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RE: Massachusetts Lobbying Law: New Requirements: Compliance

Introduction

In 2009, Massachusetts enacted a substantial series of amendments to its lobbying registration and disclosure laws, as well as changes to the state's ethics and campaign finance laws. The changes in the lobbying laws have the effect of sweeping some activities into the category of "lobbying" which previously may not have been considered lobbying. The newly amended laws are effective January 1, 2010. You should be aware of the parameters of the statute and consider its effects on your activities.

Following is an overview of the requirements of the lobbying laws as amended. Please call me to discuss specific application of these requirements to your situation. This memo is for your educational use and is not a legal opinion or legal advice. Counsel should be consulted if you have any questions.

Lobbying

The definitions of "lobbying" and "lobbyist" have been changed resulting in an expansion of the law. This expansion triggers the requirement to register and report as a lobbyist by many who never considered that they were lobbying. The amendments also changed the requirements for the semi-annual financial and issue disclosure by lobbyists and their employers.

The amended law has five characteristics that frame lobbying and define a “lobbyist”–

- compensation of the person for the activity, including at least one communication;
- communication by the person to a government official about legislation, rule, regulation, standard, rate, policy or procurement;
- influencing the outcome of a decision regarding legislation, or the outcome regarding a rule, rate, standard, policy or procurement decision;
- not incidental per the statute to activities of the person; and
- exempt activity under specific provisions or definitions in the statute.

There are nuances to each of these characteristics, but the core goal of the amended law is to cast a broad net and capture lobbying activity that may have escaped disclosure in the past.

To expand on these characteristics, “compensation” is not confined to paying a person in a specific or explicit contractual way for lobbying, and the statute even uses the word “reward” which further expands the idea of how someone could be compensated for lobbying. It means if the business or professional activity of that person includes – specifically or generally – communications to influence government decision-making, then the person is being compensated for lobbying. This compensation factor is important in the context of what is “incidental” lobbying activity, which will be discussed later.

“Communication” means activities by a person interacting directly with a government official and asking for a specific result about a legislative bill or resolution, a rule, a regulation, a standard, a rate, a policy, or procurement of goods and services. The content and purpose of a communication is the “attempt to influence” the government official. In addition, the amended law includes, under the umbrella of “communication,” all the time and costs associated with the planning, research and strategizing that went into creating the communication and how it is delivered. Again, these terms become important in the context of how “incidental” lobbying activity calculated and for the semi-annual disclosure filings. Finally, the lobbying law also includes communications to municipal officials when such lobbying is in concert with lobbying at the state level. Communications in the law also include attempts to influence quasi-state “authorities,” such as Massachusetts Port Authority.

The activity must be more than “incidental” to the person’s work. To be considered incidental, the lobbying activity needs to be outside the normal activities or responsibilities of the person, but connected to the business or profession of the person. However, even if such activity is incidental it can still be brought under the statute, requiring lobbying registration and disclosure, when it exceeds the threshold in the “incidental” provision of the law that creates the exemption. This statutory “incidental” threshold is measured in hours and compensation/reward related to such activity. If lobbying by the person, which includes the total time and cost of the communication (planning, strategizing, research, and the communication event), is less than 25 hours and less than \$2500 in compensation/reward between January 1 to June 30, or between July 1 to December 31, then the “incidental” exemption applies. Note that both provisions must be met to satisfy the standard thus gain the incidental exemption.

Keep in mind, that a person is not eligible for exemption if the person’s business or professional job includes specifically or generally activities to influence government officials; in that case the person must register and report as a lobbyist regardless of the time or compensation/reward. In other words, the incidental exemption is available to a person whose actions to influence a government official are in the context of a “one of a kind” event and who does not exceed the hours and compensation threshold.

The newly amended law continues a number of exemptions that existed previously. These are explicit exemptions for certain types of communications in certain situations, often with very narrow parameters. They apply in very specific situations and need to be considered carefully on a case-by-case basis. (For your convenience, there is a list at the end of this memo that summaries situations that are either exempt specifically, or are excluded by virtue of a specific definition.)

Once a person becomes a lobbyist under the terms of the law, that person has very specific responsibilities and legal restrictions on his or her political activity and personal conduct. It is vital that a new lobbyist become familiar with those requirements and ethical responsibilities because failure to adhere to them carries substantial personal jeopardy with civil and criminal penalties, including imprisonment and fines of up to \$10,000.

Reporting and Additional Provisions

In addition to the above, the recent amendments also changed the provisions and scope of the semi-annual disclosure required of each lobbyist and the lobbyist's client/employer. The newly amended laws continue the requirements for semi-annual reports, including disclosure of lobbying salaries, issues lobbied, and costs by the individual lobbyist and by the entity compensating the lobbyist. With the amendments, the statute is more explicit. In calculating and reporting the "cost" of lobbying, the semi-annual disclosure filing must include the direct and indirect (support, overhead in detail) costs for the entire lobbying effort connected to the communication. If an action or expense is related to the preparation, research, planning, strategy and communication itself, its costs are to be included in the semi-annual disclosure. Also changed is how the "issues" that are lobbied are reported. The semi-annual report needs to include not only the identification of the bill, rule, rate, policy, or procurement as previously required, but also the position that was taken on it. This "position" item is new.

Finally, the newly amended law requires a lobbyist to take a course every year to review the requirements and mandates of the lobbying laws in Massachusetts, including the legal and ethical boundaries of a person who is a lobbyist. This must be taken before a person can register as a lobbyist. This course is on the Secretary of State's website and currently requires a reading of the amended laws covering lobbying registration and reporting, ethical requirements, gift limitations, political campaign contribution limitations, and bribery provisions. There are civil and criminal penalties for violation of these laws, including fines of up to \$10,000. In other words, the status of being a lobbyist subjects a person to a set of strict behavior under the law with substantial penalties.

Application

These new lobbying laws will affect everyone who hires a lobbyist or engages in activities to affect public policy in Massachusetts. Several steps need to be taken to determine whether, and to what extent, the newly amended laws apply.

The first step should be to identify:

- What activities are undertaken to affect legislation, rules, policy or procurement, by you, your business, and others in your organization?
- What are the issues addressed or to be addressed?

- Where are the activities are focused (Legislature, agency, municipality, etc.)?
- Who is undertaking activities to affect legislation, rules, rates, policy, or procurement and what is that person's business or professional responsibilities?

The next step is to examine this information in light of the statutory provisions, definitions, and the reach of the law:

- Does the person or people doing the activity/communication have explicit or implicit responsibility for such actions and therefore may be considered a "lobbyist(s)" under the law?
- Are the people who are (or will be) doing activities resulting in a "communication" exempt because such actions are "incidental" to them?
- Are the specific activities exempt per definitions in the statute, and therefore will not be considered in determining whether a person is a "lobbyist"?
- What are the costs of the activities to the person and to the employer/client, and who else in an organization participates in the research, planning, and strategizing?
- How much time does, or will, the person spend on activities to influence government decisions?
- How much time and expense is committed by others to the activities of the person who is lobbying?

The final step, assuming someone is a "lobbyist," is to comply with the law and create mechanisms to collect the data necessary to file the registration and to the file semi-annual disclosure reports.

- Immediately register the person or persons who qualify as a "lobbyist" under the act.
- Register a person at the point during the calendar year when his or her activities trigger registration under the law, or when a person is newly hired for lobbying.
- Collect data about how much time and associated costs are spent on "lobbying," so that information exists on a going forward basis to complete the semi-annual disclosure forms.

- Collect data on the specific issues (legislation, rule, policy, procurement) lobbied, including the position taken on each issue, which is necessary to complete the initial registration and later to file the semi-annual disclosure reports.
- Collect information about the lobbyist's personal political contributions to state, county, or local candidates for public office, which is necessary for the semi-annual disclosure filings. (Federal contributions are not included.)
- File the semi-annual disclosure forms, for both the lobbyist and for the employer/client, which together include compensation, political contributions, expenses, issue(s), and position taken on the issue(s).

Who and When

While this memo is focused on who is a lobbyist and what lobbying is, the statutory responsibilities for registration and reporting extends to the person/entity providing the compensation or reward to the person who lobbies. Both the lobbyist and the person/entity providing compensation/reward to the lobbyists have specific responsibilities, and there are deadlines for compliance applicable to both.

Registering a person who has lobbying responsibilities and who is expected to lobby in a calendar year takes place between December 1 and December 15 proceeding the next calendar year. Registration is for a one year period. Both the person and the person/entity providing compensation/reward must file with the Massachusetts Secretary of State. Registering a person who is hired for lobbying during the year, or who trips the lobbying definition (e.g. who is not exempted by the "incidental" threshold or other definitional exclusion) during the year, must take place within ten days of the "hire" or immediately when activities put a person in the category of a lobbyist. Again, both the lobbyist and the person/entity providing compensation have disclosure reporting responsibilities on a semi-annual basis during the calendar year with the Massachusetts Secretary of State's Office.

Resources

We anticipate there will be a number of situations requiring specific analysis to determine whether the statute applies to a person, and when filings are due and what they contain. The Massachusetts Secretary of State's website has some information. In addition, we can assist you in sorting through responsibilities under the newly amended law. Please give me a call if you have any questions.

Specific Exemptions

The lobbying laws in Massachusetts have always contained a number of exemptions for what is not a lobbying activity. These exemptions are provided in the context of lobbying on legislation before the Legislature, and for lobbying on the executive side of government for legislation, rules, regulations, rates, standards, policy and procurement. (The lobbying laws do not extend to activity before the judicial branch of state government.)

Caution should be exercised, as each exemption has discrete parameters. Therefore, close review of the actual statutory language is needed to make sure that an exemption is applicable in a particular situation. Obtaining opinion of counsel is recommended.

Following is a list of the current exemptions as defined by statute pertaining on the one hand to the Legislature and on the other hand to the executive side of government. These are paraphrased here. Therefore, please call us to examine a specific situation that implicates one of these.

Legislative Branch –Exemptions

- Information provided in writing in response to a written request from an employee of the legislative branch of government for technical advice or factual information regarding legislation.
- Lobbying of municipal officials is not covered by the state law, except lobbying at the municipal level that is done in common purpose with lobbying of the legislation before the Legislature.

Executive Branch –Exemptions

- An act made in the course of participation in an advisory committee or task force.
- A request for a meeting, absent any attempt to influence a decision.
- Information provided in writing in response to a written request for specific information by an officer or employee of the executive branch or authority.
- Lobbying of municipal officials is not covered by the state law, except for lobbying at the municipal level done in common purpose with lobbying of legislation, a rule, a regulation, a standard, a rate at the state level.
- An act required by a judicial order or otherwise compelled by a law, regulation or other action of the executive branch or authority.
- A communication to an employee or officer of the executive branch, or an authority, about a civil or criminal judicial proceeding, investigation or inquiry; or communication regarding any filing or proceeding required by law to be confidential, provided the office or the authority is charged with the responsibility for such proceeding, inquiry, investigation, or filing.
- An act made in compliance with an adjudicatory or evidentiary proceeding under the state administrations procedure act (Chapter 30A); or a similar proceeding conducted by any department, board, commission, or official not under the administrative procedure act.
- An act on behalf of an individual regarding the individual's benefits, employment or other personal matters.
- A response to a request for proposals or similar invitation for information relevant to a contract.
- Participation in a bid conference.
- An appeal or request for review of a procurement decision.
- Communications to influence a decision concerning policy or procurement are limited to specific "covered executive officials" – basically senior people in the executive branch. (This is a very technical and specific provision, and any situation in this area needs to be carefully reviewed.)

- Adjudication or determination of any rights, duties, or obligations of a person made on a case by case basis, including the issuance or denial of a license, permit, or certification – or disciplinary action or investigation involving a person.
- Procurement “communications” under the law applies only where the item or expenditure has a value greater than twenty-five thousand dollars.