**Comments of the Pennsylvania Association for Government Relations**

**on**

**The Final-Form Regulations of Department of State Regulation #16-40 (IRRC #2665)**

**Lobbying Disclosure**

The Pennsylvania Association for Government Relations (PAGR) respectfully submits for your consideration the following comments on the final-form regulations delivered to the Independent Regulatory Review Commission (the "Commission") on September 18, 2008. By way of reference, these comments are a compilation of the comments that PAGR received from its membership. The Mission of PAGR is to promote the purpose and effectiveness of the lobbying profession consistent with the public interest. Further, association members encourage high standards of personal and professional conduct among all lobbyists.

## Standard and Scope of Review

PAGR's comments have been drafted in accordance with the standard of review enumerated in Section 5.2 of the Regulatory Review Act (hereinafter "RRA"), Act of June 25, 1982, P.L. 1227, No. 148, *as amended*, 71 P.S. §745.5b, which states in pertinent part:

> (a) In determining whether a…final-form…regulation is in the public interest, the commission shall, first and foremost, determine *whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intention of the General Assembly in the enactment of the statute upon which the regulation is based.* In making its determination, the commission shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General.
>
> (b) Upon a finding that the regulation is consistent with the statutory authority of the agency and with the intention of the General Assembly in the enactment of the statute upon which the regulation is based, the commission shall consider the following in determining whether the regulation is in the *public interest*:
>
> (1) *Economic or fiscal impacts of the regulation*, which include the following:
>
> (i) *Direct and indirect costs* to the…private sector.

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(iii) The nature of required reports, forms or other paperwork and the estimated cost of their preparation by individuals, businesses and organizations in the public and private sectors.

(iv) The nature and *estimated cost* of legal, consulting or accounting services which the public or private sector may incur.

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(3) The clarity, feasibility and reasonableness of the regulation to be determined by considering the following:

(i) Possible conflict with or duplication of statutes or existing regulations.

*(ii) Clarity and lack of ambiguity.*

(iii) Need for the regulation.

(iv) Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors. (Emphasis added.)

The Statutory Construction Act, 1 Pa. C.S. §§1501-1991 (hereinafter the "SCA") states that where the intent of the General Assembly is clear from the plain meaning of a statute, statutory interpretation need not be pursued. 1 Pa. C.S. §1921(b); *LTV Steel Co., Inc. v. Workers' Compensation Appeal Board (Mozena)*, 562 Pa. 205, 754 A.2d 666, 674 (2000). Only when the language of the statute is ambiguous does statutory construction become necessary. 1 Pa. C.S. §1921(c); *Oberneder v. Link Computer Corp.*, 548 Pa. 201, 696 A.2d 148, 150 (1997). In addition, penal statutes are to be strictly construed. 1 Pa. C.S. §1928(b)(1); *Commonwealth v. Booth*, 564 Pa. 228, 766 A.2d 843, 846 (2001). "[S]trict construction does not require that the words of a penal statute be given their narrowest possible meaning or that legislative intent be disregarded." *Booth*, 766 A.2d at 846. "It does mean, however, that where ambiguity exists in the language of a penal statute, such language should be interpreted in the light most favorable to the accused." *Id.* It is also worth noting that the aforementioned rules of statutory construction are equally applicable when construing regulations. *Presock v. Department of Military and Veterans Affairs*, 855 A.2d 928 (Pa. Cmwlth. 2004).

Section 1309-A(e) of Act 134, 65 Pa. C.S. §1309-A(e), provides for criminal penalties for intentional violations of Act 134 made by principals, lobbyists and lobbying firms. Accordingly, where there is ambiguity in Act 134's language, that language is to be interpreted in the light most favorable to the regulated community, namely, principals, lobbyists and lobbying firms.

**CHAPTER 51 -- GENERAL PROVISIONS**

**Section 51.1 Definitions**

1. **The payment of economic consideration to a lobbyist or lobbying firm by a principal without that lobbyist or lobbying firm engaging in direct or indirect communication does not constitute an "effort to influence legislative action or administrative action" and thus is not "lobbying" as that term is defined by Act 134; therefore such a regulation fails to conform to the plain language of Act 134 and is in violation of Section 5.2(a) of the RRA.**

The definition of "lobbying" in Section 1303-A of Act 134, 65 Pa. C.S. §1303-A, constitutes "*an effort to influence legislative action or administrative action in this Commonwealth*" which includes[1] "*direct or indirect communications*," "office expenses" and "providing any gift, hospitality, transportation or lodging to a State official or employee for the purpose of advancing the interest of a lobbyist or principal." (Emphasis added.)

"Direct communications" is defined in Section 1303-A of Act 134 as "[a]n *effort*, whether written, oral or by any other medium, made by a lobbyist or principal, *directed* to a State official or employee, the purpose or foreseeable effect of which is to influence legislative action or administrative action. The term may include personnel expenses or office expenses." (Emphasis added.)

"Indirect communications" is defined in Section 1303-A of Act 134 to include "[a]n *effort*, whether written, oral or by other medium, *to encourage others*, including the general public, *to take action*, the purpose or foreseeable effect of which is to directly influence legislative action or administrative action…(Emphasis added.)

The proposed regulations promulgated by the Lobbying Disclosure Regulations Committee (hereinafter "Committee") defined "effort to influence legislative action or administrative action" to mean:

> 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:

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[1] The use of the term "includes" in a statute has been interpreted by the Commonwealth Court as a term of limitation, rather than a term of enlargement by the courts. *Velocity Express v. Pennsylvania Human Relations Commission*, 853 A.2d 1182, 1186 (Pa. Cmwlth. 2004). Here, "includes" precedes a specific list, *i.e.*, indirect and direct communications, office expenses and providing any gift, hospitality, transportation or lodging to a State official or employee, for the purpose of advancing the interest of a lobbyist or principal. PAGR asserts that the definition of the term "lobbying" in Act 134 is limited to that exclusive list of activities and nothing else.

> *(i) 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.* (Emphasis added.)

In its Comments dated March 20, 2008, the Commission found that Paragraph (i) of the definition of "effort to influence legislative action or administrative action" (hereinafter "Paragraph (i)") went beyond the scope of the plain language of Act 134. In addressing Paragraph (i), the Commission stated as follows:

> Regarding Paragraph (i), we agree that a principal could prevent an individual lobbyist or lobbying firm from presenting opposing views by hiring or retaining the lobbyist or lobbying firm. However, the Committee needs to explain its statutory authority to require registration and reporting when the 'lobbyist or lobbying firm does not make direct or indirect communications or take any other action' particularly in regard to the Act's definitions of 'lobbying,' 'direct communication' and 'indirect communication,' which all require 'an effort…to influence legislative or administrative action.' If the Committee believes it has the authority, the Committee also needs to explain the need for registration and reporting of this information, and its incremental cost above registration and reporting of only those who make direct or indirect communications. (Commission Comments, p. 3)

In response to the Commission's Comments, the Committee amended Paragraph (i) 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) <u>The term includes</u> ~~P~~paying a<u>n individual or entity economic consideration for lobbying services.</u>~~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.~~

In its Final Preamble, the Committee justified its revisions to Paragraph (i) in the following manner:

> 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 opted to use the term "economic consideration" because it is a defined term in the statute, and it includes both compensation and reimbursement. (Lobbying Disclosure Regulations Final Preamble, pp. 3-4) (Emphasis added.)

The Committee's revisions to Paragraph (i) as well as its citation to Section 1304-A(a) of Act 134 above as justification for its revision to Paragraph (i) are still inconsistent with Act 134's definition of "lobbying." First of all, the Committee's replacement of the term "retainer" with "economic consideration" does not change the meaning of Paragraph (i). Section 1903(a) of the SCA, 1 Pa. C.S. 1903(a), provides that "[w]ords and phrases shall be construed according to rules of grammar and according to their common and approved usage; but technical words and phrases and such other as have acquired a peculiar and appropriate meaning or are defined in this part, shall be construed according to such peculiar and appropriate meaning or definition." The term "economic consideration" is defined by Section 1303-A of Act 134 to mean "[a]nything of value offered or received. The term includes compensation and reimbursement for expenses." The term "retainer" is defined in both *Black's Law Dictionary* as well as the *American Heritage College Dictionary*. *Black's Law Dictionary* defines "retainer" to mean "[a] fee paid to a lawyer to secure legal representation." BLACK'S LAW DICTIONARY 1317 (7th ed. 1999). The *American Heritage College Dictionary* provides two definitions for "retainer": "1. The act of engaging the services of a professional adviser, such as an attorney, a counselor or a consultant. 2. The fee paid to retain a professional adviser." AMERICAN HERITAGE COLLEGE DICTIONARY 1164 (3d. ed. 2000). After reviewing these definitions, it is clear that a "retainer" is a specific kind of "economic consideration" paid to engage the services of a lobbyist or lobbying firm. Simply put, the Committee's use of the term "economic consideration" is a broader way of saying "retainer" and by replacing the term "retainer" with "economic consideration" the Committee essentially created a term distinction without establishing a difference in meaning.

Furthermore, in its Final Preamble, the Committee stated that the revisions made to Paragraph (i) were done in an effort to prevent principals, lobbyists and lobbying firms from avoiding Act 134's registration and reporting requirements by failing to disclose advanced payments. Such an interpretation is inconsistent with the language and intent of Act 134. Section 1304-A(a) of Act 134 states in relevant part: "…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.) Lobbyists or lobbying firms *are not acting* in their capacities as lobbyists or lobbying firms by merely being paid an advanced payment by a principal; some subsequent action or "effort"[2] must be undertaken by that lobbyist or lobbying firm in order for such action

[2] The term "effort" means "a serious attempt: try." WEBSTER'S DICTIONARY 368 (10th ed. 1994).

to constitute "lobbying" under Act 134 and that lobbyist or lobbying firm is not subject to Act 134's registration and reporting requirements unless and until such "lobbying" activity takes place. Put another way, if an advanced payment is paid to a lobbyist or lobbying firm without that lobbyist or lobbying firm engaging in "direct communications," "indirect communications" or providing any gift, hospitality, transportation or lodging to a State official or employee for the purpose of advancing the interest of the lobbyist or principal, then such payment is not "lobbying" and hence that lobbyist or lobbying firm is not subject to Act 134's registration and reporting requirements. In its revisions to Paragraph (i) and its explanation in the Final Preamble above, the Committee is making the exact opposite conclusion by requiring lobbyists and lobbying firms to register and report the receipt of advanced payments from principals even if that lobbyist or lobbying firm does not make direct or indirect communications or take any other action. As such, the Committee's revisions to Paragraph (i) of the definition of "effort to influence legislative action or administrative action," still exceeds Act 134's definition of "lobbying" and thus should be disapproved by the Commission for violating Section 5.2(a) of the RRA.

The Committee's revisions to Paragraph (i) are also inconsistent with the language of other provisions of Act 134. 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 Act 134, 65 Pa. C.S. §1305-A(b)(2), should be read in *pari materia* with the definition of "lobbying" as provided in Section 1303-A of Act 134 when interpreting the definition of "effort to influence legislative action or administrative action" found in the regulations.

Section 1305-A(b)(2) of Act 134 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.)

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 SCA, 1 Pa. C.S. §1921(b); *Commonwealth v. Packer*, 568 Pa. 481, 798 A.2d 192 (2002).

It has been clearly established above that a principal paying a lobbyist or lobbying firm an advanced payment 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 Act 134 and since Section 1305-A(b)(iv) of Act 134 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 Act 134 for lobbyists and lobbying firms to register and report the mere receipt of advanced payments from principals. Furthermore, reviewing the mandatory language provided in Section 1305-A(b)(iv) of Act 134 reveals that the General Assembly never intended the costs of advanced payments paid to lobbyists and lobbying firms without conducting direct and indirect communications to be included within Act 134's definition of "lobbying." After reading Section 1305-A of Act 134 in *pari materia* with the definition of "lobbying" found in Section 1303-A of Act 134, it is clear that the Committee's revisions to Paragraph (i) and subsequent explanation in its Final Preamble still run contrary to the clear language of Act 134 by requiring lobbyists and lobbying firms to register and report the receipt of advanced payments from principals without taking any subsequent action. Accordingly, the Commission must disapprove the Committee's revisions to Paragraph (i) pursuant to Section 5.2(a) of the RRA.

**2. The phrase "in connection with" found in Paragraph (ii) to the definition of "effort to influence legislative action or administrative action" is not sufficiently clear and subject to multiple interpretations, and depending upon which interpretation is adopted, meeting the requirements of such a regulation would be economically unfeasible to the regulated community. Accordingly, the revisions to Paragraph (ii) must be disapproved by the Commission for being contrary to the public interest in violation of Sections 5.2(b)(1)(i) and (b)(3)(ii) of the Regulatory Review Act.**

In the proposed regulations, Paragraph (ii) to the definition of "effort to influence legislative action or administrative action" (hereinafter "Paragraph (ii)") stated 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:
>
> *(ii) Monitoring legislation, legislative action or administrative action.* (Emphasis added.)

In its Comments dated March 20, 2008, the Commission found that Paragraph (ii) went beyond the scope of the language of Act 134. In addressing Paragraph (ii), the Commission stated as follows:

> Regarding Paragraph (ii), we disagree that monitoring alone constitutes lobbying. The simple acts of 'monitoring legislation, legislative action or administrative action' would encompass any lobbyist who reads information commonly available to the public, such as the General Assembly's website, the *Pennsylvania Bulletin*, newspapers, and news services. It would also include any lobbyist who observes a legislative session, standing committee meeting or any public meeting of any agency. If no action was taken to influence legislative action or administrative action, we question the Committee's authority to require registration and reporting due to monitoring, and why this information would be useful. Reporting monitoring activities could also tremendously increase reporting, perhaps to the point where it would be difficult to distinguish those who seek to influence legislative or administrative action from those who do not. The Committee needs to explain how reporting monitoring activities in Paragraph (ii) is consistent with the statute and why this reporting is needed. (Commission Comments, pp. 3-4)

In response to the Commission's Comments, the Committee amended Paragraph (ii) 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:~~
>
> (ii) Monitoring of legislation, monitoring of legislative action or monitoring of administrative action is not lobbying. However, for an individual or entity that is not exempt, the costs of monitoring are subject to the reporting requirements of the act when the monitoring occurs *in connection with* activity that constitutes lobbying. (Emphasis added.)

In its Final Preamble, the Committee justified its revisions to Paragraph (ii) by stating the following:

> The Committee decided to amend the definition of 'effort to influence administrative action or legislative action' to clarify that monitoring alone is not lobbying. *However, the costs of monitoring are subject to the reporting requirements of the act when the monitoring occurs in connection with activity that constitutes lobbying.* The Committee reasoned that the second

> sentence of section 13A05(b)(2) requires that expense reports shall include monitoring in the total costs of personnel expenses, among other things. The definition of 'personnel expense' at section 13A03 includes 'research and monitoring staff.' Therefore it is reasonable that principals and their lobbyists be required to disclose the time that they and their staff spent monitoring once it occurs with activity that constitutes lobbying. (Lobbying Disclosure Regulations Final Preamble, p. 4) (Emphasis added.)

Although the Committee, in its revisions, correctly clarified that monitoring alone does not constitute "lobbying," the Committee failed to adequately define and explain the phrase "in connection with" when revising Paragraph (ii) thereby rendering it ambiguous and subjecting Paragraph (ii) to multiple interpretations by principals, lobbyists and lobbying firms as to how the costs of monitoring are to be properly allocated when monitoring occurs in connection with activity that constitutes lobbying.

The present ambiguity of revised Paragraph (ii) can be summarized in the following two hypothetical situations:

> 1. Lobbyist X represents Principal A before the Pennsylvania General Assembly. It is Lobbyist X's responsibility to keep Principal A informed of all legislation introduced and considered by the General Assembly in the area of agriculture. It is also Lobbyist X's responsibility to advocate for the passage or defeat of legislation in those instances where a particular bill would affect Principal A's interests.
>
> For the first six months of the legislative session, Lobbyist X attends all House and Senate Agriculture Committee meetings and monitors 50 bills that have been considered by these committees without advocating the passage or defeat of any of these bills. Lobbyist X keeps Principal A informed of the status of these bills. Eventually, HB 001 comes before the House Agriculture Committee and the language of this particular bill is damaging to Principal A's interests. After being informed by Lobbyist X that HB 001 has been voted out of the House Agriculture Committee, Principal A instructs Lobbyist X to defeat the passage of this bill when it is considered before the full House. Lobbyist X then visits various House Members' offices actively advocating the defeat of HB 001 and also contacts Principal A's members to engage in a letter-writing campaign opposing HB 001. Lobbyist X attends the full House session to monitor HB 001 where it is soundly defeated.

After reviewing this fact pattern, two possible interpretations of revised Paragraph (ii) could be deduced as to what specific costs of monitoring are to be reported by Lobbyist X:

> A. Lobbyist X must report the costs of monitoring HB 001 as well as the 50 prior bills that had been considered by the House and Senate Agriculture Committees because, according to revised Paragraph (ii), the monitoring of all these bills occurred *in connection with activity that later constituted lobbying*.
>
> OR
>
> B. Lobbyist X must report the costs of monitoring HB 001 only and not the 50 prior bills that had been considered by the House and Senate Agriculture Committees because only the monitoring of HB 001 occurred *in connection with activity that later constituted lobbying*.

2. Lobbyist Y represents Principals C, D, and E before the Pennsylvania General Assembly. It is Lobbyist Y's responsibility to keep Principals C, D and E informed of all legislation introduced and considered by the General Assembly in the areas transportation, labor and telecommunications, respectively. It is also Lobbyist Y's responsibility to advocate for the passage or defeat of legislation in those instances where a particular bill would affect the interests of Principals C, D and E.

For the first six months of the legislative session, Lobbyist Y monitors 60 bills for each respective Principal (total of 180 bills) that have been considered by the General Assembly without advocating the passage or defeat of any of these bills. Lobbyist Y keeps Principals C, D and E informed of the status of these bills. Eventually, SB 002 comes before the Senate Communications and Technology Committee and the language of this particular bill is favorable to Principal E's telecommunications interests and potentially has favorable impacts to Principal D's labor interests. After being informed by Lobbyist Y that SB 002 has been voted out of the Senate Communications and Technology Committee, Principal E instructs Lobbyist Y to work for the passage of this bill while Principal D instructs Lobbyist Y to continue to monitor SB 002. Lobbyist Y then visits various Senate Members' offices actively advocating for the passage of SB 002 and also contacts Principal E's members to engage in a letter-writing campaign supporting SB 002. Lobbyist Y attends the full Senate session to monitor SB 002 where it is passed and sent to the House for its consideration. Lobbyist Y continues to monitor SB 002 for Principal D while simultaneously advocating for the passage of SB

002 on behalf of Principal E before the House. SB 002 is eventually enacted into law.

After reviewing this fact pattern, three possible interpretations of revised Paragraph (ii) could be deduced as to what specific costs of monitoring are to be reported by Lobbyist Y:

A. Lobbyist Y must report the costs of monitoring SB 002 for both Principals D and E as well as costs of monitoring the 120 prior bills that had been monitored by Lobbyist Y on behalf of Principals D and E because the monitoring of all these bills occurred *in connection with activity that later constituted lobbying*.

OR

B. Lobbyist Y must report the costs of monitoring SB 002 for Principal E only, and not the costs of monitoring SB 002 for Principal D or the costs of monitoring the 120 prior bills that had been monitored by Lobbyist Y on behalf of Principals D and E because only the monitoring of SB 002 occurred *in connection with activity that later constituted lobbying*.

OR

C. Lobbyist Y must report the costs of monitoring SB 002 for both Principals D and E only, and not the costs of monitoring the 120 prior bills that had been monitored by Lobbyist Y on behalf of Principals D and E because only the monitoring of SB 002 on behalf of Principals D and E occurred *in connection with activity that later constituted lobbying*.

After examining these hypothetical fact patterns, it is apparent that any of the aforementioned interpretations of "in connection with" found in revised Paragraph (ii) is possible, thereby making this regulation unclear and ambiguous to principals, lobbyists and lobbying firms who are trying to comply with Act 134's reporting requirements. Furthermore, the economic and fiscal impacts of the regulation upon the regulated community would vary drastically depending upon which interpretation is adopted. For instance, the time and costs to the regulated community in preparing the necessary reports in order to comply with Act 134's registration and reporting requirements would be significantly higher if Interpretations 1A and 2A were adopted insofar as principals, lobbyists and lobbying firms would have to record and keep track of billing records that go farther back in time than if Interpretations 1B, 2B and 2C were adopted. Accordingly, PAGR is asking the Commission to disapprove the Committee's revisions to Paragraph (ii) for being unclear and ambiguous in violation of Section 5.2(b)(3)(ii) of the RRA as well as economically and fiscally burdensome upon the regulated community in violation of Section 5.3(b)(1)(i) & (iii) of the RRA.

## CHAPTER 53 -- REGISTRATION AND TERMINATION

### Sections 53.2-53.4 Principal, Lobbying Firm and Lobbyist Registration

1. **The final-form regulations pertaining to principal, lobbying firm and lobbyist registration pursuant to Sections 53.2-53.4, still conflict with the provisions of Act 134 and such regulations should be disapproved by the Commission for being contrary to the language and legislative intent of Act 134 and thus is in violation of Section 5.2(a) of the RRA.**

Section 1304-A(a) of Act 134 states as follows:

> **General rule.--**Unless excluded under section 13A06 (relating to exemption from registration and reporting), 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.* Registration shall be biennial and shall begin January 1, 2007. (Emphasis added.)

Section 1303-A of Act 134 defines "lobbyist" to include "[a]ny individual, association, corporation, partnership, business trust or other entity that *engages in lobbying* on behalf of a principal for economic consideration. The term includes an attorney at law while engaged in lobbying." (Emphasis added.) Section 1303-A of Act 134 defines "lobbying firm" as "[a]n entity that *engages in lobbying* for economic consideration on behalf of a principal other than the entity itself." (Emphasis added.) Section 1303-A of Act 134 defines "principal" to include "[a]n 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 own behalf." (Emphasis added.)

Section 51.1 of the proposed regulations defines "engaging in lobbying" as "[a]ny act by a lobbyist, lobbying firm or principal that constitutes *an effort to influence legislative action or administrative action* in this Commonwealth, as defined in the definition of "lobbying" in section 13A03 of the act (relating to definitions)." (Emphasis added.) Clearly, this definition is consistent with the definition of "lobbying" found in Section 1303-A, which includes the same language.

Section 53.2(a)(1) of the proposed regulations stated as follows:

> (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 acting in any capacity as a principal.

> (1) *Engaging a lobbyist*[3] or lobbying firm for purposes including lobbying constitutes acting in the capacity of a principal. (Emphasis added.)

Section 53.3(a)(1) of the proposed regulations stated as follows:

> (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 acting in any capacity as a lobbying firm.
>
> (1) *Accepting an engagement to lobby or accepting a retainer or other compensation for purposes including lobbying constitutes acting in the capacity of a lobbying firm.* (Emphasis added.)

Section 53.4(a)(1) of the proposed regulations stated as follows:

> (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 acting in any capacity as a lobbyist.
>
> (1) *Accepting an engagement to lobby or accepting a retainer or other compensation for purposes including lobbying constitutes acting in the capacity of a lobbyist.* (Emphasis added.)

In its Comments dated March 20, 2008, the Commission found that Sections 53.2, 53.3 and 53.4 of the proposed regulations went beyond the scope of the language of Act 134. In addressing this issue, the Commission stated as follows:

> Consistent with our first comment on the scope of the statutory definition of the term 'lobbying,' we do not believe Paragraphs (a)(1) should include accepting a retainer or other compensation, unless those are compensation for lobbying (i.e., an **effort** to influence legislative action or administrative action). We recommend removing retainers or other compensation from Paragraphs (a)(1).
>
> Second, consistent with our first comment on the scope of the statutory definition of the term 'lobbying,' Paragraphs (a)(1) of Section 53.2, 53.3 and 53.4 use the phrase 'for purposes including lobbying,' to perform many other unrelated tasks, but never

[3] Section 51.1 of the proposed and final-form regulations defines "engaging a lobbyist" to mean "[c]ontracting or otherwise arranging for the services of a lobbyist or lobbying firm for lobbying on behalf of a principal for economic consideration."

actually lobby. We recommend rewriting these provisions to clearly require lobbying to be the action that requires registration. (Commission Comments, p. 7) (Emphasis in original.)

In response to the Commission's Comments, the Committee amended Sections 53.2(a)(1), 53.3(a)(1) and 53.4(a)(1) 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.

**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.

**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.

In its Final Preamble, the Committee justified its revisions to Sections 53.2, 53.3 and 53.4 in the same manner:

> 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.
>
> (Lobbying Disclosure Regulations Final Preamble, pp. 9,10,11) (Emphasis in the original.)

These final-form regulations are still in direct conflict with the plain language of Act 134 insofar as the arranging for services or advanced payment of money 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 Act 134. 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 or the principal merely makes an advanced payment to the lobbyist or the lobbying firm. It is clear from Act 134'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 revised Sections 53.2(a)(1), 53.3(a)(1) and 53.4(a)(1) still runs contrary to the language of Act 134 insofar as the Committee is disregarding the letter of Act 134 under the pretext of pursuing its spirit and thus must be disapproved by the Commission for violating Section 5.2(a) of the RRA.