STATEMENT OF THE PENNSYLVANIA ASSOCIATION FOR GOVERNMENT RELATIONS

On Proposed Regulations for Act 93 of 1998
The Lobbyist Disclosure Act

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Good morning Chairman Gannon, Chairman Blaum and members of the Committee. My name is David Tive. I am President of The Tive Lobbying Group, and I am here today on behalf of the Pennsylvania Association for Government Relations (PAGR), the professional organization representing lobbyists in Harrisburg. Our over 220 members reflect all aspects of the lobbying community, including lobbyists from associations and corporations, as well as lawyer lobbyists, contract lobbyists and even several legislative liaisons for administrative departments and agencies. Thank you for letting us testify today on the proposed regulations to implement Act 93 of 1998, the Lobbyist Disclosure Act.

Since it began, PAGR has spoken out on the need to reform Pennsylvania's antiquated and ineffective lobbying law, and we worked closely for two legislative sessions with the sponsors and drafters of what has become Act 93. While we feel there are some problems with the bill as finally enacted, we nevertheless have been working since its passage to achieve smooth and effective implementation in keeping with the law.

On behalf of PAGR, I testified on December 30 at a public hearing held by the seven-member committee charged with writing the regulations. There I identified some of the major problems contained in the draft released for public comment right before Christmas. I am glad to say that a number of our suggestions were adopted by the committee before it approved the proposed regulations as published on January 30. Unfortunately, there are still many problems which remain and which need to be resolved before the regulations can be finally adopted. I will address the more serious of those here, within the limits of the time allotted, and the remainder will be covered in our official comments which will be submitted to the committee, and to you, before the 30-day comment period has expired.

Due Process

It is probably best if we start at the end of the proposed regulations, in Chapters 41 and 43 dealing with Compliance Audits; and Investigations, Hearings and Referrals, because it is here that the most serious problems exist.

Let me say at the start that the worst problems in the draft regulations put out for comment last December were also found in these two chapters. The most egregious of those, such as the presumption that any lobbyist appearing in front of the Ethics Commission is guilty until proven innocent, and that the accused lobbyist must present his defense first, before hearing the case of his accusers, have been removed. However, there is still much in the

proposed regulations which denies lobbyists and lobbying groups due process as we have come to understand it, and much that goes against our concepts of fair play.

Let's start with the concept of "cause". This is important in two places where it helps determine whether the Commission can take action against a lobbyist or principal. First of all, in §41.1 it says that no lobbyist or principal shall be subject to an audit more than once in every two-year session *except for cause.* However cause is never defined. It needs to be clearly spelled out so that lobbyists and principals will know when their actions may place them in jeopardy of being audited or having other disciplinary action taken against them.

The need to have clear criteria for starting audits is made even more important by provisions at §41.2 (d) and (e) which state that while auditing any lobbyist or principal, the Commission can also examine the relevant records of any other lobbyist or principal. What are "relevant records"? Again, we have no idea. Apparently, relevant records can be anything the Commission wishes them to be. Taken together, this ambiguity, and the lack of a definition of "cause", seem to give the Commission the power to audit anyone at any time for any reason. That is not what these regulations should do. They should provide registrants with safeguards, guarantees and understandable procedures. They should not provide the Commission with free reign for open-ended audits or with justifications for fishing expeditions.

Moving on to Chapter 43, we once again come up against the concept of cause. Here we are talking about what constitutes cause for the Commission to open a proceeding against a lobbyist or principal. In §43.2 the grounds for opening a proceeding under §1307 of the Act, dealing with specific prohibited activities, are far too vague. Paragraph (a) of §43.2 says that the Commission must begin a preliminary hearing if it receives a signed complaint alleging a violation of §1307. However, paragraph (b) says that the Commission can start an inquiry based on "any alleged" violation. That allegation need not even be in the form of a complaint, let alone signed, and could be anything from any source that the Commission happened to come across. As before, the absence of specificity and clarity are very troubling.

This is multiplied thousands of times over when we get to §43.3. This subsection deals with cause for the Commission to open a proceeding under §1304 and §1305 of the Act, dealing with registration and reporting. Here we see that proceedings can be opened for virtually any reason at all, including a complaint, information that doesn't meet the criteria for a complaint, an audit, or the motion of the Executive Director which can be based, without limitation, on any information he may have received.

As bad as that is, it gets even worse at §43.3(b)(4) where it says "information received informally" may form the basis for opening a proceeding. Informal information is, of course, not defined, but I don't think it is too far fetched to view it as including such things as rumor, innuendo or malicious gossip. Once you deviate from the constitutional concept of requiring something akin to just cause in order to start a proceeding, anything at all is sufficient cause.

But wait, it still gets worse. Following the receipt of this informal information the Commission may begin a "non-investigative process". The very idea of a non-investigative process is horrifying and offensive. It says that the Commission doesn't need to be bothered finding any facts, it already knows what it needs to know. And how does the Commission know it? Well we're back to the malicious gossip again. And then, to support the idea that it already knows what it needs to know without any investigation, the first thing the Commission does upon opening this non-investigative process is to send a *notice of noncompliance* to the lobbyist or principal involved.

Remember, the Commission may well have no actual evidence that the registrant has done anything wrong. It may only have "informal information". It may only have a belief or idea that the registrant has done something wrong. It has not investigated anything. This is explicitly a "non-investigative process". However, the first step is to issue a notice of noncompliance.

The concept of the Commission undertaking a non-investigative process is bad enough, but to start it with an official communication indicating that it believes you have done something wrong, is far worse. It says that the Commission has decided, based on possibly specious information from a potentially unreliable and unknown source, and without attempting to get any clarifying input from the accused, that a violation has occurred. I ask the members of this Committee if you would like to be subjected to such a process.

Let me take you through the rest of the process. The registrant then has 20 days in which to "cure the noncompliance". There may, of course, not be any noncompliance to cure, but it must be cured in any case. If it is not, a petition for civil penalties is issued. This petition must set forth the "pertinent factual averments", which, in the absence of any investigation, can have been derived from things as inconsequential, or I should say "informal", as party gossip. The registrant can then request a hearing in front of the Commission, and since he luckily is no longer presumed to be guilty at the start, the Commission must prove his guilt. The standard of proof is, of course, not specified. However that may be a moot point since this is the same Commission that has already determined his guilt, as evidenced by its notice of noncompliance.

The seriousness of all this is clear when you remember that in addition to monetary penalties, the Commission can also ban a lobbyist or an organization from lobbying for up to five years. While we have significant reservations about the constitutionality of banning a group of citizens from lobbying their government, that is a provision of the law and not open to discussion here. However, we urge you to review that part of Act 93 after you finish acting on the regulations.

Our solution for all these due process and fairness problems is simple. Chapters 41and 43 should be rewritten to parallel the current Chapter 21 of Title 51 of the Pa. Code, the regulations of the Ethics Commission for public officers and employees. Those processes appear to have worked well for the past couple of decades, have withstood court scrutiny and are easily adaptable to lobbyists and principals. We do not understand the need for a separate lower and constitutionally inadequate standard of due process for lobbyists and principals, and we strongly oppose it.

The chart on the last page of my statement shows the differences between the processes for public officials and employees and those for lobbyists and principals. First of all, as grounds for opening a proceeding in Chapter 21 there must be an official complaint, which must be sworn to and signed and must allege a violation of more than *de minimus* economic impact. Under Chapters 41 and 43, as we have seen, virtually anything, down to and possibly including rumor and innuendo, is deemed sufficient grounds not for just an inquiry, but for issuance of a notice of noncompliance.

The next step in Chapter 21, after receipt of the official complaint, is a preliminary inquiry. Again, with regard to lobbyists and principals the Commission can opt for an explicitly non-investigative process with no inquiry. Following the preliminary inquiry in Chapter 21, the Commission can either close the case or open a full investigation if the results of the inquiry meet specific grounds for doing so, and it must notify the official or employee involved. Under Chapter 43, a notice of noncompliance is sent at the start, there is no investigation, and no

standards need to be met at all. It should also be noted at this point that under Chapter 21, an official or employee who is the subject of frivolous or harassing complaints can ask the Commission to investigate them. Lobbyists and principals are given no such right.

In keeping with due process, all investigations under Chapter 21 must be carried out according to a lengthy and specific list of procedures and rules. The subject of the investigation must be kept informed of its progress, and the rights of all involved are carefully protected. For lobbyists and principals accused under §1304 and §1305 there is no investigation since the Commission has deemed them noncompliant from the start.

Finally we get to the hearing process, and here, at last, the proposed regulations state that the hearing should be conducted in accordance with the Ethics Act and its regulations *to the extent possible*. We don't know why that qualifier is added, as it is at every citation of the Chapter 21 regulations in this document, and we suggest that it be removed in each case.

These two processes are clearly separate and unequal. PAGR sees no justification at all for even having two processes, especially when one is so stunningly deficient in due process and fairness. We urge this Committee to recommend that the proposed regulations be rewritten to include one and only one process, and that it be the same as that contained in Chapter 21 of the Commission's current regulations.

Lobbying Activity

The proposed regulations refer a number of times to "lobbying activity". The most obvious places it occurs are at §31.8(e)(1) where the Commission is directed to publish an annual report on lobbying activities in the state, and §35.2 where registrants are required to keep records of all of their lobbying activity. The problem is that the term "lobbying activity" is never defined.

We raised this issue in December, along with our concern that if you read the definition of lobbying in the act and the regulations, you could draw the conclusion that lobbyists will be required to keep records of every person they talk to or contact in any way in the course of business. We felt that this went far beyond the requirements of the law.

The proposed regulations address part of our concerns by making it clear in Chapter 35 that we need not report all the persons we contact. However, since there still is no definition of lobbying activities, we still don't know exactly what it is we are supposed to keep a record of. Furthermore, the proposed regulations state that registrants may keep their records of lobbying activities separate from their records of non-lobbying activities. If we don't know what lobbying activities are, we certainly don't know what non-lobbying activities are, and are therefore completely unable to distinguish between them.

If we are to be held liable, under penalty of law, for our records of lobbying activities, we must be able to know what they are. Only a clear definition of the term will serve that purpose. Anything short of that will cause people trying to conscientiously comply in full with the law to commit unknowing violations of it.

Deficiencies and Delinquencies

Under the proposed regulations, failure to file complete and accurate reports in a timely manner subjects a principal or lobbyist to action by the Commission under the penalties

sections of the law. This is as it should be. However, different terms are used to describe such failure, and this makes for a potentially confusing situation. Since Act 93, at §1309(c), requires a daily fine for a failure to file registration statements or reports, it is crucial for registrants to know what they could be fined for, and when.

The terms, "delinquency" and "deficiency" are not defined clearly enough to enable a principal or lobbyist to fully know which sections of the proposed regulations they may be violating, and which they are not. For example, under §31.5 failure to file registration statements and reports on time is a delinquency. However, in subsection (d) it says that a delinquent statement or report continues to be such "until received in proper form". This would qualify as a deficiency under the next section, §31.6, which says that deficiencies are statements and reports that are not properly filled out. Two questions which immediately come to mind are:

(1) does a statement or report which is filed in a delinquent manner and is then found to be deficient, become increasingly delinquent until refiled without any deficiencies? and
(2) does a statement or report filed on time but in a deficient manner, and which must be refiled at a later date, become therefore both delinquent and deficient?

It seems to us that a simple way to do resolve this problem would be to just use the term found in the statute and elsewhere in the regulations, compliance. Failure to comply would be a clearer concept to the registrants than trying to distinguish between deficiency and delinquency.

Our goal here, as it is with many of our other comments, is to provide regulations that enable registrants to understand what they have to do and when they have to do it. Far too often in this document we find language that is imprecise, vague or not defined. All that does is to create a situation where compliance becomes excessively difficult if not impossible, and open traps for registrants to fall into. That benefits no one.

Other Issues

As I said at the start, I have spoken in detail only about some of our major concerns with this document. However, given the time constraints of this Committee, and its need to hear other witnesses, I cannot give our other concerns the same treatment. So let me finish by listing a series of brief key points to bring these items to your attention. We will be expounding upon them at length when we submit our formal comments to the drafting committee next week. The following are given in the order they appear in the proposed regulations.

(1) The definition of "association" leaves out any reference to unincorporated associations, many of which are lobbying principals.
(2) The definition of "child" leaves unaddressed the status of stepchildren.
(3) The definition of "effort to influence legislative action or administrative action" contains a exemption for the provision of purely technical data to a state official or employee, or to a legislative or administrative body, in response to a request for the information. An argument can be made that most or all information a lobbyist provides is "technical data", and this loophole could lead to a great deal of misunderstanding and confusion, and perhaps even evasion of the law.
(4) The definition of "service (of official papers)" states that the papers are deemed served on the date mailed by the Commission. This could create problems since the regulations often provide for short response times to Commission action (i.e. seven days). If a lobbyist is on vacation for two weeks, he could miss an important deadline. Official papers that require a

response should be sent by certified mail, and the date of service should be considered to be the date received and signed for.

(5) Under Chapter 31, language needs to be added providing for a three day grace period before the Commission begins action to impose a fine on registrants who file registration statements or expense reports late,. This would be consistent with the Rules of Appellate Procedure as used in the state courts.

(6) Under §31.11 dealing with electronic filing, there should be a clear statement limiting access to a registrant's digital signature, and requiring all employees of the Commission who have that access to maintain strict confidentiality.

(7) Under §31.11 and §31.12 supporting documents such as fees and photographs for registration statements filed electronically, and signed originals for faxed documents, are due within five days of receipt by the Commission of the electronic filing or the fax. The due dates for these supporting documents should remain what they would be if filed by mail or by hand, and not be moved up because of the use of more modern means of transmission.

(8) Language in §33.1(a) seems to require duplicate payments of the registration fee. For example, my firm is retained by a principal to provide lobbying services. Under this proposal, the principal would have to pay, my firm would have to pay, and I would have to pay. Some who have read this section also see it as requiring my firm and me to each pay a separate fee for each client. Our understanding of the act is that there should be one fee for the principal and one fee for the lobbyist. That's it. The regulations need to be rewritten to be consistent with the act.

(9) Provisions of the proposed regulations at §33.2(b)(3) and §35.1(g)(2) require the reporting of unregistered lobbyists in registration statements and financial reports. The statute contains specific exemptions to avoid catching masses of citizen lobbyists in the net of this law, and all reference to unregistered lobbyists should therefore be deleted.

(10) Following from number (8) above, §33.3(a)(3) seems to require a separate registration statement from the firm and the lobbyist. One should be sufficient to identify who is lobbying for what.

(11) There is no need for the requirement at §33.3(f) for a separate registration statement for each principal a lobbyist represents. The lobbyist should be able to file one statement listing all the principals represented, as we do now. Remember, the principals are all also each filing their own registration statements, so there is plenty of information detailing who is lobbying for whom.

(12) The entire section on termination, §33.5, is a minefield just waiting to destroy even the most conscientious lobbyist or principal. One small example is the requirement that the lobbyist sign the principal's termination report. Sometimes a termination is less than amicable, and one party could cause a great deal of trouble for the other by refusing to sign or not allowing him to sign. The regulations should be rewritten to more closely mirror the act's simple language on terminations.

(13) Section 35.1(i) requires that the rental cost of office space be included in the quarterly financial reports. However, it does not require the cost of offices that may be owned by the lobbyist or principal to be reported. Many associations and corporations own huge and luxurious office facilities, but those costs would go unreported, while a small one person operation would have to report the cost of office space.

(14) PAGR is concerned by provisions of the proposed regulations at §35.2 that require lobbyists and principals to give the Commission full access to their computer files. There is no indication that any sort of warrant or legal justification is necessary for this invasion of privacy, and we believe that it could rise to the level of a constitutional violation of privacy.

Summary

To summarize let me say that PAGR finds these proposed regulations to be seriously deficient in many ways. First and foremost, they do not protect the rights of those regulated under the law, but seem to seek ways to punish them. They use terms that are not defined well or at all, and in other places are written in a very confusing manner. They show little understanding of what lobbying really is and how lobbyists and principals operate. They seem to assume that all lobbyists are private contract firms, and are written with that segment in mind, ignoring or not recognizing the fact that the vast majority of lobbyists are full-time employees of one and only one principal, usually either an association or a corporation.

In short, we feel that these regulations have so many flaws that the best course of action is to have the drafting committee go back, virtually to the start, and do a major rewriting. Failing that, we will ask you to reject them when they come before you in final form.

On behalf of PAGR let me say that we look forward to working with you and all other concerned parties to resolve the difficulties in implementing this statute. There is work do be done, and we are anxious to help do it.

Thank you for your time and attention. I will be happy to answer any questions you may have.

COMPARISON OF CHAPTER 21 AND CHAPTER 43

TOPIC	CHAPTER 21	CHAPTER 43
Who is covered?	Public officials and employees	Lobbyists and lobbying organizations
Grounds for opening a proceeding	An official complaint which must be sworn and signed and allege a violation of more than *de minimus* financial impact	Any information received by the Commission
First step in proceeding	A preliminary inquiry for up to 60 days	Notice of noncompliance sent to registrant based on information alleging a violation
Investigation	An investigation may be opened if inquiry has produced evidence of a violation. Subject must be notified and kept informed on a regular basis. Subject may provide evidence. Many protections are put in place, and detailed procedures must be followed.	None required
Protection against frivolous or harassing complaints	Subject may ask for an investigation and the Commission is required to comply.	None
Hearing process	Very detailed rules with ample due process and civil liberties protections for the accused	Same as Chapter 21 *to the extent possible*. Accused must defend himself against a Commission that has already found him to be noncompliant.