

New York State Comprehensive Lobbying Regulations Overview

December 26, 2018

New York State's first-ever Comprehensive Lobbying Regulations were approved by the New York State Joint Commission on Public Ethics (JCOPE) and will take full effect on January 1, 2019. The new regulations incorporate and replace a patchwork of guidance documents, advisory opinions, and interpretations of New York's Lobbying Act, dating back to 1978.

The new regulations are intended to provide greater transparency around lobbying activity, account for evolving technology, and streamline reporting requirements.

This is a brief overview of the existing Lobbying Act and key elements of the new regulations. Departures from prior practice are highlighted.

What is Lobbying?

Lobbying is any "attempt to influence" the following activities, known as Lobbying Act "1-c(c) activities":

- State or local legislation
- State or local executive orders
- State or local rules or regulations
- Rate making proceedings by state agencies or municipalities
- Governmental procurements
- Tribal-state compacts, memoranda of understanding, or any other tribal-state agreements

What is an Attempt to Influence?

An "attempt to influence" is any activity that is intended to support, oppose, modify, delay, expedite, or in any way affect any of the listed 1-c(c) activities.

Direct Lobbying

Direct lobbying occurs when direct contact is made between a lobbyist and the individual the lobbyist is attempting to influence. This contact includes, but is not limited to:

- A face-to-face meeting
- Telephone calls
- Distribution of any written materials
- Emails
- Social media interaction

Direct lobbying does *not* include:

- Providing technical information or answering technical questions
- Providing clerical or administrative assistance (*i.e.*, translations, sign language, and audio/visual assistance)
- Observation for educational purposes (only when the observer has no role in

strategizing, planning, messaging, or any other substantial role in the overall lobbying effort)

- Scheduling a meeting or placing a call in solely an administrative capacity (if lobbying is expected to occur at the meeting, the activity would be reported by the individual who directed the call or meeting to be set up)

Direct Lobbying: Lobby Days

The new regulations require that an organization holding a “lobby day” must report certain employees and certain expenses.

- Who needs to report activity for lobby days?
 - An employee or the designated lobbyist for the entity that is engaged in “Direct Lobbying” on the lobby day by directly contacting the public official and speaking on behalf of the organization at the lobby day. (This individual *must* be listed on the Statement of Registration and the Bi-Monthly Report.)
 - Importantly, mere presence at the lobby day does not make the person an individual lobbyist. Volunteers and members of the organization would *not* need to be listed as individual lobbyists.
- Reportable lobby day expenses may include the following:
 - Compensated staff time for attendance at the lobby day
 - Staff time planning for the lobby day
 - Expenses for advocacy materials and giveaways
 - Expenses relating to transportation to the lobby day (*i.e.*, train fares and bus services)

Direct Lobbying: Social Media

Reportable direct lobbying involves direct contact between a lobbyist and the individual the entity is attempting to influence. Social media communication can be considered direct lobbying if:

- The communication is sent directly to an account known to be owned or controlled by a public official
- The public official’s account is tagged or linked in the communication
- The communication is targeted at a public official’s staff

Expenses relating to Social Media Lobbying, where such activities constitute lobbying, may include:

- Consulting services
- Staff time allocated to planning and posting
- Advertising
- Sponsorship
- Search engine optimization

In any case, attribution of personal social media activities of an individual to an organization occurs only when those activities are conducted in the course of the person’s employment.

Grassroots Lobbying

Grassroots lobbying occurs when a lobbyist or lobbyist organization solicits another to

deliver a message to a public official on behalf of the lobbyist or lobbyist organization.

Audiences or recipients who voluntarily (without compensation) deliver the lobbying message to a public official are *not* considered to be Grassroots lobbyists or engaging in Grassroots lobbying.

Communication that references a lobbying activity, takes a clear position on that lobbying activity, and includes a “call to action” is considered Grassroots Communication. A call to action is a solicitation to the public or a person to directly contact a public official or to have them solicit others to directly contact the public official.

If an organization has employees engaging in the delivery of a Grassroots Lobbying Communication (in the course of the employees’ employment) who can be identified as speakers, and are participating in the shaping of a message that is being expressed in the communication, such individuals must be listed on all lobbying filings.

Reportable expenses attributable to Grassroots and Social Media Lobbying are similar to those for Direct Lobbying Social Media.

Procurement Lobbying

Procurement lobbying is an attempt to influence a government contract or to influence the decision of purchasing goods, services, revenue contracts, or real property with estimated annual expenditure of at least \$15,000.

Gift Rules

Both lobbyists and clients of lobbyists are *prohibited* from giving gifts to a public official. This includes officers and employees of local municipalities with a population of at least 5,000. While there are exceptions to the gift rules, they can be complicated. Therefore, consult qualified counsel for guidance before giving a gift of any kind to a public official.

Reportable Business Relationships (RBRs) Disclosure

Lobbyists and clients of lobbyists are required to publicly disclose RBRs where a state person receives more than \$1,000 in compensation either from the lobbyist or the client in a calendar year. The new regulations expressly provide that RBRs of the lobbyist’s or the client’s board or senior executives (known as High Level Individuals) are attributable to the organization. (For colleges and universities, this includes the governing board members, president or chief executive, and provost or central applications office.) Lobbyists and their clients may rely on a JCOPE questionnaire to determine whether reportable RBRs came from High Level Individuals within their organizations.

Contingency Fees, Stock/Equity Compensation for Lobbying Services Impermissible

The Lobbying Act expressly prohibits contingency arrangements where compensation for lobbying services is dependent upon the outcome of any governmental decision or lobbying effort. The new regulations also make clear that stock or equity compensation for lobbying activity is a *per se* violation of the prohibition against contingent retainers. The presumption of impermissibility can be overcome only by showing the value of stock or equity is not directly dependent on the outcome of the governmental action. In addition, any stock or equity payments for lobbying activity must be approved by JCOPE.

JCOPE will consider the following factors in determining whether such payments are permissible:

- Whether the stock is publicly traded or closely held;
- Whether the lobbying activity relates to a lobbying firm's entry or continued access to a geographic or product market;
- Whether the government action has broad impact across an industry or population, not simply affecting a small number of organizations;
- Any trading activity and changes in price, appraisal, or valuation over the preceding 12 months; and
- Other factors as determined by JCOPE.

Coalitions

A coalition is a group of otherwise unaffiliated members or entities who pool funds for the primary purpose of engaging in lobbying activities on behalf of the members of the coalition. Under the new regulations:

- A coalition must file lobbyist reports as an entity; or
- Each member of the coalition must file individual lobbying reports disclosing his or her contribution to the coalition.

Significantly, if the coalition members elect to file individually, those who spend more than \$5,000 a year on lobbying are considered beneficial clients, which may trigger source-of-funding disclosures.

Changes to Reporting Requirements

The new regulations require that Lobbyist Bi-Monthly reports and Client Semi-Annual reports disclose the actual individual targets of lobbying. Departing from prior practice, instead of merely disclosing vague targets of lobbying (*i.e.*, the assembly or legislative branch), the new regulations require the filer to disclose in more detail his or her lobbying efforts.

Following is a summary of the changes related to the filing of the Statement of Registration, Bi-Monthly Reports, Client Semi-Annual Reports, and Terminations.

Statement of Registration

- All parties in the lobbying effort must be disclosed, this includes all lobbyists, clients, and coalitions.
- Disclosure of the targets of the anticipated lobbying effort includes the subject-matter, agencies, organization, municipality, office, and the specific legislative body. In addition, the names of all individuals anticipated to be lobbied at the targets are required.
- Whether the lobbying effort is Direct, Grassroots, or both must be indicated.

Bi-Monthly Reports/Client Semi-Annual Reports

- All parties in the lobbying effort must be disclosed, this includes all lobbyists, clients, and coalitions.
- All targets of the actual lobbying efforts that took place during the two-month reporting period must be disclosed. This includes the subject-matter, agencies, organization, municipality, office, and the specific legislative body. In addition, the names of all individuals lobbied at the targets are required.
- Whether the lobbying effort is Direct, Grassroots, or both must be indicated.
- A lobbyist entity that files bi-monthly reports and lobbies only on its own behalf and *does not* retain an outside lobbyist or lobbyist entity is no longer required to file a Client

Semi-Annual Report.

Termination Requirements

Lobbyists and their clients will no longer be required to provide a termination notice to JCOPE when an agreement expires on the date stated in the agreement. Additionally, if the termination date in the agreement is the same as the end of the biennial registration period, no termination notice is required.

Online Ethics Training for All Lobbyists

All registered lobbyists will be required to complete online ethics training within 60 days of becoming a registered lobbyist.

New Online Filing Application

Beginning with the 2019-2020 biennial registration period, all filers will be required to register and file lobbying reports using the new JCOPE filing application program. All users will be required to create a profile with NY.gov, which will allow access to the system. JCOPE anticipates that the profiles will be available by early November 2019 and the 2019-2020 registrations can be filed by December 1, 2019.

While all new JCOPE regulations will become effect January 1, 2019, the reports required to be filed by January 15, 2019 (for July 2018-December 2018 and November 2018-December 2018) need not follow the new regulations. The new reporting requirements will be implemented for the reports due March 15, 2019 (for January 2019-February 2019).

Late Fee

Prior to the new regulations, first-time filers were charged a late fee of up to \$10 per day and all other filers were charged \$25 per day. Under the new regulations, filers may be charged a late fee ranging from \$75 per day to \$1,000 per day.

If you have any questions or would like to discuss the new regulations in detail, please contact Jackson Lewis.

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