HEATHER BRICCETTI
President

February 25, 2013

Ms. Ellen Biben
Executive Director
Joint Commission on Public Ethics
540 Broadway
Albany, NY 12207

Dear Ellen:

I am writing today to share my concern and frustration with two JCOPE decisions regarding Lobbying Act compliance. I am concerned that JCOPE's regulatory decisions are inconsistent with the letter and intent of statutory provisions, and that decisions (i) result in significant additional administrative burdens and costs, (ii) have questionable public benefit, and (iii) create substantial compliance burdens and uncertainty for The Business Council and other members of the regulated community.

I look forward to the opportunity to discuss both the legal and practical component of these issues with you and your staff at your convenience. I believe that there are workable alternatives that meet the legislature's compliance and disclosure objectives while providing the regulated community with more straightforward, manageable compliance obligations.

Reportable business relationship ("RBR") – The statute is clear in that any "client of a lobbyist" is required to disclose business relationships with public officials valued in excess of $1,000 per year. The Lobbying Act clearly defines "client" in § 1-c (b) as "every person or organization who retains, employs or designates any person or organization to carry on lobbying activities on behalf of such client." The Lobbying Act further defines "organization" as "any corporation, company, foundation, association, college . . ., labor organization, firm, partnership, society, joint stock company, state agency or public corporation."

There is no dispute that The Business Council is a client of a lobbyist. Thus, it is clear that as a result of the RBR statute, the Business Council must disclose reportable business relationships between the Council and certain public officials. This is a manageable obligation, even with the expansive set of public officials and employees to which this provision applies. Unfortunately, however, JCOPE's RBR Guidelines make this standard unmanageable. In these guidelines, JCOPE arbitrarily redefines the term "client" in instances where the client is an "organization," to include the organization's "directors" and "executive management" (an undefined term, the precise meaning of which is unclear). Since the Legislative Law defines the term "organization" to mean associations as well as corporations, under JCOPE's unsupported redefinition of "client," trade

associations as well as business corporations appear obligated to query their board of directors and some unclear subset of their internal managers as to their personal business relationships with New York public officials.

There is no other Lobbying Act-related statute, rule, or regulation that uses this modified definition of "client," and there is no other aspect of the Lobbying Act that expands the definition of "client" to include to an organizations' directors and managers.

JCOPE's approach results in two major concerns. First and foremost, there is no statutory basis or authority for JCOPE to disregard the clear statutory definition of "client" and apply a new, unsupported meaning for this specific compliance purpose as part of an informally issued guidance document. Second, it imposes an obligation on the organization to intrude into non-business-related contracts involving their directors and managers. Since it is unclear what level of inquiry would satisfy the "knows or has reason to know" threshold, organizations are put in the strange and awkward position of having to ask their boards and managers about such relationships. By imposing this requirement on members of boards of directors, many of whom have no ties to New York State, JCOPE adds a new and challenging compliance risk upon these board members. There is simply no justification for this intrusive and unsupportable expansion of the statute's plain language and meaning.

The solution to these problems is simple: JCOPE should conform its RBR Guidelines to the authorizing statute and limit this reporting obligation to the "client," as such term is defined in the Legislative Law.

Source of funds – The Lobbying Act requires disclosure of any "source of funding over five thousand dollars from a single source that were used to fund the lobbying activities reported [to JCOPE] and the amounts received from each identified source of funding." [Emphasis added.]

Generally speaking, trade associations receive little or no payments specifically for lobbying; their lobbying activities are funding from a portion of dues payments and other revenue sources. However, trade associations do report expenditures of lobbying activities to JCOPE, in addition to reporting the share of dues payments used for lobbying expenditures to the IRS.

Again, JCOPE has decided to disregard these well-established practices, as well as existing law, and adopt a new compliance standard through emergency regulations. By its express terms, the recently enacted provision of the Lobbying Act only requires disclosure of funding pertaining to State lobbying activities. "Lobbying" and "lobbying activity" are defined terms under the legislative law that require that the lobbyist "attempt to influence" some enumerated governmental action. Yet, the regulation requires trade association filers to disclose some portion of payments made to the association, regardless of whether the payment was for lobbying or other services.

We have two specific concerns regarding JCOPE's emergency rule and proposed final rule on "source of funds." First, it has the incongruous effect of requiring

many trade associations – including The Business Council - to report "source of lobbying funds," even if the source provided significantly less than the $5,000 threshold referenced in the statute. Second, the proposed approach imposes a significant new administrative burden because of the recordkeeping and reporting requirements, which go well beyond our typical accounting and bookkeeping practices, necessary for compliance with this new requirement.

The Business Council has on several occasions provided written recommendations to JCOPE on how to deal with the "source of fund" disclosure mandate with regard to associations. Specifically, we urged JCOPE to use existing lobby expense data as reported to JCOPE to define the "source of funds" required to be disclosure, i.e., The Business Council's ratio of reportable lobby expenses to total expenses would be applied to total payments from a single source. As our ratio of lobbying expenditures to total expenditures is about 25 percent, under this approach we would disclose the source, amount and date of payments exceeding $20,000 in the aggregate. JCOPE's emergency and proposed final rule partially accepts and partially rejects The Business Council's proposal. Essentially, the emergency and proposed rules require associations to identify every source of $5,000 or more, regardless of how much that source has contributed to the lobbying effort, and report an amount that is the result of their total payments multiplied by its "lobby expense ratio."

No doubt, this standard is a significant improvement over JCOPE's initial draft regulation, which would have required the disclosure of the source, amount and date of all contributions over $5,000 (in aggregate), regardless of the purpose of the contribution. Even with this improvement, however, the regulation is inconsistent with a plain reading of the statute, which requires disclosure of sources of lobbying funds of $5,000 or more. Instead, the promulgated rule requires that The Business Council report information regarding sources that make as little as $1,250 in payments that are attributable towards lobbying expenses. This result is inconsistent with the clear statutory intent of the "source of funds" disclosure mandate and results in disclosure of amounts that may actually exceed the total amount expended by the Business Council for lobbying activity.

Moreover, the new disclosure requirement increases our direct reporting obligations more than three-fold under the emergency rule, compared to our proposed approach. Moreover, it requires a substantial increase in internal financial reviews, mostly done manually, to ascertain whether any of our 2,500 member businesses approach this $5,000 total aggregate payment threshold over a rolling twelve-month period. Because of the way the rule works, this process cannot easily be automated. Thus, the new requirement literally requires dozens of man-hours to complete accurately.

The "source of funding" statute is widely seen as a response to certain advocacy organizations with little or no public disclosure as to their members or funding sources. In contrast, many trade associations, including The Business Council, publicly disclose their members and their directors, as well as provide extensive lobby expense and other lobbying activity disclosures to JCOPE. It is unclear to us how this expansive application of the "source of funding" mandate to long-

established trade associations provides any significant new information to the public. In summary, it remains unclear to us why a reportable lobby expense figure already accepted by both JCOPE and the IRS, is not appropriate in this setting.

Finally, we are compelled to note that our compliance efforts are further aggravated by a JCOPE on-line reporting system that often simply does not work. If the regulated community is required to make investments to meet these new compliance standards, we respectfully note that the Commission too must make investments, and urge that JCOPE start with upgrading its technology and improving its website.

I appreciate your willingness to consider our concerns, and to consider possible further amendments to JCOPE's approach on these two issues. I look forward to meeting soon.

Sincerely,

Copy to Robert Cohen, Commission Members