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When ethics reform legislation was being acted on during the 2011 legislative session, language was included that focused on concerns about the source of funding of entities engaging in very public legislative advocacy, but without any real public disclosure as to the individuals or organizations backing and funding these groups. By all accounts, these concerns were the origin and focus of the "source of funding language" included in Chapter 399, Laws of 2011.

At that time, The Business Council raised concerns about the additional and unnecessary compliance burden this language would impose on trade associations and similar organizations. Many of these entities, including The Business Council, have long histories of involvement in advocacy efforts, and provide public information as to their membership and financial backing. Moreover, we raised concerns that – as potentially applied to trade associations and other membership groups – the statutory "source of funding" disclosure requirement would do little more than require these organizations to reveal their dues structure, but would result in little if any public benefit.

Unfortunately, JCOPE's proposed rule exacerbates the impact of this statutory language, and does so in a way that goes beyond the clear grant of legislative authority granted in Chapter 399.

In part, Chapter 399 requires that any lobbyists' client that is required to file a semi-annual report under the Lobbying Act, spends more than $50,000 in reportable lobbying expenses during a twelve month period, and whose lobbying expenses exceed three percent of their total expenditures, "report to the commission the names of each source of funding over five thousand dollars from a single source that were used to fund the *lobbying activities reported* and the amounts received from each identified source of funding." [Emphasis added.]

In sharp contrast, the JCOPE proposed rule would require the disclosure of the source and amount of "any payment [of more than $5,000] to, or the benefit of, the Client Filer [e.g., trade association] and which is intended to fund, in whole or in part, the Client Filer's *activities or operations*." [Emphasis added]

Contrary to the clear provision of statute – that clients report sources of funding over $5,000 spent on *reportable lobbying expenses.* The proposed JCOPE rule would require the disclosure of the source, and total contributions or payments, of more than $5,000 regardless of how the funds are used.

This is clearly inconsistent with the statute that requires disclosure of contributions of more than $5,000 from a single source that is used "to fund the lobbying activities reported" by the client/lobbyist. The term "lobbying" or "lobbying activities" is specifically defined in pre-existing statute – Legislative Law Article 1-A, § 1-c (c) – as applying to attempts to influence action on legislation, executive orders, regulations, ratemaking, governmental procurement and tribal compacts. The Legislative Law further requires that clients report their lobbying expenses, including compensation paid or owed to each of it lobbyist, and any other expenses paid or incurred by such client for the purpose of lobbying. As such, the concept of "lobbying expenses," for purposes of the Chapter 399 source of funding reporting mandate, is clearly and specifically defined.

Ironically, JCOPE's draft rule – in (c) in Part 938.1 - correctly describes this clear statutory mandate. In its section entitled "Intent and Purpose," draft Part 938 recognizes that the source of funding disclosure, by statute, only applies to "each source of funding over $5,000 for . . . lobbying."

Unfortunately, draft Part 938.1 goes on to assert that in issuing regulations, JCOPE will "clarify the source of funding reporting requirements," and in doing so, ". . . the Commission has sought the broadest determination possible of what must be disclosed pursuant to statute and as allowed by law."

While the regulated community appreciates the use of regulations to "clarify" statutory compliance obligations, proposals must reflect the fundamental principal of administrative law that regulations be consistent with underlying statue. Agencies may not expand their grant of legislative authority through rulemaking (Freitas v. Geddes Savings and Loan), and may not create a rule which is inconsistent with a statute (Rotunno v. City of Rochester). The draft Part 938 rule fails on both counts with regard to its suggested implementation of the source of funding requirement.

In its proposed rule, JCOPE purports to "clarify" a pre-existing provision of state law that needed no clarification, namely the detailed statutory definition of what constitutes "lobbying" or "lobbying expense."

Our specific concerns focus on three provisions of the proposed rule:

- Section 938.2 (c) defines "contribution" as "any payment to, or for the benefit of, the Client Flier and which is intended to fund, in whole or part, the Client Filer's activities or operations."

- Section 938.3(a) requires that Client Filers are required to disclose "contributions," in accordance with Section 938, beginning with semi-annual reports due on 1.1.13 and thereafter.

- Section 938.3 (b), (c) and (d) each impose disclosure requirements on Client Filers of any single source of "contributions" exceeding $5,000 over a twelve month period.

We oppose JCOPE's proposed regulation for several reasons.

First and foremost, it simply inconsistent with statute, and as such exceeds JCOPE's granted authority to compel financial disclosures.

Second, in many instances, such as the case of trade associations, the JCOPE proposal would have the perverse outcome of requiring disclosure of an aggregate amount of contributions that are several times larger than that of actual reportable lobby expenses. The Business Council generates the bulk of its revenues through general membership dues payments, only a portion of which is used for (and reported as) lobbying expenses – about 20% of dues payments, in our case. In addition, The Business Council and other organizations generate revenues from a range of activities wholly unrelated to lobbying activities, including sale of tangible goods and services. Under the draft rule, the entirely of all these funding sources are swept into its reporting mandate for sources of *lobbying* funds.

We note that the regulatory impact statement published in the September 12, 2012 *State Register* states that under the draft rule's definition of "contribution," "[a] payment in exchange for goods or services rendered or delivered directly to the individual or entity making the payment is not a contribution under these regulations." The EIS hints at a regulatory exemption for these types of commercial transactions. While such an exemption would at least partially address our concerns, we fail to see such an outcome would flow from the proposed regulation. It is unclear to us whether JCOPE believes the definition of "contribution" somehow excludes these types of mercantile transactions, or whether explicit language exempting such transactions was inadvertently left out of the express terms. Our recommendation is that JCOPE's final rule includes a clear exemption for these types of transactions.

Third, JCOPE has missed an opportunity to address real ambiguity in Chapter 399 regarding how trade associations and similar organizations are to comply with the "source of funding" requirement, and how they are to determine what constitutes a source of funds used to "fund lobbying activities," in instances where a Client Filer receives payments for general purposes, with no portion of such funds designated specifically for lobbying.

The Business Council's experience is likely typical of many trade associations, whose income is largely derived from of dues payments made by member businesses. Under the JCOPE proposed rule, every member that paid us more than $5,000 in a 12 month period, whether in dues, to attend a conference or meetings, or for any other "activity or operation", would be disclosable, regardless of whether such funds could be used to finance lobby activities. Not only is this outcome inconsistent with the underlying statute, we see no additional public benefit coming from JCOPE's proposed expanded reporting mandate.

There is a far more appropriate alternative. In response to JCOPE's earlier request for input on implementation of its new source of funding disclosure statute, The Business Council previously recommended a logical, workable approach for trade associations and other entities receiving general purpose dues payments. Specifically, we recommended, and we continue to recommend, that the final rule require a Client Filer to determine the ratio of its reportable lobby expenses to its total expenditures, and apply that ratio to its revenues on a source-specific basis. Source of funds reporting would be defined by, and limited to, those payers whose pro-rated payments exceeded $5,000. Alternatively, a Client Filer can apply its calculated

tax deductibility factor, calculated under section 162 of the Internal Revenue Code, to source-specific payments. Under IRC 162, the portion of such dues payments attributed to lobbying activities is not deductible under federal tax law. Many trade associations are already calculating this figure and reporting it to their members. Both approaches present valid, reasonable methods for determining what share of general dues payments are related to lobbying, and therefore should be reported under PIRA.

While we would support a broad, straightforward exemption for trade associations and similar organizations that have a publically available membership list, it is unclear whether the statute supports this type of broad exemption. Without such an exemption, we strongly recommend that JCOPE adopt a final rule that focuses this new source of funding reporting and disclosure mandate on contributions that actually exceed the specific statutory threshold.

In closing, The Business Council believes it is important that regulatory agencies adopt rules that are both consistent with statutory intent, and that provide the regulated community with compliance obligations that are straightforward and clear, and that impose only those compliance obligations necessary to achieve statutory intent.

Our recommendations today are intended to address both these regulatory objectives.

Based on our discussions, we believe that a number of trade associations in New York State share the concerns and recommendations discussed above.

Please feel free to contact me if I can provide you with any additional information regarding this issue.

Thanks you.

Sincerely,