KENNETH J. POKALSKY
Vice President, Government Affairs

August 16, 2012

Joint Commission on Public Ethics
540 Broadway
Albany, NY 12207

I am submitting the following comments on the Joint Commission's draft guidelines regarding the Lobbying Act's new "reportable business relationship" reporting requirements.

The Business Council has been engaged with the prior commissions charged with implementing and enforcing the Lobbying Act, and has regularly provide written comments on proposed commission guidance, regulations and policies.

In doing so, our objective has been to assure that any implementation regulations or guidelines are both consistent with statutory provisions and legislative intent, and to provide advocacy organizations with straightforward, workable compliance requirements.

The following comments identify three key compliance issues relating to JCOPE's draft guidance, as well as practical approaches to addressing them in a way that meets statutory requirements and sets forth reasonable compliance measures.

We appreciate this opportunity to provide formal input into your guideline development process, and look forward to providing you with any additional information you may need regarding our comments.

"Reason to Know" - The Business Council has concerns about the ability of clients and lobbyists to comply with statutory requirements that statements of registration and semi-annual reports identify any reportable business relationships with entities that the client/lobbyist "knows or has reason to know" has a statewide elected official, state officer, state employee, member of the legislature or legislative employee as a proprietor, partner, director, officer/manager, or significant owner (i.e., owns or controls ten percent or more of the stock of such entity (or one percent in a publicly traded company.)

Such relationships with high profile public officials may be obvious. However, with more than 200,000 New York State employees included in the Act's definition of state official, concerns have been raised about how the "reason to know" test will be applied to contracts with entities that have less obvious public official involvement.

We appreciate JCOPE's effort to craft a reasonable person test in its compliance guide. However, the draft guidance still leaves a considerable gray area

regarding the degree and depth of inquiry that would be sufficient to meet the "reason to know" test.

We recommend that JCOPE's final guidance include a safe harbor provision on which clients and lobbyists can rely for compliance. For example, we believe that JCOPE's guidance could provide that, if clients and lobbyists make a good faith inquiry of a potential contractor as to the presence of a public official as partner, manager or owner within the company, that inquiry and its results should be sufficient to satisfy the "reason to know" test. After all, it is unclear how else a person or business would be able to obtain information about owners, managers and key employees of an enterprise - especially a non-publicly traded enterprise - other than making such a direct inquiry.

The draft guidelines already say that "any efforts by the client [or lobbyist] to obtain information" related to public official's involvement in a potential contract will be a factor used in evaluating the "reason to know" test, and that an adequate inquiry at least falls somewhere short of submitting freedom of information requests for official's "financial disclosure forms."

We believe a reasonable safe harbor provision will meet the legislative intent set forth in the "reportable business relationship" mandate and provide clients and lobbyists with a workable compliance requirement. We urge JCOPE to include some form of "safe harbor" provision in its final guidance.

Definition of "Client" - The draft guidelines' definition of "client," goes well beyond the statutory definition of "client" found in the Lobbying Act, which is "every person or organization who retains, employs or designates any person or organization to carry on lobbying activities on behalf of such client."

While the proposed guideline's definition includes this statutory language, it expands substantially upon the statutory definition by adding, "With respect to an organization, the term Client also includes the following: Proprietors, partners, directors, or executive management of the organization; Individuals who own or control ten percent or more of the stock of the organization (or one percent in the case of a corporation whose stock is regularly traded on an established securities exchange); Employees of the organization whose duties or responsibilities relate to lobbying activities in the State; and Employees of the organization whose duties or responsibilities relate to procurement activities with the State."

We object to this expanded definition of what constitutes a "client" on legal grounds as it goes well beyond what is provided for in statute. This expanded definition is also inconsistent with JCOPE's recently amended and published "Guidelines to the Lobbying Act," (see http://www.jcope.ny.gov/about/lob/Lobbying%20Guidelines%204_24_12revised2.pdf), and - to our knowledge - is unsupported by any prior Temporary Commission or Public Integrity Commission advisory opinion.

This draft definition is of practical concern as well as it would impose substantial new compliance obligations on lobby clients for which compliance will be difficult if not impossible to achieve.

For organizations, the business relationship reporting mandate is meant to capture formal and informal agreements between the organization and public officials. Under JCOPE's proposed rule, the organization will be required to somehow identify and assess business relationships between a potentially large number of its employees and public officials – business relationships that likely have no connection to or relevance for the client/organization.

Since this guidance document will presumably influence JCOPE's compliance determination and civil enforcement actions, it is critical that it both reflect statutory intent and spell out clear and reasonable compliance obligations. We believe the proposed expansion fails on both count.

To address this, we strongly recommend that this final guidance reflect the statutory definition of the term "client."

Reportable Business Relationship – We are concerned that, as written, the draft guidance would result in a wide range of common credit arrangements – including credit cards and other lines of credit, mortgages, car loans, etc. – being publicly disclosed "reportable business relationships."

The draft guidelines carry over the statutory definition of "compensation," which includes "loans" along with salaries, fees, gifts and other things of value. As such, a business that retains a lobbyist would be required to disclose any such "loans" of more than $1,000 to public officials as a "reportable business relationship."

We believe that the Lobbying Act allows for a more reasonable application of law.

The Act provides flexibility, in saying that the definitions set forth in Section 1-c are to be applied as written "unless the context otherwise requires." We believe that the provision of Sections 1-e (c)(8)(i) and 1-j(b)(6)(i) of the Act– which speak to compensation <u>to be paid</u> - combined with the statutory definition of "reportable business relationship" - i.e., a relationship in which compensation <u>is paid to</u> a public official by a lobbyist or client <u>in exchange for goods or services</u> - present a sufficiently different context to justify a modified definition of "compensation."

Commercial loans are not "paid to" their recipients in exchange for services. This definition of compensation was drafted to describe payments to lobbyists, for purpose of determining whether a lobbyist had met the financial threshold for registration, and therefore strikes us as inconsistent with the purpose of the reportable business relationship reporting requirement.

In addition, the final guidance's definition of compensation should also carry forward statutory language that excludes political contributions subject to the state Election Law.

For these reasons, we recommend the final guidance contain a definition of compensation that includes any "salary, fee, gift, payment, benefit, advance or any other thing of value paid, owed, given or promised by a client/lobbyist to a

State Person, except loans and other forms of credit that provided on the same terms and conditions as offered to the general public or segments thereof and contributions reportable pursuant to article fourteen of the election law."

Again, on behalf of The Business Council and its members, I appreciate your efforts to reach out to us and other stakeholders in developing your final compliance guidelines.

I hope these comments are useful, and I look forward to working with you in any way as you finalize your compliance guidelines.

Sincerely,

kp