October 14, 2017

Carol C. Quinn, Deputy Director of Lobbying Guidance
Joint Commission on Public Ethics
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Re: Comments on Proposed Part 943

Dear Ms. Quinn,

I submit these comments regarding the proposed comprehensive lobbying regulations, 19 NYCRR Part 943, on behalf of Lawyers Alliance for New York, Nonprofit Coordinating Committee ("NPCC") and New York Legal Services Coalition.

Who we are

Lawyers Alliance for New York is the leading provider of business and transactional legal services for nonprofit organizations that are improving the quality of life in New York City neighborhoods. Its network of pro bono lawyers from law firms and corporations and staff of experienced attorneys collaborate to deliver expert corporate, tax, real estate, employment, intellectual property, and other legal services to community organizations. By connecting lawyers, nonprofits, and communities, Lawyers Alliance helps nonprofits to develop affordable housing, stimulate economic development, promote community arts, strengthen urban health, and operate and advocate for vital programs for children and young people, the elderly, and other low-income New Yorkers. Among the services it provides to its clients is help complying with the Lobbying Act.

NPCC was founded in 1984 after successfully contesting a government proposal to remove the charitable property tax exemption from many of New York City's nonprofit cultural institutions. NPCC has since evolved into the area's largest 501(c)(3) nonprofit membership organization and serves more than 1,750 members by encouraging strong, transparent, and informed management and by advocating for fair and reasonable nonprofit public policy. It provides valuable education, training, information, benefits, and policy and compliance guidance for 501(c)(3) organizations.

New York Legal Services Coalition, formed in 2014, is a 501(c)(3) nonprofit organization that consists of 51 civil legal services organizations, serving every county in New York

State. Collectively, its members provide high quality civil legal services to hundreds of thousands of low income New Yorkers in matters relating to the essentials of life. The Coalition works to ensure fairness for all in the judicial system through a wide range of educational activities, advocates on legal issues affecting low-income communities and the delivery of civil legal aid, identifies and promotes best practices in the civil legal aid profession, and provides technical assistance and capacity building resources for its members.

Our comments

We provide these comments to draw particular attention to the effect that the proposed regulations will have on small nonprofit organizations. Many nonprofit organizations have no in-house lawyers and no dedicated compliance staff. In fact, many have no dedicated administrative staff – everyone in the organization is involved in program delivery, and time spent on compliance takes time away from delivering those programs. In order for these organizations to provide the transparency the Lobbying Act seeks to achieve, it is essential that compliance with the Act be as straightforward and efficient as possible.

In these comments, we suggest the following amendments to the proposed regulations:

1. Remove from the definition of direct lobbying those communications "broadcast to more than just a Public Official when the clear intent is to reach a Public Official, including, for example, a billboard placed on a highway exit leading to the Capitol or a rally held outside the Capitol." 943.6(a)(1)(i)(*f*).
2. Remove from the definition of grassroots lobbying asking someone to engage in grassroots lobbying. 943.7(b)(3)(i).
3. Revise the rules regarding coalitions to adhere to the parameters of the source of funding disclosure law, and work with the New York City Clerk to develop congruent rules regarding coalitions. 938.2(3); 943.9(h)(3); 943.10(j)(9)(i). Additionally, clarify the requirement to list a coalition as a party to lobbying. 943.10(j)(9); 943.11(f)(4); 943.12(f)(6).
4. Streamline compliance by allowing an organization that will never reach the $5,000 expenditure threshold to stop reporting, and by allowing organizations to report information about their New York City advocacy just once, to JCOPE.
5. Incorporate language from JCOPE's current guidelines regarding JCOPE's discretion to waive fees. 942.10.g, 943.11(d), 943.12(b).
6. Make clear that in lieu of publicly disclosing an employed lobbyist's salary an organizational lobbyist may simply say that it anticipates spending $5,000 during that calendar year. 942.10.j(1)(i)(*f*).

I. The regulations should adhere to the current, court-sanctioned definitions of direct and grassroots lobbying.

A. Billboards and rallies are not direct lobbying

The proposed regulations should not include in the definition of direct lobbying those communications "broadcast to more than just a Public Official when the clear intent is to

reach a Public Official, including, for example, a billboard placed on a highway exit leading to the Capitol or a rally held outside the Capitol." 943.6(a)(1)(i)(*f*). This attempt to regulate communications delivered to the public that do not contain a call to action is a broad, unconstitutional expansion of the Lobbying Act's definition of "direct lobbying."

As the legislature recognized when it enacted the Lobbying Act**,** association for the purpose of petitioning government is at the core of the First Amendment. Legis. Law § 1-a. As a result, lobbying disclosure regulations are subject to exacting scrutiny, which requires "a 'substantial relation' between the disclosure requirement and a 'sufficiently important' government interest." *Citizens United v. FEC*, 558 U.S. 310, 366-67 (2010). *See also National Ass'n of Mfrs. v. Taylor*, 582 F.3d 1, 10 (D.C. Cir. 2009). Federal courts have recognized that the goals of avoiding corruption and ensuring that busy lawmakers know who is asking them to take official action adequately support laws requiring disclosure of people who directly petition lawmakers or who specifically exert others to do so. *See U.S. v. Harriss*, 347 U.S. 612, 625 (1954). However, courts and regulators have warned that serious constitutional issues would be raised by any attempt to require disclosure of people who fund issue advocacy that is not specifically directed to public officials and does not specifically exhort others to directly contact public officials:

- The Supreme Court's holding in *United States v. Harriss* that the federal lobbying disclosure act then in effect passed constitutional muster was premised on the Court's finding that the law sought to regulate only two types of communication: direct communication with legislators and grassroots communications exhorting the public to engage in such communication via a call to action. 347 U.S. at 620, 625. As the dissenting justices noted in *Harriss*, in order to find the statute constitutional, the majority read it "narrowly as applying only to those who are paid to 'buttonhole' Congressman," and as covering only those communications to the public that call for such buttonholing. *Id.* at 630-32 (J. Douglas, dissenting).
- A federal district court's 1982 rejection of a constitutional challenge to the predecessor of New York's Act relied on the court's interpretation that the law covered only direct and grassroots lobbying, as defined in *Harriss*, and did not cover "*any* discussion of the merits of any governmental action that *may* ultimately affect or influence such action." *Comm'n on Indep. Coll. & Univ. v. N.Y. Temporary State Comm'n on Regulation of Lobbying*, 534 F. Supp. 489, 496 (N.D. N.Y. 1982). (emphasis in original).

JCOPE's proposed expanded definition of direct lobbying would cover precisely the sort of communication made to the public, not directly to a public official, that both *Harriss* and *Commission on Independent Colleges and Universities* implied could not constitutionally be regulated.

Furthermore, the regulation is unconstitutionally vague because it fails to provide reasonable notice of the activities that count as lobbying, and allows arbitrary and discriminatory enforcement. *Cf. U.S. v. Williams*, 553 U.S. 285, 304 (2008). The Supreme Court has long held that a speech regulation turning on the speaker's intent is unconstitutionally vague. *See FEC v. Wisconsin Right to Life*, 551 U.S. 449**,** 468 (2007) (Roberts, Ch. J.); *Buckley v. Valeo*,

424 U.S. 1, 43-44 (1976). In *FEC v. Wisconsin Right to Life*, for instance, Chief Justice Roberts warned:

> [A]n intent-based test would chill core political speech by opening the door to a trial on every ad within the terms of [the statute at issue], on the theory that the speaker actually intended to affect an election, no matter how compelling the indications that the ad concerned a pending legislative or policy issue. No reasonable speaker would choose to run an ad covered by [the statute] if its only defense to a criminal prosecution would be that its motives were pure.

Wisconsin Right to Life, 551 U.S. at 468.

The proposed regulation is a perfect example of why an intent-based speech regulation is unconstitutionally vague. How is a New Yorker supposed to determine the difference between "[p]ublic communications broadcast to more than just a Public Official when the clear intent is to reach a Public Official," which are deemed a direct lobbying communication, and a "communication that is directed to a group of which a Public Official is incidentally a member, or is intended for the public generally," which is not? *Compare* 943.6(a)(1)(i)*(f)*; 943.6(a)(1)(iii). In this era of mass communication, it is always possible that a public official will learn about a protest located anywhere in the state. Protestors encircling nearly 100 New York City public schools may be aiming to educate parents and other community members about the effects of a proposal by Gov. Cuomo regarding school funding. *See* Brian Charles & Stephanie Snyder, *At Widespread Anti-Cuomo Protests, Parents and Teachers to Join Hands*, Chalkbeat (March 11, 2015), https://www.chalkbeat.org/posts/ny/2015/03/11/teachers-parents-and-union-hold-hands-to-push-back-at-cuomos-agenda/. Does the event become lobbying if it is covered by a major newspaper whose coverage Gov. Cuomo is likely to see, or if one of the schools is located near an Assembly Member's district office? What if one of the protestors communicates their message by posting graffiti on a wall within several blocks of City Hall?

The examples provided by JCOPE muddy the waters further. Why does a billboard on a highway exit leading to Albany or a rally on the capitol steps evince a "clear intent" to reach a lawmaker, while an opinion piece in an Albany newspaper or a tweet to a group of followers known to include that lawmaker (but lacking a "tag" directed at that lawmaker) does not? *Compare* 943.6(a)(1)(i)*(f)*; 943.6(c)(5)(ii). This vagueness renders the proposed regulation unconstitutional. For these reasons, 943.6(a)(1)(i)(*f*) should be removed from the proposed regulations.

B. Asking someone to engage in grassroots lobbying is not itself grassroots lobbying.

Proposed section 943.7(b)(3)(i) would broaden the definition of grassroots lobbying to include "[a] solicitation, exhortation, or encouragement to the public, a segment of the public, or an individual to...solicit, exhort, or encourage others to directly contact a Public Official." As explained above, the Supreme Court in *Harriss* and the federal district court in

CICU both held that a narrow definition of lobbying was necessary for a lobbying disclosure law to be constitutional. Both "held that indirect lobbying, in the form of campaigns to exhort the public to send letters and telegrams to government officials, could be included within the definition of lobbying activities." *CICU*, 534 F. Supp. at 496 (quoting *Harriss*, 347 U.S. at 621 n.10). Accordingly, under existing law, a lobbyist who hires a consultant to conduct a grassroots lobbying campaign must report that as a grassroots lobbying expenditure.

The proposed regulation extends that definition further, to include not only a direction given to an agent but also an exhortation to another person to urge the public to lobby. To the extent that this expansion extends beyond instructions given to agents, it serves no valid government interest. What is the government's valid interest in knowing when a lobbyist urges (but does not pay) an acquaintance to carry out a grassroots lobbying campaign? Under current law, that lobbyist's role, and any financial arrangements in support of the activity, would be reported. The government has no constitutionally permissible regulatory interest in a suggestion that someone else should engage in grassroots lobbying, absent that financial support.

II. Coalitions

A. JCOPE and the NYC Clerk Should Issue Congruent Rules

As an initial matter, we strongly urge JCOPE to work with the New York City Clerk to develop congruent rules regarding coalitions. Otherwise, the many organizations regulated both by JCOPE and the City Clerk will have to report their lobbying in coalitions in one way to the State and another to the City, resulting in a jumble of contradictory information that will confuse, rather than enlighten, anyone trying to understand lobbying reports.

B. The coalition reporting regulations should adhere to the Legislative Law.

JCOPE oversteps its authority under the Lobbying Act and raises logistical issues by requiring coalitions to disclose their members under certain circumstances. The proposed regulations define a Coalition as "a group of otherwise-unaffiliated entities or members who pool funds for the primary purpose of engaging in Lobbying Activities" that "expends or incurs more than $5,000 in annual Compensation and Expenses related to Lobbying Activity." A coalition faces a choice: either: 1) the coalition itself can identify on its lobbyist or client reports each member that spends $5,000 or more on lobbying in a calendar year, or 2) each of its members must include in their own lobbying reports the full amount of their contributions to the Coalition, even if most of the contribution is not used for lobbying. § 943.9(h)(3); 943.10(j)(9)(i). Moreover, regardless of which option the coalition chooses, the full amount of each member's contributions to a coalition counts towards the $15,000 expenditure threshold that determines whether the member will be required to report to JCOPE regarding the contributions it receives. *See* §§ 938.2(e); 943.9(h)(3)(v). These rules raise serious logistical issues, and exceed JCOPE's authority. We suggest instead that JCOPE adhere to the parameters of the source of funding disclosure requirements in §§ 1-h(c)(4) and 1-j(c)(4) of the Lobbying Act.

1. It is an enormous administrative burden for a coalition to track the lobbying expenditures of each member.

Since a coalition is defined as "a group of otherwise-unaffiliated entities or members", it will presumably need to act through its lead member (the one who collects the money). It is unclear how that lead member will gather the information necessary to identify which of its members spend $5,000 or more on lobbying. How can the lead member know how much the other members spend on lobbying unrelated to the coalition? If the lead member relies on information provided by the other members, who is responsible for the accuracy of that information? Must a lead member calculate the portion of dues or contributions related to lobbying, or is the entire amount of any donation assumed to be a reportable expense, whether or not it is earmarked for lobbying? If a member pays dues in January, but does not pass the $5,000 expenditure threshold until June, is the lead member required to disclose the member's identity and contribution, and if so when?

2. The Lobbying Act requires disclosure only of payments earmarked or used for lobbying.

The proposed regulations exceed JCOPE's authority to the extent that they require disclosure of payments that were not earmarked or used for lobbying. The Lobbying Act requires lobbyists and clients to report compensation that is earmarked for lobbying. Leg. Law §§ 1-c(a) & (b), 1-e(c)(2), 1-j(b)(2), (5). It also requires clients and lobbyists to report the source of funds that they use for lobbying activity, but only under certain circumstances: member dues and payments to 501(c)(3) organizations are exempted; only contributions over $2,500 must be reported; donor disclosure is required only by entities that spend more than $15,000 in a twelve-month period on lobbying, where the lobbying expenditures constitute at least 3% of the organization's total expenditures. Leg. Law §§ 1-h(c)(4), 1-j(c)(4). Moreover, in order to satisfy constitutional requirements disclosure is not required if it would cause harm, threats, harassment or reprisals to the contributor. *Id.*; *see also See Citizens United v. FEC*, 130 S. Ct. at 914; *Brown v. Socialist Workers' 74 Campaign Committee*, 459 U.S. 87 (1982).

The proposed regulations' requirement that each of a coalition's members must include in their own lobbying reports their contributions to the coalition goes beyond these parameters. It appears to require reporting of all contributions to a coalition, whether or not the specific contribution was made or used for the purpose of lobbying. And it contains none of the statutory exceptions to the source of funding provisions – it extends to 501(c)(3) organizations, to contributions under $2,500, to entities that spend under $15,000 in a twelve-month period on lobbying, and it applies even if the contributor would face harm as a result of the disclosure.

For instance, if a 501(c)(4) coalition spends $6,000 on lobbying in a year, constituting 51% of its total revenues, a dues-paying member that reports to JCOPE must publicly identify itself as a member of the coalition and include the full amount of its contribution to the coalition as a lobbying expenditure. That is true even if the member's dues are only $50 (well below the $2,500 source of funding disclosure threshold), and even though the coalition's twelve-month lobbying expenditures are well below the $15,000 source of funding threshold. Moreover, the disclosure would still be required even if doing so would

subject the member to harassment or other harm. This is an unauthorized end run around the source of funding disclosure provisions in the Legislative Law. For this reason, the proposed regulations should be amended to include all of the statutory exceptions to the source of funding provisions listed above.

The proposed regulations exceed JCOPE's authority in another way, too: by providing that all contributions to a coalition count towards the $15,000 source of funding disclosure threshold. *See* §§ 938.2(e); 943.9(h)(3)(v). The Lobbying Act applies the source of funding disclosure requirement only to a client that has spent $15,000 "for lobbying." Leg. Law § 1-j(c)(4). The proposed regulations should be amended to exclude contributions to a coalition that are not earmarked for lobbying.

3. The requirement to list coalitions among the parties to lobbying should be clarified.

Under the proposed regulations, a lobbyist statement of registration, lobbyist bi-monthly report, and client semi-annual report must all report all "parties to the Lobbying...including all Lobbyists, Clients, and Coalitions." 943.10(j)(9); 943.11(f)(4); 943.12(f)(6). It is unclear how a coalition could be a "party" to lobbying except as a lobbyist or client. This requirement should be clarified.

III. Streamlining compliance

Too often, lobbyists and clients must report the same information multiple times. An organization lobbying the NYC government on its own behalf may have to report a single lobbying expenditure twice to JCOPE (on a lobbyist bi-monthly report and again on a client semi-annual report), and separately to NYC. As the Ethics Review Commission documented in 2015, "filers often have to submit multiple forms for the same activity – whether it be financial or lobbying disclosure at both the New York State and New York City level." The Commission recommended that "any duplicate or triplicate filings be eliminated, either through internal administrative action, or through administrative and operational agreements with other entities that have overlapping filing requirements." (N.Y. Ethics Review Commission, Review of JCOPE and the Legislative Ethics Commission: Report & Recommendations, Nov. 2015, p. 13, http://www.nyethicsreview.org/wp-content/uploads/2015/11/Ethics-Review-Commission-Final-Report.pdf).

These multiple filings are entirely unnecessary. They waste the time of JCOPE and NYC compliance officials. They cause nonprofits that lobby to divert scarce charitable donations to pay for administrative time that could be better spent helping the community. The voluminous, redundant reports make it more difficult for members of the public to determine who is spending what to lobby.

A. **The proposed regulations will streamline and improve compliance in important ways.**

We applaud JCOPE for proposing to allow an organization that acts as its own lobbyist to file only one set of reports, rather than two separate sets of reports, as both a lobbyist and a lobbying client. This will eliminate the unnecessary requirement that every six months such organizations must transcribe the information from their last three lobbyist reports into a separately filed, entirely redundant Client Semi-Annual Report. This redundant reporting does not increase transparency. Eliminating it will free up time spent by nonprofit staff, which could be better spent delivering charitable programs. It will also allow JCOPE staff to stop spending time monitoring whether multiple, duplicative reports have been filed, and instead focus their attention on higher priorities. Notably, this change will align JCOPE's practice with that of the New York City Clerk, which also regulates lobbying activity by many of the organizations regulated by JCOPE.

We also applaud JCOPE for proposing to eliminate the requirement that a client that has filed a Semi-Annual Report for the first six months of the year but does not meet the $5,000 reporting threshold for the entire year must still file a Semi-Annual Report for the last six months of the year.

B. JCOPE should do more to streamline compliance.

We urge JCOPE to similarly allow an organization that is its own lobbyist to terminate its registration, and stop filing reports, if at any point during a calendar year it concludes that it is unlikely to reach the $5,000 expenditure threshold during that year. Many Lawyers Alliance clients register as a lobbyist at the beginning of a two-year registration cycle out of an abundance of caution. Then, they must file Lobbyist Bi-Monthly reports for the next two years even if they engage in only a minimal amount of lobbying because they change priorities, a hoped-for opportunity fails to materialize, or they eliminate their entire advocacy program. Allowing an organization that will never reach the $5,000 reporting threshold to voluntarily terminate its registration would be a sensible way to reduce unnecessary burdens without reducing transparency.

Additionally, organizations should be able to report information about their New York City advocacy just once, to JCOPE, which has the broadest jurisdiction. JCOPE would have to revise its forms and website to allow people to provide information in the form that the City Clerk requests, such as the City's preferred name for each of its agencies. JCOPE could then share with the City Clerk all information submitted by clients and lobbyists regarding lobbying of New York City officials. The information should be shared promptly and in a data format allowing the City Clerk to fulfill its enforcement obligations. Organizations that want to take advantage of this streamlined procedure would simply file one report containing all of the information required by both the state Lobbying Act and the NYC Lobbying Law.

JCOPE and the NYC Clerk have the authority to adopt this procedure. Both have the authority to design forms for the submission of lobbyist and client reports. NYS Legis. Law § 1-d(d); NYC Admin. Code §§ 3-212. The City Clerk could simply deem the requirement

to file a Lobbyist Periodic Report to be satisfied by the filing of a JCOPE Lobbyist Bi-Monthly Report containing all of the information required by city Lobbying Law for the relevant reporting period. Likewise, the City Clerk could deem the requirement to file a Client Annual Report to be satisfied by the filing of JCOPE Client Semi-Annual Reports covering the relevant reporting period. JCOPE should make every effort to persuade the NYC Clerk to adopt this procedure.

IV. Additional issues

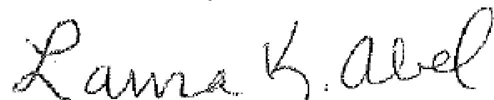
942.10.g, 943.11(d), 943.12(b): These provisions, regarding late filing fees, should include language from p. 31 of JCOPE's current guidelines regarding JCOPE's discretion to waive fees.

942.10.j(1)(i)(*f*): This provision should acknowledge that in lieu of publicly disclosing an employed lobbyist's salary an organizational lobbyist may simply say that it anticipates spending $5,000 during that calendar year, as JCOPE's sample "Authorization Letter (Employee)" currently allows. *See* *http://jcope.ny.gov/forms/lob/samples/Sample%20employee%20authorization%202016.docx*

Conclusion

We urge JCOPE to revise its draft regulations along the lines discussed above. Thank you for considering these comments. Please do not hesitate to contact me at (212) 219-1800 x283 or label@lawyersalliance.org with any questions.

Sincerely,



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