LOBBYING SYNOPSIS
1996-2017

WHAT IS LOBBYING?

DEFINITION OF LOBBYIST

"**Lobbyist" means any individual who acts to promote, advocate, influence or oppose any matter pending before the General Assembly by direct communication with the General Assembly or any matter pending before a State agency by direct communication with that State agency, and who in connection therewith either:**

> **(a) has received or is to receive compensation in whole or in part from any person; or**
> **(b) is authorized to act as a representative of any person who has as a substantial purpose the influencing of legislative or administrative action; or**
> **(c) expends any funds during the calendar year for the type of expenditures listed in § 5835 (b) of this title [food, refreshments, entertainment, lodging, travel if trip exceeds 100 miles, recreation expenses, and gifts or contributions, excluding political contributions. 29 Del. C. § 5831(a)(1).**

"Indirect Communication" Does Not Require Registration--Commission Op. No. 02-42

The State Public Integrity Commission was asked if lobbyist registration was required if a trade association has its employees and professional contractors contact citizens by letters, faxes, etc., and urge them to contact General Assembly members on issues of interest. Based on the following law and facts, the Commission concluded that such action would not trigger registration.

Lobbyist means " any individual who acts to promote, advocate, influence or oppose any matter **by direct communication** with the General Assembly...or **direct communication** with a State agency....29 Del. C. § 5831(a)(1) (emphasis added).

The trade association, its employees or representatives will not deal with any Delaware official. Rather, their efforts will be directed at providing citizens with information so they can decide if they wish to contact any Delaware State official. This is called "grass roots" lobbying or "lobbying solicitation." *Commission Op. No. 96-37 (citing Note, Federal Lobbying Disclosure Reform Legislation, Harv. J. on Leg.* (1980), reprinted in *1 Sutherland Stat. Constr. pp. 875-905, at 877 and 893-900* (5th ed. 1992); *Commission Op. No. 96-63 (citing Golden Rule Ins. Co. v. Commonwealth of Kentucky,* Ky. Cir., C.A. No. 94-CI-01420, J. Graham (Mar. 29, 1995).

In *Golden Rule*, the Kentucky statute was virtually identical to Delaware's. The Court said the General Assembly chose to define lobbying as "direct communication" with any member of the General Assembly. The Court found that:

> [T]he language leaves little room for interpretation and is anything but ambiguous. Simply put, if one directly contacts any of the enumerated officials to promote, advocate or oppose the passage, modification, defeat . . . of any legislation, one has engaged in the statutorily defined activity of lobbying. By implication, the opposite is also true: if there is no direct communication, the activity is not considered to be "lobbying" . . . *Id.* at 6.

Media broadcasts were used in that instance to urge citizens to contact General Assembly members. The Court held that General Assembly members might see the broadcasts, but such communication was still "indirect." Similarly, this Commission held that information put on the Internet would be "indirect communication, "even though State officials could access the Internet. *Commission Op. No. 96-63.* Here, the information will not be aired on television, radio, Internet, etc. Rather, it will be faxed or mailed to citizens, so there is less likelihood the information would be read or heard by State officials unless the citizens who are the target of the mailings, etc., decide to contact a State official. The Commission must be consistent in its opinions. 29 Del. C. § 5809(5). According, we find the activity would be "indirect communication," and therefore not require registration. However, if the association and its employees and professionals begin to engage in "direct communication," they must register as lobbyists.

Contacts with Legislators and State Agencies when Non-Profit Receives State Funds--Commission Op. No. 96-80

The Executive Director of a non-profit firm expressed the belief that contacts with members of the General Assembly and members of State agencies was not "lobbying" because "we're not trying to impact legislation at all." He said he believed most people thought that lobbying "is trying to influence legislation." The Commission addressed his question at length to help clarify activities which constitute "lobbying."

I. Facts

Under the corporation's by-laws, the firm is a private, non-profit corporation with the corporate purpose of "promoting, advancing and enhancing opportunities for the modernization and competitiveness" of a particular industry engaging or intending to engage in business in the State of Delaware. It receives State funds to achieve that purpose. It contacts members of the General Assembly and State agencies. The details of that contact are discussed below in the context of the lobbying statute.

II. "Lobbying" Includes More than "Influencing Legislation"

"Lobbyist" means any individual who acts to promote, advocate, influence or oppose any **matter** pending before the General Assembly by direct communication with the General Assembly or any **matter** pending before **a state agency by direct communication with that state agency**, and who in connection therewith either:

(a) Has received or is to receive compensation in whole or in part from any person; or

(b) Is authorized to act as a representative of any person who has as a substantial purpose the influencing of **legislative or administrative action**; or
(c) Expends any funds during the calendar year for the type of expenditures listed in § 5835 (b) of this title [food, refreshment, entertainment, lodging away from home; travel if the trip exceeds 100 miles; recreation expenses; and gifts or contributions, excluding political contributions. 29 Del. C. § 5831(a)(1) (emphasis added).

In light of the firm's belief about the meaning of "lobbying," the Commission first emphasized that the statute applies not only to influencing legislative action, but also administrative action. That is because the statute was amended, effective as of January 15, 1996, to include lobbying State agencies. Besides this expansion to include direct communication with State agencies, the statute applies to any "matter" pending before the General Assembly or a State agency. The statute defines "matter" as "any application, petition, request, business dealing, transaction or decision of any sort." 29 Del. C. § 5812(7). Thus, from the definition, the statute clearly encompasses more than just influencing legislation. Placed within that statutory framework, the Commission addressed the firm's particular contact with members of the General Assembly and State agencies.

(A) Contact with the General Assembly

(1) Direct Contact with General Assembly Members when Funds are Expended

Lobbying occurs if the person is promoting, advocating, influencing or opposing any matter by direct communication with General Assembly members **and in connection therewith expends funds for food, refreshments, etc.** 29 Del. C. § 5831(a)(1)(c) (emphasis added). When such funds are spent, the exemptions from registration do not apply. 29 Del. C. § 5831(b).

The primary example given of the firm's contact with General Assembly members is in the form of direct communication with them at periodic luncheons hosted by the firm. The firm's Executive Director said the reason for the luncheons is "to see [the firm] succeed." To do so, the firm invites General Assembly members to the luncheon to "learn" about the firm. At the luncheons, the Executive Director said the firm "educates" General Assembly members on what State money it receives and what it does with the money. He said that if the General Assembly members believe the firm is "doing what they're asked to do," the General Assembly will give it the State funding it seeks; if the General Assembly does not believe the firm is "doing the job," the General Assembly can tell it to "go out of business."

Clearly, there is direct communication with General Assembly members with expenditures on food and refreshments. The "matter" on which the firm's representatives are directly communicating with General Assembly members is to

promote, advocate, or influence their decision on approving State funding for the firm.[5] Accordingly, such activity requires registration.

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[5]"Promote" means "to advance. . . to help bring into being;" "advocate" means "to plead in favor of;" "influence" means "the act or power of producing an effect; to have an effect on the condition or development of;" and "oppose" means "to offer resistance to." *See, Commission Op. No. 96-47*..

(2) Contact where no funds are expended

Lobbying also occurs if no funds are expended, if there is direct communication with the General Assembly or a State agency to promote, advocate, influence or oppose any matter and in connection therewith the individual: (a) **has received or is to receive compensation** in whole or in part from any person; or (b) **is authorized to act as a representative** of any person who has as a substantial purpose the influencing of legislative or administrative action. 29 Del. C. § 5831(a)(1)(a) and (b) (emphasis added).

Beyond periodic lunches, the firm said it contacts members of the General Assembly or State agencies when no money is spent. When asked what kinds of things the firm would ask a legislator or members of the Executive Branch to do, the firm's Executive Director said he might go to the legislator or even the governor and say: "We've been out here for three years and we think there might be something lacking in our infrastructure, and you may want to have your department think about a way that our [industry] could get this kind of resourcing or training."

As the firm's Executive Director, he: (1) received compensation and (2) was its authorized representative. Thus, if he approached members of the legislative or executive branch and advocated ways for the firm to get resources or training, the "matter" on which he would be directly communicating would be for a decision on how that result would be achieved--whether through legislative or administrative action.

(B) Contact with State Agencies

The firm also has contact with an oversight committee of a State agency which reviews the firm's State funding request and with a State agency which regulates the industry.

(1) Contact with the Agency which Reviews Funding Requests

The Executive Director said that each year he goes before the oversight committee of a State agency to present the firm's annual report, including what the company has done for the State of Delaware, because the State is a "major investor."

In those meetings the firm's representative: (1) provides a fixed figure of how much funding it needs; (2) says what portion of that amount it seeks from the State; (3) explains what the firm has accomplished; and (4) details future projects. The State agency predicates how much funding it will recommend based on the firm's information. The Executive Director said usually the agency, in making its funding recommendation, does not deviate much from what the firm requests. When asked if he were in a sense advocating for funds because the firm comes in with the figure it wants and presents it to the agency, he replied: "Sure, to the extent--there is a certain advocacy there." Thus, even without being aware of the scope of the statute, he recognized the activity as advocating a decision by a State agency. Again, the "matter" is a decision on State funding. The Commission concluded that this activity also constitutes lobbying and requires registration.

Besides soliciting funding recommendations from the agency, a State official from the agency is on the firm's Board of Directors. Additionally, a State official from the State agency which regulates the industry is on the firm's board. As guidance to the firm, the Commission pointed out that this may be similar to a situation previously encountered by the Commission. *See, Commission Op. No. 96-25.* In that situation, a private corporation, where membership

consisted of companies of a particular industry, was regulated by a State agency. It gave the agency data which was significant in establishing price structures for approval by the State agency. It routinely met with agency employees to discuss why the agency should accept its data. The meetings were not public. The Commission found that such action was direct communication with a State agency; that the organization's access to the agency provided the opportunity to promote and/or advocate reasons why they should accept its data; the data was significant to the agency; and the contact was not subject to public scrutiny. The Commission held that "as a minimum the public is entitled to know the identity of persons acting to influence State government, which is the purpose of lobbyist registration."

Similarly, this firm has the opportunity, without being subject to public scrutiny, to present its funding plan to the agency for approval. Moreover, two State officials serve on its Board. One official works for the State agency which makes the funding recommendation and one works for the State agency which regulates the industry. The funding request establishes the number of State dollars the firm will seek and generally the agency does not deviate from that request, which gives significance to the dollar figure which the firm sets as its estimate for State funding.

Lobbyists are required to register for strong policy reasons. Registration at least assures that the public knows of contact with legislators and State officials and may be less likely to perceive it as "privileged contacts" not available to the public, which avoids the suggestion that interest groups have gained special access to government officials, "usurping it from the hands of the ordinary citizen." *See, Federal Lobbying Disclosure Reform Legislation, Harv. J. on Leg*. (1980), reprinted in *1 Sutherland Stat. Constr. pp. 875-905 at pp.876-877.* Structuring an organization so that it could conduct activities but avoid registration, "fuels a public cynicism about the responsiveness of government." *Id.* at 882. Here, the firm, through its corporate structure, has access to government officials who work for key agencies that deal with the firm and its members. Such access is not available to the ordinary citizen. The Commission noted that the firm was open and honest about this relationship. In interpreting a federal statute similar to Delaware's, the United States Supreme Court recognized that there is a class of "entirely honest and respectable representatives of business, professional, and philanthropic organizations who come to Washington openly and frankly to express their views . . . many of whom serve a useful and perfectly legitimate purpose in expressing the views and interpretations . . . They will likewise be required to register . . . " *United States v. Harriss,* 347 U.S. 612, 621, 74 S. Ct. 808, 814 (1954).

(2) Contact with the State Agency which Regulates the Industry

The Executive Director said that the firm, on occasion, contacts the State agency which regulates the industry on behalf of its members if the members are having trouble interpreting the agency's regulations. In these discussions, without disclosing names of the members, the firm seeks information on regulatory compliance, including where the member company might go for help.

These facts do not indicate that this specific activity is directed at promoting, advocating, influencing or opposing administrative action. Rather, it seems to fall more within the purview of "ministerial" actions, which the Commission has concluded do not fall within the registration requirement. *Commission Op. No. 96-47* (contacting State agency for assistance in complying with administrative requirements, such as assistance in completing forms, etc., is "ministerial" and not promoting, advocating, influencing or opposing government action).

The firm also said that it provides comments on the agency's rules and regulations. The Commission previously ruled that where comments on an agency's rules and regulations are conducted as part of public hearings, then registration is not required. *Commission Op. No. 96-31.* When asked if the comments resulted from requests for public comment, etc., the Executive Director said that in the past the firm's members had wanted to see if the State regulatory agency would make a policy change. Through a board convened by the State agency, certain people were selected by the agency to participate in a workshop. The workshop was not open to the public. A draft policy came out of the workshop. An employee of the firm attended the sessions for a time, but quit going because it was believed that the industry's point of view was represented by other attendees. Apparently, the firm no longer engages in this type of activity. If the firm is no longer engaging in this type of activity, then the question of whether it constitutes lobbying is moot.

Does a One-time Donation of Greeting Cards Constitute Lobbying?--Commission Op. No. 97-29

A private enterprise asked if it must have a representative register with the Commission. Its activities were limited to offering to give greeting cards to a State agency to include in a package the agency gives to anyone in Delaware who has a new-born baby. The card would congratulate them on the event and include a reminder to have their child inoculated. If the State agency could accept the card, and if approved by the Committee which decides the items to be placed in the packages, then the card company wanted either the Governor or the First Lady of Delaware to sign the card. The card company has provided these cards to at least 26 states which include them in new-born packages. The private enterprise had no other dealings with any State agency. The Commission found that this isolated incident of communication with a State agency did not constitute lobbying under the statute. It also concluded that the expenditure was not the type of expenditure envisioned by the lobbying statute as it was not a direct expenditure on members of the General Assembly or members or employees of a State agency. *See*, 29 Del. C. § 5831(a)(1)(c) and 29 Del. C. § 5835(b).

Contracting with the State--Commission Opinion No. 96-08

An attorney, working in a non-legal position with a private enterprise, advised the Commission that the corporation responded to a State agency's Request for Proposals (RFPs). There was public notice and bidding pursuant to the State procurement law. *See,* 29 Del. C., Chapter 69. His corporation, among others, was contacted by the State agency and asked to meet to discuss qualifications, approaches to the project, ability to furnish the service, etc., as permitted by the procurement law. He asked if such contact with a State agency would require him, and/or others who would represent the corporation at the meetings, to register as lobbyists.

The Commission noted that "matter" as used in defining lobbyist, means "any application, petition, request, business dealing, transaction or decision of any sort." 29 Del. C. § 5831(a)(7). It concluded that a broad, literal interpretation of "matter" could mean that corporate representatives meeting with a State agency in response to RFPs could fall within the definition of "lobbyists." However, the Commission concluded that the legislature did not intend such an undesirable result. Delaware courts have held that where the literal reading of statutory language "would lead to an absurd and undesirable result," the statutory terms should be

modified to agree with legislative intent. *Law v. Developmental Child Care, Inc.,* Del. Super., 523 A.2d 557, 560 (1987); *Helfand v. Gambee,* Del. Ch., 136 A.2d 558, 561 (1957); *see also, 2A Sutherland Stat. Constr. § 46.07* (5th ed. 1992).

The legislative intent of lobbyist registration laws is to ensure, through disclosure, that the public and government officials are informed of special interest groups to prevent abuse of the public trust. *See, e.g., 1 Sutherland Stat. Const. § 13.04* (5th ed. 1992). The General Assembly has passed legislation governing competitive bidding for State contracts. Included are provisions regarding public notice and bidding, submission of responses, opportunities for discussion and revision of proposals, protection of the proposals during the negotiation process, when the contents of proposals are to be disclosed, etc. *See,* 29 Del. C. § 6922. The purpose of the procurement statute, aside from offering protection to bidders during the negotiation process, is to "protect the public against the wasting of money." *Haddock v. Board of Pub. Educ.,* Del. Ch., 84 A.2d 157 (1951). As the General Assembly has established the disclosure procedure under the procurement law, with consideration of protecting the public's trust, a literal reading of the lobbying law might nullify the specific provisions of the procurement law in that it could require disclosure that might be protected during the negotiation process.

In the *Law* case, *supra*, the Delaware Superior Court interpreted provisions regarding disclosure of information. *Law,* 523 A.2d 557. One provision, if read literally, would require disclosure, while other provisions treated the information as protected. *Id.* at 559-60. The court held that the provisions should be read in conjunction and with a view toward the statutory purpose. *Id.* at 560. It held that where a literal reading of one provision could result in "neutralizing privileges" in other provisions, such interpretation "would lead to an absurd and undesirable result." *Id.* The Court did not believe such result reflected true legislative intent.

Similarly, this Commission does not believe the General Assembly intended to "neutralize privileges" related to disclosure in the procurement law by any provision in the lobbying law. The Commission notes that protecting the public trust is an objective of both statutes. The public trust purpose can be served through procurement statute disclosure provisions. Under these factual circumstances, corporate representatives need not register as lobbyists.

Lobbying by State Agencies --Commission Opinion No. 96-13

A Commission established by legislative action was charged with "recommending constitutional or statutory changes" on matters within its purview. To accomplish its legislative mandate, it would have direct communication with the General Assembly, such as testifying, seeking funding, presenting draft legislation, etc. It also could have direct communication with State agencies on these matters.

"Lobbyist" includes individuals having direct communication if they are "authorized to act as a representative of any person who has as a substantial purpose the influencing of legislative or administrative action." 29 Del. C. § 5831(a)(1)(b). "Person" means "any individual, partnership, corporation, trust, joint venture and any other association of individuals or entities." 29 Del. C. § 5831(a)(4). The legislature separately defined "State agency" as including "any commission" existing by virtue of an act of the General Assembly. 29 Del. C. § 5831(a)(6). The rules of statutory construction require that "when the legislature provides a definition for a term, it is that definition to which a person should conform his conduct." *1A Sutherland Stat. Constr. § 20.08* (5th ed. 1992). "State agency" was not only excluded from the term "person," but was

given a distinct and separate definition. The General Assembly is presumed to be aware of this distinction and had it wished to include "State agency" within the definition of "person," it could have done so.

This Commission further noted that the purpose of the statute is to allow the public to be informed as to the identity of persons acting to influence State government. Here, the General Assembly, in creating the "State agency" publicly identified the co-chairs in the legislative act. It also provided that the "State agency" include members of the "general public." Additionally, the "State agency" is subject to public meeting laws, has held such meetings in all three counties, made copies of its reports available to public libraries, the news media as requested, etc. Thus, the legislative structure of the "State agency" insures the public knows who is dealing with government officials. Under these facts, no registration is required.

Sending Representatives to Public Meetings--Commission Opinion No. 96-18

A private trade association advised the Commission that it sends individuals from the association to public meetings to monitor State activities and report the information back to the association's membership. The association asked if such individuals must register as lobbyists.

The statute requires that persons who act to promote, advocate, influence or oppose any matter pending before a state agency by direct communication with that state agency are lobbyists under certain circumstances. 29 Del. C. § 5831(a)(1). The statute does not define "direct communication." Words and phrases are to be read within their context and construed according to the common and approved usage of the English language, unless such construction would be inconsistent with the manifest intent of the General Assembly. 1 Del. C. §§ 301 and 303.

To the extent the association members attend public meetings to monitor and report back to the association, there appears to be no type of communication with the State agency, much less any "direct communication."

To the extent the association members attending these meetings may, like any member of the public, express their opinions, positions, etc., it appears that such a broad interpretation of the terms would be inconsistent with the manifest intent of the General Assembly. Lobbyist registration laws are enacted to inform the public and government officials whom they are dealing with so that the voice of the people will not be "drowned out by the voice of special interest groups." *United States v. Harriss,* 347 U.S. 612, 98 L.Ed. 989, 74 S.Ct. 808 (1954). As public meetings permit participation by any interested member of the public, it appears unlikely that the General Assembly intended to encompass such activity within the terms of "direct communication." Accordingly, under these circumstances, such persons need not register.

Responding to State Investigatory Inquiries--Commission Opinion No. 96-14

An attorney for a company regulated by a State agency asked if persons within the company who were appointed to respond to inquires from the regulatory agency when the agency was conducting an investigation following a complaint from a citizen, were required to register as lobbyists. The agency, during an investigation, might speak with attorneys, corporate officers, and other company employees. If the matter could not be resolved as a

result of an investigation then the matter would proceed by an appropriate channel, such as through arbitration.

The Commission concluded that it was clear that there was "direct communication" with a State agency. It noted that the statute may be broad enough to encompass this particular type of activity as being within the term "matter" because the complaint could be viewed as an "application, petition or request," and the response from the company could be viewed as a "business dealing or transaction." *See,* 29 Del. C. § 5831(a)(7) (definition of "matter"). Further, to the extent the State agency could resolve the investigation by speaking with company representatives, such action might be viewed as a "decision."

However, the rules of statutory construction require words and phrases to be read in their context and construed in a manner consistent with legislative intent. 1 Del. C. §§ 301 and 303. The purpose of lobbyist registration is to identify "special interest groups" having contact with government officials so the public and government officials know what interests a lobbyist represents. *See, Commission Opinions 96-08, 96-13; see also, United States v. Harriss,* 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808 (1954) (registration insures government officials can properly evaluate pressures to influence them without the voice of the people being drowned out); 52 N.J.S. § 52:13C-18 (preservation and maintenance of the integrity of the legislative and executive process requires identification in certain instances of persons and groups who seek to influence legislation or administrative action to make available to the government and the public the information as to activities of persons seeking to influence government action); *W.J.M. Cody & R.R. Lynn, Honest Government: An Ethics Guide for Public Services* (Praeger Publishers 1992) (registration laws identify special interest groups so the public and government officials know what interests a lobbyist represents).

The Commission noted that Delaware Courts have held that where the literal reading of statutory language "would lead to an absurd and undesirable result," the words of the statute should be modified to agree with legislative intent. *See, Commission Opinions 96-08, (citing Law v. Developmental Child Care, Inc.,* Del. Super., 523 A.2d 557, 560 (1987)*, Helfand v. Gambee,* Del. Ch. 136 A.2d 558, 561 (1957) , and *2A Sutherland Stat. Constr. § 46.07* (5th ed. 1992)).

To read the statutory terms so broadly as to encompass responding to an investigation as promoting, advocating, influencing or opposing any matter pending before the State appears inconsistent with the manifest intent of the General Assembly when at the request of a citizen the State initiates an investigation, and either resolves such matters through its investigation or the particular contested case proceeds through appropriate channels, such as arbitration, for a decision on the merits.

State Rule-Making Action—Commission Op. 96-31

Are attorneys who file written comments and appear before a State agency for a client during a rule-making action "lobbyists?" A court decision directed an agency to use its rule-making authority, pursuant to the Administrative Procedures Act (APA). Attorneys were asked by their client, an association, to represent its position on any administrative action by the agency to formulate a rule. The client was not a party to the court action, but would be affected by the administrative action. There was direct communication with the State agency in presenting motions and comments for the client.

Read broadly, "lobbyist" could encompass such activities. However, Delaware law requires words and phrases in a statute to be read in their context and construed consistent with legislative intent. *See, 1 Del. C. §§ 301 and 303; Commission Opinion Nos. 96-14 and 96-18*.

In rule-making, the APA requires, with certain exceptions: (1) public notice describing the proceedings and the manner by which persons may present their views; (2) receipt of information, factual evidence and public reaction; (3) notice of whether the hearing is public; (4) compliance with the procedures for public hearings if it is public; and (5) keeping records, which generally are made public, of the proceedings, etc. *See,* 29 Del. C. § 10112-10119.

Here, the agency published public notice, solicited public comments, held public hearings, etc. Also, the Public Advocate was served with information, as required by 29 Del. C. § 8829. The Public Advocate appears before this State agency on behalf of consumers in matters where the Public Advocate deems that consumers' interests require participation. 29 Del. C. § 8828.

The purpose of lobbyist registration is to identify "special interest groups" contacting government officials so the public and the officials know what interests a lobbyist represents. *See, Commission Opinions 96-08, 96-13, 96-14* and *96-18.* It insures that "the voice of the people will not be drowned out by the voice of special interest groups." *United States v. Harriss,* 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808 (1954). Where the public interest is served and protected by other legislation which discloses who is contacting government officials and what interests are represented, a broad reading of the lobbyists' statute requiring disclosure of the same information under the lobbyists' law would not reflect true legislative intent. *See, Commission Opinions 96-08, 96-13, 96-18.*[1] Thus, the activities did not require registration by the attorneys.

Lobbying a State Agency-- Commission Opinion No. 96-25

A corporate organization's membership consisted of all companies of a particular industry which transacted business in Delaware. A State agency regulated the industry. For many years, the corporate organization had frequent contact with the agency. It had urged the agency to adopt an administrative rule which the organization's membership advocated. Besides this issue, the organization had continuing contact with the agency on other matters. Specifically, an organization representative routinely met with agency employees to provide certain data. When it provided the data, the organization had the opportunity to discuss the reasons why the agency should accept its data. The meetings were not public meetings. The organization was the only licensed agent to provide this data; there was no public notice and bidding for the opportunity to compete against it; the review of the data was not open to the public; and only after the agency decided to accept the data did it become a public record. The data was "significant" in establishing pricing structures which the agency had to review and approve.

The Commission found that such action was direct communication with a State agency; that the organization's access to the agency provided the opportunity to promote and/or advocate reasons why its data should be accepted; the data was significant in setting pricing

[1]It should be noted that here, and in the cited opinions, the factual evidence was that there were no expenditures of the types listed in 29 Del. C. § 5835(b).

structures; and the contact was not subject to public scrutiny. It concluded that as a minimum the public is entitled to know the identity of persons acting to influence State government, which is the purpose of lobbyist registration. *See, Commission Opinion Nos. 96-08, 96-13, 96-14, 96-18* and *96-31.* Accordingly, registration was required.

Non-compensated Board Members--Commission Opinion No. 96-37

Are non-compensated board members of an organization that does not make the types of expenditures listed in the statute "lobbyists"?

If the individual promotes, advocates, influences or opposes matters pending before the General Assembly or a State Agency by direct communication and in connection therewith "is authorized to act as a representative of any person[2] who has as a substantial purpose the influencing of legislative or administrative action," they are lobbyists. 29 Del. C. § 5831 (a)(1)(b) (emphasis added). That provision does not require that the individual be compensated.

(1) "Representative of any person"

In interpreting lobbying laws, courts have recognized that corporations exercise the rights of petition and free speech only through agents. *Moffett v. Killian,* D. Conn., 360 F. Supp. 228, 231 (1973). Similarly, associations or organizations exercise their rights to petition and free speech through agents. Thus, as the board members act at the behest of the organization, in their capacity as the governing body of the organization, they are its representatives.

(2) "Substantial Purpose"

The person represented must have as a "substantial purpose" the influencing of legislative or administrative action. 29 Del. C. § 5831(a)(1)(b). "Substantial purpose" is not defined. The United States Supreme Court interpreted similar language in the Federal Lobbying Act.[3] *United States v. Harriss,* 347 U.S. 612, 98 L. Ed. 989, 74 S. Ct. 808 (1954). The Federal Act required that the "principal purpose" must be for lobbying. *Harriss,* 347 U.S. at 622, 74 S. Ct. at 814. The Court held that the law applied if one of the main purposes is to influence legislation, even if that is not the single, sole, or predominant purpose. *Id.; See also, 1 Sutherland Stat. Constr. § 13.13* (5th ed. 1992). The Court said the legislative history showed that "principal" was adopted merely to exclude those persons having only as an "incidental" purpose the influencing of legislation. *Harriss,* 347 U.S. at 622, 74 S. Ct. at 814. The Court said that conversely, the "principal purpose" requirement does not exclude persons whose activities in "substantial part" are directed at influencing legislation through direct means. *Id.;* 74 S. Ct. at 814 (emphasis added).

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[2]"Person" means "any individual, partnership, corporation, trust, joint venture and any other association of individuals or entities." 29 Del. C. § 5831 (a)(4).

[3]The Federal Lobbying Act was amended in 1995, eliminating the "principal purpose" test because Congress found that such test, as interpreted by the United States Supreme Court in *Harriss*, "created significant gaps in coverage." *H.R. No. 104-339, "Lobbying Disclosure Act of 1995,"* Nov. 14, 1995, p. 3. This Commission relies on *Harriss*, as the United States Supreme Court equated "principal purpose" with "substantial part," which makes it similar to the "substantial purpose" test of the Delaware statute.

Here, the organization's primary purpose is to focus on individual complaints and cases, rather than lobbying. While the organization also monitors legislation, most of the monitoring includes no direct communication with the General Assembly. An intern reviews proposed legislation and refers bills that might be of interest to the organization's legislative subcommittee to further narrow down legislation of interest. In addition to other duties, the Board of Directors decides if any action should be recommended. If the Board determines action should be taken, they ask members to write letters to the General Assembly. The Board members have no authority to make the members write. Periodically, Board members are asked if they would like to contact members of the General Assembly, but the organization has no requirement or power to make the Board members follow-up with members of the General Assembly. The Commission found that these activities were not a substantial part of their work. It concluded that while the Board members were representatives of the organization, the substantial activities of the Board members were not directed at influencing legislation. Further, because the organization's executive director had registered as a lobbyist, the public purpose of insuring that the public and government officials are on notice of the specific organization and the area(s) of interest that it may seek to influence was served. The Commission held that under these particular facts, only the executive director was required to register as a lobbyist.

Insufficient Facts to Render a Decision--Commission Opinion No. 96-27

An individual's lobbyist registration form stated that he did not believe he should have to register because he, nor his organization, engages in the activities under § 5835 (paying for food, refreshment, etc., for members of the General Assembly or State agencies). He said he was retired and was a non-paid volunteer of a political action committee.

While he was not a lobbyist under 29 Del. C. § 5831(a)(1)(a)(those receiving compensation) or 29 Del. C. § 5831(a)(1)(c)(those expending funds), the forms suggested he might be under 29 Del. C. § 5831(a)(1)(b) (authorized representative), which does not distinguish between paid and non-paid persons or require direct expenditures on members of the General Assembly or State agencies.

The forms stated: the "group I represent" is a "political action committee." That indicated he was "authorized to act as a representative" of the organization. The form also identified the "type of legislation or regulation or administrative action to be promoted or opposed." This indicated he expected to promote or oppose legislative or administrative action on those specified matters.

The question then was how he intended to promote or oppose such action--would there be "direct communication" with members of the General Assembly or State agencies? There was insufficient information on the forms to decide that issue. While the Commission is required to "administer and implement the lobbyist registration provisions," 29 Del. C. § 5809(16), and has authority to "prepare and publish . . . guides explaining the duties of individuals covered by this chapter; giving instructions . . . to facilitate compliance," 29 Del. C. § 5809 (9), its authority to issue advisory opinions must be based on a "particular fact situation." 29 Del. C. § 5807 (c). Accordingly, he was advised that he could submit more detailed information or meet with the Commission to discuss the type of contact he anticipated so that the Commission could render a final decision.

Lobbying Solicitation--Commission Opinion No. 96-37

Are non-paid rank and file members exempt from registration if they are "encouraged to contact their legislators to support or oppose legislation?"

Rank and file members were notified by the organization of legislation of interest and asked to contact legislators. However, the member could elect to do so, or not. As opposed to "direct lobbying," this is known as "lobbying solicitation." *See, Note, Federal Lobbying Disclosure Reform Legislation, Harv. J. on Leg.* (1980), reprinted in *1 Sutherland Stat. Constr. pp. 875-905, at 877 and 893-900* (5th ed. 1992). The members were not compensated and do not spend the type of funds listed in the lobbying statute.

As they are not compensated, nor do they expend any funds of the type listed, they are not lobbyists under 29 Del. C. § 5831(a)(1)(a) and (c). This Commission found that the organization's substantial purpose was not to influence legislative or administrative action. *(See, Commission Opinion No. 96-37, supra)*. Based on that finding, the rank and file members would also not be lobbyists under 29 Del. C. § 5831(a)(1)(b) (authorized representative for any person who has lobbying as substantial purpose). The Commission noted that the public purpose of insuring that government officials and the public are aware of this "special interest group" was served because the organization's executive director was registered as a lobbyist.

Even assuming the rank and file members fell within the definition of "lobbyist," there is an exception for persons if they do not expend funds and are:

Persons communicating with the General Assembly or a state agency if such communication is undertaken by them as a personal expression and not as an agent of their employers as to matters of interest to a person by whom or by which they are employed and if they receive no additional compensation or reward, in money or otherwise, for or as a result of such communication. 29 Del. C. § 5831(b)(4).

The Commission found that such communication was a "personal expression." One joins or participates in an organization because it addresses and expresses the types of issues in which the individual has a personal interest. While rank and file members might be considered "agents" in the broad sense of the term because they may call legislators and say they are calling on behalf of the organization, the exemption also requires that: "they receive no additional compensation or reward in money or otherwise, for or as a result of such communication." Here, the rank and file members receive no compensation.

Further, this Commission construes the statute in a manner consistent with the manifest intent of the General Assembly. *See,* 1 Del. C. § 301. This Commission has previously found that it would not reflect true legislative intent to interpret the statute in a way that reflects an absurd result. *See, Commission Ops. 96-08* and *96-14.*

If the statute required every rank and file member of an organization to register as a lobbyist because the organization asks them to contact General Assembly members, it would, in effect, be asking such organizations for an entire listing of its membership. The Commission does not believe the General Assembly intended such a result. *See, e.g., NAACP v. Alabama,* 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958) (Association not required to disclose full list of its membership who contributed to political campaigns to, in effect, influence elections, because of Constitutional implications). Further, the purpose of lobbyist registration laws is to insure that the public and government officials know who represents what interests.

Commission Op. Nos. 96-13, 96-14, and *96-18.* The registration of the organization's Executive Director serves this public purpose.

Accordingly, non-paid rank and file organizational members, whom their organization solicits to lobby, are not required to register as lobbyists even if the organization's solicitation to lobby results in direct communication with General Assembly members, where no expenditures of the type listed in the statute are made and the registration of the primary representative serves the statutory purpose.

Volunteer Organization--Commission Opinion No. 96-36

An organization was created as a 501(c)(4) corporation, with the express purpose of lobbying and educating. Its principal purpose is "working for responsible taxation and spending policies." The organization initially wants to focus on tax and spending policies at the State level, such as the State's current budget. The corporate president is the primary lobbyist and registered with the Commission. He expects to develop a core of persons within the organization to aid him in lobbying. Rank and file members also will be asked to contact government officials and come to Dover to speak to them on occasion. No one in the organization is compensated and no funds are spent on members of the General Assembly or State officials for such things as food, entertainment, travel, etc., as listed in 29 Del. C. § 5835.

Subparagraph (b) requires those who are authorized to act as a representative of any person who has as a substantial purpose the influencing of legislative or administrative action to register. 29 Del. C. § 5831(a)(1)(b). "Person" is "any individual, partnership, corporation, trust, joint venture and any other association of individuals or entities." 29 Del. C. § 5831(a)(4). The Commission found that because the individual was the corporate president, he would certainly be authorized to act as its representative. As he is the primary lobbyist and will have direct communication with members of the General Assembly and/or State agencies, his registration was proper.

If a core of organization members is developed specifically to aid in lobbying, they too would be authorized to act for the organization with the substantial purpose of lobbying; would have direct communication with members of the General Assembly and/or State agencies; and would be expected to register.

Other than these "direct lobbying" activities, the organization expects to ask rank and file members to contact government officials and possibly come to Dover to speak. As opposed to "direct lobbying," this is referred to as "lobbying solicitation." The Code provides an exemption for "personal expression," where there are no expenditures of funds of the type listed. 29 Del. C. § 5831(b)(4). That exemption applies to persons if they do not expend funds and are:

> Persons communicating with the General Assembly or a state agency if such communication is undertaken by them as a personal expression and not as an agent of their employers as to matters of interest to a person by whom or by which they are employed and if they receive no additional compensation or reward, in money or otherwise, for or as a result of such communication. 29 Del. C. § 5831(b)(4).

While government officials and the public have the right to know what groups are seeking to influence public policy, this Commission does not believe the General Assembly intended for every non-paid member of an organization to register merely because the organization solicits them to contact government officials, even if that solicitation results in a "direct communication." *Commission Opinion No. 96-37.* By registering those core persons who represent the organization and have lobbying as a substantial purpose, government officials and the public are on notice of the specific organization and of the area(s) of public policy it seeks to influence. *Id.* Thus, even assuming direct communication and assuming that the members are "agents" of the organization, as they receive no compensation if they respond to the "lobbying solicitation," they are not required to register when the public purpose has been served by registering core lobbyists.

Ministerial Action--Commission Opinion No. 96-47

Are individuals in a law firm, who function as corporate paralegals, required to register as lobbyists if they are filing and retrieving public records and communicate with State employees concerning the filings?

The definition of lobbyist requires, in part, that individuals "promote, advocate, influence or oppose" matters pending before the General Assembly or State agencies. Under the rules of statutory construction, terms must be given their common and ordinary meaning. 1 Del. C. § 303. "Promote" means "to advance . . . to help bring into being." *Merriam Webster's Collegiate Dictionary, p. 933*(10th ed. 1994). "Advocate" means "to plead in favor of." *Id.* at 18. "Influence" means "the act or power of producing an effect; to have an effect on the condition or development of." *Id.* at 599. "Oppose" means "to offer resistance to." *Id.* at 816.

The individuals, who function as corporate paralegals, file and retrieve public documents. Such ministerial actions are clearly not within the meaning of those terms. They also have direct communications with State employees concerning the filings. The direct communications consist of purely ministerial communications, such as asking for the status of a filing, how to properly complete the forms, filing procedures, how to obtain copies of the public documents, and questions of similar nature. Such communication does not indicate that the individuals have the chance to promote, advocate, influence, or oppose such matters. Thus, as the communications are purely ministerial, the corporate paralegals are not required to register as lobbyists because the activities do not fall within the definition of "lobbyist."

On-line Lobbying--Commission Opinion No. 96-63

An out of state corporation asked if: (1) establishing an on-line site with legislative information and (2) sending a letter with the on-line address to Delaware legislators and other Delaware officials would constitute lobbying.

The on-line site would identify specific legislation and give the company's position. For example, if the Delaware General Assembly introduced legislation affecting the company's product, the on-line site would identify the specifics of the legislation such as the fact that it is a Delaware bill, the bill number, the language of the bill, the effect of passage on the company's product, and whether the company opposed or supported the legislation. The company would not limit the site to covering just Delaware legislation, but would comment on legislation from

other States. The on-line site would not have a two-way exchange--the on-line user would be able go in and look at the site but would not be able to communicate on-line with the information provider.

The letter to Delaware State officials was expected to just be an informational letter, notifying them of the site address and providing general information about the site. There apparently would be no information about the company's position on any legislation. Alternatively, the company might use an advertisement to announce its on-line site and address.

"Lobbyist" means any individual who acts to promote, advocate, influence, or oppose any matter pending before the General Assembly or a State agency by "direct communication." 29 Del. C. § 5841(a)(1). Words and phrases are to be read within their context and construed according to the common and approved usage of the English language, unless such construction would be inconsistent with the manifest intent of the General Assembly. 1 Del. C. §§ 301 and 303.

The common and ordinary meaning of "direct" is "from point to point without interruption"; "from the source without interruption or diversion"; "without an intervening agency or step"; or "marked by absence of an intervening agency, instrumentality, or influence." *Merriam Webster's Collegiate Dictionary, p. 328* (10th ed. 1994).

"Promote" means "to advance . . . to help bring into being." *Id.* at p. 933. "Advocate" means "to plead in favor of." *Id.* at 18. "Influence" means "the act or power of producing an effect; to have an effect on the condition or development of." *Id.* at 599. "Oppose" means "to offer resistance to." *Id.* at 816.

A letter with the on-line address and general information about the on-line site contents sent to State officials, appears to be "direct communication." However, if the letter is informational, and does not espouse positions on legislation or administrative action, the activity does not appear to fall within the terms of promoting, advocating, influencing or opposing.

If an ad is used, promoting the product and identifying the web site where more information can be obtained about the product, this might not be "direct communication," if, for example, the ad is published in a newspaper and/or on television, or on the web site.

According to the company's correspondence, the content of the on-line site would "be the promotion or opposition of legislation . . . ." While the content appears to fall within the definitions of promoting, advocating, influencing or opposing, it does not appear to fall within the definition of "direct communication" as the content is merely posted on the site. Delaware state officials, like any other user, decide if they wish to access the information.

The Commission is not aware of any case law dealing specifically with on-line activities. However, a decision in a case that may be considered analogous was found in an unreported Kentucky trial court decision. *Golden Rule Ins. Co. v. Commonwealth of Kentucky,* Ky. Cir., C.A. No. 94-CI-01420, J. Graham (Mar. 29, 1995). In *Golden Rule*, a company ran television broadcasts regarding pending legislation. *Id.* at 1. Under the statute, "lobby" meant "to promote, advocate, or oppose the passage . . . of legislation by direct communication . . . *Id.* at 4. The Kentucky Legislative Ethics Committee contended that "based upon the areas in which they [the broadcasts] were aired, it was highly likely that they were heard or seen by members of the General Assembly." *Id.* at 4-5. The Committee also argued that "even if members of the General Assembly did not hear or see the broadcasts directly, the broadcasts were intended to

generate direct communication with legislators by others who did hear the broadcasts." *Id*. The Court said that the General Assembly chose to define lobbying as "direct communication" with any member of the General Assembly. *Id.* at 6 (emphasis by Court). The Court found that:

> [T]he language leaves little room for interpretation and is anything but ambiguous. Simply put, if one directly contacts any of the enumerated officials to promote, advocate or oppose the passage, modification, defeat . . . of any legislation, one has engaged in the statutorily defined activity of lobbying. By implication, the opposite is also true: if there is no direct communication, the activity is not considered to be "lobbying" . . . *Id.* at 6.

The Court said that while the broadcasts may have resulted in people contacting General Assembly members, that such resulting communication was indirect. *Id.* Accordingly, the broadcasts were not "direct communication."

An online site is similar to a television broadcast in that a person may "tune in" to a particular site. In this instance, the on-line site, like the television set, would not allow for interactive or "direct communication." Also like a television broadcast, the web site could generate direct communication with State officials by persons who enter the site and view the information. However, communication generated in that manner would not constitute "direct communication," but would, in essence, be a solicitation to the users to lobby. This Commission has previously held that solicitations to lobby are not encompassed by the statute, even if it results in direct communication with a State official. *Commission Op. No. 96-36.*

Thus, a reading of the statute against the facts herein does not appear to require that persons engaged in the activities, as described, would be required to register as lobbyists, as long as the activities are limited to such actions.