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Long Separate Regimes Converge to Regulate Lobbyist Political Acts

On Tuesday, Mayor Michael Bloomberg signed into law three bills he and City Council Speaker Christine Quinn had called among "the most significant political reforms in the city in nearly 20 years."¹

Twenty years earlier, in the wake of Borough President Donald Manes' suicide and the corruption it brought to light, the city had adopted its first lobbyist regulations and campaign finance reforms. Over the next two decades the scope of these two regulatory regimes expanded, but the boundary between them had not been breached.

For example, in 1998, a City Charter referendum authorized regulation of the "acceptance of campaign contributions from individuals and entities doing business with the city," but not of the making of such contributions. New York City Charter §1052(a)(12). Similarly, in 2004, when the Council extended contribution limits and disclosure requirements to candidates not participating in public financing, it did not purport to regulate anyone other than candidates and their authorized political committees. See City of New York, Local Laws Nos. 58, 59, and 60 (2004).

In contrast, the contribution limits of the Election Law apply to both recipients and makers of political contributions. See N.Y. Election Law §14-114(1). The more narrow scope of local legislative authority had seemingly compelled the city to confine its regulation of political activity to that of city candidates and public servants.²

Until now, that is. These long separate regulatory regimes are converging to regulate lobbyist political activities. This article summarizes the new requirements.

The New Items

A person or organization retained, employed or designated by any client to engage in "lobbying" is a "lobbyist." See N.Y.C. Administrative Code §3-211(a)



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(lobbyist), (c) (lobbying). The new laws cover fund-raising activities, gifts, and political contributions by: (i) lobbyists; (ii) their spouses, domestic partners and unemancipated children; (iii) officers and employees of lobbyist organizations who engage in lobbying activities of the organization; (iv) officers and employees employed in the organization's division that engages in lobbying activities of the organization; and (v) the spouses, domestic partners and unemancipated children of such officers and employees (hereinafter, lobbyist and associated persons).

• **Fund-raising Activities.** The new law requires lobbyists to report "fund-raising activities" of the lobbyist and associated persons, specifically the "solicitation or collection" of contributions for candidates for city office and for public servants who are candidates for any elective office, whether done as a volunteer or for compensation. When a lobbyist is an organization the fund-raising activity of "only that division...that engages in lobbying

activities" is subject to disclosure.

• **Contributions.** In future elections, contributions by lobbyists and associated persons to candidates seeking public financing will not be matched with public funds.³ In determining whether a contribution is not matchable, the Campaign Finance Board (CFB) is directed to rely on the computerized database of lobbyist filings to be created by the city clerk (clerk).

• **Gifts.** Lobbyists and associated persons may not offer or give a gift to any public servant. The Conflicts of Interest Board (COIB), in consultation with the clerk, shall adopt rules to define prohibited gifts and to create exceptions, in a manner consistent with its pre-existing rules and opinions governing "valuable gifts" received by public servants. The exceptions will include "de minimis gifts, such as pens and mugs, gifts public servants may accept as gifts to the city and gifts from family members and close personal friends on family or social occasions...."

The COIB is authorized to direct the Department of Investigation (DOI) to investigate violations. The COIB will adjudicate these violations, for which civil and criminal sanctions apply. This new law marks an unprecedented extension of the COIB's jurisdiction to persons other than public servants and candidates.

Political Consulting

• **Political Consulting.** The new law requires lobbyists to report "political consulting activities": (i) participating in the campaign of any candidate for city office or of any public servant who is a candidate for any elective office "by providing political advice;" or (ii) providing political advice to a city elected official. Unlike "fund-raising activities," this disclosure is required only for political consulting activities done "for compensation" and does not apply to associated persons' activities.

• **Disclosure.** Currently, every lobbyist must file an annual statement of registration with the clerk, unless the lobbyist "does not expend, incur or receive" more than \$2,000 of "reportable compensation and expenses" for lobbying in that year. See N.Y.C. Administrative

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Code §3-213(a)(1). Future registrations will also identify the names, addresses and telephone numbers of associated persons.

Lobbyists required to register must also file periodic and annual reports. The new law requires filings by electronic submission. It also directs the clerk to supply reporting forms that "to the extent practicable shall be identical to periodic reporting forms used by the New York Temporary State Commission on Lobbying" (Lobbying Commission) and authorizes the clerk to conform the city's reporting periods with those of the Lobbying Commission. (The Lobbying Commission administers the state's Lobbying Act, which contains additional and overlapping requirements that apply to persons lobbying city officers and employees. See Lobbying Act, codified as N.Y. Legislative Law §§1-a, et seq.)

Registration and periodic statements filed by lobbyists and the annual report filed by lobbyist clients will now require detailed information about the subjects of the lobbying. Specifically, "information sufficient to identify the local law or resolution, procurement, real property, rule, rate making proceeding, determination of a board or commission, or other matter..." must be included.

A supplement to both periodic and annual reports will be "fund-raising and political consulting reports." These shall cover activities "conducted directly by the lobbyist, or through any other entity of which such lobbyist is a principal." These reports will identify: the lobbyist and lobbyist employees engaged in fund-raising or political consulting; all persons and entities with whom the lobbyist contracted for these activities; the candidate, public servant, or elected official "to whom or on whose behalf" the lobbyist provided fund-raising or political consulting services; compensation paid or owed to the lobbyist for these activities; and "the total dollar amount raised for each candidate...."

• **Random Audits.** The new law requires the clerk to conduct random audits. It empowers the clerk to "require the production of such witnesses and records as may have been relevant to the preparation of the statements or reports audited."

• **Enforcement.** The clerk must designate by rule penalties for late filings, which shall conform to the Lobbying Commission's schedule for such charges. Civil penalties for violations have been doubled, to as much as \$30,000 for knowing and willful violations. The clerk must report determinations of willful violations and suspicions of criminal violations to DOI.

The DOI will assist in training the clerk's administrative and enforcement personnel. In turn, the clerk shall develop compliance programs for lobbyists and their clients.

• **Public Information.** While most of the new requirements take effect on the 180th day after enactment, the effective date for the clerk to keep lobbyist and client filings in electronic form, establish a computerized database for the information he or she is required to keep, and post this information on the Internet "as soon

as practicable" is one year after enactment. Each March 1, the clerk must post on the Internet a report detailing information about complaints, civil penalties, orders to cease lobbying activities, random audits, and compliance programs in the preceding calendar year. As soon as practicable after issuing an order or imposing a civil penalty, the clerk must post on the Internet information identifying the lobbyist or client in violation, the provision of law violated, the duration of the order, and/or the amount of the penalty.

• **Joint Commission.** Approximately 30 months after enactment, the mayor and the council shall jointly appoint a five-member commission to review and evaluate the performance of the clerk. Within six months thereafter, the commission will make recommendations to strengthen the lobbying law's administration and enforcement, including whether to increase the \$2,000 threshold for filing a statement of registration.

Observations

Some contend the new laws leave a "glaring loophole": campaign contributions that lobbyists "bundle" may continue to be matched with public funds.⁴ With certain exceptions, current law defines an intermediary as one who delivers contributions. See N.Y.C. Administrative Code §3-702(12). City candidates must disclose to the CFB any intermediaries for contributions accepted and are also required to collect sworn statements from intermediaries listing the contributions they delivered. In past elections some lobbyists were intermediaries for many contributions, including contributions that were matched with public funds.

It is notable that the new law defines fund-raising activities, as "solicitation or collection" of contributions, but not as "delivery." Thus, regardless of perceptions, intermediary disclosure to the CFB will not necessarily overlap with fund-raising activities disclosure to the clerk. Likewise, the new law requires lobbyists to disclose "total funds raised" for each candidate, an amount which may be significantly different from the total amount of contributions the candidate reports as accepted or intermediated. Will deviations among the reports filed by lobbyists and candidates nonetheless trigger compliance inquiries by the clerk or the CFB?

The law was designed not to place the onus on candidates to determine whether a contribution was from a lobbyist (or associated person) and therefore not matchable. Under existing law, however, candidates must disclose to the CFB employment information for all contributors giving \$100 or more. Since the new law also authorizes the CFB to rely on "such other information known to" it in determining whether a contribution was made by a lobbyist or associated person, will the CFB initially deny public funds for contributions reported to be from employees of registered lobbyists? And, in turn, will the clerk review the information candidates obtain from lobbyists to address the CFB's invalidation

of such matching claims?

Indeed, the promise of cooperative and complementary compliance-monitoring among the clerk, the CFB, the COIB, and DOI is potentially the new laws' most dynamic innovation.

There is also the promise of further reform. Long before the Joint Commission comes into existence, the CFB is due (on Sept. 1) to make recommendations to the mayor and the City Council. See N.Y.C. Administrative Code §3-713. More than a year ago the CFB resumed inquiry into how to implement the 1998 Charter referendum, noted above, for which it has held four public hearings. The CFB's upcoming report may well address this subject.

With the first steps now taken, will the city ultimately adopt an approach similar to New Jersey's, which requires business entities to disclose certain contributions when they seek or win government contracts and places special limitations on the contributions they (and connected persons) make and, in some instances, solicit?⁵ If so, which contributors and contribution-solicitors might become subject to similar "pay-to-play" regulation by the city?

Conclusion

Here's one thought. Currently, lobbyist clients must submit annual statements to the clerk. This class of individuals and companies is, therefore, already identified and subject to regulation. As such, they could become a target for the extension of the new requirements (e.g., requiring client identification of associated persons and corollary disclosure of fund-raising activities, and prohibiting their making of matchable contributions and gifts to public servants).

The prospect of additional political activity regulations will undoubtedly become the subject of future lobbying activities.

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1. New York City Council, Int. Nos. 190-a, 191-a, and 192-a (2006); Chan, "City Council Passes Bills to Limit Lobbyists' Influence," *New York Times*, May 25, 2006, at B3.

2. See, e.g., N.Y.C. Administrative Code §§3-701, et seq. and §§3-801, et seq.; N.Y.C. Charter §2604(b)(9), (11), (12) and (15). Regarding the City's legislative authority, see generally, Friedlander, Louis and Laufer, "The New York City Campaign Finance Act," 16 *Hofstra Law Rev.* 345 (1988).

3. Candidates for mayor, public advocate, comptroller, borough president, and City Council may qualify to receive matching public funds for monetary contributions received from natural persons resident in the city of New York. See N.Y.C. Administrative Code §3-702(3), defining "matchable contribution."

4. Chan, "Restrictions on City Lobbying Ignore Loophole, Critics Say," *New York Times*, May 24, 2006, at B1 (quoting Gene Russianoff of the New York Public Interest Research Group).

5. See, e.g., New Jersey, P.L. 2004, c.19 (N.J.S.A. 19:44A-20.3, et seq.), P.L. 2005, c.51 (N.J.S.A. 19:44A-20.13, et seq.), and P.L. 2005, c.271.