



PHILADELPHIA BAR ASSOCIATION

Rudolph Garcia, Esq.
CHANCELLOR

Buchanan Ingersoll & Rooney PC | Two Liberty Place
50 S. 16th Street, Suite 3200 | Philadelphia, PA 19102-2555
Phone: 215-665-3843 | Fax: 215-665-8760 | E-mail: rudolph.garcia@bipc.com

June 14, 2011

VIA Email and Hand Delivery

Richard Glazer, Esq., Chair
Hon. Phyllis W. Beck
William H. Brown III, Esq.
Sanjuanita González, Esq.
Michael H. Reed, Esq.
Philadelphia Board of Ethics
1441 Sansom Street, 2nd Floor
Philadelphia, PA 19102

Re: Comments Regarding Proposed Regulation No. 9 (Lobbying)

Dear Chair Glazer and Members of the Board:

On behalf of the members of the Philadelphia Bar Association, I am pleased to submit these comments and suggestions to the Board of Ethics' draft Regulation No. 9 (Lobbying) (the "Draft Regulations") that interpret Philadelphia's lobbying ordinance, Chapter 20-1200 of the Philadelphia Code (Bill No. 100127, approved June 16, 2010) (the "Lobbying Ordinance" or the "Ordinance"). These comments and suggestions were prepared and are being submitted in connection with the Board's hearing on the Draft Regulations. The hearing is scheduled to be held on Wednesday, June 15, 2011.

I want to begin by thanking the Board and its staff for all of your efforts in preparing these draft regulations and preparing to implement the Lobbying Ordinance under significant time pressure and with a limited budget. The members of the Philadelphia Bar Association very much appreciate your ongoing efforts to implement this complicated ordinance.

Below is an outline of our comments followed by our comments, conclusions and recommendations. The majority of our comments are directed to issues that we believe may be addressed in the final regulations by the Board of Ethics. We then include a few general comments regarding needed revisions to the Lobbying Ordinance that we hope the Board of Ethics will recommend to City Council.

The following is an outline of our comments:

	Page
1. Attorneys engaged in the practice of law are not subject to the requirements of the Lobbying Ordinance because Rule 1.19 of the Pennsylvania Rules of Professional Conduct does not apply to ordinances enacted by the City of Philadelphia. The Draft Regulations and the frequently asked questions (“FAQ”) document should be amended to expressly make this clear.	3
2. The final regulations should expressly state that the exemption for participating in an “administrative adjudication” includes all aspects of matters that involve, or might lead to, a formal adjudication before a City board, commission or official or by a court.	9
3. Voluntary <i>pro bono publico</i> service under Rule 6.1 of the Pennsylvania Rules of Professional Conduct does not require registration under the Lobbying Ordinance.	11
4. Registrations should end at the end of a calendar year without the requirement for filing of a notice of termination in the subsequent year. By providing for a presumption of automatic renewal, the Draft Regulations create a significant trap for the unwary that will cause confusion and be burdensome to individuals who are not permanent lobbyists.	12
5. Technical and Organizational Issues and Questions	14
A. Section 9.16 I. (relating to routine, ministerial matters as not being lobbying) is misplaced and should be moved.	14
B. Clarification is needed as to what level of detail needs to be disclosed with respect to the subject matter being lobbied.	15
C. The examples of what is not an “Agency” in the definition of “Agency” should be expanded.	16
D. Addition of language to Section 9.2 B. on page 7 in the Draft Regulations.	17
E. Technical change in section 9.7 C. on page 9 of the Draft.	18

F. Questions regarding subsections B. and D. of Section 9.9 (Contents of a Lobbyist Registration Statement) on page ___ of the Draft Regulations. 18

G. Section 2.28 C. (relating to records) on page 15 of the Draft Regulations should be clarified to acknowledge that the Board does not require a registrant to keep two sets of books in order to avoid having all of its business records subject to inspection by the Board. 19

H. Clarification is needed regarding what is a statement of policy in the definition of “Administrative Action” on page 2 of the Draft Regulations. 19

6. The Lobbying Ordinance requires immediate and substantial amendment and the Ethics Board should recommend amendments to City Council. 20

The following are the comments of the Philadelphia Bar Association:

1. **Attorneys engaged in the practice of law are not subject to the requirements of the Lobbying Ordinance because Rule 1.19 of the Pennsylvania Rules of Professional Conduct does not apply to ordinances enacted by the City of Philadelphia. The Draft Regulations and the frequently asked questions (“FAQ”) document should be amended to expressly make this clear.**

A. **Introduction and summary of position.**

(1) The definition of “lobbyist” in the Lobbying Ordinance includes attorneys while engaged in the practice of law “provided however that attorneys engaged in lobbying are subject to the requirements and restrictions of [the Lobbying Ordinance] **only to the extent permissible under the Pennsylvania Rules of Professional Conduct.**” 20 Phila. Code § 20-1201(20) (definition of “lobbyist”) (emphasis added).

(2) The Supreme Court of Pennsylvania adopted Rule 1.19 of the Pennsylvania Rules of Professional Conduct, which deals directly with lawyers acting as lobbyists. The Rule states that a lawyer acting as a lobbyist is only subject to regulations or requirements defined in (i) a statute, (ii) a regulation passed by either house of the Legislature, or (iii) a regulation promulgated by the Executive Branch or agency of the Commonwealth of Pennsylvania.

(3) An ordinance adopted by Philadelphia City Council is not a “statute”, even if it has the force of law; and it is not a regulation passed by either house of the General Assembly. In addition, the City of Philadelphia is not part of the Executive Branch of Pennsylvania state government or an agency of the Commonwealth.

(4) Therefore, Rule 1.19 does not apply to the Lobbying Ordinance and, by the terms of the Lobbying Ordinance, attorneys are not “lobbyists” and thus are not subject to the requirements and restrictions of the Lobbying Ordinance. Activities of lawyers are governed by the Pennsylvania Rules of Professional Conduct.

(5) Under Article V, Section 10(c) of the Pennsylvania Constitution, only the Supreme Court may regulate the practice of law. If the Lobbying Ordinance and the Draft Regulations (which simply copy the Ordinance’s definition of “lobbyist”) are interpreted as applying to attorneys, the Lobbying Ordinance and the Draft Regulations would unconstitutionally intrude upon the Supreme Court’s exclusive constitutional authority to supervise the practice of law.

(6) We ask that the Draft Regulations be amended to state specifically that the Lobbying Ordinance does not apply to attorneys engaged in the practice of law. We also ask that the FAQ be withdrawn or edited to reflect this.

B. Analysis and Discussion.

(1) The Draft Regulations quote the words of the Lobbying Ordinance in defining the term “lobbyist” as:

(20) “Lobbyist.” Any individual, association, corporation, partnership, business trust or other entity that engages in lobbying on behalf of a principal for economic consideration, including an attorney at law while engaged in lobbying provided, however, that attorneys engaged in lobbying are subject to the requirements and restrictions of this Chapter only to the extent permissible under the Pennsylvania Rules of Professional Conduct.

Draft Regulations, § 9.1 Z. (emphasis added)

(2) Accordingly, an attorney engaged in lobbying, which is defined as “an effort to influence legislative action or administrative action

including: (1) Direct or indirect communication; (2) Incurring office expenses; and (3) Providing any gift, hospitality, transportation or lodging to a City official or employee for the purpose of advancing the interest of the lobbying or principal,” Draft Regulations, § 9.1 X., would be subject to the requirements imposed by the Lobbying Ordinance, but only to the extent that compliance is permitted by the Pennsylvania Rules of Professional Conduct.

(3) The provision of Pennsylvania Rules of Professional Conduct that relates to lawyers acting as lobbyists, however, does not apply to ordinances enacted by Pennsylvania local governments. The scope of the applicable rule, Rule 1.19, is specifically limited to a list of state level issuances, as follows:

Rule 1.19 Lawyers Acting as Lobbyists

(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.

(b) Any disclosure of information relating to representation of a client made by the lawyer-lobbyist in order to comply with such a statute, resolution, or regulation is a disclosure explicitly authorized to carry out the representation and does not violate RPC 1.6.

(4) The FAQ, which appears on the Board’s website, incorrectly concludes that the Lobbying Ordinance is binding on lawyers through Pa. RPC 1.19.

(a) Pursuant to Article V, Section 10 of the Pennsylvania Constitution, the Supreme Court of Pennsylvania has the exclusive constitutional authority to regulate the legal profession. See *Gmerek v. State Ethics Comm’n*, 569 Pa 579, 807 A.2d 812 (2002); *Gmerek v. State Ethics Comm’n*, 751 A.2d 1241 (Pa. Commw. Ct. 2000). *Gmerek* held that the Commonwealth’s then existing Lobbying Disclosure Act infringed upon the Supreme Court’s exclusive jurisdiction to regulate attorneys.

(b) Subsequently, on December 22, 2003, the Supreme Court promulgated Rule 1.19 of the Pennsylvania Rules of Professional Conduct. The Administrative Office of Pennsylvania Courts (“AOPC”) issued a press release at the time that made it very clear that the new Rule 1.19 applies only at the state level. The AOPC press release stated that the Rule:

requires lawyers acting as lobbyists to comply with registration and disclosure laws, regulations or rules enacted by the executive or legislative branches of state government; authorize disclosure of information related to client representation in order to comply with disclosure laws, regulations or rules; and reiterate that all such compliance actions by a lawyer-lobbyist must be consistent with the Rules of Professional Conduct.

Press Release, Administrative Office of Pennsylvania Courts, “Supreme Court of Pennsylvania Issues New Rule for Lawyer/Lobbyists” (Dec. 22, 2003).

(c) Rule 1.19 clearly does not include a municipal ordinance as a type of government action that may be applied to attorneys acting as lobbyists and the Rule similarly does not include a municipal entity as a governmental authority with the power to regulate lawyers acting as lobbyists.

(d) Furthermore, the General Assembly has made clear that a municipal ordinance is not a “statute.” In the Statutory Construction Act of 1972, 1 Pa.C.S. § 1501, *et. seq.* the General Assembly specifically defined the word “statute” to mean:

[a]n act of the General Assembly, whether under the authority of the Commonwealth or of the late Proprietaries of the Province of Pennsylvania.

1 Pa.C.S. § 1991.

(e) There is no indication that the Pennsylvania Supreme Court used the word “statute” in any manner inconsistent with the Statutory Construction Act. As quoted above, the Press Release issued by the AOPC after Rule 1.19 was adopted reflects the Court’s intention that the Rule should be

understood to encompass rules and regulations enacted by Pennsylvania's state government.

(f) In addition, the Commonwealth Court has concluded that the word "statute" as defined in 1 Pa. C.S. § 1991 should not be read to include ordinances. See *Fantastic Plastic, Inc. v. Flaherty*, 361 A.2d 489, 492 n.7 (Pa. Commw. Ct. 1976) ("Appellees have argued that the word 'statute' as used by the courts should be read to include ordinances. We reject this interpretation and adhere to the definition of statute found in the Statutory Construction Act of 1972, 1 Pa. C.S. § 1991, which defines statute to be an act of the General Assembly.").

(g) Finally, there is absolutely no authority suggesting that a Commonwealth agency includes a municipal entity. See *Blount v. Phila. Parking Auth.*, 965 A.2d 226, 231-232 (Pa. 2009) (entity is an agency of the Commonwealth where the entity acts throughout the state and under the state's control). Furthermore, as the court noted in *Fantastic Plastic*, the Statutory Construction Act of 1972 defines the word "legislature" to mean "[t]he General Assembly of the Commonwealth of Pennsylvania." 1 Pa.C.S. § 1991.

(h) Further, the Home Rule Act does not vest Philadelphia City Council with the authority to enact "statutes."

(i) The FAQ suggests that because ordinances have the effect of statutes pursuant to the Home Rule Act, ordinances are statutes.

(ii) In support of this proposition, the Board cites, *H.A. Steen Industries, Inc. v. Cavanaugh*, 430 Pa. 10, 241 A.2d 771 444 (1968).

(iii) However, *H.A. Steen* does not stand for this proposition. The fact that an ordinance has the effect of a statute is of no consequence. The fact that, pursuant to the First Class City Home Rule Act, the City was granted limited legislative autonomy does not mean that the City was granted the authority to enact statutes. 53 P.S. § 13101 et. seq. That power is vested in the General Assembly alone. This is made clear in the Pennsylvania Constitution, which provides that "[t]he legislative power of this Commonwealth shall be vested in a General Assembly, which shall consist of a Senate and a House of Representatives." Pa. Const., Art. II, § 1.

(5) Because the Lobbying Ordinance does not fall within the scope of Rule 1.19, a lawyer whose practice of law includes "lobbying" will not be protected if he or she discloses client information, as required under the Ordinance.

(a) Subsection (b) of Rule 1.19 states that “any disclosure of information relating to representation of a client made by the lawyer-lobbyist in order to comply with such a statute, resolution, or regulation is a disclosure explicitly authorized to carry out the representation and does not violate RPC 1.6.” If Rule 1.19 does not apply to lawyers, they have no protection if client information is disclosed.

(b) In order to comply with the Lobbying Ordinance, attorneys are required to disclose significant client information. For example, the Lobbying Ordinance requires that the lawyer-lobbyist disclose the name of his or her client as well as personal information about the client in the lobbyist’s registration statement. 20 Phila. Code § 20-1202(3). A lawyer who complies with this requirement would potentially violate Rule 1.6 of the Pennsylvania Rules of Professional Conduct, which bars a lawyer from revealing information relating to the representation of a client.

C. Conclusion.

(1) Without intervention from the Supreme Court of Pennsylvania, which is vested with the sole authority to regulate the practice of law, the Ethics Board must conclude that the Lobbying Ordinance does not apply to lawyers.

(2) Furthermore, the FAQ, as presently written, is inaccurate and must be withdrawn and amended to state the same.

D. Recommended Action:

(1) We urge the Board to add language to the Draft Regulations specifically stating that, until and unless the Supreme Court amends the Pennsylvania Rules of Professional Conduct, the Lobbying Ordinance does not apply to the practice of law.

(2) The definition of “lobbyist” in Section 9.1 Z. of the Draft Regulations should be amended to read: (Draft new language underlined).

Z. Lobbyist. Any individual, association, corporation, partnership, business trust or other entity that engages in lobbying on behalf of a principal for economic consideration, including an attorney at law while engaged in lobbying, provided, however, that attorneys engaged in lobbying are subject to the requirements and restrictions of Chapter 20-1200 only to the extent permissible under the

Pennsylvania Rules of Professional Conduct. Until and unless the Pennsylvania Supreme Court amends the Pennsylvania Rules of Professional Conduct to permit the application of Philadelphia Ordinances to attorneys engaged in lobbying, Chapter 20-1200 does not apply to the actions of attorneys engaged in lobbying.

(3) The FAQ should be withdrawn and revised to comply with the above proposed revision to the Proposed Regulations.

(4) If the Board of Ethics believes that the Lobbying Ordinance should apply to the practice of law, the Board should ask the Supreme Court to amend Rule 1.19 to specifically include the Lobbying Ordinance or, more generally, to apply to ordinances adopted by Pennsylvania units of local government.

2. **The final regulations should expressly state that the exemption for participating in an “administrative adjudication” includes all aspects of matters that involve, or might lead to, a formal adjudication before a City board, commission or official or by a court.**

A. Section 9.24 J., Draft Regulations, page 21, exempts the following persons and activities from registration and reporting:

J. Participating as a party or as an attorney or representative of a party, [sic] case or controversy in any administrative adjudication.

B. This was copied directly from § 20-1204(10) of the Lobbying Ordinance.

C. We strongly urge that the Ethics Commission clarify this exemption to include all phases of matters that involve, or might lead to, a formal adjudication before a City board, commission or official or by a court. The clarification also should cover contacts with City employees and officials, including attorneys in the Law Department, after an adjudication is rendered and before and during a possible appeal.

D. The basis for this request is the following:

(1) Employees of entities and their attorneys routinely contact City employees and officials, including attorneys in the Law Department, regarding the proper imposition of taxes (including inquiries and ruling requests

concerning how certain items are treated for tax purposes); the resolution of disputes or citations, such as tax disputes, real estate tax assessments, the imposition of real estate transfer tax, the imposition of other taxes and a wide variety of citations issued by the City; and voluntarily disclosures including amounts owed to the City or disclosures of other problems about which the City has no knowledge.

(2) In each of these instances, the contact with the City is made to resolve a pending matter that, if not settled, will lead to a formal administrative adjudication. This could include, for example, assisting a taxpayer in determining how to properly treat a matter for tax purposes or requesting a ruling as to how City ordinances apply to a specific resident or business. These contacts are dispute-specific and are not aimed at broad changes in policy. Each of these matters could lead to a formal administrative adjudication.

(3) From a public policy and efficient use of City resources perspective (and from the perspective of City Council's intent in enacting the Lobbying Ordinance), it would make no sense not to include settlement/resolution discussions in the definition, but rather to require an individual or an entity to go through a formal hearing in order to be exempt from the Lobbying Ordinance.

(4) An "administrative adjudication" involves the complete administrative process, and not just the time spent in person appearing before (for example) a City board or commission. The complete administrative process should be included in the "administrative adjudication" exemption.

E. Recommended Action:

(1) A. Section 9.24 J., Draft Regulations, page 21 should be amended to read [New Language underlined]:

9.24 Exemptions

The following persons and activities are exempt from registration and reporting:

* * *

J. Participating as a party or as an attorney at law or representative of a party, [sic] case or controversy in any administrative adjudication. An "administrative adjudication" includes the entire administrative process from (i) the issuance of a notice, citation or other document that could lead to a formal administrative adjudication or appeal to a City board.

commission or official or to court; until (ii) a final determination of such a matter after appeal. The term includes all actions, including responses, discussions, submissions, and settlement negotiations made by a party, an attorney at law or a representative of a party regarding any claim, controversy, assessment, voluntary tax disclosure, or letter ruling request or similar formal or informal request for advice from any City agency with respect to any case, controversy or action taken by an agency, or action might be taken by an agency, that could lead to any administrative adjudication, if not resolved.

3. **Voluntary *Pro Bono Publico* Service Under Rule 6.1 of the Pennsylvania Rules of Professional Conduct Does Not Require Registration Under the Lobbying Ordinance.**

A. The Pennsylvania Supreme Court consistently has urged lawyers to provide voluntary *pro bono publico* service, which service includes law reform activities.

B. Rule 6.1 of the Pennsylvania Rules of Professional Conduct (regarding voluntary *pro bono publico* service) provides that “[a] lawyer should render public interest legal service.” This specifically includes “service in activities for improving the law” *Id.*

C. The comment to Section 6.1 provides that “[l]aw firms should act reasonably to enable and encourage all lawyers in the firm to provide the pro bono legal services called for by this Rule.”

D. The Rules of Professional Conduct permit a lawyer to “serve as a director, officer or member of an organization involved in reform of the law . . . notwithstanding that the reform of the law may affect the interests of a client of the lawyer” RPC 6.4.

E. The Philadelphia Bar Association strongly supports Rule 6.1 and its call for attorneys to engage in *pro bono publico* service, including undertaking law reform activities. We are concerned that nothing in the lobbying regulations be seen to have a chilling effect on or inhibit or discourage attorneys from engaging in voluntary *pro bono publico* law reform activities not for compensation.

F. We strongly believe that nothing in the Lobbying Ordinance was intended to restrict such *pro bono publico* law reform activities. We want to make certain that, if the Pennsylvania Supreme Court takes action to permit the application of the Lobbying Ordinance to lawyers, that nothing in the final regulations will have the unintended consequence of inhibiting such *pro bono publico* law reform activities.

G. Recommended Action. We suggest that Part D of the Draft Regulations be amended by adding a new subsection "M." to Section 9.24 (Exemptions) to read: (Draft new language underlined.)

M. A lawyer rendering *pro bono publico* services in activities for improving the law as provided in Rule 6.1 of the Pennsylvania Rules of Professional Conduct, when such activity is not undertaken for compensation, is not engaging in lobbying as defined in the Act and is not required to register as a lobbyist.

4. **Registrations should end at the end of a calendar year without the requirement for filing of a notice of termination in the subsequent year. By providing for a presumption of automatic renewal, the Draft Regulations create a significant trap for the unwary that will cause confusion and be burdensome to individuals who are not permanent lobbyists.**

A. Section 9.4 on page 8 sets the normal registration period as each calendar year and provides that a registration statement is effective for the calendar year unless sooner terminated.

B. Section 9.4 states:

9.4. Registration Period.

A. Registration shall begin on July 1, 2011 for the period of time from July 1, 2011 through December 31, 2011.

B. On or after January 1, 2012, the registration period shall be for the period of time that begins on January 1 and ends on December 31 of each calendar year.

C. Unless terminated, a registration statement is effective from the date of filing through December 31 of that calendar year.

C. Just reading Section 9.4, one would think that, if an individual registers on (for example) February 1, 2012, that the registration expires on December 31 and that no further action is needed unless the individual is required to register again in 2013.

D. However, Section 9.6 (Renewal of Registration) requires renewals of registration and adds a presumption of renewal that is nowhere found in the Lobbying Ordinance. That section provides as follows:

9.6 Renewal of Registration.

A. Each registrant shall renew his, her, or its registration with the Board and pay the annual registration fee no later than January 31 of each calendar year.

B. It is presumed that a registrant is renewing for a calendar year unless a notice of termination is filed on or before January 31 of that calendar year.

E. We are very concerned that this presumption of renewal creates a significant trap for the unwary, especially those who are one-year or limited issue lobbyists. It complicates an already complicated process by requiring the filing of a notice of termination, even if the individual who registered in one year does no lobbying and intends to do no lobbying in the second year.

F. We see no justification for such an automatic renewal process based on the words of the Lobbying Ordinance and we believe that such a policy is not in the public interest.

G. The Lobbying Ordinance and the Draft Regulations are based on a calendar quarter and calendar year system. One is either registered or one is not registered. The Lobbying Ordinance permits the Board to charge fees only “[a]t the time of each registration.” The Lobbying Ordinance specifically states that “[r]egistration shall be annual. . . .” 20 Philadelphia Code § 20-1202(1). § 20-1202(2) and (3) list specific, detailed requirements for what must be included in each registration statement.

H. The automatic renewal process does not appear to be consistent with the registration system established by the Lobbying Ordinance, which contemplates an annual registration process.

I. The Lobbying Ordinance provides for registration “within ten days of acting in a capacity as a lobbyist, lobbying firm or principal. Registration shall be annual, shall be in such electronic format as is mandated by the Board, and shall begin July 1, 2011.” If one does not lobby in a specific calendar year, one is

not required to register and report. The automatic renewal will trap many unsuspecting individuals. It is not in the public interest and should be revised.

J. Recommended Action.

(1) The Board should revise the Draft Regulations to provide that registrations end as of December 31 unless a new registration statement is filed in accordance with the Lobbying Ordinance and the Draft Regulations.

(2) We would have no objection to the Board providing that an individual or entity could choose to have their registration automatically renewed from year to year. However, we question whether, in the case of an automatic renewal system, the Board has the authority to charge an additional fee, if a full registration statement is not required to be filed each year.

5. Technical and Organizational Issues and questions.

A. Section 9.16 I. (relating to routine, ministerial matters as not being lobbying) is misplaced and should be moved. Draft Regulations, pages 15-16.

(1) Subsection I of Section 9.16 of the Draft Regulations provides:

I. Communication with a City official or employee on a routine, ministerial matter is not lobbying. Examples of "routine, ministerial" matters include:

- (1) Scheduling a meeting;
- (2) Requesting the status of an administrative matter;
- (3) Requesting forms or procedures

(2) Section 9.16 is titled "Reporting of Total Lobbying Costs in a Report Period." The Section deals with what comprises "total costs of all lobbying expenses" that are required to be reported.

(3) Subsection I, however, deals generally with communications with a City official or employee on a "routine, ministerial matter." The scope of the subsection is much broader than what constitutes the total costs of lobbying.

(4) Recommended Action:

(a) We believe that the language in current Subsection I is an important clarification as to what is and what is not lobbying. It should be moved to a more prominent place in the Draft Regulations. As currently

positioned, it easily will be missed and could lead to confusion as to actions that are and are not lobbying.

(b) We recommend that this Subsection I be moved to Part D (Exemption from Registration and Reporting).

B. Clarification as to what level of detail needs to be disclosed with respect to the subject matter being lobbied.

(1) Section 9.15(B)(1) of the Draft Regulations, on page 12, provides for the disclosure of the following information “for each direct communication conducted during the reporting period”:

[t]he specific subject matter, issue, or administrative action or legislative action (including bill number) being lobbied and the position taken, such as supported, proposed, or amended.

(2) Section 9.15(C)(1) contains a similar provision with respect to indirect communication.

(3) We strongly urge the Ethics Board to explain, with concrete examples, what this language means. For example, in the “administrative action” context, consider the following:

(a) Example 1: Which of the following is adequate disclosure of the “specific subject matter” required?

(i) Seeking to obtain a Streets Department contract; or

(ii) Seeking to obtain a Streets Department contract to pave the 1400 and 1500 blocks of North Broad, Cecil B. Moore Avenue from Broad to 21st Street; N. 21st Street to Ridge Avenue and Ridge avenue from 21st Street to Broad Street; or

(iii) Something else entirely?

(b) Example 2: Which of the following is adequate disclosure of the “specific subject matter” required before any bill has been prepared for introduction in City Council:

(i) Seeking a zoning variance;

(ii) Seeking a zoning variance for 1234 Market Street;

(iii) Seeking a zoning variance for 1234 Market Street to change the zoning from X to Y; or

(iv) Something else entirely?

(4) Read literally, the phrase “for each direct communication conducted during the reporting period” requires a lobbyist to disclose each individual conversation the lobbyist has and the subject matter of that conversation. We find it difficult to believe that the Lobbying Ordinance requires that level of disclosure, that the Ethics Board intends to require that level of detail or that the public interest would be served by the inordinate amount of information such a requirement would generate (even if it were possible that anyone would or could actually comply with a requirement to report each individual conversation).

(5) We are very concerned with the ambiguity of the requirements and, especially, with the enormous volume of disclosure that could result from the current language in the Draft Regulations. We also are concerned that a disclosure requirement that is so detailed as to require the disclosure of proprietary information before a project becomes public may have an adverse impact on economic development of the City (particularly where the proprietary information reflects competitive business strategies embedded in a development project that eventually will be required to be publicly disclosed once the project is announced and becomes part of a formal request for action).

(6) We strongly urge the Ethics Board to revise the Draft Regulations to make clear that only a reasonable amount of information must be disclosed and to give specific examples of the types of information to be disclosed.

C. The examples of what is not an “Agency” in the definition of “Agency” should be expanded. Draft Regulations, page 3.

(1) As attorneys, we have a particular appreciation for the critical role of ethics education in effective ethics compliance systems. Therefore, we very much appreciate the Board including examples contained in the Draft Regulations in the text of the Draft Regulations. We urge the Board to keep, and expand the number of examples.

(2) Recommended Action:

(a) We recommend that additional examples of what agencies are not included in the definition of "Agency" be expanded to include other examples, including the Philadelphia Housing Authority, the Pennsylvania Convention Center Authority and Community Behavioral Health.

(b) We recommend that the definition of "Agency" in Section 9.1 D. be amended to read as follows [New language underlined]:

D. Agency. Any office, department, board, commission, or other entity that is part of the government of the City of Philadelphia, including City Council. Entities that are not part of the City government as organized under the Home Rule Charter are not "agencies" under Chapter 20-1200.

EXAMPLE: "Agency" does not include the School District, the Parking Authority, the Register of Wills, SEPTA, PAID, PIDC, the Philadelphia Housing Authority, the Pennsylvania Convention Center Authority, Community Behavioral Health, or any other non-profit corporation or other entity that has a contract with the City.

D. Addition of language to Section 9.2 B. in the Draft Regulations.
Draft Regulations, page 7.

(1) Subsection B. of Section 9.2 (relating to filing deadlines) provides:

B. A lobbying registration statement shall be filed by a lobbyist, lobbying firm or principal within ten days of acting in any capacity as a lobbyist, lobbying firm or principal.

(2) The same 10 day concept is included on page 8 with respect to the general rule, but is modified by the words "[u]nless exempt from registration and reporting under City Code §20-1204 and Subpart D of this Regulation."

(3) Recommended Action: In order to avoid confusion and keep the provisions uniform, we recommend that the clause "Unless exempt from

registration and reporting under City Code §20 1204 and Subpart D of this Regulation” be added at the beginning of Subsection B of Section 9.2 so that the subsection would read: (Draft new language underlined; deleted language in [brackets].)

Unless exempt from registration and reporting under City Code §20 1204 and Subpart D of this Regulation, [A] a lobbying registration statement shall be filed by a lobbyist, lobbying firm or principal within ten days of acting in any capacity as a lobbyist, lobbying firm or principal.

E. Technical change in Section 9.7 C. on page 9 of the Draft Regulations.

(1) Section 9.7 C. states:

C. A principal that is an association or organization shall include in its registration statement the number of dues-paying members of the association or organization in the most recently completed calendar year.

(2) Recommended Action: Because there are many organizations that do not have members, we recommend that the subsection be revised to read: (New language underlined.)

C. A principal that is an association or organization with members shall include in its registration statement the number of dues-paying members of the association or organization in the most recently completed calendar year.

F. Question regarding subsection B. and D. of Section 9.9 (Contents of a Lobbyist Registration Statement) of the Draft Regulations.

(1) Subsections B. and D. of Section 9.9 provide:

9.9 Contents of a Lobbyist Registration Statement.

* * *

B. A lobbyist who is an individual shall include a recent passport-sized (2 inch x 2

inch) photograph of the lobbyist at the time he or she files the registration statement.

* * *

D. The failure to submit a photograph constitutes a failure to register as required by Chapter 20-1200.

(2) We have the following two questions:

(a) Since registration is required by § 20-1202(1) to be in electronic form, why is an individual who must register as a lobbyist not able simply to upload a recent photograph or send such a photograph electronically via email? Not having that option in part defeats the purpose of the Lobbying Ordinance to have the efficiencies of an electronic system applied to implementation of the Lobbying Ordinance.

(b) Are there exemption procedures available for an individual to follow if his/her religious beliefs forbid him/her from having his/her picture taken?

G. Section 2.28 C. (relating to records) on page 15 of the Draft Regulations should be clarified to acknowledge that the Board does not require a registrant to keep two sets of books in order to avoid having all of its business records subject to inspection by the Board.

(1) Section 9.28 C. states:

C. A registrant may keep records of all lobbying activity separate from records of the registrant's non-lobbying activity. If the registrant's records combine both lobbying and non-lobbying activities, all of the records shall be retained and made available for inspection as requested by the Board.

(2) We do not understand on what basis the Board believes that it has the authority to require registrants to either (i) keep a separate set of books for lobbying expenses or (ii) subject all of its business records, whether related in any way to lobbying or not, to an unrestricted right of the Board to inspect records unrelated in any way to the registrant's lobbying activities.

(3) For example, suppose that Company C keeps one set of records covering all of its businesses in Philadelphia and in Delaware. Does the Board believe that it has the right to inspect aspects of Company C's records that

deal solely with its business in Delaware just because Company C does not go to the expense to keep a separate set of books for Philadelphia lobbying activities?

(4) We ask that this provision be clarified and that the Board acknowledge that it does not claim a right to inspect information unrelated to lobbying in Philadelphia.

H. Clarification is needed regarding what is a statement of policy in the definition of "Administrative Action" on page 2 of the Draft Regulations.

(1) Section 9.1 B.(1)(b) on page 2 states that the term "administrative action" includes "[d]evelopment or modification of a statement of policy."

(2) We understand that City Council copied this from the Commonwealth's lobbying statute without change.

(3) In the context of City government operations, what does this term mean? We request that the Board define the term to avoid a significant ambiguity with respect to interpretation of the Lobbying Ordinance.

6. **The Lobbying Ordinance requires immediate and substantial amendment and the Ethics Board should recommend amendments to City Council.**

A. The Philadelphia Bar Association is aware that the Ethics Board is bound by the words of the Lobbying Ordinance, as enacted by City Council. We understand that, in drafting the Draft Regulations, the Board had significant limits on its ability to make the rules less complex and more user friendly.

B. The more we look at the text of the Ordinance, the more we become concerned that portions of the Lobbying Ordinance are drafted so broadly that they will require very large numbers of individuals and entities, who have no idea that they could be "lobbying," to register, pay \$500 per year per person and comply with a set of very complex rules. Particularly smaller businesses and nonprofits will not understand the hyper-technical rules and be able to comply realistically with the extraordinarily sweeping provisions of this ordinance.

C. Moreover, implementation of the Lobbying Ordinance in Philadelphia may result in significant, unintended, negative impacts on individual business and nonprofit organizations and on the City and its government as a whole.

(1) Ultimately, the ambiguity and confusion over the scope and application of the ordinance may have more far-reaching negative consequences, as the ordinance may discourage ordinary business activities and new business activity to the detriment of the local economy and quality of life in Philadelphia.

(2) If a corporation or venture is choosing from two or more cities or regions in which to launch a new business, it may well pass over a city with a broad, ambiguous lobbying registration requirement, and related personnel and administrative expenses, in favor of a city or region without such burdens.

D. Please consider the following examples (which address only a portion of the problems that we see in the Lobbying Ordinance)

(1) One extreme example is the fact that the Lobbying Ordinance only exempts from the definition of "lobbyist" City officials who act in an official capacity. It does not exempt Federal, state or other local officials who "lobby" as the term is defined in the Lobbying Ordinance. This could lead to some unconstitutional, or at least absurd, results. Consider the following:

(a) The Governor, the leaders of the House and Senate and the Superintendent of the Philadelphia School District negotiate with the Mayor and City Council in order to have City Council provide additional funding to the schools. Apparently, none of them are exempt from the Lobbying Ordinance's provisions and each personally would be subject to a civil penalty of up to \$2,000 and daily penalties for failure to register or report plus a civil penalty not exceeding \$250 for each late day (with a maximum of an additional \$2,000).

(b) President Judge Dembe of the Court of Common Pleas lobbies City Council regarding court funding. She is a state official and not a City Official, as defined in the Lobbying Ordinance. Once she spends more than 20 hours in a calendar quarter on those budget activities, she has to register and report under the Lobbying Ordinance.

(c) Elected officials and employees of Montgomery County and Lower Merion Township negotiate with City officials and City Council members and staff to further regulate the City Avenue Special Services District. They expect that the result of their negotiations will be action by City Council and/or the Mayor and/or the Streets Department, etc. None of the local government officials are exempt from Philadelphia's Lobbying Ordinance. How much cooperative planning is there going to be if the elected officials of other municipal governments have to register and report in Philadelphia (to say nothing of each having to pay \$500 per year and their unit of local government having to register as a principal and pay \$500 per year)?

(2) An employee of a business or a nonprofit who files a complaint with the City and seeks to have the City respond to the complaint (have the complaint “determined”) is lobbying. If he or she spends a significant amount of time on a particular project -- from getting a crack in the sidewalk fixed to the resolution of a child abuse complaint -- that employee is a lobbyist. He or she will have to register as a lobbyist (and pay \$500 per year) and his or her employer will have to register as a principal and pay \$500 per year. This makes no sense.

(3) If a carpenter, plumber, contractor, architect, or employee of a developer stands in line at the Municipal Services Building to get permits for work his or her employer is undertaking, that individual is lobbying. (The definition of “administrative action” includes a determination with respect to “the use, development, or improvement of real property subject to City regulation”) How many of those individuals will understand that obtaining routine permits may require them to register and report as “lobbyists”?

(4) A number of Philadelphia nonprofit organizations have social workers who spend all of their time trying to arrange for services to be provided, for example, to individuals who are elderly or homeless. They seek to have a City agency disburse public money (*i.e.* contract to pay for services with other nonprofits) in order to provide necessary services to their clients. (The definition of “administrative action” includes “solicitation . . . of a grant . . . involving the disbursement of public monies”) What possible public good will result in requiring these social workers to register and report as “lobbyists”?

E. We are aware of significant complaints from the nonprofit sector (and particularly among smaller nonprofits) regarding burden that will be placed on the nonprofit sector by the \$500 annual registration fee that must be paid by the organization and well as by each “lobbyist.”

(1) When a small community group with, say, 4 employees, becomes involved in, for example, a land use issue, its employees could easily spend more than 20 hours in a calendar quarter and have to register as “lobbyists.”

(2) The annual registration fee of \$2,500 (\$500 for the nonprofit and \$500 for each of the 4 employees), to say nothing of the cost of administrative compliance, will place a real burden on smaller nonprofits. \$2,500 per year is a significant amount of money for small community organizations. Those funds will not be available to help the organization fulfill its charitable mission and the burden may stifle the organization’s ability to speak out on current community issues.

(3) We urge you to consider recommending that City Council adopt a sliding scale that takes into account the lack of resources of small community and public interest groups.

F. The definition of lobbying (as being administrative action and legislative action) has been expanded from an analogous definition in the Commonwealth's statute so that, for example, "administrative action" includes a wide range of activities that are currently part of routine communications and daily business activities.

(1) If the definition of the term is not narrowed or clarified, it likely will create a major administrative burden for the Ethics Board. You may find that the Board is overwhelmed by a very large number of reports of routine and minor activities that involve activities far outside the normal definition of the word "lobbying." You also may find that the amount of disclosure limits the usefulness of the disclosure as any useful information may be buried in a mass of data.

(2) Also, as drafted, the definition of "lobbying" has been so expanded from its traditional meaning that it will be very difficult for the average citizen, local businessperson or small to medium sized nonprofit to determine whether their routine, day-to-day activities are covered by the Lobbying Ordinance. This is the classic standard for determining whether a regulation, ordinance or statute is well-drafted. If the average person cannot determine whether the ordinance applies to his or her daily activities, it is not well drafted and should be changed.

G. There are numerous other examples of problems with the Lobbying Ordinance. We are aware that it is not easy to sort out routine and legitimate government communications from communications that may result in inappropriate backroom deals or self dealing. However, in order to have a functioning disclosure system, the Board and City Council must grapple with drawing these lines in a way that serves the public interest. And while the public has an interest in knowing who is paying large sums to influence policy, there is little reason for knowing who is paying people to do ordinary government business. Instead of sorting out these different kinds of contacts, the ordinance seeks to collect information indiscriminately. The result may be simply to increase bureaucracy and generate so much data that the problematic government contacts are buried in an immense collection of other unimportant governmental business communications.

H. There is no reason why complaints to City agencies on dirty restaurants, neglected children, delayed licenses, obtaining routine real estate permits and approvals for particular properties, complaints to the Streets Department or Water Department or requests for City services by taxpayers should have to be tracked and reported simply because someone is receiving

compensation when they make the contact. The rationale is particularly confusing since someone who contacts the City on his own personal behalf, and specifically asks for a special deal or favor, need not report since he or she is not paid.

I. The Philadelphia Bar Association urges the Ethics Board to recommend immediate amendment to the Lobbying Ordinance. We request that the Board urge City Council to rethink these rules in a way that reflects the underlying goals they are hoping to achieve. The Association is available to assist the Ethics Board in its work in whatever way the Board deems appropriate.

Thank you again for the opportunity to present these comments from the Philadelphia Bar Association.

Very truly yours,



Rudolph Garcia
Chancellor

cc: J. Shane Creamer Jr., Esq., Executive Director, Board of Ethics
Nedda Massar, Esq., Deputy Executive Director, Board of Ethics
Shelley R. Smith, Esq., City Solicitor
Richie Feder, Chief Deputy City Solicitor
Evan Meyer, General Counsel, Board of Ethics
Philadelphia Bar Association Task Force on Philadelphia's Lobbying
Ordinance