

An Overview of
Pennsylvania's New Lobbying Disclosure Act
(Revised January 19, 2007)

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Pennsylvania's new lobbyist registration and disclosure statute became effective on January 1, 2007. The "Lobbying Disclosure Act"² ("Lobbying Act" or the "Act") is a comprehensive law that applies to those engaged in "lobbying." This will include *both* non-attorneys and attorneys. For attorneys, the Act applies to activities that in the past have been considered to be the practice of law rather than lobbying.

The Lobbying Act, with certain limited exceptions, requires registration and reporting by any person or entity that is paid or pays to influence the actions of the General Assembly and/or the Executive Department³ of Pennsylvania's state government.⁴

Applicability. The Act's scope is very broad. The statute applies to traditional lobbying activities where the lobbyist seeks to influence the passage of legislation. In addition, "lobbying" includes actions to influence whether the Governor will veto a bill. It also includes trying to influence the confirmation of gubernatorial nominees and appointments to public bodies by members of the General Assembly.

In addition, the Lobbying Act regulates attempts to influence "administrative action." This includes such activities as the "proposal, consideration, promulgation or rescission of a regulation." The term also includes procurement of supplies, services and construction under Pennsylvania's Procurement Code. The issuance or rescission of executive orders, appointments to state offices and employment by the Commonwealth also are regulated by the Act.

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² Act of November 1, 2006, P.L. ____, No. 2006-134, 65 Pa.C.S. Chapter 13-A (relating to Lobbying Disclosure). Section references in this outline are to sections of the Act in 65 Pa.C.S. Chapter 13-A.

³ "Executive Department" is defined in the Pennsylvania Constitution as the ". . . Governor, Lieutenant Governor, Attorney General, Auditor General, State Treasurer, and [the Secretary of Education] and such other officers as the General Assembly may from time to time prescribe." Pennsylvania Constitution, Art 4, § 1.

⁴ The Lobbying Act applies only to state government lobbying and does not affect lobbying at the local government level or outside Pennsylvania.

Included in the Lobbying Act's definition of "lobbying" are "direct communications," "indirect communications," "office expenses" and providing any "gift," "hospitality," "transportation or lodging to a state official or employee for the purpose of advancing the interest of the lobbyist or principal." Each of the terms or phrases in quotation marks is either a term defined in the Act or will become a term of art as the new statute is implemented.

The Act focuses on three classes of individuals/entities: lobbyists, lobbying firms and principals. The terms "lobbyist" and "lobbying firms" have very similar definitions, with the distinction being that a lobbying firm must be an entity. Each require that the individual or entity be engaged in lobbying for economic consideration on behalf of a "principal." A "principal" is an individual or entity on whose behalf a lobbying firm or lobbyist engages in lobbying or that engages in lobbying on the principal's own behalf.

Registration. The Act requires registration with the Pennsylvania Department of State by each lobbyist, lobbying firm and principal. Each must register with the Department of State within ten days of acting in any capacity as a lobbyist, lobbying firm or principal, unless exempted. There is a \$100 biennial registration fee, which is subject to periodic adjustment for inflation. The Department of State has promised that, eventually, the entire registration process may be done online. As of the date of this overview (January 19, 2007), no estimate is available as to when this functionality will be available. Please see <http://www.dos.state.pa.us/campaignfinance/site/default.asp?bcelNav=>

Exemptions from Registration and Reporting. The Lobbying Act contains various important exemptions from registration and reporting. The following do not have to register and file reports under the Lobbying Act:

- An individual who does not receive economic consideration for lobbying.
- An individual who lobbies for his or her employer for less than 20 hours during any reporting (*i.e.*, 3 month) period. If the employer is a "principal," the costs allocable to an employee's lobbying activities must be reported, even if the employee spent less than 20 hours lobbying during that reporting period.
- An individual whose total aggregate economic consideration for lobbying from all principals represented is less than \$2,500 for any reporting period. Since reporting periods are 3 months long, an individual may make up to \$10,000 per year without registering or reporting, so long as no more than \$2,500 is received during any reporting period.
- A principal whose total lobbying expenditures are less than \$2,500 for any reporting period. If a principal is registered and has total expenses of under \$2,500 during any reporting period, the principal does not have to file a report, but must file a statement that its expenses are less than \$2,500 for the reporting period.

- An individual who limits his or her lobbying activities to preparing testimony and testifying before a committee of the General Assembly or participating in an administrative proceeding of an agency.
- An individual who participates as a party or as an attorney or representative of "a party, case or controversy in any administrative adjudication. . . ."
- An individual who participates in responding to publicly advertised bid invitations and requests for proposals and vendor activities for small and emergency procurements. Hopefully, the forthcoming regulations will clarify what activities are included in responding to bid requests and RFPs. It is important to note that the Act requires disclosure of expenses paid for a lobbying firm or lobbyist to influence and agency's "preparing, bidding, entering into or approving a contract."
- Certain elected or appointed government officials or employees. This exemption does not apply to outside counsel for state or local agencies.
- An individual who participates in activities that are election expenditures or transactions subject to the Pennsylvania Election Code.
- An individual who is not a registered lobbyist and who serves on an advisory board, working group or task force at the request of an agency or the General Assembly.
- An individual representing a bona fide church or bona fide religious body of which the individual is a member where the lobbying is solely for the purpose of protecting the constitutional right to the free exercise of religion.
- A media employee in the ordinary course of business.

Reporting. Detailed expense reporting is required by principals. Lobbyists and lobbying firms do not ordinarily file reports, unless they engage in lobbying where the expenses associated with that lobbying were not reported in any expense report filed by a principal. Also lobbyists and lobbying firms must report if they lobby for State or local officials and employees who are exempt from registration. Expense reports must be filed not later than 30 days after the last day of the quarter.

Lobbying firms (and individual lobbyists not associated with a lobbying firm) are required to sign the reports submitted by each principal. A statement may be attached to the report of the principal describing the limits of the lobbying firm's or lobbyist's knowledge of the information contained in the expense report.

What Must Be Reported. The Lobbying Act requires specific reporting of "the total costs of all lobbying for the period." This includes all lobbying-related "office expenses," "personnel expenses," "expenditures related to gifts, hospitality, transportation and lodging to state officials or employees" and "any other lobbying costs." For individuals for whom lobbying is incidental to their regular employment, there will need to be "a good faith prorated estimate based on the value of the time devoted to lobbying."

Costs must be allocated to one of three categories: (1) costs for gifts, hospitality, transportation and lodging; (2) costs for direct communication; and (3) costs for indirect

communication. The Act provides that any "reasonable method" of estimation and allocation is permitted to be used. As of the date of this overview (January 19, 2007), reporting forms and instructions have not yet been issued by the Department of State. Forms and filing instructions are expected to be issued in advance of the first reporting deadline at the end of April 2007.

In addition, every time a state official or employee receives anything of value from a principal or lobbyist that must be included in the official's or employee's statement of financial interest, the lobbying report must identify the name of the official or employee, his or her position and the specifics of each occurrence.

Conflicts of Interest. The Lobbying Act prohibits conflicts of interest and contains a provision similar to the conflict of interest rules for attorneys.

Lobbying is not permitted on behalf of a principal "on any subject matter in which the principal's interests are directly adverse to the interests of another principal currently represented by the lobbyist or previously represented by the lobbyist during the current session of the General Assembly or the lobbyist's own interests."

A principal may waive a conflict of interest in certain circumstances similar to those in which a client may waive an attorney's conflict of interest. The lobbyist first must believe that he or she "will be able to provide competent and diligent representation to each affected principal." Written notice must be provided to each affected principal upon the lobbyist becoming aware of the conflict and the principal must provide "informed consent" waiving the conflict of interest.

If a lobbyist cannot represent a principal due to a conflict of interest, neither can the lobbyist's employer, partner or another person associated with the lobbyist. Also, the State Ethics Commission may impose civil penalties up to \$2,000 and up to a five-year prohibition on lobbying for violations of the conflict of interest rules.

Administration. The Act authorizes the State Ethics Commission generally to administer and enforce the Act. Investigations, hearings, audits and the imposition of significant civil and criminal penalties for violations are also included in the statute. The Lobbying Act establishes a new nine member committee to promulgate regulations. The first regulations are expected to be issued sometime later this year.

Opportunity to Obtain Advice and Opinions. The State Ethics Commission is required to provide advice and opinions (what they call "advisories") regarding the Act. A person who acts in good faith based on the written advice or opinion of the Commission will not be held responsible for a violation of the Act if the facts were as stated in the advice/opinion request. It is important to note that advisories may be issued on a confidential basis. The advisory will be public, but confidential information will be redacted.

Contingent Compensation. The Lobbying Act prohibits contingent compensation and contains a detailed list of “unlawful acts.” The list of “unlawful acts” includes engaging in conduct “which brings the practice of lobbying or the Legislative or Executive Branches of State government into disrepute.”

Other Unlawful Acts. The Act contains strong enforcement and penalty provisions, both civil administrative penalties and criminal penalties. Among other actions, the Act contains a list of 10 specific unlawful acts. Under the Act, a lobbyist or principal may not:

1. Instigate the introduction of legislation to obtain employment to lobby against legislation.
2. Knowingly counsel a person to violate the Lobbying Act or any other federal or state statute.
3. Engage in or counsel another to engage in fraudulent conduct.
4. Attempt to influence a State official or employee by making a loan to the State official or employee.
5. When lobbying on behalf of a principal, refuse to disclose the identity of the principal, upon request, to a State official or employee.
6. Commit a criminal offense arising from lobbying.
7. “Influence or attempt to influence, by coercion, bribery or threat of economic sanction, a State official or employee in the discharge of the duties of office.”
8. Extort or “otherwise unlawfully retaliate” against a State official or employee by reason of his or her position with respect to or vote on administrative or legislative action.
9. Attempt to influence a State official or employee by the promise of financial support in a future election or financing of opposition in a future election.
10. “Engage in conduct which brings the practice of lobbying or the legislative or executive branches of the State government into disrepute.”

Enforcement and Penalties. The State Ethics Commission may receive complaints and initiate its own investigations regarding alleged violations of the Act. After notice and hearing, the Commission may impose an administrative penalty not to exceed \$2,000. It is unclear from the Act whether that is an overall \$2,000 penalty or \$2,000 per incident. In addition, the State Ethics Commission may prohibit a lobbyist from lobbying for economic consideration for up to five years. Negligent failure to register or to submit a report is punishable by an administrative penalty not exceeding \$50 for each late day. The Act contains no limit to this administrative penalty.

The Act contains significant criminal penalties as well. The Commission may refer an alleged violation to the Attorney General for investigation and prosecution. With respect to allegations made against an attorney, the Commission may refer matters to the Disciplinary Board of the Supreme Court.

Attorneys. The Lobbying Act will apply to the actions of attorneys that, in the past, have been considered to be exclusively the practice of law. This is now permitted

as the Pennsylvania Supreme Court amended Rule 1.19 of the Pennsylvania Rules of Professional Conduct to subject lawyers to legislation such as the Lobbying Act. Under revised Rule 1.19(a):

A lawyer acting as lobbyist, as defined in any statute, or in any regulation passed or adopted by either house of the Legislature, or in any regulation promulgated by the Executive Branch or any agency of the Commonwealth of Pennsylvania shall comply with all regulation, disclosure, or other requirements of such statute, resolution, or regulation which are consistent with the Rules of Professional Conduct.

Disclosure of information relating to the representation is permitted in order to comply with the Lobbying Act. Rule 1.19(b).

Any time an attorney is retained with respect to pending legislation or regulations, the attorney must analyze whether his or her actions will require registration and reporting under the Lobbying Act.

Political prohibitions. Lobbyists may not serve as officers for a candidate's political committee or political action committee if the candidate is seeking a statewide office or the office of Senator or Representative in the General Assembly. Moreover, lobbyists' fees may not be converted into a contribution to a candidate for public office or a political committee.

Indirect communication disclosure. The Act includes a requirement pertaining to "indirect communications." When a person makes an expenditure for the purpose of disseminating or initiating an indirect communication (which includes a mailing, telephone bank, print or electronic media advertisement, billboard, publication or education campaign), the communication is required to "clearly and conspicuously state the name of the person who made or financed the expenditure for the communication."

Audits. The Lobbying Act requires that 3% of all completed registrations and expense reports be audited by certified public accountants or public accounting firms retained by the Secretary of the Commonwealth. Registrations and Expense reports to be audited will be chosen on a random basis within 60 days following the close of each fourth quarter reporting period. The audit report and findings will be confidential except that the Department of State will make an audit report and findings available to the State Ethics Commission, if the Commission is investigating an alleged violation involving the audited registration or expense report.