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Recent Congressional Lobbying and Ethics Reforms

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Revised

On Friday, September 14, 2007, President Bush signed the “Honest Leadership and Open Government Act of 2007.” Earlier this year the House of Representatives amended its ethics rules through House Resolution 6. These changes seek to distance the relationship between lobbyists and Members of Congress, while mandating greater public disclosure of funds spent by lobbyists to influence legislation and of the actions taken by members during the legislative process itself. To achieve these goals, the law amends numerous statutes that govern lobbying and other political activity, including the federal Lobbying Disclosure Act (“LDA”), the Federal Election Campaign Act (“FECA”), the Foreign Agents Registration Act (“FARA”), the Ethics in Government Act and the United States Criminal Code, as well as the rules of the Senate and the House of Representatives.

The Act imposes significant civil and criminal penalties on lobbyists and lobbying organizations for violations of the disclosure, gift and travel rules. For the first time, lobbying organizations and lobbyists are required to certify compliance with these rules and that no one listed on the report has knowingly made prohibited gifts. While there are revised reporting schedules for LDA disclosure -- reports will now be filed on a quarterly, not semi-annual, basis --, the monetary thresholds remain similar. Therefore, these changes are not likely to cause organizations that have not been required to register to trigger the reporting thresholds. Organizations in the past, however, may have registered under the LDA and listed individuals as lobbyists even if their lobbying activities did not rise to the level of mandatory reporting. In light of the heightened risk of criminal and civil penalties, organizations and lobbyists may wish to evaluate carefully whether they are required to register and report under the LDA.

This memorandum gives a brief overview of the changes most likely to affect nonprofit organizations and lobbying firms that seek to influence federal legislation or that undertake other advocacy efforts.¹ Guidance is already available through the House Committee on Standards of Official Conduct, the Senate Select Committee on Ethics and Federal Election Commission; additional guidance is expected later this year.

¹ This memorandum does not provide a broader summary of federal lobbying law, House and Senate Rules, federal election law or other statutes that may be implicated by the 2007 amendments.

Lobbyist Registration and Reporting

- Lobbying reports required under the LDA must be filed quarterly instead of semi-annually, as currently required. The reports must be filed within 20 days of the end of a reporting period instead of within 45 days. *Effective date January 1, 2008.*²
- Registration and reporting thresholds are adjusted to reflect quarterly, instead of semiannual, reporting. Organizations that employ in-house lobbyists are now required to register if expenditures for lobbying activities exceed or are expected to exceed \$10,000 in a quarterly period. (The former threshold was \$20,000 in a semi-annual period). Lobbying firms must register for a client if income from that client for lobbying activities exceeds or is expected to exceed \$2,500 in a quarterly period. The former limit was \$5,000 in a semi-annual period). These amounts are indexed for inflation.³
- Registrants must also disclose on their registration statement all government service in the executive and legislative branches of their lobbyists during the previous 20 years. (Under previous law, registrants were required to report such information for only the two prior years.) It is not clear how this new provision will apply to lobbyists who are currently registered.
- Registered lobbyists and their employers must disclose to the Secretary of the Senate and Clerk of the House semi-annually the following from either themselves or from a federal PAC that they establish or control: 1) contributions of at least \$200 to federal candidates, political parties or leadership PACs (defined as any federal PAC that a federal officeholder or candidate established, financed, maintained or controlled, except for his or her official campaign committee and any political party committee); 2) payments for an event to honor or recognize a legislative or executive branch official; 3) payments to an entity that is named for a legislative branch official; 4) payments to a person or entity in recognition of a legislative branch official; 5) payments to an entity that is established, maintained, financed or controlled by a legislative or executive branch official; 6) payments to an entity that is designated by a legislative or executive branch official; 7) payments for a meeting, retreat, conference or similar event that is held by or in the name of a legislative or executive branch official; and 8) donations of at least \$200 to a presidential library foundation or presidential inaugural committee. *Effective January 1, 2008.* The first report will be due July 30, 2008.

² Effective dates pertain to both activities and reporting of those activities; a January 1, 2008, effective date means that conduct during 2007 and reporting about that conduct in 2008 will be subject to the previous rules, but all activity beginning on January 1, 2008, and reporting of that activity is subject to the new rules.

³ Under prior law, these amounts were indexed for inflation every four years. Thus, under the old law, the reporting thresholds as adjusted for inflation were actually \$24,500 per semiannual period for organizations with in-house lobbyists and \$6,000 per semiannual period for lobbying firms. It is not clear whether the new financial triggers for registration and reporting will remain as stated in the new law (i.e. \$10,000 and \$2,500) or whether the new quarterly amounts will be adjusted upwards to account for the indexing that took place in prior years.

- Candidate campaign committees, leadership PACs and political party committees must report “bundled” contributions in their reports to the Federal Election Commission. These committees must report when a person (“reasonably known” to be a lobbyist, a registrant organization, or a political committee established or controlled by a registrant or individual lobbyist) provides two or more bundled contributions totaling \$15,000 or more in the aggregate during a semiannual reporting period. A “bundled contribution” is defined as one which is: (1) collected and forwarded from a contributor to a committee or (2) received by a committee from a contributor and “credited” by that committee to a person “through records, designations or other means of recognition.” The FEC must make this information available to the public online in a searchable format. The Act directs the FEC to develop rules for the reporting of bundled contributions within six months. *The effective date is three months after the FEC’s rules are promulgated.*
- Registered lobbying coalitions are required to disclose the name, address and principal place of business of any organization, other than the registrant, that contributes more than \$5,000 in a calendar quarter to the registrant or the client for lobbying activities and actively participates in the planning, supervision or control of such lobbying activities. Previously, the members of coalitions were required to be disclosed only if they “in whole or in major part plan, supervise or control” lobbying activities. The old law also had a higher threshold of financial support – \$10,000 in contributions – although the total was over a semiannual period. Disclosure is not required of entities that have only a passive role – defined as those organizations that are solely donors or recipients of information and reports. In addition, disclosure is not required of organizations that are identified by the registrant as affiliated with the registrant or client on a publicly accessible internet website of the client as being a member or major contributor to the client (unless the organization in whole or in major part plans, supervises or controls the lobbying activities of the registrant). Disclosure of individuals who are members or donors to an entity is not required. *This provision will take effect January 1, 2008.*
- Disclosure reports must be filed electronically and will be made available to the public in a searchable online database.
- The Act amends FARA to broaden the scope of activities that are subject to required disclosure. Under previous law, a registrant was required to disclose activities on behalf of a foreign entity that contributed more than \$5,000 toward lobbying activities and “directly or indirectly, in whole or in major part, plans, supervises, controls, directs, finances, or subsidizes the activities of the client.” The Act expands the scope of registrable activities by requiring disclosure of foreign entities that pay more than \$5,000 in a quarterly reporting period to “fund lobbying activities” and that “actively participate” in lobbying activities. Foreign entities that merely have a “passive role” in lobbying activities, such as receiving information or reports, are not subject to disclosure.
- FARA reports must now be filed electronically. Earlier this year, the Department of Justice made FARA reports available to the public online; registrations and reports will be made available to the public online within 48 hours of filing.

Gift Rules for Members of Congress and Their Staff

The following gift rule reforms were approved for both the House and Senate:

- Members of the Senate and House and their staffs may not knowingly accept *any* gifts from a registered lobbyist or agent of a foreign principal or from any entity that retains or employs a registered lobbyist or agent of a foreign principal. There remain exceptions from the definition of gifts discussed below. *Effective September 14, 2007.*
- The Act does not change the rules permitting individuals who are not registered lobbyists or foreign agents (and entities that do not employ them) to make gifts of up to \$49.99 to a Member of the House or Senate subject to an annual limit of up to \$99.99. The exceptions discussed below apply to this rule.

Exceptions to Gift Rules⁴

Many exceptions to the gift bans in the House and Senate remain unchanged or only slightly modified. For instance, members and their staffs may still accept the following even from organizations that are registered under the LDA:

- Free attendance at “widely attended events” (such as conferences, forums, and dinners) provided by a sponsor of the event so long as: (1) the event is open to individuals from throughout a profession or industry or attendees represent a range of persons interested in the subject matter; (2) at least 25 persons, other than Members, staff or officers of Congress, are reasonably expected to attend (officials of other branches of government count toward the 25 outside attendees; spouses of Members do not); (3) attendance is related to the Member’s or Senator’s official duties; and (4) the invitation is provided by the sponsor of the event. Free attendance includes waiver of conference fees, provision of local transportation and informational materials that are furnished to all attendees, but does not include tickets or an offer of free attendance to a sporting or entertainment event purely of a recreational nature. Food and refreshments may be received so long as they are taken in a group setting with substantially all of the other attendees.
- Free attendance at a charity event. Under the House rules, this exception applies if: (1) net proceeds of the event are for the benefit of the charity; 2) the charity, not another source, pays the local transportation and lodging costs; and 3) the sponsor’s offer of free attendance is unsolicited. The Senate rules continue to allow free attendance at charitable events. “Free attendance” is defined to include conference fees, local transportation, food/refreshments/entertainment, and instructional materials that are integral to the event, but not collateral entertainment, or food/refreshments taken other than in a group setting with all or substantially all other attendees.

⁴ The exceptions to the gift rules are described generally for purposes of this memo; there may be minor differences in their application between the House and Senate rules. Therefore, it is advisable to consult the ethics manuals and advisory memoranda available through the House Committee on Standards of Official Conduct and the Senate Select Committee on Ethics.

- Food and refreshments of nominal value other than as part of a meal.
- Gifts of nominal or little intrinsic value, such as a baseball cap or greeting card.
- Gifts on the basis of personal friendship for a nonbusiness purpose.
- Free attendance and food at events sponsored by political organizations.
- Informational materials sent to the office of a Member or employee in the form of books, articles, periodicals, other written materials, audiotapes, videotapes, or other forms of communication;
- A plaque, trophy, or other item that is substantially commemorative in nature and which is intended for presentation.

Senate Only Gift Reforms

- Senators and their staff may accept free attendance at a conference, constituent event, dinner or other event in their home state if: it is sponsored and attended by a group of constituents; there are no registered lobbyists in attendance; the cost of the meal is less than \$50 and the Senator or employee participates in the event as a speaker or panelist presenting information regarding his or her official duties. The event must otherwise comply with the rules on widely attended events (discussed above). *Effective September 14, 2007.*
- Subject to the limits above, Senators and their staff must report the fair market value of entertainment and sports tickets. The market value of a ticket is its face value or, where a ticket does not have a face value, the value of the highest priced ticket for the event. A member may present evidence in advance to the Ethics Committee that the ticket is equivalent to another ticket and therefore establish that the market value should be set at the face value of the equivalent ticket. *Effective September 14, 2007.*
- A Senator may not participate in an event that is paid for by a registered lobbyist or an entity that employs a registered lobbyist and held in the Senator's honor at a national political party convention unless the Senator is honored as the party's actual or presumptive nominee for the Presidency or Vice Presidency. *Effective September 14, 2007.*

House Only Gift Reforms

- Entertainment and sports tickets are valued at face value or, where a ticket does not have a face value, at the highest cost of a ticket with face value. *Effective September 14, 2007.*
- A Member may not participate in an event held in his or her honor that is paid for by a registered lobbyist or an entity that employs a registered lobbyist at a national political

party convention unless the Member is honored in his or her capacity as a presidential or vice presidential candidate. *Effective September 14, 2007.*

Senate and House Travel Reforms

- A Senator or Member of the House or an employee may not be reimbursed for transportation, lodging, and related expenses for travel to a meeting, speaking engagement, fact-finding trip or similar event in connection with his or her duties if paid for by a registered lobbyist or an agent of a foreign principal.
- Travel expenses may not be paid for directly by a *private entity* that retains one or more registered lobbyists or agents of a foreign principal except under certain narrow conditions:
 - House Members, Senators and their staff may accept travel by an entity that employs a lobbyist for a one-day event/fact finding mission with pre-approval (see procedures below) from the House Committee on Standards of Official Conduct or the Senate Ethics Committee, respectively. Approval for an additional day of travel may be granted by the Committee where unique aspects of the trip (e.g. a distant destination, other burdens of travel) are present. This exception does not permit reimbursement by the registered lobbyist or foreign agent, only by the employing entity;
 - A Senator, Member or employee may not be accompanied “on any segment” of the one-day event by a registered lobbyist or agent of a foreign principal; and
 - Involvement of a registered lobbyist or agent of a foreign principal in the planning, organization, request or arrangement of the trip is permissible only if it is *de minimis* under rules to be prescribed by the Senate and House Committees.

The effective date for the House was March 1, 2007. Effective date for the Senate is 60 days after enactment or the date on which the Ethics Committee issues guidance, whichever is later.

House Only Travel Rules

- Under the House Rules only, there is an exception for reimbursement of travel paid directly from an institution of higher education within the meaning of section 101 of the Higher Education Act of 1965. The restrictions on lobbyist and foreign agent involvement in planning and arranging the travel and accompanying the Member discussed above do not apply to this exception. *Effective date March 1, 2007.*

Senate Only Travel Rules

- Senators and their staff may accept travel paid by a 501(c)(3) organization with pre-approval from the Select Committee on Ethics. Under this exception, Senators and their

staff may accept reimbursement for necessary transportation, lodging, and related expenses for travel to a meeting, speaking engagement, fact-finding trip or similar event for trips of one day or longer – even if the 501(c)(3) employs or retains a lobbyist(s) – provided that: 1) the trip is in connection with the Senator or a staff person’s official duties (and is not substantially recreational in nature); 2) no lobbyist is involved in planning the trip in anything other than a *de minimis* capacity or accompanies the Senator or staffer at any time during the trip, and 3) pre-approval for the trip is granted by the Ethics Committee.

- When deciding whether to pre-approve a 501(c)(3) organization, the Select Committee must consider the stated mission of the organization, the organization’s prior history of sponsoring congressional trips, other educational activities performed by the organization besides sponsoring congressional trips, whether any trips previously sponsored by the organization led to an investigation by the Select Committee and any other factor deemed relevant by the Committee.
- This exception does *not* apply if the trip was planned, organized, or arranged by or at the request of a registered lobbyist or agent of a foreign principal, or on which a lobbyist *accompanies* the Member or employee on any segment of the trip, unless such involvement by the lobbyist is *de minimis* as set forth in regulations to be issued by the Select Committee on Ethics.

Effective date on the later of either 60 days after enactment date or on the date the Ethics Committee issues guidelines.

Certification and Prior Approval of Travel

No later than 30 days before proposed travel paid for by a private source, Senators, Members and employees must provide to the Senate Select Committee on Ethics or the House Committee on Standards of Official Conduct, respectively, a request for prior approval accompanied by a *written certification prepared and signed by an officer of the source* stating:

- The trip will not be financed in any part by a registered lobbyist or agent of a foreign principal;
- The source either does not retain or employ registered lobbyists or agents of a foreign principal, or the trip falls within one of the permissible exceptions described above;
- The source will not accept from another source any funds earmarked directly or indirectly for the purpose of financing any aspect of the trip;
- The official traveling will not be accompanied on any segment of the trip by a registered lobbyist or agent of a foreign principal (unless the reimbursement is from an institution of higher education under the House Rules); and

- The trip will not in any part be planned, organized, requested, or arranged by a registered lobbyist or agent of a foreign principal except as permitted under the *de minimis* rule.

Employment and “Revolving Door” Restrictions

- New so-called “cooling off” or “revolving door” provisions will take effect on December 31, 2007, or whenever the current session of the 110th Congress adjourns, whichever comes first. These measures affect how members of Congress can seek employment, their ability to lobby after their service as an elected official ends, and also apply to certain congressional staff.
- Former Senators may not lobby either chamber of Congress for two years after the conclusion of their Senate service. Former members of the House may not lobby either body for one year.
- The Act also seeks to end attempts by members of Congress or staff from influencing hiring decisions or employment practices of private employers by imposing civil penalties and up to 15 years imprisonment for taking or withholding an official act, threatening to do so, or influencing, offering to influence, or threatening to influence the official act of another party solely on the basis of partisan political affiliation.

Enforcement and Penalties

- The Act significantly increases civil penalties and provides for criminal penalties and enhanced enforcement, as well as disclosure and monitoring of enforcement efforts. Most notably, while under prior law the rules on gifts and travel regulated members of Congress and Congressional staff, the new law imposes independent liability for lobbyists and organizations that employ lobbyists for violations of these rules.
- Penalties for a willful violation of the lobbying disclosure laws are increased from \$50,000 to \$200,000. The new law also establishes criminal penalties for knowing and corrupt failure to comply with the law. Knowing and corrupt violations of LDA provisions now carry a possible criminal penalty of up to 5 years imprisonment and fines. *Effective upon enactment.*
- The Comptroller General will audit annually lobbyists’ compliance with disclosure rules through random audits of registrants’ reports. In addition, the Comptroller will have access to an audited registrant’s reports, as well as authority to ask a registrant to provide additional information. *Effective for audits of the first quarter of 2008.*
- The Act requires the Senate Ethics Committee to issue an annual report by January 31 detailing the number of alleged violations of Senate rules in the preceding year and summarizing the various actions taken by the Committee in response.
- The U.S. Attorney General will now be required to report semiannually to Congress about the number of LDA registrants referred to the U.S. Attorney for D.C., the number

of enforcement actions brought, and any sentences imposed. The names of registrants against whom actions are brought, or other information that would identify them, will not be disclosed as part of these reports unless that information is already a matter of public record.