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Alert | Political Law & Compliance

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JCOPE Again Amends NY Comprehensive Lobbying Regulations; Mandates Recertification of Filer IDs; Delays Deadline for January 2021 Filings

On Dec. 2, 2020, the New York Joint Commission on Public Ethics (JCOPE) issued an emergency rulemaking clarifying rules the agency had promulgated in January 2019. The new rules are effective Jan. 1, 2021, the start of the new biennial registration period. For the most part, the rules codify existing practices and agency decisional precedent. They also, however, provide important new guidance for entities that combine efforts as "coalitions." In addition, JCOPE is using these rules to clarify:

- Source of Funding (SoF) disclosure requirements;
- reporting requirements relating to lobby days, lobbying through social media, and grass roots lobbying;
- Lobby Day reporting; and,
- the application of the state's ban on contingent fees for lobbying with respect to compensation that includes an equity interest in the client.

Less than two weeks after issuing the emergency rulemaking, JCOPE advised the regulated community that the State Lobbying Application should be available beginning Dec. 16 in order to start preparing filings for 2021, but that for the first time, "[f]ilers will be required to verify their email addresses and recertify their user and organization profiles before filings may be submitted in the JCOPE Lobbying Application." However, JCOPE also has provided a bit of a reprieve, notifying lobbyists and clients of lobbyists that "[d]ue to the breadth of the changes to the lobbying regulations (effective January 1, 2021) and the corresponding changes to the online filing system, any filing due in January 2021 will be considered timely if submitted by January 29, 2021." This GT Alert provides a high-level summary of the new lobbying regulations.

Amendments to Comprehensive Lobbying Regulations

A. Coalition Filing Requirements. Pursuant to the JCOPE regulations that have been in effect since 2019, coalitions are groups of otherwise-unaffiliated entities or members that pool funds for the primary purpose of lobbying. Since then, there has been some confusion as to whether the lobbyist registration and disclosures should be completed by the coalition itself, or its membership. The revised regulations clarify that if a coalition's efforts meet or exceed the $5,000 expenditure threshold the registration must be completed: (i) by the coalition if it is "structured," but by the individual members who meet the threshold if the coalition is "unstructured." Notably, the new regulations make it clear that the potential filer will never be considered a "coalition" if it has "incorporated or otherwise created a legal entity."

1. **Structured Coalitions**. The new regulations define a "structured coalition" as a "coalition that designates an individual to serve as its President, Treasurer, or in such capacity." Furthermore:

   – A structured coalition that meets the threshold must file its own lobbying reports disclosing compensation and expenses related to the structured coalition and any expenses incurred by a member on behalf of the structured coalition.

   – All filings of the structured coalition, as well as filings by lobbyists retained by the coalition, must list the structured coalition as the Contractual and Beneficial Client of the coalition; the members, however, should not be identified as beneficial clients.

   – Contributions by members of the structured coalition are excluded from any calculation to determine whether a coalition member has met the $5,000 threshold triggering a separate registration by the coalition member.

   – Structured coalition members that are separately registered as lobbyists should not include any of the member's contributions to the coalition on the member's own filings.

2. **Unstructured Coalitions**. Pursuant to the new regulations, a coalition that has not designated an individual to serve as its President, Treasurer, or in a similar capacity, is considered an "unstructured coalition" and shall not file its own lobbying reports. Members of an unstructured coalition that meet the registration threshold must disclose their contributions to the coalition in their own lobbying reports.

   – Unlike with a structured coalition, an unstructured coalition member's contribution to the coalition is considered a lobbying expenditure for purposes of the member determining whether it has met the $5,000 threshold triggering reportable lobbying.

- Members of unstructured coalitions that are subject to JCOPE's registration and disclosure obligations must include their coalition expenses plus any other unrelated lobbying activity expenses in their JCOPE filings.
    - A member of an unstructured coalition that already is obligated to file a Client Semi-Annual Report must disclose its unstructured coalition contributions in that report.
    - If a member of an unstructured coalition does not otherwise have an obligation to file a Client Semi-Annual Report, but its contributions to/expenses incurred on behalf of the unstructured coalition trigger disclosure, it must complete its own registration and file subsequent reports that include the member's unstructured coalition contributions and identify itself as the Contractual Client and Beneficial Client.
- Members of an unstructured coalition that are subject to registration with JCOPE must include on their disclosure reports:
    - the name of the unstructured coalition;
    - contributions to and expenses incurred on behalf of the unstructured coalition; and,
    - any expenses incurred by the member on behalf of the unstructured coalition, regardless of whether the funds are from the member's own direct contributions to the coalition or from the unstructured coalition's pool of funds.
        - For each such expense:
            - the purpose of the incurred expense; and
            - whether it was incurred using 100% of such member's own funds (considered a direct contribution), or a portion of such member's funds (such portion also considered a direct contribution) and a portion of the unstructured coalition's pooled funds.
- Lobbyists retained by a member of an unstructured coalition to lobby on behalf of a coalition must disclose that member as the Contractual Client and the Beneficial Client.

B. Reporting of Social Media and Other Grassroots Activity. The new regulations clarify that when a lobbying entity uses "the organization's social media account(s)" to lobby a public official, that activity is reportable lobbying activity by the organization. In contrast, if an individual – including a lobbying organization's employee – uses "their personal social media account(s)," the employee's activity is reportable only if the employee's duties include social media activity or the individual was otherwise "specifically retained . . . for such social media activity."

Similar changes have been made with respect to employees engaging in grassroots lobbying. The regulation now expressly states that grassroots lobbying will not trigger an obligation to identify an individual lobbyist unless that individual is otherwise "a Retained Lobbyist . . . or is retained or compensated specifically for social media activities." Additionally, JCOPE is now clear that when an individual engages in grassroots lobbying on his or her own behalf and incurs expenses to publish that grassroots lobbying communication, the individual will need to register as a Designated Lobbyist.

C. Lobby Day Reporting. The new regulations clarify that volunteers or "mere members" of a lobbying organization who attend meetings with public officials do not need to be disclosed unless the employee has been designated to speak on behalf of the lobbying organization. Lobby day expenses (e.g., bus transportation, meals provided to volunteers, signs, placards) must be reported by the organization paying for such expenses.

D. Contingent Fee Prohibition: Stock or Equity Payments for Lobbying Activity. Generally, the statutory prohibition against contingent fee arrangements for lobbying engagements has been interpreted to prohibit lobbying contracts where the compensation consists in whole or in part of an equity interest (including shares of stock) in the client. The 2019 version of JCOPE's regulations somewhat eased this interpretation by providing that such arrangements were presumed to be impermissible when paid to Retained Lobbyists, unless there was a showing that the value of the stock or equity was not directly dependent on the outcome of the lobbying. The 2020 version of the Regulations clarifies this analysis by setting out factors that, if present, mandate a finding of a violation of the prohibition or that mitigate in favor of a finding that the proposed compensation is permissible. If a lobbyist submits an application to JCOPE to approve any stock or equity payments for lobbying activity, JCOPE will, among other things, consider:

- the diversity of product or business lines in the Beneficial client's operations and the relative size or importance – to the beneficial client – of the product or business that will be impacted by the governmental action;
- the specific governmental action in Lobbying Act section 1-c(c) that the lobbyist is attempting to influence;
- if the lobbying activity includes any attempt to influence a state or municipal Governmental Procurement;
  - the value of the procurement relative to the total capitalization of the beneficial client;
  - any history of being awarded similar procurements.
- whether stock is publicly traded or closely held;
- whether the lobbying activity addresses a lobbying firm's entry or continued access to a geographic, demographic, or product market;
- the impact of the governmental action on the beneficial client versus on similarly situated competitors; and
- any significant trading activity or changes in price, appraisal, or valuation over the preceding 12 months.

The new regulations also provide a quasi safe-harbor for employed or designated lobbyists (i.e., lobbyists who are part of the organization that is lobbying but are not employed or retained for such services, such as board members, directors, or officers) by providing that stock or equity compensation to Employee or Designated Lobbyists is permissible, unless the number of shares, relative size of the equity interest offered, or any aspect of the lobbyist's shareholder rights – including seniority, conversion, and other options – depend on the outcome of the lobbying.

Source of Funding Regulations – Funds Earmarked for Use Outside NYS

JCOPE has also amended its SoF rules, beginning with the 2021 filing year. The new rules are nearly identical to those in effect for prior filing years, except for one significant change relating to the contributions that are earmarked for use outside New York state.

New York has long-required lobbyists and clients of lobbyists that meet certain thresholds disclose the sources of funds contributed to the entity by third parties. "Contribution" in this context means any payment to or for the benefit of the client filing the disclosure, including related corporate entities. The regulations now clarify that both Contractual Clients and all Beneficial Clients must complete SoF reports.

The revised regulations carry over the existing carve-out for payments made in exchange for goods or services provided directly to the entity or individual. However, the new regulations now provide another exception for funds earmarked for a specific purpose other than lobbying activity in New York, but only where such funds are maintained in a segregated account that cannot be used for general operating expenses of the entity. The regulations emphasize that to qualify for this exception, the payor must not only restrict a payment from being used for lobbying in New York but also earmark the payment for the specific non-New York state purpose.

The SoF regulations were also amended to clarify that a source of funding cannot be reported as "anonymous" unless the client filer affirms that the client filer is not able to determine the identity of the source.

Completing Required Disclosures for 2021

In mid-December, JCOPE blasted out a series of emails regarding changes made to the JCOPE Lobbying Application (LA). JCOPE sent these messages to any individual listed in the LA as an organization's: (i) lobbyist, (ii) Chief Administrative Officer (CAO), or (iii) Delegated Administrator (DA). This mass distribution has caused some confusion in the regulated community. Individual lobbyists who do not have a need to access the LA system because they are not involved in the actual preparation or submitting of disclosure reports do not have to take any action at this time. In contrast, the listed CAO and/or DA MUST click the link provided in the email and re-certify the contact information. If the CAO/DA fail to re-certify the organizational profile and contact information, no bi-monthly reports, client semi-annual reports, or registrations for 2021 will be able to be filed timely. Regardless, it is helpful that JCOPE has delayed the deadline for filing the final 2020 bimonthly and client semiannual reports until Jan. 29.

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

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.

GT'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.