NEW YORK
CITY BAR

June 26, 2015

Joint Commission on Public Ethics
540 Broadway
Albany, New York 12207
Via email to martin.levine@jcope.ny.gov

Dear Commissioners;

The Committee on Government Ethics of the New York City Bar Association submits this letter in response to the Commission's May 27, 2015, request for comment on proposed guidance on the scope of the definition of "lobbying" in the New York State Lobbying Act, Legislative Law Article 1-A.

Section 1-c(c) of the Lobbying Act defines lobbying as including "any attempt to influence" various governmental activities, including the passage or defeat of any legislation. Accordingly, the Commission's proposed guidance properly, in our view, includes consideration of the meaning of "influence."

A proper understanding of the word "influence" for purposes of the Lobbying Act is important. This word appears both in section 1-c(c) and in the legislative declaration establishing what the Lobbying Act seeks to accomplish. That declaration says that the protection of the integrity of governmental decision making requires the disclosure of the "identity, expenditures and activities of persons and organizations retained, employed or designated to *influence*" the specified governmental actions which, as noted above, include the passage or defeat of any legislation. (Emphasis added.)

The proposal that the Commission is considering has two parts. First, it addresses what it calls "direct lobbying," which involves a "direct interaction" with a public official. This part of the proposal specifies that "*Direct interaction* includes, but is not limited to (i) verbal or written communications, including communications made for the purpose of facilitating access to a public official; (ii) attendance at a meeting with a public official; and (iii) presence on a phone call with a public official."

Second, the proposal considers what it calls "grassroots lobbying." This is defined as activity that involves "a message or communication that solicits the public at large, or a segment or portion of the public at large" to engage with a public official in an attempt to influence any of the specified governmental activities. Examples include recent television campaigns aimed at influencing the passage or defeat of New York State legislation.

As to grassroots lobbying, the proposal specifies that a person or entity who "controls the content and delivery" of such a message or communication is engaged in lobbying. The proposal further specifies that the word "controls," with respect to the content of the communication, "includes participation in the formation of the communication or some influence over reviewing or editing the communication."

Speaking to direct lobbying, we believe that the proposal should include not only persons having direct interaction with a public official but also those who participate directly in crafting or delivering the communication at issue. Thus any person or entity that helps decide the substance of the talking points for a lobbying meeting or a lobbying letter to be delivered to a public official, as well as the client officers and employees who review or otherwise help decide the lobbying message or its intended audience, are engaged in lobbying because these people are engaged in activity which forms a material part of the attempt to influence a governmental action. The plain meaning of section 1-c(c) requires their inclusion, as does the manifest purpose of the Act to secure the right of the public to know what is being spent for what activity and by whom to influence governmental action.

With respect to grassroots lobbying, our Committee is supportive of the proposal as written with a few relatively minor exceptions. Grassroots lobbying is distinct from direct lobbying in that it solicits a third party to engage in lobbying activity. We think the proposal's focus on influencing the content of the lobbying communication is correct; the alternative would be to make every funder of the lobbying communication a person or entity engaged in grassroots lobbying activity. It is not clear to us, however, that funding of solicitation of others to lobby falls within the statutory text of the Lobbying Act. The funder who does not participate in the crafting of the lobbying communication or in identifying its target audience seems more appropriately to be seen as a passive client of the lobbyist whose identity is to be disclosed by the lobbyist.

We also suggest that the phrase "controls the content and delivery" be replaced with the phrase "influences the content or intended audience" to more accurately reflect the terms of the proposal. This change would require deleting the phrase "some influence" in what would now be the definition of "influences". Indeed the definitional sentence could well be shortened to read:

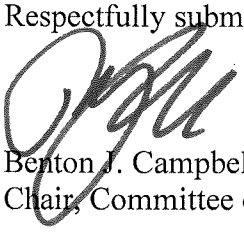
> "*Influences*, with respect to the content of the communication or its intended audience, includes substantive participation in the formation, review or editing of the communication or in specifying its intended audience."

The addition of the word "substantive" will exclude persons and entities that have no material substantive influence, such as proofreaders and media outlets, and therefore do not need to be covered.

Finally, we wish to thank the Commission for this initiative aimed at providing guidance as to the meaning of the word "influence" in the Lobbying Act. As you know from our report, *Hope for JCOPE*, it is our hope that the Commission will take comparable initiative in providing guidance concerning the State Code of Ethics and in particular whether the phrase "violation of

public trust" includes participating in wrongfully concealing official misconduct or failing to report known or reasonably suspected official misconduct.

Respectfully submitted,



Benton J. Campbell
Chair, Committee on Government Ethics

cc: JCOPE Review Commission