New York's Comprehensive Lobbying Rules Set to Take Effect January 1, 2019

September 28, 2018

Earlier this year, the New York Joint Commission on Public Ethics (JCOPE) promulgated new Comprehensive Lobbying Regulations (N.Y. Comp. Codes R. & Regs. tit. 19, § 943.1-943.14) that are designed to close certain disclosure loopholes and compile existing JCOPE guidelines and advisory opinions into a single set of rules. ***These new rules take effect on January 1, 2019, and supersede any previously issued guidelines, opinions, instructions, or practices.*** JCOPE is also rolling out a new lobbying filing system, the "JCOPE Lobbying Application," by December 1, 2018 for the filing of 2019-2020 registrations.

The key changes include the following:

- **Grassroots lobbying:** The regulations provide that a grassroots lobbying communication is a communication by any means (a rally, billboard, print ad, website, social media post, or personal appeal) that: (1) references "or otherwise implicates" a covered government action, (2) takes a clear position on that action, and (3) includes a "call to action" asking or encouraging the recipient of the message to directly contact a public official or to ask or encourage others to do so. Additionally, if the communication includes a mailing address, email address, website, phone number, or similar contact information for a public official or otherwise facilitates the recipient's contact with a public official, such as by including a petition or link to a petition, then the communication is automatically deemed to include a call to action.

- **Direct lobbying via social media:** The regulations provide that the use of social media is considered to be direct lobbying if the social media communication attempts to influence a covered government action and a public official either (1) is directly sent the message via social media (such as by sending a direct message to a public official's social media account), or (2) by creating a "direct electronic link" to any social media account known to be owned or controlled by a public official (such as tagging a public official's account in a social media post).

- **"Preliminary contact" is considered direct contact lobbying:** The regulations provide that direct lobbying includes engaging in "preliminary contact" with a public official—such as by scheduling a meeting or a telephone call or introducing a client to a public official—to "enable or facilitate" lobbying if the lobbyist "knows or has reason to know that the Client will attempt to influence a public official" in the future.

- **Disclosure of specific targets of lobbying required:** The regulations require Lobbyist Bi-Monthly and Client Semi-Annual reports to disclose the names of the public officials, government offices, and legislative bodies with which the lobbyist engaged in direct communication. For example, it will no longer be sufficient for a filer to simply disclose that they had direct communication with the

"Committee on Health" or the "State Senate." The regulations instead provide that if a lobbyist lobbies a Senator on one occasion and then also sends out a memo urging support for a bill to all members of a legislative committee, it would be required to disclose the Senator's name and the name of such legislative committee.

- **"Beneficial clients" must be identified and may be required to disclose funding sources:** Under the new regulations, a lobbyist must identify not only who is paying for their services (the "contractual client"), but must also list any "beneficial client," which is defined as "the specific individual or organization on whose behalf and at whose request or behest lobbying activity is conducted." Under the previous rule, listing a third party beneficiary was optional. The contractual client and beneficial client will often be the same individual or organization, such as when an organization uses in-house personnel to lobby for its own benefit. The regulations also provide that if an organization lobbies on behalf of the general public or on behalf of members of a population or class, then the benefitting public/population/class would not be considered a beneficial client. In the case of a lobbying coalition, though, if a coalition member exceeds $5,000 in cumulative annual lobbying compensation and expenses then it is automatically considered to be a beneficial client. The regulations require both contractual clients and beneficial clients to file Client Semi-Annual Reports, but contractual clients may omit the Source of Funding section. Beneficial clients are now required to submit the Source of Funding section of the contractual client's Client Semi-Annual Report, which is designed to prevent groups from using intermediaries to hire a lobbyist to avoid disclosing their sources of funding.

- **Lobbying coalitions:** A key focus of the new regulations is increasing transparency into lobbying coalitions. The new 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 on behalf of the members of the coalition," but the definition excludes 501(c)(5) labor organizations and 501(c)(6) trade organizations. The regulations allow a lobbying coalition to either: (1) register and file disclosure reports as a single entity (listing members of the coalition as contractual and/or beneficial clients), or alternatively, (2) each coalition member may register and file its own disclosure reports that list, among other things, their contributions to the lobbying coalition (listing the date, amount, and name of the recipient coalition). Again, each member of the coalition that spends more than $5,000 on lobbying in a year is automatically deemed to be a beneficial client and is thereby subject to source of funding disclosure requirements. If a coalition decides to register and file disclosure reports as a single entity, then a coalition member's contribution(s) to the coalition are not considered lobbying expenditures by that member for purposes of determining whether the member must separately register as a lobbyist or file Bi-Monthly or Client Semi-Annual Reports.

- **Reduced filing obligations for organizations that lobby using exclusively in-house personnel:** Organizations that engage in lobbying exclusively through the use of in-house personnel and accordingly file Lobbyist Bi-Monthly Reports will no longer be required to also submit a Client Semi-Annual Report if all activity that would be included in the Client Semi-Annual Report is reported in its Bi-Monthly reports. The organization must still, however, submit the Source of Funding portion of the Semi-Annual Report, if such report is required.

- **Equity compensation for lobbying *per se* impermissible:** The regulations prohibit the provision of compensation if the amount or rate of compensation is contingent on the outcome of any lobbying, even if provided by a beneficial client, and extend this prohibition to cover stock or equity payments for lobbying activity. Such payments of stock or equity are presumed to be impermissible under the regulations and are a *per se* violation of the New York State law, unless overcome by showing that the value of the stock or equity is "not directly dependent on the outcome of the government action" through the filing of an application to JCOPE to approve the payments.

- **Commission salespersons exemption clarified:** Activity conducted by "commission salespersons" with respect to governmental procurements has long been excluded from the definition of "lobbying" under New York law. Generally speaking, a commission salesperson is an individual who, among meeting other requirements, is compensated on a commission basis for all or "a substantial part of the sales" that the person "has caused, promoted, influenced, or induced." The new regulations provide that the key phrase "a substantial part of the sales" means that an individual must be compensated on a commission basis for at least 50% of such sales.

Caplin & Drysdale's Political Law Group is available to assist with any questions that may arise in connection with New York advocacy and potential registrable activities. If you have any questions concerning this alert or would like additional information, please contact:

Trevor Potter	Matthew T. Sanderson	Bryson B. Morgan	Emma K. Lewis
tpotter@capdale.com	msanderson@capdale.com	bmorgan@capdale.com	elewis@capdale.com
202.862.5092	202.862.5046	202.862.7836	202.862.7844

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For more information, please visit us at www.caplindrysdale.com.

Washington, DC Office:
One Thomas Circle NW
Suite 1100
Washington, DC 20005
202.862.5000

New York, NY Office:
600 Lexington Avenue
21st Floor
New York, NY 10022
212.379.6000

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