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NYS JCOPE Adopts Opinion Expanding Definition of Lobbying Activity to Include Activities Traditionally Considered as Non-Lobbying Consultant/Public Relations Services

On Jan. 26, 2016, the New York State Joint Commission on Public Ethics (JCOPE) formally adopted two Advisory Opinions that will affect government officials and individuals who interact with government or otherwise provide services to entities engaged in lobbying activity. This Alert focuses on Advisory Opinion 16-01 (the Opinion) under which JCOPE will now treat certain public relations and communication consultants as lobbyists subject to the State's registration and disclosure obligations. The Opinion addressed two different categories of activity: (i) grassroots communications and (ii) direct interactions with government by individuals in order to facilitate other individuals or entities to make lobbying contacts. This Alert summarizes the Opinion, and explains what activity is and is not covered by this new interpretation of the Lobbying Act.

Grassroots Communications and Interactions with the Press

As noted above, JCOPE Advisory Opinion 16-01 addresses two major topics. The grassroots component of the opinion answered the question "[m]ust consultants who create and implement grassroots lobbying campaigns on behalf of clients themselves register as lobbyists?" This is not the first time a New York State lobbying regulator has attempted to address the issue of grassroots lobbying. In fact, for more than three decades, the State has held that "lobbying included not only direct contacts with a public official, but also exhortations to the public to contact the public official, *i.e.*, a call to action." Thus, despite a variety of legal challenges, it has long been understood that a consultant need not directly communicate with a public official in order to be deemed to be engaging in lobbying activity. The now-defunct predecessor to JCOPE, the State Temporary Commission on Lobbying (the Commission) repeatedly explained that "[a]dvertisements, fliers, pamphlets, and similar documents, as well as billboards and messages broadcast over radio or television, which are

distributed or otherwise disseminated to the public, which is addressed to specific pending legislation, and which urge or exhort the public to contact legislators or the governor to pass, defeat, delay, approve, or veto such legislation constitutes 'lobbying activities' within the purview of the [New York State] Lobbying Act." The Commission also determined that a communication that "never specifically lists or identifies . . . bill numbers," but nonetheless urges "grassroots lobbying effort[s] in regard to pending legislation," would be considered lobbying activity.

Notwithstanding the foregoing, the Commission also advised that consultants who assisted in the production of a grassroots call-to-action communication would not necessarily be deemed to have engaged in lobbying activity. Rather, as explained in an opinion from 1997, "[l]obbying activity requires some participation in both message content and delivery. A company that has complete control over mailing in furtherance of a grassroots lobbying effort would be a lobbyist only if that company participated in the formation of the message itself or was given some control over reviewing or editing the client's message."

The old opinions, however, left some of the regulated community asking for greater clarity as to what is considered grassroots lobbying. As a result, JCOPE issued A.O. 16-01, but, significantly, JCOPE has now taken a more nuanced view of the Commission's 1997 opinion in explaining what third-party communications are considered lobbying. Specifically, JCOPE now asserts that grassroots communications constitute lobbying activity if the communication:

1. References, suggests, or otherwise implicates an activity covered by [the] Lobbying Act [definition of "lobbying" or "lobbying activities," e.g., attempting to influence legislation, regulation, etc.];
2. Takes a clear position on the issue in question; and
3. Is an attempt to influence a public official through a call to action, *i.e.*, solicits or exhorts the public, or a segment of the public, to contact (a) public official(s).

Moreover, in explaining how this standard applies to consultants engaging in grassroots communications, JCOPE reiterated that lobbying occurs "if the consultant controlled the delivery of the message and had input into its content," but now provides a detailed definition of "***control of the delivery***," and "***input into the content***," along with some specific examples and exceptions.

- "***Control of the delivery***" requires "participation in the *actual* delivery of the message to the audience, whether verbally or in writing." In order for a consultant to be considered to have "control of the delivery," the "speaker/author should be identifiable as a person/entity distinct from their client," but is nonetheless "speaking for the client's benefit."

- "***Input into the content***" is more succinctly defined as "participation in forming the message[;] . . . shaping the content of the communication."

In providing examples of how this standard is to be applied, JCOPE noted that a "public relations consultant who contacts a media outlet in an attempt to get it to advance the client's message in an editorial would also be delivering a message," and therefore potentially engaged in lobbying activity. In contrast, communications between an entity's spokesperson and a reporter who is gathering information or seeking comments for a story, would not be considered lobbying communications. Similarly, based on the definition of "control of the delivery," JCOPE appears to be taking the position that where a consultant merely ghost writes an advertisement that expressly includes a lobbying call to action – but does not identify the consultant in any way – and then places the advertisement with some media outlet, the consultant would *not* be deemed a lobbyist. Where, however, a consultant develops and delivers a letter to the editor that exhorts the public to take action, or communicates with a newspaper columnist to write an opinion piece, the communications would be lobbying activity that could trigger a registration obligation.

There has been much criticism in the press regarding the applicability of this new standard to public relations consultants who deal with the media. In response to these concerns, JCOPE sought to draw a line between consultants who speak with individual reporters (not lobbying) and attempts to influence an editorial board to write (or not write) on an issue (lobbying). Nevertheless, many questions have been raised. For example, is JCOPE's interpretation inappropriately causing

individuals who interact with the press to disclose advocacy efforts? Does such disclosure in this context chill free speech? JCOPE relies on the seminal 1954 United States Supreme Court case United States v. Harriss, which held that the federal lobbying law did not significantly burden the First Amendment right of free speech. However, JCOPE's new interpretation of the Lobbying Act goes beyond Harriss because, for the first time, it imposes registration and reporting obligations that arise out of interactions with the press. Under evolving First Amendment jurisprudence, this may well be constitutionally suspect.

Introductions and Door Opening

Under the Lobbying Act, for an individual to be deemed a "lobbyist" engaged in "lobbying activity," he or she must be "retained, employed or designated by any client to" engage in one of the types of activities identified in § 1-c(c) of the Act, and have either direct or indirect contact with a covered public official. Predecessor commissions have noted that "direct contact" is not limited to face-to-face interactions; it also includes "written and printed communications, telephone contact, e-mail or any other electronic means of communication." JCOPE's A.O. 16-01 takes this analysis a step further and expressly states that "reportable lobbying includes preliminary contact made with public officials to enable or facilitate the ultimate advocacy," even if there is no attempt to influence a covered government activity. Thus, JCOPE has taken the position that communications made solely to facilitate another individual's ability to meet with and "lobby" the public official, would be considered lobbying as well. Similarly, if a consultant hired to only make an introduction, or to accompany a client to a lobbying meeting, in order to help facilitate the meeting, that individual's sheer presence could be considered lobbying. Much like the individual interacting with editorial boards on behalf of a client seeking to influence one of the covered lobbying activities, this consultant who is assisting in facilitating a lobbying contact, will now be expected to register and disclose as a lobbyist.

Conclusion

For many consultants, JCOPE's interpretation is a departure from past practices and may result in individuals and entities who previously considered themselves solely to be media, public relations, communications, or political consultants, now being required to register and disclose information in the same fashion as all other lobbyists. Similarly, these individuals would now be barred from accepting compensation on a contingency basis. Thus, unless this interpretation by JCOPE is successfully challenged, affected consultants should swiftly take steps to comply with the Lobbying Act.

Greenberg Traurig's Government Law Compliance Practice is available to assist with questions regarding New York City and State's lobbying, ethics, and election laws – including this new interpretation by the Joint Commission on Public Ethics. Greenberg Traurig has a broad range of experience in New York City and State, and provides advice to some of the world's leading corporations, lobbying firms, public officials, candidates, advocacy organizations, and others who seek to navigate New York's complex political law compliance requirements.

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