

MEMORANDUM

TO: New York City Lobbying Commission
FROM: New York Advocacy Association
DATE: March 29, 2011
RE: Comments on the differences between City and State Lobbying Schemes

The New York Advocacy Association (“NYAA”) supports transparency but urges the Commission to ensure that speech protected under the First Amendment is not chilled or discouraged because of unduly complicated reporting requirements. In United States v. Harriss,¹ the Supreme Court explicitly held that when regulating lobbyists, there is an obligation not to intrude upon the constitutional rights to speak, publish, and to petition the government.

In an effort to improve the City’s lobbying process and to increase consistency between City lobbying and State lobbying, the NYAA would like to bring the following issues to the attention of the Commission.

Duplication of Report Filing: Under the current law, lobbyists who perform lobbying activities within New York City must register with both the City and the State, in some cases, paying two fees and filing two sets of overlapping but inconsistent reports. Ideally, there should be comprehensive jurisdiction at either the state or city levels, or at least that one system should cover only areas not covered by the other. Absent that, it would reduce the paperwork burden if lobbyists could report both City and State lobbying activities on the same forms and schedule.

Late Fees: The New York City Lobbying Law requires the City Clerk to designate by rule penalties for late filings, which shall conform to the schedule established by the State.² However, in practice, the two penalty systems are quite different. The State can impose a penalty of up to \$25 a day but has the discretion to impose both late fees that are less than the maximum amount and to waive late fees entirely.³ Conversely, the New York City Clerk’s Office imposes a late fee of \$10 a day for first time filers and \$25 a day for everyone else.⁴ The City Clerk’s office stated at the March 15, 2011, Lobbying Commission Hearing that they have no flexibility in assessing late fees. Also, unlike the State penalty system, there is no maximum

¹ 347 U.S. 612 (1954)

² Admin. Code § 3-223(c)

³ N.Y. LEG. LAW § 1-e: The New York State Lobbying Act states that “the commission *may* impose a fee for the late filing of a registration statement required by this section not to exceed twenty-five dollars for each day that the statements required to be filed is late.” [Emphasis added.]

⁴ 51 RCNY §1-03(b)(1)(iv)(a)-(b) : City Lobbying Law states that “any person or organization who has never previously filed a statement or registration or any other filing required pursuant to the Lobbying Law and these Rules and is filing for the first time *shall* be charged a late filing fee of \$10 per day for each day the required filing is late” and “any other person or organization *shall* be charged a late filing fee of \$25 per day for each day the required filing is late.” [Emphasis added.]

late fee prescribed under New York City law. While having no flexibility with regards to late fees and penalties insulates the Clerk's office from political pressure, it does not give the Clerk's office the ability to deal with unforeseen circumstances. There is no evidence of abuse of discretion by the State commission. Therefore, the NYAA respectfully submits that the Clerk's office be specifically authorized to use discretion and consider mitigating and aggravating factors when assessing late fees and penalties.

Inconsistent Treatment of Late Fees and Audit Penalties: At the March 15 Hearing, the Clerk's office stated that deficiencies discovered during a random audit of a lobbyist do not result in automatic fines or penalties. Rather, if a deficiency is discovered during an audit, the City gives the lobbyist a 30-day window to correct before late fees or penalties are assessed. This treatment is not only inconsistent with the Clerk's policy on late fees, but it creates an inverse incentive program. Lobbyists who uncover mistakes and bring them to the attention of the Clerk are hit with automatic fees and penalties, whereas problems that are not cured until they are discovered during a random audit result in a 30-day cure period and no fees or penalties. The lack of late fees discretion creates an incentive for a lobbyist not to self report problems.

Due Process Concerns: The New York City Administrative Code states that "the amount of any assessment made or duration of order issued pursuant to this section shall be determined only after a hearing at which the party shall be entitled to appear and be heard."⁵ Despite these provisions, the Clerk's office has set up a system whereby late fees are assessed without giving the alleged offender an opportunity to be heard. The NYAA respectfully submits that the Clerk's office give lobbyists and clients an opportunity to be heard at a hearing before any late fees or penalties are assessed, as is the State practice.

Client Annual Reports: Client reporting is an unnecessary burden that serves no useful public purpose while exposing both the client and the lobbyist to a gotcha game, and should be eliminated. The State and City differ greatly in their treatment of Client Annual Reports. The State allows a lobbyist to prepare a hard copy of the report for their client to sign. Conversely, the City mandates that the client prepare and submit the report themselves using the City's website. The City's method creates several problems. First, sometimes it is difficult to get the client to perform this task on his or her own. This problem is exacerbated when the client has little to no computer knowledge or experience. Second, even when the client agrees to file a report, the lobbyist typically has to help the client through the online filing process because the lobbyist maintains all relevant information, such as lobbying targets, and more importantly, understands the statutory definitions, such as which expenses need be reported and which do not. The State's system, at least, is much more efficient and is less burdensome for clients.

Commencement of Lobbying Activities: For State lobbying purposes, lobbying does not begin until a piece of legislation has been introduced. However, for City lobbying, the mere discussion of a potential law is considered lobbying. The answer to such a fundamental question, such as when lobbying commences, should be consistent between the City and the State. Registration should be required at any time prior to the commencement of lobbying contacts with public officials, not when such activity is "reasonably anticipated," a constitutionally vague standard.

⁵ Admin. Code § 3-223(f)

Naming Issues: The City's online lobbying system only lets a client register under their legal entity name. This creates problems when the legal entity name differs from the name that the entity traditionally does business under, or when a special purpose entity is the actual applicant, and compounded when another entity is used to pay operating expenses. The state system is more flexible, because client enrollment – a requirement not found in the City law but mandated by the Clerk – is not required. Clients should be able to choose the reporting entity and certify that the reports cover all affiliates.

System Cleanup: The City does not periodically purge their online system of old information. Because of the confusion surrounding an entity's name in the database, the appearance of prior names for a particular client can cause confusion.

Pre-populated Fields: When completing the City's online filing process, the "subjects lobbied" and "targets lobbied" fields do not "pre-populate" with information from prior periods. When filing with the State, the subjects lobbied and targets lobbied carry over from period to period so that a lobbyist does not have to re-enter the same information each period. The State system is more efficient because the subjects lobbied and targets lobbied fields do not typically change significantly from period to period. If changes are necessary, it is easier to make edits to pre-existing information than to enter new information from scratch.

The NYAA is available to meet with the Lobbying Commission to address any concerns or answer any questions related to the above.

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