TESTIMONY ON

LOBBYING DISCLOSURE ACT REGULATIONS

BEFORE THE HOUSE JUDICIARY COMMITTEE

BY

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THURSDAY, FEBRUARY 25, 1999

HARRISBURG, PENNSYLVANIA

Chairman Gannon, Chairman Blaum, and Members of the House Judiciary Committee:

I deeply appreciate the opportunity to discuss the proposed regulations of the Lobbying Disclosure Act.

I have been active in ethics-related legislation for more than two decades. I voted for the Ethics Act in 1978. I testified before the Local Government Committee against repealing the Ethics Act in 1979. I co-sponsored the Ethics Act of 1989, and authored some of its provisions. I supported the Lobbying Disclosure Act of 1998 on the House floor, and testified before the Lobbying Disclosure Committee in December, 1998.

The Lobbying Disclosure Act of 1998 represents an improvement over the lobbying disclosure bills of prior years. The Lobbying Disclosure Act regulations of 1999 represent an improvement over the Lobbying Disclosure Act regulations of 1998.

We are moving in the right direction, but we still have a long way to go. We need regulations that avoid producing needless litigation and controversy. We need regulations that fully protect the due process, equal protection, and free speech rights that all Americans have under the United States Constitution.

We need regulations that have clear meanings, produce information with clear meanings, and allow the Ethics Commission to proceed with focus and economy of effort.

When I testified before the Lobbying Disclosure Committee around Christmas, I, like everyone else, was able to offer only first impressions due to time pressures. I deeply appreciate the responsiveness that was shown to my December comments in the current draft. My understanding of the current draft has been immensely aided by excellent staff work from both diverse leadership offices and the Judiciary Committee.

These regulations can and must continue to be improved. I offer the following suggestions for change:

CLARIFY INTERRELATED DEFINITIONS

First, interrelated definitions should be made much clearer by using identical language wherever possible. The definitions of "gift", "lobbying", and "hospitality" are interrelated in Section 31.1, and should be clearly consistent when read together.

The definition of "hospitality" should be alphabetized under "H" and not be buried under "Transportation and lodging or hospitality received in connection with public office or employment" under "T." "Entertainment "and" meals" fit under the definition of "hospitality", but are listed separately under "lobbying."

The definition of "lobbying" should exclude the words "entertainment" and "meal" and use the word "hospitality" instead. Similarly, the quarterly expense reports listed in Section 35.1(g)(6) should exclude the words "entertainment," "meals," and "receptions", and use the word "hospitality" instead.

The language in 35.1(j) lacks clarity. While I believe the intent is to acquire disclosure of information by principals or lobbyists, which covered public employees must disclose, other interpretations could be made. I would suggest the relevant section of 35.1(j) should read: "anything of value which, due to the cumulative amount for the current calendar year, must be included...."

I would also suggest that Section 35.1(j)(1) should end "an aggregate amount per calendar year" in order to remove any ambiguity as to what "year" means.

MAKE REPORTING DATES CONSISTENT

Second, the reporting dates for lobbyists should be consistent with the reporting dates for public officials. Since public officials report on a January through December year, an erroneous impression of lying could be created in certain circumstances if there is disparity between the public official's annual report and a lobbyist's quarterly report.

Regulation 31.4(b) should create periods of January through March, April through June, July through September, and October through December. I would suggest that the first reporting period beginning August 1, 1999, be adjusted in 31.4(b) to continue through December 31, 1999.

NARROW THE DEFINITION OF GIFT

Third, the definition of "Gift" states what it includes, but not what it does not include. The definition of "Gift" in 31.1-- "anything which is received without consideration of equal or greater value" -- is too broad. Help with a constituent problem, testimony before a committee, the text of a bill enacted in another state, research about actions or results of actions in another state, the results of a public opinion poll, the text of a study, all fit under the category of "anything."

The definition of "gift" should be modified to include "anything which is received for the personal and non-governmental use of the recipient without consideration of equal or greater value."

MERGE THE DEFINITION OF LOBBYING

Fourth, the term "effort to influence legislative action or administrative action" in Section 31.1 should be merged with the definition of Lobbying in 31.1, because lobbying is defined as -- you guessed it -- "an effort to influence legislative action or administrative action."

DELETE THE "PURELY TECHNICAL DATA" SENTENCE

The second sentence of the definition of "effort to influence legislative action or administrative action" -- "the term as used in the Act does not apply to the provision of purely technical data to a state official or employee or to a legislative body, at his, her, or its request" -- is puzzling and serves no apparent purpose. It should be deleted.

What is "purely technical data?" What is data that is not purely technical? What is a "request?" If a lobbyist says, "I have reports here for anyone who wants them," and all public employees present raise their hands, is that lobbyist responding to a request? What is the significance of whether data -- purely technical or not -- is provided in response to a request or not?

The relevant question under the Lobbying Disclosure Act is whether the provision of information or constituent assistance to a legislator constitutes a gift. My clear and unequivocal sense of the will of the General Assembly is that it does not. We should nip in the bud any frivolous investigations of whether data is purely technical or not purely technical, or whether data was or was not provided in response to a request. We should get rid of the entire "purely technical data" sentence.

DO NOT ALLOW ATTRIBUTING EXPENDITURES ON A GROUP TO AN INDIVIDUAL

Fifth, lobbyists should not be given the option of accumulating and attributing values of certain gifts, transportation, meals, and hospitality to one individual when more than one individual benefits from them. If a lobbyist wishes to set up a lunch or dinner with House Judiciary Committee members, for instance, the total cost should not be reported as a gift for Chairman Gannon.

Section 35.1(k)(6) (ii) is unclear in meaning. My guess is that it was intended to allow the cost-per-person of, for example, a meal for ten people, to be divided by ten. This would be a perfectly reasonable purpose. But, there is a lot of surplus wordage in Section 35.1(k)(6)(ii) that allows the argument that a dinner for ten could be attributed to the leader of the group.

I recommend that Section 35.1(k)(6)(ii) be clarified by striking all language after the word, "recipients" on line two. I feel it is totally unnecessary to say that the costs of meals on one occasion should be added to the cost of meals on another occasion in order to calculate a total spent on a public official. If it is felt to be necessary to say it, it should be clearly placed in another sentence, and not as a dependent clause in a sentence discussing a single "occasion" or "transaction."

ELIMINATE OR CAREFULLY DEFINE THE USE OF NONINVESTIGATIVE PROCESSES

Sixth, the noninvestigative process under Sections 43.3(b) and 43.3(c) allow the Executive Director of the Ethics Commission to issue a "Notice of Noncompliance" without having conducted any investigation. If there are to be any proceedings conducted without any investigations, the circumstances for such proceedings should be clearly and narrowly defined in order to avoid litigation over due process and equal protection of the laws.

Absent such careful delineation of the circumstances for noninvestigative procedures, I would recommend that all noninvestigative procedures be removed from these regulations and that all actions proceed through investigative procedures.

MORE TIGHTLY DEFINED AUDIT PROCEDURES

Seventh, the audit procedures provided for in Sections 41.2(c) and 41.3(c) need to be more tightly defined. "Any other relevant information" in Section 41.2(c) and "interviews of

....all other individuals necessary to the completion of the audit" are formulas for investigations of endless scope and kind. This sweeping language should be deleted.

Any additions to items covered in Section 35.2 (which enumerate the records which must be retained by registrants) should be narrowly targeted and clearly defined, if they are necessary at all. Similarly, audit interviews should be limited to those who prepare relevant documents and any other clearly and narrowly defined persons.

DO NOT ALLOW INVESTIGATIONS BASED ON "INFORMATION THAT DOES NOT SATISFY THE CRITERIA FOR A FORMAL COMPLAINT"

Eighth, the regulations should make clear that the Ethics Act standards of Section 1107 and 1108 of the Ethics Act apply to the Lobbyist Disclosure Act. These standards establish a formal investigative process -- preliminary inquiry after a formal complaint or the motion of the Executive Director, then a full investigation and a findings report with four members required to find a violation by clear and convincing proof.

The proposed regulations at Section 43.3(a)(iv) allow commission proceedings to be based on "information received that does not satisfy the criteria for a formal complaint," which would appear to include an anonymous letter or telephone call. Section 43.3(e) specifically equates the punishment levied by noninvestigative processes with the punishment levied by investigative processes. This again raises the question of why the noninvestigative processes should be allowed to subject the enforcement of the act to legal challenges from due process and equal protection claims.

REQUIRE THE DEFINITION OF LOBBYIST TO INCLUDE ONLY THOSE WHO CONVERSE WITH AT LEAST ONE GOVERNMENTAL OFFICIAL

Ninth, the question of who is a lobbyist is greatly impacted by the broad definition of indirect communication in Section 31.1. Under this definition, advertising agencies, mailing houses, research analysts, pollsters, academic experts, and others who have no direct contact with legislators should be counted as lobbyists.

I would suggest that the definition of "lobbying" be amended to "an effort to influence legislative action or administrative action by one who personally meets or otherwise engages in conversation with one or more legislative or administrative employees in a reporting period." This would eliminate large numbers of support personnel from the reporting requirements and make the information received more relevant to the public. Other regulations already limit the reporting to those who spend time equivalent to $2,500 over three months.

DO NOT REGULATE PUBLISHING SCHEDULES

The term "regularly published" should be deleted from the last line of the definition of "indirect communication" in accord with the First Amendment to the United States Constitution. The Ethics Commission should not be investigating publishing schedules, which commonly vary widely from year to year in many organizations. All periodic newsletters primarily designed for and distributed to members of organizations should be deleted from the definitions of "indirect communication."

REQUIRE FOUR ETHICS COMMISSIONERS TO FIND A VIOLATION BY A STANDARD O F CLEAR AND CONVINCING PROOF

Tenth, Section 43.3 (e) should be clarified to require four members of the seven member Ethics Commission to find a violation by a standard of clear and convincing proof. This is the standard that I am proud to have been responsible for initiating, and it belongs in this regulation to avoid due process and equal protection legal challenges.

EITHER ELIMINATE OR NARROWLY DEFINE "FOR CAUSE" AUDITS

Eleventh, the limitation on lottery audits of reports in Section 41.(c) can also be read to indirectly authorize an unlimited number of undefined "for cause" audits.

I would suggest that Section 41.1(c) be rewritten to say "(N)o lobbyist or principal shall be subject to a random audit more than once in any biennial registration period." If there is a need to create a new category of "for cause" audits, that need should be clearly and narrowly defined in a separate section from the lottery audits.

GIVE LOBBYISTS THE SAME RIGHTS AS PUBLIC OFFICIALS HAVE

Twelfth, to avoid equal protection and due process challenges, lobbyists must be accorded the same rights as public officials are. The Lobbying Disclosure Act in Section 1308 provides that investigations should be conducted in accordance with Sections 1107 and 1008 of the Ethics Act. The current Ethics Act regulations at 51Pa.Code, Chapter 21 should be followed regarding investigations of violations of the Lobbying Disclosure Act.

All sections dealing with investigations of lobbyists should make clear that lobbyists have the same rights as public officials, including, but not limited to, four members being needed to find a violation, and a standard of proof by clear and convincing evidence.

CONCLUSION

In conclusion, I hope these remarks will be helpful to the House Judiciary Committee and the Lobbying Disclosure Committee. The lobbying regulations must be further amended to meet the goals of the Lobbying Disclosure Act passed in 1998 by unanimous vote.

We need public accountability, and meaningful information. We do not need investigations of trivial or irrelevant matters, or a highly politicized or heavily litigated implementation of this act.

Use of the concepts of clarity, focus, economy of enforcement efforts, due process, and equal protection will produce results that we and the public will all be proud of for years to come.