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INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

November 12, 2008

Robert A. Mulle, Esq.
Deputy Chief Attorney General
Office of Attorney General
15th Floor, Strawberry Square
Harrisburg, PA 17120

Albert H. Masland, Esq.
Chief Counsel
Department of State
301 North Office Building
Harrisburg, PA 17120

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

Dear Mr. Mulle and Mr. Masland:

The Independent Regulatory Review Commission disapproved your regulation on November 6, 2008. Our order is enclosed and will be available on our website at www.irrc.state.pa.us.

Within 40 days of receipt of our order, Section 7(a) of the Regulatory Review Act requires you to select one of the following options: (1) proceed with promulgation under Section 7(b); (2) proceed with promulgation under Section 7(c); or (3) withdraw the regulation. If you do not take any action within this period, the regulation is deemed withdrawn.

If you or your staff have any questions, please contact me at 783-5506.

Sincerely,

Kim Kaufman
Executive Director
kms
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 of the Commonwealth
Louis Lawrence Boyle, Esq., Department of State

**INDEPENDENT REGULATORY REVIEW COMMISSION
DISAPPROVAL ORDER**

Commissioners Voting:

Public Meeting Held November 6, 2008

Arthur Coccodrilli, Chairman, Dissenting
Alvin C. Bush, Vice Chairman
Nancy Sabol Frantz, Esq., Abstaining
Karen A. Miller
John F. Mizner, Esq.

Regulation No. 16-40 (#2665)
Department of State
Lobbying Disclosure Regulations Committee
Lobbying Disclosure

On January 9, 2008, the Independent Regulatory Review Commission (Commission) received this proposed regulation from the Department of State (Department). This rulemaking was adopted by the Lobbying Disclosure Regulations Committee (Committee) and adds 51 Pa. Code Chapters 51 to 69. The proposed regulation was published in the January 19, 2008 *Pennsylvania Bulletin* with a 30-day public comment period. The final-form regulation was submitted to the Commission on September 18, 2008.

We find that this final-form regulation exceeds the statutory authority of the Lobbying Disclosure Act (Act). 65 Pa. C.S. §§ 13A01 – 13A11. The final-form regulation would require registration and reporting of activities that do not require registration and reporting under the Act.

The Regulatory Review Act requires this Commission to “first and foremost, determine whether the agency has the statutory authority to promulgate the regulation.” 71 P.S. § 745.5b(a). When properly promulgated, a regulation has the full force and effect of law. Therefore, a regulation can only implement and specify the powers bestowed by its statutory authority. A violation of this regulation can result in criminal penalties, a \$25,000 fine and a prohibition from lobbying for five years. 65 Pa. C.S. § 13A09. Therefore, it would not be proper to impose these serious penalties on a person who violates the regulation written by the Committee, but not the Act that was approved by the General Assembly and signed into law by the Governor.

The first paragraph of our comments dated March 20, 2008, stated:

We find that portions of the [proposed] 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.

This comment was directed to the proposed regulation’s definition of the phrase “effort to influence legislative action or administrative action.” We included in that comment an extensive discussion of our interpretation of the Act and its limitations. In relation to retainers, we stated:

[T]he 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.”

Unfortunately, despite our extensive comments, we find that the final-form regulation continues the violation of the Regulatory Review Act criterion of statutory authority. 71 P.S. § 745.5b(a).

There is a strong framework within the Act that directly and consistently relates back to the statutory definitions of “lobbyist,” “lobbying firm” and “principal,” and to the definition of “lobbying.” 65 Pa.C.S. § 13A03. Contained within these definitions are two components that trigger registration and reporting under the Act, unless an exemption in 65 Pa.C.S. § 13A06 applies. First, under the statutory definitions of “lobbyist,” “lobbying firm” and “principal” the person or entity must engage in lobbying *for economic consideration*. “Economic consideration” is defined in 65 Pa.C.S. § 13A03 as “anything of value offered or received. The term includes compensation and reimbursement for expenses.”

Second, the actions have to meet the statutory definition of “lobbying.” In our extensive comments on the proposed regulation, we found that, under the Act, a communication is a tangible, proactive communication that is “written, oral or by any other medium” that is made to influence legislative or administrative action. Similarly under the Act, “office expenses” must be “utilized for lobbying” and 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.” The Act further defines many of the components of “lobbying,” including “legislative action,” “administrative action,” “direct communication,” “indirect communication,” “office expenses,” “gift” and “hospitality.” 65 Pa.C.S. § 13A03.

The Act does not define the phrase “effort to influence legislative action or administrative action.” In Section 51.1 of the final-form regulation, the Department amended its definition of that phrase to state:

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.

- (i) The term includes paying an individual or entity economic consideration for lobbying services.
- (ii) Monitoring of legislation, monitoring of legislative action or monitoring of administrative action is not lobbying. However, for an individual or entity that 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.

Paragraph (i), as written and explained by the Committee, would require registration and reporting when a payment or contract is made for “lobbying services,” irrespective of whether a

communication is made or is ever made to influence legislative or administrative action. The definition effectively amends the statutory definitions of “lobbying,” “lobbyist,” “lobbying firm” and “principal” by equating payment of economic consideration with an attempt to influence legislative or administrative action. Consequently, the regulation requires registration and reporting of actions that, under the Act, do not constitute “lobbying” and do not require registration or reporting.

Our concern with the definition of “effort to influence legislative action or administrative action” in Section 51.1 extends to registration provisions for lobbyists, lobbying firms and principals in Sections 53.4(a)(1), 53.3(a)(1) and 53.2(a)(1). These provisions also require registration upon engaging an individual or entity for lobbying services or paying economic consideration for lobbying services, without the actual act of “lobbying,” as defined in 65 Pa. C.S. § 13A03. We also find the phrase “lobbying services” lacks clarity because the regulation does not specify what constitutes “lobbying services.”

The Committee satisfactorily responded to our comment on monitoring by adding clarification in the final-form regulation that monitoring is not lobbying and only has to be reported when it occurs “in connection with activity that constitutes lobbying.” However, in regard to our comment on retainers, the Committee amended the language to include “paying an individual or entity economic consideration for lobbying services.” The Committee noted in the final-form submittal that 65 Pa.C.S. § 13A04(a) requires registration within ten days of “acting in any capacity as a lobbyist, lobbying firm or principal.” The Committee reasons that this is needed because limiting registration to within ten days of a communication could exclude disclosure of advanced payments. The Committee reasons this would enable persons to avoid registration or reporting requirements through the timing of payments.

We find the Committee’s reasoning to be flawed for several reasons. First, the phrase “acting in any capacity” cannot be divorced from the clear statutory limits of the following phrase “as a lobbyist, lobbying firm or principal.” Since the terms “lobbying,” “lobbyist,” “lobbying firm” and “principal” are all defined in 65 Pa.C.S. § 13A03, it is not proper to include in regulation some other “capacity” that is not in the statute.

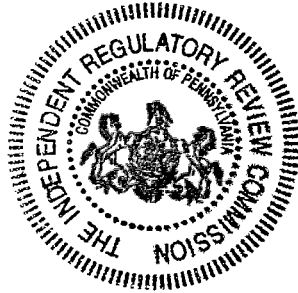
Second, the Committee advances its theory that registration and reporting could be avoided by the timing of payments. At our public meeting, the Pennsylvania Bar Association (PBA) offered a solution to the Committee’s concern that it believes falls within the Act. PBA believes that costs could be pro-rated to the time period when lobbying actually occurs. If the Committee’s concern is that registration and reporting could be avoided by the timing of payments, the Committee should give strong consideration to the PBA’s solution. If the Committee believes there are other activities that need to be reported, such as payments and retainers, without the actual act of lobbying, it should seek statutory amendments, as we recommended in our comments on the proposed regulation.

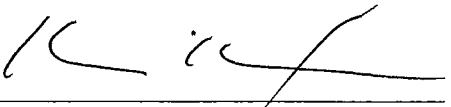
Finally, the Act delineates the circumstances and expenses that require registration and reporting. The only categories for reporting expenses specified by 65 Pa.C.S. § 13A05(b)(2)(iv) do not contemplate expenses related to anything but the specific activities listed in the definition of “lobbying” in 65 Pa.C.S. § 13A03. If the Committee believes other expenses need to be reported, it needs to seek statutory amendments for reporting them.

Based upon the information provided to us, we have determined this regulation is not consistent with the statutory authority of the Department (65 Pa.C.S. § 13A10(d)) and the intention of the General Assembly. We find promulgation of this regulation is not in the public interest.

BY ORDER OF THE COMMISSION:

This regulation is disapproved.





Kim Kaufman, Executive Director