NEW YORK STATE COMMISSION ON PUBLIC INTEGRITY

JOINT COMMENTS BY THE HUMAN SERVICES COUNCIL OF NEW YORK CITY, LAWYERS ALLIANCE FOR NEW YORK AND THE NONPROFIT COORDINATING COMMITTEE OF NEW YORK ON THE COMMISSION STAFF'S LEGISLATIVE PROPOSALS TO AMEND THE NEW YORK STATE LOBBYING ACT.

September 3, 2009

INTRODUCTION

The Human Services Council of New York City, Lawyers Alliance for New York and the Nonprofit Coordinating Committee of New York thank the Commission for its "Invitation to Present Position" regarding the Commission staff's legislative proposals to amend the Lobbying Act.

Human Services Council of New York City (HSC) is a coalition of 160 organizations strengthening the human services sector's ability to serve New Yorkers in need. As a non-partisan intermediary between government agencies and member organizations, we passionately champion the sector. We proactively negotiate with State and City government for mutually beneficial, solutions-based budget, policy, and legislative reform that improve our constituents' work and the lives of the individuals they serve.

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City's low-income and disadvantaged neighborhoods. With the assistance of a staff of twenty-one, including thirteen attorneys, and a network of more than 1000 active volunteer attorneys from more than 100 law firms and corporate legal departments, Lawyers Alliance uses its $2 million annual budget to leverage many millions worth of legal services to over 500 nonprofit groups each year.

The Nonprofit Coordinating Committee of New York, Inc., (NPCC) is the largest "umbrella" group serving New York City area nonprofits. NPCC informs and connects nonprofit leaders, saves nonprofits money, and strengthens the nonprofit sector's relations with government. NPCC has more than 1,700 dues-paying members in the New York City area.

Like many policy makers, the not-for-profit community is committed to meeting the needs and enriching the lives of New York's residents through a broad array of high quality services. Good communication between policy makers and service providers is a fundamental component of the development of sound services systems. We offer the following comments that are focused on the impact of the proposed amendments on not-for-profit organizations in New York.

RAISING THE REGISTRATION AND REPORTING THRESHOLD--PROPOSAL NO. 7.

We believe that Proposal No. 7--to raise the monetary threshold for registration and reporting to $10,000-- is of the utmost importance AND we urge you to consider increasing the threshold to $25,000. The $25,000 threshold might be applicable only to organizations qualifying for federal income taxation under section 501 (c) (3) of the Internal Revenue Code (principally religious, charitable, educational and scientific organizations, "no part of the net earnings of which inures to the benefit of any private shareholder or individual").

The burdens on small organizations of registration and reporting are considerable, resulting in a material diversion of work from performing the mission as well as creating uncertainty, anxiety, and errors due to confusion and ignorance. Given how lobbying is conducted today, efforts having a cost below $25,000 are highly unlikely to involve the abuses and call for the scrutiny that is the concern of the Lobbying Act. This is particularly true in the case of section 501(c)(3) organizations that seek legislative and regulatory changes on behalf of those they serve. Also, the registration and reporting requirements are time-consuming, especially for organizations that lack staff schooled in the rules. In stark terms, diverting a staff member from feeding the homeless to spending time doing the required paperwork means that there is that much less available for feeding the homeless. This very real trade-off could be further ameliorated by raising the registration threshold to $25,000 for charitable organizations.

CHANGING THE DEFINITION OF "LOBBYING"—PROPOSAL NO. 1

We oppose this proposal because it broadens the categories of conduct considered lobbying beyond the intent of the statute. Clarification of the definition of "lobbying" would allow for a greater understanding of the law by the public, lobbyists, clients and administrators and further the transparency goals of the Lobbying Act. However, this proposal would almost certainly have the opposite effect.

By substituting a very general description of the activities covered by the law ("...any attempt to influence any act or decision made by a public official ..") for the eight specific activities now comprising the definition of "lobbying," this proposal broadens the categories of conduct that will be covered by the law in unpredictable ways that are certainly not contemplated by the intent of the statute. Public and administrative agency officials engage in "acts" and make "decisions" every day that are unrelated to the passage of legislation, the promulgation of regulations, or the award of government procurements, including "acts" of constituent service and "decisions" about contracts already awarded and other routine agency business. All of these matters, and any attempt to influence the discharge by public officials of their many, many responsibilities, would be swept within the Lobbying Act as drafted in this proposal.

Clarification of the scope of the conduct covered by the Lobbying Act would be most welcome, but is not to be achieved through a simplification of this kind. For example,

the scope of the Act's application to state or municipal administrative agency determinations beyond rate-making determinations and the promulgation of regulations (turning upon the meaning of "...any rule or regulation having the force and effect of law...") has caused much confusion among not-for-profit groups that seek to reform agency policy and practices in ways that have general applicability to all or part of the sector. To the extent that those efforts are intended to produce generally applicable results and involve interpretation of state law and regulation, do they produce "rules" and require reporting of those efforts as administrative lobbying? Unfortunately, this proposal does not address such questions, and instead encompasses these activities as well as other activities unrelated to the subject of the Lobbying Act.

REMOVING ALL EXCEPTIONS FROM THE DEFINITION OF "GIFT"—PROPOSAL NO. 3

We oppose this proposal because it would impose unnecessary burdens on not-for-profit organizations. Clarification of the meaning of gifts of "more than nominal value" would certainly help to dispel confusion and encourage compliance by not-for-profit organizations that so frequently interact with public officials. However, this proposal would impose impractical regulatory obligations on the Commission's staff and do little to control the unsavory "quid pro quo" arrangements that are intended to be deterred by the ban on gifts to public officials.

There are more than 70,000 not-for-profit organizations in New York State, with more than 35,000 in the New York City area alone. These organizations stage thousands of fundraising and other public events every year, and they typically invite elected and administrative agency officials to those events. Items of less than nominal value, such as those described in the current exceptions in the Act, are offered at these events to public officials and members of the public who attend. To expect those not-for-profit organizations, most of which are not registered as lobbyists or lobbying organizations, to be aware of their obligation to seek an advance ruling from the Commission's staff before distributing food and beverage, ceremonial awards, or coffee mugs bearing the organization's logo to public officials is a trap for the unwary and a recipe for widespread noncompliance. To expect the Commission's staff to respond to thousands of such requests each year, and to do so in time to preserve a not-for-profit's plans for events that may be crucial to the organization's revenues, is an impractical burden and a waste of limited resources on trivial applications.

The Lobbying Act currently includes exceptions to the ban on gifts to public officials, including; complimentary attendance, including food and beverage, at bona fide charitable or political events; complimentary attendance; food and beverage offered by the sponsor of an event that is widely attended or was in good faith intended to be widely attended (when attendance at the event is related to the attendee's duties or responsibilities as a public official or allows the public official to perform a ceremonial function appropriate to his or her position); awards, plaques, and other ceremonial items which are publicly presented, or intended to be publicly presented, in recognition of public service (provided that the item or items are of the type customarily bestowed at

such or similar ceremonies and are otherwise reasonable under the circumstances); honorary degrees bestowed upon a public official by a public or private college or university; and promotional items having no substantial resale value (such as pens, mugs, calendars, hats, and t-shirts which bear an organization's name, logo, or message in a manner which promotes the organization's cause). Recognizing that the foregoing only partly captures the items of less than nominal value that might be offered, the Act also prohibits gifts "unless under the circumstances it is not reasonable to infer that the gift was intended to influence" a public official. While imperfect, these exceptions signal to not-for-profit organizations that some practices that are very common in the sector do not require regulatory concern, while others that are not enumerated may be prohibited.

IMPOSING PENALTIES FOR FAILURE TO COMPLY WITH A RANDOM AUDIT—PROPOSAL NO. 4

We oppose this proposal as it is currently drafted. Random audits are an important enforcement tool, the utility of which would be thwarted if registrants are able to refuse to participate without penalty. However, this proposal contains an ambiguity that may permit the imposition of penalties on lobbyists or lobbying organizations that do not receive notice of such an audit or otherwise inadvertently fail to cooperate.

The proposal seeks to amend section 1-d(b)(i) by adding the following sentence: "If a lobbyist or client is chosen for random audit and upon notification of such selections (sic), refuses to cooperate or participate in such audit, such conduct will be in violation of legislation law (sic) and subject the lobbyist or client to a civil penalty." However, the section of the Act that actually imposes the penalty, section 1-o (b)(iii)(A) and (B) of the statute, would be amended to provide, "A lobbyist or client who knowingly and willfully violates the provision of subdivision one of section 1-n of this article or who does not comply with a request of the Commission to schedule and comply to (sic) a random audit shall be subject to a civil penalty not to exceed ten thousand dollars for an initial violation." As drafted, the scienter requirement contained in the phrase "knowingly and willfully" is applicable to violations of section 1-n, but not to the failure to comply with a request from the Commission to initiate a random audit.

While the Commission's staff is typically diligent about providing notification regarding random audits and other matters, it is always possible that such notice may be lost in the mail or misdirected within a registered organization. By adding the requirement that a failure to comply must be "knowing and willful," as is the case with violations of section 1-n, the imposition of this penalty will be reserved for noncompliant registrants who are deserving of such treatment.

REQUIRING RETENTION OF BUSINESS RECORDS FOR THREE BIENNIAL FILING PERIODS—PROPOSAL NO. 6

We oppose this proposal as drafted because it does not contain an exception for organizations that may have already disposed of records that are older than three years. The Lobbying Act currently requires the Commission itself to maintain filing records for clients and lobbyists for three biennial periods, or six years. However, the statute currently requires registrants to maintain records for a period of only three years, making it impractical for the Commission to conduct random audits or other enforcement actions for earlier periods. Commendably, this proposal would bring those record-retention requirements into symmetry by extending the record-keeping obligation of lobbyists and lobbying organizations to three biennial periods, but does not contain a provision for organizations who have already disposed of records.

While it may be sound business practice today to retain some records for a period of six years, that practice must be balanced with the modern trend in the not-for-profit and business sectors toward electronic record retention and the need to control storage costs. An undetermined number of current registrants will have already disposed of lobbying records older than three years, because they were not required to be retained under current law. This problem with the proposal could be resolved by limiting the application of this change to records created no more than three years prior to its effective date, and thereafter.

CONCLUSION

We applaud the Commission's work in making our public policy processes more transparent, preventing conflicts of interest, and reducing the influence of powerful lobbying entities. Government enjoys a long and rich tradition of collaboration between the not-for-profit community and policy makers. As the State and City's partners in the delivery of social, cultural, educational, and many other services, not-for-profit providers are encouraged by efforts to make government more responsive to the needs of the public over special interest groups with deep pockets.

Again, we thank you for your time and for this opportunity to provide you with comments. Please feel free to contact us at the information below if you have any questions or if you we can be of assistance.

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