

# New York State Issues Draft Lobbying Regulations for Public Comment

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The New York State Joint Commission on Public Ethics (JCOPE) recently issued almost 50 pages of proposed new rules to regulate the practice of lobbying in the state. The proposal would implement legislative changes enacted over the summer to New York's state lobbying law. ("New York State Passes Changes to Lobbying and Campaign Finance Laws," *Election Law News*, July 2016.) More importantly, the proposed rules also would codify principles articulated by JCOPE and its predecessor agencies in a hodgepodge of advisory opinions throughout the years. JCOPE is accepting written public comments on the proposed rules until November 21, and a public hearing on the proposal is scheduled for December 7.

According to JCOPE, the proposed regulations are meant to provide a "one-stop shop" that, for "the first time," consolidates in one place the substance of New York's lobbying statute as well as the agency's interpretation and implementation of the statute. A few noteworthy aspects of the proposal include its treatment of grassroots lobbying, the regulation of consultants who advise on grassroots lobbying, the use of social media in lobbying, and payments made to "pass-through coalitions."

So-called "grassroots lobbying" refers to attempts to influence government action indirectly by asking members of the public, or segments of the public, to contact government officials. For example, an environmental advocacy group may communicate directly with legislators through its lobbyists about a bill the group supports or opposes. In addition, the group may ask its members or the general public to contact their legislators about the bill. Although New York's lobbying law until now has not formally or explicitly addressed grassroots lobbying, the statutory definition of "lobbying" is broad

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enough that it could encompass the practice. Indeed, this has been the long-standing interpretation of JCOPE and its predecessor agencies.

JCOPE's proposed rules would formally define regulated "grassroots lobbying" as any "communication that: (1) References or otherwise implicates an action [otherwise defined as lobbying under the existing law]; (2) Takes a clear position on that action; and (3) Includes a ... solicitation, exhortation, or encouragement to the public, a segment of the public, or an individual to contact a Public Official."

Related to the regulation of grassroots lobbying is the proposal's treatment of any consultant who "participates in: (i) delivering a Grassroots Lobbying Communication on behalf of the Client; and (ii) shaping the substantive message expressed in the communication" as a potential lobbyist. Among other examples, the proposal specifically includes

"[s]erving as a spokesperson" for a client. This doubles down on JCOPE's advisory opinion issued earlier this year, in which the agency took the position that even public relations consultants who contact reporters or editorial boards on behalf of clients regarding public policy issues could be regulated as lobbyists. That aspect of the opinion was quickly challenged in federal court by a group of PR consultants. ("New York State Expands Lobbying Law to Cover Consultants, PR consultants," *Election Law News*, March 2016.)

In a partial rebuke of JCOPE, the changes enacted to New York's lobbying laws over the summer by the state legislature specifically exempted contacts with the news media from the definition of lobbying. JCOPE's proposed regulations duly incorporate that legislative exemption. Relatedly, JCOPE has moved for dismissal of the PR consultants' lawsuit on the grounds that it is mooted by the amended law. However, as the plaintiffs in the litigation have noted in opposing the motion to dismiss, PR consultants are still subject to potential regulation as lobbyists if they represent their clients before persons other than journalists. Indeed, JCOPE's proposal confirms that this would be the agency's regulatory approach if the rules are enacted.

JCOPE's proposal also addresses social media communications, and treats tweets or messages containing lobbying messages on a public official's social media page as direct lobbying. Posts containing lobbying messages on a person's or organization's own social media page that "tag" a public official also would be considered lobbying. On the other hand, posts on one's own social media page that merely refer to a public official but do not tag the official would not be considered lobbying. However, if a post on one's social media page includes a "call to action" for readers or visitors to contact the public official, the post presumably would be considered grassroots lobbying, even if the official is not tagged.

JCOPE's proposed rules also would crack down on avoidance of donor disclosure by so-called "pass-through coalitions." The proposal defines a pass-through coalition as a group that spends more than 90% of its expenditures on lobbying in New York. Any contribution to a pass-through coalition would be considered compensation for lobbying, and may require the contributor to report as a lobbyist principal, and also may trigger donor disclosure for the contributor in certain circumstances.

For more information, please contact one of the authors listed.