

## Outside Counsel

## Expert Analysis

# New Ethics Law Stiffens Requirements On Attempts to Influence Government

On Aug. 15, 2011, Governor Andrew Cuomo signed into law legislation that makes sweeping changes to New York state's ethics and lobbying laws. The Public Integrity Reform Act of 2011 provides for disclosure of outside income by lawmakers, the creation of an independent monitor to investigate corruption and stricter rules for lobbyists. With only a few exceptions, these changes became effective on Aug. 15, 2011.

While many of the provisions of the act relate primarily to activities of government officials, it is nevertheless important to those in the private sector who interact with the government to understand the changes. Of particular interest should be the disclosure requirements of Project Sunlight and the greater disclosures required of lobbyists, both of which could subject practitioners as well as their clients to greater scrutiny. In addition, amendments to New York's gift law could impact the manner in which many private entities interact with government officials.

The renewed focus of the state on these matters and the broad applicability of the act necessitate that entities and individuals closely monitor their activities in order to ensure their complete and accurate compliance.

The full text of the legislation is available at <http://open.nysenate.gov/legislation/bill/S5679-2011>.

### Joint Commission

The act creates a new unified, independent Joint Commission on Public Ethics with jurisdiction over compliance and enforcement of ethics rules by executive and legislative branch elected officials, officers and employees, and lobbyists. The joint commission replaces the Commission on Public Integrity which had jurisdiction only over executive branch elected officials, officers and employees, and lobbyists. The act leaves the Legislative Ethics Commission in place; it has jurisdiction over ethics matters involving the elected officials, officers and employees of the legislative branch. The act, however, alters its jurisdiction in certain situations. For example, the joint commission is now empowered to, inter alia, investigate potential violations of state ethics law



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by legislators and legislative branch employees, a role previously reserved for the Legislative Ethics Commission. The Legislative Ethics Commission retains exclusive jurisdiction to impose penalties on members of the Legislature and legislative employees, based upon findings of fact and law by the joint commission. In addition, the joint commission has jurisdiction to investigate and penalize executive officials, officers and employees, and lobbyists for ethics violations. Investigative reports and dispositions are required to be made public.

The joint commission is also responsible for conducting ethics training and tracking of training compliance, with compliance statistics made regularly available to the public.

Lobbyists will be required to disclose the names of any state elected official, officer or employee with whom the lobbyist has a 'reportable business relationship.'

The act provides for the composition and selection of the members of the joint commission. Among other restrictions, no individual may serve on the joint commission who is or has been: a registered lobbyist within the last three years; a state elected official, member of the Legislature or political party chairman; or a state officer or employee, or a legislative employee within the last year. During their tenure, members of the joint commission are prohibited from making campaign contributions to candidates for state executive or legislative elective offices.

### Lobbyist-Related Provisions

The act expands the definition of "lobbying" to include advocacy to affect not only the passage or defeat of legislation but of resolutions as well, and the introduction or intended introduction thereof.

The act establishes a requirement that all lobbyists participate in online ethics training. The curriculum will include instruction on, for example, state statutes and regulations involving ethics and election law, relevant advisory opinions, and the practical application thereof. This training is to be completed at least once in any three-year period during which a lobbyist is registered.

Lobbyists will be required to disclose in registration forms and semi-annual reports the names of any state elected official, officer or employee with whom the lobbyist has a "reportable business relationship." A "reportable business relationship" is a newly created term meaning a relationship in which compensation is paid by a lobbyist or by a client of a lobbyist, in exchange for any goods, services or anything of value, the total value of which is in excess of \$1,000 annually, to be performed or provided by or intended to be performed or provided by:

(1) any state elected official, officer, employee, member of the Legislature or legislative employee; or

(2) any entity in which the lobbyist or the client of a lobbyist knows or has reason to know the state elected official, officer, employee, member of the Legislature or legislative employee is a proprietor, partner, director, officer or manager, or owns or controls 10 percent or more of the stock of such entity. This threshold is reduced to one percent in the case of entities organized as corporations whose stock is regularly traded on an established securities exchange.

In bi-monthly reports required of certain lobbyists, additional information regarding sources of funding for lobbying activities is now required. If a lobbyist whose lobbying activity is performed on their own behalf and not pursuant to retention by a client has spent at least \$50,000 and at least 3 percent of their total expenditures during the last year on lobbying activity at the New York state and local levels, that lobbyist must disclose each source of funding over \$5,000 in the aggregate used for such lobbying for the relevant period. This disclosure is also applicable to clients of lobbyists that meet the same threshold criteria. Certain not-for-profit organizations qualified as exempt organizations under IRS §501(c)(3) and §501(c)(4) are exempt from these disclosures.

### Campaign Finance

The act makes several changes to New York election law. In response to the U.S. Supreme Court

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decision in *Citizens United v. Federal Election Commission*,<sup>1</sup> the act requires the State Board of Elections to issue regulations by Jan. 1, 2012, setting forth and clarifying the requirements for individuals, corporations, political committees and any other entities to disclose independent expenditures made for advertisements or any other type of advocacy that expressly identifies a political candidate or ballot proposal. The act also requires that broadcast television scripts and Internet advertisements used in political campaigns be disclosed and provided to the Board of Elections. The penalties for violations of filing requirements and contribution limits were substantially increased.

The act also expands and creates jurisdiction of the county and supreme court for proceedings to enforce the requirements of the election law relating to campaign finance restrictions and specifies the standards to be applied by the court in determining an appropriate penalty for such violations.

Current state and local campaign contribution limits remain unchanged.

### Ethics Reform

In general, state elected officials, officers and employees, may not receive compensation for rendering services in connection with any case, proceeding, application or other matter before a state agency. The act expands this prohibition by including among the prohibited actions services related to "any legislation or resolution before the state legislature" or any "executive order."

Information regarding appearances before state entities will now be collected and made public. The act requires the creation of a publicly available database termed "Project Sunlight" that will aggregate information on all firms and individuals that appear before any state agency, public authority, board or commission on behalf of a client or customer for purposes of:

- procuring a state contract for real property, goods or services for such client;
- representing such client or customer in a proceeding relating to rate making;
- representing such client in a regulatory matter;
- representing such client or customer in a judicial or quasi-judicial proceeding; or
- representing such client or customer in the adoption or repeal of a rule or regulation.

State entities will be required to track and provide such information for inclusion in the database.

### Definitions in Gift Ban

The act amends the rules relating to gifts, including the attendance by state and local elected officials, officers and employees at certain events.

### Financial Disclosure

The act provides that all financial disclosure statements of state elected officials, officers and employees must be filed with the joint commission; previously, such statements were filed with either the Commission on Public Integrity (for the executive branch) or the Legislative Ethics Commission (for the legislative branch). Statements filed by elected officials will be posted to the Internet.

Certain legislative branch employees will be required to file financial disclosure forms with both the joint commission as well as the Legislative Ethics Commission. Under the act, greater and more

precise disclosure is required, including information regarding a reporting individual's and his or her firm's outside clients and customers doing business with, receiving grants or contracts from, seeking legislation or resolutions from, or involved in a case or proceeding before the state.

### New Enforcement Authority

The joint commission and Legislative Ethics Commission are now authorized to impose civil penalties and refer any potential criminal violations of the financial disclosure requirements to the appropriate prosecutorial entity; previously, the Commission on Public Integrity and the Legislative Ethics Commission could only refer a violation in lieu of a civil penalty. The amount of a civil penalty that may be imposed has been increased.

The New York code includes a Code of Ethics applicable to public officers that establishes rules regarding conflicts of interest. The act provides for increased penalties for violations of this code, particularly vis-à-vis financial conflicts deemed damaging to public confidence in the state government.

As in most jurisdictions, the New York code includes a Code of Ethics applicable to public officers that establishes rules regarding conflicts of interest. The act provides for increased penalties for violations of this Code of Ethics, particularly vis-à-vis financial conflicts deemed damaging to public confidence in the state government.

### Pension Forfeiture

The act establishes a procedure under which certain state and local elected officials, officers and employees who commit crimes related to their public offices may have their government pensions reduced or forfeited.

### National Trend

New York's recent overhaul of its ethics laws is part of a national trend in which state and local governments are heightening the scrutiny of government officials and lobbyists. For example, in December 2010, the state of Alabama enacted a series of bills (Act No. 2010-762, Act No. 2010-763, Act No. 2010-764) aimed at strengthening its anti-corruption laws. Key provisions of the law include:

- Broadening the definition of lobbying to include activity with the executive, legislative or judicial branches;
- Requiring the State Ethics Commission to allow electronic filing of records and maintain an electronic database searchable by the public;
- Requiring mandatory ethics training for public officials, employees and lobbyists;
- Amending requirements and procedures for appointment and confirmation of members of the State Ethics Commission;
- Providing for revised standards and procedures for acting on complaints and authorizing a formal investigation, subpoena power for the State Ethics Commission, new procedures for post-investigative

referral and status reports by the Attorney General or district attorney;

- Providing for additional penalties and violations; and
- Revising and adding certain terms related to lobbyists and gifts.

On the heels of legislation enacted in 2009 to strengthen the ethics laws in Massachusetts in reaction to a scandal involving the then-House Speaker, it is widely anticipated that additional legislation will be introduced in the next session of the Legislature to institute more comprehensive ethics reform. Intended as a proactive measure rather than what some deem as largely reactive legislating in this area, it is expected that the legislation will include the following provisions:

- Prohibit members and staff from contacting public entities regarding pending procurements before the award decision is made;
- Limit members and staff to written recommendations for job seekers in the public sector;
- Create a duty for members and staff to report any unethical or criminal conduct of any other members or staff;
- Prohibit lobbyists from entering the House Chamber and the Members' Lounge, and limit lobbyist access to members and staff unless displaying a publicly visible badge identifying them as lobbyists; and
- Create detailed disclosure requirements in the event a member or staff is arrested, indicted or charged with criminal offenses, or named as a defendant in a domestic violence restraining order.

In June of this year, the state of South Carolina enacted comprehensive legislation (H 3181) to strengthen its ethics and lobbying laws. The legislation makes the following changes:

- With regard to registration and re-registration of lobbyists, requires lobbyists to pay all outstanding penalties prior to resuming lobbyist activities;
- Strengthens the authority of the State Ethics Commission to enforce filing requirements and assess penalties for failure to file; and
- Clarifies certain definitions pertaining to the rules regarding conflicts of interest.

Earlier this year, the Texas House and Senate considered legislation (HB 246; SB 371) that, much like New York's act described above, would suspend pension benefits to elected officials in the Legislature or the executive branch on the official's conviction for certain felony offenses related to corruption. While the legislation has not yet passed either the House or Senate, this activity demonstrates the intent to bring Texas in line with several other states (now including New York) that have enacted stiffer penalties for lawmakers convicted of wrongdoing.

### Conclusion

As long as public sentiment continues to evidence concern over the ethics of public officials and lobbyists and the manner in which they interact, the trend toward strengthening ethics and lobbying laws beyond the jurisdictions that have already acted in the area will continue. As a result, practitioners and clients alike must be aware of changes nationwide that may affect their activities.

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1. *Citizens United v. Federal Election Commission*, 558 U.S. 80-205 (2010).