BEFORE THE NEW YORK STATE COMMISSION ON PUBLIC INTEGRITY

MOTHERS AGAINST DRUNK DRIVING &
THE HUMANE SOCIETY OF THE UNITED STATES,

Complainants,

v.

THE AMERICAN BEVERAGE INSTITUTE,
BERMAN AND COMPANY, INC., &
RICHARD B. BERMAN

Respondents.

IN THE MATTER OF AN INVESTIGATION INTO AMERICAN BEVERAGE INSTITUTE'S FAILURE TO REGISTER AS A LOBBYIST AND FAILURE TO REPORT LOBBYING EXPENSES

INTRODUCTION

Mothers Against Drunk Driving (MADD) and The Humane Society of the United States (HSUS) hereby file this complaint requesting an investigation and enforcement action concerning illegal lobbying in violation of New York State's Lobbying Act by the American Beverage Institute, its management company, Berman and Company, Inc. ("Berman & Co."), and Richard B. Berman, its president, director, and general counsel (collectively ABI). MADD and HSUS (Complainants) respectfully urge the New York State Commission On Public Integrity (the "Commission") to commence an investigation of the American Beverage Institute's failure to register and report lobbying activities and expenditures in 2008 and 2009 in violation of §1-e and §1-h of the Lobby Act.

SUMMARY OF FACTS GIVING RISE TO THIS COMPLAINT

In May 2008, ABI purchased and caused to be published full-page advertisements to run in the *New York Post* and the *New York Times* to influence pending legislation related to ignition interlock devices.[1] ABI is an unregistered lobbyist. During the relevant timeframe, legislation was pending before the New York State Senate sponsored by Senator Charles J. Fuschillo Jr., Ranking Member of the Senate Transportation Committee, requiring all persons convicted of driving while intoxicated (DWI) to install an ignition interlock

[1] A copy of the image used in the advertisements is attached at *Exhibit A*. *See also e.g.* Ken Bensinger, "State lawmakers ponder requiring ignition interlocks for drunk-driving offenders," *Los Angeles Times*, May 24, 2008 (discussing *New York Times* advertisement) (*available at* http://www.smartstartofcalifornia.com/news_CC_march242008.html).

device in all vehicles used by the offender while on probation. The pending law sought to reduce DWI recidivism, making roadways safer for all citizens.[2] As discussed more fully below and as illustrated in the advertisement, ABI categorically opposes mandatory interlocks for DWI offenders following their first conviction.[3]

ABI does not disclose or identify itself as the purchaser of the advertisement.[4] However, according to numerous media reports, "The full-page black-and-white ad . . . was paid for by the American Beverage Institute, a trade group that supports the interests of the alcohol industry."[5] Based on estimates provided by a licensed third party media advertising service, ABI likely paid in excess of $70,000 to place these advertisements in New York centric publications in an effort to defeat proposed legislation that could have a significant impact on alcohol beverage sales and industry profits. The advertisements direct the reader to a website owned and operated by ABI, www.InterlockFacts.com. According to the website, "InterlockFacts.com is a special project of the

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[2] Also, ignition interlocks provide DWI offenders with an alternative to full license suspension and loss of all driving privileges. Under the law, persons convicted of a DWI could continue driving as long as they are not drunk.

[3] *See e.g.* Ashley Halsey III, "Md., Va. consider ignition breathalyzers for first offense," *The Washington Post*, March 2, 2010.

[4] M&C People, "Lindsay Lohan's mug used for drunk driving prevention," May 3, 2008 (Containing statements attributed to ABI's managing director, Sarah Longwell, in defense of the advertisement. According to the article, "The ad was designed to attack legislation for devices that measure a driver's blood alcohol level before their vehicle can start.").

[5] *See e.g.* American Beverage Institute, Interlock Facts, web page, "Associated Press writes story on ABI Interlock Ad," citing Derrik J. Lang, "Lindsay Lohan mugshot used in liquor industry ad," Associated Press, May 5, 2008 (discussing the ad, which also ran in USA Today) (*available at* http://interlockfacts.com/news-item.cfm?id=347).

American Beverage Institute."[6] With legislation pending to require ignition interlock devices for all individuals convicted of a DWI, the advertisements clearly relate to the subject of the legislation and attempt to influence passage of the law.

ABI has never registered its lobbying activity nor reported its lobbying expenditures related to these advertisements or its subsequent lobbying efforts. The Lobbying Act §1-e requires every lobbyist to submit a statement of registration with the Commission if they have more than $5000 of reportable compensation and expenses for lobbying in any calendar year. Further, the Lobbying Act §1-h requires that any lobbyist required to file a statement of registration pursuant to §1-e of the Lobby Act who in any lobbying year, reasonably anticipates that during the year such lobbyist will expend, incur or receive combined reportable compensation and expenses in an amount in excess of five thousand dollars shall file with the commission a bi-monthly written report, on forms supplied by the commission, by the fifteenth day next succeeding the end of the reporting period in which the lobbyist was first required to file a statement of registration. Such reporting periods shall be the period of January first to the last day of February, March first to April thirtieth, May first to June thirtieth, July first to August thirty-first, September first to October thirty-first and November first to December thirty-first.

Section 1-o of the Lobby Act provides any lobbyist or client who knowingly

[6] The American Beverage Institute, "About Us," web page, http://interlockfacts.com/about/, last visited May 4, 2010.

and willfully fails to file timely a report or statement required by this section or knowingly and willfully files false information shall be guilty of a class A misdemeanor. In addition, any lobbyist or client who knowingly and willfully fails to file a statement or report within the time required for the filing of such report shall be subject to a civil penalty for each such failure or violation, in an amount not to exceed the greater of twenty-five thousand dollars or three times the amount the person failed to report properly.

There are sufficient facts in the record to commence an investigation by the Commission of ABI's failure to register and report lobbying activity in 2008 and 2009 in violation of §1-e and §1-h of the Lobby Act.

JURISDICTION OF THE COMMISSION

The Commission is authorized by Executive Law §94(12)(a) to commence inquiries into possible violations of Article 1-A of the Legislative Law. Pursuant to Executive Law §94(16)(d), the Commission is authorized to conduct any investigation necessary to carry out the provisions of Executive Law §94. Pursuant to this power and duty, the Commission may administer oaths or affirmations, subpoena witnesses, compel their attendance and require the production of any books or records that it may deem relevant or material. When the Commission determines there has been a violation Article 1-A of the Legislative Law authorizes the Commission to assess a civil penalty in an amount not to exceed the greater of twenty-five thousand dollars or three times the amount the person failed to report properly.

In lieu of a civil penalty, the Commission may refer a violation of the Lobby Act §1-e and §1-h to an appropriate prosecutor which, upon conviction, shall be punishable as class A misdemeanor. Executive Law §94(12)(b) provides that if the Commission determines that there is reasonable cause to believe that a violation of Article 1-A of the Legislative Law has occurred, the Commission shall send a notice of reasonable cause: (i) to the reporting individual or (ii) to the complainant, if any.

THE AMERICAN BEVERAGE INSTITUTE

ABI is a tax-exempt IRS 501(c)(6) organization located at 1090 Vermont Avenue, NW Suite #800, in Washington DC. Its phone number is (202) 463-7110 and its Employer Identification Number is 52-1730954. ABI is controlled by its president, director, and general counsel, Richard Berman ("Berman"). Berman is president and sole owner of Berman & Co., a Washington, DC-based for-profit lobbying, public relations, advertising, and government affairs firm. Berman & Co. is also located at located at 1090 Vermont Avenue, NW, Suite #800, in Washington DC. ABI's 2008 federal IRS Form 990 states, "Berman and Company, Inc. is the management company for American Beverage Institute, and it staffs and operates the day-to-day activities of the organization."[7] Berman's firm also shares its office space and equipment with ABI. ABI's 2008 Form 990 also states ABI has delegated control over management duties customarily performed or supervised by its officers, directors, trustees, and/or

[7] ABI 2008 Form 990, Schedule O, Supplemental Information to Form 990, Part VI, Section A, Line 3, p. 28.

key employees to Berman & Co.[8] ABI has no employees of its own.[9] Rather, all ABI work is performed by Berman & Co. employees who bill their time to ABI. As ABI's president, director, and general counsel, Berman examines Berman & Co. bills charged to ABI and decides whether or not to pay them. In 2008, ABI paid Berman & Co. more than $1.3 million—over 81 percent of ABI's total revenues in 2008—for management fees and operational expenses.[10]

According to its website, ABI is "a restaurant trade association[.]" In 1991, industry trade publication *Nation's Restaurant News* reported ABI's formation in 1991 was a collaborative effort by large restaurant chains to "downplay the dangers of drinking … to shore up on-premises alcohol sales."[11] According to the article, one of ABI's central goals was, "[t]o counter legislative efforts to curb drinking…."[12] ABI's members and funders are bars, restaurants, retailers, and others in the alcohol industry that have long-held concerns about legislation that could reduce alcohol consumption and decrease industry revenues. As such, ABI opposes legislation that might negatively impact alcohol sales.

ABI's mission has been described in several ways. In a letter to Philip Morris, Berman once described ABI's mission saying, "The American Beverage

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[8] ABI Form 990, Part VI, Section A, Governing Body and Management, line 3, p. 6.
[9] ABI 2008 Form 990, Part V: Statements Regarding Other IRS Filings and Tax Compliance, Questions 2a, p. 5, stating in relevant part, "Enter the number of employees reported on Form W-3." Answer: "0" (zero).
[10] ABI 2008 Form 990, Part I, Line 12, at p. 1, Total revenue, $1,678,484. Schedule L, Transactions With Interested Persons, Part IV, Business Transactions Involving Interested Persons, p. 25.
[11] "Chains unite to combat temperance movement," *Nation's Restaurant News*, Sept. 30, 1991.
[12] *Id.*

Institute [ ] opposes overly aggressive DWI laws…."[13] According to the *San Francisco Chronicle,* ABI "fights drunk-driving laws…."[14] ABI's website says, "ABI is the only organization dedicated to the protection of responsible on-premise consumption of adult beverages."[15] Irrespective of the rhetoric used to describe ABI, its actions speak for themselves. ABI opposes virtually all legislation that could negatively impact alcohol sales.

Currently, one of ABI's chief concerns are state legislative efforts intended to combat drunk driving recidivism by mandating ignition interlock devices for all convicted DWI offenders. According to its website, ABI uses its "Communication" and "Legislative Program[s]" to oppose interlock legislation at the state and federal level. ABI states it's "Communication[s]" are intended, in part, to ensure ABI's message "reaches policymakers and the public."[16] Through its "Legislative Program …ABI actively participates in legislative battles at the state and federal levels."[17]

A. ABI's Stated Tax-Exempt Purpose

ABI's 2008 Form 990 stated it was responsible for "development of public policy regarding alcohol consumption issues."[18] ABI also stated in 2008 it "Wrote and sent 15 press releases with related information on issues that **affect**

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[13] Richard Berman, Untitled letter to Barbara Trach at Philip Morris, Tobacco Legacy Library, 3 pp. September 5, 1995 (*available at* http://legacy.library.ucsf.edu/tid/ewk06c00).
[14] Chronicle Editorial, "Truth is elusive in soda battle," *San Francisco Chronicle,* Aug 10, 2003, (*available at* http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2003/08/10/ED256767.DTL).
[15] American Beverage Institute, About Us, website, http://abionline.org/aboutUs.cfm, last visited May 5, 2010.
[16] *Id.*
[17] *Id.*
[18] ABI 2008 Form 990, Part III, Line 1, p.2.

the debate about moderate and responsible drinking prior to driving."[19] (emphasis added). In addition, ABI's 2008 Form 990 reported it, "Ran a campaign to educate the public about ignition interlock technology. The campaign (which included newspaper and radio ads, and a new website called interlockfacts.com)…."[20] ABI listed $28,178 of Section 162(e) non-deductable lobbying and political expenditures on its Schedule C Form 990 federal tax return for 2008.[21]

B. ABI's Attempts to Influence New York Legislation

The following list presents an overview of the American Beverage Institute's attempts to influence legislation during the relevant time period.

1. On May 5, 2008 ABI likely paid the *New York Post* $19,941 to publish a full page advertisement related to Senator Fuschillo's bill requiring ignition interlock devices.[22]

2. On May 20, 2008 ABI likely paid the *New York Times* $50,148 to publish a full page advertisement related to Senator Fuschillo's bill requiring ignition interlock devices.[23]

3. On May 30, 2008 ABI caused an op-ed to be published in the *Syracuse Post-Standard* titled "Going Too Far" and referred to Senator Fuschillo's bill requiring interlock devices

4. On June 6, 2008 ABI caused to be published an op-ed in the *Buffalo News* that opined, "Proponents of the bill claim the measure will fight drunken driving. . . . [T]he problem has been reduced to a few individuals who severely abuse alcohol and still choose to drive.

[19] *Id.* at Line 4b.
[20] *Id.* at Line 4c.
[21] *Id.*, Part III-B, Line 2a, p. 17.
[22] Cost estimate obtained from a licensed third party media service.
[23] Cost estimate obtained from a licensed third party media service.

Mandating interlocks for first offenders doesn't focus on those dangerous criminals."

5. On January 23, 2009 ABI issued a press release denouncing what it termed "radical legislation" proposed by New York State Assemblyman Felix Ortiz related to interlock devices.

6. On May 5, 2009 ABI issued a press release urging the New York Legislature to reject New York Senate bill SB27.

7. On May 14, 2009 ABI caused to be published in *Newsday* an op-ed criticizing New York Senate bill SB27, saying it would be ineffective because, "drunk driving accidents ha[ve] been reduced to a few individuals who severely abuse alcohol and still choose to drive."

8. On September 10, 2009 ABI issued a press release urging the New York Legislature to amend New York Senate bill SB27.

Neither ABI, Berman & Co., nor Richard Berman registered as lobbyists or clients in New York State during the relevant time period of 2008 - 2009.

FAILURE TO REGISTER AND REPORT EXPENDITURES AS A LOBBYIST PURSUANT TO §1-e and §1-h OF THE LOBBY ACT

A. The New York State Lobbying Act

The Lobby Act requires registration by all entities engaged in lobbying activity:

> **§ 1-e. Statement of registration.** (a) (1) Every lobbyist shall annually file with the commission, on forms provided by the commission, a statement of registration for each calendar year…."

Only lobbyists are required to register under the Act. A "lobbyist" is defined under the §1-c (a) and provides, "The term **'lobbyist'** shall mean every person or organization retained, employed or designated by any client to engage in

lobbying…." The Act defines "lobbying" under §1-c (c) providing:

> The term **'lobbying'** or **'lobbying activities'** shall mean any attempt to influence:
>
> (i) the passage or defeat of any legislation by either house of the state legislature or approval or disapproval of any legislation by the governor;
>
> (ii) the adoption, issuance, rescission, modification or terms of a gubernatorial executive order;
>
> (iii) the adoption or rejection of any rule or regulation having the force and effect of law by a state agency;
>
> (iv) the outcome of any rate making proceeding by a state agency;
>
> (v) any determination:
>
> (A) by a public official, or by a person or entity working in cooperation with a public official related to a governmental procurement, or
>
> (B) by an officer or employee of the unified court system, or by a person or entity working in cooperation with an officer or employee of the unified court system related to a governmental procurement;
>
> (vi) the approval, disapproval, implementation or administration of tribal-state compacts, memoranda of understanding, or any other tribal-state agreements and any other state actions related to Class III gaming as provided in 25 U.S.C. § 2701, except to the extent designation of such activities as "lobbying" is barred by the federal Indian Gaming Regulatory Act, by a public official or by a person or entity working in cooperation with a public official in relation to such approval, disapproval, implementation or administration;
>
> (vii) the passage or defeat of any local law, ordinance, resolution, or regulation by any municipality or subdivision thereof;
>
> (viii) the adoption, issuance, rescission, modification or terms of an executive order issued by the chief executive officer of a municipality;

(ix) the adoption or rejection of any rule, regulation, or resolution having the force and effect of a local law, ordinance, resolution, or regulation; or

(x) the outcome of any rate making proceeding by any municipality or subdivision thereof.

The Commission is the regulatory body charged with determining if registration is or was required by the aforementioned entities. The Commission has not issued any opinions or regulations since its inception in September of 2007 thru the date of this complaint relative to the definition of lobbying and more specifically whether advertisements, such as those placed by the American Beverage Institute, would require registration and the concomitant reporting of expenses. However, the Commission's predecessor agency, the Temporary Commission on Lobbying (TCL) has issued opinions on the matter and the Commission has specifically stated it will follow any precedence established by the TCL unless and until specifically superseded by Commission opinions. The TCL has issued several opinions, 79-1, 84-1, 97-1, 00-2 and 00-3 (attached hereto) that provide clear guidance and a means to determine if any individual advertisement would necessitate registration and/or reporting as a lobbying expense.

Opinion 79-1 holds that the Commission will conform to Federal case law, *United States v. Harriss*, 347 U.S. 612 (1954), and consider any contacts with legislators, the Governor or regulatory decision makers to be lobbying if the contact is direct and further that direct contact will be interpreted to include

written or printed communications directed to the decision maker. In opinion 97-1 the Commission extended the definition of lobbying to include ***any*** attempt to influence the defined activities that constitute lobbying "irrespective of how contact is made". The Commission specifically included, "A company's use of computer software and the Internet" as activities that would fall within the Act's meaning of direct contact. In opinion 00-3 the Commission completed its analysis of what would constitute a direct contact under *Harriss* requiring registration holding that an advertisement urging listeners to contact a decision maker constitutes lobbying even though it never specifically lists or identifies the bill numbers of pending legislation. The Commission stated in plain language a three-part test to determine if activity constitutes lobbying. Lobbying under New York law, occurs "when the activity in question relates to pending legislation, a position is stated, and the activity is an attempt to influence decision makers". Op-00-3

Commission opinions 84-1 and 00-2 make clear that activity that does not meet the three part test set forth in opinion 00-3 could still be considered a lobbying expense that would need to be reported if the expense is part of an entity's lobbying effort. Any expenditure of a registered entity that is used in any fashion to assist the lobbying effort would be a lobbying expense requiring its inclusion on the entity's reports.

The extent to which the Commission's opinions can require registration and reporting of advocacy that does not involve direct face to face

communications with legislators has been challenged by the New York Civil Liberties Union in the federal case of *NYCLU v. Grandeau*, 528 F.3d 122 (2d Cir. 2008). The suit was filed in 2003 alleging the Commission could not require the reporting of advertising as a lobbying expense on First Amendment grounds. Summary judgment was awarded to the Commission in a 2008 ruling that the NYCLU's First Amendment challenge was not, "as a prudential matter, ripe for judicial review." *NYCLU v. Grandeau*, 528 F.3d 122 (2d Cir. 2008).

The Commission's published guidelines to the Act have further stated expenses related to a lobbying effort are reportable and is part of the amount necessary to determine if the threshold has been met necessitating registration. The guidelines read as follows:

> *Reportable expenses shall mean any expenditure incurred by or reimbursed to the lobbyist for the purpose of lobbying. Reportable expenses include, but are not limited to the following: advertising, telephone, electronic advocacy, food, beverages, tickets, entertainment, parties, receptions or similar events, advocacy rallies, consultant services, expenses for non-lobbying support staff, and courier services when said expenses are part of a lobbying effort.*

B. ABI's May 2008 "Mug shot" advertisement

Two similar ABI-sponsored advertisements ran in the *New York Post* and the *New York Times* and both were available to be seen by New York State legislators along with the Governor. The advertisements state that ignition interlocks are a great tool to prevent hard-core drunk drivers from driving but should not be placed in every car. During the relevant timeframe, legislation

was pending before the New York State Senate sponsored by Senator Fuschillo to require anyone convicted of DWI to install an ignition interlock device. With legislation pending to require ignition interlock devices for all DWI convictions, the advertisements clearly relate to the subject of the legislation. The advertisements state a position that ignition interlocks are a bad idea for all but "hard-core" drunk drivers and further states that "activists now want to put one in every car" and as such can be viewed as attempting to influence decision makers by advocating for the position that ignition interlock devices under the proposed legislation will be required in too broad a range of applications and by extension should be defeated. The May 5, 2008 full-page advertisement in the *New York Post* cost $19,941 to publish.[24] The May 20, 2008 full-page advertisement in the *New York Times* cost $50,148 to publish.[25]

Since these advertisements cost more than $5000, if the Commission were to determine the purchase and publication of the advertisements met the definition of lobbying, ABI would be in violation of the Lobby Act for failure to register and report their lobbying activity.

Even if the Commission determined the advertisements do not constitute lobbying, the subsequent press releases advocating for defeat and/or amendment of a specific pending bill are clearly lobbying and as such, all expenses related to that lobbying effort, including the cost of the afore referenced advertisements would require registration and reporting.

[24] Cost estimate obtained from a licensed third party media service.
[25] Cost estimate obtained from a licensed third party media service.

CONCLUSION

There is reasonable cause to believe based on the record evidence that ABI has failed to register as a lobbyist and report all of its expenses incurred as part of its lobbying efforts for the years 2008 and 2009 in violation of §1-e and §1-h of the Lobby Act. HSUS and MADD urge the Commission to investigate the relevant facts. If the Commission determines violations have occurred, it should take any and all steps necessary to safeguard and protect the public's interest. Section 1-a expressly states the statute's purpose, namely, "responsible democratic government requires that the fullest opportunity to be afforded to the people . . . to persevere and maintain the integrity of the governmental decision-making process in this state[.]"

Respectfully Submitted,

David Grandeau, Esq.
Counsel for Mothers Against Drunk Driving &
The Humane Society of the United States

Exhibit A

Ignition interlocks A good idea for:

Mug shot of Lindsay Lohan, arrested for multiple DUIs.

But a bad idea for us:

Ignition interlocks, or in-car breathalyzers, are a great tool for getting hard-core drunk drivers off our roads. However, activists now want to put one in every car in America. That means the end of moderate and responsible drinking prior to driving…No more champagne toasts at weddings, no more wine with dinner, no more beers at a ballgame.

Let's stop drunk driving without eliminating our traditions.

Drink Responsibly.
Drive **Responsibly.**

Visit InterLockFacts.com

Temporary Commission on Lobbying Opinions:

79-1, 84-1, 97-1, 00-2, 00-3

NEW YORK
TEMPORARY STATE COMMISSION
ON REGULATION OF LOBBYING

OPINION NO. 21 (79-1)

FACTS

The Committee on Public Utility Law of the New York State Bar Association posed the following as the first of three questions:

"May contacts other than direct contacts with legislators, the Governor, or regulatory agency decision makers be deemed 'lobbying' or 'lobbying activities' under Section 3(b) of the Act?"

The Committee believes such contacts are not lobbying, citing as the prime support for its opinion U.S. vs. Harriss, 347 U.S. 612 (1953), and later cases substantially relying on Harriss. The Committee therefore claims only certain direct contact activities come under the State's Regulation of Lobbying Act. These would include "buttonholing," or an equivalent, of a governmental decision maker. The Committee's brief relies heavily on the First Amendment guarantees of "unrestricted competition of ideas in the intellectual marketplace," and claims that the phrase "attempts to influence," under Section 3(b) of the Act, is "vague and unqualified."

ISSUE

The issues appear to narrow themselves to what constitutes "direct contact," and who may be included in the class of "decision makers."

DISCUSSION

Federal case law is clear when it speaks of a requirement that, to constitute lobbying, the action "must have been through direct communication with members of Congress." (U.S. vs. Harriss, 347 U.S. 612 and several later cases.) Relative to what constitutes direct communications, the question arises as to whether physical presence is necessary. In the Harriss case, Justice Douglas, in dissent, sees the majority as "construing the law narrowly to 'buttonhole' Congressmen...". However, the majority is nowhere that specific in suggesting the necessity of a physical presence. In fact, the majority (at p. 620) acknowledges the intent of Congress in passing the Federal Lobbying Act to cover disclosure of "direct pressures exerted by lobbyists themselves or through their hirelings or through an artificially stimulated letter campaign." (Emphasis added.) Thus, direct physical presence or "buttonholing" would not appear to be necessary to constitute lobbying.

Further, it is a well-accepted practice, due to the complexities of modern government and the business world, for decision makers to delegate decision-making power to specified subordinates and to rely heavily on the informed recommendations of subordinates in the making of decisions. Today's busy legislator or executive cannot begin to become intimately familiar with all the information necessary for decision making in every instance, such that reliable staff are essential to the process. Lobbyists have long recognized this in focusing much of their effort to influence decision-making on key staff. Clearly, then, this type of lobbying must be considered "direct

contact" under the Harriss and later cases.

On the question of First Amendment freedoms discussed by the Committee in their brief, the Supreme Court is quite clear in the Harriss opinion (p. 625):

"Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal. This is the evil which the Lobbying Act was designed to help prevent."

"Toward that end, Congress has not sought to prohibit these pressures. It has merely provided for a modicum of information from those who for hire attempt to influence legislation or who collect or spend funds for that purpose. It wants only to know who is being hired, who is putting up the money, and how much..."

OPINION

To conform with Federal case law, to constitute "lobbying activity" under the New York State Regulation of Lobbying Act, Section 3(b), contacts with legislators, the Governor or regulatory agency decision makers must be direct. However, the term "direct" must be interpreted to include written or printed communications directed to the decision maker. Further, "direct contact" would include contacts with those staff members of the decision maker to whom authority to decide had been delegated and to those staff members upon whom the decision maker relies for informed recommendations on matters under consideration. To conclude otherwise would afford lobbyists, who might wish to use same, a major loophole through which they could accomplish their goal of attempting to influence legislation (through key staff) without having to register or report.

APPROVED BY COMMISSION: FEBRUARY 8, 1979

CONCURRING: CHAIRMAN S. STANLEY KREUTZER, VICE CHAIRMAN OWEN McGIVERN, MARGARET C. ANDRONACO, and D. CLINTON DOMINICK.

/S/

S. STANLEY KREUTZER
Chairman

NEW YORK
TEMPORARY STATE COMMISSION
ON LOBBYING

OPINION NO. 38 (84-1)

FACTS

This matter comes before our Commission as a consequence of the various parties, receptions, and events which are frequently hosted by registered lobbyists and their clients to which government and state officials customarily are invited.

At the time the party, reception, or event takes place, there is pending legislation, or a proposed rule or regulation having the force and effect of law, in which the lobbyist or the client is interested, and concerning which some or all of the invitees may have some input by virtue of their official capacities, whether in the legislative or executive branch of government.

ISSUE

The question before us is whether the costs of such parties, receptions, and events are reportable as a lobbying expense by the registered lobbyist and the client under the Lobbying Act. (Lobbying Act, Section 8(a)(1) and (2); *Guidelines*, Section VII(C)).

OPINION

We are of the opinion that, absent special circumstances, the funding of parties, receptions, and events, which are hosted by registered lobbyists and clients with a special interest in pending legislation or in a proposed rule or regulation, constitutes a lobbying expense within the statute.

Section 3(c) of the Lobbying Act provides as follows:

"The term 'lobbying' or 'lobbying activities' shall mean any attempt to influence the passage or defeat of any legislation by either house of the legislature or the approval or disapproval of any legislation by the governor, or the adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate-making proceeding by a state agency."

We consider that such events are part of a lobbying effort which ordinarily would not take place unless there was at the time pending legislation or a proposed rule or regulation in which the sponsor or sponsors of the event were interested.

We hold, therefore, that disclosure is required of all expenses in connection therewith, when a registered lobbyist or the client is a sponsor or participating sponsor of an event, from which it may reasonably be assumed that influencing or advancing the interest of the lobbyist or the client with respect to pending legislation or a proposed rule or regulation was an objective.

In our opinion, such event is another method by which the registered lobbyist or the client seeks to attract the attention of a public official in order to promote or facilitate the lobbying effort and is reportable within the statute and our Guidelines.

APPROVED BY COMMISSION: MARCH 7, 1984

CONCURRING: RICHARD A. BERNSTEIN, S. STANLEY KREUTZER, ARTHUR A. LORENZO, AND NATHANIEL T. HELMAN.

/S/

RICHARD A. BERNSTEIN
Chairman

NEW YORK
TEMPORARY STATE COMMISSION
ON LOBBYING

OPINION NO. 39 (97-1)

FACTS

This matter comes before our Commission as a result of a company inquiring about whether they qualify as a "lobbyist" as defined in the Lobbying Act and thus should register with the Commission. The company in question advertises themselves as lobbyists and receives a fee for handling all of the grassroots lobbying efforts for its clients. Although this company has exclusive control over the mail fulfillment functions for it's clients, they claim they do not advise, review, edit, or write text on behalf of their clients.

ISSUE

The question presented is whether a company hired as a consultant is required to register with the Commission when said company handles all of the mail fulfillment functions, but does not advise, review, edit or write text for the grassroots lobbying message?

OPINION

A consultant can and does engage in lobbying activity when said consultant has control over message delivery, and that control results in a direct contact with decision makers. A direct contact includes face to face meetings with legislators, written and printed communications, telephone contact, e-mail or any other electronic means of communication. (Opinion 21).

A lobbyist cannot be allowed to avoid registering with the Commission simply by changing how contact with legislators is made. Any attempt by a lobbyist to influence the passage or defeat of any legislation by either house of the Legislature or the approval or disapproval of any legislation by the Governor, or the adoption or rejection of any rule or regulation having the force and effect of law or the outcome of any rate making proceeding by a state agency is lobbying irrespective of how contact is made (Lobbying Act, Section 3(a)).

A company's use of computer software and the Internet would clearly fall within the Act's meaning of a direct contact. However, direct contact without more may not constitute a lobbying activity.

A person, group or organization that merely processes a client's mail and or delivery functions would not be engaged in a lobbying activity, and therefore, would not have to file a statement of registration with the Commission. For example, if a delivery service were hired by a client to deliver a message to a legislator that advocated a certain position on pending legislation, that delivery company would not be engaging in a lobbying activity. Similarly, it is well established that newspapers and other periodicals and radio and television stations are not included under the definition of lobbying when they publish paid advertisements. (Lobbying Act, Section 3 (c) (2)). However, if a person, group or organization was hired by the same client to deliver the same message, but this time took any other action beyond the mere delivery itself, that person, group

or organization would be engaging in a lobbying activity.

Lobbying activity requires some participation in both message content and delivery. A company that has complete control over mailing in furtherance of a grassroots lobbying effort would be a lobbyist only if that company participated in the formation of the message itself or was given some control over reviewing or editing the client's message.

This company does not meet the Lobbying Act's definition of a lobbyist based on the facts that were presented to the Commission. However, this company's actions in advertising their services as a lobbyist is troubling. If this company does not truly engage in lobbying activity and does not wish to register as a lobbyist, it should refrain from holding itself out to the public as a lobbyist.

APPROVED BY COMMISSION: JUNE 18, 1997

CONCURRING: STEWART C. WAGNER, CHAIR; MILTON MOLLEN, VICE CHAIR; MORRIS H. KLEIN, ALBERT S. CALLAN AND BARTLEY F. LIVOLSI.

/S/

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STEWART C. WAGNER
Chairman

NEW YORK
TEMPORARY STATE COMMISSION
ON LOBBYING

OPINION NO. 43 (00-2)

FACTS

A registered client/lobbyist conducts grassroots advocacy programs. In pursuing these programs they also encourage employees of the client/lobbyist to become part of the grassroots program and attend events at the Capitol and lobby their own legislators as part of the overall lobbying effort.

ISSUES

(1) Does the registered client/lobbyist administration of the grassroots advocacy program constitute lobbying?

(2) What compensation and expenses must be reported by the client/lobbyist for such grassroots advocacy program when in fact employees of the client/lobbyist take part in this grassroots program?

(3) Is the client/lobbyist required to register every employee that lobbies on its behalf even if the employee does not independently incur $2,000 in reportable compensation and/or expenses during the calendar year?

DECISION

The grassroots advocacy program does constitute lobbying if in fact it falls within the definition of the Lobbying Act. That is; is the activity meant to influence the State Legislature and/or Governor with regard to pending legislation. If it meets that criteria, then any compensation and expenses paid by the client/lobbyist must be reported to the New York Temporary State Commission on Lobbying. Such activity includes the participation of employees of the client/lobbyist in the grassroots program, therefore, any compensation and/or expenses paid on behalf of the employees attending or taking part in the grassroots program must be included as expenses on the Client/Lobbyist Bimonthly and Semi-Annual Reports. However, the Act does not require the client/lobbyist to register every employee that lobbies on its behalf.

If the employee does not independently incur $2,000 in reportable compensation and/or expenses, the client/lobbyist need not register these employees as lobbyists. If the client/lobbyist does not choose to list it's employees as additional lobbyists, then they must report all expenses of the employee taking part in the grassroots program, including lodging and travel as part of their overall lobbying expenses.

APPROVED BY COMMISSION: JUNE 21, 2000

CONCURRING: JOSEPH A. DUNN, CHAIR; ALBERT S. CALLAN, VICE CHAIR; BARTLEY F.

LIVOLSI, MILTON MOLLEN, AND STEWART C. WAGNER.

/S/

JOSEPH A. DUNN
Chairman

NEW YORK
TEMPORARY STATE COMMISSION
ON LOBBYING

OPINION NO. 44 (00-3)

FACTS

This matter comes before the Commission as a result of a company inquiry about whether it qualifies as a "lobbyist" as defined in the Lobbying Act and thus should register with the Commission. The company in question was responsible for the playing of radio advertisements containing the following phrases: "Let Governor Pataki know" and "Tell Governor Pataki to". The advertisements addressed the issue of an "Indian gambling casino proposed by Governor Pataki without the legal approval of the State Legislature." At the time the advertisement was aired, there existed pending legislation (A.06461 and S.01391) requiring state legislative consent to any compact made by New York State with an Indian tribe authorizing commercialized casino gambling activities, along with other pending legislation addressing casinos, (see A.07543, S.00960, S.01389, S.07907). The company claims the advertisement would not constitute a "direct contact or lobbying within the meaning of the Act."

ISSUE

The question presented is whether an advertisement urging listeners to contact the governor constitutes lobbying even though it never specifically lists or identifies the bill numbers of pending legislation.

OPINION

Advertisements containing language as set forth above are clearly an "attempt to influence the approval or disapproval of any legislation by the governor" and as such if the cost thereof exceeds $2000 requires registration and reporting under the Act. (See Opinion #3, (78-3) and Opinion #21, (79-1)).

The company's reliance on the omission of a bill number to avoid the requirement of disclosure is misplaced; it is the clear attempt to stimulate a grassroots lobbying effort in regard to pending legislation that controls the question.

Lobbying, under New York law, occurs when the activity in question relates to pending legislation, a position is stated, and the activity is an attempt to influence decision makers. (See Opinion #38, (84-1)). The facts in question clearly meet this test. Direct contact is not required (See Opinion #21 above).

APPROVED BY COMMISSION: AUGUST 21, 2000

CONCURRING: JOSEPH A. DUNN, CHAIR; ALBERT S. CALLAN, VICE CHAIR; BARTLEY F. LIVOLSI, MILTON MOLLEN, AND STEWART C. WAGNER.

/S/

JOSEPH A. DUNN
Chairman