



Outside Counsel

Expert Analysis

Ethics and Lobbying Reform In State Government (Again)

Less than five years after the passage of a comprehensive law touted as the solution to restore public trust and confidence in government, lawmakers returned to square one in an attempt to re-make the image of a state government mired in seemingly unending scandal. On Aug. 15, 2011, Governor Andrew Cuomo signed the Public Integrity Reform Act (PIRA) of 2011 into law. PIRA overhauled the last “sweeping reform,” the Public Employee Ethics Reform Act (PEERA) of 2007, leaving very few of the signature aspects of that prior act in place. These successive reform measures, however, are creating a difficult working environment for state government officials and lobbyists who regularly find the need for clear guidance in an area already filled with more than its share of gray.

The PIRA reforms are dramatic and wide-ranging. There will now be one unitary, independent ethics agency with jurisdiction—for the first time—over both the executive and legislative branches. Gone is the self-contained policing system used by the Legislature. The act provides enhanced transparency for disclosure of interactions between state agencies and representatives from the private sector, more detailed financial disclosure of the outside income of both full-time public servants and unpaid government board members who serve as policymakers, a robust mandatory training program for public officials and lobbyists, an overhauled investigatory process for those who are alleged to have strayed from the ethics or lobbying laws, and a pension forfeiture provision for new government



By **Karl J. Sleight**



And **Joan P. Sullivan**

employees convicted of a crime related to their public office.

Change of Regulatory Guard

PIRA effectively abolished the former Commission on Public Integrity (CPI) upon passage with language stating that the CPI “shall not otherwise investigate, discipline or provide advisory opinions,” and created the Joint Commission on Public Ethics (JCOPE). The JCOPE will have the power to investigate both the executive and legislative branches. The JCOPE becomes the sixth ethics and/or lobbying regulatory agency to exist in state government within the last five years.¹ The new commission will be operational by Dec. 15, 2011.

The JCOPE will consist of 14 appointed members and will be established within the Department of State. Six of the members will be appointed jointly by the governor and lieutenant governor, three of whom must be from the opposite political party of the governor. Three each will be appointed by the Senate and Assembly majorities. The Senate and Assembly minorities will have one appointment each. Thus, Senate Republicans and Assembly Democrats will permanently have three appointments even if they lose their majority status. This measure was designed to prevent partisan political witch hunts—a matter of concern to the drafters of the PIRA bill.

PIRA provides statutory preferences for the major political parties, leaving other significant political parties such as the Conservative, Independence and Working Families parties without a designated representative on the JCOPE. PIRA also prohibits certain classifications of individuals from serving as members of the JCOPE, including registered lobbyists, current government office holders, state employees within the last year, and current commissioners of an executive agency appointed by the governor. This latter prohibition prevents former CPI gubernatorial commissioners from transitioning and serving on the new JCOPE.

There are strict new confidentiality provisions for JCOPE members and staff. Breaches of JCOPE confidentiality are subject to investigation by the Office of the State Inspector General, and a commissioner or staffer who “intentionally without authorization” releases confidential information is guilty of a class “A” misdemeanor.

Investigation Process

PIRA changes the process by which a governmental official, lobbyist and client of a lobbyist is investigated and charged with a violation of law. Since 1987, violations of the ethics law were prosecuted based on an allegation set forth in an accusatory instrument known as a Notice of Reasonable Cause (NORC). In 2007, with the passage of PEERA, violations of the Lobbying Act by lobbyists and clients of lobbyists were also prosecuted utilizing the NORC. Now, a report will be issued similar to reports utilized by the Inspector General or the Office of the State Comptroller.

The JCOPE will issue its findings of wrongdoing in the form of a Substantial Basis Investigation report utilizing a “substantial basis” standard. Although PIRA is subject to the State Administrative Procedure Act (SAPA) there are no specific statutory provisions in

KARL J. SLEIGHT and JOAN P. SULLIVAN are members of Harris Beach. Mr. Sleight is the former executive director of the New York State Ethics Commission, and Ms. Sullivan was a counsel at both the ethics commission and the Commission on Public Integrity.

the new law setting forth the adjudicatory processes and due process protections for targets of JCOPE investigations. Presumably, the JCOPE will promulgate regulations for their hearing process since the significant monetary civil penalty provisions that may be imposed remain in effect.

While members of the state Legislature and their employees may be investigated by JCOPE, the new commission may not impose civil penalties for their wrongdoing. That function remains with the Legislative Ethics Commission (LEC), an agency that was created as part of PEERA and survived the PIRA amendments.

PIRA establishes a fairly complicated back-and-forth process between the LEC and JCOPE devised to accommodate both political and separation of powers concerns arising from an investigation and punishment of sitting legislative members and employees. Last year, the LEC charged former Senator Hiram Monserrate and sitting Assembly Member William F. Boland Jr. with violations of the state ethics laws suggesting an increased willingness on their part to act on serious allegations of misconduct.²

Increased Transparency

Building on then Attorney General Cuomo's "Project Sunlight" initiative to add transparency to the legislative expenditure process, PIRA includes what has been described as "Project Sunlight 2." Project Sunlight 2 is an effort to capture and memorialize for the public a database of meetings and contacts between government officials and private sector firms, entities and individuals. These contacts include attorneys, lobbyists and agents who are engaged in certain covered activities. The covered activities include representation in: procurement of state contracts for goods, services or real estate; rate-making proceedings; regulatory matters; judicial or quasi-judicial proceedings, and the adoption or repeal of a rule or regulation.

If a firm or individual is meeting with a state agency in such a matter, a record is usually accomplished through state agency sign-in sheets. PIRA formalizes the process by requiring that state agencies cooperate with the Office of General Services (OGS) and list all firms and individuals who have appeared before them in order to create a master list or database in an effort to make the contacts publicly available.³ PIRA contains a safe harbor for agency contacts that are "subject to statutory confidentiality restrictions," although it is unclear whether OGS or the state agency involved will decide what information remains confidential.⁴ Attorneys involved in matters that may be confidential would be well-advised to take

steps to prevent inadvertent disclosure of a confidential matter by the Project Sunlight 2 initiative. Local governments and their respective agencies are not subject to Project Sunlight 2.

The annual financial disclosure statement (FDS) filed by government officials, including full-time state employees, members of the Legislature, and unpaid or per diem appointees of state boards, commissions and councils, has been amended to increase transparency. Referral to a legislator's outside law or professional services firm is now reportable. "Referred to the firm" is a defined term within PIRA meaning to knowingly and intentionally take a specific act or series of acts to intentionally procure for the state official's firm a client for certain covered engagements.

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The FDS now requires filers to disclose how much money they make from their outside employment and who their clients are. Disclosure is required if they personally provided services or if they referred the work to their firm and earned fees in excess of \$10,000 during the reporting period if in direct connection with: (i) a proposed bill or resolution in the Senate or Assembly; (ii) a contract of \$50,000 or more from the state or a state agency for services, material or property; (iii) a grant of \$25,000 or more from the state or a state agency; (iv) a grant obtained through a legislative initiative, or (v) a case, proceeding, application or *other matter that is not ministerial before a state agency*—a catch-all that will capture an array of previously undisclosed matters (emphasis added).⁵

There is a limited exception for medical services or residential real estate brokering services. For lawyers naturally concerned with violating the disciplinary rules, there is a provision in PIRA stating that disclosure of the identity of a client on an annual FDS will not constitute grounds for professional misconduct or disciplinary action of any kind or form the basis of a civil or criminal cause of action.⁶ This new provision will require disclosure of new clients retained after July 1, 2012, and will be reported to JCOPE on the FDS due on May 15, 2013.

Forecast for the Future

PIRA 2011 represents a sea change in the enforcement and regulation of lobbying and ethics in the state of New York and creates an uncertain environment in the near term. An entirely new enforcement agency with increased jurisdiction over the legislative branch that is also tasked with training both the state work force and lobbyists will have plenty of work ahead. The commissioners appointed by the governor and Legislature and a revamped permanent staff will likely take the agency in a new and evolving direction.

Pressure to continue high-profile investigations pursued by past state lobbying and ethics agencies should keep enforcement actions in the public domain. The new JCOPE will also need to set parameters on the increased disclosure requirements and other changes to the law at an early stage. Businesses, government affairs personnel and attorneys that regularly interact with state government should remain particularly vigilant during this transition period to ensure compliance with statutory changes under PIRA.

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1. The other five state entities were the State Ethics Commission, Temporary State Commission on Lobbying, Legislative Ethics Committee, Legislative Ethics Commission and the now defunct Commission on Public Integrity.

2. Notices of reasonable cause at <http://www.legethics.state.ny.us/PublicDocuments.aspx> (as of September 25, 2011).

3. L. 2011, ch. 399 Part A, section 4

4. *Id.*

5. Public Officers Law §73-a, question 8(b).

6. Public Officers Law §73(6); see also 22 NYCRR 1200.1.6 (b)[6] (allowing disclosure "to comply with other law").