiation of proceedings based on information that does not satisfy the criteria for a formal complaint. This ambiguous language could be construed as permitting the conduct of investigations on the basis of information that lacks the credibility of a formal complaint. In order to safeguard against the possibility of abuse, such as investigations triggered by baseless, anonymous or frivolous phone calls or letters from a competing constituency. It is recommended that the Commission delete category #4 in its entirety since other criteria grant the Commission ample authority to conduct any and all necessary investigations. As to category #5, it is recommended that it be amended to require that the executive director initiate an investigation which is based upon verified information received rather than simply information received.

SUGGESTION

Delete category #4 which enables the Commission to conduct investigations based upon information that does not satisfy the criteria for a formal complaint and amend category #5 in order to require that any investigation initiated by the executive director be based upon verified information.

(7) The proposed regulations should clarify that civil penalties for negligent failure to register or for inaccurate reporting be imposed by vote of a majority of the entire SEC membership based upon a standard of clear and convincing evidence. Regs. 43.3(e).

In § 43.3(e), the proposed regulations empower the Commission to impose civil penalties based upon a majority vote of the members present if it determines that there is a registration or reporting violation following a noninvestigative process or an investigative process. This is inconsistent with § 1309(c) of the Lobbying Disclosure Act which requires a vote of a majority of the Commission members (as distinguished from a majority of the members "present") in order to levy a civil penalty for negligent failure to register or report. In addition, § 1308(h) of the Lobbying Disclosure Act directs the Commission to conduct its investigations in accordance with Sections 1107 and 1108 of the State Ethics Act. In this regard, Section 1108 of the State Ethics Act requires that at least 4 members of the Commission must determine that a violation has occurred.

In light of the clear legislative intent that lobby law investigations be conducted in accordance with the same standards that currently apply to Ethics Act violations, it is further recommended that the regulations specify that a finding of a violation be established by clear and convincing proof as currently provided for in the State Ethics Act.

SUGGESTION

To promote consistency, the Ethics Act requirements regarding findings of violations by the affirmative vote of at least 4 members and clear and convincing proof should be included under the lobbying regulations and these standards should apply to any noncompliance proceedings which could result in penalties, as well as to investigative proceedings.

(8) The proposed regulations should clarify the regulations with regards to their effect upon religious organizations. (Section 1306 of Act 93).

In testimony presented to this Committee, the American Civil Liberties Union raised questions concerning the treatment of religious organizations. In this regard, Democratic Chairman Blaum engaged in the following questions during this Committee's Public Hearing: (see Notes of Testimony - February 25, 1999, page 82):

> **REPRESENTATIVE BLAUM**: When you say religious organizations are exempt from provisions of this law, how would that impact a contract-lobbying firm who may be retained by a religious organization to lobby on behalf of their interests? Would that exempt the lobbyist and that firm from the provisions of the law and regulations?
>
> **MR. TU**: That question is probably directed to those who drafted the regulations better than I am. But my reading of the regulations is that, any lobbyist is exempt when acting on behalf of a bona fide church establishment. I would have to check the regulations and read them over again, but that's my impression.

(9) Other Concerns.

Some of the following concerns may be beyond the committee to address by way of revised regulation although, pursuant to 65 Pa.C.S. section 1310(c), the committee has the authority to promulgate regulations "necessary to carry out" this Act. Accordingly, even if you determine that some of the issues raised herein exceed your authority to make changes by way of revised regulation, the sense of the committee is that it is best that they be raised to this Committee and would appreciate your comments on their merit, nonetheless.

(a) Concerns were raised that the reporting requirements imposed on lobbyists require subjective judgments, will be difficult to satisfy with precision, and could lead to unnecessary paperwork, inefficient resource management, and perhaps even punitive enforcement.

For example:

- The regulations anticipate the reporting of expenses when incurred rather than when paid, a situation which may not be consistent with the accounting practices of many principals and lobbyists.

- The categories for reporting expenses may overlap resulting in questions as to whether a particular expense should be reported as a "direct" lobbying expense, an "indirect" lobbying expense or some other expense such as an expense of an event or reception.

- Some types of expense reporting are inherently difficult to attribute between lobbying and non-lobbying activities. Such items as benefits (healthcare, other personal insurance, and related employee benefits) may be difficult to divide on an individual employee basis between lobbying and non-lobbying activities. Likewise, such ministerial items used as office supplies (fax machines, telephone usage, office expenses, electric, etc.) may be difficult to divide on an individual employee basis between lobbying and non-lobbying activities.

- Similarly, attribution of general overhead for facilities, real estate and taxes, and other equipment may be difficult to accomplish.

- The proposed regulation governing access to a registrant's computerized/electronic records should be subjected to safeguards which will prevent intrusion into information governing communications between legislators and registrants on sensitive legislative issues absent a showing of legally sufficient cause to access such information.

If you or your staff have any questions or would like to discuss any of these points in greater detail, please let me know.

Very truly yours,

Honorable Thomas P. Gannon
Chairman , House Judiciary Committee

Honorable Kevin Blaum
Democratic Chairman , House Judiciary Committee

cc: Honorable Matthew J. Ryan, Speaker
Honorable John M. Perzel, Majority Leader
Honorable William DeWeese, Minority Leader
Brian J. Preski, Chief Counsel, Judiciary Committee
Edward C. Hussie, Chief Counsel to the Majority Leader
Reizdan B. Moore, Chief Counsel to the Democratic Caucus
Michael P. Edmiston, General Counsel, Democratic Caucus
Vincent J. Dopko, Chief Counsel, State Ethics Commission