

February 9, 2011

SDEC Informal Advice Letter No. IA11-02

Jesse Mainardi
The Sutton Law Firm
150 Post Street, Suite 405
San Francisco, CA 94108

Re: Request for Advice Regarding the Applicability of the City's Lobbying Ordinance to Placement Agents and Investment Management Firms

Dear Mr. Mainardi:

This advice letter responds to your letter to the City of San Diego Ethics Commission dated January 31, 2011. In your letter, you request advice from the Ethics Commission regarding the impact of California Assembly Bill 1743 [AB 1743] on the City's Lobbying Ordinance. Because your questions do not pertain to the specific contemplated actions of a particular individual or investment management firm, we are treating your inquiry as a request for informal advice.

QUESTIONS

1. Irrespective of AB 1743, are individuals who attempt to influence the San Diego City Employees' Retirement System [SDCERS] regarding new or increased investments with an investment management firm, whether as an employee or outside consultant of the firm, subject to the City's lobbying laws? What about the investment management firms?
2. Does AB 1743 change the City's lobbying registration thresholds for these individuals and firms?
3. Are the activities of individuals who meet the requirements of California Government Code section 7513.87(b) in any case exempted from the City's lobbying laws?
4. Do any of the exemptions from registration or reporting under the City's lobbying laws apply to these individuals or firms?

SHORT ANSWERS

1. Any individual who has a direct communication with a City Official for the purpose of influencing a SDCERS contract or any other decision of the SDCERS Board of Directors is engaging in “lobbying” and that individual’s firm or organization will be required to register as a lobbying entity with the City Clerk if certain thresholds are met.
2. AB 1743 does not change the City’s lobbying registration thresholds for any individuals or firms.
3. Individuals who meet the requirements of California Government Code section 7513.87(b) are not exempted from the City’s lobbying laws.
4. The exemptions from registration and reporting under the City’s lobbying laws will apply to these individuals or firms to the same extent they would apply to any other individual or entity engaging in similar types of communications.

BACKGROUND

In September of 2010, the State of California passed AB 1743, which, in part, added section 7513.87(a) to the California Government Code. This provision requires that:

A person acting as a placement agent in connection with any potential system investment made by a local public retirement system shall file any applicable reports with a local government agency that requires lobbyists to register and file reports and shall comply with any applicable requirements imposed by a local government agency pursuant to Section 81013.

AB 1743 also defines “placement agents” to mean:

Any person hired, engaged, or retained by, or serving for the benefit of or on behalf of, an external manager, or on behalf of another placement agent, who acts or has acted for compensation as a finder, solicitor, marketer, consultant, broker, or other intermediary in connection with the offer or sale of the securities, assets, or services of an external manager to a board or an investment vehicle, either directly or indirectly.

Further, AB 1743 amended the state’s definition of “lobbyist” to include any person who is a “placement agent.” Cal. Gov’t Code § 82039. It is relevant to note that the regulation of “lobbyists” under state law is limited to persons and entities that lobby state officials; the state’s lobbying laws do not apply to any individual or entity in the context of lobbying the City of San Diego. The lobbying of City Officials is regulated exclusively by the City’s Lobbying Ordinance. In other words, state and local lobbying laws operate independently of each other.

ANALYSIS

A. Investment Management Firms Seeking New or Increased Investments

You have asked, regardless of the application of AB 1743, whether the City's lobbying laws apply to individuals who attempt to influence SDCERS regarding new or increased investments with investment management firms. Under the Lobbying Ordinance, any individual who has a direct communication (e.g., meeting, telephone conversation, letter, e-mail) with a City Official for the purpose of influencing a municipal decision is engaging in "lobbying" and that individual's firm or organization will be required to register as a lobbying entity with the City Clerk if certain thresholds are met.

The City's lobbying laws contain two different registration thresholds. The first applies to organizations that have compensated employees who lobby on their behalf, such as an investment management firm whose employees contact government officials in an effort to encourage investment with their firm. These entities are referred to as "organization lobbyists," and they are required to register with the City Clerk if their compensated owners, officers, and employees collectively have ten or more lobbying contacts with City Officials over a sixty day period. The second threshold applies to individuals who engage in lobbying on behalf of a client or third party, such as a placement agent who earns a commission from an investment management firm if he brings new or increased investments to the firm. These individuals (if self-employed) or their employers are referred to as "lobbying firms," and they are required to register as soon as they have one lobbying contact with a City Official. (Note that this registration threshold applies to all types of compensated contacts, including those made pursuant to a contingency fee agreement, which includes any agreement for commission-based compensation.)

Note that not all City employees are "City Officials" for purposes of the Lobbying Ordinance. With regard to SDCERS, for example, the term "City Official" includes officers and employees holding the titles of Board Member; Retirement Administrator; Chief Executive Officer; Chief Financial Officer; General Counsel; Chief; Deputy Chief; Assistant Deputy Chief, and any other position listed in section 27.4002 of the Lobbying Ordinance. Direct communications with individuals holding these positions are considered lobbying communications if made for the purpose of influencing a municipal decision.

A "municipal decision" includes any decision made by the SDCERS Board of Directors. San Diego Municipal Code [SDMC] § 27.4002. It also includes any contract. *Id.* Accordingly, if an individual is communicating with a "City Official" at SDCERS regarding a new or increased investment with an investment management firm, and the decision concerning the investment involves a contract or otherwise requires approval by the SDCERS Board of Directors, then it is a lobbying communication and subject to the City's Lobbying Ordinance. Under such circumstances, the individual's employer (or the individual if he/she is self-employed) will be required to register as a lobbying firm or organization lobbyist if the applicable threshold is met.

If, on the other hand, an individual is communicating with a SDCERS officer or employee who is not a “City Official,” then that communication is not subject to the Lobbying Ordinance. Moreover, if an individual is communicating with a “City Official” at SDCERS regarding a matter that does not involve a contract, require approval by the SDCERS Board of Directors, or otherwise meet the definition of “municipal decision” in SDMC section 27.4002, then that communication is also not subject to the Lobbying Ordinance.

B. Impact of AB 1743

In connection with the above discussion, you have asked whether AB 1743 changes the City’s lobbying registration thresholds for individuals and firms seeking to do business with SDCERS. AB 1743 does not change the City’s lobbying registration thresholds in any respect. The fact that an individual is acting as a “placement agent” with regard to SDCERS does not change the applicability of the Lobbying Ordinance. What is relevant is whether or not the individual meets the definition of “lobbyist” under the Lobbying Ordinance:

Lobbyist means any individual who engages in lobbying on behalf of a client and any individual owner, compensated officer, chairperson, or employee who engages in lobbying on behalf of an organization lobbyist. Lobbyist also means any individual owner, compensated officer, chairperson, or employee who has been designated on a lobbying firm’s or organization lobbyist’s registration form as being expected or authorized to lobby.

SDMC § 27.4002.

Accordingly, if a placement agent falls within the above definition, he or she is a lobbyist. A person does not, however, become a “lobbyist” solely on the basis of being a “placement agent,” a position that may or may not involve lobbying. The same is true with respect to investment firms. If the compensated officers and employees of an investment firm have ten lobbying contacts with City Officials within a sixty day period, then the firm is an organization lobbyist and must register as such with the City Clerk. If, on the other hand, an investment firm does not meet this lobbying threshold, it will have no obligation to register with the City Clerk. Nothing in AB 1743 impacts these rules.

You indicate in your letter that AB 1743 “evidently seeks to compel local placement agents to register as local lobbyists.” However, the plain language of AB 1743 states that such persons must file any *applicable* reports and comply with any *applicable* requirements imposed by local agencies. In other words, it does not impose a registration requirement or otherwise require local jurisdictions to amend their lobbying laws to classify placement agents as lobbyists. As you know, the City’s lobbying laws require organization lobbyists and lobbying firms to file registration forms and quarterly reports. Clearly, these reports are *applicable* only to individuals and entities that meet one of the registration thresholds delineated in the Municipal Code. Similarly, the additional requirements and prohibitions contained within the City’s lobbying laws, such as the \$10 per month gift limit, are *applicable* only to the individuals and entities that meet one of the registration thresholds.

Note that in the wake of AB 1743, SDCERS updated its written Placement Agent Payment Disclosure Policy to require investment management firms to provide SDCERS with additional disclosures (separate and distinct from any requirements in the Lobbying Ordinance) relating to the use of placement agents. You are encouraged to contact SDCERS directly regarding the applicability of the SDCERS policy to your clients.

C. Applicability of Gov't Code section 7513.87(b)

You have also asked whether individuals who meet the requirements of California Government Code section 7513.87(b) are exempt from the City's lobbying laws. This state code provision, adopted with the passage of AB 1743, provides that an individual acting as a "placement agent" is exempt from Government Code section 7513.87(a)'s disclosure requirements if that individual is an "employee, officer, director, equityholder, partner, member, or trustee of an external manager who spends one-third or more of his or her time, during a calendar year, managing the securities or assets owned, controlled, invested, or held by the external manager." Thus, section 7513.87(b) may exempt someone from the requirements of section 7513.87(a). It does not, however, serve to also exempt someone from the requirements of a local lobbying law.

As stated in the previous section, AB 1743 does not alter the applicability of the City's lobbying laws to any particular individual. Instead, AB 1743 creates disclosure obligations that are separate and distinct from those in the Lobbying Ordinance. An individual is subject to the Lobbying Ordinance only if he or she meets that Ordinance's definition of "lobbyist." SDMC § 27.4002. All relevant exceptions are set forth in SDMC section 27.4004, which does not contain any language incorporating or mirroring the provisions of Government Code section 7513.87(b).

D. Exemption from Lobbying Ordinance

Your final question relates to whether any of the exemptions in SDMC section 27.4004 will apply to individuals attempting to influence SDCERS regarding new or increased investments with an investment management firm, or will otherwise apply to the firms themselves. Whether a particular SDMC section 27.4004 exemption will apply to a firm or individual depends on the relevant facts. You have not provided any specific factual scenarios in your letter, and thus we can only speculate as to whether a particular exemption would apply. For example, if a placement agent, investment firm employee, or any other individual speaks to the SDCERS Board of Directors at one of its public meetings, that communication will be exempt from the Lobbying Ordinance. SDMC § 27.4004(j). Alternatively, if an investment firm is bidding on a contract for which SDCERS is seeking competitive bids, the firm's written response to a request for proposals or qualification would also be exempt. SDMC § 27.4004(c)(2). Communications regarding ministerial actions are exempt (SDMC § 27.4004(f)), as are communications that constitute seeking advice regarding a City policy (SDMC § 27.4004(d)). There is not, however, a blanket exemption for speaking with SDCERS or any other City department regarding making new or increased investments. For more information, you may wish to review our Fact Sheet on Exceptions to the Lobbying Ordinance, which can be obtained on the Ethics Commission website (www.sandiego.gov/ethics/sheets/).

CONCLUSION

AB 1743 requires that placement agents working with SDCERS file any “applicable” reports and comply with any “applicable” requirements imposed by local agencies. The registration and reporting requirements in the City’s lobbying laws are applicable to individuals, firms, and organizations that engage in lobbying as defined by the Municipal Code. Thus, in the event that a placement agent or investment management firm engages in lobbying and triggers a registration threshold, the local lobbying forms and requirements will be applicable. Essentially, AB 1743 does not alter the registration thresholds, reporting requirements, additional regulations, or exemptions that apply to persons and entities that qualify as lobbying firms and organization lobbyists under the City’s laws.

Please note that this advice letter is being issued by the Ethics Commission solely as technical assistance from a regulatory agency as provided by SDMC section 26.0414(b). It is not to be construed as legal advice from an attorney to a client. Moreover, the advice contained in this letter is not binding on any other governmental or law enforcement agency.

If you have any additional questions, please do not hesitate to contact our office.

Sincerely,

Stephen Ross
Program Manager-Technical Assistance