

Lobbying Regulation in New York State

By Mark Glaser

Introduction

New York State first required lobbyists to register and disclose their efforts to influence legislation nearly one hundred years ago, in 1906.¹ Proving, once again, that the more things change, the more they stay the same, the first person to register under the 1906 law was the Reverend A. S. Gregg, who represented the “International Reform Bureau of Washington” and was retained to lobby for an anti-gambling bill that would make gambling a felony within “racetrack inclosures.”² The 1906 law required that lobbyists register with the Secretary of State, and, at the end of the legislative session, disclose their expenses.³ This law remained in effect for seventy-one years until 1977 when the Temporary State Commission on Lobbying (the “Temporary State Commission”) was created to receive lobbying filings and to issue advisory opinions on the application of the lobbying law.⁴ Subsequent to the 1977 law, what is now the Lobbying Act was amended numerous times, nearly each time creating new regulatory bodies to regulate the lobbying industry in response to a perceived scandal.

Today, the New York State Lobbying Act covers activities far beyond the realm of legislation, regulating “lobbying activities” before New York State government—a term that is very broadly defined—and jurisdictions with a population of 50,000 or more. In addition, New York City has its own extensive lobbying regulatory structure,⁵ and Suffolk County also has a local law pertaining to certain lobbying activities before the County.⁶

This article reviews the provisions of the New York State Lobbying Act, its breadth, disclosure requirements, and the many restrictions imposed on lobbyists and clients of lobbyists. As is highlighted below, a determination of whether an activity constitutes lobbying, or is reportable, depends on the specific facts of the particular situation. Thus, individuals and entities that interact with State or local government must always be cautious in determining whether an activity is, in fact, regulated lobbying activity. It is important to note that the information provided below is informed by advisory opinions and guidance documents issued by the former Commission on Public Integrity, the Commission on Lobbying and the Temporary State Commission. In 2011, the Public Integrity Reform Act



of 2011 was enacted, creating the new Joint Commission on Public Ethics (sometimes referred to herein as “JCOPE” or the “Commission”).⁷ JCOPE is required to examine prior guidance and advisory opinions and to determine whether such advice is consistent with law. Although JCOPE may, on a going forward basis, revise prior interpretations, and, in fact, has issued revised guidance and proposed regulations,⁸ there is a body of well-settled law and guidance.

New York State Lobbying Act

The New York State Lobbying Act (the “Act”)⁹ entails significant reporting and compliance requirements, and imposes stringent penalties for violations of its provisions. Furthermore, the Act (along with corresponding provisions in the Public Officers Law) makes it generally illegal for a lobbyist or a client to offer to give or to give a gift to a public official. However, before one can have an appreciation of the Act, one must understand what activities constitute lobbying.

Definition of Lobbying Activities

Section 1-c of the Act defines “lobbying” and “lobbying activities” as attempts to influence a broad range of governmental decision-making at the State, agency, tribal and local levels, specifically:

- The introduction, amendment, passage or defeat of State legislation;¹⁰
- The approval or disapproval of such legislation by the Governor;¹¹
- The adoption or rejection by a State agency of a rule or regulation having the force and effect of law;¹²
- The outcome of a state agency rate-making proceeding;¹³
- The introduction, amendment, passage or defeat of a local law, ordinance, resolution or regulation by a covered jurisdiction;¹⁴
- The adoption or rejection of any rule or regulation having the force and effect of a local law, ordinance or regulation in a covered jurisdiction;¹⁵
- A rate-making proceeding by a covered local jurisdiction;¹⁶
- The State and local government procurement process where the value of the procurement is estimated to be greater than \$15,000 on an annual basis;¹⁷

- Tribal-state compacts and other agreements, or other State actions with respect to Class III (casino) gaming;¹⁸ or
- State or local government Executive Orders.¹⁹

Attempts to influence covered entities with regards to these issues are subject to the registration and reporting obligations that are described below. Similarly, lobbying of industrial development agencies, public authorities and public corporations (but not school districts) is also covered. It is important to remember that even if a person is only lobbying a local jurisdiction registration with JCOPE likely is required if the local jurisdiction has a population of more than 50,000.²⁰ In the case of lobbying the City of New York or Suffolk County government, registration and reporting may be required with both the municipality and JCOPE.²¹ When simultaneous registration is required, registration with only one of these bodies is insufficient and, as described below, may result in penalties for failure to timely file registrations and reports.

The lobbying regulatory bodies have also interpreted “lobbying activity” very broadly. As has long been held by these bodies, lobbying activity encompasses “[a]ny activity intended to support, oppose, modify, delay, expedite or otherwise affect any of the [governmental] actions specified in” the Lobbying Act.²² Furthermore, any activity intended to influence a covered official with respect to one of the enumerated lobbying activities “is lobbying irrespective of how contact is made.”²³ Contact includes face-to-face meetings, printed communications and electronic communications (including phones, e-mail and faxes), billboards and other communications exhorting contact with public officials (grassroots lobbying).

Exclusions from Lobbying Activity

The Act excludes the following activities from the definition of lobbying activities:

- Engaging in drafting, advising clients on or rendering opinions on proposed legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, procurement contracts,²⁴ or tribal-state compacts, memoranda of understanding, or any other tribal-state agreements or other written materials related to Class III gaming as provided in 25 U.S.C. § 2701, when such professional services are not otherwise connected with state or municipal legislative or executive action on such legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, procurement contracts, or tribal-state compacts, memoranda of understanding, or any other tribal-state agreements or other written materials related to Class III gaming as provided in 25 U.S.C. § 2701;

- Publication or broadcast of news items, editorials or other comments, or paid advertisements by newspapers and other periodicals and radio and television stations, and owners and employees thereof, in connection with proposed legislation, rules, regulations or rates, municipal ordinances and resolutions, executive orders, tribal-state compacts, memoranda of understanding or other tribal-state agreements related to Class III gaming as provided in 25 U.S.C. § 2701, or procurement contracts by a state agency, municipal agency, local legislative body, the state legislature, or the unified court system;
- Participating as witnesses, attorneys or other representatives in public proceedings of a state or municipal agency when all such participation by a person is part of the public record thereof and all preparation by such person for such participation;
- Attempts to influence a state or municipal agency in an adjudicatory proceeding, as “adjudicatory proceeding” is defined by section 102 of the state administrative procedure act;
- Preparing or submitting a response to a request for information or comments by the state legislature, the governor, or a state agency or a committee or officer of the legislature or a state agency, or by the unified court system, or by a legislative or executive body or officer of a municipality or a commission, committee or officer of a municipal legislative or executive body; and
- Any attempt by a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a federal income tax return under paragraph 2(A)(i) of section 6033(a) of Title 26 of the United States Code or a religious order that is exempt from filing a federal income tax return under paragraph (2)(A)(iii) of such section 6033(a) to influence passage or defeat of a local law, ordinance, resolution or regulation or any rule or regulation having the force and effect of a local law, ordinance or regulation.²⁵

Procurement Lobbying

As noted previously, any attempt to influence any determination by a public official (defined to mean virtually any officer or employee of the State or a covered municipal entity), or by a person or entity working in cooperation with a public official related to a governmental procurement, constitutes lobbying activity.²⁶ The rules regarding procurement lobbying are extensive, nuanced, and not always intuitive.

In addition to the provisions that make procurement activities lobbying, it is important to understand

that the Lobbying Act prohibits certain contacts with State government officers and employees during the time that a procurement is pending.²⁷ This limitation on contacts, known as the “restricted period,” is one of the most comprehensive in the nation. The restricted period is discussed in more detail below, but it is important to stress that the penalty for violating the restricted period is draconian.²⁸ Another unusual aspect of the procurement lobbying rules is that procurements by an officer or employee of the Unified Court System, or by those working in cooperation with such officers or employees, are also covered, as are procurements by the State Legislature.²⁹ This is the only instance where lobbying the Judicial branch of government constitutes covered activity.

But what constitutes a “governmental procurement”?

Section 1-c(p) of the legislative law provides that a governmental procurement means:

- 1) the public announcement, public notice, or public communication to any potential vendor of a determination of need for a procurement, which shall include, but not be limited to, the public notification of the specifications, bid documents, request for proposals, or evaluation criteria for the procurement contract;
- 2) solicitation for a procurement contract;
- 3) evaluation of a procurement contract;
- 4) award, approval, denial or disapproval of a procurement contract;
- 5) approval or denial of an assignment, amendment (other than amendments that are authorized and payable under the terms of the procurement contract as it was finally awarded or approved by the comptroller, as applicable), renewal or extension of a procurement contract, or any other material change in the procurement contract resulting in a financial benefit to the offerer.³⁰

The Legislative Law instructs that covered procurement contracts relate to the governmental procurement of commodities, services, a technology, a public work, construction, a revenue contract, the purchase, sale or lease of real property or an acquisition or granting of other interest in real property.³¹ A “revenue contract” means “any written agreement between a state or municipal agency or a local legislative body and an offerer whereby the state or municipal agency or local legislative body gives or grants a concession or a franchise.”³²

Commission Guidelines provide that procurement lobbying activities do not begin until a covered entity makes a “determination of need” for the product or service to be procured.³³ Accordingly, attempts to influence a procurement prior to the issuance of such a determination do not constitute lobbying. Thus, true business development activities, before a governmental entity has decided that it “needs” a product or service, are not lobbying.

The Commission recognizes that not all covered entities actually make a formal determination of need, and thus, to avoid a violation of the restricted period, specifically authorizes a limited inquiry to the entity to ask whether or not it has made a determination of the need for the product or service.³⁴ The Commission has advised that this inquiry always be made before attempting to influence a procurement.³⁵

The Act provides a limited list of activities that are excluded from the definition of procurement lobbying, including:

- Activities of commissioned salespersons with respect to governmental procurements. Commissioned salespersons are defined in the statute to mean persons who are primarily employed to cause or promote the sale of, or to influence or induce another to make a purchase of, an article of procurement, and who are paid in whole or in part based on a percentage of all or substantial part of their sales.³⁶
- Persons engaged in drafting procurement contracts, advising clients on or rendering opinions on proposed procurement contracts, but only when such professional services are not otherwise connected with governmental action on the procurement contract.³⁷
- Activities relating to procurements under Section 162 of the State Finance Law (Preferred Sources). Such sources include agencies for the blind and other severely disabled persons and veteran’s workshops. This exception is limited, however; it does not apply to attempts to influence the issuance or terms of the specifications that serve as the basis for bid documents, requests for proposals, invitations for bids, or solicitations of proposals, or any other method for soliciting a response from offerers intending to result in a procurement contract.³⁸
- Participation in bid conferences.³⁹
- Negotiations between a purported successful bidder and the governmental entity.⁴⁰

- Communications between a governmental entity and the holder of an existing procurement contract for the purpose of negotiating the terms of a purchase of a commodity, service, technology or other article of procurement pursuant to that existing contract, except that communications with a local legislative body relating to the terms of a franchise renewal remain within the definition of lobbying activity.⁴¹
- Parties to a bid protest, appeal or other review proceeding before the governmental entity conducting the procurement seeking a final administrative adjudication or in subsequent judicial proceedings.⁴²
- Bringing of complaints of alleged improper conduct in a procurement to the attorney general, inspector general, district attorney or court of competent jurisdiction.⁴³
- Submission of written protests, appeals or complaints to the State Comptroller's office during the process of contract approval, where the State Comptroller's office approval is required by law, and where such communications and any responses are made in writing and are required to be entered in the procurement record.⁴⁴
- Bringing of complaints of alleged improper conduct in local government procurements to the State Comptroller's office.⁴⁵
- Submission of a bid or proposal (orally, written or electronically) in response to a solicitation intending to result in a procurement contract.⁴⁶
- Offerers⁴⁷ submitting written questions to a designated contact of the procuring governmental entity when all written questions and responses are to be disseminated to all offerers who have expressed an interest in the solicitation.⁴⁸
- Contacts during the procurement process between designated staff of the procuring entity involved in the procurement and officers and employees of bidders or potential bidders, or their subcontractors, "who are charged with the performance of functions relating to contracts and who are qualified by education, training or experience to provide technical services to explain, clarify or demonstrate the qualities, characteristics or advantages of an article of procurement."⁴⁹ Such contacts must: (i) be limited to providing information to the staff of the procuring entity to assist them in understanding and assessing the qualities, characteristics or anticipated performance of an article of procurement; (ii) not include any recommendations or

advocate for any contract provisions; and (iii) occur only at such times and in such manner as authorized under the procuring entity's solicitation or guidelines and procedures. The law further restricts this exception by defining technical services to mean "analysis directly applying any accounting, engineering, scientific or other similar technical disciplines."⁵⁰ Note that this exception does not permit use of consultants, outside experts or agents.⁵¹

- After award, communications by an officer or employee of the offerer, when such communications are in the ordinary course of providing the article of procurement and within the assigned duties of the officer or employee. Registered lobbyists, as well as agents and independent contractors whose primary duty is to engage in lobbying activities, are not eligible to take advantage of this exception.⁵²
- Persons who communicate with public officials, where such communications are limited to obtaining factual information related to benefits or incentives offered by a State or municipal agency and where such communications do not include recommendations or advocate governmental action or contract provisions and are not otherwise connected with legislative or executive action or determinations. Registered lobbyists are not eligible to take advantage of this exception.⁵³

Restricted Contact Rules for Procurement Activities

As noted previously, one of the most significant provisions of the Lobbying Act is the imposition of a restricted period, prohibiting most lobbying activity by lobbyists or their clients during a governmental procurement.⁵⁴ The restricted contact provisions are applicable to all State governmental entities, industrial development agencies located in a municipality with a population of more than 50,000 and local public benefit corporations. Note, however, that except as provided above, the restricted period provisions are not applicable to local governments. Pursuant to § 1-n of the Legislative Law, the restricted period runs from the date of the first written notice, advertisement or solicitation for the procurement and ends with the final contract award, including, where applicable, approval by the State Comptroller.⁵⁵ The Commission has interpreted this provision to mean that the restricted period begins at the earliest written notice of a formal (whether written or oral) solicitation of a response from offerors.

During the restricted period, lobbyists and clients may not:

- Contact any person within the procuring entity, except for the person or persons designated to receive such contacts, relating to the procurement. This prohibition is applicable to all New York State procuring entities.⁵⁶
- Engage in lobbying activities concerning a procurement by contacting any person in a State agency other than the procuring agency.⁵⁷ The definition of a State agency is broad and includes “any department, board, bureau, commission, division, office, council committee or officer” of the State, or a public benefit corporation or public authority, at least one of whose members is appointed by the Governor, and authorized by law to make rules or to make final decisions in adjudicatory proceedings.⁵⁸ Note, however, that in some circumstances, contact with members of the legislature and legislative staff may be permitted provided that when the legislature is the procuring entity, such contact is also prohibited. Note also that this prohibition against contacts with agencies other than the procuring entity does not apply to local governments. Finally, it is also worth noting that some procurement contract solicitations, on both the State and local government level, may impose a restriction on contacts that may be more stringent than the requirements of State law.⁵⁹

Penalties for violating these prohibitions during the restricted period are severe, including fines, loss of the contracting opportunity, and for repeated offenses, debarment of the client and lobbyist.⁶⁰

There are a number of exceptions to the restricted contact rules which are deemed not to be lobbying activities, and, therefore, are permissible. These are similar to the exceptions to procurement lobbying activity enumerated above, and are not repeated here.

There is one exception, however, that bears special mention. Contacts with members of the State Legislature concerning governmental procurements by a State agency, the unified court system or a municipal agency are expressly permitted by the Act. Note that contact with a State legislator is not authorized with respect to procurements by the House of the State Legislature in which the legislator serves.⁶¹

Who Is a Lobbyist?

Under the Act, every person or organization retained, employed or designated by any client to engage in the lobbying activities described above is considered a lobbyist.⁶² Unlike in some other jurisdictions, this definition encompasses employees of entities who, as part of their duties, interact with government in a way that constitutes lobbying activities. For the

purposes of registration, these employee lobbyists will generally not be the registrant, but must still be identified as an “additional lobbyist” of the entity employer.

Registration and Disclosure Obligations of Lobbyists and Clients of Lobbyists

a. Statements of Registration, Bi-Monthly Reports, and Semi-Annual Reports

All lobbyists who expend, incur or receive, or reasonably anticipate that they will expend, incur or receive in the coming year, compensation or expenses in excess of \$5,000 for lobbying during the calendar year, must annually file a Statement of Registration with the Commission⁶³ as well as bi-monthly reports.⁶⁴ For lobbyists who reasonably anticipate being paid more than \$5,000 for lobbying services, the Statement of Registration must be filed by January 1 if they are retained prior to December 15.⁶⁵ If retained or hired after December 15, then the registration must be filed within 15 days of being retained or within 10 days of expending or receiving any monies for lobbying activities.⁶⁶ Of note to municipal attorneys, lobbyists must report on the Statement of Registration the resolution or municipal ordinance numbers of resolutions or municipal ordinances lobbied or expected to be lobbied.⁶⁷ The lobbyist registration must be accompanied by a \$200 fee, but only if the lobbyist expects to incur or expend in excess of \$5,000.⁶⁸

Additionally, clients of lobbyists (i.e., entities or persons who retain or employ lobbyists) must file semi-annual reports.⁶⁹ Semi-annual reports are cumulative for all lobbying activities on behalf of the client during the reporting period and must contain the same information required to be reported on the Lobbyist bi-monthly reports.⁷⁰ Clients must remit a \$50 filing fee with their semi-annual reports.⁷¹

The registration and reporting forms are supplied by the Commission. The Commission prefers electronic filing of all forms and reports. These forms are available at the Commission’s website: <http://www.jcope.ny.gov/>.

b. Reportable Expenses

Expenses are to be listed in the aggregate if \$75 or less.⁷² If any one expense for the purpose of lobbying is more than \$75, the expense must be detailed as to amount, purpose, to whom paid and, if an expense greater than \$75 is on behalf of any individual person, the name of the person is required to be reported.⁷³ Expenses, however, do not include: (1) personal sustenance, lodging and travel disbursements of the lobbyist; or (2) expenses, not in excess of \$500 in any one calendar year, directly incurred for the printing or other means of production or mailing of letters, memoranda or other written communications.⁷⁴

Expenses for salaries, other than that of the lobbyist, are to be reported in the aggregate. Thus, the allocable expenses incurred for an in-house lobbyist's secretary and other clerical help are required to be reported, but aggregated in a lump sum.⁷⁵

Expenses of more than \$50 are required to be paid by check or substantiated by receipts. The checks and receipts are required to be maintained on file for a period of three years.⁷⁶

c. Filing Dates for Reports

As noted previously, bi-monthly reports must be filed within 15 days after the close of the applicable reporting period, and semi-annual reports must be filed by July 15th for the first semi-annual filing period, and by January 15th of the following year, for the second semi-annual filing period.⁷⁷

Other Disclosure Obligations of the Act

a. Reportable Business Relationships

Since 2012, lobbyists and clients of lobbyists have been required to disclose all "reportable business relationships."⁷⁸ A "reportable business relationship" means any relationship where a lobbyist or a client pays more than \$1,000 "for any goods, services or anything of value," to any state public officer, legislator, or employee, or "any entity in which the lobbyist or client of a lobbyist knows or has reason to know [that such government official] is a proprietor, partner, director, officer or manager, or owns or controls ten percent or more of the stock of such entity," or one percent or more of stock in a publicly traded entity.⁷⁹ Lobbyists are now required to report such relationships as part of their statement of registration. Clients are similarly required to disclose any such business interaction on their semi-annual reports.

b. Source of Funding Disclosure

Also since 2012, lobbying entities and clients of lobbyists are required to disclose the names of persons and entities that financially contribute to a lobbying effort.⁸⁰ Pursuant to regulations recently adopted by JCOPE, any entity that: (1) engages in lobbying on its own behalf (as opposed to a lobbying firm that represents clients); (2) spends more than \$50,000 in lobbying compensation and expenditures during the prior calendar year or in the 12 months preceding the relevant bi-monthly reporting period; and (3) devotes at least 3% of its total expenditures during the same period towards lobbying activity in New York State, will be required to identify the names of all sources that provided more than \$5,000 to support the entity's lobbying activities, and the amount that each source provided. The lobbying entity is required to report this information on the bi-monthly reports due on July 15. Clients of lobbyists filing semi-annual reports on

that same date will also have to disclose the name and amount of funding provided if the client spent more than \$50,000 in lobbying compensation and expenditures during prior calendar year or in 12 months preceding the relevant bi-monthly reporting period; and devoted at least 3% of its total expenditures during the same 12 month period towards lobbying activity. This client report obligation exists even for those entities that did not engage in any lobbying on its own behalf, but raised funds to pay an outside consultant for the lobbying effort.

The law provides for only very narrow exceptions to the new obligation to disclose the sources that provide funding for the covered entity's lobbying effort:

- Charitable organizations that are registered with the New York State Attorney General and exempt from taxation pursuant to Internal Revenue Code 501(c)(3); and,
- organizations that are registered with the New York State Attorney General and exempt from taxation pursuant to Internal Revenue Code 501(c)(4), if the entity can establish that disclosure of the contributors would "lead to harm, threats, harassment, or reprisals" to the donor; and governmental entities, are excluded from this new reporting.⁸¹ JCOPE has been very reticent to issue a waiver under this exception.

c. Disclosure of Lobbying Activities Related to Grants

Lobbying with respect to grants receives special treatment under the Act.⁸² Although not considered lobbying activity, lobbyists who are already required to register and file lobbying reports, who also seek to influence the solicitation, award or administration of a grant, loan, or agreement involving the disbursement of public monies in excess of \$15,000 (other than a governmental procurement), must file an additional report.⁸³

It is worth noting that persons seeking grants through the State legislative process (*e.g.*, as part of the State budget) or through a similar local process where the lobbyist seeks to influence local laws or resolutions, are likely engaged in traditional lobbying activity that is required to be reported.

Gift Restrictions

Lobbyists and clients of lobbyists are prohibited from offering or giving any gift of more than nominal value to any public official.⁸⁴ Recently adopted regulations define nominal value as "an item or service with a fair market value of ten dollars or less."⁸⁵ As noted below, exceptions to the gift rules are limited. In addition, some agencies have more stringent gift prohibitions than those set out below.

The definition of a public official is extremely broad, covering all statewide elected officials, state employees, members of the legislature, legislative employees, members and commissions of boards, commissions and public benefit corporations.⁸⁶ In addition, local elected officials and local government employees of municipalities of 50,000 or more are also included within this definition. Note that gifts include meals, tickets to sporting events and entertainment, and anything else of value given to a public official. However, gifts do not include:

- Complimentary attendance, including food and beverage, at bona fide charitable or political events.⁸⁷
- Food and beverage valued at \$15 or less.⁸⁸
- Complimentary attendance, food and beverage offered by the sponsor of a widely attended event (or in good faith intended to be widely attended), but only if attendance at the event is: (a) related to the attendee's duties or responsibilities as a public official, or (b) allows the public official to perform a ceremonial function appropriate to his or her position.⁸⁹ Note that the Act provides a safe harbor provision with respect to when a public official's duties or responsibilities are related to an event, providing that a "public official's duties or responsibilities shall include, but not be limited to either (1) attending an event or a meeting at which a speaker or attendee addresses an issue of public interest or concern as a significant activity at the event or meeting; or (2) for elected public officials or their staff attending with or on behalf of such elected officials, attending an event or a meeting at which more than one-half of the attendees...are residents of the county, district or jurisdiction from which the elected public official was elected."⁹⁰
- Awards, plaques, and other ceremonial items, but only if the award is: (a) publicly presented, or intended to be publicly presented; (b) in recognition of public service; (c) of the type customarily bestowed at such or similar ceremonies; and, (d) otherwise reasonable under the circumstances.⁹¹
- An honorary degree by a public or private college or university.⁹²
- Promotional items having no substantial resale value such as pens, mugs, calendars, hats and t-shirts that bear an organization's name, logo or message in a manner that promotes the organization's cause.⁹³
- Goods and services, or discounts for goods and services, offered to the general public or

a segment of the general public and offered on the same terms and conditions as offered to the general public or segment thereof.⁹⁴

- Gifts from family members, members of the same household, or persons with a personal relationship with the public official, including invitations to attend personal or family social events, but only if it is the family, household, or personal relationship that is the primary motivating factor as determined by the following considerations: (a) the history and nature of the relationship between the donor and the recipient, including whether items have been previously exchanged; (b) whether the item was purchased by the donor; and, (c) whether or not the donor at the same time gave similar items to other public officials. Note that this exception does not apply if the donor seeks to charge or deduct the item as a business expense or seeks reimbursement from a client.⁹⁵
- Political contributions reportable under Article 14 of the Election Law.⁹⁶
- Travel reimbursement or payment for transportation, meals and accommodations for an attendee, panelist or speaker at an informational event but *only if* the reimbursement or payment is made by a governmental entity, or an in-state accredited public or private institution of higher education that hosts an on-campus event provided that lodging may only be accepted at the location on or within close proximity to the host campus and only for the night preceding and the nights of the days on which the attendee, panelist or speaker actually attends the event.⁹⁷
- Provision of local transportation only to inspect or tour facilities, operations or property owned or operated by the entity providing the transportation. But, note that payment or reimbursement of lodging, meals or travel expenses to and from the locality will be treated as a gift and, therefore, are prohibited unless covered by a separate exception to these gift rules.⁹⁸
- Meals or refreshments when participating in a professional or educational program and the meals are provided to all participants.⁹⁹
- When, under the circumstances, it is not reasonable to infer that the gift was intended to influence the public official. This is a very narrow exception that is strictly construed. The facts and circumstances of the gift and the relationship between the donor and donee must clearly demonstrate that it cannot reasonably be inferred that the gift was intended to influence the public official.¹⁰⁰ An improper gift will always be pre-

sumed where reimbursement from the employer of the lobbyist or client is sought, or where the client actually pays for the gift.¹⁰¹

- Recipient pays the fair market value of the item received. The Guidelines explain that any “payment in reimbursement from a public official must be given contemporaneously with the offer of the gift or promptly thereafter.” Any offsetting payment must be made within a commercially reasonable period of time of the receipt of the thing of value. “The making of a payment in reimbursement after a party to the transaction learns that an investigation has been commenced is presumptively unreasonable.”¹⁰²

Contingent Retainers Prohibited

The Lobbying Act prohibits the use of contingent retainers or success fees whereby the compensation of the lobbyist is dependent, in whole or in part, on the outcome of the lobbying effort. A violation of this prohibition is punishable as a Class A misdemeanor.¹⁰³

Penalties for Violation of the Act

The Act contains numerous penalties for violations, including late filings and false filings.¹⁰⁴ Where an organization is required to file, the Chief Administrative Officer of the organization is responsible for making and filing the reports unless another individual is designated as the responsible individual prior to the due date of the filing.

A knowing and willful failure to file a statement or report, or a violation of the prohibition on giving gifts, is punishable as a class A misdemeanor.¹⁰⁵ A second violation of this provision within a 5-year period is punishable as a Class E Felony and debarment.¹⁰⁶ In addition, significant civil penalties may be assessed. Lobbyists or clients who knowingly and willfully: (1) fail to file timely reports or statements may be subject to a penalty of up to \$25,000 or three times the amount that the person or entity failed to disclose; (2) file false statements are subject to a civil penalty of up to \$50,000 or five times the amount that the person or entity failed to disclose; (3) violate the restriction on providing gifts to public officials shall be subject to a civil penalty not to exceed the greater of \$25,000 or three times the amount that the person impermissibly contributed, expended, gave, or received; (4) violate the restricted contact period during a governmental procurement shall be subject to a civil penalty not to exceed \$10,000 for an initial violation; if the same lobbyist or client is found to violate the same restriction within four years of the first finding, they may be subject to a 4 year debarment and a civil penalty of up to \$25,000; (5) engage in lobbying activities after being debarred, shall be subject to a civil penalty of up to

\$50,000 plus an amount equal to fifty times the value of any gift, compensation, or benefit received in connection with the violation; or (6) fail to retain records as required by the Lobbying Act shall be subject to a civil penalty of up to \$2,000 for each violation.¹⁰⁷ Furthermore, late statements and reports are subject to a \$25.00 per day late fee, except if the filer had not previously been required to file a statement or report, the late fee is \$10.00 per day.¹⁰⁸ This late fee can be, and usually is, imposed without regard to whether the violation was intentional.

Record Keeping Obligations

Lobbyists and clients are required to keep records of compensation and expenses for a period of three years.¹⁰⁹

Random Audits

JCOPE is authorized to, and routinely does, conduct random audits of clients and lobbyists with respect to compliance with the Lobbying Act. The Commission possesses subpoena power in order to enforce its audit powers.¹¹⁰

Conclusion

New York’s Lobbying Act is one of the broadest such acts in the country. As one can see from the foregoing description of its provisions, the Act is extraordinarily comprehensive and detailed. Notably, the Act covers many activities that attorneys may view as simply the practice of law. While that is true, the fact that such activities may constitute legal work is not an exemption from registration or reporting under the Act. This is particularly true with respect to local government activities that do not involve interactions with State government, and thus, it is not apparent that State reportable lobbying may be occurring. Attorneys should familiarize themselves with the provisions of the Act and, if engaging in lobbying activity, take the necessary actions to be compliant with the Act.

Endnotes

1. N.Y. Laws of 1906, Ch. 321.
2. *First Lobbyist to Register*, N.Y. Times, May 1, 1906.
3. N.Y. Laws of 1906, Ch. 321.
4. N.Y. Laws of 1977, Ch. 937.
5. N.Y.C. Admin. Code §§ 3-211, *et seq.*
6. Suffolk Cty. Code § 580.
7. N.Y. Laws of 2011, Ch. 399.
8. As of the date that this article was written, the comment period for JCOPE’s proposed regulations governing gifts from lobbyists had expired. JCOPE is expected to finalize those regulations in the near future.
9. N.Y. Legis. Law, §§ 1-a, *et seq.*

10. N.Y. Legis. Law § 1-c(c)(i).
11. N.Y. Legis. Law § 1-c(c)(ii).
12. N.Y. Legis. Law § 1-c(c)(iii).
13. N.Y. Legis. Law § 1-c(c)(iv).
14. N.Y. Legis. Law § 1-c(c)(vii).
15. N.Y. Legis. Law § 1-c(c)(viii).
16. N.Y. Legis. Law § 1-c(c)(x).
17. N.Y. Legis. Law § 1-c(c)(v); see *infra* notes 26-61 and accompanying text (discussing procurement lobbying and related provisions).
18. Section 1329 of the Racing, Pari-mutuel and Breeding Law, as enacted by Chapter 174 of the Laws of 2013, authorizing casino gaming in New York State, includes a separate and distinct requirement for persons who seek to influence the New York State Gaming Commission to register with the Secretary of the Gaming Commission.
19. N.Y. Legis. Law § 1-c(c).
20. N.Y. Legis. Law §§ 1-c(a)(iii), 1-c(k).
21. N.Y. Admin. Code §§ 3-211 *et seq.*; Suffolk Cnty. Code § 580.
22. N.Y. State Joint Commission on Public Ethics, Guidelines to the New York State Lobbying Act § 1-c(c) (eff. April 24, 2014) (“Guidelines”), available at http://www.jcope.ny.gov/about/lob/Lobbying%20Guidelines%204_24_12revised2.pdf.
23. Advisory Opinion # 97-39, issued by the former Commission Lobbying.
24. N.Y. Legis. Law § 1-c(g).
25. N.Y. Legis. Law § 1-c(a).
26. N.Y. Legis. Law § 1-c(c).
27. N.Y. Legis. Law § 1-n.
28. See N.Y. Legis. Law § 1-o. See also *infra* notes 104-08 and accompanying text (discussing penalties).
29. N.Y. Legis. Law § 1-c(c)(v)(B).
30. N.Y. Legis. Law § 1-c(p).
31. N.Y. Legis. Law § 1-c(o).
32. N.Y. Legis. Law § 1-c(n).
33. See Guidelines, *supra* note 22, § 1-c(p).
34. *Id.*
35. *Id.*
36. N.Y. Legis. Law § 1-c(c)(U). The Guidelines provide that a person qualifies under this exemption only if the individual satisfies all of the following criteria: (i) the person’s primary purpose of employment is the sale of products or services through direct contact with potential purchasers; (ii) the person receives a commission in the form of a percentage of all or substantially all of the sales the person has caused, promoted, influenced or induced; (iii) the person is not otherwise required to file a statement of registration by virtue of engaging in lobbying activity; (iv) the person is either an employee or has a contract with a vendor for a definite term of not less than six months. A discretionary bonus which is based upon factors including success in meeting sales targets, but which is not calculated as a percentage of sales, does not constitute commission income. Guidelines § 1-c(c)(O).
37. N.Y. Legis. Law § 1-c(c)(A).
38. N.Y. Legis. Law § 1-c(c)(G).
39. N.Y. Legis. Law § 1-c(c)(H).
40. N.Y. Legis. Law § 1-c(c)(I).
41. *Id.*
42. N.Y. Legis. Law § 1-c(c)(J).
43. *Id.*
44. *Id.*
45. *Id.*
46. N.Y. Legis. Law § 1-c(c)(K).
47. Offerers are bidders and their representatives, employees, agents, and consultants. N.Y. Legis. Law § 1-c(q).
48. N.Y. Legis. Law § 1-c(c)(L).
49. N.Y. Legis. Law § 1-c(c)(M).
50. N.Y. Legis. Law § 1-c(c)(M)(iii).
51. *Id.*
52. N.Y. Legis. Law § 1-c(c)(P).
53. N.Y. Legis. Law § 1-c(c)(Q).
54. N.Y. Legis. Law § 1-n.
55. *Id.*
56. *Id.*
57. *Id.*
58. N.Y. Legis. Law § 1-c(j)(e).
59. N.Y. Legis. Law § 1-n.
60. N.Y. Legis. Law § 1-o.
61. N.Y. Legis. Law § 1-n(3).
62. N.Y. Legis. Law § 1-c(a).
63. N.Y. Legis. Law § 1-e.
64. N.Y. Legis. Law § 1-h. The reporting periods for bi-monthly reports are: January 1 through the last day of February, due on March 15th; March 1 through April 30th, due on May 15th; May 1 through June 30th, due on July 15th; July 1 through August 31st, due on September 15th; September 1 through October 30th, due on November 15th; and November 1 through December 31st, due on January 15th of the ensuing year. *Id.* Bi-monthly reports require disclosure of the following information with respect to each reporting period: (1) identifying information pertaining to the lobbyist and the client, similar to that required in the Statement of Registration; (2) a description of the general subject or subjects lobbied, the bill numbers of legislation, and the rule, regulation or rate making numbers with respect to which the lobbyist has lobbied; (3) the name of the person, organization, or legislative body before which the lobbyist has lobbied; and, (4) the compensation paid or owed to the lobbyist, and any expenses expended, received or incurred by the lobbyist for the purpose of lobbying. See *infra* notes 72-76 (discussing reportable expenses).
65. N.Y. Legis. Law § 1-e.
66. *Id.*
67. The Statement requires disclosure of the following information: (1) name, address, telephone number of each lobbyist and each employee of the lobbying firm; (2) name, address, telephone number of the client retaining or employing the lobbyist; (3) if no written retainer/employment agreement is provided, a written authorization from the client; (4) description of the general subject or subjects and the legislative bill numbers of any bills and the rule, regulation, and rate making numbers of any rules, regulations, or rates or proposed rules, regulations, or rates on which the lobbyist is, or expects to lobby; (5) the name of the person, organization, or legislative body before which the lobbyist is lobbying or expects to lobby; (6) Executive Order numbers, or if none, the subject matter of the exclusive order; (7) subject matter of, and tribes involved, in tribal-state compacts, memoranda of understanding, or other state-tribal agreements and any state actions related to Class III gaming lobbied or expected to be lobbied; (8) resolution or municipal ordinance numbers of resolutions or municipal ordinances lobbied or expected to be lobbied; and (9) titles and any

identifying numbers of any procurement contracts or other documents disseminated by a State agency, either house of the Legislature, the unified court system, municipal agency or local legislative body, in connection with a government procurement. If the lobbyist is retained or employed pursuant to a written agreement, a copy of the agreement must be filed; if there is no written agreement, a statement of the substance of the oral agreement must be provided on the form. *Id.*

68. *Id.*
69. N.Y. Legis. Law § 1-j.
70. *Id.*
71. *Id.*
72. *Id.* at (b)(5)(ii).
73. *Id.*
74. *Id.* at (b)(5)(iii).
75. *Id.* at (b)(5).
76. *Id.* at (b)(5)(v).
77. N.Y. Legis. Law § 1-j(b).
78. N.Y. Legis. Law §§ 1-c(w), 1-e(c)(8)(i)-(iii), & 1-j(b)(6)(i)-(iii).
79. N.Y. Legis. Law §§ 1-c(w), 1-e(c)(8)(i)-(iii), & 1-j(b)(6)(i)-(iii).
80. 19 N.Y.C.R.R. Part 938.
81. N.Y. Legis. Law § 1-h(4)(ii).
82. N.Y. Legis. Law § 1-l.
83. This report must contain the following: (1) the name, address and telephone number of the lobbyist and individuals employed by the lobbyist who are engaged in public monies lobbying activities; (2) the name address and telephone number of the client by whom, or on whose behalf, the lobbyist is retained, employed or designated to perform such lobbying activity; (3) a description of the grant, loan or agreement involving the disbursement of public monies on which the lobbyist lobbied; (4) the name of the person, organization or legislative body before which the lobbyist has engaged in public monies lobbying; and (5) the compensation and expenses paid or owed to the lobbyist for such public monies lobbying. *Id.*
84. N.Y. Legis. Law § 1-c(l).
85. See, generally, 19 NYCRR 934.1.
86. N.Y. Legis. Law § 1-c(l).
87. N.Y. Legis. Law § 1-c(j)(i).
88. N.Y. Legis. Law § 1-c(j)(xii).
89. N.Y. Legis. Law § 1-c(j)(ii).
90. *Id.*
91. N.Y. Legis. Law § 1-c(j)(iii).
92. N.Y. Legis. Law § 1-c(j)(iv).
93. N.Y. Legis. Law § 1-c(j)(v).
94. N.Y. Legis. Law § 1-c(j)(vi).
95. N.Y. Legis. Law § 1-c(j)(vii).
96. N.Y. Legis. Law § 1-c(j)(viii).
97. N.Y. Legis. Law § 1-c(j)(ix).
98. N.Y. Legis. Law § 1-c(j)(x).
99. N.Y. Legis. Law § 1-c(j)(xi).
100. N.Y. Adv. Op. 08-01 (N.Y. Commn. Public. Int.), 2008 WL 5772564 (March 25, 2008).
101. N.Y. Legis. Law § 1-m.
102. N.Y. Legis. Law § 1-c(j); see also Guidelines, *supra* note 22, § 1-c(j).
103. N.Y. Legis. Law § 1-k.
104. See N.Y. Legis. Law § 1-o.
105. *Id.* at § 1-o(a)(i).
106. *Id.* at (a)(ii).
107. N.Y. Legis. Law § 1-o.
108. N.Y. Legis. Law § 1-h(c)(3).
109. N.Y. Legis. Law § 1-e(4)(b)(ii).
110. N.Y. Legis. Law § 1-d.

Mark F. Glaser is a shareholder in the Albany office of Greenberg Traurig, LLP. He focuses his practice on legislative issues, governmental ethics and compliance, and advising lobbying firms and others with respect to their obligations under the Lobbying Act, New York City's Lobbying Law. He also regularly appears in matters before the New York State Joint Commission on Public Ethics and the New York City Clerk's Office. Previously, Mark served as counsel to the Majority of the New York State Assembly, acting as legal advisor to five Speakers of the Assembly as well as other members of the Assembly's leadership. Mark also serves as a Commissioner of the New York State Commission on Uniform Laws.

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