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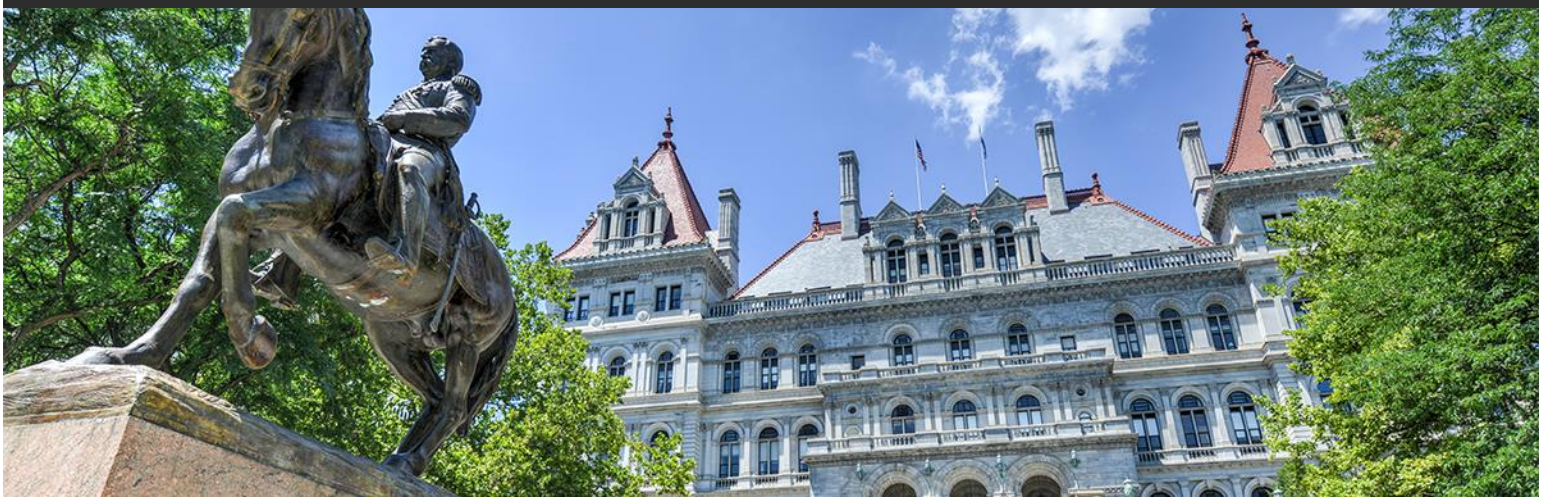

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NY's Comprehensive Lobbying Regulations Take Effect: A Summary of the Top Compliance Obligations for Those Interacting With Government in New York

After more than a year of public comments and deliberation, the New York State Joint Commission on Public Ethics (JCOPE) "Comprehensive Lobbying Regulations"[1] (the Regulations) will take effect on Jan. 1, 2019.[2] The Regulations largely codify existing practices, procedures, and decades of advisory opinions from JCOPE and its predecessor agencies. More importantly, however, the Regulations clarify how JCOPE will interpret various provisions of the Lobbying Act[3] and impose new standards for evaluating lobbyist registration and reporting obligations. This GT Alert summarizes the most significant changes and highlights steps that covered persons can take to ensure continued compliance.

[1] *See, generally,* 19 NYCRR 943.
[2] On Nov. 28, 2018, several petitioners commenced an action in the Supreme Court, Albany County, seeking to declare the new regulations null and void, and to enjoin enforcement of the Regulations. As of early December 2018, the court had not ruled on the application and, thus, all affected parties must comply with the Regulations as adopted.
[3] *See, generally,* Legislative Law Article 1-A.

Registration and Reporting

- Lobbyist bi-monthly and client semi-annual reports will require more detailed information, including:
  - Filers will need to distinguish between direct and indirect lobbying.
  - Direct lobbying disclosure requires identification of the name of the public official or public official's office or committee with whom the lobbyist engaged in direct communication. It will no longer be sufficient to simply report that the lobbying target is the Assembly, Senate, or Executive.
  - Grassroots lobbying disclosure must include the name of the target, or the agency, municipality, or legislative body.
  - Where appropriate, filers will need to identify whether there is a coalition or other collaborating lobbyist involved the lobbying effort.
  - Reports will include greater detail of the relevant activity, including where the work completed involves seeking to influence the introduction of a bill or resolution.
- Lobbyists retained by one entity on behalf of another entity will be required to disclose both the "**beneficial client**" (the entity that receives the benefit of the lobbying effort) and the "**contractual client**" (the entity that enters into the lobbying contract with the lobbyist).
- **Coalitions** (otherwise unaffiliated entities that join in a common lobbying effort) must either register and report as a coalition (i.e., the coalition registers as the lobbyist and files bi-monthly reports on behalf of all members of the coalition) or, if the coalition is not registered, each member of the coalition whose lobbying expenses exceed $5,000 must separately register;
  - If the coalition is reporting on behalf of its members, the coalition must submit a questionnaire to its members to determine whether any of them are expending more than $5,000 on the coalition's lobbying effort. Members that reach this threshold will need to be reported on the coalition's JCOPE filings.
  - Members of the coalition that expend more than $5,000 on lobbying (other than what is paid for the benefit of the coalition) must separately register as a lobbyist, regardless of whether the coalition has identified the entity on the coalition's filings. If the coalition does not file a consolidated report, the expenses incurred by each entity for the coalition lobbying effort must be aggregated with any other lobbying expenses that the member incurs to determine if the entity has an independent registration obligation.
  - Coalition members that exceed the $5,000 threshold are subject to the gift restrictions of the Lobbying Act, even if the member does not have an independent registration obligation.
- The Regulations reiterate the finding of JCOPE's Advisory Opinion 16-01.
  - Consultants that make **preliminary contacts**/engage in **"door opening"** will be required to register as lobbyists if the compensation and expenses in support of the client's underlying lobbying effort exceed $5,000.
    - The following preliminary contacts with public officials will be considered lobbying if the individual making the preliminary contact "knows or has reason to know that the Client will Attempt to Influence a Public Official on a matter covered by the Lobbying Act": (i) scheduling a phone call or a meeting for the client with a public official; (ii) introducing a client to a public official; or (iii) any other contact with a public official on behalf of the client.
    - Those contacts will not be considered lobbying, however, if the person who schedules a meeting or places a call does so in a purely administrative capacity.

- **Grassroots lobbying** is clarified to mean a lobbying activity that takes a clear position on an issue and includes a call to action. Thus, if an individual meets with members of an organization to urge the members to call their legislators to support passage of a bill, it would constitute grassroots lobbying, and the individual would be a lobbyist.
  - If the individual meets with members of an organization to talk about a bill, but does not ask the members to speak with their legislators (or other public officials), it would not be a lobbying activity.
  - Public relations firms that help develop the message of a lobbying communication, but do not deliver the message, are not engaging in lobbying (but must be reported as an expense of the lobbying effort by their client).
  - Similarly, if an entity simply delivers the message but does not take part in its development, the delivery of the message would not make the entity a lobbying entity. For example, a magazine publisher that simply publishes a lobbying ad is not, by that fact alone, a lobbyist.

- **Social media activity** can constitute direct or indirect lobbying (requiring registration).
  - If social media is used to direct a lobbying message to a covered government official's social media account, linked to an account owned or controlled by a government official, or knowingly targeted to the account of staff of a covered official, the communication will be treated as direct lobbying.
    - Employees of lobbyists who make direct contact with a public official through tagging, personal messaging, or posting to a public official's web page, or similar activity, are engaging in lobbying activity unless the direct contact is not aimed at public officials, but rather is part of a social media campaign aimed at a wide audience.
  - In contrast, when a social media account is used to direct readers to call their legislators to support certain legislation, the individual or entity engaged in this social media activity is involved in grassroots lobbying.
  - Expenses of a social media lobbying campaign (including expenses of individuals acting on behalf of an organization) are reportable as lobbying expenses.
- Lobbying activity by **unpaid board members/officers; volunteers;** and paid employees who only attend a **lobby day**.
  - Unpaid board members and officers must be identified on the entity's lobbyist statement of registration if those individuals engage in lobbying on behalf of the entity. The fact that the board member or officer is unpaid does not exempt them from disclosure.
  - Activity by individuals who attend a lobby day does not need to be captured if the individual is neither on the organization's board nor a paid employee.
  - An employee of an organization that coordinates a lobby day "is engaged in *Direct Lobbying*" and *must be listed* as a lobbyist for the organization if: the employee makes direct contact with a public official as part of the employee's duties; and speaks on behalf of the organization at the lobby day.
- **Procurement Lobbying** clarified.
  - Lobbying contacts during the restricted period are permitted, but only to the designated contact.
  - Business Development activity does not constitute lobbying until the governmental entity determines that it wants to procure the subject of the lobbying activity.
  - "Commission sales persons" remain exempt from registration requirements, but will only qualify for this exception if:

    - the primary purpose of the individual's employment is to cause or promote sales to government;
    - the individual is either an employee or independent contractor for a term of at least six months; and
    - that person is compensated or intended to be compensated, in whole or in part, by the payment of a commission of at least 50 percent of the number of New York governmental sales induced by the salesperson.
  - Technical experts may also be exempt from registration, but only if the individual's role is limited "to explain[ing], clarify[ing] or demonstrat[ing] the qualities, characteristics or advantages" of the procurement item, and does not recommend or advocate for the purchase.
- Communications that are direct but **not considered lobbying**.
  - An individual will not be considered to have engaged in lobbying if he or she attended a meeting simply to provide **technical information** or address technical questions, or to provide **clerical or administrative** assistance (including audio/visual, translation or interpretation, and sign language), or for **educational** purposes, provided that the individual does not play any role in the strategy, planning, messaging, or any other substantive aspect of the lobbying effort.

Contingent Fee Prohibition Clarified

- Payment for lobbying services with stocks, bonds, etc. is a per se violation of the contingent fee ban, but JCOPE will review such arrangements upon request and, if convinced that the arrangement is not a subterfuge for a contingent fee, may approve the payment.

Training

- Lobbyists who register for the first time will be required to take the statutorily required online lobbyist training program within 60 days of registration; thereafter, all lobbyists must complete the online training every three years.

To fully implement the Regulations, JCOPE revamped its filing systems and established a new "Lobbying Application." To accommodate the new information required for registrations and reports, the new filing system will be effective beginning in 2019 for all registrations and all subsequent lobbyist bi-monthly and client reports. This is a major overhaul of JCOPE's systems. Expect technical glitches and growing pains as the new system is implemented, and filers should anticipate that it may take longer to prepare registration documents. Beginning in 2019, lobbyists need to keep track of lobbying targets with whom they communicate, whether through direct lobbying or social media communications.

GT's New York State Political Law & Compliance Practice is well-versed in the new regulations and provides legal counsel and assistance with questions regarding the coverage of the Lobbying Act. In addition, GT assists clients with their reporting requirements under New York State's Lobbying Act, the New York City Lobbying Law, and other state obligations regarding lobbying compliance.

About Greenberg Traurig's New York State Government Law & Policy Practice

Greenberg Traurig's New York State Government Law & Policy Practice comprises lawyers and lobbyists in the firm's Albany office who have spent years solving real-world problems in the business, political, and legal environments. The team represents a wide range of clients, from small and medium businesses to Fortune 500 companies, nonprofit organizations, trade associations, political parties and committees, and other entities, in legislative and regulatory matters. Complemented by a team in New York City, the team

has been consistently ranked among the top five law firm lobbying practices in New York State, by the Joint Commission on Public Ethics, and its predecessors.

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