

May 18, 2015

The Lobbying Bureau
Office of the City Clerk
141 Worth Street
New York, New York 10013
Lobbyist_helpdesk@cityclerk.nyc.gov

Re: Comments on the City Clerk's Proposed Amendments to 51 RCNY Chapter 1

To Whom It May Concern:

Greenberg Traurig, LLP ("GT") is a law firm with a significant presence in New York City. GT is a lobbyist registered with the New York City Clerk ("the City Clerk"), and currently has approximately 54 lobbying clients in the City. Moreover, GT provides legal counsel to many firms, corporations and not-for-profit associations seeking to effectively meet the obligations imposed by New York City's lobbying law and regulations. GT is committed to compliance with the lobbying law and regulations, and is proud of its history of working closely with the City Clerk's Lobbying Bureau to achieve common goals.

These comments are submitted in response to the City Clerk's proposed rulemaking which putatively seeks to "conform existing rules to the amendments enacted by Local Law 129 of 2013." We commend the City Clerk for attempting to clarify certain issues. It appears, however, that there are aspects of the proposed regulation that exceed the statutory authority granted by the City Administrative Code. Additionally, some of these provisions could have a significantly chilling effect on the ability of individuals and organizations to engage in lobbying activity – particularly law firms. The following comments are intended to highlight suggested amendments to the proposed rule.

Definition of Lobbyist

Section 1-01 of the proposed regulations set forth definitions for more than a dozen terms used throughout the regulations. One term not defined is "lobbyist." As a result of amendments made to the administrative code and the City's interpretations thereof, there is some confusion surrounding who should be considered a "lobbyist."

New York City Administrative Code § 3-211(a) states that a lobbyist is "every person or organization retained, employed or designated by any client to ***engage in lobbying.***" (Emphasis added.) When subdivision (h) was added to that section in order to define "fundraising activities" and explain when information regarding such activities need to be reported, the section was amended to provide that "solicitation or collection of contributions . . . by a lobbyist" would be considered fundraising, and that "[t]he term 'lobbyist' shall mean a lobbyist as defined

in subdivision (a) of this section and the spouse or domestic partner and unemancipated children of the lobbyist, and if the lobbyist is an organization, the term ‘lobbyist’ shall mean only that division of the organization that engages in lobbying activities and any officer or employee of such lobbyist who engages in lobbying activities of the organization or is employed in an organization's division that engages in lobbying activities of the organization and the spouse or domestic partner and unemancipated children of such officers or employees.” Clearly, the expansion of the definition of lobbyist included in subdivision (h) is intended only to ensure that fundraising information regarding certain non-lobbying individuals who are affiliated with individuals who engage in lobbying is reported. The City Clerk should take this opportunity to promulgate a clear definition of lobbyist that makes this distinction. For example, § 1-01 could be amended to add the following definition:

“Lobbyist” means any person or organization retained, employed or designated by any client to engage in lobbying, provided however, for purposes of completing fundraising reports pursuant to § 3-216.1 of the Administrative Code of the City of New York, lobbyist shall also include any spouse or domestic partner and unemancipated children of individuals who engage in lobbying, and if the lobbyist is an organization, the term shall include any officer or employee within a lobbying division of an organization that engages in lobbying activities, as well as the spouse or domestic partner and unemancipated children of such officers or employees.

Although not directly on point, this definition would be consistent with the Second Circuit Court of Appeal’s decision in Ognibene v. Parkes which, among other things examined the applicability of the New York City lobbying and campaign finance laws and noted that, in interpreting the campaign finance law which also uses two different definitions of lobbyist, “the narrower definition,” namely the § 3-211(a) language of “every person or organization retained, employed or designated by any client to engage in lobbying,” are the only individuals actually engaging in lobbying and therefore the only ones subject “to the [campaign finance law’s] doing business limitations,” while the broader definition of lobbyist used in the campaign finance law, in this instance, the lobbyist, “as well as the lobbyist’s spouse or domestic partner; unemancipated children; and, for entities, the organization’s officers and employees who engage in lobbying or work for a division of the organization that engages in lobbying activities and their family members.” Ognibene v. Parkes, 671 F.3d 174, 180-181 (2011)

Enrollment

We commend the City Clerk for attempting to make a formal rule regarding the enrollment process. Amendments need to be made, however, to several provisions within § 1-03 “e-lobbyist Enrollment.”

Timing

New York City Administrative Code § 3-213(a)(2) generally provides that lobbyists who “reasonably anticipate combined reportable compensation and expenses in excess of” \$5,000, must file statements of registration with the City Clerk within fifteen days. The Administrative Code further provides that “[b]efore a lobbyist files a statement of registration pursuant to paragraph one of this subdivision, the lobbyist and its client shall enroll in the

electronic filing system.” N.Y.C. Ad. Code § 3-213(a)(3). The Administrative Code provides no time period within which the enrollment must occur. Nor does the Administrative Code grant the City Clerk with the authority to levy penalties against a client who fails to enroll in a timely manner. Yet, § 1-03(a)(1), (2) of the proposed rules would require clients and lobbyists to enroll in the e-lobbyist system five days before the registration is due. Similarly, § 1-11(b)(1) and (7)(i) of the proposed regulation would create a violation of “failure to enroll in e-Lobbyist,” and “failure to punctually enroll in e-Lobbyist.”

There is nothing in the law that would prevent the enrollment and registration process from happening contemporaneously. For this reason, the regulation should be revised to state that clients and lobbyists will be deemed timely enrolled in e-Lobbyist as long as the enrollment occurs before the registration deadline. Additionally, as there is no statutory authority for penalizing late enrollment, the corresponding provisions of §1-11(b) should be removed.

Administrative Enrollment

The proposed regulations would create a process by which the City Clerk could “create an Administrative Enrollment on behalf of a client” in certain situations. Although it is not expressly stated, it appears that as a result of this process, if a lobbyist is unable to register with the City Clerk for a client that has failed to enroll in e-Lobbyist, to avoid being penalized, the lobbyist would be required to “send[] a certified letter . . . to the last known address of the unenrolled client urging compliance with the Lobbying Law.” Then, if the client remains unresponsive or otherwise does not enroll, the lobbyist would be required to contact the City Clerk and inform the City Clerk of the client’s failure to comply with the enrollment process. This creates potential business problems for all lobbyists, but may create an ethical violation for lawyers who are lobbyists. Although a law firm should always strive to aid its clients in complying with all laws, except in rare circumstances, none of which are applicable here, attorneys have an ethical obligation to protect their client’s non-public information. Protecting the attorney-client privilege is one of the sacrosanct obligations of an attorney. The proposed regulation’s requirement that an attorney-lobbyist inform the City Clerk that the client has not complied with the enrollment requirement to protect the attorney-lobbyist from potential penalty creates a Hobson’s choice. Either inform on the client, or face a penalty. This proposed regulation should be revised.

Principal Officers

The proposed regulation seeks to impose hyper-technical regulations on the activities of the lobbyist’s and client’s Principal Officer. Although we understand the City Clerk is attempting to create a more efficient system, this must be done through a process that will not chill the ability of lobbyists or clients to engage in lobbying activity. We are concerned that several of the new requirements are so expansive that the practical reality would be that lobbying activity would be stifled in certain instances.

First, the proposed regulations expressly state that no lobbying firm and no client could have more than one Principal Officer at any one time. *See* § 1-04(a). While this may not be an issue in the abstract, the proposed regulations include additional conditions and restrictions that

make the single Principal Officer requirement cumbersome and, in some cases, unworkable. For example, as described in more detail below, (a) the proposed regulation's prohibition against the Principal Officer sharing his or her e-Lobbyist password will lead to late registrations and, for some lobbying firms that are also law firms, implicate ethical concerns; (b) the proposed regulations would require the Principal Officer be the signatory on every Retainer, even if the Principal Officer will have no other involvement with that client, again implicating ethical concerns; (c) the regulations afford no real opportunity for a lobbyist or a client to seek an extension of any filing obligation except in the event of: "(i) the death of the Principal Officer or his or her immediate family member; (ii) the illness of the Principal Officer or; (iii) force majeure", thus potentially leading to late registrations; and (d) the Principal Officer must be listed on every client registration, also leading to potential ethical issues for law/lobbying firms.

There are several scenarios where these restrictions combined will make it nearly impossible for a lobbyist to timely register and disclose lobbying activity. For example, it is common for a lobbyist to be retained by a client to engage in activity immediately. If only one individual is permitted to serve as a Principal Officer, and that one individual is on an extended vacation, out of the office on business, or otherwise unable to sign a retainer letter or log-on to the e-Lobbyist system to complete a registration, the registration cannot happen timely.

Additionally, there are reasons why a law firm that engages in lobbying activity could not agree to comply with the Principal Officer requirements listed in § 1-04. There may be instances where the representation of two or more clients would generally create a legal conflict for the law firm, but the clients with differing business or legal interests have knowingly agreed to waive the conflict, with the condition that the individual attorneys working on one matter will be screened off from the attorneys working on the potentially conflicting matter. Should the Principal Officer be on one side of the ethical wall, it would at least create the appearance of a violation of the ethical waiver if his or her name was placed on the conflicting client's registration statement. Similarly, in a law firm context, engagement letters are generally signed by the lawyer who will be representing the client or otherwise opening up the firm's client matter. A single Principal Officer cannot be required to sign all engagement letters with the lobbying law firm, particularly if at any point there is an ethical conflict that would prevent the Principal Officer from even being made aware of the efforts on behalf of a particular firm client.

It is important to note that nothing in the Administrative Code requires that there be only one chief administrative officer ("principal officer"). Significantly, § 3-223(c)(1), which provides the authorization for the imposition of fines for late filings, specifically authorizes the naming of designees to "make and file" such reports. Thus, the proposed regulations render this provision of the Administrative Code a nullity. Moreover, there is simply no authorization in the Administrative Code for the Clerk to mandate who may sign a Retainer on behalf of a lobbyist.

For all of the above reasons, the proposed regulations should be revised to eliminate the requirements in § 1-04(b): that the Principal Officer be listed on each statement of registration, and be the signatory on every Retainer. Additionally, we suggest that the City Clerk provide an opportunity for there to be designees authorized to exercise all powers of the principal officer, not the limited powers included in the proposed regulations.

CONCLUSION

Greenberg Traurig appreciates the opportunity to submit these comments, and trusts that the City Clerk will take them under consideration. We look forward to discussing these concerns further, if the City Clerk has any questions, and continuing to be a strong partner in ensuring strict compliance with the City's lobbying laws.

Respectfully Submitted,



Mark F. Glaser