COMMITTEE ON GOVERNMENT ETHICS

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NYS Joint Commission on Public Ethics
c/o Martin Levine, Director of Lobbying and FDS Compliance and Senior Counsel
540 Broadway
Albany, New York 12207

Re: Proposed Advisory Opinion 15-0x – Reporting obligations under the Lobbying Act for a party who is compensated for consulting services in connection with lobbying activity

Dear Commissioners:

I write on behalf of the Committee on Government Ethics of the New York City Bar Association.[1] We submit this letter as a comment on the Commission's November 19, 2015, Proposed Advisory Opinion ("PAO") 15-0x entitled "Reporting Obligations Under the Lobbying Act for a Party Who Is Compensated for Consulting Services in Connection with Lobby Activity." We note that, on May 27, 2015, the Commission issued a similar PAO on the definition of Lobbying under Article I-A of the Lobbying Act, which the current PAO refers to as "Initial Proposed Draft 5-27-15." As the Commission may recall, we commented on Initial Proposed Draft 5-27-15 in a letter dated June 4, 2014.[2] That initial draft also proposed advice regarding the scope of both direct and grassroots lobbying. Several of the same comments are applicable to the current PAO.

We are appreciative of the Commission's continued efforts to bring focus to this important topic, and are grateful for the opportunity to submit additional comments. Lobbying requirements and guidance such as the current and prior PAOs serve the public interest by helping disclose useful information about who is lobbying public officials and how much they are spending to do so. This information, together with specific information as to who is being lobbied, provides the public, government officials and others with information that can be used to evaluate how the process of government is functioning. Together with campaign contribution

[1] Please note that Committee member Robert Cohen took no part in the preparation of this letter or the Committee's consideration of its substance.

[2] *Available at* http://www2.nycbar.org/pdf/report/uploads/20072923-LettertoJCOPEreproposedLobbyingActguidance.pdf.

information, such PAOs help improve the public's ability to evaluate the objectivity of government representatives and to gauge more effectively the value of proposed legislation or regulation.

We begin by noting that the November 19 PAO offers much "common sense" advice about lobbying disclosure. For example, the obligation to report does not depend on whether one calls oneself a lobbyist, but applies just as well to consultants and others who engage in lobbying activity. Likewise, under the PAO, lobbying activity includes preparatory meetings with government officials, and the mere presence of a hired lobbyist–regardless of what is discussed–constitutes lobbying. The PAO's advice is both practical and sensible, and presents an opportunity to build toward obtaining the goal of providing the public and government officials with an accurate picture of who is spending what to influence the exercise of governmental power by those officials.

In our June 4, 2015 letter, we addressed both "direct" and "grassroots" lobbying. For "direct lobbying," meaning lobbying efforts aimed at public officials who are decision makers and the policy staff on whom they rely for advice, we urged that it "should include not only persons having direct interaction with a public official but those who participate in crafting the direct lobbying communication." As to "grassroots lobbying," which constitutes indirect efforts aimed at inducing others to lobby a public official, we described as too narrow the PAO's requirement that to be engaged in grassroots lobbying, the person or entity in question had to control *both* the content and the delivery of the lobbying communication. We urged that individuals should be considered to have engaged in grassroots lobbying if they influenced either the content or the delivery of the lobbying communication. We also proposed the following definition of "influences" as that word is used in the Lobbying Act:

> *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.
> (Emphasis added)

The November 19 PAO once again provides advice on the scope of "lobbying" under the Lobbying Act. With respect to direct lobbying, it urges that as a matter of New York State advisory opinion precedent, direct lobbying includes only direct contact with a government official whether by meeting, phone call or written communication. This definition is said to be drawn from the decision of the Supreme Court of the United States in *United States v. Harriss*, 347 U.S. 612 (1954), construing a constitutional vagueness challenge to a federal criminal law related to lobbying activity.

With respect to grassroots lobbying, which the *Harriss* opinion defines as lobbying whose purpose is to pressure government officials through "an artificially stimulated letter campaign," the Commission confirms its position, said to be based on a 1997 Advisory Opinion of its predecessor entity, that a reporting obligation exists only when the reporting person provides "**substantive or strategic input on both the content and delivery of the message**." PAO at 8.E (emphasis in original). Under this reading, a firm hired by a client to craft the

grassroots lobbying message would not have to report the firm's fees and expenses, and the source of its funding, unless it also actually delivered the message or participated in determining of how to distribute or disseminate the message.

The New York City Bar Government Ethics Committee continues to believe that these definitions of direct and grassroots lobbying are too limited. With respect to the *United States v. Harriss* decision, 347 U.S. 612 (1954), we agree that there is a need for clarity but think the Commission construes *Harriss* too narrowly. As acknowledged by both the Commission and the Supreme Court in *Harriss*, the objective of promoting a broader understanding of "who is being hired, who is putting up the money and how much," 347 U.S. at 625, cannot be achieved unless all paid lobbying work is disclosed, including that done indirectly by persons who are not in contact with government officials. Without reporting by all those retained to provide such service, the answer to the "how much" question will be significantly understated and the "from whom' question will not yield responsive information.

We believe that the Commission has erred by converting *Harriss's* definition of lobbying "in its commonly accepted sense" of "direct pressures, exerted by the lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign." 347 U.S. at 620, into a bar on disclosure by others who are part and parcel of the direct lobbying effort. That conversion improperly excludes those who are paid to assist such direct pressure by crafting the lobbying message unless they are engaged by the person having direct contact with government officials. There is nothing in *Harriss* that suggests that the Court meant to exclude all other forms of lobbying activity, including indirect participation in lobbying efforts. Not only is the Commission's proposed limitation inconsistent with the purpose of lobbying disclosure as the Supreme Court articulated in *Harriss*, the limitation is inconsistent with the Court's inclusion in its definition of lobbying of "artificially stimulated letter campaigns" where the paid participants required to report almost certainly will not have any direct contact with public officials. *Id.*

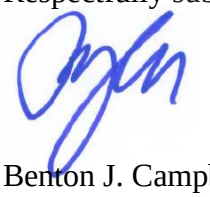
The definition of lobbying that we included in our letter of June 4, and again advance in this Comment, raises no substantial constitutional question either as a matter of due process, constitutional vagueness – which is a function of how a statute or regulation is applied – or with respect to the First Amendment. A requirement of full reporting by all persons participating substantially in lobbying communications with public officials, or in artificially stimulating letter (and now email) campaigns, does not regulate content but only sets reasonable disclosure obligations and regulations to further a legitimate, and recognized, public interest.

The practical effect of our proposal, moreover, is not dramatic, as the lines between what constitutes lobbying and what does not are easily understood. For example, attorneys who are hired by a client as active members of an advocacy team assembled for the purpose of lobbying members of the Assembly on a piece of proposed legislation, and who prepare memos and other materials with the knowledge that they will be used in a lobbying effort but do not themselves meet with legislators or elected officials or their staffs, would nonetheless fall within the definition of lobbying. On the other hand, responding to a client request for information or advice on the scope of a piece of proposed legislation or a regulation without the request being connected to influencing government action on the proposal, would not constitute lobbying activity. Disclosure of those involved in the lobbying team, even if they do not directly interact

with government officials, and the amounts such individuals are being paid for their services, serves the ends of enhancing knowledge of "who is being hired, who is putting up the money and how much" without running afoul of confidential privileges.

Thank you again for the opportunity to submit these comments. As always, we would welcome any questions or comments.

Respectfully submitted,



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