City of Oakland
Public Ethics Commission

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TO: Public Ethics Commission
FROM: Daniel Purnell
DATE: July 6, 2009

RE: **<u>FIRST SUPPLEMENTAL</u> Staff Report And Action To Be Taken Regarding Proposed Amendments To The Lobbyist Registration Ordinance And A Proposed Moratorium On Commission Enforcement Actions Pertaining To The Registration Of Certain Officers And Directors Of Corporations, Organizations And Associations**

I. INTRODUCTION

At the Commission's previous direction, Commission staff prepared a memorandum dated June 1, 2009, to provide a series of options for amending Section 3.20.030(D) of the Lobbyist Registration Act ("LRA") relating to the definition of "local governmental lobbyist." It also directed staff to prepare a proposed "moratorium" policy addressing the enforcement of future complaints alleging violation of certain provisions of Section 3.20.030(D). Finally, the Commission requested staff to prepare proposed amendments for Section 3.20.160, the current prohibition on the creation of "false appearances of public favor or disfavor" regarding a proposed governmental decision.

This First Supplemental staff report provides several additional areas of consideration with respect to the above topics.

II. DEFINITION OF LOBBYIST

A. Proposed Reference To "Client"

In the June 1, 2009, memorandum, Commission staff provided three basic options for possible amendment to the definition of "lobbyist". As to the existing

definition of "lobbyist" and the three proposed options, Commission staff notes the absence of any express reference to the person on whose behalf the lobbying activities are performed, and/or from whom any compensation is received: In other words, the "client." The LRA currently defines "client" in relevant part as:

> *"[T]he real party in interest for whose benefit the services of a local governmental lobbyist are actually performed."* [LRA §3.20.030(A)]

While it is strongly implied that a lobbyist is someone who advocates on behalf of another, it may help clarify the existing as well as any new definition of "lobbyist" to include an express reference to this other person. Furthermore, the concept of who or what constitutes a "client" should also clarify that a client is some person other than the "lobbyist" (that is, a person is not a "lobbyist" merely for representing his or her own interests.) Thus Commission staff proposes that 1) any definition of "lobbyist" include a reference to "client," and 2) the definition of "client" specify that he, she or it is someone other than the lobbyist.

Applying the above recommendation to the current definition of local governmental lobbyist (or to any of the proposed options) would provide:

> *"Local governmental lobbyist" means any individual:*
>
> > *(1) who receives or is entitled to receive one thousand dollars ($1,000) or more in economic consideration in a calendar month, other than reimbursement for reasonable travel expenses, or*
> >
> > *(2) whose duties as a salaried employee, officer or director of any corporation, organization or association include communication directly or through agents with any public official, officer or designated employee*
> >
> > *for the purpose of influencing <u>on behalf of a client</u> any proposed or pending governmental action of the city or the redevelopment agency.*
> >
> > *No person is a local governmental lobbyist by reason of activities described in Section 3.20.030(A). In case of any ambiguity, the definition of "local governmental lobbyist" shall be interpreted broadly.*
>
> *"Client" means the real party in interest, <u>other than the local governmental lobbyist himself or herself</u>, for whose benefit the services of the local governmental lobbyist are actually performed.*

B. "Broad" Interpretation Of The Term "Local Governmental Lobbyist"

The last sentence in the current and proposed definitions of "local governmental lobbyist" provide:

> *"In case of any ambiguity, the definition of 'local governmental lobbyist' shall be interpreted broadly."*

While appreciating the apparent intent -- that the definition of lobbyist be applied broadly instead of narrowly -- Commission staff questions whether that such a policy direction should apply where an "ambiguity" exists. An "ambiguity" exists when a word or provision is subject to two or more meanings. Ambiguity in a law hinders public notice (because a person might not appreciate whether the law applies to him or her), and the fair application of its provisions. This is arguably the wrong context in which to apply a term "broadly." Commission staff thus recommends this provision be stricken within the existing and proposed definitions of "local governmental lobbyist" and replace it with the following language elsewhere in the Act:

> *"In determining whether a person meets the definition of 'local governmental lobbyist,' the Public Ethics Commission shall interpret the provisions of this Act broadly."*

C. Should The Act Regulate Non-Lobbyists?

Commission staff noted in the June 1, 2009, memorandum that Article V of the LRA contains a series of prohibitions that apply to all local governmental lobbyists and, in some cases, their clients:

> ***3.20.130 Personal Obligation of City Officials Prohibited***
>
> *Local governmental lobbyists, clients, contractors, and persons doing business with the city or the redevelopment agency shall abstain from doing any act with the express purpose and intent of placing any city or agency officer or designated employee under personal obligation to such lobbyist, client, contractor or person.*
>
> ***3.20.140 Deception Prohibited***
>
> *No local governmental lobbyist, client, contractor or person doing business with the city or the redevelopment agency shall deceive or attempt to deceive a city or agency officer or designated employee as to any material fact pertinent to any pending or proposed governmental action.*

3.20.150 Improper Influence Prohibited.

No local governmental lobbyist shall cause or influence the introduction of any ordinance, resolution, appeal, application, petition, nomination or amendment thereto for the purpose of thereafter being employed as a lobbyist to secure its granting, denial, confirmation, rejection, passage or defeat.

3.20.160 False Appearances Prohibited.

No local governmental lobbyist, client, contractor, or person doing business with the city or the redevelopment agency shall attempt in any way to create a fictitious appearance of public favor or disfavor of any governmental action or to cause any communication to be sent to a city or agency officer or designated employee in the name of any fictitious person or in the name of any real person, except with the consent of such real person.

3.20.170 Prohibited Representations.

No local governmental lobbyist, client, contractor, or person doing business with the city or the redevelopment agency shall represent, either directly or indirectly, orally or in writing that such person can control or obtain the vote or action of any city or agency officer or designated employee.

As noted, the above prohibitions also apply in certain cases to "contractors" and "person(s) doing business with the city or redevelopment agency":

"Contractor" means any party to an agreement in which the value of the consideration exceeds one thousand dollars, and, (1) The city is a party, or (2) the redevelopment agency is a party, or (3) the agreement or its effectiveness is in any way dependent or conditioned upon approval by the city council or redevelopment agency board or any board or commission, officer or employee of the city or the agency. [LRA §3.20.030(B)]

"Person doing business with the city" means any person whose financial interests are materially affected by governmental action as defined by Section 3.20.030(E). It includes persons currently doing business with the city or the redevelopment agency, planning to do business with the city or agency, or having done business with the city or agency within two years. For purposes of this Act a person's financial interests shall not be found to be materially affected by the issuance of any license or permit which does not require the exercise of discretion by city or agency officers or employees. [LRA §3.20.030(G)]

A policy question is raised whether an ordinance regulating lobbyists should also regulate the broad definitional categories of "contractors" and "persons doing business with the city", especially when: 1) the "contractor" threshold is only $1,000 and there is no means to track or notify those who qualify, and 2) a person need only to "plan" to do business with the City within two years to be regulated by the LRA's provisions. Arguably such a broad class of persons would not expect to find themselves regulated under a chapter of municipal law regulating the conduct of "lobbyists." The Commission may wish to consider deleting these terms and definitions from the LRA.

III. STAFF RECOMMENDATION

Commission staff recommends that the Commission take public input on the issues presented in this memorandum and the memorandum of June 1, 2009, and give direction to staff for any additional proposals for consideration at a subsequent meeting.

Respectfully submitted,

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Executive Director