

Pennsylvania Association of Nonprofit Organizations
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February 19, 2008

Louis Lawrence Boyle, Esq.
Deputy Chief Counsel
Pennsylvania Department of State
301 North Office Building
Harrisburg, PA 17120-0029

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Office of Chief Counsel

Re: PANO Comments on the Proposed Rulemaking for the Lobbying Disclosure Act (Act 134 of 2006) - 53 Pa.B. 435 (January 19, 2008)

Dear Mr. Boyle,

On behalf of Pennsylvania Association of Nonprofit Organizations and our member organizations I respectfully submit the following comments and recommendations on the proposed rulemaking for the Lobbying Disclosure Act (Act 134 of 2006) - 53 Pa.B. 435 (January 19, 2008) (the "Act").

PANO is the statewide membership organization serving and advancing the charitable nonprofit sector through leadership, advocacy, education and services in order to improve the quality of life in Pennsylvania. PANO is a 501(c)(3) charitable nonprofit organization representing over 700 member charities and the broader charitable community. Advocacy is a central part of PANO's charitable mission as it is for many charities.

PANO supports the goals of transparency and accountability through lobbying disclosure. But when the economic or fiscal impact of that disclosure would so exceed its societal value, then the public interest is not served, and we can no longer support it.

Despite best intentions of the Committee, the Proposed Regulations have created an obstacle to public participation in advocacy that is fundamentally contrary to the public interest. The Proposed Regulations exceed the scope of the Act by: 1) expanding the definition for administrative action and legislative action to include grants, the release of funds from the capital budget, and loans and investment of funds; 2) defining mere monitoring and paying a lobbyist to not lobby as lobbying; and 3) failing to clarify whether grassroots participants who accept the benefit of indirect communication are lobbyists. In addition, the Preamble to the Proposed Regulations fails to address the fiscal impact that the Proposed Regulations will have on the private sector for tracking, disclosing, recordkeeping, and training, specifically with respect to mid-sized and smaller 501(c)(3) charitable nonprofit organizations.

Comments and Recommendations:

The Proposed Regulations fail to clarify, simplify or minimize the economic or fiscal impact of the Act, and have created an obstacle to public participation in advocacy that is fundamentally contrary to the language of the Act as well as the public interest.

The Proposed Regulations attempt to expand the Act's provisions contrary to the Act, and outside the scope of the Regulation Committee's authority by: 1) expanding the definition for administrative action and legislative action to include grants, the release of funds from the capital budget, and loans and investment of funds; 2) defining mere monitoring and paying a lobbyist to not lobby as lobbying; and 3) failing to clarify whether grassroots participants who accept the benefit of indirect communication are lobbyists. Additionally, the Preamble to the Proposed Regulations fails to address the fiscal impact that the Proposed Regulations will have on the regulated community specifically for tracking, disclosing, maintaining records, and compliance training.

1) The proposed regulations expand the definition of lobbying under the Act by adding "grants, the release of funds from the capital budget, loans and investment of funds" to the definition of "administrative action" and to the definition "legislative action," contrary to the language of the Act.

Section:

Section 1303-A of the Act defines "Administrative action." The Act is silent as to "grants, the release of funds from the capital budget, loans and investment of funds."

Proposed Regulations §51.1(vi) adds to the definitions of "administrative action" and "legislative action" "grants, the release of funds from the capital budget, loans and investment of funds."

Discussion:

The Proposed Regulations add to the definitions of "administrative action" and "legislative action" "grants, the release of funds from the capital budget, loans and investment of funds." This requirement is not provided for in the Act and is therefore contrary to the Act.

Under §51.1 the definition of "administrative action (vi)" and the definition of "legislative action (v)" "grants, the release of funds from the capital budget, loans and investment of funds" would be considered lobbying. This is a significant addition to the language of the Statute that is not supported by the language in the Act.

Section 1303-A clearly defines "administrative action" with specific listed criteria. "Grants, the release of funds from the capital budget, loans and investment of funds" is not listed in this criteria. Section 1303-A also clearly defines "legislative action" with specific listed criteria. "Grants, the release of funds from the capital budget, loans and investment of funds"

is not listed in this criteria either. This is a significant departure from the express language of the Act. Inclusion of this language in the Proposed Regulations is contrary to the Act.

Recommendation:

- a) Proposed Regulations §51.1 should completely remove (vi) “grants, the release of funds from the capital budget, loans and investment of funds” from the definition of “administrative action”
- b) Proposed Regulations §51.1 should completely remove (v) “grants, the release of funds from the capital budget, loans and investment of funds” from the definition of “legislative action”

2) The proposed regulations expand the definition of lobbying under the Act by defining mere monitoring and paying a lobbyist to not lobby as lobbying contrary to the language of the Act.

Section:

Section 1303-A defines “lobbying” as “an effort to influence legislative action or administrative action...” The Definitions for both “direct communication” and “indirect communication” require “an effort” “the purpose or foreseeable effect of which is to influence legislative action or administrative action...” The word “monitoring” appears in the definition of “personnel expenses” [65 Pa.C.S. §1303-A].

- a) The Proposed Regulations §51.1 add (ii) “Monitoring legislation, legislative action or administrative action” under the definition of “Effort to influence legislative action or administrative action”. [38 Pa.B. at 446]
- b) The Proposed Regulations §51.1 add (i) “Paying a lobbyist or lobbying firm a retainer or other compensation, even if that lobbyist or lobbying firm does not make direct or indirect communications or take any other act.” under the definition of “Effort to influence legislative action or administrative action”. [38 Pa.B. at 446].

Discussion:

- a) Lobbying requires some effort to influence legislative or administrative action. Merely monitoring without any additional effort to influence is not lobbying under the Act.

Monitoring is included in the Act under the Definition of Personnel Expenses, which may be reported under “direct communication” or “indirect communication”. The Act does not define monitoring in the absence of an effort to influence, as lobbying. The Act merely provides that where monitoring is used in an effort to influence legislative action or administrative action, those expenses are considered personnel expenses” and reported under “direct communication” or “indirect communication”. By adding “monitoring legislation” to the definition of “Effort to influence legislative action or administrative action”, the Proposed Regulations attempt to expand this definition contrary to §1303-A of the Act.

- b) Merely paying a lobbyist to not lobby without that lobbyist making some effort to influence, is not lobbying under the Act. The lobbyist must engage in some effort to influence. The Proposed Regulations expand the definition of what is considered lobbying to include a completely new subsection that is not provided under the Act.

Recommendation:

- a) Proposed Regulations §51.1 should completely remove (i) "Paying a lobbyist or lobbying firm a retainer or other compensation, even if that lobbyist or lobbying firm does not make direct or indirect communications or take any other act"
- b) Proposed Regulations §51.1 should completely remove (ii) "Monitoring legislation, legislative action or administrative action."

3) The Proposed Regulations fail to clarify whether the definition of lobbying under the Act includes as lobbyists grassroots participants who accept the benefit of indirect communication, and therefore could be interpreted as expanding the definition of lobbying under the Act.

Section:

The Act defines a "lobbyist." as "Any individual, association, corporation, partnership, business trust or other entity that engages in lobbying on behalf of a principal for economic consideration....." "Economic consideration" is defined as anything of value offered or received including compensation and reimbursement for expenses. [65 Pa.C.S. § 1303-A]. An expense report must contain "the names and registration numbers when available of all lobbyists" [65 Pa.C.S. § 1305-A(b)(1)].

The Proposed Regulations §55.1 require "a quarterly expense report of a principal required to be registered under the act must include at least the following information:"

(1) The names and, when available, the registration numbers of all lobbyists or lobbying firms, by whom the lobbying is conducted on behalf of the principal. If a lobbyist is a lobbying firm, association, corporation, partnership, business trust or business entity, its name and the names of the individuals who lobby on behalf of the principal must be included [38 Pa.B. at 446].

Discussion:

The Proposed Regulations fail to clarify the issue and therefore could be interpreted as expanding the definition of lobbying under the Act to include grassroots volunteers who accept the benefit of indirect communication.

Under the Proposed Regulations, a person exercising their right to visit their legislator's Capitol office one day a year if they received anything of value from a lobbyist, may have to be disclosed by name as a lobbyist also on another lobbyist's quarterly report.

Every person who visits the capital in connection with a lobbying principal should not be considered a lobbyist to be listed by name on the lobbying principal's expense report, merely because they accepted a bagged lunch, rode on the bus, or sat through a presentation.

Employees that are incidental to or lobby below the \$2,500 quarterly threshold need not be listed by name on the principal lobbyist's disclosure report. Only the monetary value of their lobbying activities is reported; not their names. [38 Pa.B. at 446]. Similarly, if employees need not be listed, grassroots participants should not be listed as lobbyists by name on quarterly reports either. But without clarifying language in the Proposed Regulations, it is possible that volunteers may be treated as lobbyists.

Recommendation:

The Proposed Regulations should be clarified to specifically prevent any interpretation that grassroots participants who accept the benefit of indirect communication are lobbyists. We recommend replacing §55.1(g)(1) with the following language:

(g)(1) The names and, when available, the registration numbers of all lobbyists or lobbying firms required to register, by whom the lobbying is conducted on behalf of the principal. If a lobbyist is a lobbying firm, association, corporation, partnership, business trust or business entity, its name and the names of the individuals required to register who lobby on behalf of the principal must be included.

The Preamble to the Proposed Regulations fails to address the fiscal impact that the Proposed Regulations will have on the private sector for tracking, disclosing, recordkeeping, and training.

Section: Preamble to the Proposed Regulations [38 Pa.B.435 et seq.]

Discussion: Fiscal impact

The Preamble to the Proposed Regulations fails to address the fiscal impact on the private sector. The Preamble devotes a sizeable paragraph to justifying the need for increase funding for the Office of Attorney General, the Department of State, the State Ethics Commission and the Supreme Court Disciplinary Board to administrate the proposed regulations. The Preamble does not include a comparable analysis on the costs imposed on the regulated community beyond a mere \$100. The Preamble fails to mention the cost for tracking, disclosing, record keeping, and training.

Testimony was presented to the Committee at a public hearing on August 2, 2007 that specifically addressed the cost of compliance with the regulations for small and mid-sized charitable nonprofit organizations.

Furthermore, dividing the "fiscal impact" from to "paperwork requirement" in the Preamble obfuscates the causal relationship between the paperwork requirements and the costs incurred by the regulated community in preparing that paperwork.

Recommendation:

Based on a fiscal impact analysis of the costs for tracking, disclosing, maintaining records, and compliance training that the Proposed Regulations will impose on the regulated community, particularly on small and mid-sized charitable nonprofit organizations, a clear

and unambiguous statement of these costs and the impact of these costs should be added to the Preamble.

Additionally, greater flexibility for size scope and purpose of the lobbying registrant must be provided through clear and concise language in the Proposed Regulations.

In addition to PANO's specific comments on the Proposed Regulations, PANO offers the following general comments for the Committee's consideration.

Between the lack of clarity, the lack of bright-line rules with which the general public can understand, and the lack of examples in the Proposed Regulation to assist in compliance, the Proposed Regulations will prove costly and burdensome to the regulated community and have a chilling effect on advocacy by small and mid-sized charitable organizations. These are same mission driven community organizations that often serve under-represented groups and improve the quality of life in our communities.

While some charities hire professional lobbyists, most smaller charities conduct limited advocacy in-house. Depending upon their budget size, they frequently lack the resources to adequately track communications and calculate expenses. In the interest of transparency, charities are now face significant compliance burdens under these Proposed Regulations that will deplete charitable resources and discourage engagement in advocacy.

Based on these comments and recommendations, it is PANO's position that language in the Proposed Regulations be withdrawn, subject to additional public hearings, The Proposed Regulations should be rewritten to improve clarity, and reduce the fiscal and economic impact on the regulated community as well as on the general public. The Proposed Regulations should include bright-line standards and examples to make compliance easier and less costly. Once these changes are made, the Proposed Regulations should be reissued as a Proposed Rulemaking for additional public comment.

Thank you for considering our comments and recommendations.

Sincerely,

David A. Ross,
Public Policy Officer
Pennsylvania Association of Nonprofit Organizations (PANO)

Cc: James Smith, Regulatory Analyst, Independent Regulatory Review Commission