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VIA E-MAIL

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Re: ***Comments on Proposed Regulations on Lobbying Registration and Reporting***

Dear Mr. Boyle:

I am writing to comment on the proposed regulations promulgated under the Lobbying Disclosure Act of 2006 (the "Act"), specifically Chapter 57, Exemption from Registration and Reporting. I represent clients in the business community who are regulated by the Act and I wish to suggest two minor modifications to the proposed regulations, which I believe will further the purpose of – and improve compliance with – the Act.

First, the "vendor activities" exemption contained in proposed Section 57.2(b)(4) is too narrow and fails to exempt conduct that, in light of the purposes of the Act, should not be considered lobbying activity. Under the Act, contacts between a vendor and a state official made in connection with the performance of an existing contract may be deemed lobbying, even though there is no attempt to influence government activity or decision-making. I therefore respectfully suggest that proposed Section 57.2(b)(4) be expanded to exempt from registration and reporting requirements contacts made pursuant to an existing contract.

Second, the meaning of Section 57.2(b)(2) is unclear, as the current language could be construed either broadly to exempt all contacts with state officials made by a vendor in certain enumerated situations, or narrowly to exempt those activities only when they involve contacts between the vendor and the relevant agency's designated contracting officer. I therefore respectfully suggest that the subsection be clarified so that it is clear that the broader reading of the regulation is the correct one.

I. Proposed Regulation Section 57.2(b)(4)

Section 57.2(b) of the proposed regulations exempts from lobbying registration and reporting requirements certain "vendor activities" as provided in section 1306-A(15). Although the Section does exempt a relatively wide range of activity and as the Preamble to the proposed regulation states, is not exclusive, it does not exempt a class of vendor activities that are necessary and incidental to *performing an existing contract or business arrangement* and instead merely exempts vendors who engage in the "[d]emonstration of products or services authorized by an existing contract to covered agencies that may order from the contract."[1] Such a limited approach is contrary to both the intent of the Act and the approach taken in the lobbying regimes of neighboring jurisdictions. Accordingly, I respectfully propose that Section 57.2(b)(4) be expanded to exempt ordinary and customary communications and activities undertaken pursuant to the servicing of existing contracts with covered state agencies.

A. Exempting Activities Incidental To Servicing A Contract Is Consistent With The Intent Of The Act

The stated purpose for the Act is that:

> The ability of the people to exercise their fundamental authority and to have confidence in the integrity of the processes by which laws are made and enforced in this Commonwealth demands that the identity and scope of activity of those who are paid to influence the actions of the General Assembly and the Executive Department be publicly and regularly disclosed.[2]

To implement this purpose, the Act requires registration by individuals engaged in lobbying activities, *i.e.*, efforts to influence legislative or administrative action as well as reporting of their expenditures connected with those activities.

Requiring vendors to report communications and activity made in the course of performing an existing contract therefore does not further the purpose of the Act. Such communications do not involve efforts to influence official actions of Commonwealth public officials; rather, such contacts are a routine and necessary aspect of effectuating an agreement that has already been made. Indeed, a public official likely would be negligent if he or she failed to require regular communications with the vendor during the life of a contract to ensure that the vendor is satisfying all contract terms. Exempting such compelled communications from the lobbying requirements is thus entirely consistent with the goals of the Act.

In fact, failing to exempt such communications would effectively frustrate the Act's purpose. The Act seeks to inform the public about which parties are making the most concerted efforts (both in terms of the number of contacts and the amount of expenditures) to influence decision-making by Commonwealth public officials. However, if contacts made incidental to the

[1] Proposed Lobbying Disclosure Regulations § 57.2(b)(4).
[2] 65 Pa.C.S. § 1302-A(a).

performance of an existing contract are not exempted, then the disclosures filed by vendors under the Act will indicate the existence of far more lobbying activity than is actually taking place. And such exaggerated reports of lobbying activity in turn are likely to mislead the public regarding private actors' attempts to influence government activity and to create false impressions as to which entities are in fact devoting the most resources to influencing the Commonwealth's decision-making.

B. Other Jurisdictions Exempt Activities Incidental To Servicing A Contract From The Definition Of Lobbying

Furthermore, exempting communications made pursuant to the performance of an existing contract would make the approach taken by the Act consistent with the approaches taken by lobbying regimes in neighboring states. Nearly all of those jurisdictions already recognize that vendor activities undertaken to service an existing contract should not be deemed to be lobbying activities. For example:

- ***New Jersey*** does not apply its Legislative and Governmental Process Activities Disclosure Act to:

  > A communication by an individual with an employee of a principal department in the Executive Branch of State government, or with an employee of any authority, board, commission, or other agency or instrumentality in or of a principal department of the Executive Branch of State government for a routine, ministerial matter[, which includes] . . . a communication to: . . .
  >
  > ix. Inquire about the delivery of services or materials pursuant to an existing contract;
  > x. *Provide advice or perform services pursuant to an existing contract.*[3]

- ***Connecticut*** does not require registration as a "communicator administrative lobbyist" where a person merely engages in:

  > ordinary and customary communications made to the agency, or a related entity, including, but not limited to, communications made *incident to the performance of a contract* . . . .[4]

- ***New York City*** excludes from the definition of "lobbying activities":

  > contractors or prospective contractors who communicate with or appear before city contracting officers or employees in the regular course of procurement planning, contract development, the contractor selection process, *the administration of a contract*, or the audit of a contract, when such

[3] N.J.A.C. § 19:25-20.3(a)(7)(ix), (x) (emphasis added). See also 37 N.J.R. 2838(a) (exempting such contacts because the state regulator "believed that it was not the intent of the Legislature that routine, ministerial communications be treated as lobbying activity.").

[4] CONN. AGENCIES REGS. § 1-92-42a(e)(2) (emphasis added).

> communications or appearances are made by such contractors or prospective contractors personally," or through certain designated agents or employees.[5]

- ***New York State*** excludes from the definition of "lobbying":

> Communications made by an officer or employee of the offerer after the award of the procurement contract when such communications are in the *ordinary course of providing the article of procurement* provided by the procurement contract and in the ordinary course of the assigned duties of the officer or employee . . . .[6]

Thus, expanding the current proposed exemption to include ministerial, service oriented vendor activity would not represent a radical departure from prevailing norms; rather, it would place the Act squarely within the mainstream approach to such conduct, which recognizes that communications made in the course of servicing an existing contract do not involve an effort to affect official decision-making and therefore should not be considered lobbying.

* * *

Because the proposed regulations do not specifically address this issue, I propose that the Commonwealth revise regulation § 57.2(b)(4) to include an exemption for ordinary and customary communications and activities undertaken pursuant to the servicing of existing contracts with covered state agencies. Such a proposed exemption is faithful to the stated intent of the Act and reasonably calculated to ensure that the lobbying activity of state vendors is accurately reflected in their quarterly expense reports.

II. Proposed Regulation Section 57.2(b)(2)

Proposed Section 57.2(b)(2), which expands on the exemption from registration and reporting for "vendor activities" in section 1306-A(15), provides that the following activities fall within the exemption:

> Submission of questions, participation in a site visit, prebid or preproposal conference, and communications concerning the procurement process between the vendor's and the covered agency's contracting officer designated by the public competitive procurement document (RFQ, IFB or RFP) during an active procurement.[7]

I respectfully submit that the provision as currently drafted is unclear in one important respect, namely, whether the clause "between the vendor's and the covered agency's contracting officer" applies only to the final action (*i.e.*, "communications concerning the procurement process") or to any or all of the preceding actions (*i.e.*, "[s]ubmission of questions, participation in a site visit, prebid or preproposal conference"). As drafted, the section could be fairly read to

[5] N.Y. CITY ADMIN. CODE § 3-211(c)(3)(vi)(A) (emphasis added).
[6] N.Y. LEGIS. LAW § 1-c(c)(P) (emphasis added).
[7] Proposed Lobbying Disclosure Regulations § 57.2(b)(2).

broadly exempt all pre-bid or proposal conferences, or only those between the vendor's and the covered agency's contracting officer.

Such ambiguity presents an issue for many vendors who engage in these contacts and activities and wish to accurately report their activities. Absent clarification, it is inevitable that different vendors will interpret the provision differently and therefore, depending on the correct construction of the section, there will be widespread over-inclusion or under-inclusion. Either situation would again result in potentially inaccurate and inconsistent reporting of lobbying activity and expenditures by registered state lobbyists or potential registrants.

Therefore, I request that this subsection be revised so that it is clear that the expansive reading of the regulation is the intended interpretation. The enumerated activities, (1) submission of questions, (2) participation in a site visit, and (3) prebid or preproposal conferences are all examples of ministerial activity undertaken prior to contract negotiations that are again outside of the Act's intended scope. Such activity is not directed at influencing the determination of covered officials and moreover, reading the regulation to exclude this activity is reasonable and consistent with the statutory language.

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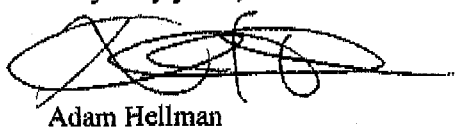
Thank you for the opportunity to comment on the regulations proposed by your Department. Please do not hesitate to contact me regarding the foregoing if I can be of further assistance in any way.

Very truly yours,



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