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C. DALE McCLAIN

September 26, 2008

Arthur Coccodrilli, Chairman
Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Dear Chairman Coccodrilli:

Attached please find the Pennsylvania Bar Association's Comments on the lobby disclosure regulation, IRRC Number 2665. If you have any questions, please do not hesitate to contact us. Thank you for your consideration.

Sincerely,

C. Dale McClain

C. Dale McClain
President

Enclosure

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COMMENTS OF THE PENNSYLVANIA BAR ASSOCIATION REGARDING THE FINAL FORM RULEMAKING OF THE LOBBY DISCLOSURE REGULATIONS COMMITTEE

These Comments specify significant problems that the Pennsylvania Bar Association has identified with the Final-Form Regulation ("regulation") for Act 134 of 2006, IRRC regulation number 2665. Because of these problems, the PBA respectfully requests the Independent Regulatory Review Commission ("IRRC"), the Senate State Government Committee, and the House Judiciary Committee disapprove the regulation absent the needed changes specified.

1. **Section 53.2(a)(1), "Engaging an individual or entity for lobbying services or paying economic consideration to an individual or entity for lobbying services constitutes acting in the capacity of a principal," is legally impermissible as it exceeds the authority of the enabling legislation, Act 134 of 2006, and may violate federal constitutional law.**

Discussion

Principal is defined (in relevant part) in § 51.1 of the regulation as "An individual, association, corporation, partnership, business trust or other entity, . . . on whose behalf a lobbying firm or lobbyist engages in lobbying, or that engages in lobbying on the principal's own behalf." This definition clearly equates *principal* with 'engages in lobbying'; and *engaging in lobbying* in § 51.1 is defined as "Any act by a lobbyist, lobbying firm or principal that constitutes an effort to influence legislative action or administrative action in this Commonwealth, as defined in the definition of 'lobbying' in section 1303-A of the act . . . . " *Lobbying* is defined by §1303-A as "An effort to influence legislative action or administrative action," and includes "direct and indirect communication," and "office expenses." Given these definitions, the meaning of § 53.2(a)(1) is clear: Engaging or paying economic consideration to an individual or entity for lobbying services constitutes an effort to influence legislative or administrative action.

a) Per the Statutory Construction Act ("SCA"), 1 Pa.C.S. § 1501 *et seq.*, words in a statute are to be "construed according . . . to their common and approved usage," 1 Pa.C.S. § 1903(a), and the SCA applies to regulations, 1 Pa.C.S. § 1502. Given the meaning of engage,[1] as well as a rational reading, *engaging* and *paying* in § 53.2(a)(1) can refer to an action *prior to* there being any actual lobbying. Hence, § 53.2(a)(1) presents an incongruent situation: engaging or paying an entity for lobbying services is an effort to influence, despite the fact that the entity may not yet have made any actual effort to influence, and the extent (*i.e.*, cost) of its future effort to

[1] *Webster's New Collegiate Dictionary* (1977) defines *engage* as follows in relevant part:

> *vt* . . . **4 a** : to provide occupation for : INVOLVE <~ him in a new project> **b** : to arrange to obtain the use or services of : HIRE . . . **[5] b** : to induce to participate <*engaged* the shy boy in conversation> . . . *vi* **1a** : to pledge oneself : PROMISE . . . **2 a** : to begin and carry on an enterprise <he *engaged* in trade for a number of years> b : to take part : PARTICIPATE <at college he engaged in gymnastics> . . .

influence may be unknown. Note the comments of the Independent Regulatory Review Commission ("IRRC") on the Proposed Rulemaking (p. 2):

> Under the Act [134], an "effort" is described as a tangible, proactive communication that is "written, oral or by any other medium" and that is made to influence legislative or administrative action.
>
> . . . . Accordingly, a person or entity that does not make a tangible communication is not, by the Act's definition, a lobbyist, lobbying firm or principal and would not have to register or report.

b) In addition, in the context of § 55.1(a),[2] if the mere act of engaging or paying economic consideration makes the engagor or payor entity a principal irrespective of what the engagee or payee entity has done or will do, then anything and everything (even nothing) the latter does for the former after being engaged or paid is effectively lobbying. 'Everything', of course, includes monitoring legislative or administrative action. For example, Association X pays Lobbying Firm A $3,000 to work on Issue α for 15 hours. Per § 53.2(a)(1), this payment makes Association X a principal—an entity engaged in lobbying. Firm A then spends seven hours researching economic and legal aspects of Issue α, two hours monitoring related bills, *and then* six hours engaged in direct or indirect communications to influence bills on Issue α. Pro rata, lobbying costs are $900, below the $2,500 threshold; yet per § 55.1(a) the engagor or payor entity is a principal and must report the entire $3,000. Nevertheless, the nine hours of research and monitoring are not an effort to influence and are therefore not lobbying, as IRRC made clear. (For more on monitoring, see point 5 below.)

c) Moreover, divorcing lobbying—*i.e.*, an entity becoming a principal—from an actual effort to influence, as § 53.2(a)(1) does, rationally leads to the unreasonable result that every party that hires counsel to deal with a Commonwealth legal issue is by definition a principal. Suppose Association Y hires Law Firm B to deal with Issue β. Dealing with Issue β likely means suing the Commonwealth, but it may also involve Firm B lobbying an agency to change a regulation, and perhaps pushing legislation. However, at the time Association Y pays Firm B its initial fees, while the full panoply of steps that Association Y and Firm B can and may taken is known, the actual steps that will be taken are unclear and perhaps unknown. In such a scenario, per § 53.2(a)(1), Association Y would seem to be a principal at the time it pays the initial fees to Firm B. Hence, § 53.2(a)(1) violates the SCA, 1 Pa.C.S. § 1922, which states in relevant part:

> In ascertaining the intention of the General Assembly in the enactment of a statute, the following presumptions, among others, may be used:
>
> (1) That the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable.

d) Further, the language in § 55.1(g)(3)(iii) of the regulation,

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[2] "A quarterly expense report is required to be filed as set forth in this section when the total lobbying expenses of a registered principal, registered lobbying firm or registered lobbyist lobbying on the principal's behalf, together, exceed $2,500 in a quarterly reporting period. The threshold of $2,500 includes any economic consideration paid by a principal to a lobbying firm or lobbyist."

> Although a registrant is only required to report the amount of economic consideration that is attributable to lobbying in the Commonwealth, the entire amount shall be reported unless the principal, lobbying firm or lobbyist maintains records that establish the portion attributable to lobbying, as well as the portion attributable to non-lobbying services,

does not change the impact of § 53.2(a)(1). Once § 53.2(a)(1) makes lobbying anything and everything the payee entity does on behalf of the payor entity after receiving economic consideration, all economic consideration is attributable to lobbying. In addition, the SCA, 1 Pa.C.S. § 1921(a), requires that "Every statute shall be construed, if possible, to give effect to all its provisions." In this context, the words "attributable to lobbying in the Commonwealth" in § 55.1(g)(3)(iii) are key, *as they appear no where else* in § 55.1, which relates to quarterly expense reports. Given that Act 134 defines *lobbying* in relevant part as "an effort to influence legislative action or administrative action in this Commonwealth, 65 Pa.C.S. § 13A03, thereby making lobbying done in other jurisdictions not lobbying for Act 134 purposes, § 55.1(g)(3)(iii) clearly means that while a registrant need only report economic consideration related to lobbying in the Commonwealth, absent records establishing which economic consideration is related to lobbying in Pennsylvania and which is not, all economic consideration shall be considered related to lobbying in Pennsylvania. To suggest that somehow § 55.1(g)(3)(iii) means that some economic consideration provided by the payee entity to the payor entity could be attributable to non-lobbying services in the Commonwealth not only ignores § 53.2(a)(1), it also requires reading out of the language "attributable to lobbying in the Commonwealth" in violation of the SCA.

e) Finally, § 53.2(a)(1) may violate the federal Constitution. The language of the regulation focuses on *lobbying services*. The Tax Reform Code of 1971 ("TRC")[3] imposes the sales and use tax ("sales tax") on *lobbying services*, 72 P.S. §§ 7201, 7202, defined as "Providing the services of a lobbyist, as defined in the definition of 'lobbyist' in section 2 of the Act of September 30, 1961 . . . known as the 'Lobbying Registration and Regulation Act.'" 72 P.S. § 7201(w). As this act no longer exists, per the SCA, 1 Pa.C.S. § 1937,[4] the definition of *lobbying services* is now provided by Act 134, which is implemented through its regulation.

Significantly, the effective definition of *lobbying services* in the regulation is quite close to that provided by the TRC's relevant regulation, 61 Pa.Code § 60.6. As noted, per the regulation, engaging or paying economic consideration for lobbying services is an "[e]ffort to influence legislative action or administrative action," which in turn is defined as "[a]ny attempt to initiate, support, promote, modify, oppose, delay, or advance a legislative action on behalf of a principal for economic consideration." *Lobbying services* is defined in § 60.6 as "to advocate:"

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[3] Per 1991 Pa.Laws 22 (P.L. 97).

[4] **§ 1937. References to statutes and regulations**
(a) A reference in a statute to a statute or to a regulation issued by a public body or public officer includes the statute or regulation with all amendments and supplements thereto and any new statute or regulation substituted for such statute or regulation, as in force at the time of application of the provision of the statute in which such reference is made, unless the specific language or the context of the reference in the provision clearly includes only the statute or regulation as in force on the effective date of the statute in which such reference is made.
(b) The provisions of subsection (a) . . . shall apply to every statute finally enacted on or after July 1, 1971.

(i) The passage or defeat of legislation to members or staff of the General Assembly, or approval or veto of legislation to the Governor or his staff.

(ii) To officers of employes or an agency of the Commonwealth that the agency take or refrain from taking formal action, or that an agency engage in lobbying services as defined in subparagraph (i).

Hence, it appears that the mere engagement of or paying economic consideration to a lobbyist is taxable under 61 Pa.Code § 60.6 because such acts per the regulation are an effort to influence.

True, § 60.6 excludes from *lobbying services* "[r]eview of proposed legislation, amendments or tax journals," and "[c]ommunications to a client, another lobbyist, members of an association or to a private individual;" while including "[c]ommunications to" the executive or legislature. Nevertheless, per the regulation, the engagement of an entity to lobby, and anything subsequently done by that entity, is an effort to influence, giving the Department of Revenue ("DoR") a colorable argument that under § 60.6 such activities are taxable per the parallel effective definitions of lobbying services.[5] Further, the DoR can amend its regulation to tax whatever is determined to be lobbying per Act 134 and its regulation.

In the context, then, that it is likely that § 53.2(a)(1) imposes the sales tax on economic consideration paid to an entity for lobbying services, irrespective of what, if anything, the entity has done or will do, and recognizing that lobbying is covered by the First Amendment,[6] including lobbying done by those paid to do so,[7] note *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870 (1943), where an ordinance required

'That all persons canvassing for or soliciting within said Borough, order for goods, paintings, pictures, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited, shall be required to procure from the Burgess a license to transact said business and shall pay to the Treasurer of said Borough therefore the following sums according to the time for which said license shall be granted.

'For one day, $1.50, for one week seven dollars ($7.00), for two weeks twelve dollars ($12.00), for three weeks twenty dollars ($20.00), provided that . . . .'

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[5] Skeptics that the DoR would use this colorable argument need only look at the expansive definition the DoR has given to the sales and use taxability of lobbying services. Under the TRC, taxable is "[t]he obtaining by the purchaser of lobbying services," while *purchaser* by definition does "not include[e] an employer who obtains services from his employes in exchange for wages or salaries when such services are rendered in the ordinary scope of their employment." 72 P.S. § 7201(h) and (o)(9). Nevertheless, § 60.6 specifies the "tax is imposed upon the purchase price of the lobbying service," and includes within the definition of *purchase price* "The dues or fees received by an organization or firm relating to the expenditure of time and expenses by an employe of the organization or firm in the performance of lobbying services for a member or purchaser." The TRC prohibits imposing the tax on lobbying by employees; the regulations impose the tax on lobbying by employees.

[6] *Gmerek v. State Ethics Comm'n*, 751 A.2d 1241, 1258-59 (Pa. Cmwth. 2000), *aff'd*, 569 Pa. 579, 807 A.2d 812 (Pa. 2002) (evenly divided court); *Vermont Soc'y of Assoc. Executives v. Milne*, 172 Vt. 375, 378-80, 779 A.2d 20, 23-25 (Vt. 2001).

[7] "Thus, the communications of paid lobbyists deserve no less constitutional protection than that afforded to the direct entreaties of individual citizens." *Vermont Soc'y*, 172 Vt. at 380, 779 A.2d at 25 (citation omitted).

Id. at 106, 63 S.Ct. at 871. The Court overturned convictions of Jehovah's Witnesses who had handed out information and asked residents to buy their publications, *id.* at 106-07, 117, 63 S.Ct. at 872, 877:

> We do not mean to say that religious groups and the press are free from all financial burdens of government. . . . We have here something quite different, for example, from a tax on the income of one who engages in religious activities or a tax on property used or employed in connection with those activities. It is one thing to impose a tax on the income or property of a preacher. It is quite another thing to exact a tax from him for the privilege of delivering a sermon. The tax imposed . . . is a flat license tax, the payment of which is a condition of the exercise of these constitutional privileges. The power to tax the exercise of a privilege is the power to control or suppress its enjoyment. Magnano Co. v. Hamilton, 292 U.S. 40, 44, 45, 54 S.Ct. 599, 601, . . . and cases cited. Those who can tax the exercise of this religious practice can make its exercise so costly as to deprive it of the resources necessary for its maintenance. . . .
>
> . . . . It is a license tax-a flat tax imposed on the exercise of a privilege granted by the Bill of Rights. A state may not impose a charge for the enjoyment of a right granted by the federal constitution. Thus, it may not exact a license tax for the privilege of carrying on interstate commerce . . . , although it may tax the property used in, or the income derived from, that commerce, so long as those taxes are not discriminatory . . . . A license tax applied to activities guaranteed by the First Amendment would have the same destructive effect. It is true that the First Amendment, like the commerce clause, draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes. But that is no reason why we should shut our eyes to the nature of the tax and its destructive influence. The power to impose a license tax on the exercise of these freedoms is indeed as potent as the power of censorship which this Court has repeatedly struck down. . . . And the license tax is fixed in amount and unrelated to the scope of the activities of petitioners or to their realized revenues. It is not a nominal fee imposed as a regulatory measure to defray the expenses of policing the activities in question. It is in no way apportioned. It is a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment. Accordingly, it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise. . . .
>
> The fact that the ordinance is 'nondiscriminatory' is immaterial. The protection afforded by the First Amendment is not so restricted. . . . Freedom of press, freedom of speech, freedom of religion are in a preferred position.

Id. at 112-15, 63 S.Ct. at 874-76 (citations omitted). Likewise, in *Follett v. Town of McCormick*, 321 U.S. 573, 64 S.Ct. 717 (1944), where the ordinance in question was no different from that in *Murdock*, *id.* at 574-75, 64 S.Ct. at 939, the Court stated,

> The exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious (*Grosjean v. American Press Co.* [297 U.S. 233, 56 S.Ct. 444 (1936)], *supra*; *Murdock v. Pennsylvania*, *supra*) as the imposition of a censorship or a previous restraint. . . . For, to repeat, "the power to tax the exercise of a privilege is the power to control or suppress its enjoyment." *Murdock v. Pennsylvania*, *supra*, p. 112.
> . . . .
> This does not mean that religious undertakings must be subsidized. The exemption from a license tax of a preacher who preaches or a parishioner who

> listens does not mean that either is free from all financial burdens of government, including taxes on income or property. We said as much in the *Murdock* case. 319 U.S. p. 112. But to say that they, like other citizens, may be subject to general taxation does not mean that they can be required to pay a tax for the exercise of that which the First Amendment has made a high constitutional privilege.

Id. at 577-78, 64 S.Ct. at 941 (citation omitted).

The Court commented on its *Murdock-Follett* jurisprudence in *Jimmy Swaggart Ministries v. Board of Equalization of Cal.*, 493 U.S. 378, 110 S.Ct. 688 (1990), where the issue was "whether the Religion Clauses of the First Amendment prohibit a State from imposing a generally applicable sales and use tax on the distribution of religious material by a religious organization. *Id.* at 380, 110 S.Ct. at 691. The Court stated:

> Our decision in these cases . . . resulted from the particular nature of the challenged taxes - - flat license taxes that operated as a prior restraint on the exercise of religious liberty. . . .
>
> Significantly, we noted in both cases that a primary vice of the ordinances . . . was that they operated as prior restraints of constitutionality protected conduct: . . . .
> We do, however, decide the Free Exercise question . . . by limiting *Murdock* and *Follett* to apply only where a flat license tax operates as a prior restraint on the free exercise or religious beliefs. . . . Thus, the [California] sales and use tax is not a tax on the right to disseminate religious information, ideas, or beliefs *per se;* rather, it is a tax on the privilege of making retail sales of tangible personal property and on the storage, use, or other consumption of tangible personal property in California. . . .
>
> Moreover, our concern in *Murdock* and *Follett* that flat license taxes operate as a precondition to the exercise of evangelistic activity is not present in this case, because the registration requirement . . . and the tax itself do not act as prior restraints -- no fee is charged for registering, the tax is due regardless of preregistration, and the tax is not imposed as a precondition of disseminating the message. Thus, unlike the license tax in *Murdock*, . . . the tax at issue in this case is akin to a generally applicable income or property tax, which *Murdock* and *Follett* specifically state may constitutionally be imposed on religious activity.

Id. at 386-87, 389-90, 110 S.Ct. at 694-96. Note also the following from *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 46 U.S. 575, 586 n.9, 103 S.Ct. 1365, 1372 n.9 (1983) (citations omitted):

> In each of those cases, the local government imposed a flat tax, unrelated to the receipts or income of the speaker or to the expenses of administering a valid regulatory scheme, as a *condition* of the right to speak. By imposing the tax as a condition of engaging in protected activity, the defendants in those cases imposed a form of prior restraint on speech, rendering the tax highly susceptible to constitutional challenge. *Follett, supra*, . . . ; *Murdock, supra*, ...

Imposing a tax, irrespective of its name, on economic consideration paid to an entity for lobbying services, irrespective of what, if anything, the payee has done or will do, is not imposing a generally applicable sales tax on actual lobbying, a tax which would arguably be

constitutionally permissible.[8] Nor is it rational given *Murdock*, *Follett*, *Jimmy Swaggart*, and *Minneapolis Star* to argue that the tax's constitutionality turns on whether it is a flat tax—"It is true that the First Amendment . . . draws no distinction between license taxes, fixed sum taxes, and other kinds of taxes." *Murdock*, 319 U.S. at 113, 63 S.Ct. at 875. In fact, the sales tax is in reality not a sales tax on lobbying, but, parallel to the flat tax in *Murdock*, a tax that is sized per the extent one merely wishes to exercise a First Amendment privilege.

Rather, these Supreme Court cases stand for the rule that government may not through a tax place a "prior restraint," *Jimmy Swaggart*, 493 U.S. at 389, 110 S.Ct. at 695, on First Amendment-guaranteed rights. That imposing the sales tax on economic consideration paid to an entity for lobbying services, irrespective of what the entity has done or will do, does just that is clear: the tax bears no relationship to the amount of actual lobbying the payee entity does for the payor entity. Whether it does no or 20 hours of actual lobbying the same sales tax is imposed. The imposition of the sales tax is nothing other than a tax required in order for an entity to have the right to take the first steps—hiring a lobbyist, monitoring a bill, etc.—in determining whether it wants to petition the executive or legislature; the payment of the tax being "a condition of the exercise" of First Amendment-protected rights. *Murdock*, 319 U.S. at 112, 63 S.Ct. at 874. Hence, § 53.2(a)(1), in concert with the TRC, will likely dissuade entities from lobbying; or as the Court stated in *Murdock* about First Amendment-guaranteed rights and the tax in question, "it restrains in advance those constitutional liberties of press and religion and inevitably tends to suppress their exercise." *Id.* at 114, 63 S.Ct. at 875.

In addition, the sales tax bears no relationship to the Commonwealth's expenses in policing actual lobbying. *See, id.*, 319 U.S. at 113-14, 63 S.Ct. at 875. It is, then, a "tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." *Id.* at 114, 63 S.Ct. at 875.[9]

Further, the sales tax will be placed on the mere monitoring of legislative or administrative action; the more an entity monitors, the more tax it pays—apparently whether

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[8] In *Minneapolis Star*, 460 U.S. at 581, 103 S.Ct. at 1369, the Court stated, "[T]he First Amendment does not prohibit all regulation of the press. It is beyond dispute that the States and the Federal Government can subject newspapers to generally applicable economic regulations without creating constitutional problems." In *Leathers v. Medlock*, 499 U.S. 439, 451, 111 S.Ct. 1438, 1446 (1991) the Court added, "*Cammarano* [*v. United States*, 358 U.S. 498, 79 S.Ct. 524 (1959)] established that the government need not exempt speech from a generally applicable tax."

[9] The PBA is examining, but has not come to a determination on, the related issue of the $100 registration fee in Act 134. Per § 13A10(a), an entity that is required to register must pay a $100 biennial registration fee. Hence, per § 53.2(a)(1), the mere payment of economic consideration by a payor entity to a payee entity or individual for lobbying services, or the mere engagement by an entity of another for lobbying services, irrespective of what, if anything, the payee or engaged entity or individual has done or will do, triggers the requirement to pay the $100 fee. This fee, imposed irrespective of whether an effort to influence is made, appears directly parallel to the license tax in *Murdock*—a fee that must be paid to the government, irrespective of whether any actual lobbying has been done, in order that an entity may merely engage in a First Amendment right. It is "a flat tax imposed on the exercise of a privilege granted by the Bill of Rights." *Murdock*, 319 U.S at 113, 63 S.Ct. at 875. It "operate[s] as [a] prior restraint[] of constitutionally protected conduct"—lobbying. *Jimmy Swaggart*, 439 U.S. at 387, 100 S.Ct. at 694. Further, the fee, when imposed at the time of engaging or paying a lobbyist irrespective of any other events, bears no relationship to the Commonwealth's expenses in policing actual lobbying, *see*, *Murdock*, 319 U.S. at 113-14, 63 S.Ct. at 875, as lobbying occurs when there is an effort to influence, not when a lobbyist is engaged or paid.

done in-house by a government relations department or out-of-house by a contract lobbyist.[10] In this context, note that the United States Supreme Court has dealt with the "chilling" effect of regulations effecting First Amendment-guaranteed rights. In *Laird v. Tatum*, 408 U.S. 1, 11, 92 S.Ct. 2318, 2324-25 (1972), the Court stated,

> In recent years this Court has found a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights. E.g. Baird v. State Bar of Arizona, 401 U.S. 1, 91 S.Ct. 702 . . . (1971); Keyishan v. Board of Regents, 385 U.S. 589, 87 S.Ct. 675 . . . (1967), Lamont v. Postmaster General, 381 U.S. 301, 85 S.Ct. 1493 . . . (1965); Baggett v. Bullitt, 377 U.S. 260, 84 S.Ct. 1316 . . . (1964). . . . in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject the regulations, proscriptions, or compulsions that he was challenging.

More recently, in *United States v. National Treasury Employees Union*, 513 U.S. 454, 457, 468-71, 475, 480, 115 S.Ct. 1003, 1008, 1014-15, 1017, 1019 (1995) ("*NTEU*"), the Court struck down "a law that broadly prohibits federal employees from accepting any compensation for making speeches or writing articles:"

> The widespread impact of the honoraria ban . . . gives rise to far more serious concerns than could any single supervisory decision. . . . In addition, unlike an adverse action taken in response to actual speech, this ban chills potential speech before it happens. Cf. *Near* v. *Minnesota ex rel. Olson*, 283 U.S. 697, . . . 51 S. Ct. 625 (1931). For these reasons, the Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action. The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's "necessary impact on the actual operation" of the Government. *Pickering* [*v. Board of Ed. Of*

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[10] Section 53.2(a)(1) provides, "Engaging an individual or entity for lobbying services or paying economic consideration to an individual or entity for lobbying services constitutes acting in the capacity of a principal." Obviously an entity lobbying on its own behalf is not engaging another entity for lobbying services. It is, however, engaging an individual—*i.e.*, a staffer—for lobbying services, and paying economic consideration to that individual, as it cannot literally lobby on its own behalf unless it is an individual. In other words, an entity itself can lobby by engaging an in-house individual. Reinforcing this reading is that per § 53.2(b)(3), a principal must list "[t]he name and permanent business address of each individual, registered or unregistered, who will for economic consideration engage in lobbying on the principal's behalf;" thereby implying that an *individual* who is an in-house lobbyist for the entity is a different being from the *entity* itself. Such a reading achieves the rational goal of placing in-house and contract lobbyists on the same regulatory plane.

Section 53.2(a)(2) does provide that "Lobbying by a principal on the principal's own behalf constitutes acting in the capacity of a principal." This language could be read to mean that an entity can lobby on its own behalf through its own personnel, so that "individual" in paragraph (a)(1) actually refers to non-in-house persons. But such a reading necessitates playing loose with the word "principal." As noted, "principal" equates to an entity that is lobbying, that is already making an effort to influence. Hence, § 53.2(a)(2) on its face really reads, "Lobbying by an entity that is lobbying on its own behalf constitutes acting in the capacity of an entity that is lobbying on its own behalf"—a somewhat meaningless statement. Rather, to achieve this reading, paragraph (a)(2) would have to state, "Lobbying by an entity on the entity's own behalf constitutes the entity acting in the capacity of a principal."

> *Township High Scool Dist. 205, Will Cty.*], 391 U.S. [563] at 571[, 88 S.Ct. 1731 (1968)].
>
> Although § 501(b) neither prohibits any speech nor discriminates among speakers based on the content or viewpoint of their messages, its prohibition on compensation unquestionably imposes a significant burden on expressive activity. See *Simon & Schuster, Inc.* v. *Members of N. Y. State Crime Victims Bd.*, 502 U.S. 105, 112 S. Ct. 501 . . . (1991); see also *Arkansas Writers' Project, Inc.* v. *Ragland*, 481 U.S. 221, 227-231, . . . 107 S. Ct. 1722 (1987); *Minneapolis Star* . . . Publishers compensate authors because compensation provides a significant incentive toward more expression. By denying respondents that incentive, the honoraria ban induces them to curtail their expression if they wish to continue working for the Government.
> . . . .
> The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said. See *Virginia Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-757, . . . 96 S. Ct. 1817 (1976). We have no way to measure the true cost of that burden, but we cannot ignore the risk that it might deprive us of the work of a future Melville or Hawthorne. The honoraria ban imposes the kind of burden that abridges speech under the First Amendment.
> . . . .
> [T]he Government has failed to show how it serves the interests it asserts by applying the honoraria ban to respondents.
> . . . .
> As we noted . . . "when the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.' . . . It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broadcasting System* [*, Inc. v. FCC*], 512 U.S. [622,] at 664 [,114 S. Ct. 2445 (1994)]. That case dealt with a direct regulation of communication by private entities, but its logic applies as well to the special burden § 501 imposes on the expressive rights of the multitude of employees it reaches. As Justice Brandeis reminded us, a "reasonable" burden on expression requires a justification far stronger than mere speculation about serious harms. . . . *Whitney* v. *California*, 274 U.S. 357, 376, . . . 47 S. Ct. 641 (1927) (concurring opinion).

The parallel between *NTEU* and the situation created by § 53.2(a)(1) is strong. There is a financial disincentive created by § 53.2(a)(1) to monitor legislative or administrative action, *i.e.*, to discuss public issues, just as there was a financial disincentive in *NTEU* for government employee expression. In fact, § 53.2(a)(1) also creates a chilling effect on actual lobbying, as monitoring legislation is likely a prelude to actual lobbying. Note the Vermont Supreme Court's recent quoting of the United States Supreme Court:

> "Whatever difference may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Mills v. Alabama*, 384 U.S. 214, 218, 86 S.Ct. 1434 . . . (1966). That is the case because "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison v. Louisiana*, 379 U.S. 64, 74-75, 85 S.Ct. 209 . . . (1964).

Vermont Soc'y of Assoc. Executives v. Milne, 172 Vt. 375, 380, 779 A.2d 20, 24 (Vt. 2001). Likewise, the Committee has failed to articulate real harms that imposing the sales tax on such monitoring will cure or prevent.

In sum, if the Committee believes that engaging or paying an entity for lobbying services is an effort to influence, *i.e*, is lobbying, on the part of the engagor, and is constitutional, then it should request that the General Assembly amend Act 134 to so provide. Only the General Assembly has the authority to amend a statute.

Needed Change

Given the problems with § 53.2(a)(1), and that the definition of *principal* adequately expresses what transforms an entity into a lobbyist, § 53.2(a)(1) should be removed.

2. Section 53.3(a)(1), "Accepting an engagement to provide lobbying services or accepting economic consideration to provide lobbying services constitutes acting in the capacity of a lobbying firm," is legally impermissible as it exceeds the authority of Act 134.

The issues here are cognates to those in point 1. Section 51.1 defines *lobbying firm* as "An entity that engages in lobbying for economic consideration on behalf of a principal other than the entity itself." Hence, per the definition of *engaging in lobbying* (see point 1), the meaning of § 53.3(a)(1) is clear: Accepting an engagement or economic consideration to provide lobbying services constitutes an effort to influence legislative action or administrative action.

a) As with § 53.2(a)(1), accepting a engagement or accepting economic consideration to provide lobbying services can refer to an action *prior to* there being any actual lobbying. Therefore, § 53.2(a)(1) presents the same incongruent situation: accepting an engagement or economic consideration to provide lobbying services constitutes an effort to influence, despite the fact that the accepting entity may not yet have made any actual effort to influence, and the extent it will make an effort to influence in the future may be unknown.

b) In addition, parallel with point 1, in the context of § 55.1(a), if the mere act of accepting an engagement or economic consideration to provide lobbying services by Lobbying Firm A makes it a lobbyist irrespective of what it has done or will do for Association X, then anything and everything (even nothing) Firm A does after accepting is effectively lobbying. This result is simply not possible under Act 134, as IRRC noted in its Comments (p. 3): "A lobbyist or lobbying firm that does not make direct or indirect communication to influence legislative action or administrative action would not meet the definition of 'direct communication' or 'indirect communication,' and thus would not meet the Act's definition of 'lobbying.'"

c) Moreover, parallel with point 1, every law firm accepting an engagement or economic consideration from a party to deal with a Commonwealth legal issue would appear to be a lobbying firm, a somewhat ridiculous reading of Act 134 that therefore violates 1 Pa.C.S. § 1922.

If the Committee believes that accepting an engagement to provide lobbying services or accepting economic consideration to so provide is an effort to influence, *i.e.*, is lobbying, on the part of the accepting entity, then it should request that the General Assembly amend Act 134 to so provide. Only the General Assembly has the authority to amend a statute.

Needed Change

Given the problems with § 53.3(a)(1), and that the definition of *lobbyist* adequately expresses what transforms an entity into a lobbyist, § 53.3(a)(1) should be removed.

3. Section 53.4(a)(1), "Accepting an engagement to provide lobbying services or accepting economic consideration to provide lobbying services constitutes acting in the capacity of a lobbyist," is legally impermissible as it exceeds the authority of Act 134.

Discussion

This point is almost identical to point 3. Section 51.1 defines *lobbyist* in relevant part as "An individual, association, corporation, partnership, business trust or other entity that engages in lobbying on behalf of a principal for economic consideration." Consequently, per the definition of *engaging in lobbying*, the meaning of § 53.4(a)(1) is clear: Accepting an engagement or economic consideration to provide lobbying services constitutes an effort to influence legislative or administrative action. As with § 53.3(a)(1), § 53.4(a)(1) is impermissible.

Needed Change

Given the problems with § 53.4(a)(1), and that the definition of *lobbyist* adequately expresses what transforms an entity into a lobbyist, § 53.4(a)(1) should be removed.

4. In the context of §§ 53.2(a)(1), 53.3(a)(1), and 53.4(a)(1), providing in § 51.1 that "paying an individual or entity economic consideration for lobbying services" is an *effort to influence legislative action or administrative action, i.e.*, is lobbying, is legally impermissible as it exceeds the authority of Act 134.

In a different context, equating "paying an individual or entity economic consideration for lobbying services" with lobbying might be acceptable. However, per the SCA, 1 Pa.C.S. § 1932, and governing case law, this phrase must be interpreted in the context of other relevant sections of the regulation.[11]

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[11] **§ 1932. Statutes in pari materia**

(a) Statutes or parts of statutes are in pari materia when they relate to the same persons or things or to the same class of persons or things.

(b) Statutes in pari materia shall be construed together, if possible, as one statute.

Commenting on § 1932, the Superior Court stated,

> We begin our discussion by citing the well-established principles of statutory construction, in particular, 1 Pa.C.S. § 1932, which provides that statutes or parts of statutes that relate to the same persons or things or to the same class of persons or things are to be construed together, if possible. *See Mid-State Bank and Trust Co. v. Globalnet Int'l, Inc.*, 710 A.2d 1187, 1193 (Pa.Super.1998), *aff'd*, 557 Pa. 555, 735 A.2d 79 (1999). Moreover, individual provisions of a statute should not be read in the abstract, but "must be construed with a view to its place in the entire legislative structure of the [statute]." *In the Matter of T.R.*, 445 Pa.Super. 553, 665 A.2d 1260, 1264 (1995), *rev'd on other grounds*, 557 Pa. 99, 731 A.2d 1276 (1999).

Casiano v. Casiano, 815 A.2d 638, 642 (Pa.Super. 2002), *appeal denied*, 574 Pa. 745, 829 A.2d 1156 (Pa. 2003).

In the context of §§ 53.2(a)(1), 53.3(a)(1), and 53.4(a)(1) it is clear that "paying an individual or entity economic consideration for lobbying services" can include payment that preludes any actual lobbying on the part of the payee. Revisit the language of these three sections that is parallel to the § 51.1 language:

§ 51.1:	**§ 53.2(a)(1)**:	**§ 53.3(a)(1)**:	**§ 53.4(a)(1)**:
"paying an individual or entity economic consideration for lobbying services"	"paying economic consideration to an individual or entity for lobbying services"	"accepting economic consideration to provide lobbying services"	"accepting economic consideration to provide lobbying services"

Hence, as with §§ 53.2(a)(1), 53.3(a)(1), and 53.4(a)(1), the language in § 51.1 that "paying an individual or entity economic consideration for lobbying services" is an *effort to influence legislative action or administrative action* presents an incongruent situation: paying an entity for lobbying services is an effort to influence, despite the fact that the engaged entity may not yet have made, may make only a limited (with respect to the size of the payment), or may not make any, actual effort to influence.

It is important to note that while the Committee has removed the retainer language from the definition of *effort to influence legislative action or administrative action*, the Committee's new language in reality maintains this removed language in the definition. As noted above, the new language effectively defines *effort to influence legislative action or administrative action* in relevant part as economic consideration paid by the payor entity to the payee entity *irrespective* of what, if anything, that payee entity has done or then does for the payor entity. Working from our comments on the Proposed Rulemaking (pp. 3-4) on the above quoted retainer language, Act 134 does not expressly or impliedly provide for paying economic consideration to an entity to be considered an effort to influence when such payment is not for direct or indirect communications. With respect to expressly, being paid simply does not equate to effort to influence. With respect to impliedly, the Department of State can track lobbying costs without requiring the disclosure of funds an entity spends merely to hire another entity for lobbying services. Further, Section 55.1, "Quarterly expense reports," of the proposed rulemaking specifies that all lobbying expenses must "be allocated" in the "categories" of "direct communications," "indirect communications," and "gifts, hospitality," etc. How exactly does one allocate economic consideration not connected to an effort to influence? Direct communication? Indirect communication? Consequently, this new language leads to an absurd result, thereby violating 1 Pa.C.S. § 1922.

If the Committee believes that "paying an individual or entity economic consideration for lobbying services" is an effort to influence legislative action or administrative action, *i.e.*, is lobbying, then it should request that the General Assembly amend Act 134 to so provide. Only the General Assembly has the authority to amend a statute.

Needed Change

Given the problems with equating "paying an individual or entity economic consideration for lobbying services" with an *Effort to influence legislative action or administrative action*, and that the initial sentence in the definition of *Effort to Influence legislative action or administrative*

action in § 51.1 adequately defines the term, paragraph (i) in the definition of *Effort to Influence legislative action or administrative action* should be removed.

5. **In the context of §§ 53.2(a)(1), 53.3(a)(1), and 53.4(a)(1), the language in § 51.1 in the definition of *Effort to influence legislative action or administrative action*, and in § 55.1(g)(3)(iv) (relating to quarterly expense reports), "Monitoring of legislation, monitoring of legislative action or monitoring of administrative action is not lobbying. However, for an individual or entity which is not exempt, the costs of monitoring are subject to the reporting requirements of the act when the monitoring occurs in connection with activity that constitutes lobbying," is ineffective in excluding monitoring from being considered lobbying.**

The second sentence of this language limits the first sentence, specifying when monitoring is lobbying—"when it occurs in connection with activity that constitutes lobbying." As discussed, irrespective of any actual effort to influence, § 53.2(a)(1) makes the engaging of or paying an entity lobbying on the part of the engagor, while §§ 53.3(a)(1) and 53.4(a)(1) makes the acceptance of an engagement or economic consideration to provide lobbying services lobbying on the part of the accepting entity—in other words, acting in the capacity of a principal, lobbying firm, or lobbyist is activity that constitutes lobbying. Note the parallel language with respect to the derivatives of the word *act* (in italics):

Monitoring language	**§ 53.2(a)(1)**:	**§ 53.3(a)(1)**:	**§ 53.4(a)(1)**:
"when it occurs in connection with *activity* that constitutes lobbying"	"Engaging an individual or entity for lobbying services or paying economic consideration to an individual or entity for lobbying services constitutes *acting* in the capacity of a principal."	"Accepting an engagement to provide lobbying services or accepting economic consideration to provide lobbying services constitutes *acting* in the capacity of a lobbying firm."	"Accepting an engagement to provide lobbying services or accepting economic consideration to provide lobbying services constitutes *acting* in the capacity of a lobbyist."

Hence, anything and everything (even nothing) the engagee entity does for the engagor entity after being engaged or paid is effectively lobbying, including monitoring.

That this conclusion is the same as that discussed with respect to Association X, Lobbying Firm A, and Issue α is rational in that the regulation is consistent in its determination of what is lobbying. Whatever is done after engaging an entity to provide lobbying services, which rationally includes monitoring, is lobbying per §§ 53.2(a)(1), 53.3(a)(1), and 53.4(a)(1); while this monitoring language makes it clear that this reading is correct.

If the Committee believes that monitoring legislative or administrative action is lobbying, then it should request that the General Assembly amend Act 134 to so provide. Only the General Assembly has the authority to amend a statute.

Needed Change

No change needs to be made to this language if the other changes recommended herein are made. Otherwise, the second sentence of this language should be changed to the following: "However, for an individual or entity which is not exempt, the costs of monitoring are subject to reporting requirements of the act when the monitoring occurs in connection with direct communication or indirect communication."