February 10, 2020

Office of the City Clerk
Boston City Hall
One City Hall Square, Room 601
Boston, MA 02201
Attn: Sammy Nabulsi, Chairman

Re: Draft Proposed Regulations of the Municipal Lobbying Compliance Commission

Dear Chairman Nabulsi and members of the Commission:

We represent a diverse coalition of member associations, non-profits, and businesses that work within the City of Boston. We understand the importance of transparency to the City of Boston and believe that accountability is of paramount importance to the work our organizations do with the City. We appreciate the opportunity to comment on the Municipal Lobbying Compliance Commission's Draft Proposed Regulations (the "Draft Regulations") to implement the Lobbyist Registration and Regulation Ordinance signed by Mayor Walsh in October 2018.[1]

[1] An Ordinance Amending Chapter 2 of the City of Boston Code, Ordinances Regarding Lobbyist Registration and Regulation, Ordinances of 2018 – Chapter 9, *available at* https://www.boston.gov/sites/default/files/lobbying-ordinance-2019.pdf ("the Ordinance").

In July of 2019, our coalition submitted a legal analysis of the Ordinance to Mayor Walsh and Councilor Wu. This document was also shared with the City Clerk, all City Councilors, and members of the Lobbying Compliance Commission. We have re-attached the legal analysis, prepared by the law firm Foley Hoag LLP, which highlights our key concerns with the Ordinance.

The Draft Regulations include important clarifications that address some of the concerns raised in Foley Hoag's original legal analysis. We appreciate the Commission's attention to the issues we raised previously. The Draft Regulations make significant strides toward ensuring the Ordinance is applied in a manner that promotes transparency without stifling the dialogue between public officials and community members.

Our most significant concern, however, is that the Ordinance and the Draft Regulations (as proposed) will result in hundreds of individuals facing registration and reporting burdens for activities that are not traditionally considered lobbying: in numerous instances, participating in a single meeting or phone call (absent another applicable exception) will require registration as lobbyists, submission of disclosure reports, and payment of registration fees. The Commission is well within its legal authority to promulgate regulations clarifying that individuals are only "retained, employed, or designated" to engage in lobbying if they meet certain *de minimis* thresholds, and we strongly recommend that it do so.

Our targeted comments below are focused on ensuring that the Draft Regulations implement the Ordinance in a manner consistent with its intent, and on advocating for key clarifications that will ameliorate the chilling effect the Ordinance will otherwise have on important communications with City officials.

I. Areas Requiring Additional Clarification

A. The Regulations Must Recognize a De Minimis Exception for Incidental Lobbying

As explained in the legal memorandum attached to our July 2019 letter, analogous federal, state, and municipal lobbying registration statutes acknowledge that individuals who only participate in a limited number of lobbying activities are not "lobbyists" for purposes of the reporting and registration requirements.

The federal and Massachusetts state statutes do so by creating "de minimis" thresholds, requiring individuals to register as lobbyists only if their lobbying activity exceeds an incidental amount of lobbying. Under the state law, individuals are required to register if they engage in lobbying activity for more than 25 hours during any six-month reporting period or if they receive more than $2,500 during any reporting period for lobbying.[2] Federal law requires individuals to register as lobbyists if they have engaged in more than one lobbying contact *and* if their lobbying activities constitute more than 20 percent of the total time spent by that individual on behalf of a

[2] G.L. c. 3, § 39.

given client over a 3-month reporting period.[3] To illustrate, under the federal statute an individual who works for a client for 10 hours in a reporting period, and expends more than 2 of those hours on lobbying activities, is required to register.

We remain deeply concerned that neither the Ordinance nor the Draft Regulations include a *de minimis* exception or incidental-lobbying threshold for reporting requirements. Without such an exception, many individuals participating in a single meeting or phone call would be required to register as lobbyists, submit disclosure reports, and pay a registration fee. As written, the Ordinance and the Draft Regulations will not only compel the registration of a large number of individuals who are not professional lobbyists, but will subject them to the possibility of significant monetary penalties if they fail to comply (Section 13). We do not believe the City Council intended the reporting and registration requirements to apply to such a wide-cross section of individuals with limited interactions with City officials.

It is well within the legal discretion of the Commission—as the entity charged with overseeing both registration under the Ordinance (as evidenced by Section 5 of the Draft Regulations) and enforcement of the Ordinance (as evidenced by Sections 8 through 13 of the Draft Regulations)—to establish for those same registration and enforcement purposes a definition of what constitutes being "retained, employed, or designated" to engage in lobbying.

The proposed revision 1 in Section II addresses this issue.

B. Clarification of the Technical Service Experts Provisions

We applaud the Commission for including Section 4 of the Draft Regulations, clarifying that Technical Service Experts engaged in qualified non-lobbying activity are not considered lobbyists for purposes of the Ordinance. This regulation is essential to ensuring that Technical Service Experts are not discouraged from participating in meetings with City officials, and that City officials are able to benefit from their technical expertise.

We remain concerned, however, that as currently drafted, the Draft Regulations arbitrarily distinguish which professions and professionals are entitled to the benefit of Section 4. For example, Section 4(2) limits Technical Service Experts to those individuals that are "educated, trained, *and* licensed to provide technical services" (emphasis added). While we agree that Technical Service Experts should be required to have bona fide credentials in the field in which the practice, many highly-trained professionals would not meet this definition because no government entity offers a license in their field.

Similarly, Section 4(3), limits Technical Services to "accounting, engineering, scientific, or architectural disciplines." This limited list excludes several skilled professions that provide substantively similar technical services to those offered by accountants, engineers, scientists, and

[3] 2 U.S.C. § 1602(10). Federal law also contains an exception from registration if the lobbyist meets the percentage threshold but does not exceed $2,500 in lobbying income (adjusted for inflation) in the reporting period. 2 U.S.C. § 1603(a)(3)(A)(i).

architects. In the absence of any other applicable exception, technical experts in fields of significant importance to the development of City decisions and policy—including medicine, human services, and education—would be required to register as lobbyists, submit disclosure reports, and pay a registration fee for providing similar technical guidance. In contrast, New York City, whose lobbying ordinance also excludes persons providing "technical services" from the definition of lobbying, provides a more flexible definition of "technical services." New York City defines "technical services" as "advice and analysis directly applying any engineering, scientific or technical discipline."[4]

To illustrate the presumably unintended arbitrary application of Section 4 as currently drafted, consider the following examples:

- A developer of a proposed affordable housing project that requires discretionary approvals seeks to minimize traffic impacts. As part of her permit application, the developer proposes designing, funding, and constructing improvements to a nearby public way. In the course of designing these improvements, the developer's licensed professional engineer participates in technical review meetings with various City employees. The professional engineer brings not-yet-licensed engineering school graduates and engineers-in-training under the direct charge and supervision of the professional engineer to the technical review meetings to help answer technical questions.[5] The professional engineer is a Technical Service Expert, but the engineering school graduates and engineers-in-training are not. Under Section 4 as drafted, the graduates and trainees would arguably have to register as lobbyists.

- A small business owner is meeting with the Boston Environment Department regarding an approval the small business needs to modify the waterfront property it occupies. The small business owner has hired a real estate attorney to advocate for the approval, and an architect and a climate scientist also join the meeting to answer technical questions about the design of the project and the potential impact of rising sea levels on the project. No public entity currently offers a license for climate scientists. The architect, who is licensed by the Commonwealth, is a Technical Service Expert, but the climate scientist is not. Under Section 4 as drafted, the climate scientist would arguably have to register as a lobbyist.

- A local academic medical center has a private meeting with staff of the Boston Public Health Commission to discuss implementation of a City grant to support a drug treatment and needle exchange program. While the academic medical center employs a government affairs professional to advocate for additional funding, an accountant attends to answer questions about how current funds have been spent, and a faculty member, who is an expert in public health and drug abuse prevention, attends to answer questions on the

[4] N.Y.C. Admin. Code §3-211.

[5] *See* 250 CMR 5.04 (permitting those under the direct charge and supervision of a professional engineer to practice engineering).

public health benefits and risks of needle exchange. The accountant is a Technical Service Expert, but the public health expert is not. Under Section 4 as drafted, the public health expert would arguably have to register as a lobbyist.

The proposed revisions 4 and 5 in Section II addresses this issue.

C. Qualified Non-Lobbying Activity

The Draft Regulations clarify that Technical Service Experts are not considered Lobbyists for the purposes of the Ordinance, provided they are engaged in "qualifying non-lobbying activity." Section 4(4) states that qualified non-lobbying activity does not include "recommending or advocating for approval, denial, or postponement of a decision or administrative action."

While we appreciate the need to clarify the difference between lobbying activity and qualified non-lobbying activity, in practice, it will be difficult to distinguish consistently between whether a Technical Service Expert who is providing technical information is assisting in the understanding of a matter, or recommending or advocating for approval, denial, or postponement of a decision or administrative action. For example, an environmental engineer explaining to the Boston Environment Department how a proposed project design will mitigate the potential shadow impacts on neighboring properties is implicitly advocating for the project design, even if her presentation solely relates to her technical expertise. In many instances, whether the provision of technical information by a Technical Service Expert is characterized as permissibly assisting understanding or impermissibly making a recommendation will turn on the subjective perception of the City Employee attending the presentation. Indeed, that perception could even differ between two City Employees hearing the very same presentation. Whether a given individual has an *objective* obligation to register as a lobbyist neither can nor should depend on the *subjective* (and perhaps even unstated) opinion of a third party.

As currently drafted, this provision will not have the intended impact of allowing technical experts to freely provide technical information to the Mayor, City Council or City Employees. We encourage the Commission to allow the objective limitations of Sections 4(2) and 4(3), coupled with the first sentence of Section 4(4), to serve to appropriately limit the practical scope of the Technical Service Experts exemption.

The proposed revision 6 in Section II addresses this issue.

D. Communications Required or Requested by City Officials

The Ordinance includes several exceptions to the definition of "lobbying or lobbying activities" confirming that the City Council did not intend for reporting and registration requirements to apply to individuals who are only communicating with the Mayor, City Council, or City Employees within the bounds of processes, meetings, or submissions required or

requested by City officials.[6] The Draft Regulations, however, add ambiguity to the exemptions established by the City Council.

In Section 3(1)(d), the Draft Regulations state that "[t]he filing of an application for a permit, license, grant of permission or other assent from the Mayor, City Council, or a City Employee shall not be considered lobbying or a lobbying activity for purposes of the Ordinance." As drafted, the Draft Regulations are ambiguous whether communications *prior* to the filing, the provision of *routine supporting information*, and *supplemental* submissions or amendments to an initial application (all of which are required under many board and agency procedures) are included in this exception. While an exemption does exist for written responses to written requests for specific information by a City Employee under Section 3(2)(c), the exemption does not appear to cover responses to oral requests for information. As a practical matter, many of the City's requests for additional information occur in the context of meetings, and are not routinely formalized as written requests.

Similarly, the Draft Regulations are unclear as to whether the exception in Section 3(2)(h) for acts made in compliance with written board or agency procedures "regarding an adjudicatory proceeding or evidentiary proceeding" applies to certain decisions concerning the development of real property or zoning. While proceedings before the Zoning Board of Appeal are undoubtedly adjudicatory, other related development approvals may not be. For example, it is unclear whether a Boston Planning & Development Agency (BPDA) Board meeting is an adjudicatory or evidentiary proceeding within the meaning of the regulation, and whether actions taken in compliance with agency procedures in preparation for that Board meeting would be considered exempt.

The unintended consequence of the gaps in the above exemptions is that many routine communications to City officials, made in accordance with City policies and procedures, are arguably considered lobbying activity. The BPDA's Article 80 development review process (as outlined in its own guidance) provides helpful illustrations:

- The BPDA strongly encourages project proponents to meet with the Agency staff and other City of Boston officials prior to filing an application for Article 80 development impact review. The "pre-filing meeting" is an opportunity for proponents to "outline project intentions and conceptual design, and [for] BPDA staff [to] inform the developers

[6] *See* Ordinance, Section 2:15-2 (exempting from the definition of lobbying or lobbying activity "(c) providing information in writing in response to a written request for specific information…, (f) an act required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action,… (g)… an act made in compliance with written board or agency procedures regarding adjudicatory proceedings or evidentiary proceedings; attorneys, consultants, or advocates representing a client solely in an appearance at a publicly noticed meeting… (k) a response to a request for proposals or similar public invitation by a City employee for information relevant to a contract").

about the Article 80 process."[7] This essential meeting occurs before the filing of an application and is thus arguably outside the scope of the "filing of an application" exemption under Section 3(1)(d).

- Following the filing of the formal application materials, the Agency encourages frequent meetings between the developer and City officials. During this review period, "[d]evelopers meet frequently with BPDA and [City of Boston] staff. The review process offers multiple opportunities for community feedback, including a public meeting and formal comment periods. The process is iterative and varies in length."[8] During this review process, supplemental information is not only frequently provided to the City voluntarily by the project proponent as project design develops, but is often *requested* by the City outside of a formal written request for information. The exchange of such supporting information could be hindered by regulations that appear to limit exemptions to the "filing of an application" and to written responses to written requests (Section 3(2)(c)).

Other City agencies, departments, boards, and commissions also recommend the use of pre-filing meetings and make use of informal communication methods when requesting additional information. These additional submissions and exchanges of information are the types of communications made in response to requests or requirements of City officials, which the City Council intended to exempt. Further, the Draft Regulations, as written, will create unintended and unnecessary additional workload for City Employees, by incentivizing individuals who wish to avoid registering as lobbyists to ask every City Employee to put in writing every request that is currently made informally.

The proposed revision 2 in Section II addresses this issue.

E. Inconsistencies with the Ordinance

Section 3(2) of the Draft Regulations restates nearly all of the exceptions to the definition of "Lobbying or lobbying activities" included in Section 2-15.2 of the Ordinance. The Draft Regulations, however, do not repeat exceptions (h) and (i) in the Ordinance. While these exceptions are still enforceable because they are in the Ordinance, the failure to include them in the Draft Regulations creates unnecessary legal ambiguity. We encourage their inclusion in the final regulations for the sake of consistency.

Additionally, Section 2-15.2 of the Ordinance defines "Lobbying or lobbying activities" to include any attempt to influence "any decision… with respect to… the development of real property or zoning." The Draft Regulations in Section 3(1)(d), in comparison, modify that language to include "any decision or *administrative actions*… with respect to… the development

[7] See Boston Planning and Development Agency, Large Project Review Fact Sheet (2014), available at: http://www.bostonplans.org/projects/development-review/what-is-article-80. See also Boston Zoning Code, Article 80B-5 ("The Applicant is strongly encouraged to request a pre-review planning meeting with the [BPDA].")

[8] See BPDA Large Project Review Fact Sheet.

of real property or zoning" (emphasis added). This expansion of the definition of "Lobbying or lobbying activities" with respect to real estate and zoning is not supported by the Ordinance, and creates unnecessary legal ambiguity about how the Ordinance will be applied. We encourage that this provision be removed in the final regulations for the sake of consistency.

The proposed revision 3 in Section II address this issue.

II. Recommendations

We recommend the following targeted changes to the Draft Regulations to clarify its application (proposed additions in *underlined italics*; proposed deletions in ~~strikethrough~~).

1) Revise Section 2 to add the following new definition, which tracks the federal lobbying statute but proposes a significantly lower threshold for registration:

> *Retained, employed, or designated to engage in lobbying or lobbying activities: An individual is retained, employed, or designated to engage in lobbying or lobbying activities when more than 10 percent of the total time an individual spends in the service of a given client over a 3-month period is spent on lobbying or lobbying activities for that client.*

2) Revise Section 3(1)(d) to clarify that the exemption from the definition of lobbying for "filing an application" includes all supplements, amendments, and required or requested communications in relation to the original application submitted after first submission:

> Decisions ~~or administrative actions~~ of the Mayor, the City Council, or a City Employee with respect to the approval, denial, or postponement of a decision concerning the development of real property or zoning including zoning approval. The filing of an application*, supporting materials, or any supplements or amendments to an application*, for a permit, license, grant of permission, or other assent from the Mayor, City, Council, or a City Employee, *and any communications made in compliance with written board or agency procedures in connection with such an application,* shall not be considered lobbying or lobbying activity for purposes of the Ordinance.

3) Add the following subsections to Section 3(2), which recite the cognate provisions 2-15.2(h) and (i) of the Ordinance:

> *q. a petition for action by the City made in writing and required to be a matter of public record pursuant to established procedures of the City;*
>
> *r. any act done in furtherance of obtaining a non-discretionary City approval, such as applying for a permit or license.*

4) Revise Section 4(2) to clarify that Technical Service Experts include any individuals with bona fide credentials in the field in which they provide technical services:

> For purposes of this Section 4, Technical Service Experts shall be limited to individuals that are educated, trained, ~~and~~ *or* licensed to provide technical services *and who are providing information in their area of technical expertise*.

5) Revise Section 4(3) to include all disciplines that provide technical expertise on City programs and projects:

> For purposes of Section 4, Technical Services shall be limited to services and analysis directly applying accounting, engineering, scientific, ~~or~~ architectural, *health, education, or other similar* disciplines.

6) Revise Section 4(4) to remove ambiguity about the instances in which a Technical Service Expert is engaged in qualified non-lobbying activity:

> Qualified non-lobbying activity shall be limited to providing technical information to the Mayor, City Council, or City Employee to assist the understanding of characteristics or elements of a matter that is or may be subject to discretionary or non-discretionary decisions or administrative actions of the City. ~~Qualified non-lobbying activity does not include recommending or advocating for approval, denial, or postponement of a decision or administrative action.~~

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We appreciate the opportunity to provide these comments on the Draft Regulations. Our broad coalition is committed to working with the Commission to ensure that the Ordinance and the Draft Regulations are implemented in a manner that increases transparency and accountability in public decision making while maintaining public access to City officials.

Respectfully,

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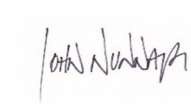

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