

## ADVISORY OPINION

To: [John]  
Re: Case No. 01021.A, Lobbying  
Date: August 24, 2001

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You are a [sales representative], and an owner of [the company ] in Chicago. In January 2001, you called the Board and asked how the lobbyist registration and disclosure provisions of the City's Governmental Ethics Ordinance would apply to your firm's proposed activities. You were advised orally that the Board would consider your inquiry fully if you requested an advisory opinion, and that, pending a later resolution by the Board, you and/or your firm's representatives could meet with City personnel without registering as a lobbyist. On April 23, 2001, you requested an advisory opinion to determine whether, based on the activities undertaken as described in this opinion, your firm and/or its representatives must register as lobbyists with the Board. For the reasons explained below, the Board is compelled to determine that: 1) your firm is acting as a "lobbyist" (as defined in the City's Governmental Ethics Ordinance) by virtue of its representatives' contact with City employees or officials for the purpose of selling the City [ services ] offered through your firm by [a principal company] and 2) therefore, either your firm, or its representatives individually, are required to register under the lobbyist provisions of the Ordinance; and 3) if the City does not issue a Request For Proposals, but instead elects to purchase [ ] services directly through your firm, and your firm receives its compensation as a sales commission (i.e., it is paid by [the principal company ] if and only if the City determines to purchase that company's products and services through your firm), that compensation constitutes a prohibited contingent lobbying fee, and both your firm and the [principal firm] whose product it sells would violate the Ordinance.

**FACTS:** You explained that your firm regularly acts as a sales representative on behalf of any number of [principal companies] whose products and services it is authorized by contract to sell and service. You said that representatives from your firm would be contacting employees of [the department ] to discuss the City's possible purchase of [ services] through your firm. You described these services as investment contracts whereby the City would invest cash into an account managed by a [principal company] which would invest the money [ ] at either fixed or fluctuating interest rates. You also said that your firm's representatives would make these contacts not in response to a published Request for Proposals (RFP) issued by the City, but through uninvited "cold calls" on City employees or officials. You also said that the compensation your firm would receive would be paid fully by the [principal company] whose product is sold, solely on a commission basis. Receipt of this commission depends on whether a sale is made—if there is no

sale, the firm receives no compensation. The amount of compensation is determined by how much and at what rate the money is invested, and other factors specific to your firm's relationship with the particular [principal].

You were previously advised that your firm could proceed with this course of action without registering as a lobbyist, and that, if the Board later determined (as it now has) that, by virtue of your firm's conduct it was a lobbyist, and that registration was required, the firm or its associates could register at that time without penalty. On June 14, 2001, you advised staff that your firm's representatives had begun making City contacts, and indications were that the City may well be interested in purchasing products and services sold through your firm. Further, the City may issue an RFP for these products and services, inviting your firm and four others to bid on it.<sup>1</sup>

**ISSUES:** In this opinion, the Board will address the following questions:

1. Is your firm (or its representatives individually) acting as a "lobbyist" (as defined in the City's Governmental Ethics Ordinance) by virtue of its representatives' contact with City employees or officials for the purpose of attempting to sell the City an investment contract, and, if so, must the firm or its representatives register under the lobbyist provisions of the Ordinance?
2. Assuming that: a) your firm is acting as a lobbyist; and b) without issuing an RFP, the City elects to purchase [ ] services through your firm; and c) your firm receives its compensation from the [principal company] in the manner described in this opinion, is that compensation a prohibited contingent lobbying fee under § 2-156-300 of the Ordinance?

**RELEVANT LAW:** Section 2-156-210 of the Ordinance, "Persons Required to Register," provides:

**Each lobbyist shall register and file reports with the Board of Ethics as provided in this Article. This section shall extend to any person who undertakes to influence any legislative or administrative action as any part of his duties as an employee of another, regardless of whether such person is formally designated as a lobbyist by his employer.**

Section 2-156-010, "Definitions," sub-parts (a) and (p), provide, respectively:

**(a) "Administrative action" means any decision on, or any proposal, consideration, enactment or making of any rule, regulation, or any other official nonministerial action or non-action by any executive department, or by any**

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<sup>1</sup>The Board notes here and sincerely appreciates your firm's desire from the outset to understand and comply with the standards in the Ordinance.

official or employee of an executive department, or any matter which is within the official jurisdiction of the executive branch.

(p) "Lobbyist" means any person who, on behalf of any person other than himself, or as any part of his duties as an employee of another, undertakes to influence any legislative or administrative action, including but not limited to:

(1) a bond inducement ordinance; (2) a zoning matter; (3) a concession agreement; (4) the creation of a tax increment financing district; (5) the establishment of a Class 6(b) Cook County property tax classification; (6) the introduction, passage or other action to be taken on an ordinance, resolution, motion, order, appointment or other matter before the City Council; (7) the preparation of contract specifications; (8) the solicitation, award or administration of a contract; (9) the award or administration of a grant, loan, or other agreement involving the disbursement of public monies; or (10) any other determination made by an elected or appointed City official or employee of the City with respect to the procurement of goods, services or construction; provided, however, that a person shall not be deemed to have undertaken to influence any legislative or administrative action solely by submitting an application for a City permit or license or by responding to a City request for proposals or qualifications.

The term "lobbyist" shall include, but not be limited to, any attorney, accountant, or consultant engaged in the above-described activities; provided, however, that an attorney shall not be considered a lobbyist while representing clients in a formal adversarial hearing; and provided further that the term "lobbyist" shall not include a person who, on an unpaid basis, seeks to influence legislative or administrative action on behalf of an entity that is not engaged in a profit-seeking enterprise; further provided that an employee, officer or director of a non-for-profit entity who seeks to influence legislative or administrative action on behalf of such an entity shall not be considered a lobbyist for purposes of this chapter.

Last, Section 2-156-300, "Contingent Fees," provides:

No person shall retain or employ a lobbyist for compensation contingent in whole or in part upon the approval or disapproval of any legislative or administrative matter, and no person shall accept any such employment or render any service for compensation contingent upon the approval or disapproval of any legislative or administrative matter.

**ANALYSIS AND CONCLUSIONS: A. Is your firm (or its representatives) acting as, and must it register as, a “lobbyist”?** For the reasons that follow, the Board is compelled to conclude that your firm (through its representatives) is indeed acting as a “lobbyist” (as defined in the City’s Governmental Ethics Ordinance) by virtue of its representatives’ contact with City employees or officials for the purpose of attempting to sell the City [ ] services], and that therefore the firm or its representatives are required to register as a lobbyist.

1. Did your firm undertake, on behalf of another, to influence an administrative action? As delineated above, the Ordinance’s definition of “lobbyist” (which became effective on June 7, 2000), includes any person (such as your firm or its representatives), who, “on behalf of another” (such as [a principal] company), “undertakes to influence administrative action,” specifically including “the preparation of contract specifications, or the solicitation, award or administration of a contract,” or “the award or administration of any other agreement involving the disbursement of public monies,” or “any other determination made by an elected or appointed City official or employee of the City with respect to the procurement of goods, services or construction.” The City’s purchase of the [ ] products and services] offered by [principal companies ], as described in this opinion, qualifies as the procurement of services. We therefore conclude that your firm’s contacts, on behalf of another person, namely the [principal companies ] whose products and services it is authorized to sell, were undertaken to influence a determination made by employees of [the department ] to recommend and create—or not to recommend or create—a contract for the City’s procurement of the cash management products and services your firm would discuss with City employees. And, we further conclude, the determination to be made by City employees or officials constitutes “administrative action” as defined by the Ordinance.

2. Do any of the exceptions to the definition of lobbyist apply? The definition of “lobbyist” contains five exceptions. In summary, they are: that a person shall not be deemed to have undertaken any legislative or administrative action: i) solely by submitting an application for a City permit or license; or ii) solely by responding to a City request for proposals or qualifications; iii) attorneys, while representing clients in a formal adversarial hearing; iv) persons who, on unpaid basis, seek to influence legislative or administrative action on behalf of an entity not engaged in a profit-seeking enterprise; and v) employees, officers or directors of non-for-profit entities who seek to influence legislative or administrative action of behalf of such entities. Clearly, numbers i, iii, iv and v do not apply to the facts in this case. As to number ii, you have stated that when your firm scheduled the meeting and met with City employees for the purposes described above, it was “cold-calling,” i.e., there was no RFP to which it was responding. While the City may, partly as a result of your firm’s contacts with City employees, in the future issue an RFP for the procurement of the very products and services your firm discussed with City employees, no RFP was issued at the time your firm had those discussions. Thus we conclude that this exception does not apply to your firm’s conduct.

3. Must your firm and/or its representatives register under the lobbying provisions? As to whether your firm and/or its employees must register as lobbyists, the Ordinance provides in § 2-156-210 that

“each lobbyist shall register and file reports with the Board of Ethics as provided in this Article.” The Ordinance exempts only four types of persons from its lobbyist registration provisions.<sup>2</sup> None of these, however, apply in this case. Therefore, we conclude that either your firm must register as a lobbyist (listing in its registration the names of each individual associated with it who will be lobbying or who has lobbied), or those individuals themselves must register as lobbyists, listing as clients your firm and the [principal companies] whose products and services they have discussed or in the future will discuss with City employees or officials.

**B. Would your firm’s compensation be a prohibited contingent lobbying fee?** As delineated above, § 2-156-300 of the Ordinance provides that no person shall render any service for compensation contingent upon the approval or disapproval of any legislative or administrative matter. As the Board has already concluded that your firm’s conduct was intended to seek approval of an “administrative action,” and thus lobbying, it remains for the Board to address whether your firm’s compensation, as you have described it, constitutes a prohibited contingent lobbying fee. Black’s Law Dictionary (3d Ed., at 290) defines “contingent” as

possible, but not assured ... conditioned upon the occurrence of some future event which is itself uncertain, or questionable ... This term, when applied to a ... legal right or interest, implies that no present interest exists, and that whether such interest or right ever will exist depends upon a future uncertain event.

You have said that your firm’s only compensation for its efforts to market, put together, propose, and, if appropriate, service a contract with the City for [            the] products and services offered by one of the [principal companies] it represents, will come from that [principal company] if and only if, and after, the City procures those services through your firm. If your firm’s efforts in this respect are unsuccessful, and no City procurement occurs through your firm, then your firm receives no compensation for its work. Accordingly, your firm’s compensation for what we have concluded are its lobbying efforts is not a present interest, but is completely conditioned upon a future uncertain event, namely the creation or award of a contract by the City to your firm (and/or [a principal company] through your firm), that is, upon the City’s approval of an administrative matter. In the absence of any legislative intent to the contrary,<sup>3</sup> we are compelled to conclude that, if the City does not issue an RFP, but elects to purchase [            ] services through your firm other than through

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<sup>2</sup> In § 2-156-220 (“Persons or Entities Not Required to Register”), these four types are, in summary: 1) the news media; 2) City officials and employees appearing in their official capacities before City agencies; 3) persons who assist in drafting revisions to the City’s Municipal Code at the City’s request; and 4) certain persons who testify publicly before City Council or a Council Committee.

<sup>3</sup> The Board attempted to ascertain whether the drafters of the June 2000 amendments to the Ordinance, which include the provisions at issue in this case, intended to exempt sales representatives, such as your firm, from either the definition of “lobbyist” or the registration requirements, or to exempt sales commissions from the prohibition on contingent lobbying fees. Our inquiry failed to adduce any evidence of such an intent.

an RFP, and your firm receives its compensation in the manner described above, then that compensation indeed constitutes a prohibited contingent lobbying fee. In that event both your firm and the [principal company] itself would be in violation of this section of the Ordinance.<sup>4</sup>

**DETERMINATIONS:** After conducting considerable research, including an attempt to ascertain the intent of the drafters of the laws we are interpreting, the Board is compelled to determine that your firm is acting as a “lobbyist” (as defined in the City’s Governmental Ethics Ordinance) by virtue of its representatives’ contact with City employees or officials for the purpose of selling the City [ services], and that, therefore, either the firm or its representatives individually are required to register under the lobbyist provisions of the Ordinance. Further, the Board has determined that, if the City does not issue an RFP, but instead elects to purchase [such] services directly through your firm, and your firm receives its compensation in the form of a sales commission (i.e., it is paid by the [principal company ] if and only if the City determines to purchase that company’s products and services through your firm), that compensation constitutes a prohibited contingent lobbying fee, and both your firm and the principal company] itself would be in violation of the Ordinance.

Our determinations do not necessarily dispose of all issues relevant to this situation, but are based solely on the application of the City’s Governmental Ethics Ordinance to the facts stated in this opinion. If the facts stated are incorrect or incomplete, please notify the Board immediately, as any change may alter our opinion. Other rules or laws may also apply to this situation. Should the facts presented change, you should contact the Board for further review of the matter.

**RELIANCE:** This opinion may be relied upon by (1) any person involved in the specific transaction or activity with respect to which this opinion is rendered and (2) any person involved in any specific transaction or activity indistinguishable in all its material aspects from the transaction or activity with respect to which the opinion is rendered.

          [signature]            
Darryl L. DePriest  
Chair

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<sup>4</sup> Because the City has not yet issued a relevant RFP, the Board need not at this time address whether all or any part of your firm’s compensation would be a prohibited contingent lobbying fee if the City does issue an RFP and your firm is the successful bidder. The Ordinance’s definition of lobbyist states that “a person shall not be deemed to have undertaken to influence any legislative or administrative action *solely* by ... *responding* to a City request for proposals or qualifications.” (Emphasis added.) Resolution of that issue would turn on whether your firm’s compensation stems “solely” from responding to this RFP.