



California Fair Political Practices Commission

June 27, 1990

Barry H. Epstein
Grueneich & Ellison
50 California Street, Suite 800
San Francisco, CA 94111

RE: Your Request for Advice
Our File No. A-90-306

Dear Mr. Epstein:

You have requested advice concerning the lobbying provisions of the Political Reform Act (the "Act").^{1/} You are seeking this advice on behalf of your firm and several of the firm's clients. Because you have not identified the clients on whose behalf you are requesting advice, the information provided in this letter is limited to the disclosure obligations of the law firm. (See Regulation 18329, copy enclosed.)

FACTS

Grueneich & Ellison is a law firm which is also a registered lobbying firm. The firm represents two national non-profit environmental organizations before the California Energy Commission (CEC). One of the environmental organizations is currently a registered lobbyist employer; however, neither organization is currently registered as a client of Grueneich & Ellison for purposes of lobbying disclosure. The firm also represents the Department of General Services and the University of California before the California Public Utilities Commission (CPUC). That representation includes participation in rate setting cases for individual regulated utilities (e.g., a proceeding in which PG&E is seeking a rate increase), participation in CPUC initiated policy making proceedings which result in CPUC orders setting forth CPUC policy, participation in proceedings which result in the development of CPUC regulations and guidelines, and monitoring (no advocacy) of energy legislation.

^{1/} Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

QUESTIONS

1. Will Grueneich & Ellison's representation on behalf of the two national non-profit environmental organizations in proceedings before the CEC require the firm to register these organizations as clients and report payments received for services when:

a. The proceedings will result in the CEC's adoption of reports related to the state energy policy--the Biennial Report, the Fuels Report, the Electricity Report and the Conservation Report? (You have stated in your letter that there is no clear statutory directive that the findings and conclusions of these reports will be implemented or followed by other state agencies or by CEC.)

b. The proceedings may result in changes in the state's building and appliance efficiency standards contained in Title 24 of the California Code of Regulations?

c. If the answer to a. or b. is yes, must Grueneich & Ellison amend its Lobbying Firm Registration Statement (Form 602), report the payments received by the firm for this activity on its Report of Lobbying Firm (Form 625), and obtain a Lobbying Firm Activity Authorization (Form 602) from the two national nonprofit environmental organizations?

2. Given that all of the compensation received by the firm consists of public money awarded by the CEC, does the fact that compensation received from the CEC under the Intervenor Funding Program^{2/} affect the applicability of the Act's lobbying registration and reporting requirements?

3. Must the firm report payments received from a private entity for acting as counsel before the California Public

^{2/} As stated in your letter, participation by the two national nonprofit environmental organizations takes place under the CEC's Intervenor Funding Program established by the Legislature (SB 283, Chapter 1436, Stats. of 1988). Under this program, the organizations are compensated by the CEC using public funds for the organizations' participation in the proceedings before the CEC. The compensation process consists of first obtaining the CEC's pre-approval of the budget for such participation, and second, filing a request for compensation after participation has been completed. Compensation covers the actual cost of attorney and consultant fees and expenses for representation and is awarded by the CEC at a public hearing on the compensation request. The two non-profit organizations have instructed the CEC to pay the compensation directly to the attorneys and consultants, so that the funds never actually are received by the non-profit organizations.

Utilities Commission in the same or similar proceedings mentioned above for the Department of General Services, a state agency?

4. Is Grueneich & Ellison required to amend its Lobbyist Registration Statement to include the Department of General Services or the University of California as a client and report the payments received from these two agencies on its quarterly lobbying disclosure reports, Form 625?

CONCLUSIONS

Because your letter did not indicate any involvement in "legislative action," all of the conclusions provided in this letter are limited to application of the Act's lobbying provisions concerning "administrative action."

1a. It appears that the reports referred to in your letter may have regulatory effect. In addition, this type of proceeding is not specifically excluded from the definition of "administrative action." Therefore, we believe the firm's attempts to influence the content or adoption of the reports should be disclosed as payments to influence administrative action.

1b. & c. A proceeding which may result in changes to existing state regulations is considered "administrative action" and, therefore, participation in such proceedings is reportable under the lobbying disclosure provisions of the Act. Prior to engaging in any testimony on behalf of the national nonprofit environmental organizations, the firm is required amend its registration and file lobbying firm activity authorization forms with the Secretary of State's Office. Payments received for participating in these proceedings are required to be reported on the firm's Report of Lobbying Firm (Form 625).

2. The fact that the payments to compensate the organizations' lobbyists are made by the Intervenor Funding Program does not change the conclusions in this letter. The lobbying firm is required to report the payments received from the Intervenor Funding Program as intermediary for its clients, the national nonprofit environmental organizations.

3. & 4. As a registered lobbying firm, Grueneich & Ellison is required to report the payments it receives for the purpose of influencing "administrative action." However, the firm will not be required to register the Department of General Services or the University of California (state agencies) as clients if the employee providing the lobbying services on behalf of the firm is a "designated employee" covered by the state agencies' Conflict of Interest Codes. This conclusion would not change if the employee of the firm is a registered lobbyist.

ANALYSIS

The Act requires lobbyists, lobbying firms and lobbyist employers to report their expenditures and activities in connection with attempting to influence administrative action. (Sections 82038.5, 82039, 82039.5, and 86100 - 86118.) Your representation of organizations before the CEC will require registration and disclosure under the Act if they constitute attempting to influence "administrative action."^{3/}

"Administrative action" is defined, in pertinent part, as follows:

"Administrative action" means the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding....

Section 82002.

The CEC is a state agency. (Section 82049.) In order to be considered "administrative action," a proceeding must either be a "quasi-legislative" proceeding or a "rate-making" proceeding. (Section 82002.) The information that you have submitted regarding the proceedings before the CEC does not indicate that these proceedings would be classified as "rate-making proceedings." Therefore, this analysis will be limited to determining if the proceedings would be considered quasi-legislative.

In making a determination whether a particular proceeding is quasi-legislative, the Commission has determined as a threshold matter that matters which are quasi-judicial are not quasi-legislative. (See, In re Evans (1978) 4 FPPC Ops. 84; In re Leonard (1976) 2 FPPC Ops. 54, copies enclosed.) Thus, for example, adjudicatory proceedings such as licensing or permit proceedings are not considered administrative action. (See, Abbott Advice Letter, No. A-88-164; Teitelbaum Advice Letter, No. A-86-277, copies enclosed.)

The Commission has also adopted a regulation which excludes certain types of proceedings from the definition of "quasi-legislative proceeding." The regulation provides as follows:

(a) A proceeding of a state agency is not a quasi-legislative proceeding for the purposes of Government Code Section 82002 if it is any of the following:

^{3/} For purposes of this analysis, we accept your assumption that the contacts and compensation tests for lobbying are met. (See, Sections 82038.5, 82039; Regulations 18238.5, 18239, copies enclosed.)

(1) A proceeding to determine the rights or duties of a person under existing laws, regulations or policies.

(2) A proceeding involving the issuance, amendment or revocation of a permit or license.

(3) A proceeding to enforce compliance with existing law or to impose sanctions for violations of existing law.

(4) A proceeding at which an action is taken involving the purchase or sale of property, goods or services by such agency.

(5) A proceeding at which an action is taken which is ministerial in nature.

(6) A proceeding at which an action is taken awarding a grant or contract.

(7) A proceeding involving the issuance of a legal opinion.

Regulation 18202, copy enclosed.

You have identified two basic types of proceedings before the CEC. One type of proceeding described is a proceeding to consider modification of the State's building and appliance efficiency standards contained in the California Code of Regulations. Since this will involve the proposal, drafting, development, consideration, amendment, enactment or defeat by a state agency of a regulation of general application to be applied to future cases, and it is not excluded under Regulation 18202, it would constitute administrative action. (See, In re Evans, supra at 82; Abbott, supra.)

The second type of proceeding is one to adopt a report which will then be used to establish the State's energy policy. You indicate that there is no statutory directive to actually implement the policy. However, we do not think that it is clear that the policy reports referred to cannot have regulatory effect. For example, we note that the Electricity Report to which you refer contains information which is part of the standard in licensing power plants. (See, California Public Resources Code Sections 25305, 25523 and 25524.) The proceeding is not one which is specifically excluded from the definition of "quasi-legislative proceeding" under Regulation 18202. Furthermore, we have previously advised that proceedings to establish policy objectives are "quasi-legislative" proceedings. (Abbott Advice Letter, supra.) One of the purposes of the Act is to assure that activities of lobbyists are regulated and disclosed in order to assure that

improper influences will not be directed at public officials. (Section 81002(b).) Therefore, we would advise that the proceedings before the Energy Commission to adopt policy reports should be treated as administrative action.^{4/}

Regulation 18614 (copy enclosed) provides, in part, that the following payments from a client to a lobbying firm are considered payments for lobbying services:

- (1) Payments for services related to a matter on which the client expressly or implicitly authorizes the lobbying firm to communicate directly with an elected state official, legislative official or agency official for the purpose of influencing legislative or administrative action.

Grueneich & Ellison is currently registered as a lobbying firm with the Secretary of State. The firm's registration includes, among other things, names of clients with whom the lobbying firm contracts to provide lobbying services in addition to authorization forms signed by all of its clients. (Section 86104(d).) When a lobbying firm retains new clients, it must amend its registration statement to reflect the new clients. The firm must file the amendment prior to engaging in any direct communication for the purpose of attempting to influence administrative action on behalf of the new clients. (Section 86107(a).)

The Act provides that the lobbying disclosure provisions are not applicable to any employee of the State of California acting within the scope of his or her employment. (Section 86300(a).) This exclusion for employees of the State of California may, under certain circumstances, apply to outside consultants or counsel hired by a state agency. Under most circumstances, if a consultant is covered by the state agency's Conflict of Interest Code adopted pursuant to Section 87300, the consultant will meet the definition of an "employee of the State of California" as used in Section 86300. In addition, such consultants and outside counsel (who are designated in the agency's Conflict of Interest Code) who are already registered lobbyists are not required to report payments received from a state agency for lobbying services. (Quessenberry Advice Letter, No. A-84-121, copy enclosed.)

^{4/} We note that there might be circumstances in which the entity adopting a policy report is merely an advisory agency with no administrative, regulatory or enforcement powers. In that situation, it is possible that hearings leading to a report would not be considered administrative action. (See, Craigie Advice Letter, No. I-89-188, copy enclosed.)

Therefore, the exclusion in Section 86300(a) will apply to Grueneich & Ellison and its employees, so long as each employee who provides lobbying services to the Department of General Services or the University of California is a "designated employee" in the agency's Conflict of Interest Code. Any employee of the firm who is not designated in a Conflict of Interest Code will be providing lobbying services and the firm will be required to report the payments received for these services on its quarterly lobbying reports.

Please contact me at 916/322-5662 if you have additional questions concerning the advice provided in this letter.

Sincerely,

Scott Hallabrin
Acting General Counsel


By: Mary Ann Kvasager
Political Reform Consultant

Enclosures