

Remarks for
Legal Issues in Lobby Reform
by
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Undue Influence? Improving the Regulation of Lobbying
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At the outset, I should note that I am not a professional lobbyist, but rather a lawyer who has spent the lion's share of his professional life in the administrative arena, focused on legal frameworks that, for the most part, emphasize transparency and merit-based decision-making in contexts in which the decision-maker must rely solely on materials to which all parties have access. Rules barring ex parte communications are illustrative of the procedural constraints that apply. Rightly or wrongly, this background clearly colors my approach to the area of lobbying regulation.

Let me make several general observations before listing, in descending order of importance (to my mind), the five most significant changes to the Lobbying Disclosure Act (LDA) made by the 2007 Honest Leadership and Open Government Act (HLOGA). (While HLOGA made many changes that did not involve the LDA, I will focus on the LDA since it has been the one statute where I have devoted most of my attention in recent years.)

First of all, the LDA began as a pure disclosure regime where the disclosure was designed to aid the public at large, not only government

officials, in getting a handle on lobbyist influence on the federal government. While a vast improvement in that regard from the Federal Regulation of Lobbying Act of 1946 that it replaced, the fact of the matter is that the disclosures were (and are still today in many cases) pretty elemental; detail with regard to the nature of lobbying campaigns is not a hallmark of the LDA. However, after 2007, the LDA was transformed into something quite different: what I consider the centerpiece of federal lobbying regulation as it exists today, one that incorporates not only disclosure mandates, but prohibitions and, moreover, intersects with congressional and executive branch gift rules, campaign-finance law, and (most recently) Obama Administrative initiatives, exposing and limiting the money-nexus that increasingly connects lobbyists with the governmental process.

And this brings me to my second general observation: the important role the LDA plays in this matrix of laws and regulations is created, in part, by the reliance placed on the LDA definition of “lobbyist,” a definition that is inherently arbitrary (more than 1 lobbying contact and at least 20% of time devoted to lobbying activities over a three month period). While arbitrary, it took 40 plus years of legislative wrangling to arrive at a politically acceptable definition that was not deemed to sweep either too broadly or too narrowly in a legislative scheme (the original LDA of 1995) that focused solely on disclosure. However, as various speakers today have noted, too heavy a reliance on

the LDA definition of “lobbyist” in defining the scope of lobbyist regulation may have odd, if not perverse, affects in certain circumstances (e.g. barring communications from LDA lobbyists, but not their politically-connected clients, to federal officials with regard to funding under the American Recovery and Reinvestment Act of 2009, as was the case with the first iteration of the Obama directive on stimulus lobbying). Law students learn (or should learn) early in their careers that the same word or phrase may sometimes have to carry different meanings in different legal contexts; otherwise absurd or mischievous results may follow. As Pam Gavin in the Office of the Secretary of the Senate who administers the LDA remarked to me recently, the LDA may today be carrying “too much weight.” At the same time, since crafting the definition of a lobbyist specifically for each distinct area of regulation may be a daunting task, the reliance on the LDA definition has the attraction of saving time; it also may appear to the drafter as a way to avoid controversy since he or she will not be reopening an issue laid to rest (for certain purposes) years before.

So now to my Top Five list of LDA improvements made by HLOGA, starting, as I said, with the most important in my view. By the way, I will along the way identify some of the problems I see with each.

1. *Making congressional gift rules legally enforceable against the gift-giver.* Sizable civil and criminal penalties now apply to private parties’

violating the rules. While a clear improvement over the prior situation where the rules were ignored by gift-givers in some (or perhaps many) instances, this is clearly a second-best solution; preferable would be aggressive policing by Congress of violations of its own rules by Members, something that seems not to occur today despite HLOGA reforms to the congressional ethics process.

HLOGA, however, limits enforceability of the rules to those gifters who are LDA lobbyists and registrants. But why should someone who spends 10% of their time engaged in lobbying activities (and is not, therefore, an LDA lobbyist) get away with violating the rules? Moreover, why should the enforceability be limited to congressional gift rules and not extend to executive branch gift rules that are very similar and also may lack a fully effective internal enforcement regime?

2. *Mandating disclosure of lobbyist bundling of political contributions.*

As with many people, the influence of a lobbyist depends more on their ability to raise money from others than the size of their own individual contributions. As you may know, prior to HLOGA, Federal Election Commission regulations required disclosure of bundling, but the reports did not identify the bundler as a lobbyist and disclosure did not apply if the bundler did not “touch” the money in getting it to the ultimate recipient. Now that has changed; and the FEC adopted implementing regulations last year (after a long-delayed process of

rulemaking). Again, however, coverage of the rules is limited to LDA lobbyists and registrants as if they are the only ones who lobby and benefit from bundling. There is also, unfortunately, the issue of compliance with the rules. I understand a private study is underway and early results offer some suggestions of significant under- or non-reporting.

3. *Semiannual reporting of various contributions and disbursements to or for the benefit of federal officials.*

I am referring here to the reports required by Section 203 of HLOGA that must be filed with the Senate and House; they cover political contributions (also reported to the FEC by political committees) as well as various other contributions for the benefit of congressional and executive branch officials. The listing of FECA-covered contributions under Section 203 by the contributor lobbyist or LDA registrant is a beneficial double-check on reporting of the same information to the FEC by political committees. Many of the other covered disbursements that must be reported may not heretofore have been on public display. Again, however, the reports are required only of LDA lobbyists and registrants.

The reported disbursements to federal officials overlap to some degree with congressional and executive branch gift and travel rules. Accordingly, the reports can be used to show violations of those rules. Moreover, filers must certify that they have not given or offered a gift

in violation of the congressional (though not the executive branch) rules. Not only would a false certification be prosecutable under the LDA and the False Statements Accountability Act, but there is a provision of the certification that will facilitate prosecution for gifting in violation of the congressional rules: the certification includes a statement that the filer has read and is “familiar” with the often arcane and complicated congressional rules. So imagine this scenario: a prosecution of a lobbyist for giving a Congressman two large screen, high def TVs at an award banquet; the gift violates congressional rules. The prosecution will succeed under HLOGA only if the violation was “knowingly” committed by the gifter. In response to protestations by the defendant that the rules are complicated and difficult to understand, the United States Attorney shows the jury the Section 203 certification to the effect that the defendant has read and is “familiar” with the rules. End of case, if it even gets this far—a plea bargain is more likely given the certification.

4. *Criminal penalties.* Sizable criminal penalties and jail-time are available for LDA violations. Prior to 2007, only civil penalties could be imposed as sanctions. The short of it is that criminal penalties endow a regulatory regime with a seriousness of purpose that attracts attention lacking in other circumstances. And in the LDA context, it forces registrants and their lobbyists to think carefully in preparing their registration statements and reports and in signing their Section

203 certifications. The downside is that criminal penalties may encourage some to avoid registration by keeping below the thresholds for required registration (for a lobbyist, less than 20% of their time lobbying over a quarterly period). This arguably undercuts the disclosure purposes of the LDA.

5. *Public availability of information disclosed.*

If the purpose of a statute is public disclosure, it ill-serves that purpose to make information available only at an agency's office in, for example, microfiche file cabinets. Prior to 2007, disclosure of the contents of lobbying reports was conducted in different ways by the House and Senate; and without mandatory electronic filing it took a long time to put reported information in a form viewable in the way information is most accessible to the public today—on the Internet. After 2007, all filings with the Senate and House under the LDA must be made electronically and available on the Internet as soon as practicable in downloadable, sortable, and searchable databases linked to FEC databases. The FEC is likewise required to make lobbyist bundling information available on the Internet and linked to the LDA databases. Whether the downloadability, searchability, and sortability of the Senate's, House's, and FEC's databases are sufficient today to maximize their usefulness in understanding the lobbying industry and its impact on the government is an issue of surpassing importance. The issue deserves close attention by the Government Accountability

Office and persons outside government. What is clear is that the databases today do not easily yield a complete picture of lobbyist influence. For example, there is today only one electronic link among the webpages of the three responsible government entities—that found on the Senate Office of Public Records’ page and that merely takes the viewer to the FEC’s general website. Wouldn’t the public be much better off in terms of its knowledge of lobbying influence if, for example, when a search is made under the name of a particular lobbyist, information were displayed on the same page showing the lobbyist’s and his or her PAC’s political and other contributions required by Section 203 along with the political contribution and bundling information filed with the FEC as to that lobbyist and PAC?

As a final note, there are many ways to improve lobbying disclosure as it currently exists, including requirements for more detailed, meaningful, and focused information. Tom Susman and I identified some of these areas for improvement in a 2006 article (*see* William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32 (2006)), areas that HLOGA does not touch; some of the other panelists today advocated reforms to fill some of the gaps we identified. The pending Supreme Court case dealing with the constitutionality of limitations on corporate political spending may, even if it results in striking down those limitations, offer some

ray of hope in terms of lobbying disclosure. If, as is reportedly expected from various Justices' questioning during oral argument in *Citizens United v. FEC*, Congress cannot limit spending by corporations as it has, the crucial remaining regulatory technique available to Congress to protect government functioning from "undue influence" is, as Justice Brandeis years ago described it, "sunlight"-- more and better disclosure. In that circumstance, the Court will be hard-pressed to reign in Congress if it gets serious about revealing the nature of lobbying campaigns and the influences lobbyists have on government.