

New York State Expands Lobbying Law to Cover Consultants, Reiterates Regulation of Grassroots Lobbying

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Through a recent advisory opinion, the New York State Joint Commission on Public Ethics (JCOPE) significantly broadened the state's lobbying laws to cover certain consultants, and also reiterated the state's regulation of so-called "grassroots lobbying." As a result of the opinion, many individuals and organizations that may not consider themselves to be engaged directly in lobbying may now have to register nonetheless as lobbyists or lobbying entities.

Like most other states, individuals and firms that are compensated by clients or employers for lobbying the state legislature and executive branch on legislative, executive, and administrative matters are required to register and report as lobbyists. Clients and employers of lobbyists also are required to file semiannual lobbying reports in New York, and organizations that employ in-house lobbyists also may register on behalf of their employee lobbyists (and, in fact, are encouraged to do so by JCOPE). New York is relatively unique in that its state lobbying laws also cover lobbying in most municipalities, and some municipalities such as New York City may have their own additional lobbyist registration and reporting requirements.

The recent JCOPE advisory opinion expands these lobbyist registration and reporting requirements to paid consultants who do not themselves engage directly in what is traditionally regarded as lobbying, but who merely make "preliminary communications to facilitate or enable the eventual substantive advocacy." In other words, according to the JCOPE opinion, "when [an] individual

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communicates with a public official (or [the official's] staff) on behalf of a client – for the purpose of enabling the client to explicitly advocate before the public official – the lobbying has begun.”

Additionally, if a consultant merely and passively attends a meeting or monitors a phone call with a public official, during which someone else lobbies the official, the consultant is also regarded as having engaged in lobbying. The initial JCOPE opinion characterized these activities as “reportable lobbying.” This begged the question as to whether these activities merely have to be reported by individuals and entities that are otherwise required to register as lobbyists, or whether these activities also count toward the registration thresholds. JCOPE subsequently issued three additional “FAQ” memos clarifying the initial opinion. Although still not explicitly clear, the subsequent FAQ memos appear to suggest that these “reportable lobbying” activities also trigger the registration requirements if the thresholds are met.

The JCOPE opinion also confirms guidance that had been issued previously by JCOPE's predecessor agency, the New York Temporary State Commission on Lobbying, which had concluded that so-called “grassroots lobbying” is regulated in New York. According to the latest opinion, “a grassroots communication constitutes lobbying if it: (1) References, suggests, or otherwise implicates an activity covered by [the lobbying law]; (2) Takes a clear position on the issue in question; and (3) Is an attempt to influence a public official through a call to action, *i.e.*, solicits or exhorts the public, or a segment of the public, to contact (a) public official(s).” A communication need not identify a particular bill number, executive order, or regulation to be considered grassroots lobbying.

Like its treatment of consultants with respect to direct lobbying, the latest opinion's treatment of grassroots lobbying is expansive in scope. Specifically, the opinion states that “participation in the actual delivery of the [grassroots] lobbying message to the audience, whether verbally or in writing,” constitutes lobbying. According to the opinion, a “consultant who contacts a media outlet in an attempt to get it to advance the client's message in an editorial” and “paid media consultants who are hired to proactively advance their client's interests through the media” are engaged in lobbying. In addition, anyone who “participat[es] in forming” a grassroots lobbying message is also engaged in lobbying.

The opinion enumerates several exceptions, such as for billboard or sign owners, copy editors, advertisement writers, storyboard artists, film crews, media outlets and broadcasters, media buyers and placement agents, etc. Still, there may be many functions that fall into a grey area. For example, are vendors engaged in lobbying if they make robocalls or live telephone calls delivering a grassroots lobbying message on behalf of a client to members of the public? Under the literal language of the JCOPE opinion, they would appear to be “participat[ing] in the actual delivery” of a grassroots lobbying message, and thus may be required to register and report as lobbying firms.

Five public relations firms have filed suit against JCOPE in federal court, challenging the constitutionality of the agency's opinion as well as the process by which it was adopted. Pending resolution of the litigation and absent a court injunction, the JCOPE opinion should be treated as authoritative. As we have reported on previously, failing to properly register and report as lobbyists and lobbying entities in New York State may result in penalties of tens of thousands of dollars. (See *Coming Soon: Amnesty for New York State Lobbyist*

Registration and Reporting Violations, Election Law News, Nov. 2015.)