Comments of the Independent Regulatory Review Commission

Department of State Regulation #16-56 (IRRC #3012)

Lobbying Disclosure Registration Fee

July 31, 2013

We submit for your consideration the following comments on the proposed rulemaking published in the June 1, 2013 *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 Department of State (Department) to respond to all comments received from us or any other source.

1. **Comments of the House State Government Committee – Legislative intent; Policy decision of such a substantial nature that it requires legislative review; Economic impact; Reasonableness.**

In a letter dated June 26, 2013, the House State Government Committee (Committee) said, in part, "Quite simply we believe that the proposed increase is excessive." The Committee's comments include the following points:

- The Committee questions whether legislators envisioned that the authority to adjust biennial fees granted by the law in 2006 would have been used to propose a 250 percent fee increase.

- The Department's statement that the fee increase may cause one-third of current registrants to drop their registration suggests that the excessive magnitude of the increase will have real and practical impact on individuals, businesses and other organizations that may desire to lobby their government.

- The Committee urges the Department to consider withdrawing the regulation.

We share the concerns raised in the Committee's comments. If the Department does not withdraw the regulation, the Department should reach consensus with the Committee prior to filing a final-form regulation.

If the Department chooses to proceed with this rulemaking, we raise the following additional concerns with this regulation.

2. Comments of House Democratic Leader Frank Dermody - Legislative intent; Policy decision of such a substantial nature that it requires legislative review; Economic impact; Reasonableness.

House Democratic Leader Frank Dermody submitted comments dated July 23, 2013. His comments explain several concerns with the fee increase, including the "exorbitant" amount of the increase and its effect on persons associated with nonprofit organizations and small membership-based advocacy groups with limited financial resources. He also questions whether the fee increase would pass constitutional muster as it may infringe on free speech rights and the rights of citizenry to petition their government. While his comments express support for the disclosure of lobbying, he submits that "the proposed fee increase is unconstitutional, unreasonable, contrary to the intent of the lobbying disclosure statute and, therefore, not in the public interest."

We will review the Department's responses to these concerns as part of our determination of whether the final-form regulation is in the public interest. In addition, the Department should reach consensus with Representative Dermody prior to filing a final-form regulation.

3. Communication with the regulated community. – Reasonableness; Compliance with provisions of the Regulatory Review Act.

Governor's Executive Order 1996-1

Regulatory Analysis Form (RAF) 14 asks the Department to describe the communications with the regulated community and list the specific groups involved. The Department responded:

> The Department did not seek input from the public or other groups because the Department's lobbying disclosure budget is an administrative function. Additionally, it is necessary for the Department to raise the registration fee so that it may defray its costs of administering the act.

Governor's Executive Order 1996-1 requires that "regulations shall be drafted and promulgated with early and meaningful input from the regulated community." In addition, this order states in Section 3 (Pre-Drafting and Drafting Guidelines) that "agencies, where practical, shall undertake extensive public outreach to those who are likely to be affected by the regulation." See Governor's Executive Order 1996-1, Sections 1.h. and 3.a.

We strongly disagree that raising fees by regulation is an administrative function that does not require communications with the regulated community. The amount of public comment on the proposed regulation and the issues raised in those comments demonstrate the importance and value of their input and perspectives. Why did the Department see no need for "early and meaningful input from the regulated community," as directed by Governor's Executive Order 1996-1?

Public comments

The public commentators oppose the fee increase and raise issues that include:

- Many groups can barely put together enough money to maintain a part time lobbyist and may discontinue lobbying. Forcing groups out of participating in the legislative process is bad policy.

- Increased fees could prevent lobbying activities by small businesses.

- Advocacy groups do not have clients and do not bill for their services. They can only absorb the fee increase by decreasing their services.

- Heavily regulated industries must hire lobbyists to monitor legislation and represent their interests. The fee increase will make that vital function more expensive.

- The fee increase is a significant burden on small lobbying efforts, particularly for non-profit organizations.

- This dramatic increase is a disincentive for citizens to engage in the democratic process. Many organizations will face the difficult decision of whether to engage in lobbying along with its costs or forfeit their right to engage in public policy making.

- The fee increase could create barriers to transparency.

- Several commentators suggest implementing a fee schedule with different rates such as a sliding scale fee.

We strongly recommend that the Department meet with the regulated community prior to submitting a final-form regulation to resolve and reach consensus on the many concerns raised with the fee increase.

4. Balancing the provisions of the Lobbying Disclosure Act. – Legislative intent; Reasonableness; Protection of the public health, safety and welfare.

The Lobbying Disclosure Act (Act) includes the following statement of intent:

> . . . 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.

The Act set an original fee of $100 for registration and allowed for increases in that fee. The Act also provides exemptions and inflation of the dollar amount threshold for exemptions. See 65 P.S. §§ 13A02(a) and 13A08(j).

The Committee has commented that the fee increase is simply too much. Additionally, counsel to Senator Joe Scarnati commented that when the Act was developed, there was little to no discussion of setting the registration fee at an amount that would cover the entire cost of administering the program.

Several commentators stated that lobbying efforts will be curtailed or possibly eliminated if the fee is increased to $700. Some commentators describe the increase as unconstitutional because it would limit their right to free speech. The Department itself assumes in RAF 19 that one third of current registrants will drop their registration. Based on the comments, it appears that the fee increase will curtail the disclosure that the Act has accomplished to date. Why is this result in the public interest? The Department should provide an explanation justifying how it has balanced the fee increase with the rights of individuals to express their views in the legislative process and "the public disclosure of the identity and scope of activity of those who are paid to influence the actions of the General Assembly and the Executive Department."

5. Revenues and costs – Consistency with statute; Fiscal impact; Reasonableness.

The Department's authority for this regulation is Subsection (j) *Inflation adjustment* of 65 P.S. § 13A08 which states, in part:

> . . . On a biennial basis commencing in January 2009, the department shall review the filing fee established under section 13A10 (relating to registration fees; fund established; system; regulations) and may by regulation adjust this amount if the department determines that a higher fee is needed to cover the costs of carrying out the provisions of this chapter . . . .

We have several questions and concerns relating to the documentation provided with the proposed regulation in support of the determination that "a higher fee is needed to cover the costs of carrying out the provisions of this chapter." We ask the Department for supporting documentation of total dollar amounts it has used for annual and biennial periods. We request a breakdown of the dollars by activity to show how the dollars are spent. In addition, as explained below, the Department should review all of the cost and revenue estimates it presents in the final-form regulation to make sure the numbers are sufficiently explained and are consistent.

Costs of carrying out the provisions of this chapter

Several commentators suggested that the Department should minimize costs before passing the costs onto the regulated community by raising fees. A commentator alleges that the Department has selected vendors that resulted in cost overruns and delays in implementing the electronic system. Another commentator questions whether all expenses related to carrying out the Act are necessary and believes there is a significant overlap in audit activities. The Department should provide an explanation demonstrating that the expenses exclusively represent the costs of carrying out the provisions of the Act and what the Department has done to reduce expenses to the greatest extent possible before imposing a higher fee on the regulated community.

Projected revenues

In response to RAF 19, the Department states that it "assumes that as many as one-third of the individuals and entities currently registered will not seek to register when the new fees go into effect in the 2015-2016 registration period." How did the Department calculate this one-third assumption? How did the Department incorporate this assumption into the fee increase, revenue and expense dollar estimates shown elsewhere in the RAF and Preamble? Did the Department

evaluate the cost effectiveness of losing a third of registrants and their revenue due to the magnitude of the fee increase?

Reconciliation of revenues

In response to RAF 19 the Department estimates regulated entities will incur an additional cost of $1,349,500 for the 2015-2016 registration period. However, RAF 23 appears to show an increased cost to the regulated community of $2,210,600. The Department should reconcile these amounts in the RAF submitted with the final-form regulation.

Reconciliation of expenditures

In response to RAF 18, the Department provides the following example of spending:

> . . . for the 2011-2012 biennial registration period, the Department spent approximately $1,800,394 to administer the act and received approximately $733,879 in registration fees. The balance, approximately sixty-three percent (63%) of the total expended, was financed from the General Fund . . . .

In regard to fees, RAF 18 also includes a table that shows a figure of $665,000 of funds used from the restricted account, not the $733,879 fee figure in the example. What accounts for the difference between the fees received and the funds withdrawn from the restricted account?

In regard to overall expenditures, RAF 18 states that $1,800,394 was spent to administer the program for the 2011-2012 biennial registration period. However, RAF 23a, which asks for an expenditure history, does not demonstrate expenditures for any two years that totals to $1,800,394. For example, the expenditures for FY-1 ($832,834) and FY-2 ($853,622), when added together equal $1,686,456, not $1,800,394. We ask the Department to reconcile the amounts presented in RAF 18 and RAF 23a.

6. Threshold for registration – Legislative intent; Economic impact; Exemption for individuals or small businesses; Less costly or less intrusive alternative for small businesses; Reasonableness.

RAF 27, in part, asks the Department to explain:

> In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses . . . .

The Department response includes the statements that the Department did not consider less stringent reporting requirements for small business, and the Act already includes exemptions.

The Act, at 65 P.S. §§ 13A06(4), 13A04(6) and 13A05(d), specifies exemptions from registration and reporting for activities that do not exceed $2,500 in value in a reporting period. The Department included the $2,500 thresholds in its regulation at 51 Pa. Code §§ 55.1(a), 55.1(b), 57.2(a)(4), and 57.2(a)(6). These thresholds have not been increased above the original statutory amount of $2,500 established in 2006 by the Act.

Subsection (j) *Inflation adjustment* of 65 P.S. § 13A08 states, in part:

> On a biennial basis commencing in January 2009, the department shall review the threshold under section 13A06 (relating to exemption from registration and reporting) for registration under section 13A04 (relating to registration) and the threshold for reporting under section 13A05(d) (relating to reporting) and shall increase these amounts to rates deemed reasonable for assuring appropriate disclosure . . . .

At this point in time, the Department has reviewed the thresholds three times, in January of 2009, 2011 and 2013. In addition, the Department has gained experience relating to "assuring appropriate disclosure" through the reports that have been filed over several years.

The Department should justify why it has not increased the thresholds. The $2,500 thresholds effectively are more stringent today than the original thresholds specified in the statute because they have not been increased to reflect inflation. As a result, entities that could be exempted may be incurring unnecessary costs to register, prepare reports and pay fees and the Department may be incurring unnecessary costs to regulate them.

The Department should explain how the original thresholds specified in the Act of $2,500 are reasonable today, the details of how the Department has determined the original $2,500 thresholds continue to be "deemed reasonable for assuring public disclosure," and how the Department has met the statutory requirement and intent to review thresholds as required by 65 P.S. § 13A08(j).