

**OTHER AGENCIES  
ELECTION LAW ENFORCEMENT COMMISSION**

**Lobbyists and Governmental Affairs Agents**

**Adopted Amendments: N.J.A.C. 19:25-20.1 through 20.16, 20.18, 20.19, and 20.20**

**Adopted New Rules: N.J.A.C. 19:25-20.3A, 20.3B, 20.9A, 20.10A, and 20.18C**

Authorized by: Election Law Enforcement Commission, Frederick M. Herrmann, Ph.D.,  
Executive Director

Authority: N.J.S.A. 52:13C-23.2

Filed: November 9, 2005 as R. 2005, 37 N.J.R. 2838(a) at 2841, **without change**, but with  
proposed N.J.A.C. 19:25-20.3(a)8iii not adopted.

Effective Date: December 5, 2005

Operative Date: January 1, 2006

Expiration Date: May 26, 2010

The Commission authorized proposal of extensive amendments to its regulations and new rules to implement the provisions of lobbying laws enacted during 2004; see 37 N.J.R. 224(a) (January 18, 2005) (hereafter, original proposal). The new lobbying laws not only changed the name of the lobbying law from the "Legislative Activities Disclosure Act of 1971" to the "Legislative and Governmental Process Activities Disclosure Act," N.J.S.A. 52:13C-18 et seq. (hereafter, the Lobbying Act), but also significantly expanded the scope of lobbying activity and reporting in New Jersey. As a result of testimony offered at public hearings on the original proposal, conducted on February 15 and March 15, 2005, and the numerous written comments received, the Commission determined that the new rules and amendments, as originally proposed, required significant changes to address issues raised by the commenters. The required modifications were substantive, and therefore, pursuant to the Administrative Procedure Act (N.J.S.A. 52:14B-1 et seq.), could not be made upon adoption. To implement the provisions of the lobbying laws enacted in 2004, the Commission therefore repropose the new rules and amendments to its regulations originally proposed at 37 N.J.R. 224(a).

A public hearing on the repropose new rules and amendments was conducted before the sitting Commission on September 20, 2005, at the offices of the Election Law Enforcement Commission (hereafter, the Commission), in the Edward J. Farrell Memorial Conference Room, 28 West State Street, 12<sup>th</sup> Floor, Trenton, New Jersey. Six people offered testimony at the September 20, 2005 public hearing. Advance written notice of the hearing was circulated on or about August 10, 2005, to the Secretary of State, the County Clerks, the State House press corps, registered agents, and other interested individuals. The period for receipt of written comments expired on September 30, 2005, and 26 written comments were received. The Commission wishes to thank the following for their testimony and comments on the reproposal:

Fred J. Abbate, Ph.D., Executive Director, New Jersey Utilities Association

Peter Allen, Executive Director, Consulting Engineers Council of New Jersey

Richard Chapkis, Esq., Vice President and General Counsel, Verizon, Inc.

Paul D. Chrystie, Executive Director Coalition for Affordable Housing & Environment

Kevin J. Curry, Assistant Compliance Officer, First Trenton

Linda Czipo, Executive Director, The Center for Non Profit Corporations, Inc.

Kathleen A. Davis, Executive Vice President & COO, Chamber of Commerce of Southern New Jersey

Tom DiGangi, Jr., Director, Government Affairs, Building Contractors Association of New Jersey

Frederick DiSanti, Vice President of External Affairs for Public Service, Electric & Gas Public Service Enterprise Group

Edward C. Eastman, Jr., Manager, Lomurro, Davidson, Eastman & Munoz, P.A.

Michael A. Egenton, Assistant VP, Government Relations, New Jersey State Chamber of Commerce

John P. Friedman, Assistant Vice President & Senior Legislative Counsel, United Services Automobile Association

Richard Goldberg, Esq., President, Commerce & Industry Association of New Jersey

Amy Hansen, Policy Analyst, New Jersey Conservation Foundation

Stuart A. Hoberman, Esq., President, New Jersey State Bar Association, Wilentz, Goldman & Spitzer, P.A.

Paul Josephson, Esq., New Jersey State Bar Association

Chuck Leitgeb, Vice President, Insurance Council of New Jersey

Lisa Levine, Esq., Counsel, Pringle Quinn Anzano, P.C.

Brian J. Litten, Esq., Director, Government Affairs, Horizon

John A. Maxwell, Associate Director, NJ Petroleum Council

Frank A. Melchior, V.P. & Senior Underwriting Counsel, New Jersey Title Insurance Company

Terry Newhard, Executive Director, Norwestcap

John Rogers, Esq., Vice President/Human Resources, New Jersey Business & Industry Association

Richard Stokes, Esq., Regional Manager & Counsel, Property Casualty Insurers Association

Charles D. Vogel, Counsel, State Farm Insurance

Deborah A. Wean, CPCU, Assistant Counsel, NJM Insurance Company

Douglas A. Wheeler, Esq., Chief of Staff and Assistant Commissioner, Department of Banking and Insurance

Andrew G. Wynne, Legislative Assistant, Public Affairs Management

After reviewing the testimony and comments concerning the reproposal, the sitting Commission voted on October 25, 2005, to adopt the amendments and new rules as repropounded without change, but with proposed N.J.A.C. 19:25-20.3(a)8iii not adopted. The public hearing record and record of opportunity for the public to be heard may be reviewed by contacting Michelle R. Levy, Associate Legal Director, Election Law Enforcement Commission, P.O. Box 185, Trenton, New Jersey 08625-0185.

**Summary of Public Comment and Agency Response:**

**Exemptions from the Scope of the Lobbying Law**

With the enactment of the new lobbying laws in 2004, the scope of reportable lobbying activity was expanded significantly beyond attempts to influence legislation and regulation to include attempts to influence "governmental processes" which include: promulgation of executive orders; rate setting; development, negotiation, award, modification or cancellation of public contracts; issuance, denial, modification, renewal, revocation or suspension of permits, licenses or waivers; procedures for bidding; imposition or modification of fines and penalties; procedures for purchasing; rendition of administrative determinations; and award, denial, modification, renewal or termination of financial assistance, grants, or loans; see N.J.S.A. 52:13C-20u.

To address comments received that the breadth of "governmental processes" was too far-reaching, the Commission repropounded N.J.A.C. 19:25-20.3, Exemptions from the Act, to include a new paragraph 7 of subsection (a) (hereafter, paragraph 7) which recites a representative list of routine contacts with staff members of State government that are exempt from reporting as lobbying activity. The exemptions were based on the understanding that such routine contacts are not intended to lobby for preferential treatment from or alter the decision of a State department or agency. Instead, the communications are "ministerial," involving "obedience to instructions or laws instead of discretion, judgment, or skill." Black's Law Dictionary (Eighth Edition).

The Commission believes that many of the examples offered by the commenters are routine, ministerial matters that may be exempt from the scope of lobbying under reproposed N.J.A.C. 19:25-20.3. The Commission expects that it will be called upon to interpret this list and apply its provisions to more detailed and specific examples through the advisory opinion process. The Commission further anticipates that amendments will be necessary to clarify whether or not communications come within the exemption for routine, ministerial matters.

**COMMENT:** Commenters asked for further expansion of the list of exemptions in paragraph 7 of N.J.A.C. 19:25-20.3 to include an insurance company seeking the approval of forms, as required by law from the Department of Banking and Insurance (DOBI), and a utility company resolving a routine customer complaint with the Board of Public Utilities (BPU).

**COMMISSION RESPONSE:** The Commission believes that communications with employees of State government to secure approval of forms and to resolve customer complaints are examples of the routine, ministerial matters contemplated in reproposed N.J.A.C. 19:25-20.3, specifically paragraph 7. Where the same standards or procedures are applied by a government entity in responding to all similar communications, these contacts do not result in preferential treatment for the individual business making the communication. As the Commission explained in the reproposal, it would be impractical to include an exhaustive list of exempt routine, ministerial contacts in the rules, because such a list would be unwieldy and not helpful for the public. Therefore, the exemptions listed in paragraph 7 were intended to serve as illustrations of possible exempt activities, and the Commission is not expanding the list at this time.

**COMMENT:** N.J.A.C. 19:25-20.3(7) establishes a list of “routine, ministerial” actions that are exempt from the scope of lobbying and therefore not subject to any reporting requirement. A commenter suggested that the Commission insert the word “or” between “routine” and “ministerial” because the term “ministerial” has a different meaning from “routine.”

**COMMISSION RESPONSE:** As the Commission explained in the reproposal, the term “ministerial” was used to describe communications with employees in State government whose responses were constrained by instructions and did not involve “discretion, judgment, or skill.” The use of the word “routine” was intended to reinforce the idea that the communication was “in accordance with established procedures,” as defined in Webster’s Ninth New Collegiate Dictionary. It was not the Commission’s intent to establish a two-prong test, but rather to emphasize the “commonplace or repetitious character” of the exempted communications. The Commission therefore retains the “routine, ministerial” description in paragraph 7. However, if experience in applying the new term warrants, the Commission would consider an amendment to the rule in the future.

**COMMENT:** A commenter suggested that a ministerial task might still involve some element of discretion on the part of a State employee, and that this could result in uncertainty about lobbying reporting. The commenter asked the Commission to further clarify the amount of discretion involved in a task that would be necessary to render the task no longer ministerial and therefore no longer eligible for the exemption as a routine, ministerial matter.

**COMMISSION RESPONSE:** The Commission believes that the uncertainty expressed by the commenter can be addressed through the Commission's advisory opinion process. The commenter should present specific examples for the Commission's consideration of the tasks that might not be purely ministerial. The Commission will review each task and advise the commenter whether or not the task comes within the exemption in paragraph 7 as a routine, ministerial task. The Commission anticipates that it will receive many such requests as the new lobbying rules are implemented.

**COMMENT:** Several commenters suggested that while the Commission cannot completely exclude all "rate setting" activity from the scope of lobbying, there are many tasks associated with "rate setting" that may be exempt as routine, ministerial matters. The commenters also suggested that "file and use rate filings" and "product filings" with the DOBI are ministerial in nature and should be considered exempt from lobbying reporting.

**COMMISSION RESPONSE:** The Commission believes that "rate setting" communications concerning routine, ministerial matters are eligible for the exemptions in paragraph 7 in the same manner as communications concerning any other governmental process. For example, if an employee of a utility company contacts the BPU to schedule a meeting, request forms, or provide a response to a request for specific information, the communication is most likely exempt from lobbying reporting pursuant to paragraph 7 because it is a communication for a routine, ministerial matter. The Commission believes the result would be the same if the communication were made by a restaurant owner scheduling a meeting, requesting forms, or providing a response to a request for specific information from the Department of Labor. The rule requires examination of the purpose and nature of the communication rather than the type of business entity making the communication.

The Commission is of the opinion that questions concerning whether or not "file and use rate filings," "product filings," and other similar tasks may be exempt from lobbying as routine, ministerial matters, pursuant to paragraph 7, must be examined in the context of the advisory opinion process. These matters are complex and industry-specific and will require detailed review by the Commission of specific fact patterns. The Commission encourages the commenters to request an advisory opinion and to provide detailed descriptions and examples of these governmental processes for the Commission's consideration.

**COMMENT:** Several commenters described partnerships between their organizations and State agencies for various tasks, including the acquisition of land. These partnerships require constant communications between the agency and the organization. The commenters requested that such partnerships be exempted from the scope of lobbying regulation. The commenters also noted that at other times, a State agency may request specialized information from the organization.

**COMMISSION RESPONSE:** The Commission recommends that these commenters request an advisory opinion concerning their partnerships with State agencies. The Commission is unfamiliar with the processes involved in these public-private partnerships and requires a thorough review before determining whether or not they may be exempt from lobbying reporting. The detailed information supplied by a requesting party as part of the advisory opinion process not only enables the Commission to respond with an analysis of the facts and

applicable statutory and regulatory materials, but also assists in developing criteria for possible future regulatory action.

The Commission believes that the exemption at subparagraph xiv of N.J.A.C. 19:25-20.3(a)7 addresses the commenter's concern about an organization's response to a request for information from a State agency. Under the repropose rules, a communication with an employee of a State agency or department is exempt from lobbying if the communication provides "a response to a detailed request for specific information."

**COMMENT:** Commenters asked whether or not participation in joint programs and at forums with State agencies constitutes reportable lobbying as communications concerning governmental processes. The commenters explained that such programs may be organized by State agencies.

**COMMISSION RESPONSE:** The Commission does not believe, in general, that participation as an invited panelist or member of a forum which also includes a representative or representatives of a State agency constitutes lobbying communication. The Commission notes that the rules currently exempt from lobbying reporting expenditures made by an agent for food and beverages provided to an "invited speaker" who is "a member of the Legislature, legislative staff, the Governor, the Governor's staff, or an officer or staff member of the Executive Branch, when the food and beverages are provided to all persons who attend the convention, banquet, or other similar function." See N.J.A.C. 19:25-20.11(b)2. The Commission believes that this existing exemption supports treating participation as an invited panelist or speaker as a non-lobbying communication. The Commission may consider in future rulemaking that this type of communication be included in N.J.A.C. 19:25-20.3(a)7 as an additional exemption from lobbying.

**COMMENT:** A commenter requested that the Commission amend the definition of governmental processes to exclude the acts of employees of non-profit organizations because the expansion of the scope of lobbying will have a negative impact on such organizations.

**COMMISSION RESPONSE:** The Commission does not find any authority in the Lobbying Act to exclude communications by employees of not-for-profit organizations from the scope of governmental processes. The Commission notes that many not-for-profit organizations are currently active in influencing legislation and influencing regulation and are therefore already filing lobbying reports. No basis exists in the Lobbying Act to distinguish these organizations from for-profit entities that are subject to lobbying requirements. The Commission believes, however, that the exemptions from lobbying for routine, ministerial matters, added to N.J.A.C. 19:25-20.3, will significantly reduce the number and kinds of communications subject to reporting as governmental processes.

**COMMENT:** A commenter suggested that it is not possible to reconcile the existence of certain lobbying exemptions in paragraph 7 with the list of governmental processes in the Lobbying Act. As an example, the commenter cites the exemption from lobbying in paragraph 7 for the preparation of documents in response to a request for proposal (RFP), but notes the inclusion of the "negotiation, award, modification or cancellation of public contracts" in the list of covered governmental processes; see N.J.A.C. 19:25-20.3(a)7xi and N.J.S.A. 52:13C-20u and N.J.A.C. 19:25-20.2. Another commenter posed a similar question about the grant application process

which is specifically included in the Lobbying Act as a governmental process; see N.J.S.A. 52:13C-20u.

**COMMISSION RESPONSE:** The Commission concludes that there is no conflict between an exemption in paragraph 7 for some tasks associated with a governmental process and the inclusion of that process in the statutory and regulatory list of processes covered by the Lobbying Act. In each case, the governmental process may be subdivided into its many component operations, some of which are routine, ministerial tasks that are exempt from the scope of lobbying, and others which have the potential for lobbying contacts. A vendor who wishes to submit a bid may assign an employee to obtain the RFP from a State agency and to call the State agency to verify the time of a bidders' conference. Each of these tasks is a routine, ministerial task and should not count as lobbying. However, the Commission cannot preclude the possibility that other communications concerning the RFP may be considered to be lobbying.

Similarly, an individual's request for procedures and forms to apply for a grant is a routine, ministerial matter. Those tasks alone should not trigger a lobbying reporting requirement. However, other contacts with the State agency awarding a grant may be reportable lobbying events if the contact in any way might influence the grant application and approval process. The Commission believes that once a grant is awarded, communications with the State agency by the grantee are analogous to and should come within the exemption for providing advice or performing services pursuant to a contract; see N.J.A.C. 19:25-20.2(a)7x.

### **Rebuttable Presumption of Lobbying Activity**

Many comments received in response to the original proposal suggested that the Commission use the level of authority or title of an Executive Branch official receiving a communication to determine whether or not the communication is a lobbying contact. Routine contacts with "low level" officials would not count as lobbying, while contacts with policymakers or "higher level" officials would be lobbying activity. The Commission acknowledged that the difference suggested by the commenters is useful method to further define communications made to influence legislation, regulations, or governmental processes. A contact by a governmental affairs agent with a "higher level" government official, even to obtain routine information, introduces the possibility to exert special influence about legislation, regulations, or governmental processes. The Commission therefore proposed a new rule, N.J.A.C. 19:25-20.3A, Presumption of lobbying activity, to distinguish between communications made by governmental affairs agents, that are presumed to be lobbying, and routine, ministerial communications made by other individuals.

**COMMENT:** Commenters noted that they believe businesses will be burdened by the difficulty of distinguishing between a communication that is exempt from lobbying as a routine, ministerial matter, pursuant to N.J.A.C. 19:25-20.3(a)7, and one that is subject to lobbying reporting pursuant to N.J.A.C. 19:25-20.3A, Presumption of lobbying activity. One commenter suggested that the exemptions for routine communications established by N.J.A.C. 19:25-20.3(a)7 should be incorporated in N.J.A.C. 19:25-20.3A.

**COMMISSION RESPONSE:** The Commission believes that N.J.A.C. 19:25-20.3, Exemptions from the Act, and N.J.A.C. 19:25-20.3A, Presumption of lobbying activity, serve different

purposes and therefore must remain distinct. N.J.A.C. 19:25-20.3(a)7 concerns communications with government by individuals and employees who are not governmental affairs agents, while N.J.A.C. 19:25-20.3A is addressed specifically to communications made by governmental affairs agents.

The exemptions recited in paragraph 7 of subsection (a) of N.J.A.C. 19:25-20.3 are intended to apply to an employee or businessperson who must communicate with governmental entities as part of his or her work, but who is not paid to work as a governmental affairs agent. The Commission believes that the communications recited in paragraph 7 as exemptions from lobbying are among the most common and frequent contacts made by individuals with State government. The list is therefore intended as a tool to permit a non-governmental affairs agent to quickly determine whether or not his or her communication with a State government employee is exempt from lobbying reporting because it does not present the opportunity for special treatment.

By contrast, N.J.A.C. 19:25-20.3A, Presumption of lobbying activity, applies specifically to a communication with a “high level” government official by someone who is a governmental affairs agent. By definition, a governmental affairs agent is “any person who “receives or agrees to receive, directly or indirectly, compensation, in money or anything of value . . . to influence legislation, to influence regulation, or to influence governmental processes . . . .” See N.J.S.A. 52:13C-20g. The Commission believes that it is appropriate to treat communications by someone who is paid to exert influence upon legislation, regulation, or governmental processes differently from communications by an employee or individual who is not employed for such a purpose.

A contact by a governmental affairs agent with a “higher level” government official, even to obtain routine information, introduces the possibility to exert special influence about legislation, regulation, or a governmental process and should be considered lobbying activity. For example, if a governmental affairs agent contacts the assistant commissioner of a State department to obtain information about the progress of a permit application, the contact should be counted as a lobbying contact. The Commission believes that a similar inquiry from a member of the public would most likely be handled by an employee of a State department, and the average citizen would have difficulty reaching the assistant commissioner of a State department for such an inquiry. The fact that a governmental affairs agent achieves access to the assistant commissioner, who is not available to the average citizen, introduces the possibility for influence that is not available to the average citizen. The Commission therefore believes that it is reasonable to treat as lobbying activity a routine contact by a governmental affairs agent with a government official possessing a certain level of authority. 37 N.J.R. 2842. (emphasis added)

The Commission notes, however, that N.J.A.C. 19:25-20.3A creates a rebuttable presumption that a communication by a governmental affairs agent with a “higher level” State official is reportable lobbying activity. Therefore, a governmental affairs agent may treat his or her

communication with a “higher level” State official as a non-lobbying communication if the agent can establish that there was no lobbying purpose to the communication and that no special influence about legislation, regulation, or a governmental process was exerted.

**COMMENT:** A commenter asked for clarification of the term “policy advisor” which is included among the list of “higher level” State officials in N.J.A.C. 19:25-20.3A.

**COMMISSION RESPONSE:** The Commission understands that there are individuals whose primary responsibility is to develop policy within a department of State government or a State agency. These individuals have various job titles. If it is not clear from a person’s job title whether or not that person functions as a policy advisor, the Commission recommends that it is appropriate to request an advisory opinion for clarification.

**COMMENT:** A commenter asked whether or not a chance encounter with a high level official that results in a request for a meeting would constitute a reportable lobbying communication.

**COMMISSION RESPONSE:** The Commission believes that an unplanned encounter with a high level official alone does not qualify as a reportable lobbying event. It is necessary to examine the discussion that follows the chance meeting to determine whether or not a reportable lobbying event has occurred pursuant to the rebuttable presumption in N.J.A.C. 19:25-20.3A.

**COMMENT:** Other commenters asked what records would be necessary to prove that a communication by a governmental affairs agent with a “higher level” State official is not reportable lobbying activity as a result of the rebuttable presumption in N.J.A.C. 19:25-20.3A.

**COMMISSION RESPONSE:** With regard to records relevant to the rebuttable presumption, the repropose rules establish the recordkeeping requirements for all communications by governmental affairs agents. N.J.A.C. 19:25-20.15, Audit by Commission; recordkeeping, requires that a governmental affairs agent shall make, obtain, and maintain records for a period of three years of activity relating to influencing legislation and regulations. Reproposed subsection (b) of N.J.A.C. 19:25-20.15 incorporates governmental processes into the rule and imposes the same recordkeeping requirements for attempts to influence governmental processes as for attempts to influence legislation and regulation. The records include, but are not limited to, “checks, bank statements, contracts and receipts, so as to provide evidence to support statements in reports filed with the Commission and to permit an adequate basis for auditing by the Commission.” See N.J.A.C. 19:25-20.15(b).

The Commission notes that each governmental affairs agent (formerly, legislative agent) is required to file a quarterly report of his or her activity in attempting to influence legislation and regulations and must therefore currently track such communications in order to file properly; see N.J.S.A. 52:13C-22. The information is also necessary to file the lobbying annual financial report; see N.J.S.A. 52:13C-22.1. In order to complete a quarterly activity report or an annual financial report, an agent must have records to identify the communications that are subject to reporting. The new laws and proposed new rules added “governmental process” to an already-existing obligation. The Commission believes that the process is not changed by the addition of the rebuttable presumption. Each governmental affairs agent must continue to keep records of communications, including those with “high level” governmental officials, as part of the required

recordkeeping process. Therefore, at a minimum, each governmental affairs agent must keep checks, bank statements, contracts, and receipts, and should note in his or her records information to establish whether or not a communication is subject to the rebuttable presumption in N.J.A.C. 19:25-20.3A.

**COMMENT:** Commenters suggested that the Commission delete the rebuttable presumption of lobbying activity, created pursuant to N.J.A.C. 19:25-20.3A, for communications by governmental affairs agents with “high level” State officials. They stated that the presumption creates problems for non-profit entities that have frequent contacts with State government.

**COMMISSION RESPONSE:** In response to the Commission’s original proposal, several commenters suggested that the Commission use the level of authority or title of an Executive Branch official receiving a communication to determine whether or not the communication is a lobbying contact. The commenters asked that routine contacts with “low level” officials not count as lobbying, while contacts with policymakers or “higher level” officials would be lobbying activity. N.J.A.C. 19:25-20.3A, Presumption of lobbying activity, was included in the reproposal specifically in response to these comments. The Commission believes that the rebuttable presumption should be retained as a useful approach for examining communications with State officials and distinguishing reportable lobbying communications.

### **Modification of the 20-Hour Threshold**

As commenters did in response to the original proposal, many comments on the reproposal suggested that the 20-hour threshold, used to determine whether or not an individual has engaged in more than “isolated, exceptional or infrequent” lobbying activity, is now inadequate. The 20-hour threshold for lobbying registration appears in the definition of “governmental affairs agent” at N.J.A.C. 19:25-20.2. The commenters requested that the threshold be increased because of the expansion of the scope of lobbying communications to include governmental processes. They explained that because routine communications with State officials about governmental processes are very common and frequent, the 20-hour test is now too low.

The Lobbying Act provides that a person is not a governmental affairs agent if his or her communications:

with a member of the Legislature, with legislative staff, with the Governor, with the Governor's staff, or with an officer or staff member of the Executive Branch concerning any legislation, regulation or governmental process . . . [are] an isolated, exceptional or infrequent activity in relation to the usual duties of his [or her] employment.” N.J.S.A. 52:13C-20g (emphasis added).

Prior to 1991, jurisdiction over the registration of legislative agents (now governmental affairs agents) rested in the Office of the Attorney General, whose regulations included a 20-hour per calendar year test as part of the threshold for determining whether or not an individual was required to register as a legislative agent. When the Commission was given statutory responsibility for registration of legislative agents, the Commission adopted the same 20-hour test in 1992, because it believed that more than 20 hours of lobbying activity could not be characterized as “infrequent.” See 24 N.J.R. 290. Therefore, the definition of legislative agent,

now governmental affairs agent, appearing at N.J.A.C. 19:25-20.2, provides that activity is “isolated, exceptional or infrequent” if it “constitute[s] less than 20 hours of the time an employee spends working at his or her employment during a calendar year.”

The Commission continues to believe that a decision to increase the 20-hour threshold for “isolated, exceptional or infrequent activity” is premature at this time. As the Commission stated in the reproposal, the additional exemptions from lobbying activity, included in the reproposal at N.J.A.C. 19:25-20.3, Exemptions from the Act, discussed above, may address many of the commenters’ concerns and may realistically reduce the amount of reportable governmental process lobbying activity. The Commission believes that it is reasonable to postpone any revision of the 20-hour test until it has had the opportunity to examine the application of the new exemptions and to evaluate data concerning lobbying registration under the new lobbying law and reproposed regulations.

In a similar vein, one commenter noted that the statutory \$2,500 expenditure threshold for filing the annual report, recited in N.J.S.A. 52:13C-22.1, is not indexed for inflation. The Commission may consider including a recommendation to index the threshold for inflation as a legislative recommendation in the Commission’s 2005 Annual Report.

### **Reporting of Grassroots Lobbying**

A major component of the new lobbying laws was the extension of lobbying disclosure requirements to include “communication with the general public,” which communications are commonly referred to as “grassroots” lobbying. These communications are typically sent or broadcast to members of the public and ask that members of the public contact a legislator or regulator concerning a legislative or regulatory matter. The new law defined “communication with the general public” and required that such communications be included to determine whether or not a lobbyist or governmental affairs agent has met the \$2,500 threshold for filing an annual report. A lobbyist or governmental affairs agent is required to report receipts and expenditures for a “communication with the general public” on the annual report. In addition, the new law imposes an annual report filing obligation on any person, other than a lobbyist or governmental affairs agent, who receives or spends in excess of \$2,500 in any year, for the purpose of communication with the general public.

Comments received on the original proposal noted that while the new law requires reporting of expenditures for a communication with the general public, it nowhere defines the term “general public.” They requested that the Commission define “general public” and stressed that an organization must know which of its communications constitute “communications with the general public” so that it can determine whether or not it has a lobbying reporting obligation. In response to those comments, the Commission reproposed the definition of “communication with the general public,” at N.J.A.C. 19:25-20.2, Definitions, to exclude an organization’s communications made only to its members and added a definition of the term “member.” The definition of “communication with the general public” also specifically excluded communications “by a partnership, committee, association, corporation, labor union, or charitable organization made only to its members, partners, employees, and stockholders.”

**COMMENT:** Several commenters urged the Commission to adopt definitions and criteria established in Internal Revenue Service (IRS) regulations to apply to grassroots organizations and expansion of the new regulatory definition of a “member” which is repropose at N.J.A.C. 19:25-20.2. The commenters indicate that the IRS criteria will be helpful in distinguishing “communications with the general public” from those made to a member of an organization. The commenters asked whether or not the definition of the term “member” can include an organization.

**COMMISSION RESPONSE:** In preparing its reproposal, the Commission examined the regulations of the IRS concerning grassroots lobbying activity undertaken by charitable entities. For the purpose of identifying lobbying activity, the IRS rules require that an entity distinguish between its communications with members and those with non-members. This distinction provided guidance in developing the reproposal which included the new definition of “member.” The Commission decided that any further decision to expand the definition of “communication with the general public” to include IRS or other criteria be delayed until it has had experience in administering the “grassroots” provisions of the new lobbying laws.

The term “member” in N.J.A.C. 19:25-20.2 is defined as “an individual who pays dues to, makes a contribution of money or time to, or has made an affirmative request to receive materials from a committee, association, or organization.” The Commission believes that the definition as proposed may be too restrictive in limiting “member” to only an individual. The Commission understands that there are groups, frequently trade associations or ideologically-based organizations, whose membership is comprised of or includes organizations as members. The Commission believes that as long as the organizational member has met the requirements in the definition of “member,” (e.g., the organization has paid dues) a communication by an entity to that organizational member is not a communication to the general public. The Commission may include this expanded definition in its future rulemaking.

**COMMENT:** Several commenters have asked that the definition of “communication with the general public” at N.J.A.C. 19:25-20.2 be modified to exclude from the scope of “grassroots” lobbying communications by insurance companies with their policyholders and communications by various businesses with their agents, customers, and contractors. The commenters explained that because they have established relationships with these classes of recipients, communications to these recipients are not communications with the general public.

**COMMISSION RESPONSE:** The Commission concurs with the commenters that if communications by a business entity to these categories of recipients are based on a preexisting relationship, the communications are not made to the general public. They are instead similar to communications by a corporation to its shareholders or a labor union to its members. The Commission may add these communications as exemptions from the definition of “communication with the general public” which appears at N.J.A.C. 19:25-20.2 in a future rulemaking. The Commission believes that this is a substantive change which cannot be made upon adoption.

**COMMENT:** The commenters suggest that the Commission adopt the IRS “call to action” standard to define a “communication with the general public.” The “call to action” criteria

require examination of the specific type of action that a recipient of a communication is directed to take with regard to legislation.

**COMMISSION RESPONSE:** The Commission believes that, with the addition of the regulatory definition of “member,” the definition of “communication with the general public” contains sufficient specific criteria to determine whether or not a communication is a “grassroots” communication. The Commission further decides that there is no basis in the Lobbying Act to incorporate “call to action” criteria in the regulatory definition of “communication with the general public.”

**COMMENT:** A commenter requested that the Commission consider an exemption from lobbying for non-partisan analysis, study, or research conducted by a charitable organization and made available to the public. The commenter advised that such communications are not treated as lobbying under the IRS rules and should therefore be excluded from grassroots lobbying in New Jersey.

**COMMISSION RESPONSE:** As indicated in the reproposal, the Commission does not have enough information at this time to assess the impact of materials. Further, there may be significant differences among the various types of analysis, study, or research materials that should be examined before an exemption from lobbying is contemplated. The Commission suggests that the commenter may wish to seek an advisory opinion concerning specific non-partisan analysis, study, or research communications. In the context of an advisory opinion request, the Commission would have examples of the materials for consideration and information concerning the dissemination of the materials. This information must be examined by the Commission before a decision can be made that a communication is not a grassroots lobbying communication.

**COMMENT:** Commenters suggested that the definition of “governmental affairs agent” is overly inclusive because a person who is not a governmental affairs agent, but who receives \$2,500 in a year to communicate with the general public, may have to file an annual report. One commenter explained that an actress in an advertisement or a printer or graphic designer who is paid more than \$2,500 per year might come within the definition of a “governmental affairs agent.” The commenters requested clarification that the definition of “governmental affairs agent” does not include vendors who do not control the content of a communication.

**COMMISSION RESPONSE:** The definition of “governmental affairs agent” at N.J.A.C. 19:25-20.2 includes:

any person who receives or agrees to receive . . . compensation, in money or anything of value for the purpose of conducting communication with the general public or who incident to his or her regular employment conducts communication with the general public, or who holds himself or herself out as engaging in the business of conducting communication with the general public. (emphasis added.)

The Commission believes that use of the word “conducts” in the definition of “governmental affairs agent” is sufficient to establish the distinction between a vendor, who does not control the

content of a communication, and a “governmental affairs agent,” who plays a leadership or decision-making role in a communication. The actress, printer, or graphic designer is paid to play a role in the production of a communication, while the “governmental affairs agent” is paid to convey the communication or cause the communication to be delivered to the general public. The Commission therefore believes that no further clarification of the definition of “governmental affairs agent” is required to address the commenters’ concern.

**COMMENT:** Commenters have asked whether or not they may “prorate” the costs of a “mixed use” communication, such as a newsletter, when reporting lobbying expenditures pursuant to N.J.A.C. 19:25-20.11, Expenditures. The commenters explain that a “mixed use” communication is one that is not completely devoted to lobbying.

**COMMISSION RESPONSE:** The Commission recommends that the commenters provide the Commission with specific examples of “mixed use” communications in advisory opinion requests. Because regulation of grassroots lobbying is a new responsibility for the Commission, it will be necessary to examine such communications to determine whether or not it is reasonable to prorate the costs of the communications and therefore to exempt a portion of the costs from the scope of lobbying reporting.

**COMMENT:** One commenter indicated concern that including “communication with the general public” in the definition of a governmental affairs agent at N.J.A.C. 19:25-20.2 will require grassroots communicators to register as governmental affairs agents.

**COMMISSION RESPONSE:** The new lobbying law distinguishes between two scenarios for communications with the general public: those communications made by a person who engages in no lobbying activity other than communications with the general public, and those communications made by a lobbyist or governmental affairs agent who engages in communications with the general public, as well as other lobbying communications; see N.J.S.A. 52:13C-22.1. The Commission believes that the filing requirements that attach to the two scenarios, while unfamiliar because they are new, comport with the requirements of the Lobbying Act.

In the former case, the person whose lobbying activity is limited exclusively to making communications with the general public is required to file only an annual report of financial activity. This limited filing requirement is recited at repropoed N.J.A.C. 19:25-20.9A, Annual report of communication with the general public. There is no obligation in the rules that a person register as a governmental affairs agent if his or her lobbying is restricted only to communications with the general public.

In the latter case, neither the new lobbying law nor the Commission’s reproposal at N.J.A.C. 19:25-20.4 requires a governmental affairs agent to file a Notice of Representation regarding communications with the general public; see N.J.S.A. 52:13C-21. However, the governmental affairs agent is still required to file Notices of Representation relevant to employment to influence legislation, regulations, and governmental processes. Similarly, although governmental affairs agents must file quarterly activity reports of their activity to influence legislation, regulations, and governmental processes, pursuant to N.J.S.A. 52:13C-22 and

N.J.A.C. 19:25-20.5, neither the law nor the regulation requires a governmental affairs agent to file a quarterly report regarding communications with the general public.

The Commission included "communications with the general public" in the definition of "governmental affairs agent" at N.J.A.C. 19:25-20.2 to reiterate that the new lobbying law, at N.J.A.C. 52:13C-22.1, requires that communications with the general public be included to determine whether or not a lobbyist or governmental affairs agent has met the \$2,500 threshold for filing an annual report.

### **Attorney Lobbying**

The new lobbying law specifically exempted from its scope certain matters within the attorney-client privilege and matters concerning collective negotiations; see N.J.S.A. 52:13C-27g and 52:13C-27h. In its original proposal, the Commission therefore proposed addition of a new subsection (b) to N.J.A.C. 19:25-20.3, Exemptions from the Act, to specifically include the text of the two statutory exemptions. In its reproposal, the Commission responded to comments and proposed further amendment of N.J.A.C. 19:25-20.3 to clarify that certain activity by an attorney in representing a client is not within the scope of lobbying. This amendment incorporated the statement by then-Governor James E. McGreevey when he signed the new lobbying legislation on June 16, 2004, that the new lobbying law "should not be read to require attorneys representing clients in the regular course of a routine litigation or administrative proceeding with the State to register with the Election Law Enforcement Commission."

**COMMENT:** Several commenters requested further clarification of the term "administrative proceeding" so that an attorney would know with certainty when a communication was exempt from lobbying because it was made within the context of an "administrative proceeding."

**COMMISSION RESPONSE:** The Commission understands that attorneys are uncertain about whether or not their representation of clients before the multitude of State agencies will come within the exemption for representing a client in an administrative proceeding. In order to develop criteria for analyzing which proceedings are "administrative proceedings" and therefore exempt from lobbying, the Commission recommends that attorneys who are expert in and therefore familiar with the specialized operations of various State agencies, may wish to describe those proceedings in detail in a request for a Commission advisory opinion. The Commission will therefore have information with which to begin to make distinctions among the many types of agency proceedings.

**COMMENT:** The commenters also requested clarification of the term "rendition of administrative determinations" which is listed among the various governmental processes at N.J.S.A. 52:13C-20u and N.J.A.C. 19:25-20.2.

**COMMISSION RESPONSE:** The Commission will be able to develop a representative list of administrative determinations only after it responds to advisory opinions concerning the many administrative agency determinations in State government.

**COMMENT:** Commenters were concerned that an expert in an administrative proceeding, who is exempt from the need to register as a governmental affairs agent because the communication

occurs in the company of a governmental affairs agent, might inadvertently testify about non-technical issues and no longer be exempt from lobbying. The commenter further suggested clarification that if an attorney in an administrative proceeding is exempt from registering as a governmental affairs agent, the attorney is not required to bring a governmental affairs agent to accompany the expert.

**COMMISSION RESPONSE:** The Commission believes it is logical to consider that if an attorney's communication is exempt because it occurs during an exempt administrative proceeding, the communication by the expert is also exempt from lobbying. The Commission may incorporate this response in future rulemaking.

### **Volunteer Participation in Task Forces**

In response to the Commission's original proposal, many commenters explained that they are asked by State departments, authorities, boards, and commissions to participate in task forces, advisory boards, and working groups because they have expertise in various areas relevant to State government. The Commission was also advised that there are advisory boards that are specifically created by statute. For example, in the Department of Banking and Insurance alone there are the Banking Advisory Board (N.J.S.A. 17:9A-305), the Community Financial Services Advisory Board (N.J.S.A. 17:16Q-1), the Credit Union Advisory Council (N.J.S.A. 17:13-124), and the Licensed Lenders Advisory Board (N.J.S.A. 17:10C-1). Commenters indicated that they serve on advisory boards and task forces in other departments of State government. Further, the various Commissioners in the principal departments in the Executive Branch have statutory authority to convene task forces and advisory boards.

The commenters described participation as voluntary and uncompensated and indicated that there would be a chilling effect on such participation if it were subject to registration and reporting as a "governmental process." Further, the commenters were concerned that State government would be deprived of the knowledge and expertise of many talented individuals who might decline to serve on such boards if they were required to register as governmental affairs agents.

As a result of these comments, the Commission repropose N.J.A.C. 19:25-20.3, Exemptions from the Act, and added new paragraph 8 to subsection (a) to exempt from the scope of lobbying the participation by an individual in a task force, advisory board, or working group only if the following conditions are met: the task force, advisory board, or working group is specifically established pursuant to statute or the head of a principal department in State government has statutory authority to convene such groups; the individual has been specifically nominated or requested to participate; the service is uncompensated; and the proceedings of the task force, advisory board, or working group are subject to the provisions of the Open Public Meetings Act (N.J.S.A. 10:4-6, *et seq.*).

**COMMENT:** A commenter suggested that the exemption from lobbying for participation in a task force, advisory board, or working group should be extended to groups formed other than by the head of a principal department of State government.

**COMMISSION RESPONSE:** The Commission understands that there are many types of task forces, advisory boards, and working groups operating in State government. The Commission therefore recommends that rather than granting a blanket exemption for all such groups, in future rulemaking it may consider developing additional criteria to determine whether or not a task force, advisory board, or working group should be exempt from lobbying. In the interim, the Commission welcomes advisory opinion requests from persons who wish clarification concerning whether or not their participation in an advisory body will constitute reportable lobbying activity.

**COMMENT:** Several commenters advised that entities functioning as task forces, advisory boards, or working groups are not empowered to “spend public funds or affect persons’ rights,” and are therefore exempt from application of the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-7. As a result, a reference to the OPMA as a criterion for determining whether or not an advisory body is exempt from lobbying would have no legal effect; see N.J.A.C. 19:25-20.3(a)8iii.

**COMMISSION RESPONSE:** The Commission has examined several task forces, advisory boards, and working groups and determined that the OPMA would not apply to their work. The Commission has therefore determined not to adopt subparagraph iii of paragraph 8 of N.J.A.C. 19:25-20.3(a). The Commission believes that it is appropriate to not adopt subparagraph iii because this change will clarify application of the rule, will not enlarge or curtail those affected by the rule, and will not change, increase, or decrease the burden on the regulated community. As discussed above, in its future rulemaking, the Commission may develop additional criteria for determining which task forces, advisory boards, and working groups should be exempt from lobbying reporting.

### **\$250 Annual Gift Cap**

Chapter 255 of the Laws of 2003 (N.J.S.A. 52:13C-21b) establishes a \$250.00 annual cap on the total amount of compensation, rewards, gifts, employment, honoraria, or other things of value that a lobbyist or governmental affairs agent may give or offer to any legislator, legislative staff member, or any officer or staff member of the Executive Branch.

**COMMENT:** Comments were received stating that the \$250.00 gift cap, which appears in the Conflicts of Interest Law, includes a reference to a legislator’s immediate family. The commenters questioned the Commission’s authority to promulgate a rule that applies the \$250 gift cap to include the members of a legislator’s immediate family. The commenters asked the Commission to delay adoption of its regulation until the Joint Legislative Committee on Ethical Standards acts with regard to this issue.

**COMMISSION RESPONSE:** N.J.S.A. 52:13C-21b restricts the behavior of lobbyists and governmental affairs agents and is specifically allocated to the Lobbying Act. It is therefore within the Commission’s jurisdiction. N.J.A.C. 52:13C-21b, specifically states that:

The \$250.00 limit on any compensation, reward, gift, honorarium or other thing of value shall also apply to each member of the immediate family of a member of the Legislature, as defined in

section 2 of P.L.1971, c. 182 (C.52:13D-13) to be a spouse, child, parent, or sibling of the member residing in the same household as the member of the Legislature. (Emphasis added.)

The reproposed rules therefore include subsections (c) and (d) of N.J.A.C. 19:25-20.3B, \$250.00 Annual limit on gifts, which explain that calculation of the \$250 cap shall include gifts to members of a legislator's immediate family and define the term "immediate family" to comport with the statutory definition. Therefore, the Commission has direct statutory authority to prohibit a lobbyist or governmental affairs agent from making gifts exceeding \$250.00 to a legislator and his or her immediate family. Based on the statutory text, the Commission need not await a ruling from the Joint Legislative Committee on Ethical Standards on this issue.

### **Implementation of the New Lobbying Laws**

**COMMENT:** A commenter requested that implementation of the new lobbying rules be delayed until January 1, 2007, to provide sufficient time for businesses to identify and train those employees who will be affected by the new requirements.

**COMMISSION RESPONSE:** The Commission believes that implementation of the new laws, principally enacted in 2004, should not be delayed. The Commission will provide continuing, in-depth training for the lobbying community beginning in December of 2005.

The Commission notes that the new rules will become operative on January 1, 2006, and will apply from that date forward. Quarterly lobbying activity reports will be filed pursuant to the new rules beginning in April, 2006, and the first annual lobbying report filed subject to the new rules is not due for filing until February, 2007.

### **Federal Standards Statement**

A Federal standards analysis is not required because the reproposed new rules and amendments concern New Jersey filing entities. The reproposed new rules and amendments are not subject to any Federal requirements or standards.