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The Majority Leader

Senate of Pennsylvania

COMMITTEES

RULES, CHAIRMAN
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LAW AND JUSTICE

STATE SYSTEM OF HIGHER EDUCATION,
BOARD OF GOVERNORS

March 22, 1999
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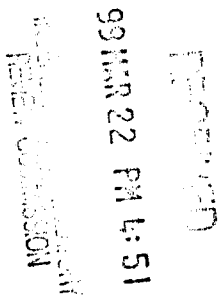

Honorable Robert E. Nyce
Executive Director
Independent Regulatory Review Commission
14th Floor, Harristown 2
Harrisburg, PA 17101

Dear Mr. Nyce:

Attached hereto is the Report to the Senate Rules Committee from the Sub-Committee on Lobbying Disclosure regarding the proposed Lobbying Disclosure Act regulations. The Senate Rules Committee voted unanimously today to transmit the Report to the Lobbying Disclosure Committee for your consideration.

Representatives of the Sub-Committee will make themselves available to answer any questions you may have.

Sincerely,

F. JOSEPH LOEPER
MAJORITY LEADER

FJL/bbk

Attachment

HOUSE OF REPRESENTATIVES
COMMONWEALTH OF PENNSYLVANIA

* * * * * * * * * *

State Ethics Commission's
Lobbying Disclosure Regulations

* * * * * * * * * *

House Judiciary Committee

Room 60, East Wing
Main Capitol Building
Harrisburg, Pennsylvania

Thursday, February 25, 1999 - 9:40 a.m.

--oOo--

BEFORE:

Honorable Thomas Gannon, Majority Chairperson
Honorable Patrick Browne
Honorable Raymond Bunt
Honorable Scot Chadwick
Honorable Stephen Maitland
Honorable Albert Masland
Honorable Chris Wogan
Honorable Kevin Blaum, Minority Chairperson
Honorable Harold James
Honorable Kathy Manderino
Honorable LeAnna Washington

IN ATTENDANCE:

Honorable Mark Cohen

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House of Representatives
COMMONWEALTH OF PENNSYLVANIA
HARRISBURG

CHAIRMAN
HOUSE JUDICIARY COMMITTEE

THE PENNSYLVANIA HOUSE OF REPRESENTATIVES
JUDICIARY COMMITTEE HEARING
ON STATE ETHICS COMMISSION'S
LOBBYING DISCLOSURE REGULATIONS
THURSDAY, FEBRUARY 25, 1999
ROOM 60, EAST WING

AGENDA

9:30 A.M.	John Contino, Executive Director State Ethics Commission
9:45 A.M.	R. David Tive, Immediate Past President Pennsylvania Association for Government Relations
10:00 A.M.	The Honorable Mark Cohen 202nd Legislative District
10:15 A.M.	Travis J. Tu, Assistant Executive Director American Civil Liberties Union
10:30 A.M.	Jean Becker Common Cause
10:45 A.M.	Franklin Kury Reed, Smith, Shaw and McClay
11:00 A.M.	David Sheppard Pennsylvania Society of Association Executives

STATEMENT OF
AUSTIN M. LEE, VICE-CHAIR OF
PENNSYLVANIA STATE ETHICS COMMISSION; CHAIR OF
LOBBYING DISCLOSURE REGULATIONS COMMITTEE
PRESENTED TO THE JUDICIARY COMMITTEE
OF THE PENNSYLVANIA HOUSE OF REPRESENTATIVES

STATE ETHICS COMMISSION
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Honorable Thomas P. Gannon
Chairman
State Judiciary Committee
House of Representatives
Commonwealth of Pennsylvania

Honorable Thomas R. Caltagirone
Democratic Chairman
State Judiciary Committee
House of Representatives
Commonwealth of Pennsylvania

Chairman Gannon

Chairman Caltagirone

Members of the State Judiciary Committee:

On behalf of the Pennsylvania State Ethics Commission and the Lobbying Disclosure Regulations Committee, I would like to express my appreciation to the Members of the House of Representatives, Judiciary Committee for the invitation to participate in today's hearing.

I regret that my temporary absence from the Commonwealth prevents my attendance at today's hearing. I ask, however, that the Committee please accept this written statement for the record.

As background, on October 15, 1998, the Lobbying Disclosure Act (Act 93 of 1998) was signed into law by Governor Thomas J. Ridge. The Lobbying Disclosure Act vests jurisdiction

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of lobbyist and principal registration and disclosure with the Pennsylvania State Ethics Commission. The Commission will have administration and enforcement responsibilities under the new law. Although the registration and disclosure provisions of the law take effect on August 1, 1999, a mandate that Regulations be promulgated took effect immediately.

In this respect, the law provides that regulations must be drafted and submitted to the Independent Regulatory Review Commission within 180 days. As part of the law, a Regulations Committee was established by the General Assembly in order to accomplish this goal. The Committee is comprised of the Chairperson of the Ethics Commission, the Secretary of Senate, the Chief Clerk of the House of Representatives, the Attorney General, the Secretary of the Commonwealth, the Auditor General, and the General Counsel, or their respective designees. As a result of the collective efforts of the Committee Members, the Regulations were drafted and submitted in a timely fashion. They followed diligent staff effort, a public hearing held on January 13, 1999, to receive public comment, and extended discussions by the Committee. The committee approved the Regulations unanimously in the form presently before you. There is little I can add to the proposed regulations in your hands for comment pursuant to the statutorily mandated regulatory review process. They speak for themselves.

It was our intention that the regulations be fair, definitive, easily understood and consistent with the legislative intent expressed in the Lobbying Disclosure Act; we hope we have achieved those goals. The regulatory review process is designed to elicit comments on the Committee's effort; we welcome any such comments all of which will be fully considered as the

review process moves forward.

I have asked John J. Contino, Executive Director of the State Ethics Commission to deliver my statement to you. Mr. Contino will also be able to advise you as to the measures being taken to implement the Act after the Regulations become final. Such steps include, most importantly, the availability of advices and opinions as to the propriety of conduct as limited or regulated by the law and the substantial educational efforts which will be available to interested parties.

Respectfully submitted,

Austin M. Lee, Esquire
Vice-Chair, State Ethics Commission
Chair, Lobbying Disclosure Regulations Committee

STATEMENT OF THE PENNSYLVANIA ASSOCIATION FOR GOVERNMENT RELATIONS

On Proposed Regulations for Act 93 of 1998
The Lobbyist Disclosure Act

Presented to the House Judiciary Committee
February, 25, 1999

R. David Tive
Immediate Past President

Good morning Chairman Gannon, Chairman Blaum and members of the Committee. My name is David Tive. I am President of The Tive Lobbying Group, and I am here today on behalf of the Pennsylvania Association for Government Relations (PAGR), the professional organization representing lobbyists in Harrisburg. Our over 220 members reflect all aspects of the lobbying community, including lobbyists from associations and corporations, as well as lawyer lobbyists, contract lobbyists and even several legislative liaisons for administrative departments and agencies. Thank you for letting us testify today on the proposed regulations to implement Act 93 of 1998, the Lobbyist Disclosure Act.

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.

On behalf of PAGR, I testified on December 30 at a public hearing held by the seven-member committee charged with writing the regulations. There I identified some of the major problems contained in the draft released for public comment right before Christmas. I am glad to say that a number of our suggestions were adopted by the committee before it approved the proposed regulations as published on January 30. Unfortunately, there are still many problems which remain and which need to be resolved before the regulations can be finally adopted. I will address the more serious of those here, within the limits of the time allotted, and the remainder will be covered in our official comments which will be submitted to the committee, and to you, before the 30-day comment period has expired.

Due Process

It is probably best if we start at the end of the proposed regulations, in Chapters 41 and 43 dealing with Compliance Audits; and Investigations, Hearings and Referrals, because it is here that the most serious problems exist.

Let me say at the start that the worst problems in the draft regulations put out for comment last December were also found in these two chapters. The most egregious of those, such as the presumption that any lobbyist appearing in front of the Ethics Commission is guilty until proven innocent, and that the accused lobbyist must present his defense first, before hearing the case of his accusers, have been removed. However, there is still much in the

proposed regulations which denies lobbyists and lobbying groups due process as we have come to understand it, and much that goes against our concepts of fair play.

Let's start with the concept of "cause". This is important in two places where it helps determine whether the Commission can take action against a lobbyist or principal. First of all, in §41.1 it says that no lobbyist or principal shall be subject to an audit more than once in every two-year session *except for cause*. However cause is never defined. It needs to be clearly spelled out so that lobbyists and principals will know when their actions may place them in jeopardy of being audited or having other disciplinary action taken against them.

The need to have clear criteria for starting audits is made even more important by provisions at §41.2 (d) and (e) which state that while auditing any lobbyist or principal, the Commission can also examine the relevant records of any other lobbyist or principal. What are "relevant records"? Again, we have no idea. Apparently, relevant records can be anything the Commission wishes them to be. Taken together, this ambiguity, and the lack of a definition of "cause", seem to give the Commission the power to audit anyone at any time for any reason. That is not what these regulations should do. They should provide registrants with safeguards, guarantees and understandable procedures. They should not provide the Commission with free reign for open-ended audits or with justifications for fishing expeditions.

Moving on to Chapter 43, we once again come up against the concept of cause. Here we are talking about what constitutes cause for the Commission to open a proceeding against a lobbyist or principal. In §43.2 the grounds for opening a proceeding under §1307 of the Act, dealing with specific prohibited activities, are far too vague. Paragraph (a) of §43.2 says that the Commission must begin a preliminary hearing if it receives a signed complaint alleging a violation of §1307. However, paragraph (b) says that the Commission can start an inquiry based on "any alleged" violation. That allegation need not even be in the form of a complaint, let alone signed, and could be anything from any source that the Commission happened to come across. As before, the absence of specificity and clarity are very troubling.

This is multiplied thousands of times over when we get to §43.3. This subsection deals with cause for the Commission to open a proceeding under §1304 and §1305 of the Act, dealing with registration and reporting. Here we see that proceedings can be opened for virtually any reason at all, including a complaint, information that doesn't meet the criteria for a complaint, an audit, or the motion of the Executive Director which can be based, without limitation, on any information he may have received.

As bad as that is, it gets even worse at §43.3(b)(4) where it says "information received informally" may form the basis for opening a proceeding. Informal information is, of course, not defined, but I don't think it is too far fetched to view it as including such things as rumor, innuendo or malicious gossip. Once you deviate from the constitutional concept of requiring something akin to just cause in order to start a proceeding, anything at all is sufficient cause.

But wait, it still gets worse. Following the receipt of this informal information the Commission may begin a "non-investigative process". The very idea of a non-investigative process is horrifying and offensive. It says that the Commission doesn't need to be bothered finding any facts, it already knows what it needs to know. And how does the Commission know it? Well we're back to the malicious gossip again. And then, to support the idea that it already knows what it needs to know without any investigation, the first thing the Commission does upon opening this non-investigative process is to send a *notice of noncompliance* to the lobbyist or principal involved.

Remember, the Commission may well have no actual evidence that the registrant has done anything wrong. It may only have "informal information". It may only have a belief or idea that the registrant has done something wrong. It has not investigated anything. This is explicitly a "non-investigative process". However, the first step is to issue a notice of noncompliance.

The concept of the Commission undertaking a non-investigative process is bad enough, but to start it with an official communication indicating that it believes you have done something wrong, is far worse. It says that the Commission has decided, based on possibly specious information from a potentially unreliable and unknown source, and without attempting to get any clarifying input from the accused, that a violation has occurred. I ask the members of this Committee if you would like to be subjected to such a process.

Let me take you through the rest of the process. The registrant then has 20 days in which to "cure the noncompliance". There may, of course, not be any noncompliance to cure, but it must be cured in any case. If it is not, a petition for civil penalties is issued. This petition must set forth the "pertinent factual averments", which, in the absence of any investigation, can have been derived from things as inconsequential, or I should say "informal", as party gossip. The registrant can then request a hearing in front of the Commission, and since he luckily is no longer presumed to be guilty at the start, the Commission must prove his guilt. The standard of proof is, of course, not specified. However that may be a moot point since this is the same Commission that has already determined his guilt, as evidenced by its notice of noncompliance.

The seriousness of all this is clear when you remember that in addition to monetary penalties, the Commission can also ban a lobbyist or an organization from lobbying for up to five years. While we have significant reservations about the constitutionality of banning a group of citizens from lobbying their government, that is a provision of the law and not open to discussion here. However, we urge you to review that part of Act 93 after you finish acting on the regulations.

Our solution for all these due process and fairness problems is simple. Chapters 41and 43 should be rewritten to parallel the current Chapter 21 of Title 51 of the Pa. Code, the regulations of the Ethics Commission for public officers and employees. Those processes appear to have worked well for the past couple of decades, have withstood court scrutiny and are easily adaptable to lobbyists and principals. We do not understand the need for a separate lower and constitutionally inadequate standard of due process for lobbyists and principals, and we strongly oppose it.

The chart on the last page of my statement shows the differences between the processes for public officials and employees and those for lobbyists and principals. First of all, as grounds for opening a proceeding in Chapter 21 there must be an official complaint, which must be sworn to and signed and must allege a violation of more than *de minimus* economic impact. Under Chapters 41 and 43, as we have seen, virtually anything, down to and possibly including rumor and innuendo, is deemed sufficient grounds not for just an inquiry, but for issuance of a notice of noncompliance.

The next step in Chapter 21, after receipt of the official complaint, is a preliminary inquiry. Again, with regard to lobbyists and principals the Commission can opt for an explicitly non-investigative process with no inquiry. Following the preliminary inquiry in Chapter 21, the Commission can either close the case or open a full investigation if the results of the inquiry meet specific grounds for doing so, and it must notify the official or employee involved. Under Chapter 43, a notice of noncompliance is sent at the start, there is no investigation, and no

standards need to be met at all. It should also be noted at this point that under Chapter 21, an official or employee who is the subject of frivolous or harassing complaints can ask the Commission to investigate them. Lobbyists and principals are given no such right.

In keeping with due process, all investigations under Chapter 21 must be carried out according to a lengthy and specific list of procedures and rules. The subject of the investigation must be kept informed of its progress, and the rights of all involved are carefully protected. For lobbyists and principals accused under §1304 and §1305 there is no investigation since the Commission has deemed them noncompliant from the start.

Finally we get to the hearing process, and here, at last, the proposed regulations state that the hearing should be conducted in accordance with the Ethics Act and its regulations *to the extent possible*. We don't know why that qualifier is added, as it is at every citation of the Chapter 21 regulations in this document, and we suggest that it be removed in each case.

These two processes are clearly separate and unequal. PAGR sees no justification at all for even having two processes, especially when one is so stunningly deficient in due process and fairness. We urge this Committee to recommend that the proposed regulations be rewritten to include one and only one process, and that it be the same as that contained in Chapter 21 of the Commission's current regulations.

Lobbying Activity

The proposed regulations refer a number of times to "lobbying activity". The most obvious places it occurs are at §31.8(e)(1) where the Commission is directed to publish an annual report on lobbying activities in the state, and §35.2 where registrants are required to keep records of all of their lobbying activity. The problem is that the term "lobbying activity" is never defined.

We raised this issue in December, along with our concern that if you read the definition of lobbying in the act and the regulations, you could draw the conclusion that lobbyists will be required to keep records of every person they talk to or contact in any way in the course of business. We felt that this went far beyond the requirements of the law.

The proposed regulations address part of our concerns by making it clear in Chapter 35 that we need not report all the persons we contact. However, since there still is no definition of lobbying activities, we still don't know exactly what it is we are supposed to keep a record of. Furthermore, the proposed regulations state that registrants may keep their records of lobbying activities separate from their records of non-lobbying activities. If we don't know what lobbying activities are, we certainly don't know what non-lobbying activities are, and are therefore completely unable to distinguish between them.

If we are to be held liable, under penalty of law, for our records of lobbying activities, we must be able to know what they are. Only a clear definition of the term will serve that purpose. Anything short of that will cause people trying to conscientiously comply in full with the law to commit unknowing violations of it.

Deficiencies and Delinquencies

Under the proposed regulations, failure to file complete and accurate reports in a timely manner subjects a principal or lobbyist to action by the Commission under the penalties

sections of the law. This is as it should be. However, different terms are used to describe such failure, and this makes for a potentially confusing situation. Since Act 93, at §1309(c), requires a daily fine for a failure to file registration statements or reports, it is crucial for registrants to know what they could be fined for, and when.

The terms, "delinquency" and "deficiency" are not defined clearly enough to enable a principal or lobbyist to fully know which sections of the proposed regulations they may be violating, and which they are not. For example, under §31.5 failure to file registration statements and reports on time is a delinquency. However, in subsection (d) it says that a delinquent statement or report continues to be such "until received in proper form". This would qualify as a deficiency under the next section, §31.6, which says that deficiencies are statements and reports that are not properly filled out. Two questions which immediately come to mind are:

(1) does a statement or report which is filed in a delinquent manner and is then found to be deficient, become increasingly delinquent until refiled without any deficiencies? and
(2) does a statement or report filed on time but in a deficient manner, and which must be refiled at a later date, become therefore both delinquent and deficient?

It seems to us that a simple way to do resolve this problem would be to just use the term found in the statute and elsewhere in the regulations, compliance. Failure to comply would be a clearer concept to the registrants than trying to distinguish between deficiency and delinquency.

Our goal here, as it is with many of our other comments, is to provide regulations that enable registrants to understand what they have to do and when they have to do it. Far too often in this document we find language that is imprecise, vague or not defined. All that does is to create a situation where compliance becomes excessively difficult if not impossible, and open traps for registrants to fall into. That benefits no one.

Other Issues

As I said at the start, I have spoken in detail only about some of our major concerns with this document. However, given the time constraints of this Committee, and its need to hear other witnesses, I cannot give our other concerns the same treatment. So let me finish by listing a series of brief key points to bring these items to your attention. We will be expounding upon them at length when we submit our formal comments to the drafting committee next week. The following are given in the order they appear in the proposed regulations.

(1) The definition of "association" leaves out any reference to unincorporated associations, many of which are lobbying principals.
(2) The definition of "child" leaves unaddressed the status of stepchildren.
(3) The definition of "effort to influence legislative action or administrative action" contains a exemption for the provision of purely technical data to a state official or employee, or to a legislative or administrative body, in response to a request for the information. An argument can be made that most or all information a lobbyist provides is "technical data", and this loophole could lead to a great deal of misunderstanding and confusion, and perhaps even evasion of the law.
(4) The definition of "service (of official papers)" states that the papers are deemed served on the date mailed by the Commission. This could create problems since the regulations often provide for short response times to Commission action (i.e. seven days). If a lobbyist is on vacation for two weeks, he could miss an important deadline. 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.

(5) Under Chapter 31, language needs to be added providing for a three day grace period before the Commission begins action to impose a fine on registrants who file registration statements or expense reports late,. This would be consistent with the Rules of Appellate Procedure as used in the state courts.

(6) Under §31.11 dealing with electronic filing, there should be a clear statement limiting access to a registrant's digital signature, and requiring all employees of the Commission who have that access to maintain strict confidentiality.

(7) Under §31.11 and §31.12 supporting documents such as fees and photographs for registration statements filed electronically, and signed originals for faxed documents, are due within five days of receipt by the Commission of the electronic filing or the fax. The due dates for these supporting documents should remain what they would be if filed by mail or by hand, and not be moved up because of the use of more modern means of transmission.

(8) Language in §33.1(a) seems to require duplicate payments of the registration fee. For example, my firm is retained by a principal to provide lobbying services. Under this proposal, the principal would have to pay, my firm would have to pay, and I would have to pay. Some who have read this section also see it as requiring my firm and me to each pay a separate fee for each client. Our understanding of the act is that there should be one fee for the principal and one fee for the lobbyist. That's it. The regulations need to be rewritten to be consistent with the act.

(9) Provisions of the proposed regulations at §33.2(b)(3) and §35.1(g)(2) require the reporting of unregistered lobbyists in registration statements and financial reports. The statute contains specific exemptions to avoid catching masses of citizen lobbyists in the net of this law, and all reference to unregistered lobbyists should therefore be deleted.

(10) Following from number (8) above, §33.3(a)(3) seems to require a separate registration statement from the firm and the lobbyist. One should be sufficient to identify who is lobbying for what.

(11) There is no need for the requirement at §33.3(f) for a separate registration statement for each principal a lobbyist represents. The lobbyist should be able to file one statement listing all the principals represented, as we do now. Remember, the principals are all also each filing their own registration statements, so there is plenty of information detailing who is lobbying for whom.

(12) The entire section on termination, §33.5, is a minefield just waiting to destroy even the most conscientious lobbyist or principal. One small example is the requirement that the lobbyist sign the principal's termination report. Sometimes a termination is less than amicable, and one party could cause a great deal of trouble for the other by refusing to sign or not allowing him to sign. The regulations should be rewritten to more closely mirror the act's simple language on terminations.

(13) Section 35.1(i) requires that the rental cost of office space be included in the quarterly financial reports. However, it does not require the cost of offices that may be owned by the lobbyist or principal to be reported. Many associations and corporations own huge and luxurious office facilities, but those costs would go unreported, while a small one person operation would have to report the cost of office space.

(14) PAGR is concerned by provisions of the proposed regulations at §35.2 that require lobbyists and principals to give the Commission full access to their computer files. There is no indication that any sort of warrant or legal justification is necessary for this invasion of privacy, and we believe that it could rise to the level of a constitutional violation of privacy.

Summary

To summarize let me say that PAGR finds these proposed regulations to be seriously deficient in many ways. First and foremost, they do not protect the rights of those regulated under the law, but seem to seek ways to punish them. They use terms that are not defined well or at all, and in other places are written in a very confusing manner. They show little understanding of what lobbying really is and how lobbyists and principals operate. They seem to assume that all lobbyists are private contract firms, and are written with that segment in mind, ignoring or not recognizing the fact that the vast majority of lobbyists are full-time employees of one and only one principal, usually either an association or a corporation.

In short, we feel that these regulations have so many flaws that the best course of action is to have the drafting committee go back, virtually to the start, and do a major rewriting. Failing that, we will ask you to reject them when they come before you in final form.

On behalf of PAGR let me say that we look forward to working with you and all other concerned parties to resolve the difficulties in implementing this statute. There is work do be done, and we are anxious to help do it.

Thank you for your time and attention. I will be happy to answer any questions you may have.

COMPARISON OF CHAPTER 21 AND CHAPTER 43

TOPIC	CHAPTER 21	CHAPTER 43
Who is covered?	Public officials and employees	Lobbyists and lobbying organizations
Grounds for opening a proceeding	An official complaint which must be sworn and signed and allege a violation of more than *de minimus* financial impact	Any information received by the Commission
First step in proceeding	A preliminary inquiry for up to 60 days	Notice of noncompliance sent to registrant based on information alleging a violation
Investigation	An investigation may be opened if inquiry has produced evidence of a violation. Subject must be notified and kept informed on a regular basis. Subject may provide evidence. Many protections are put in place, and detailed procedures must be followed.	None required
Protection against frivolous or harassing complaints	Subject may ask for an investigation and the Commission is required to comply.	None
Hearing process	Very detailed rules with ample due process and civil liberties protections for the accused	Same as Chapter 21 *to the extent possible*. Accused must defend himself against a Commission that has already found him to be noncompliant.

TESTIMONY ON

LOBBYING DISCLOSURE ACT REGULATIONS

BEFORE THE HOUSE JUDICIARY COMMITTEE

BY

REPRESENTATIVE MARK B. COHEN

CHAIRMAN

HOUSE DEMOCRATIC CAUCUS

THURSDAY, FEBRUARY 25, 1999

HARRISBURG, PENNSYLVANIA

Chairman Gannon, Chairman Blaum, and Members of the House Judiciary Committee:

I deeply appreciate the opportunity to discuss the proposed regulations of the Lobbying Disclosure Act.

I have been active in ethics-related legislation for more than two decades. I voted for the Ethics Act in 1978. I testified before the Local Government Committee against repealing the Ethics Act in 1979. I co-sponsored the Ethics Act of 1989, and authored some of its provisions. I supported the Lobbying Disclosure Act of 1998 on the House floor, and testified before the Lobbying Disclosure Committee in December, 1998.

The Lobbying Disclosure Act of 1998 represents an improvement over the lobbying disclosure bills of prior years. The Lobbying Disclosure Act regulations of 1999 represent an improvement over the Lobbying Disclosure Act regulations of 1998.

We are moving in the right direction, but we still have a long way to go. We need regulations that avoid producing needless litigation and controversy. We need regulations that fully protect the due process, equal protection, and free speech rights that all Americans have under the United States Constitution.

We need regulations that have clear meanings, produce information with clear meanings, and allow the Ethics Commission to proceed with focus and economy of effort.

When I testified before the Lobbying Disclosure Committee around Christmas, I, like everyone else, was able to offer only first impressions due to time pressures. I deeply appreciate the responsiveness that was shown to my December comments in the current draft. My understanding of the current draft has been immensely aided by excellent staff work from both diverse leadership offices and the Judiciary Committee.

These regulations can and must continue to be improved. I offer the following suggestions for change:

CLARIFY INTERRELATED DEFINITIONS

First, interrelated definitions should be made much clearer by using identical language wherever possible. The definitions of "gift", "lobbying", and "hospitality" are interrelated in Section 31.1, and should be clearly consistent when read together.

The definition of "hospitality" should be alphabetized under "H" and not be buried under "Transportation and lodging or hospitality received in connection with public office or employment" under "T." "Entertainment "and" meals" fit under the definition of "hospitality", but are listed separately under "lobbying."

The definition of "lobbying" should exclude the words "entertainment" and "meal" and use the word "hospitality" instead. Similarly, the quarterly expense reports listed in Section 35.1(g)(6) should exclude the words "entertainment," "meals," and "receptions", and use the word "hospitality" instead.

The language in 35.1(j) lacks clarity. While I believe the intent is to acquire disclosure of information by principals or lobbyists, which covered public employees must disclose, other interpretations could be made. I would suggest the relevant section of 35.1(j) should read: "anything of value which, due to the cumulative amount for the current calendar year, must be included...."

I would also suggest that Section 35.1(j)(1) should end "an aggregate amount per calendar year" in order to remove any ambiguity as to what "year" means.

MAKE REPORTING DATES CONSISTENT

Second, the reporting dates for lobbyists should be consistent with the reporting dates for public officials. Since public officials report on a January through December year, an erroneous impression of lying could be created in certain circumstances if there is disparity between the public official's annual report and a lobbyist's quarterly report.

Regulation 31.4(b) should create periods of January through March, April through June, July through September, and October through December. I would suggest that the first reporting period beginning August 1, 1999, be adjusted in 31.4(b) to continue through December 31, 1999.

NARROW THE DEFINITION OF GIFT

Third, the definition of "Gift" states what it includes, but not what it does not include. The definition of "Gift" in 31.1-- "anything which is received without consideration of equal or greater value" -- is too broad. Help with a constituent problem, testimony before a committee, the text of a bill enacted in another state, research about actions or results of actions in another state, the results of a public opinion poll, the text of a study, all fit under the category of "anything."

The definition of "gift" should be modified to include "anything which is received for the personal and non-governmental use of the recipient without consideration of equal or greater value."

MERGE THE DEFINITION OF LOBBYING

Fourth, the term "effort to influence legislative action or administrative action" in Section 31.1 should be merged with the definition of Lobbying in 31.1, because lobbying is defined as -- you guessed it -- "an effort to influence legislative action or administrative action."

DELETE THE "PURELY TECHNICAL DATA" SENTENCE

The second sentence of the definition of "effort to influence legislative action or administrative action" -- "the term as used in the Act does not apply to the provision of purely technical data to a state official or employee or to a legislative body, at his, her, or its request" -- is puzzling and serves no apparent purpose. It should be deleted.

What is "purely technical data?" What is data that is not purely technical? What is a "request?" If a lobbyist says, "I have reports here for anyone who wants them," and all public employees present raise their hands, is that lobbyist responding to a request? What is the significance of whether data -- purely technical or not -- is provided in response to a request or not?

The relevant question under the Lobbying Disclosure Act is whether the provision of information or constituent assistance to a legislator constitutes a gift. My clear and unequivocal sense of the will of the General Assembly is that it does not. We should nip in the bud any frivolous investigations of whether data is purely technical or not purely technical, or whether data was or was not provided in response to a request. We should get rid of the entire "purely technical data" sentence.

DO NOT ALLOW ATTRIBUTING EXPENDITURES ON A GROUP TO AN INDIVIDUAL

Fifth, lobbyists should not be given the option of accumulating and attributing values of certain gifts, transportation, meals, and hospitality to one individual when more than one individual benefits from them. If a lobbyist wishes to set up a lunch or dinner with House Judiciary Committee members, for instance, the total cost should not be reported as a gift for Chairman Gannon.

Section 35.1(k)(6) (ii) is unclear in meaning. My guess is that it was intended to allow the cost-per-person of, for example, a meal for ten people, to be divided by ten. This would be a perfectly reasonable purpose. But, there is a lot of surplus wordage in Section 35.1(k)(6)(ii) that allows the argument that a dinner for ten could be attributed to the leader of the group.

I recommend that Section 35.1(k)(6)(ii) be clarified by striking all language after the word, "recipients" on line two. I feel it is totally unnecessary to say that the costs of meals on one occasion should be added to the cost of meals on another occasion in order to calculate a total spent on a public official. If it is felt to be necessary to say it, it should be clearly placed in another sentence, and not as a dependent clause in a sentence discussing a single "occasion" or "transaction."

ELIMINATE OR CAREFULLY DEFINE THE USE OF NONINVESTIGATIVE PROCESSES

Sixth, the noninvestigative process under Sections 43.3(b) and 43.3(c) allow the Executive Director of the Ethics Commission to issue a "Notice of Noncompliance" without having conducted any investigation. If there are to be any proceedings conducted without any investigations, the circumstances for such proceedings should be clearly and narrowly defined in order to avoid litigation over due process and equal protection of the laws.

Absent such careful delineation of the circumstances for noninvestigative procedures, I would recommend that all noninvestigative procedures be removed from these regulations and that all actions proceed through investigative procedures.

MORE TIGHTLY DEFINED AUDIT PROCEDURES

Seventh, the audit procedures provided for in Sections 41.2(c) and 41.3(c) need to be more tightly defined. "Any other relevant information" in Section 41.2(c) and "interviews of

....all other individuals necessary to the completion of the audit" are formulas for investigations of endless scope and kind. This sweeping language should be deleted.

Any additions to items covered in Section 35.2 (which enumerate the records which must be retained by registrants) should be narrowly targeted and clearly defined, if they are necessary at all. Similarly, audit interviews should be limited to those who prepare relevant documents and any other clearly and narrowly defined persons.

DO NOT ALLOW INVESTIGATIONS BASED ON "INFORMATION THAT DOES NOT SATISFY THE CRITERIA FOR A FORMAL COMPLAINT"

Eighth, the regulations should make clear that the Ethics Act standards of Section 1107 and 1108 of the Ethics Act apply to the Lobbyist Disclosure Act. These standards establish a formal investigative process -- preliminary inquiry after a formal complaint or the motion of the Executive Director, then a full investigation and a findings report with four members required to find a violation by clear and convincing proof.

The proposed regulations at Section 43.3(a)(iv) allow commission proceedings to be based on "information received that does not satisfy the criteria for a formal complaint," which would appear to include an anonymous letter or telephone call. Section 43.3(e) specifically equates the punishment levied by noninvestigative processes with the punishment levied by investigative processes. This again raises the question of why the noninvestigative processes should be allowed to subject the enforcement of the act to legal challenges from due process and equal protection claims.

REQUIRE THE DEFINITION OF LOBBYIST TO INCLUDE ONLY THOSE WHO CONVERSE WITH AT LEAST ONE GOVERNMENTAL OFFICIAL

Ninth, the question of who is a lobbyist is greatly impacted by the broad definition of indirect communication in Section 31.1. Under this definition, advertising agencies, mailing houses, research analysts, pollsters, academic experts, and others who have no direct contact with legislators should be counted as lobbyists.

I would suggest that the definition of "lobbying" be amended to "an effort to influence legislative action or administrative action by one who personally meets or otherwise engages in conversation with one or more legislative or administrative employees in a reporting period." This would eliminate large numbers of support personnel from the reporting requirements and make the information received more relevant to the public. Other regulations already limit the reporting to those who spend time equivalent to $2,500 over three months.

DO NOT REGULATE PUBLISHING SCHEDULES

The term "regularly published" should be deleted from the last line of the definition of "indirect communication" in accord with the First Amendment to the United States Constitution. The Ethics Commission should not be investigating publishing schedules, which commonly vary widely from year to year in many organizations. All periodic newsletters primarily designed for and distributed to members of organizations should be deleted from the definitions of "indirect communication."

REQUIRE FOUR ETHICS COMMISSIONERS TO FIND A VIOLATION BY A STANDARD O F CLEAR AND CONVINCING PROOF

Tenth, Section 43.3 (e) should be clarified to require four members of the seven member Ethics Commission to find a violation by a standard of clear and convincing proof. This is the standard that I am proud to have been responsible for initiating, and it belongs in this regulation to avoid due process and equal protection legal challenges.

EITHER ELIMINATE OR NARROWLY DEFINE "FOR CAUSE" AUDITS

Eleventh, the limitation on lottery audits of reports in Section 41.(c) can also be read to indirectly authorize an unlimited number of undefined "for cause" audits.

I would suggest that Section 41.1(c) be rewritten to say "(N)o lobbyist or principal shall be subject to a random audit more than once in any biennial registration period." If there is a need to create a new category of "for cause" audits, that need should be clearly and narrowly defined in a separate section from the lottery audits.

GIVE LOBBYISTS THE SAME RIGHTS AS PUBLIC OFFICIALS HAVE

Twelfth, to avoid equal protection and due process challenges, lobbyists must be accorded the same rights as public officials are. The Lobbying Disclosure Act in Section 1308 provides that investigations should be conducted in accordance with Sections 1107 and 1008 of the Ethics Act. The current Ethics Act regulations at 51Pa.Code, Chapter 21 should be followed regarding investigations of violations of the Lobbying Disclosure Act.

All sections dealing with investigations of lobbyists should make clear that lobbyists have the same rights as public officials, including, but not limited to, four members being needed to find a violation, and a standard of proof by clear and convincing evidence.

CONCLUSION

In conclusion, I hope these remarks will be helpful to the House Judiciary Committee and the Lobbying Disclosure Committee. The lobbying regulations must be further amended to meet the goals of the Lobbying Disclosure Act passed in 1998 by unanimous vote.

We need public accountability, and meaningful information. We do not need investigations of trivial or irrelevant matters, or a highly politicized or heavily litigated implementation of this act.

Use of the concepts of clarity, focus, economy of enforcement efforts, due process, and equal protection will produce results that we and the public will all be proud of for years to come.