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Advisory Opinion No. 17A01: Registration, reporting, and identification obligations under the Lobbyist Registration Ordinance

INTRODUCTION

The Cook County Board of Ethics (“Board”) has recently observed an increase in the number of inquiries it receives regarding the Cook County Lobbyist Registration Ordinance (the “LRO”). *See* Cook County Code of Ordinances, Art. VII, Div. 3, §§ 2-621, *et seq.* In particular, staff to the Board has received several questions about whether the LRO requires those conducting indirect, or “grassroots,” lobbying activity to register as lobbyists. It has also received related questions about the Board’s interpretations of various exceptions to the registration requirements of the LRO. *See id.* at § 2-632.

In addition to providing guidance on these issues, the Board will provide guidance with respect to certain aspects of the LRO in which staff to the Board have observed non-compliance by certain County-registered lobbyists and which will be the subject of greater enforcement efforts if they continue to be observed in the coming year. The Board issues this advisory opinion to clarify and highlight these aspects of the LRO.

ISSUES

1. Must persons or entities who, for compensation and on behalf of another person, attempt to influence a Cook County official, appointee, or employee through the creation and/or implementation of an indirect or “grassroots” lobbying campaign register as lobbyists?
2. Does the registration exception for persons “requested in writing by a Commissioner or the President to discuss such County Matter before the Board, regardless of whether or not such Persons receive Compensation for so appearing” (*see* County Code, § 2-632(4)) apply to persons invited in writing to speak with Commissioners or the President outside the context of a meeting of the County Board or its committees?

3. Does the registration exception for persons lobbying “on behalf of a not-for-profit neighborhood, community or civic organization who receive no Compensation for Lobbying and who make no Expenditures to or for the benefit of a County Official or County Employee in connection with such Lobbying” (*see id.* at § 2-632(9)) apply to organizations such as a nonprofit healthcare entity?
4. Must Cook County-registered lobbyists wear their lobbying credentials when they speak publicly at meetings of the Cook County Board of Commissioners or its committees?
5. May Cook County-registered lobbyists fulfill their reporting obligations under the LRO by filing Lobbying Activity Reports that fail to list the specific date of each individual lobbying contact?

DISCUSSION

1. Must persons or entities who, for compensation and on behalf of another person, attempt to influence a Cook County official, appointee, or employee through the creation and/or implementation of an indirect or “grassroots” lobbying campaign register as lobbyists?

Yes. It is the Board’s opinion that the LRO’s definition of “lobbying” includes grassroots lobbying. Thus, those who execute grassroots lobbying campaigns of County officials, appointees or employees for compensation and on behalf of another person are required to register. In reaching this conclusion, the Board hereby reverses any previous opinions issued by the staff under its delegated authority to the contrary. *See* BoE R. Pro. 4.3, 9.6.

General Background

For purposes of this opinion, indirect or “grassroots” lobbying refers to a campaign by organizations or individual lobbyists intended to develop a point of view on a governmental issue among the general public or a particular constituency. The campaign’s purpose is to generate public support or opposition in the hope that the public (or members of the target constituency) will directly contact their respective legislators to voice their opinions. Grassroots lobbying ceases to be indirect at the point when a compensated lobbyist has direct contact with an official, appointee or government employee.

It is worth noting at the outset that efforts to require disclosure of grassroots lobbying efforts have long been upheld as constitutional. The United States Supreme Court first recognized the public interest in regulating what has come to be known as “grassroots” lobbying in 1954, when it upheld the Federal Regulation of Lobbying Act. *See United States v. Harriss*, 347 U.S. 612, 625 (1954) (observing that “full realization of the American ideal of government by elected representatives depends to no small extent on [Congress’s] ability to properly evaluate [the] pressures” to which it is regularly subjected). In *Harriss*, the Court noted that the law should be strictly construed to apply only to “lobbying in its commonly accepted sense – to direct

communication with members of Congress on pending or proposed federal legislation.” *Id.* Yet, interestingly, the Court concluded that “direct communication” included “such direct pressures, exerted by the lobbyists themselves or through their hirelings *or through an artificially stimulated letter campaign*,” the latter being a paid campaign to induce others – who are not being compensated – to contact members of Congress about specific legislation. *Id.* (emphasis added).

Subsequently, courts have often noted that the state has a compelling interest in the disclosure of indirect lobbying activity, perhaps even more so than for direct lobbying activity. *See Fla. League of Prof’l Lobbyists, Inc. v. Meggs*, 87 F.3d 457, 461 (11th Cir. 1996) (“[T]he government interest in providing the means to evaluate these pressures may in some ways be stronger when the pressures are indirect, because then they are harder to identify without the aid of disclosure requirements.”); *see also Minn. State Ethical Practices Bd. v. Nat’l Rifle Ass’n of Am.*, 761 F.2d 509, 511-13 (8th Cir. 1985) (upholding a state’s “compelling” interest in applying its reporting requirements to communications between an association and its members urging them to contact their state legislators in support of specific legislation).

State and local jurisdictions have taken a variety of approaches with respect to grassroots lobbying. Some, like Illinois, explicitly exclude grassroots lobbying from the ambit of their regulatory schemes. 2 IL Admin. Code 560.210(m) (exempting “[i]ndividuals or entities employed by a lobbying entity or other participants in a grass roots lobbying event whose lobbying activity is limited to participation at a grass roots lobbying event, and who report expenditures to the lobbying entity as prescribed by Section 560.325....”). Other jurisdictions, like Washington, explicitly regulate grassroots lobbying campaigns. *See RCW 42.17A.640* (Wash.) (requiring those who spend more than \$500 in a one-month period or more than \$1,000 in a three-month period “in presenting a program to the public, a substantial portion of which is intended, designed, or calculated primarily to influence legislation” to register and report “as a sponsor of a grass roots lobbying campaign.”).

Still other jurisdictions have laws that, like the LRO, are not explicit with respect to whether grassroots lobbying activity is covered. The Board conducted research into various jurisdictions to attempt to understand how such laws are interpreted, but found that guidance regarding the applicability of these laws to grassroots conduct was relatively limited. One notable exception is New York State, where the statutory definition of lobbying as an “attempt to influence” government action has consistently been interpreted to include grassroots lobbying. *See NY Joint Comm’n on Pub. Ethics Adv. Op. No. 16-01*, at 2-3, 5 (available online at <http://www.jcope.ny.gov/advice/jcope/2016/NYS%20Joint%20Commission%20on%20Public%20Ethics%20Advisory%20Opinion%2016-01.pdf> (last accessed Nov. 30, 2016)). By way of example, the New York Commission on Public Ethics’ most recent opinion on this issue held that:

A grassroots communication constitutes lobbying if it:

1. References, suggests, or otherwise implicates an activity covered by Lobbying Act Section 1-c(c) [which

lists various governmental actions, the attempt to influence which triggers registration requirements].

2. Takes a clear position on the issue in question; and
3. Is an attempt to influence a public official through a call to action, *i.e.*, solicits or exhorts the public, or a segment of the public, to contact (a) public official(s);

A consultant's activity on a grassroots campaign can be considered reportable lobbying if the consultant controlled the delivery and had input into the content of the message. Control of the delivery of a grassroots communication involves participation in the actual delivery of the message. Input on the content of a grassroots message means participation in the formation of the message.

Id. at 2.

Analysis of the LRO

Section 2-622 of the LRO defines lobbying as “for Compensation and on behalf of another Person, attempt[ing] to influence a County Official, County Appointee or County Employee with respect to any County matter[.]” County Code, § 2-622. A “lobbyist,” in turn, is “any Person who engages in Lobbying[.]” *Id.*

In the Board's view, the definition of lobbying is broad enough to encompass indirect attempts to influence an official, appointee, or employee. There is little question that those who commission a paid campaign to motivate some constituency to contact County officials for or against a particular piece of legislation are “attempt[ing] to influence” those officials. *Id.* Indeed, there would be little reason to conduct a grassroots lobbying campaign if it was not intended to influence or was not, in fact, influential.

Further, the LRO exists to promote the public policy in favor of disclosure. The Board's interpretation of the scope of the LRO with respect to grassroots lobbying promotes the public policy in favor of giving the public – and even the officials being lobbied – greater information about the source of a grassroots lobbying effort. *See, e.g., Wilbon v. D.F. Bast Co.*, 48 Ill. App. 3d (1st) 98, 102 (1977) (noting that “[p]ublic policy retains a place of great importance in the process of statutory interpretation, and the tendency of the courts has always been to favor an interpretation which is consistent with public policy.”) (internal citation omitted). The Board's interpretation is consistent with jurisdictions such as New York State that have also interpreted “attempt to influence” language to encompass grassroots lobbying. *See NY Joint Comm'n on Pub. Ethics Adv. Op. No. 16-01*, at 5.

Accordingly, it is the Board's determination that a grassroots communication constitutes lobbying for purposes of triggering the LRO's registration requirements if it is generated “for Compensation and on behalf of another Person,” takes a clear position with respect to any

County matter, and solicits or exhorts some segment of the public to contact a County Official, County Appointee, or County Employee (as those terms are defined by the LRO).¹ Registration under the LRO requires a grassroots lobbyist to disclose the name, business address, permanent address and nature of the business of the person on whose behalf s/he is lobbying; “[w]hether the relationship is expected to involve Compensation or Expenditures or both”; and a “brief description of the County Matter in reference to which such service is to be rendered.” County Code, § 2-633(a)(3). Registration also subjects grassroots lobbyists to various additional regulations under the Cook County Ethics Ordinance. *See, e.g., id.* at §§ 2-574 (gift ban extends to registered County lobbyists), 2-585 (campaign contribution limits placed on registered County lobbyists).

Notwithstanding the requirement in Section 2-631 of the LRO that lobbyists register within 30 days of engaging in lobbying activity, and in light of previous staff guidance to the contrary, any lobbyist who is required under this opinion to register due to grassroots lobbying activity conducted since July 1, 2016 is hereby given a grace period to register until January 20, 2017.

2. Does the registration exception for persons “requested in writing by a Commissioner or the President to discuss such County Matter before the Board, regardless of whether or not such Persons receive Compensation for so appearing” (*see* Section 2-632(4)) apply to persons invited in writing to speak with Commissioners or the President outside the context of a meeting of the County Board or its committees?

No. Section 2-632(4) provides an exception to the requirement to register as a lobbyist for:

Persons who, by reason of their special skills or knowledge of any County Matter pending before the Board, are requested in writing by a Commissioner or the President to discuss such County Matter before the Board, regardless of whether or not such Persons receive Compensation for so appearing. This exemption shall only be applicable to the extent that such Persons appear in the foregoing capacity. To the extent that such Persons also engage in activities with respect to which this division otherwise requires them to register, they shall so register with respect to those activities.

County Code, § 2-632(4). Section 2-632(4) contains explicit limiting language, clearly indicating an intent to create a narrow exception for persons invited by the County Board (or one

¹ This opinion reverses guidance previously issued by the staff with respect to whether grassroots lobbyists must register under the LRO. In requiring that grassroots lobbyists register pursuant to Section 2-633(a) of the LRO, the Board recognizes that once a lobbyist has registered, the LRO, as currently enacted, requires only semi-annual disclosure of direct lobbying contacts and expenditures. *See* County Code, § 2-634. In the case of a registered grassroots lobbyist who engages in no direct contact or expenditures, these semi-annual disclosures may not be as useful as the disclosures filed by more traditional, registered County lobbyists. The limitations of the disclosure regime, however, does not mean that the County Board of Commissioners intended to exclude grassroots lobbyists when they used the broad phrase “attempt to influence” to define lobbying in the LRO. To the extent that the County Board of Commissioners recognizes the potential mismatch between the lobbying activities of grassroots lobbyists and the types of disclosures required of registered County lobbyists in Section 2-634 of the LRO, this Board is prepared to assist by recommending an amendment to the LRO to close this regulatory gap.

of its committees or subcommittees) to provide information based on an individual's specialized knowledge. The exception contemplates a formal request for, and provision of, expert testimony or advice for purposes of educating the County Board on a specific matter. On its face, the exception pertains to requests to "discuss such County matter *before the Board.*" *Id.* (emphasis added). Allowing this narrow exception to extend to any meetings or communications outside of public meetings of the County Board or its committees or subcommittees would undermine public confidence in the registration system established by the LRO.

3. Does the registration exception for persons lobbying "on behalf of a not-for-profit neighborhood, community or civic organization who receive no Compensation for Lobbying and who make no Expenditures to or for the benefit of a County Official or County Employee in connection with such Lobbying" (*see* Section 2-632(9)) apply to organizations such as a nonprofit healthcare entity?

Maybe. Section 2-632(9) reads, in full:

Persons, including employees, officers, or directors Lobbying on behalf of a not-for-profit neighborhood, community or civic organization who receive no Compensation for Lobbying and who make no Expenditures to or for the benefit of a County Official or County Employee in connection with such Lobbying. This exemption shall only be applicable to the extent that such Persons appear in the foregoing capacity. To the extent that such Persons also engage in activities with respect to which this division otherwise requires them to register, they shall so register with respect to those activities.

County Code, § 2-632(9). The LRO does not define the phrase "not-for-profit neighborhood, community or civic organization." However, as with the exception in Section 2-632(4), the explicit limiting language indicates an intent to create a narrow exception. The words "neighborhood," "community," and "civic" all indicate a general intent to include local charitable organizations. *See, e.g., "civic."* Merriam-Webster Online Dictionary, 2016. <http://www.merriam-webster.com> (1 Dec. 2016) (defining "civic" as "of or relating to a citizen, a city, citizenship, or community affairs").

It is the opinion of the Board that, for purposes of Section 2-632(9), "not-for-profit neighborhood, community or civic organization" means a nonprofit charitable organization that is tax-exempt under Section 501(c)(3) of the Internal Revenue Code, and that conducts the significant majority of its operations within Cook County. The Board appreciates that this is not necessarily a bright line rule as a "significant majority" is not a fixed percentage, but it clearly places national 501(c)(3) organizations outside of this definition. Similarly, organizations of local or national scope that are tax-exempt under other provisions of Section 501(c) of the Internal Revenue Code (such as trade associations, labor unions, etc.) would not qualify for the exemption from registration under the LRO.

Thus, if a Section 501(c)(3)-exempt healthcare organization conducts the significant majority of its activities within Cook County, persons lobbying on its behalf "who receive no Compensation

for Lobbying and who make no Expenditures to or for the benefit of a County Official or County Employee in connection with such Lobbying” are exempt to the extent permitted by Section 2-632(9).

4. Must Cook County-registered lobbyists wear their lobbying credentials when they speak publicly at meetings of the Cook County Board of Commissioners or its committees?

Yes. Section 2-642 provides that “[a]ll registered Lobbyists shall display Lobbyist registration identification while engaging in all Lobbyist activities on County premises.” County Code, § 2-642. “Lobbying,” in turn, “constitutes an attempt to influence a County Official, County Appointee, or County Employee with respect to any County matter.” *See id.* at § 2-622. So long as a registered lobbyist who speaks at a meeting of the County Board is doing so in an attempt to influence action on a County matter (as is virtually always the case), the lobbyist is required to display his or her registration identification at the meeting. If the lobbyist attends a hearing but does not speak at the meeting, either publicly or to any commissioner individually, then there has been no violation.

The larger concern, however, is that, in the Board’s assessment, there has been broad disregard of the identification requirement of Section 2-642 beyond the narrow context of providing public comment. Rarely has the staff to the Board seen lobbyists wearing their credentials while conducting lobbying activity in and around the County Board Room. This is a plain violation of Section 2-642. The Board encourages all lobbyists to wear their ID cards whenever conducting business on County property, including in the County Board Room, out of an abundance of caution.

In addition, all lobbyists are to be reminded of the prohibition on “communicat[ing] with a member of the Cook County Board of Commissioners for purposes of discussing a County Matter in the Cook County Board Room . . . while said member is present on the floor of the Cook County Board Room and during such time as an active session of the Cook County Board of Commissioners, or any committee thereof, is convened and in progress.” County Code, § 2-636(e).

The Board intends to increase enforcement efforts of these provisions in 2017.

5. May Cook County-registered lobbyists fulfill their reporting obligations under the LRO by filing Lobbying Activity Reports that fail to list the specific date of each individual lobbying contact?

No. Section 2-634(a)(2) of the LRO provides:

[The] Lobbying Activity Report shall include all Lobbying contacts made with County Officials, County Appointees or County Employees. ***For each such contact***, the report ***shall list the date of the contact***, the County Official, County Appointees or County Employee with whom the Lobbying contact was made, the entity on whose behalf the Lobbying contact was made, the location of the

Lobbying contact, the subject matter of the Lobbying contact, including any County contact, involved in the contact.

(emphasis added). Thus, Section 2-634(a)(2) requires each individual lobbying contact to be reported, noting the date of the contact and other relevant information.

Consequently, lobbyists who report separate instances of lobbying (separate meetings on the same day, or contacts occurring on multiple dates) in a single entry (such as “advocacy for [Bill X] at various times throughout the reporting period”) are not compliant with the LRO. Going forward, lobbyists who fail to track and itemize each instance of lobbying in the Cook County Clerk’s Lobbyist Portal shall be deemed to be in violation of the LRO and subject to the penalties set forth in Section 2-637.

Sincerely,

THE COOK COUNTY BOARD OF ETHICS



Peggy Daley,
Chairperson