STATE OF MICHIGAN
JOCELYN BENSON, SECRETARY OF STATE
DEPARTMENT OF STATE
LANSING

January 16, 2019

Eric Doster
2145 Commons Parkway
Okemos, Michigan 48864

Dear Mr. Doster:

The Michigan Department of State (Department) acknowledges receipt of your letter dated and received October 12, 2018, which requests the issuance of a declaratory ruling or interpretative statement regarding the Department's interpretation of the Michigan Lobby Registration Act, (Lobby Law or Act), 1978 PA 472, MCL 4.411, *et seq.* A copy of your request was published on the Department's website beginning October 12, 2018 inviting public comments regarding your request, but none were received.

In your request, you state that the purpose of the request is "to obtain the Department's position as to the Act's requirements with respect to compensation arrangements for the Lobbyist who has employees who market products and services" to the State of Michigan, in-state and out-of-state municipalities, and other state governments.

The Lobby Law and Administrative Procedures Act (APA), 1969 PA 306, MCL 24.201 et seq., require the Department to issue a declaratory ruling if an interested person submits a written request that presents a question of law and a reasonably complete statement of facts. MCL 4.429, 24.263. If the Department declines to issue a declaratory ruling, it must instead offer an interpretive statement "providing an informational response to the question presented [.]" MCL 4.429(1). As the factual statement provided in your letter is insufficient to support the issuance of a declaratory ruling, the Department issues this interpretive statement in response to your request.

Your request consists of five questions, three ask the Department to interpret whether certain commission-based compensation plans are valid under the Act. The first question asks the Department to opine on whether a hypothetical compensation plan is consistent with the Act's requirements. If no, the second question asks what would be an acceptable "performance based, multi-territory compensation plan." Finally, the third question asks whether the compensation plan proposed would be a contingent compensation arrangement in violation of the Act.

The Department declines to opine on the variety of compensation plans described in your request, as "[a] declaratory ruling or interpretive statement issued under this section shall not state a general rule of law, other than that which is stated in this act," unless it is promulgated as an administrative rule or imposed by court order. MCL 4.429(1). The only provision of the Lobby Law that regulates compensation provides, "[a] person shall not be employed as a lobbyist agent for compensation contingent in any manner upon the outcome of an administrative or legislative action." MCL 4.421(1). Beyond this, the Lobby Law is silent on methods of compensating lobbyist agents.

"Administrative action" is a term of art defined in the Lobby Law as, "the proposal, drafting, development, consideration, amendment, enactment, or defeat of a nonministerial action or rule by an executive agency or an official in the executive branch of state government." MCL 4.412(1). Likewise, "legislative action" is defined as the,

> [i]ntroduction, sponsorship, support, opposition, consideration, debate, vote, passage, defeat, approval, veto, delay, or an official action by an official in the executive branch or an official in the legislative branch on a bill, resolution, amendment, nomination, appointment, report, or any matter pending or proposed in a legislative committee or either house of the legislature. MCL 4.415(1).

These two definitions share a common theme: an act that is intended to influence[1] a public official's lawmaking, rulemaking, or policymaking generally constitutes an "administrative or legislative action" for which a contingency fee cannot be paid. MCL 4.421(1). Therefore, in answer to your first three questions, if any part of the lobbyist agent's compensation is contingent upon the outcome of his or her attempts at influencing law or policy, it is in violation of the Act. For example, compensation contingent on the outcome of an administrative or legislative action and therefore barred by MCL 4.421(1) may include lobbying a public official to support or oppose a bill to ban a competitor's products, or to implement or refrain from implementing a new policy that requires a governmental agency to procure a specific type of product.

Next, your fourth question asks whether a portion of a lobbyist agent's compensation may be paid via commission, if his or her communications with the public official were part of an effort to persuade a public official to take an administrative action or make a policy decision. The Act defines "lobbying" as "communicating directly with an official . . . for the purpose of influencing legislative or administrative action." MCL 4.415(2), see *Jackson Interpretative Statement*, issued November 2, 1984. In view of the statutory ban on contingent compensation for lobbyist agents, *Jackson* previously determined that commission-based compensation is unlawful because it represents "compensation contingent . . . upon the outcome of an administrative or legislative action." *Id.* The Act altogether bans compensation that is "contingent in any manner upon the outcome of an administrative or legislative action[,]" including compensation that is based in whole or in part on a commission. MCL 4.421(1).

Since the plain language of the Act does not authorize a portion of compensation to be paid on a contingency basis, a lobbyist agent cannot be paid via commission – in whole or in part – where the commission is dependent upon the outcome of the lobbyist agent's efforts to influence a public official in the exercise of his or her lawmaking, rulemaking, or policymaking authority.

Finally, your last question asks what practical steps can be taken to verify that the lobbyist agent's communications with a public official were not an effort at persuading a public official to take an administrative action or make a policy decision. To answer this, the Department clarifies what classifies as an administrative action consistent with the standard laid out in *Jackson*.

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[1] Under the Lobby Law, "influencing" is defined as "promoting, supporting, affecting, modifying, opposing or delaying by any means, including the providing of or use of information, statistics, studies, or analysis." MCL 4.415(3).

Jackson held that lobbying occurs only if the decision to purchase a specific product or service constitutes an "administrative action." Further, *Jackson* held if the decision to purchase specific products or services requires the formation of policy or a judgment concerning the manner in which a particular policy should be applied, the lobbyists' activity is covered by the Act.

Under the Act and consistent with the Department's interpretation, "administrative action" includes only "nonministerial action," which is defined by law as "an action other than an action which a person performs in a prescribed manner under prescribed circumstances in obedience to the mandate of legal authority, without the exercise of personal judgment regarding whether to take the action." MCL 4.416(3). Stated differently, a ministerial action, or one which is narrower than the scope of authority exercised in taking "nonministerial action," is "an action that must be performed as prescribed and defined by law with such precision and certainty as to leave nothing to the exercise of discretion or judgment." See *Iron Cty. Bd. Of Sup'rs v. City of Crystal Falls*, 23 Mich. App. 319, 322 (1970). Therefore, the performance of an act that is merely ministerial does not rise to the level of an "administrative action" for purposes of the Act.

Applying these concepts to your request, the Department concludes that if the decision to purchase a product or service from a lobbyist agent requires the public official to exercise discretion, then the lobbyist agent's communications are covered under the Act's purview. As *Jackson* stated, "selling is a matter of fitting one's prices, products and services to the specifications, rather than an effort at persuading a public official to take an administrative act." Where the lobbyist agent is engaging in a routine sales presentation such as negotiating prices, products and services in order to suit the public official's needs and the official has minimal or no discretion, engaging in the State's standard procurement process, such conduct is likely not subjected to the Act. However, if that sales presentation is designed to influence a nonministerial or discretionary act on the part of the public official, then the lobbyist agent is attempting to influence an administrative or legislative action. For example, when the lobbyist agent urges a public official to support or oppose changes in law or policy to facilitate the purchase of a product or service from a vendor, then an administrative or legislative action is required, and the vendor is subject to the Act. See *Jackson*.

The Department declines to interpret *Jackson* differently, but does clarify its standard. If the Lobbyist is conducting a routine sales presentation to a public official that requires the public official to act without the exercise of personal judgement and does not require a change in law, such conduct would likely not be regulated under the Act. If the conduct requires the public official to exercise his or her personal discretion in a manner that is not prescribed by law, then the lobbyist agent's conduct would likely be regulated under the Act. If the lobbyist agent's compensation is contingent in any manner upon the outcome of the public official's administrative or legislative action, it is prohibited.

The foregoing represents an interpretative statement regarding the applicability of the Lobby Law.

Sincerely,

Hilarie Chambers

Hilarie Chambers
Chief of Staff