RECEIVED

2009 FEB 24 AM 10: 02

INDEPENDENT REGULATORY
REVIEW COMMISSION

2665

Via Email and First Class Mail

February 23, 2009

Mr. Arthur Coccodrilli, Chairman
Pennsylvania Independent Regulatory Review Commission
333 Market Street, 14th Floor
Harrisburg, PA 17101

Re: Comments pertaining to the Revised Final-Form Lobbying Disclosure Regulations (Regulation #16-40, IRRC #2665) (Department of State)

Dear Chairman Coccodrilli:

On behalf of the Pennsylvania Association for Government Relations ("PAGR"), I am submitting the following comments in response to the revised Final-Form Lobbying Disclosure Regulations ("Revised Regulations") re-submitted by the Lobbying Disclosure Regulations Committee ("Committee") to the Independent Regulatory Review Commission ("Commission") on February 9, 2009.

As you are well aware, the Commission issued its Disapproval Order on November 6, 2008, concluding that the originally-submitted Final-Form Lobbying Disclosure Regulations ("Original Regulations") "exceed[ed] the statutory authority of the Lobbying Disclosure Act (Act)[,] 65 Pa. C.S. §§ 13A01-13A11" and that "the final-form regulation would require registration and reporting of activities that do not require registration and reporting under the Act." In particular, the Commission highlighted language in Paragraph (i) of the definition of "effort to influence legislative action" in Section 51.1 as well as language in the registration provisions for lobbyists, lobbying firms and principals in Sections 53.4(a)(1), 53.3(a)(1) and 53.2(a)(1), respectively, to show where the Original Regulations were inconsistent with the language of the Act.

In an effort to remedy the issues raised by the Commission's Disapproval Order, the Committee asked the regulated community, which included PAGR, to submit amendatory language that was to be considered by the Committee when revising the Original Regulations. In accordance with the Committee's request, PAGR submitted such amendatory language to the Committee via a letter dated November 21, 2008, which is attached to this letter as **Exhibit A** and is incorporated herein by reference.

P.O. Box 116 • Harrisburg, Pennsylvania 17108 • Phone (717) 540-4391 • Fax (717) 657-9708 • www.pagr.org

At its November 24, 2008 meeting, the Committee did not adopt any of the changes recommended by PAGR and instead, amended Paragraph (i) of the definition of "effort to influence legislative action or administrative action" ("Paragraph (i)") as follows:

> *Effort to influence legislative action or administrative action* – Any attempt to initiate, support, promote, modify, oppose, delay or advance a legislative action or administrative action on behalf of a principal for economic consideration.
>
> (i) The term includes ENGAGING A LOBBYIST.
>
> ***
>
> *Engaging a lobbyist* – Contracting IN ANY FORM WITH a lobbyist or lobbying firm for lobbying on behalf of a principal for economic consideration.

(Edits omitted.)

The Committee also amended Sections 53.2(a)(1), 53.3(a)(1), 53.4(a)(1) as follows:

> **53.2 Principal Registration.**
>
> (a) Unless exempt under section 13A06 of the act (relating to exemption from registration and reporting), a principal shall register with the Department within 10 days of THE EARLIER OF THE FOLLOWING:
>
> (1) CONTRACTING IN ANY FORM WITH AN INDIVIDUAL OR ENTITY FOR LOBBYING; OR
>
> (2) ENGAGING IN LOBBYING.
>
> **53.3 Lobbying firm registration.**
>
> (a) Unless exempt under section 13A06 of the act (relating to exemption from registration and reporting), a lobbying firm shall register with the Department within 10 days of THE EARLIER OF THE FOLLOWING:
>
> (1) CONTRACTING IN ANY FORM TO ENGAGE IN LOBBYING; OR
>
> (2) ENGAGING IN LOBBYING.

53.4 Lobbyist registration.

(a) Unless exempt under section 13A06 of the act (relating to exemption from registration and reporting), a lobbyist shall register with the Department within 10 days of THE EARLIER OF THE FOLLOWING:

(1) CONTRACTING IN ANY FORM TO ENGAGE IN LOBBYING; OR

(2) Engaging in lobbying.

(Edits omitted.)

In its "Response to IRRC Disapproval Order" ("Response"), the Committee justifies the above revisions by relying on Section 1304-A of the Act which states that "a lobbyist, lobbying firm, or a principal must register with the department within ten days of *acting in any capacity* as a lobbyist, lobbying firm or principal." (Emphasis added.) The Committee contends that an individual or entity acts "in any capacity" as a lobbyist, lobbying firm or principal when that individual or entity contracts for lobbying and that any contrary interpretation "would lead to an unintended result by excluding from registration and reporting payments provided to a lobbying firm or lobbyist prior to a communication or provision of gifts, transportation, lodging or hospitality." Response p. 2.

PAGR submits that the Committee's interpretation is inconsistent with the plain language of the Act as well as other provisions of the Revised Regulations. Although the Act does not define the phrase to "act in any capacity" as a lobbyist, lobbying firm or principal, the terms "lobbyist," "lobbying firm" and "principal" are defined by the Act and that is where PAGR's analysis begins. The term "lobbyist" is defined by Section 1303-A of the Act to mean "any individual, association, corporation, partnership, business trust or other entity that *engages in lobbying* on behalf of a principal for economic consideration" and includes "an attorney at law while engaged in lobbying." (Emphasis added.) The term "lobbying firm" is defined by Section 1303-A of the Act to mean "an entity that *engages in lobbying* for economic consideration on behalf of a principal other than an entity itself." (Emphasis added.) The term "principal" is defined by Section 1303-A of the Act to mean "an individual, association, corporation, partnership, business trust or other entity: (1) on whose behalf a lobbying firm or lobbyist *engages in lobbying*; or (2) that *engages in lobbying* on the principal's behalf." (Emphasis added.)

Because all three of these terms contain the phrase "engages in lobbying" our analysis must then turn to the Act's definition of "lobbying" to determine what it means to "act in any capacity" as a lobbyist, lobbying firm or principal. "Lobbying" is defined by Section 1303-A of the Act as "an *effort* to influence legislative action or administrative action in this Commonwealth" and includes office expenses made toward "direct or indirect communication," and the provision of "any gift, hospitality, transportation or lodging to a State official or employee for the purpose of advancing the interest of the lobbyist or principal." Notice how the term "effort" is found within the definition of "lobbying"; this same term is also found in the Act's definitions for "direct and indirect communication." Webster's Dictionary defines "effort" to mean "a serious attempt:

try." WEBSTER'S DICTIONARY 368 (10th ed. 1994). When the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. Section 1921(b) of the Statutory Construction Act, 1 Pa. C.S. §1921(b); *Commonwealth v. Packer*, 568 Pa. 481, 798 A.2d 192 (2002). After examining these definitions, it is clear that lobbyists and lobbying firms are not acting in their capacities as lobbyists or lobbying firms by simply entering into a contract with a principal; some subsequent action or "effort" must be undertaken in order for that lobbyist or lobbying firm to be subject to the Act's registration and reporting requirements and unless and until such an "effort" is made, that lobbyist or lobbying firm need not register and report such activity. In its interpretation, the Committee has disregarded the plain language of the Act under the pretext of pursuing its spirit by "reading into" the regulation the requirement that lobbyists and lobbying firms must register and report after entering into a contract with a principal.

Furthermore, the Committee's interpretation of "act in any capacity" is inconsistent with Paragraph (ii) of the definition of "effort to influence legislative action or administrative action" in Section 51.1 ("Paragraph (ii)") providing that the mere monitoring of legislation is not lobbying activity subject to the Act's registration and reporting requirements. In most instances, lobbyists initially enter into contracts with principals and then monitor legislation prior to engaging in lobbying activities like direct and indirect communications and/or the payment of gifts, transportation, lodging or hospitality. Applying the Committee's interpretation of "act in any capacity" to this situation, a lobbyist would be required to report the act of contracting with the principal, but not the costs of monitoring legislation. Clearly, such an interpretation produces an absurd result which is inconsistent with the intent of Act 134. In order for the Revised Regulations to be consistent, they must either require principals, lobbyists and lobbying firms to report both the contracting with principals and the costs of monitoring or they must not and since it has been soundly concluded by the Committee, the Commission and the regulated community that monitoring alone does not constitute lobbying, the latter interpretation, not the former, should have been adopted by the Committee.

Lastly, the Committee's revisions to Paragraph (i) are also inconsistent with other provisions of the Act. Statutes or parts of statutes relating to the same class of persons are in *pari materia* and, therefore, should be construed together as one statute. 1 Pa. C.S. §1932(a); *MacElree v. Chester County*, 667 A.2d 1188 (Pa. Cmwlth. 1995). Accordingly, Section 1305-A(b)(2) of the Act should be read in *pari materia* with the definition of "lobbying" as provided in Section 1303-A of the Act when interpreting Paragraph (i).

Section 1305-A(b)(2) of the Act provides as follows:

> Each expense report shall include the total costs of all lobbying for the period. The total shall include all office expenses, personnel expenses, expenditures related to gifts, hospitality, transportation and lodging to State officials or employees, and any other lobbying costs. The total amount reported under this paragraph shall be allocated in its entirety among the following categories:
>
> (i) The costs for gifts, hospitality, transportation and lodging given to or provided to State officials or employees or their immediate families.
>
> (ii) The costs for direct communication.
>
> (iii) The costs for indirect communication.
>
> *(iv) Expenses required to be reported under this subsection shall be allocated to one of the three categories listed under this section and shall not be included in more than one category.* (Emphasis added.)

It has been clearly established above that a principal entering into a contract with a lobbyist or lobbying firm without that lobbyist or lobbying firm making "direct communications" or "indirect communications" or "by providing a gift, hospitality, transportation or lodging to a State official or employee for the purpose of advancing the interest of the lobbyist or principal" is not "lobbying" under the Act and since Section 1305-A(b)(iv) of the Act requires that costs be reported in one of these two categories (the costs for gifts, hospitality, transportation and lodging is not a relevant category here), it is contrary to the clear and unambiguous language of the Act for lobbyists and lobbying firms to register and report when entering into contracts with principals. Furthermore, reviewing the mandatory language provided in Section 1305-A(b)(iv) of the Act reveals that the General Assembly never intended the mere reporting of contracts entered into by lobbyists and lobbying firms without conducting direct and indirect communications to be included within the Act's definition of "lobbying." After reading Section 1305-A of the Act in *pari materia* with the definition of "lobbying" found in Section 1303-A of the Act, it is clear that the Committee's revisions to Paragraph (i) and subsequent explanation in its Response still run contrary to the clear language of the Act by requiring lobbyists and lobbying firms to register and report when they enter into contracts with principals without taking any subsequent action. Accordingly, we ask the Commission to disapprove the Revised Regulations because the Committee's interpretation of the phrase "act in any capacity" falls outside the clear statutory language of the Act.

PAGR's concern with the definition of "effort to influence legislative action or administrative action" in Section 51.1 of the Revised Regulations also extends to the registration provisions for lobbyists, lobbying firms and principals found in Sections 53.4(a)(1), 53.3(a)(1) and 53.2(a)(1) of the Revised Regulations, respectively. These provisions require an individual or entity to

register upon the earlier of the following: contracting in any form for lobbying or engaging in lobbying, unless exempt under Section 1306-A of the Act.

These Revised Regulations are still in direct conflict with the plain language of the Act insofar as the contracting for services between a principal and a lobbyist or lobbying firm still do not constitute "an effort to influence legislative action or administrative action" and thus do not constitute "lobbying" that is subject to the registration and reporting requirements of the Act. As stated in the above analysis, the "effort to influence legislative action or administrative action" occurs when the lobbyist or lobbying firm engages in "direct communications," "indirect communications" or provides any gift, hospitality, transportation or lodging to a State official or employee for the purpose of advancing the interest of the lobbyist or principal, not when the lobbyist or lobbying firm enters into a contract for service with the principal. It is clear from the Act's language that principals, lobbyists and lobbying firms act in their capacities as principals, lobbyists and lobbying firms when a lobbyist or lobbying firm makes an affirmative effort to advance the interest of the principal whether it be through direct or indirect communications or by providing gifts, hospitality, transportation or lodging. Accordingly, the language provided in Sections 53.2(a)(1), 53.3(a)(1) and 53.4(a)(1) of the Revised Regulations still run contrary to the plain language of the Act insofar as the Committee is disregarding the letter of the Act under the pretext of pursuing its spirit and thus must be disapproved by the Commission.

It is the overall position of PAGR that the language found in the Revised Regulations continues to exceed the clear statutory authority of the Act, and for the reasons stated above, PAGR asks the Commission to disapprove the Revised Regulations for violating Section 5.2(a) of the Regulatory Review Act. Please feel free to contact me if you have any questions or concerns.

Sincerely yours,

Peter N. Calcara
PAGR President

Exhibit A

Post Office Box 116, Harrisburg, PA 17108 • (717) 540-4391 • (717) 657-9708 fax • www.pagr.org

November 21, 2008

Albert H. Masland, Esq.
Chief Counsel
Pennsylvania Department of State
c/o Lobbying Disclosure Regulations Committee
302 North Office Building
Harrisburg, PA 17120-0029

Re: Suggested Amendatory Language to be Inserted into the Final-Form Lobbying Disclosure Regulations at No. 16-40 (IRRC No. #2665)

Dear Mr. Masland:

Pursuant to the request made by the Lobbying Disclosure Regulations Committee ("Committee") at its November 18, 2008 meeting, the Pennsylvania Association for Government Relations ("PAGR") is providing the Committee with suggested amendatory language that will help make the Final-Form Lobbying Disclosure Regulations ("Regulations") consistent with Act 134 of 2006 as well as the recommendations of the Independent Regulatory Review Commission ("Commission").

Section 1 below provides the revised language to Section 51.1 Paragraph (i) of the definition of "effort to influence legislative action or administrative action" to the Regulations (hereinafter "Paragraph (i)"). Section 2 below provides revised language to Sections 53.2 (principal registration), 53.3 (lobbying firm registration) and 53.4 (lobbyist registration) of the Regulations. Lastly, Section 3 provides revisions to Section 55.1 of the Regulations in order to make that provision's language consistent with the language of the revised Regulations found in Sections 1 and 2.

Section 1. Definition of "effort to influence legislative action or administrative action"

The final-form version of Paragraph (i) states as follows:

> Any attempt to initiate, support, promote, modify, oppose, delay or advance a legislative action or administrative action on behalf of a principal for economic consideration. ~~The term includes any of the following:~~
>
> (i) The term includes ~~P~~paying an individual or entity economic consideration for lobbying services.~~lobbyist or lobbying firm a~~

~~retainer or other compensation, even if that lobbyist or lobbying firm does not make direct or indirect communications or take any other action.~~

It is suggested that the following language be substituted for the above-quoted language in the Regulations as follows (new language underlined and in **bold**; deleted language with ~~strikethrough~~):

> Any attempt to initiate, support, promote, modify, oppose, delay or advance a legislative action or administrative action on behalf of a principal for economic consideration. ~~The term includes any of the following:~~
>
> (i) ~~The term includes~~ ~~Ppaying an individual or entity economic consideration for lobbying services.lobbyist or lobbying firm a retainer or other compensation, even if that lobbyist or lobbying firm does not make direct or indirect communications or take any other action.~~ **The payment of economic consideration is not lobbying until the individual or entity to whom the economic consideration is paid makes an effort to influence legislative action or administrative action in the Commonwealth. If economic consideration is paid in connection with an effort to influence legislative action or administrative action, the economic consideration shall be reported as part of the total costs of lobbying under § 13A05(b) of the act (relating to the content of reports), unless such activity is exempt from being reported under § 13A06 of the act (relating to exemption from registration and reporting).**

The Final Preamble should also be amended as follows (new language underlined; deleted language with ~~strikethrough~~):

> "Effort to influence administrative action or legislative action" – IRRC, PAGR, PANO, PAR and the Philadelphia Bar Association commented that the retainer language in subsection (i) should be removed because it exceeds the act. The proposed regulations stated that an "effort to influence" included paying a lobbyist or lobbying firm a retainer or other compensation, even if that lobbyist or lobbying firm does not make direct or indirect communications or take any other action. The comments stated that there must be an action taken to constitute an effort to influence. ~~In considering these comments, the Committee noted that Section 13A04(a) of the Act, requiring registration "within ten days of acting in any capacity as a lobbyist, lobbying firm or principal," could be subject to multiple interpretations that would impact both registration and reporting requirements. The Committee reasoned that an interpretation that would limit Section 13A04(a) to require registration within ten days of lobbying~~

~~communications, gift giving and the like could exclude from disclosure advance payments. The Committee reasoned that such an interpretation could enable persons to avoid registration or reporting requirements through the timing of payments.~~ After considering these comments, the Committee decided to amend the definition of "effort to influence administrative action or legislative action" to clarify that the mere payment of economic consideration is not lobbying until the individual or entity to whom the economic consideration is paid makes an effort to influence legislative action or administrative action. However, if economic consideration is paid in connection with an effort to influence legislative action or administrative action, the economic consideration shall be reported as part of the total costs of lobbying under Section 13A05(b) of the Act, unless such activity is exempt from being reported under Section 13A06 of the Act. The Committee removed all language referring to retainers from the regulations. ~~The Committee then amended the definition of "effort to influence administrative action or legislative action" to use the statutory language of administrative action, legislative action and lobbying. For example, the Committee amended the definition to state that an effort to influence legislative action or administrative action includes paying an individual or entity economic consideration for lobbying services.~~ The Committee also opted to use the term "economic consideration" because it is a defined term in the statute, and it includes both compensation and reimbursement. (Final Preamble, pp. 3-4)

Section 2. Registration Requirements

Section 53.2(a)(1) of the Regulations states as follows:

53.2 Principal registration.

(a) Unless exempt under section 13A06~~A~~ of the act (relating to exemption from registration and reporting), a principal shall register with the Department within 10 days of acting in any capacity as a principal.

(1) Engaging an individual or entity ~~lobbyist or lobbying firm~~ for ~~purposes including~~ lobbying services or paying economic consideration to an individual or entity for lobbying services constitutes acting in the capacity of a principal.

It is suggested that the following language be substituted for the above-quoted language in the Regulations as follows (new language underlined and in **bold**; deleted language with ~~strikethrough~~):

53.2 Principal registration.

> (a) Unless exempt under section 13A06~~A~~ of the act (relating to exemption from registration and reporting), a principal shall register with the Department within 10 days of acting in any capacity as a principal.
>
> (1) ~~Engaging an individual or entity lobbyist or lobbying firm for purposes including lobbying services or paying economic consideration to an individual or entity for lobbying services constitutes acting in the capacity of a principal.~~ **An individual or entity is acting in the capacity of a principal when the lobbyist or lobbying firm to whom the economic consideration is paid by the principal makes an effort to influence legislative action or administrative action in the Commonwealth. If economic consideration is paid by a principal to a lobbying firm or lobbyist in connection with that lobbyist's or lobbying firm's effort to influence legislative action or administrative action, that economic consideration shall be reported as part of the total costs of lobbying under § 13A05(b) of the act (relating to the content of reports), unless such activity is exempt from being reported under § 13A06 of the act (relating to exemption from registration and reporting).**

The Final Preamble should also be amended as follows (new language underlined; deleted language with ~~strikethrough~~):

> IRRC, the PBA and the Philadelphia Bar Association commented that in § 53.2(a)(1), accepting mere payment of a retainer is not "lobbying" and statements stating that accepting a retainer is lobbying in these sections should be deleted. IRRC also commented that the phrase "for purposes including lobbying" should be rewritten to clearly require lobbying to be the action that requires registration. ~~In considering these comments, the Committee noted that Section 13A04(a) of the Act, requiring registration "within ten days of acting in any capacity as a lobbyist, lobbying firm or principal," could be subject to multiple interpretations that would impact both registration and reporting requirements. The Committee reasoned that an interpretation that would limit Section 13A04(a) to require registration within ten days of lobbying communications, gift giving and the like could exclude from disclosure advance payments. The Committee reasoned that such an interpretation could enable persons to avoid~~

~~registration or reporting requirements through the timing of payments.~~ After considering these comments, the Committee decided to amend § 53.2(a)(1) to clarify that an individual or entity is acting in the capacity of a principal when the lobbyist or lobbying firm to whom the economic consideration is paid by the principal makes an effort to influence legislative action or administrative action in the Commonwealth. If economic consideration is paid by a principal to a lobbying firm or lobbyist in connection with that lobbyist's or lobbying firm's effort to influence legislative action or administrative action, that economic consideration shall be reported as part of the total costs of lobbying under Section 13A05(b) of the Act, unless such activity is exempt from being reported under Section 13A06 of the Act. The Committee also removed all language referring to retainers from the regulations and removed the phrase "for purposes including lobbying." ~~The Committee then amended § 53.2(a)(1) to use the statutory language regarding lobbying. For example, the Committee amended § 53.2(a)(1) to state that "engaging an individual or entity for lobbying services or paying economic consideration to an individual or entity for lobbying services constitutes acting in the capacity of a principal."~~ The Committee also opted to use the term "economic consideration" because it is a defined term in the statute, and it includes both compensation and reimbursement. (Final Preamble, p. 9)

Section 53.3(a)(1) of the Regulations states as follows:

53.3 Lobbying firm registration.

(a) Unless exempt under section 13A06~~A~~ of the act (relating to exemption from registration and reporting), a principal shall register with the Department within 10 days of acting in any capacity as a lobbying firm.

(1) Accepting an engagement to ~~lobby~~ provide lobbying services or accepting economic consideration ~~a retainer of other compensation for~~ to provide ~~purposes including~~ lobbying services constitutes acting in the capacity of a lobbying firm.

It is suggested that the following language be substituted for the above-quoted language in the Regulations as follows (new language underlined and in **bold**; deleted language with ~~strikethrough~~):

53.3 Lobbying firm registration.

> (a) Unless exempt under section 13A06~~A~~ of the act (relating to exemption from registration and reporting), a principal shall register with the Department within 10 days of acting in any capacity as a lobbying firm.
>
> (1) ~~Accepting an engagement to lobby provide lobbying services or accepting economic consideration a retainer of other compensation for to provide purposes including lobbying services constitutes acting in the capacity of a lobbying firm.~~ **An individual or entity is not acting in the capacity of a lobbying firm until such entity or individual to which economic consideration is paid makes an effort to influence legislative action or administrative action in the Commonwealth. If a lobbying firm is paid by a principal economic consideration in connection with an effort to influence legislative action or administrative action, that economic consideration shall be reported as part of the total costs of lobbying under § 13A05(b) of the act (relating to the content of reports), unless such activity is exempt from being reported under § 13A06 of the act (relating to exemption from registration and reporting).**

The Final Preamble should also be amended as follows (new language underlined; deleted language with ~~strikethrough~~):

> IRRC, the PBA and the Philadelphia Bar Association commented that in § 53.3(a)(1), accepting mere payment of a retainer is not "lobbying" and statements to the effect that accepting a retainer is lobbying in these sections should be deleted. IRRC also commented that the phrase "for purposes including lobbying" should be rewritten to clearly require lobbying to be the action that requires registration. ~~In considering these comments, the Committee noted that Section 13A04(a) of the Act, requiring registration "within ten days of acting in any capacity as a lobbyist, lobbying firm or principal," could be subject to multiple interpretations that would impact both registration and reporting requirements. The Committee reasoned that an interpretation that would limit Section 13A04(a) to require registration within ten days of lobbying communications, gift giving and the like could exclude from disclosure advance payments. The Committee reasoned that such an interpretation could enable persons to avoid registration or reporting requirements through the timing of payments.~~ After considering these comments, the Committee

decided to amend § 53.3(a)(1) to clarify that an individual or entity is not acting in the capacity of a lobbying firm until such entity or individual to which economic consideration is paid makes an effort to influence legislative action or administrative action in the Commonwealth. If a lobbying firm is paid by a principal economic consideration in connection with an effort to influence legislative action or administrative action, that economic consideration shall be reported as part of the total costs of lobbying under Section 13A05(b) of the Act, unless such activity is exempt from being reported under Section 13A06 of the Act. The Committee also removed all language referring to retainers from the regulations and removed the phrase "for purposes including lobbying." ~~The Committee then amended § 53.3(a)(1) to use the statutory language regarding lobbying. For example, the Committee amended § 5.3.3(a)(1) to state that "accepting an engagement to provide lobbying services or accepting economic consideration to provide lobbying services constitutes acting in the capacity of a lobbying firm."~~ The Committee also opted to use the term "economic consideration" because it is a defined term in the statute, and it includes both compensation and reimbursement. (Final Preamble pp. 9-10)

Section 53.4(a)(1) of the Regulations states as follows:

53.4 Lobbyist registration.

(a) Unless exempt under section 13A06~~A~~ of the act (relating to exemption from registration and reporting), a principal shall register with the Department within 10 days of acting in any capacity as a lobbyist.

(1) Accepting an engagement to provide lobbying services or accepting economic consideration to provide lobbying services ~~a retainer or other compensation for purposes including lobbying~~ constitutes acting in the capacity of a lobbyist.

It is suggested that the following language be substituted for the above-quoted language in the Regulations as follows (new language **underlined and in bold**; deleted language with ~~strikethrough~~):

53.4 Lobbyist registration.

(a) Unless exempt under section 13A06~~A~~ of the act (relating to exemption from registration and reporting), a principal shall register with the Department within 10 days of acting in any capacity as a lobbyist.

(1) ~~Accepting an engagement to provide lobbying services or accepting economic consideration to provide lobbying services a retainer or other compensation for purposes including lobbying~~

> ~~constitutes acting in the capacity of a lobbyist.~~ **An individual or entity is not acting in the capacity of a lobbyist until such entity or individual to which economic consideration is paid makes an effort to influence legislative action or administrative action in the Commonwealth. If a lobbyist is paid by a principal economic consideration in connection with an effort to influence legislative action or administrative action, that economic consideration shall be reported as part of the total costs of lobbying under § 13A05(b) of the act (relating to the content of reports), unless such activity is exempt from being reported under § 13A06 of the act (relating to exemption from registration and reporting).**

The Final Preamble should also be amended as follows (new language underlined; deleted language with ~~strikethrough~~):

> IRRC, the PBA and the Philadelphia Bar Association commented that in § 53.4(a)(1), accepting mere payment of a retainer is not "lobbying" and statements stating that accepting a retainer is lobbying in these sections should be deleted. IRRC also commented that the phrase "for purposes including lobbying" should be rewritten to clearly require lobbying to be the action that requires registration. ~~In considering these comments, the Committee noted that Section 13A04(a) of the Act, requiring registration "within ten days of acting in any capacity as a lobbyist, lobbying firm or principal," could be subject to multiple interpretations that would impact both registration and reporting requirements. The Committee reasoned that an interpretation that would limit Section 13A04(a) to require registration within ten days of lobbying communications, gift-giving and the like could exclude from disclosure advance payments. The Committee reasoned that such an interpretation could enable persons to avoid registration or reporting requirements through the timing of payments.~~ After considering these comments, the Committee decided to amend § 53.4(a)(1) to clarify that an individual or entity is not acting in the capacity of a lobbyist until such entity or individual to which economic consideration is paid makes an effort to influence legislative action or administrative action in the Commonwealth. If a lobbyist is paid by a principal economic consideration in connection with an effort to influence legislative action or administrative action, that economic consideration shall be reported as part of the total costs of lobbying under Section 13A05(b) of the Act, unless such activity is exempt from being reported under Section 13A06 of the Act. The Committee also removed all language referring to retainers from the regulations. ~~The Committee amended § 53.4(a)(1) to use the statutory language regarding lobbying. For example, the Committee amended §~~

~~53.4(a)(1) to state that "accepting an engagement to provide lobbying services or accepting economic consideration to provide lobbying services constitutes acting in the capacity of a lobbyist."~~ The Committee also opted to use the term "economic consideration" because it is a defined term in the statute and it includes both compensation and reimbursement. (Final Preamble, pp. 10-11)

Section 3. Reporting Requirements

Section 55.1 of the Regulations states in relevant part:

> (a) A quarterly expense report is required to be filed as set forth in this section when the total lobbying expenses of a registered principal, registered lobbying firm or registered lobbyist lobbying on the principal's behalf, together, exceed $2,500 in a quarterly reporting period. The threshold of $2,500 includes any economic consideration~~ retainers or other compensation~~ paid by a principal to a lobbying firm or lobbyist.~~, whether or not the lobbying firm or lobbyist then spends the retainer.~~ Individuals exempt under section 13A06 need not register or report.
>
> ***
>
> (g) A quarterly expense report of a principal required to be registered under the act must include at least the following information:
>
> ***
>
> (3) The total costs of all lobbying for the period. The total must include all office expenses, personnel expenses, expenditures related to gifts, hospitality, transportation and lodging to State officials or employees, and any other lobbying costs.~~, including retainers or other compensation paid by principals to lobbying firms or lobbyists, whether or not the lobbying firm or lobbyist then spends the retainer.~~
>
> ***
>
> (iii) Lobbying costs include the amount of economic consideration paid by principals to lobbying firms or lobbyists. Although a registrant is only required to report the amount of economic consideration that is attributable to lobbying in the Commonwealth, the entire amount shall be reported unless the principal, lobbying firm or lobbyist maintains records that establish the portion attributable to lobbying, as well as the portion attributable to non-lobbying services.

It is suggested that the following language be substituted for the above-quoted language in the Regulations as follows (new language underlined and in **bold**; deleted language with ~~strikethrough~~):

> (a) A quarterly expense report is required to be filed as set forth in this section when the total lobbying expenses of a registered principal, registered lobbying firm or registered lobbyist lobbying on the principal's behalf, together, exceed $2,500 in a quarterly reporting period. The threshold of $2,500 includes any economic consideration ~~retainers or other compensation~~ paid by a principal to a lobbying firm or lobbyist~~., whether or not the lobbying firm or lobbyist then spends the retainer.~~ **after the lobbying firm or lobbyist makes an effort to influence legislative or administrative action in the Commonwealth.** Individuals exempt under section 13A06 need not register or report.
>
> ***
>
> (g) A quarterly expense report of a principal required to be registered under the act must include at least the following information:
>
> ***
>
> (3) The total costs of all lobbying for the period. The total must include all office expenses, personnel expenses, expenditures related to gifts, hospitality, transportation and lodging to State officials or employees, and any other lobbying costs.~~, including retainers or other compensation paid by principals to lobbying firms or lobbyists, whether or not the lobbying firm or lobbyist then spends the retainer.~~
>
> ***
>
> (iii) Lobbying costs include the amount of economic consideration paid by principals to lobbying firms or lobbyists **after the lobbying firm or lobbyist makes an effort to influence legislative action or administrative action.** Although a registrant is only required to report the amount of economic consideration that is attributable to lobbying in the Commonwealth, the entire amount shall be reported unless the principal, lobbying firm or lobbyist maintains records that establish the portion attributable to lobbying, as well as the portion attributable to non-lobbying services.

The Final Preamble should also be amended as follows in relevant part (new language underlined; deleted language with ~~strikethrough~~):

> The PBA and the Philadelphia Bar Association commented that in § 55.1(a), the sentence "[t]he threshold of $2,500 includes any

retainers or other compensation paid by a principal to a lobbying firm, whether or not the lobbying firm or lobbyist then spends the retainer" should be deleted. The comments stated that the language on retainers exceeded the act. ~~In considering these comments, the Committee noted that Section 13A04(a) of the Act, requiring registration "within ten days of acting in any capacity as a lobbyist, lobbying firm or principal," could be subject to multiple interpretations that would impact both registration and reporting requirements. The Committee reasoned that an interpretation that would limit Section 13A04(a) to require registration within ten days of lobbying communications, gift giving and the like could exclude from disclosure advance payments. The Committee reasoned that such an interpretation could enable persons to avoid registration or reporting requirements through the timing of payments.~~ The Committee removed all language on retainers from the regulations. ~~The Committee then amended § 55.1(a) to use the statutory language regarding lobbying. For example, the Committee amended § 55.1(a) to state that the threshold of $2,500 includes any economic consideration paid by a principal to a lobbying firm or lobbyist.~~ The Committee also amended § 55.1(a) to state that the threshold of $2,500 includes any economic consideration paid by a principal to a lobbying firm or lobbyist after the lobbying firm or lobbyist makes an effort to influence legislative or administrative action in the Commonwealth. The Committee opted to use the term "economic consideration" because it is a defined term in the statute, and it includes both compensation and reimbursement. (Final Preamble, p. 12)

***

The PBA commented that in section § 55.1(g)(3), the phrase "including retainers or other compensation paid by principals to lobbying firms or lobbyists, whether or not the lobbying firm or lobbyist then spends the retainer" should be removed because it exceeds the act. ~~In considering these comments, the Committee noted that Section 13A04(a) of the Act, requiring registration "within ten days of acting in any capacity as a lobbyist, lobbying firm or principal," could be subject to multiple interpretations that would impact both registration and reporting requirements. The Committee reasoned that an interpretation that would limit Section 13A04(a) to require registration within ten days of lobbying communications, gift giving and the like could exclude from disclosure advance payments. The Committee reasoned that such an interpretation could enable persons to avoid registration or reporting requirements through the timing of payments.~~ The Committee removed all language referring to retainers from the regulations. ~~The Committee then amended § 55.1(g)(3) to use the statutory language regarding lobbying. For example, t~~The Committee amended § 55.1(g)(3) by adding another subsection

(iii) to address how lobbying costs include the amount of economic consideration paid by principals to lobbying firms or lobbyists after the lobbying firm or lobbyist makes an effort to influence legislative action or administrative action. The Committee opted to use the term "economic consideration" because it is a defined term in the statute, and it includes both compensation and reimbursement. Although a registrant is only required to report the amount of economic consideration that is attributable to lobbying in the Commonwealth, the entire amount shall be reported unless the principal, lobbying firm or lobbyist maintains records that establish the portion attributable to lobbying, as well as the portion attributable to non-lobbying services. (Final Preamble, p. 13)

Overall, PAGR believes the above-suggested revisions to the final-form Regulations are consistent with the clear language of Act 134 as well as the recommendations made by the Commission and would likely survive judicial scrutiny if reviewed by the courts. Thank you for giving PAGR the opportunity to provide additional input into the Committee's deliberation and PAGR looks forward to discussing these suggestions with the members of the Committee during the public comment period at the Committee's November 25, 2008 meeting.

Very truly yours,

Andrew J. Hilt
President
Pennsylvania Association for Government Relations