



# PHILADELPHIA BAR ASSOCIATION

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Deputy Chief Counsel  
Pennsylvania Department of State  
301 North Office Building  
Harrisburg, PA 17120-0029

**Office of Chief Counsel**

Re: Comments Regarding Proposed Lobbying Disclosure  
Proposed Rulemaking - 53 Pa.B. 435 (January 19, 2008)

Dear Mr. Boyle:

I am Chair of the Philadelphia Bar Association's Task Force on Pennsylvania's Lobbying Disclosure Act (the "Act"), as well as a partner at Blank Rome LLP.<sup>1</sup>

On behalf of the 13,000 members of the Philadelphia Bar Association, and with the authorization of our Chancellor, A. Michael Pratt, Esq., I am pleased to submit these comments to the Lobbying Disclosure Regulations Committee's proposed regulations (the "Proposed Regulations") to the Lobbying Disclosure Act.<sup>2</sup> These comments are being submitted to you pursuant to instructions in the Proposed Rulemaking, 38 Pa.B. at 444.

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<sup>1</sup> The undersigned may be reached directly at: Lawrence J. Beaser, Esq.; Blank Rome LLP, One Logan Square, 130 North 18<sup>th</sup> Street, Philadelphia PA 19103-6998; 215-569-5510; [beaser@blankrome.com](mailto:beaser@blankrome.com).

<sup>2</sup> Act of November 1, 2006, P.L. 1213, No. 134 ("Act 2006-134"), amending Title 65 of the Pennsylvania Consolidated Statutes. Act 2006-134 added a new chapter, Chapter 13-A titled "Lobbying disclosure." In House Bill No. 700, Printer's No. 4887 ("House Bill 700"), that became Act 2006-134, the sections of the newly added Chapter 13-A's were numbered with an "A" after the section number, e.g., 1302-A, 1310-A, etc. However, in the official publication of Title 65, the Legislative Reference Bureau apparently renumbered the sections from "1301-A" and "1310-A" to "13A01 or 13A10." Whether the Legislative Reference Bureau had the authority or whether it was good policy to change the General Assembly's numbering system are subjects beyond the scope of these comments. We have used the new numbering scheme, rather than the section numbers in Act 2006-134 for consistency with those used in the Proposed Regulations.

However, due to the unusual (for Pennsylvania) nature of this revised numbering scheme, we urge that, whenever reference is made in the Proposed Regulations to a section of the statute, the full citation (e.g. 65 Pa.C.S. § 13A01 or 65 Pa.C.S. § 13A10) be used. Mere reference to the renumbered sections is likely to cause of significant confusion as that numbering system cannot be found in either House Bill 700 or in the unofficial version of the Act that (very helpfully) is available on the State Ethics Commission's web site at

<http://www.ethics.state.pa.us/ethics/cwp/view.asp?a=337&q=211592&ethicsNav=|10533|>.

Below are specific comments regarding the Proposed Regulations, followed by our general conclusions and recommendations.

1. **Sections of the Proposed Regulations attempt to expand and amend, rather than implement, certain of the Act's provisions. Those sections of the Proposed Regulations are contrary to law and must be revised.**

A. In the Act, the General Assembly established the Lobbying Disclosure Regulations Committee (the "Regulations Committee") and gave it the "...authority to promulgate regulations necessary to carry out this chapter. . . ." 65 Pa.C.S. § 13A10(d).

B. While the General Assembly can authorize an administrative body to establish regulations that implement the legislative intent expressed in a statute, "[a] regulation cannot be upheld if it is contrary to the statute under which it was promulgated."<sup>3</sup>

C. In at least the following three instances, the Proposed Regulations attempt to expand or amend, rather than implement, the Act. Any such attempted expansion or amendment of the Act's provisions is outside the scope of the Regulations Committee's authority. The Proposed Regulations must be revised to conform them to the plain language in the Act by deleting these added requirements.

D. The following are three instances in which the Proposed Regulations would expand and amend, rather than implement, certain of the Act's provisions:

(1) **Contrary to the Act's express provisions, the proposed regulations would expand the definition of "lobbying" to include the monitoring of legislative action or administrative action, without any requirement that there be some effort to influence that legislative action or administrative action.**

(a) Under the Act's provisions, in order for there to be lobbying, there must be an effort made -- some action taken -- to actually influence legislative action or administrative action.

(b) The language of the Act is clear and unambiguously defines "lobbying" as "...an effort to influence legislative action or administrative action in this Commonwealth." 65 Pa.C.S. § 13A03 (definition of "lobbying")(emphasis added). The definition goes on to state that the "...term includes (1) direct or indirect communication; (2) office expenses; and (3) providing any gift, hospitality, transportation or lodging to a State official or employee for the purpose of advancing the interest of the lobbyist or principal." *Id.*

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<sup>3</sup> See, Consulting Engineers Council of Pennsylvania v. The State Architects Licensure Board, 522 Pa. 204, 206, 560 A.2d 1375, 1376 (1989).

(c) Contrary to this clear language of the Act, the Proposed Regulations define "effort to influence legislative action or administrative action" to include ". . .[m]onitoring legislative action or administrative action. 38 Pa.B. at 446.

(d) Since the phrase "effort to influence legislative action or administrative action" is part of the definition of "lobbying," the Proposed Regulations would add the concept that merely monitoring pending legislation or proposed changes in regulations constitutes "lobbying."

(e) Consider the following examples:

(i) A business retains an attorney and pays that attorney \$3,000 to review pending legislation on a certain subject and advise the client in order to make certain that the client remains in compliance with the law. The Proposed Regulations would transform such monitoring into "lobbying." The business would be required to register as a principal and the attorney would be required to register as a lobbyist. Quarterly reporting of expenses associated with the monitoring would be required to be filed.

(ii) A nonprofit public interest legal organization has a staff that do no traditional lobbying or such a small amount of lobbying as defined in the Act that neither the organization nor any of its staff would be required to register. However, the nonprofit's staff attorneys monitor legislation that would affect their clients in order to be able to give well informed legal advice. The amount of time spent on monitoring would put the organization over the threshold, if such activities were considered lobbying. As with the first example, under the Proposed Regulations, the amount expended to monitor legislation would become "lobbying."

(iii) A business retains an attorney and pays that attorney \$3,000 to review pending legislation on a certain subject and report to the client what the proposed legislation says, and alert the client if such bills move through the General Assembly. The attorney is not retained to and is specifically instructed not to contact any government official (or anyone else except the client) regarding the legislation. As currently drafted, as with the other examples, the Proposed Regulations would transform this activity into "lobbying."

(f) In many areas of law, and particularly in regulated areas such as banking, insurance, procurement, health, energy, environment, tax, school, municipal and workers' compensation law, such passive "monitoring"<sup>4</sup> of legislation and regulations often is a routine part of a lawyer's representation of his or her client.

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<sup>4</sup> A standard definition of "monitor" is "to watch, keep track of, or check [usually] for a special purpose." Merriam Webster's Collegiate Dictionary (1993). See, also, [www.dictionary.com](http://www.dictionary.com), which defines "monitor" in this context as "to keep track of systematically with a view to collecting information. . . ."

Lawyers routinely monitor proposed legislation and regulations to make certain that their clients remain in compliance with the law.

(g) There is absolutely nothing in the words of the Act to support the inclusion of "monitoring" in the concept of "lobbying" without some "effort to influence legislative action or administrative action."

(h) As stated above, the Regulations Committee has no authority to expand the scope of the Act. It is bound by the Act's clear language. "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1912(b).

(i) Recommended Action: The Proposed Regulations should be revised to delete "monitoring legislative action or administrative action" from the definition of "effort to influence legislative action or administrative action."

(2) **Contrary to the Act's express provisions, the Proposed Regulations would redefine lobbying to include merely paying a retainer to a lobbyist or lobbying firm ". . . even if the lobbyist or lobbying firm does not make direct or indirect communications or take any other action."**

(a) The Proposed Regulations add in the definition of "effort to influence a legislative action or administrative action" the concept that paying a lobbyist a retainer or other compensation is itself sufficient without any action or effort by the lobbyist who receives the retainer or other compensation. The definition states:

Effort to influence legislative action or administrative action--Any attempt to initiate, support, promote, modify, oppose, delay or advance a legislative action or administrative action on behalf of a principal for economic consideration. The term includes any of the following:

(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 action.

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38 Pa.B. at 446 (emphasis added).

(b) However, under the clear language of the Act, merely paying a retainer to an individual or firm, without some effort to influence legislative action or administrative action, does not make that individual or firm a lobbyist or lobbying firm under the Act's clear provisions.

(c) As stated above, under the Act, "lobbying" must involve ". . . an effort to influence legislative action or administrative action in this Commonwealth." 65 Pa.C.S. § 13A03 (definition of "lobbying")(emphasis added). Paying a retainer, without some action on the part of the individual or firm retained, cannot in and of itself constitute lobbying because there has been no effort to influence legislative action or administrative action.

(d) As quoted in the definition above, "lobbying" includes "direct or indirect communication." The mere payment of a retainer does not result in either "direct communication" or "indirect communication."

(e) "Direct communication" is defined in the Act as: "[a]n effort, whether written, oral or by any other medium, made by a lobbyist or principal, directed to a State official or employee, the purpose or foreseeable effect of which is to influence legislative action or administrative action. The term may include personnel expenses and office expenses." 65 Pa.C.S. § 13A03 (definition of "direct communication").

(f) Merely paying a retainer is not "[a]n effort. . . directed to a State official or employee" as is required for there to be "direct communication." If the individual to whom the retainer was paid never contacts a State official or employee (e.g., if the retainer is paid to have a lobbyist available if certain legislation ever begins to move in the General Assembly), there will never be any effort directed to a State official or employee. Such an "effort. . . directed to a State official or employee" is an absolute requirement for there to be "direct communication."

(g) "Indirect communication" is defined in the Act as: "[a]n effort, whether written, oral or by any other medium, to encourage others, including the general public, to take action, the purpose or foreseeable effect of which is to directly influence legislative action or administrative action." 65 Pa.C.S. §13A03 (definition of "indirect communication"). The definition goes on to provide examples of "indirect communication", including ". . . letter-writing campaigns, mailings, telephone banks, print and electronic media advertising, billboards, publications and educational campaigns on public issues." *Id.*

(h) Merely paying a retainer, without some other action, is not "[a]n effort. . . to encourage others to take action. . . ." as is required for "indirect communication."

(i) The Proposed Regulations, in effect, delete the Act's requirement that there be "[a]n effort. . . to encourage others to take action. . . ." Such a result is contrary to law.

(j) Moreover, the reporting requirements in the Act make clear that the General Assembly never intended the payment of a retainer alone to trigger the registration and reporting requirements.

(i) Lobbying expenses must be divided among three categories: (1) the costs of gifts, hospitality, transportation and lodging given to or provided to State officials or employees or their immediate families; (2) costs for direct communication; and (3) costs for indirect communication. 65 Pa.C.S. § 13A05(b)(2). The Proposed Regulations would require the same allocation of lobbying expenses. See proposed Section 55.1(g)(3).

(ii) As discussed above, merely paying a retainer is not a cost for direct communication or a cost for indirect communication. Paying a retainer to a lobbyist certainly is not a cost of gifts, hospitality, transportation and lodging.

(iii) The reporting requirements thus make clear that merely paying a retainer cannot be "lobbying" under the structure of the Act.

(k) The Regulations Committee advances the following tortured rationale for defining "lobbying" to include the payment of retainers:

(i) "The Committee proposes that lobbying includes paying a lobbyist a retainer, even if that lobbyist does not make direct or indirect communications. A principal hiring a lobbyist not to make any direct or indirect communications is an effort to influence legislative action or administrative action because it is furthering the principal's intent to influence legislative or administrative action or the lack thereof. By hiring a lobbyist to not make any direct or indirect communications, a principal could prevent that lobbyist from working for another principal with opposing views. . . ."

(ii) Clients pay lobbyists a retainer for a variety of reasons, particularly including the assurance that a specific lobbyist will be available when the client needs the lobbyist to lobby, with no intent to influence current legislative or administrative proposals. The Regulations Committee's rationale quoted above in (i) does not address this typical factual pattern. Under this typical factual pattern, the client has no intent to influence legislative action or administrative action until the client needs the lobbyist to lobby. This is not "direct communication" and cannot be included as "lobbying" under the clear language of the Act.

(iii) As to the type of defensive retainer outlined in the comment, the General Assembly might have had the authority to include that sort of activity under the definition of "lobbying." However, the General Assembly did not do so. The Regulations Committee's interpretation would read out of the statutory definition of "direct communication" an important statutory requirement, *i.e.*, that a "direct communication include "[a]n effort. . . directed to a State official or employee."

(l) As stated above, the Regulations Committee has no authority to amend the Act. That is within the sole discretion of the General Assembly.

(m) The Proposed Regulations should be revised to state clearly that the mere payment of a retainer is not "lobbying."

(n) A number of amendments to the Proposed Regulations will be necessary in order to remove the concept that the mere payment of a retainer is not "lobbying." For example,

(i) The definition of "effort to influence legislative action or administrative action", 38 Pa.B. at 466, should be amended to delete subsection (i). This section provides that "[p]aying 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 action."

(ii) § 53.2(a)(1), 38 Pa.B. at 451, should be deleted or clarified to make clear that mere payment of a retainer is not "lobbying": This section provides that "[e]ngaging a lobbyist or lobbying firm for purposes including lobbying constitutes acting in the capacity of a principal."

(iii) § 53.3(a)(1), 38 Pa.B. at 452, should be deleted or clarified to make clear that mere payment of a retainer is not "lobbying": This section provides that "[a]ccepting an engagement to lobby or accepting a retainer or other compensation for purposes including lobbying constitutes acting in the capacity of a lobbying firm."

(iv) § 53.4(a)(1), 38 Pa.B. at 453, should be deleted or clarified to make clear that mere payment of a retainer is not "lobbying": This section provides that "[a]ccepting an engagement to lobby or accepting a retainer or other compensation for purposes including lobbying constitutes acting in the capacity of a lobbyist."

(v) Recommended Action: In § 55.1(a), 38 Pa.B. at 454, the following sentence should be deleted: "The threshold of \$2,500 includes any retainers or other compensation paid by a principal to a lobbying firm or lobbyist, whether or not the lobbying firm or lobbyist then spends the retainer."

(3) **The Proposed Regulations improperly would amend the Act to add "grants, the release of funds from the capital budget, loans and investment of funds" as part of "administrative action" that is subject to the Act.**

(a) The definition of "administrative action" in the Proposed Regulations differs from the definition in the Act by adding four new categories to the definition. These are: (1) grants; (2) the release of funds from the capital budget; (3) loans; and (4) investment of funds."

(b) Below is Act's definition of "administrative action," which clearly shows that the four new categories are not included in the statute. The Act defines "administrative action" as:

"Administrative action." Any of the following:

(1) An agency's:

(i) proposal, consideration, promulgation or rescission of a regulation;

(ii) development or modification of a statement of policy;

(iii) approval or rejection of a regulation; or

(iv) procurement of supplies, services and construction under 62 Pa.C.S. (relating to procurement).

(2) The review, revision, approval or disapproval of a regulation under the act of June 25, 1982 (P.L. 633, No. 181), known as the Regulatory Review Act.

(3) The Governor's approval or veto of legislation.

(4) The nomination or appointment of an individual as an officer or employee of the Commonwealth.

(5) The proposal, consideration, promulgation or rescission of an executive order.

(c) Not only does the Act's definition of "administrative action" not include "grants", "the release of funds from the capital budget", "loans" and "investment of funds", but the Commonwealth Procurement Code expressly states that it does not apply to grants or loans. The Procurement Code provides, in pertinent part, as follows:

(i) "APPLICATION TO GRANTS.-- This part does not apply to grants. For the purpose of this part, a grant is the furnishing of assistance by the Commonwealth or any person, whether financial or otherwise, to any person to support a program. The term does not include an award whose primary purpose is to procure construction for the grantor. Any contract resulting from such an award is not a grant but a procurement contract." 62 Pa.C.S. § 102(f)(emphasis added).

(ii) "(F.1) APPLICATION TO LOANS.-- This part does not apply to loans. For the purpose of this part, a loan is the disbursement of funds by the Commonwealth to any person where the principal amount disbursed is required to be repaid to the Commonwealth, with or without interest, under an agreement." 62 Pa.C.S. 102(F.1)(emphasis added).

(d) The Commonwealth Procurement Code has no provision that applies to "the release of funds from the capital budget" or the "investment of

funds." None of the other categories in the Act's definition of "administrative action" may be read to include the four added terms.

(4) The Regulations Committee's rationalization for this added language is that this language clarifies "the statutory intent that lobbying would include communication on grants, the release of funds in the capital budget, loans and investment of funds." Discussion of "Administrative action", 38 Pa.B. at 435.

(5) This assertion has no basis in the language of the Act. As the Statutory Construction Act expressly states: "When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit." 1 Pa.C.S. § 1921(b).

(6) The General Assembly could have included "grants", "the release of funds from the capital budget", "loans" or "investment of funds" as part of "administrative action." However, it chose not to do so and the Regulations Committee has absolutely no authority to add additional language or concepts to the Act's clear language in pursuing its view of the General Assembly's "intent."

(7) Recommended Action: The Proposed Regulations should be revised to delete "grants, the release of funds from the capital budget, loans and investment of funds" before the Proposed Regulations are finalized.

2. **The Proposed Regulations need to be clarified to make certain that the names of grassroots supporters are not required to be reported as "lobbyists."**

A. The quarterly expense reporting section of the Proposed Regulations, § 55.1, 38 Pa.B. at 454, should be amended as follows: (Proposed new language underlined.)

§ 55.1. Quarterly expense reports.

\* \* \*

(g) (g) 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 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.

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B. These suggested changes in the Proposed Regulations would make the reporting requirements consistent with the decision by the Regulations Committee regarding registration not to require the listing of "lobbyists" who are not required to register as lobbyists.<sup>5</sup>

C. We suggest these amendments because the Proposed Regulations do not clarify this issue and as a result of a troubling public discussion that took place at the August 2007 public hearing. At the hearing, during the testimony of various witnesses, including the undersigned, Representative Maher asked about the following scenario:

Assume that an entity (the "Sponsor") sponsors a "Day on the Hill." The principal rents a bus and recruits supporters (members of the Sponsor and/or just ordinary citizens) ("Grassroots Supporters") to participate in the Day on the Hill. The Grassroots Supporters ride to Harrisburg on the bus, without charge. The Sponsor provides a box lunch. In Harrisburg, the Grassroots Supporters lobby their legislators for a cause supported by the Sponsor. The Grassroots Supporters then return to the place in Pennsylvania where the journey started, again traveling without charge.

D. Discussion at the public hearing indicated that the Committee might intend the Draft Regulations to require that the name of each of the Grassroots Supporters be listed on the principal's next report as a "lobbyist," even though the only "economic consideration" each of the Grassroots Supporters received was the value of the bus ride and the cost of the box lunch.

E. In our view, the notion that the Act requires the listing of thousands of grassroots "lobbyists" in quarterly expense reports runs counter to the Act's regulatory

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<sup>5</sup> The Drafting Committee's comment to Section 53.2 (Principal registration) states: "Section 13A04(b)(1) of the act contains the filing requirements for a principal's registration statement. In reviewing § 53.2(b)(3) on July 19, 2007, when the Committee discussed the requirement at section 13A04(b)(1) of the act, which would provide that the principal list the "name and permanent business address of each individual who will for economic consideration engage in lobbying on behalf of the principal or lobbying firm," it also considered the exemptions for registration and reporting at section 13A06 of the act (relating to exemption from registration and reporting). The Committee reasoned that it was not logical to require principals to list all employees or contract lobbyists hired by a principal as lobbyists or lobbying firms if those same individuals or firms are exempt from registration and reporting under section 13A06 of the act. In applying the rules of statutory construction, the Committee decided to read these different statutory provisions in sections 13A04 and 13A06 together, in pari materia, in accordance with 1 Pa.C.S. § 1932 (relating to statutes in pari materia). Furthermore, the Committee reasoned that the General Assembly did not intend a result that is absurd, as provided at 1 Pa.C.S. § 1922(1) (relating to presumptions in ascertaining legislative intent), and that it would be absurd to require a principal to list an employee or contract lobbyist on its registration statement if that individual did not qualify as a "lobbyist" due to an exemption at section 13A06 of the act." 38 Pa.B. at 438 (emphasis added).

scheme and would put a substantial burden on the Constitutional right of groups and individuals seeking to exercise their Constitutional right to petition their government.<sup>6</sup>

F. The purpose of this comment is simply to raise the Constitutional issue and not to brief it in detail. A determination by the Committee that the Grassroots Participants do not need to be listed in expense reports as "lobbyists" (for example by adopting the proposed amendment on pages 9-10 of this letter) would obviate having to further explore these serious concerns.

G. The idea that the names of Grassroots Supporters must be listed in the Sponsor's expense report, we understand, was based on the requirement that the principals must report the names of lobbyists by whom lobbying is conducted on behalf of the principal. 65 Pa.C.S. § 13A05(b)(1) provides as follows:

(1) Each expense report must list the names and registration numbers when available of all lobbyists by whom lobbying is conducted on behalf of the principal and the general subject matter or issue being lobbied.

(Emphasis added.)

H. To understand the issue, it is necessary to focus on the definitions of "lobbyist" and "economic consideration." 65 Pa.C.S. § 13A03 defines "lobbyist" as:

"Lobbyist." Any individual, association, corporation, partnership, business trust or other entity that engages in lobbying on behalf of a principal for economic consideration. The term includes an attorney at law while engaged in lobbying.

(Emphasis added.)

"Economic consideration" is defined in the same section of the Act as:

"Economic consideration." Anything of value offered or received. The term includes compensation and reimbursement for expenses.

*Id.*

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<sup>6</sup> Section 20 (Right of petition) of the Declaration of Rights in the Pennsylvania Constitution states: "The citizens have a right in a peaceable manner to assemble together for their common good, and to apply to those invested with the powers of government for redress of grievances or other proper purposes, by petition, address or remonstrance." Pennsylvania Constitution, Art. I, § 20. See, U.S. Const., Amend. I ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the government for a redress of grievances.")

I. Thus, since each Grassroots Supporter received the value of the bus ride to Harrisburg and the value of the box lunch, and since each Grassroots Supporter lobbied in Harrisburg, there apparently was discussion in the Committee that each Grassroots Supporter is a "lobbyist" and that the name of each such Grassroots Supporter must be listed on the quarterly expense reporting form.

J. The problem with this analysis is that it ignores the words of the Act and the Act's plain language with respect to lobbyists who are required to be mentioned (and sign) the quarterly reporting form.

K. Requiring Grassroots Supporters to be listed in the report would require the deletion of the word "when" from the Act.

L. As quoted above, 65 Pa.C.S. § 13A05 requires the expense report to contain two pieces of information: ". . .the names and registration numbers when available of all lobbyists. . . ." (emphasis added.) The Act thus contemplates that the registration number ("when available"), along with the name, must be listed.

M. It is important to focus on the word "when." The Act does not say that the registration numbers will be disclosed "if available" or "if the individual must register as a lobbyist." Rather the General Assembly assumed that anyone whose name will be required to be listed will eventually have a registration number. Again, the statutory phrase used is "when available."

N. None of the Grassroots Supporters (under the facts set forth above) will ever have to register. None of them will ever have a registration number. If the General Assembly had wanted principals to list everyone who technically might be regarded as a lobbyist (even someone whose compensation was a bus ride and a box lunch) it would have said so and would not have used the phrase "when available."

O. The conclusion that only individuals who must register are required to be listed by 65 Pa.C.S. § 13A05 is consistent with the requirement that only registered lobbyists must sign and "attest to the validity and accuracy" of the report. 65 Pa.C.S. § 13A05(b)(4). It does not make any sense that the General Assembly would require the listing of many "lobbyists" in one section of the report while not having them sign the report as required in another section of the Act. The two sections of the statute should be read together in pari material as required by 1 Pa.C.S. § 1936. Only registered lobbyists should be listed in an expense report.

P. Recommended Actions:

(1) We do not believe that the Act requires the names of Grassroots Supporters to be listed on the Sponsor's quarterly expense report and strongly urge that this issue be clarified by adoption of the proposed amendments set forth above.

(2) In addition, we urge that a specific example or examples be included in the Draft Regulations to make certain that there is no confusion that the names of such Grassroots Supporters should not be listed as "lobbyists" in the required expense reports.

3. **The Proposed Regulations should be clarified to state specifically that accepting the results of indirect communication (such as educational training or publications) does not result in the recipient being a "lobbyist."**

A. During the August hearing, there was additional troubling dialogue among members of the Regulations Committee and witnesses regarding whether the acceptance of educational seminars or publications constitutes compensation that results in the recipient being considered a "lobbyist." This issue has not been, but should be, clarified in the Proposed Regulations.

B. The Act does not require that everything of value given by a principal to an individual be considered "economic consideration", the receipt of which turns the recipient into a lobbyist. It is our position that funds may be expended for "indirect communication" without someone who receives the benefit of that expenditure becoming a lobbyist.

C. The definition of "indirect communication" includes "[a]n effort, whether written, oral or by any other medium, to encourage others, including the general public to take action, the purpose or foreseeable effect of which is to directly influence legislative action or administrative action." 65 Pa.C.S. § 13A03 (definition of indirect communication). The statute lists a number of specific examples including ". . . publications and educational campaigns on public issues."

D. Conducting educational sessions for or distributing publications to members of the public as part of an indirect communication effort, of necessity, requires that those members of the public be able to receive the publications and attend the educational sessions. It makes no sense to suggest that anyone who receives such a publication, or is educated in an educational campaign as part of an indirect communication effort, becomes a lobbyist for the principal, if that person is persuaded to take action, for example, by writing a letter or speaking to (*i.e.*, lobbying) a member of the General Assembly.

E. Such educational sessions are part of "indirect communication" campaigns. The individuals receiving the education are the "others" in the statutory definition of "indirect communication"<sup>7</sup> and are not "lobbyists." The General Assembly

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<sup>7</sup> "An effort. . .to encourage others. . .to take action, the purpose or foreseeable effect of which is to directly influence legislative action or administrative action." 65 Pa.C.S. § 13A03 (definition of "indirect communication").

had to have contemplated individuals receiving benefit from "indirect communications" or the whole concept would be meaningless.

F. A basic rule of statutory construction is that ". . .the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." 1 Pa.C.S. § 1922. There is absolutely no evidence in the words of the statute that the General Assembly intended to include in the definition of "lobbyist" any recipient of anything of value from actions to encourage others to influence legislative or administrative action (*i.e.*, indirect communication). Such an interpretation would stretch the words of the Act far beyond anything reasonable or, we believe, anything intended by the General Assembly.

G. Expenditures to encourage grassroots actions - even paying for bus fare and a box lunch - are and should be viewed as indirect communication expenses on the part of a principal -- part of an effort ". . .to encourage others, including the general public, to take action, the foreseeable effect of which is to directly influence legislative action or administrative action" -- and not as compensation to a lobbyist. The expenses should be reported by the principal under "indirect communication" expenses. The subjects of the expenditures were never intended to be viewed as lobbyists, whether or not they are moved by the indirect communication to lobby.

H. Moreover, a paid lobbyist should not be viewed as an "other" as that term is used in the definition of "indirect communication" The Regulations Committee should interpret the Act's definition of "lobbyist" (in fact, all the Act's definitions) in a common sense manner that, to the maximum extent possible, uses the words as they are most commonly employed. See, 1 Pa.C.S. § 1903.

I. There is no requirement in the Act, or in the rules of statutory construction, that the Regulations Committee needs to read the Act's definitions in a hyper-technical way that leads to absurd results. Requiring citizens who participate in grassroots lobbying, in the circumstances described above, to be formally listed in online, fully-searchable public records as "lobbyists" -- along side people who are paid thousands of dollars a reporting period -- in our judgment, would be an absurd result that is not warranted by the language of the Act.

J. Requiring the names of anyone engaging in grassroots advocacy in the circumstances described above could raise Constitutional concerns.

(1) A basic rule of statutory construction is that ". . .the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." 1 Pa.C.S. § 1922(3).

(2) Requiring that online fully-searchable public lists of anyone engaged in grassroots advocacy under the circumstances described above could place an impermissible burden on the exercise by an individual's right of free speech and the

right of citizens to petition their government for redress of grievances; rights that are protected by both the U.S. and Pennsylvania Constitutions.

K. Recommended Action: We urge that a specific provision be added to the Proposed Regulations at the end of the definition of "economic consideration", 38 Pa.B. at 446, as follows (new language is underlined):

*Economic Consideration--*

- (i) The term includes anything of value offered or received.
- (ii) The term includes compensation and reimbursement for expenses.
- (iii) The term does not include attendance at educational sessions, receipt of publications and other goods and services as part of an effort to encourage others to take action, the purpose or foreseeable effect of which is to directly influence legislative action or administrative action, and which is reported as part of the costs for indirect communication pursuant to § 55.1(g)(3)(iii).

4. **The Proposed Regulations should be clarified to state specifically that volunteers are not "lobbyists."**

A. As a bar association comprised of approximately 13,000 attorneys, members of the Philadelphia Bar Association engage in pro bono activities, including volunteering their time to improve the laws of Pennsylvania. Lawyers throughout Pennsylvania have a long and proud tradition of working for law reform in Harrisburg. This includes advocating for improvement both in our statutes and in state regulations.

B. Many other individuals from a wide variety of professions and occupations also volunteer their time, whether as members of nonprofit boards of directors or as individuals, to support, oppose or seek improvements to legislation and regulations. Law firms and companies, large and small, permit (and often encourage) their partners and employees to participate in these and other law reform activities both in their spare time and on "company time." We believe that these types of volunteer activities are essential to the continued vibrancy of our democracy.

C. We strongly believe that the General Assembly had no intention whatsoever to regulate such volunteer activities. We do not believe that the Act in fact regulates such volunteer activities. Moreover, we believe that the regulation of such volunteer activity also would raise significant Constitutional issues.

D. Recommended Action:

(1) The Proposed Regulations should be amended to add a clear and unequivocal statement that volunteer activity, by itself, is not lobbying.

(2) Therefore, we proposed that the following sentence be added to the text of the Proposed Regulations, to the definition of "lobbyist", 38 Pa.B. at 447-448 (new language underlined):

*Lobbyist*--An individual, association, corporation, partnership, business trust or other entity that engages in lobbying on behalf of a principal for economic consideration. The term includes an attorney-at-law while engaged in lobbying. Membership in an association alone is not sufficient to make an association member a lobbyist. Volunteer activities, including pro bono publico representations, law reform and other such activities by an attorney, alone are not sufficient to make an individual who engages in such activities a lobbyist.

5. **Simplification, bright-line standards and substantial additional examples need to be added to the Proposed Regulations.**

A. The Proposed Regulations would create an unduly complex regulatory system that will present significant problems to those who must comply with its provisions.

B. These regulations will be read, and will need to be followed by, a myriad of individuals and groups, many if not most of which will not have sophisticated legal counsel available to assist them. In our view, the public interest requires that the regulations should be written clearly and simply. Also, the regulations should be self-contained so that the public is able to determine easily, without resort to complicated legal research, what conduct is permitted and what conduct is prohibited by the Act.

C. We believe that the General Assembly established the Regulations Committee in order to insure that the final form of the Proposed Regulations are as clear as possible and as practical and useful as possible to the public. The public needs a practical one stop place to go to answer questions about when individuals and groups must register and what they must report. Although we appreciate the hard work of the Regulations Committee, unfortunately, the Proposed Regulations do not accomplish the Regulations Committee's mission.

D. Recommended Actions: We urge that the Proposed Regulations be substantially revised and simplified. Bright-line standards and a significant number of practical examples should be added to the text of the Proposed Regulations. Only when the Proposed Regulations can be said to be clear, and as free from ambiguity as possible, will the Committee have done the job that we believe the General Assembly has given to it.

6. **The preamble to the Proposed Regulations should be revised to describe the actual fiscal impact on the private sector.**

A. The preamble to the Proposed Regulations describes the fiscal impact of the Proposed Regulations on the "Private Sector" as follows:

The regulated community will have expenses in the form of a registration fee which is \$100.

B. This description ignores the very significant costs to the regulated community in complying with the expanded requirements in the regulations. The fiscal note totally ignores the costs for tracking, disclosing, recording keeping and training. The complexity inherent in the Act is compounded by the additions to the Act's requirements that the Regulations Committee seeks to add to the Act's provisions. Please see discussion in Section 1 of this letter.

C. The public has the right to know the actual financial impact of the Proposed Regulations before they become final.

D. **Recommended Actions:** The Proposed Regulations should be withdrawn and a realistic fiscal impact statement, that accurately reflects the costs that will be imposed on the private sector, should be prepared. After that is done, the regulations should be reissued as a new proposed rulemaking to give the public a chance to comment on the actual costs associated with implementing the Proposed Regulations.

7. **Technical comments.**

A. **Cross-references to other statutes.**

(1) The Proposed Regulations will be used by thousands of groups and individuals, many of whom are not attorneys and have no access to or detailed knowledge of statutory research. To the maximum extent possible, the Proposed Regulations should be self-contained so that reference to either the Act or other law is not necessary.

(2) **Recommended Action:** We urge the Regulations Committee to eliminate cross-references to other statutes, if possible. If a cross-reference is absolutely necessary, a description of the referenced provision should be included in the text of the Regulations.

B. **Citation Form.**

(1) Please see footnote 2 on page 1 of this letter for a discussion of citation form issues.

(2) Recommended Action: We strongly urge that the Proposed Regulations be amended so that any reference to the Act uses the full Pennsylvania Consolidated Statutes citation form.

### CONCLUSION

Based on all of the above comments, we believe that the Proposed Regulations should be withdrawn, subject to additional public hearings, and significantly rewritten, with the goal of improving the clarity of the Proposed Regulations so that members of the public will be able to comply easily with the final regulations.

We urge that additional bright-line standards and a significant number of practical examples be added to the Proposed Regulations and that the Proposed Regulations be issued again as a proposed rulemaking for additional public comment.

The Philadelphia Bar Association is prepared to actively participate in the public process and to provide any additional comments that might be helpful.

Very truly yours,



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LJB/lln

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