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INDEPENDENT REGULATORY REVIEW COMMISSION

333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

March 20, 2008

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Re: Regulation #16-40 (IRRC #2665)
Lobbying Disclosure Regulations Committee
Lobbying Disclosure

Dear Mr. Mulle and Mr. Masland:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me.

Sincerely,

Kim Kaufman
Executive Director

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Enclosure

cc: Honorable Jeffrey E. Piccola, Chairman, Senate State Government Committee
Honorable Anthony H. Williams, Minority Chairman, Senate State Government Committee
Honorable Thomas R. Caltagirone, Majority Chairman, House Judiciary Committee
Honorable Ronald S. Marsico, Minority Chairman, House Judiciary Committee
Honorable Pedro A. Cortes, Secretary
Louis Lawrence Boyle, Esq., Department of State

Comments of the Independent Regulatory Review Commission

on

Department of State Regulation #16-40 (IRRC #2665)

Lobbying Disclosure

March 20, 2008

We submit for your consideration the following comments on the proposed rulemaking published in the January 19, 2008 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Lobbying Disclosure Regulations Committee (Committee) to respond to all comments received from us or any other source.

1. General - Statutory authority, Need; Economic impact; Clarity.

We find that portions of the regulation exceed the statutory authority of 65 Pa. C.S.A. Chapter 13A *Lobbying Disclosure* (Act) because they require registration and reporting for activities that are not directly included in the Act. If the Committee believes registration and reporting of these activities are needed, the Committee should seek changes to the Act.

Central to the consideration of the scope of registration and reporting is the term "lobbying" as defined in Chapter 13A03 of the Act, the phrase "engages in lobbying" used throughout the Act, and the Committee's interpretation of the phrase "effort to influence legislative action or administrative action" included in the definitions of Section 51.1 of the regulation. The following is an explanation of our interpretation of the Act and the activities included in the regulation that we find do not require registration and reporting under the Act.

"Lobbying"

"Lobbying" is defined in Section 13A03 of the Act as:

An effort to influence legislative action or administrative action in this Commonwealth. The term includes:

- (1) Direct or indirect communication;
- (2) Office expenses; and
- (3) Providing any gift, hospitality, transportation or lodging to a State official or employee for the purpose of advancing the interest of the lobbyist or principal.

Although the term “effort” is not directly defined in the Act, it is described in other relevant definitions. The Act’s definition of “direct communication” states:

An effort, whether written, oral or by any other medium, made by a lobbyist or principal, directed to a State official or employee, the purpose or foreseeable effect of which is to influence legislative action or administrative action. The term may include personnel expenses and office expenses. (Emphasis added.)

Similarly, the Act’s definition of “indirect communication” states, in part:

an effort, whether written, oral or by another medium, to encourage others, including the general public, to take action, the purpose or foreseeable effect of which is to directly influence legislative action or administrative action. (Emphasis added.)

Under the Act, 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.

“Engages in lobbying”

The above concepts are important because they form the foundation of the phrase “engages in lobbying.” The Act’s definitions of “lobbyist,” “lobbying firm” and “principal” all include the qualifying phrase “engages in lobbying.” 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.

“Effort to influence legislative action or administrative action”

The Committee recognized the importance of the Act’s definition of “lobbying” and in Section 51.1 of the regulation includes that definition and defines several phrases in it. The regulation defines the phrase “effort to influence legislative action or administrative action” as:

Any attempt to initiate, support, promote, modify, oppose, delay or advance a legislative action or administrative action on behalf of a principal for economic consideration. The term includes any of the following:

- (i) Paying a lobbyist or lobbying firm a retainer or other compensation, even if that lobbyist or lobbying firm does not make direct or indirect communications or take any other action.
- (ii) Monitoring legislation, legislative action or administrative action.

In the Preamble, the Committee explains the definition of this phrase as follows:

The Committee decided to define this term because it is used in section 13A03 of the act in the definition of lobbying. The Committee discussed this definition and the one for “Engaging a lobbyist” and reasoned that the two definitions should be consistent and should include lobbying on behalf of a principal for economic

consideration. **The Committee proposes that lobbying includes paying a lobbyist a retainer, even if that lobbyist does not make direct or indirect communications. A principal hiring a lobbyist not to make any direct or indirect communications is an effort to influence legislative action or administrative action because it is furthering the principal's intent to influence legislative or administrative action or the lack thereof. By hiring a lobbyist to not make any direct or indirect communications, a principal could prevent that lobbyist from working for another principal with opposing views. Also the committee proposes that this definition should include monitoring legislation, legislative action or administrative action. (Emphasis added.)**

It is appropriate to define in regulation the phrase "effort to influence legislative action or administrative action" so that the regulated community understands how the Act will be interpreted and how to comply with the regulation. However, Paragraphs (i) and (ii) appear to go beyond the scope of the Act. A lobbyist or lobbying firm that does not make a 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."

All of the provisions in the statutory definition of "lobbying" are tied to "an effort to influence." As explained above, "direct or indirect communication" requires a tangible, proactive communication to influence legislative action or administrative action. "Office expenses" (i.e., "expenditure for an office, equipment or supplies, utilized for lobbying") must be "utilized for **lobbying**." (Emphasis added.) The provision for providing "gifts, hospitality, transportation or lodging," must be "to a State official or employee for the purpose of advancing the interest of the lobbyist or principal."

Regarding Paragraph (i), we agree that a principal could prevent an individual lobbyist or lobbying firm from presenting opposing views by hiring or retaining the lobbyist or lobbying firm. However, the Committee needs to explain its statutory authority to require registration and reporting when the "lobbyist or lobbying firm does not make direct or indirect communications or take any other action" particularly in regard to the Act's definitions of "lobbying," "direct communication" and "indirect communication," which all require "an effort...to influence legislative or administrative action." If the Committee believes it has this authority, the Committee also needs to explain the need for registration and reporting of this information, and its incremental cost above registration and reporting of only those who make direct or indirect communications.

Regarding Paragraph (ii), we disagree that monitoring alone constitutes lobbying. The simple acts of "monitoring legislation, legislative action or administrative action" would encompass any lobbyist who reads information commonly available to the public, such as the General Assembly's website, the *Pennsylvania Bulletin*, newspapers, and news services. It would also include any lobbyist who observes a legislative session, standing committee meeting or any public meeting of an agency. If no action was taken to influence legislative action or administrative action, we question the Committee's authority to require registration and reporting due to monitoring, and why this information would be useful. Reporting monitoring activities

could also tremendously increase reporting, perhaps to the point where it would be difficult to distinguish those who seek to influence legislative or administrative action from those who do not. The Committee needs to explain how reporting monitoring activities in Paragraph (ii) is consistent with the statute and why this reporting is needed.

In summary, we agree that the phrase “effort to influence legislative action or administrative action” should be defined in regulation. However, unless the Committee can explain how Paragraphs (i) and (ii) are consistent with the statute and are needed, we recommend deleting them.

Cost of compliance

Several commentators believe the regulation will be so burdensome to their organizations that it will create an obstacle to participation in advocacy. These commentators have small budgets or are smaller non-profit organizations whose primary function is not lobbying. The Regulatory Analysis Form, Question 20 response states that “there will be costs for the regulated community for administrative staff to prepare the reports however, the costs are too speculative to be quantified at this time.” The Committee should identify costs to the regulated community and explain why reporting is not as burdensome as alleged by commentators. In addition, to the extent possible under the Act, the Committee should investigate alternative ways to comply with the Act and regulation to minimize costs.

2. Section 51.1. Definitions. - Statutory authority; Need; Reasonableness; Clarity.

Our concerns with the scope of the definition of “lobbying” as described in Part 1 of this comment extend to every other definition in which that term is used.

Statutory authority and need to alter statutory definitions

We are concerned that the following definitions in the proposed regulation amend the same terms defined in Section 13A03 of the Act.

Definition	Concern
<i>Administrative action</i>	The Act states the term includes “any” of the following. Subsection (vi) substantially broadens the definition to include “grants, the release of funds from the capital budget, loans and investment of funds.”
<i>Direct communication</i>	The first paragraph of this definition mirrors the Act’s definition of the same term, except that it also includes “lobbying firm.” Paragraph (ii) does not appear in the Act’s definition. It exempts “gifts, hospitality, transportation and lodging.”
<i>Gift</i>	Paragraphs (ii)(C), (E), (F) and (G) significantly expand the scope of the Act’s definition.

<i>Hospitality</i>	Paragraphs (ii)(B) and (C) significantly expand the scope of the Act's definition.
<i>Indirect communication</i>	Paragraph (v) does not appear in the Act's definition. It exempts "gifts, hospitality, transportation and lodging." The regulation also changes the order of the paragraphs in the Act.
<i>Legislation</i>	Inclusion of the phrase "including draft legislation" in subsection (i), the term "legislative" in subsection (ii), and all of subsection (iii) depart from the Act's definition of the same term.
<i>Legislative action</i>	Subsection (v) substantially broadens the Act's definition to include "grants, the release of funds from the capital budget, loans and investment of funds."
<i>Lobbying</i>	The term "lobbying firm" appears in the regulation, but not in the Act's definition.
<i>Lobbyist</i>	The following sentence is not in the Act's definition: "Membership in an association alone is not sufficient to make an association member a lobbyist."
<i>Personnel expense</i>	"Lawyers" was added to this definition, but does not appear in the Act's definition.
<i>Principal</i>	The following sentence is not in the Act's definition: "Membership in an association alone is not sufficient to make an association member a principal."

For each concern identified in the above table, the Committee should explain its authority to amend the Act's definition and the need for the amendment, or delete the amendments so that the regulation's definition is substantially the same as the Act's definition.

Finally, the definition of "entity" is vague. As used in this definition, the term "something" offers the regulated community insufficient guidance. In the final-form regulation, the Committee should clarify this definition.

3. Section 51.4. Delinquency. - Reasonableness; Economic impact; Clarity.

Department's designee

We have two concerns with Paragraph (a)(1). It states:

Hard copy filings must be received by 5 p.m. in the office. From 5 p.m. until 12 a.m. midnight, a hard copy filing may be filed with the Department's designee, as noted in the Department's publications or on its website.

The Preamble states “the Department of State (Department) has typically used the Capitol Police force as a designee after 5 p.m. on the date filings are due.”

Our first concern is that we question the need and reliability of this provision. Given the regular business hours of the Department and the ability to file electronically, it is not clear why the ability to file for the hours from 5 p.m. to midnight is needed. We note that this service would be needed for all Commonwealth business days because of the requirement to register within ten days of lobbying. The Committee should explain the need for a designee from 5 p.m. to midnight, the reliability of the designee, the direct or indirect costs it imposes on the Commonwealth, and why these costs are justified.

Our second concern is that the regulation is not clear regarding filing with a designee. The provision requires filing with a designee “as noted in the Department’s publications or on its website.” It is not clear whether the Department’s publications or the website should be consulted to determine who the current designee is. Further, these can be changed without notice. The regulation should provide a definite filing location to file documents with a designee.

4. Section 51.7. Forms, records and Department publications. - Consistency with statute; Clarity.

Additional sheets

Subsection (b) states:

Additional sheets of equal size on forms prescribed by the Department may be attached to any hard copy form filed under the act, if more space is required.

This provision is not clear. Can a person attach any 8.5 inch by 11 inch paper, or must the attachment be on a form prescribed by the Department?

Available on a publicly accessible internet website

Under the Section 13A08(c) of the Act, it states, in part, that “The Department shall make all registrations and reports available on a publicly accessible internet website.” This provision was not included in Subsection (c) of the regulation. We recommend adding this provision from the Act to Subsection (c).

5. Section 51.10. Electronic filing. - Clarity.

Upon acceptance by the filer

Subsection (a) concludes with the sentence that “The use of an electronic signature shall have the same force and effect as a manual signature **upon acceptance by the filer.**” (Emphasis added.) It is not clear what the phrase “upon acceptance by the filer” means. We recommend either deleting this phrase or clarifying its intent.

6. Section 51.11. Enforcement of Commission orders. - Need; Clarity.

This section states: "The Commission through its staff may take appropriate action to enforce its orders." This provision is vague and does not provide lobbyists, lobbying firms or principals with sufficient guidance. What constitutes an "appropriate action"?

7. Sections 53.2 Principal registration, 53.3. Lobbying firm registration and 53.4 Lobbyist registration. - Consistency with statute.

Accepting a retainer or other compensation for purposes including lobbying

There are two concerns with this phrase.

First, Paragraph (a)(1) of both Sections 53.3 and 53.4 states,

Accepting an engagement to lobby or **accepting a retainer or other compensation** for purposes including lobbying constitutes acting in the capacity of a lobbying firm. (Emphasis added.)

Consistent with our first comment on the scope of the statutory definition of the term "lobbying," we do not believe Paragraphs (a)(1) should include accepting a retainer or other compensation, unless those are compensation for lobbying (i.e., an **effort** to influence legislative action or administrative action). We recommend removing retainers or other compensation from Paragraphs (a)(1).

Second, consistent with our first comment on the scope of the statutory definition of the term "lobbying," Paragraphs (a)(1) of Sections 53.2, 53.3 and 53.4 use the phrase "for purposes including lobbying." We believe this phrase expands the scope of activities that constitute lobbying and for which registration is required. A lobbyist could be engaged "for purposes including lobbying," to perform many other unrelated tasks, but never actually lobby. We recommend rewriting these provisions to clearly require lobbying to be the action that requires registration.

8. Section 55.1. Quarterly expense reports. - Consistency with statute; Reasonableness; Clarity.

Exemption from registration and reporting

Several commentators are concerned that grassroots activities, like bus trips with box lunches, could be considered to require reporting of the individuals who accepted them. Section 13A06 of the Act lists 15 exemptions from registration and reporting. Among them, Paragraph (4) exempts:

An individual whose economic consideration for lobbying, from all principals represented, does not exceed \$2,500 in the aggregate during any reporting period.

Subsection 55.1(a) of the regulation partially reflects Section 13A06 of the Act by including the \$2,500 reporting threshold for lobbyists, lobbying firms, and principals. However, Section

55.1(a) does not mention all of the exemptions, including Section 13A06(4) of the Act. Therefore, we recommend including in Section 55.1(a) a cross-reference to all of the exemptions in Section 13A06 of the Act.

9. Clarity Comments.

- Section 51.2 of the regulation specifies that filing dates will be extended to the next business day if a deadline falls on a weekend or holiday. This provision indicates that the statutory ten days to register and 30 days to report are interpreted to be calendar days. However, other provisions specify business days, such as Section 51.4(c), which allows receipt of photographs and filing fees “within five Commonwealth business days.” Given the specification in Section 51.2, we recommend using calendar days throughout the regulation to improve the clarity of deadlines.
- Section 51.12(a) references “the eligibility standards of the Internal Revenue Service for filing a consolidated corporate tax return.” It should include a cross-reference to these eligibility standards.
- Sections 53.2(b), 53.3(b), 53.4(b), 53.6(a), 55.1(m), 55.1(m)(1), 55.1(n)(2) and 55.2(a)(1) all require information “on a form prescribed by the Department” or standardized forms. For clarity, we recommend that all of the provisions cross-reference Section 51.7(a) (relating to *Forms, records and Department publications*).
- The reporting limit of \$10 in Paragraph 55.1(g)(6) needs to be clarified. The specified limits are “a value not exceeding \$10” and “\$10 or more.” These limits overlap at \$10. The second limit should be “more than \$10.”
- Section 55.1(k)(2) ends with the phrase “as required by law.” This should include a cross reference to the law.
- Section 55.1(n)(6) requires the lobbyist to “promptly” provide a copy to the principal. The regulation should specify a specific time period.
- As printed in the *Pennsylvania Bulletin*, the cross-reference to the Act in Section 63.3(b) needs to be corrected. It references “...or section 13A0 of the act....”

Facsimile Cover Sheet



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INDEPENDENT REGULATORY REVIEW COMMISSION
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Date: March 20, 2008
Pages: 10

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Lobbying Disclosure Regulations Committee's regulation #13-40 (IRRC #2665). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. We have sent the original through Interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by:  **Date:** 3/20/08