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Expert Analysis

Government Ethics Reform: A Work in Progress

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The late Rev. Dr. Martin Luther King observed that, "Morality cannot be legislated but behavior can be regulated." Officials at all levels of government continue to struggle with the rules governing their own behavior as well as those with whom they regularly interact to avoid at least the appearance of immorality.

There seems to be a widespread consensus that the public's lack of trust in the political process should be a genuine concern for both officials and advocates. However, elected officials at all levels struggle with avoiding compromising situations and appearances, while not stifling the free flow of information and political relationships which inform the democratic process.

President Barack Obama campaigned on an ethics reform platform against the backdrop of the Jack Abramoff scandal, in which he called for restricting and disclosing special interest access to decision makers.

Upon taking office, President Obama issued Executive Order 13490, which requires Presidential employees to execute an ethics pledge that they will not accept gifts from lobbyists even beyond the restrictions in Title 5 of the Code of Federal Regulations, and which also imposes limits on their activities in policy areas on which they had previously lobbied, as well as post employment restrictions. He prohibited lobbyists from participating in agency meetings on the allocation of funds under the economic stimulus program and recently, his special counsel for ethics and government reform announced that federally registered lobbyists would no longer be appointed to agency advisory boards and commissions.

Defining 'Lobbyist'

However, not all "lobbyists" as the public would understand the term are affected by these actions. Under the federal Lobbying Disclosure Act of 1995, the definitions of "lobbying activities" and "lobbying contacts" are expansive, but one is exempted from the definition of being a "lobbyist" if such activities involve an individual whose lobbying efforts constitute less than 20 percent of the time provided by such individual to a particular client over a six month period. Former U.S. Senate Majority Leader Tom Daschle is often cited as an example of an influential Washington advisor whose activities have yet to require him to register.

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New York State and New York City use fixed dollar expenditures for defined lobbying activities as the registration trigger, $5000 and $2000 annually, respectively. This approach poses its own issues as the definition of lobbyist includes in-house staff of organizations, such as non-profit service providers, who are covered if the proportionate share of their compensation for lobbying activities exceeds these amounts. Thus, a youth program director who spends a portion of her time seeking discretionary appropriations from the City Council may wind up with the same reporting and registration requirements as a full time professional third-party lobbying firm.

In his State of the Union address, the President called for disclosure of each contact a lobbyist has with the Administration or Congress, as well as strict limits on lobbyist contributions to federal candidates. However, no bill to this effect has been submitted yet.

In drafting such laws, Congress is obliged not to intrude upon the constitutional rights to speak, publish and to petition the government, although imposing disclosure requirements protects the public and allows the Congress to evaluate the weight it chooses to give to paid lobbying activities, *United States v. Harris,* 347 U.S. 612.

In New York, the Governor and State Legislature and New York City Council have each sought to claim the mantle of ethics reform.

Reform at the State Level

Whether the New York State Legislature is the most dysfunctional in the country, as proclaimed by the Brennan Center for Justice and various editorial boards, may be a matter of debate, but the fact that Albany has had more than its share of recent corruption cases is not.

Former State Senate Majority Leader Joseph Bruno was convicted of federal mail fraud for receiving financial benefits through sham transactions. Other recent corruption scandals involving former State Controller Alan Hevesi, four Assembly Members, not to mention the resignation of Governor Eliot Spitzer following the Byzantine allegations of what came to be known as "Troopergate," have prompted widespread calls for reform.

Previous efforts had ranged from the sweeping to the symbolic. Chapters 1 and 596 of the Laws of 2005 extended the reach of the state Lobbying Law disclosure provisions to the procurement contracts by state agencies for goods and services. Moreover, §§139(j) and (k) of the State Finance Law were amended to severely restrict efforts to influence the procurement decision making process once it had begun by limiting contacts to designated agency officials. Efforts to influence the process outside of these boundaries, whether by a lobbyist or by the vendor itself, can result in draconian penalties, including debarment. (Soliciting a state legislator to engage in such behavior on a vendor's behalf, and such intervention, was not prohibited).

In addition, then Governor Spitzer issued Executive Order No. 1/2007, "Establishment of Ethical Conduct Guidelines." Seeking to improve on Public Officers Law §§73 and 74 (the State Code of Ethics), the Executive Order limited certain behavior of gubernatorial appointees, including restrictions on gifts and use of state property, as well as prohibiting nepotism.

Subsequently, the Public Employee Ethics Reform Act of 2007 updated the Public Officers Law by prohibiting public officials and state officers

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and employees from accepting gifts of more than nominal value. Section 1-m of the Lobbying Act prohibits registered lobbyists from offering any gift to any public official, including state legislators.

Much subsequent attention has focused on meals and legislative receptions. Complementary attendance at political events and complementary food or beverage at an event that is widely attended may be permissible. There have, however, been several recent enforcement actions by the Commission on Public Integrity (COPI) against lobbyists in Albany for hosting receptions where the cost per person was allegedly more than "nominal value" or not "widely attended."

Such rules on gifts and attendance are very strict and fact specific. A host organization must determine whether a covered official will be invited, which set of rules apply and whether to hide the shrimp bowl. As a consequence, it has become commonplace for organizations to seek pre-clearance from COPI based upon detailed descriptions of event plans and for legislators and others to confirm that an event passes muster before accepting.

Reform at the City Level

The city of New York's regulatory system is administered by the Conflicts of Interests Board (COIB), whose five members are appointed by the Mayor, subject to City Council consent, for staggered six year terms, ensuring some level of independence. However, unlike the Independent Budget office, the COIB's budget is subject to discretionary appropriation and the Board is dependent on the mayorally appointed Commissioner of Investigations for legwork.

City officials are subject to Chapter 68 of the New York City Charter, which covers matters such as outside employment, conflicts of interest, financial disclosure, confidentiality and post-employment restrictions. Some specific provisions and interpretations by the city's COIB recognize the distinction between elected officials and other public officials and employees, for example with respect to community events.

The charter prohibits generally using one's official position to benefit ones' self or others with whom one is affiliated. The indictment of City Council member Larry Seabrook on Feb. 9, 2010 on federal corruption charges cites this provision in paragraph 2 of Count I. These and more specific rules address concerns over the use of city property for personal business, nepotism and the like.

Enforcement

Beginning last May and reiterated in his January State of the State address, Governor David Paterson has focused on strengthening the state ethics enforcement system, as well as on some substantive provisions.

Noting that the Legislative Ethics Commission was still not fully formed after two years, and that its predecessor had never filed charges against a single legislator or staffer—as well as criticism of the Commission on Public Integrity itself in connection with "Troopergate," the Governor has declared that the "process of enforcing ethics in State government is broken."

He called for consolidating enforcement of all the ethics laws, as well as state election campaign finance laws and provisions of the state Open Meetings Law, in a new five member Government Ethics Commission, itself selected under a process similar to the selection of members of the Court of Appeals, administered by a Designation Commission.

Legislative leaders did not rush to embrace this model. Rather, days after the State of the State, both houses passed their own comprehensive reform (A09544/S6457). This package would create a Commission on Lobbying Ethics and Compliance, appointed by the Governor and legislative leaders; an Executive Ethics and Compliance Commission, appointed by the Governor, Controller and Attorney General; a Joint Legislative Commission on Ethics Standards, made up of legislators themselves and appointees of the legislative leaders; and a Legislative Office of Ethics Investigations. Enforcement within the State Board of Elections would be beefed up with additional staffing, disclosure requirements and penalties.

In addition, new provisions regarding outside activities by legislators would require additional disclosure (albeit not the identity of legislator-lawyers' clients) and rules on gifts would be clarified to define "nominal food and beverage" as that worth less than $10.

The Governor vetoed this proposed law. Although the Legislature's initial vote was nearly unanimous, override failed, primarily because a majority of republicans who had voted for the bill voted against the override. There have been reports that the Governor and legislative leaders are discussing a compromise, although the aforesaid dysfunctionality has been exacerbated by the expulsion of Sen. Hiram Monserrate following his conviction for misdemeanor domestic violence and Governor Paterson's continuing political difficulties, including controversy over his choice to operate video lottery terminals at Aqueduct racetrack.

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Campaign Finance Program

To reduce the perceived influence of money on politics, New York city enacted a public campaign finance program which has also been suggested for Congressional and state elections. Public financing was enacted for presidential races after the 1970s Watergate scandals, although President Obama himself chose not to participate in the program.

In the 2009 elections, most city elected officials (Mayor Bloomberg a notable exception) voluntarily participated, pursuant to which their campaigns received public funds in exchange for contribution limits and disclosure requirements beyond that required under the state Election Law. Given tough economic times, adoption at the Congressional and state levels is unlikely any time soon.

The City's Lobbying Law

The city also has its own Lobbying Law which duplicates the state efforts at regulation without being completely congruent. For example, private zoning applications—a major focus of local lobbying advocacy and expenditures—are regulated from inception under city law but only come under state jurisdiction with the introduction of an authorizing Resolution at the City Council, the penultimate step in the city's lengthy Uniform Land Use Review Procedure public hearing and approval process.

Until the conviction of Council Member Miguel Martinez for misappropriation of public funds last year after discovery of the allocation of funds to "dummy" nonprofits for off-budget award, no council member had been charged with wrongdoing since Council Member Angel Rodriquez pled guilty to extorting a developer in 2002.

Nonetheless, in 2006, Council Speaker Christine Quinn and Mayor Bloomberg undertook to update the city's 1986 Lobbying Law. Their proposals mandated additional reporting to the City Clerk together with additional staffing, training and outreach. Penalties for late registration and filing were increased. The law also required the Mayor and Council to appoint a commission within two years of the effective date to evaluate the City Clerk's performance under the law. No provision was made, however, for a penalty for their failure to act in a timely manner and more than three years later, no commission has been appointed.

Simultaneous changes to the Campaign Finance Program lowered contribution limits for lobbyists and also for executives of organizations "doing business" with the city by being a vendor or prosecuting a zoning matter under ULURP (these provisions are currently being challenged in federal court by a coalition of lobbyists and political leaders).

The Speaker went so far as to pass an amendment to the Council Rules restricting lobbyist access to her suite, the members' lounge and the Council floor.

The changes to the city law made restrictions on gifts applicable to the lobbyists themselves and not just to city officials, as at the federal and state levels, apparently in the unanimous belief that it is just as bad to give as to receive.

With elections on the horizon for Congress as well as New York's four statewide elected officials and all members of the Legislature, incumbents will undoubtedly be offering and debating a variety of improvements to the various codes this year in the hopes of being perceived as part of the ethics solution and not the ethics problem.