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Joan Claybrook, President

## MEMORANDUM

May 11, 2006

**RE: Legislative proposal to restrict campaign fundraising by lobbyists**

As a matter of course in Washington, lobbyists are expected to make extensive campaign contributions from their own pockets, solicit even more contributions from their clients and arrange lavish fundraising events, all to get special access to members of Congress.

Allegations of influence peddling by lobbyists through campaign contributions are not limited to the Jack Abramoff scandal. For example, Public Citizen has documented a particularly brazen and scandalous game of making contributions to buy influence by a lobbyist on behalf of Westar Energy Corporation. Internal Westar e-mails from Westar's lobbyist outlined the company's plan to buy a "seat at the table" in a 2003 House energy conference committee by contributing cash to influential lawmakers in exchange for their support of a special regulatory exemption. After the company executives followed the carefully prepared schedule of hard and soft money contributions to officeholders and political committees, the company won the favorable legislation it was seeking as its request was quietly inserted into the bill—until the company came under investigation for corporate fraud.<sup>1</sup>

In another complaint filed with the Federal Election Commission (FEC), Public Citizen documented the vociferous activities of one lobbyist, Mitch Delk of Freddie Mac, arranging fundraising events for officeholders and candidates. In the 2002 election cycle alone, Delk hosted 45 fundraising events for federal officeholders, candidates and party committees. More than half (24) of the fundraising events he organized featured as a special guest U.S. Rep. Michael Oxley (R-Ohio), chairman of the House Financial Services Committee, which regulates Freddie Mac. Nineteen of these events were held explicitly for the benefit of congressional members with oversight responsibility over Freddie Mac. Delk had risen in stature to be considered one of the most influential lobbyists with the House Financial Services Committee.<sup>2</sup> Immediately following Public Citizen's complaint, however, Delk was fired as Freddie Mac's lobbyist. The complaint resulted in the largest civil penalty ever levied in FEC history, fining Freddie Mac (rather

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<sup>1</sup> To read more about the Westar scandal, see:  
[http://www.citizen.org/cmep/energy\\_enviro\\_nuclear/electricity/energybill/westar/index.cfm](http://www.citizen.org/cmep/energy_enviro_nuclear/electricity/energybill/westar/index.cfm)

<sup>2</sup> To read more about Public Citizen's complaint against Delk, go to:  
<http://www.citizen.org/congress/campaign/issues/electadmin/articles.cfm?ID=10582>

than Mitch Delk) \$3.8 million on April 18, 2006 for corporate involvement in federal elections.

While it is not illegal for lobbyists to host fundraising events for lawmakers whom they are trying to influence, it certainly raises the specter of corruption. The corrupting nexus between lobbyists, campaign cash and lawmakers is far more prevalent than just the practices of one or two shady lobbyists. Campaign fundraising by lobbyists – even constant, round-the-clock fundraising by lobbyists for those whom they lobby – is considered business as usual on Capitol Hill.

No other single reform would do as much to prevent the corruption and the appearance of corruption in lobbying than to break the nexus between lobbyists and campaign money for officeholders.

### **Summary of the Legislative Proposal**

#### **Break the nexus between lobbyists, money and lawmakers:**

- Cap contributions from lobbyists and lobbying firm PACs to federal candidates at \$200 per election and to national parties and leadership PACs at \$500 per election cycle.
- Prohibit lobbyists and lobbying firms from soliciting, arranging or delivering contributions and from serving as officials on candidate campaign committees and leadership PACs.
- Prohibit lobbyists, lobbying firms and lobbying organizations from paying or arranging payments for events “honoring” members of Congress and political parties, such as parties at national conventions, and from contributing or arranging contributions to entities established or controlled by members of Congress, such as foundations.

### **Draft Statutory Language**

#### **A. Campaign Contributions from Lobbyists**

*2 U.S.C. §441a(a) is amended by adding at the end the following –*

- “(9) No registered lobbyist, person employed by a registrant and listed as a lobbyist, nor any political committee affiliated with such registrant, shall make contributions –
- (A) to any candidate or candidate’s authorized political committees with respect to any election for Federal office, which, in the aggregate exceed \$200;
  - (B) to the political committees established and maintained by a national political party, which are not the authorized committees of any candidates, in any calendar year which, in the aggregate, exceed \$500;

- (C) to any other political committee in any calendar year which, in the aggregate, exceed \$200.”

**B. Contributions Solicited or Arranged by Lobbyists**

*2 U.S.C. §441j is added to read –*

- “§441j. No registered lobbyist, person employed by a registrant and listed as a lobbyist, nor any political committee affiliated with such registrant, shall –
- (A) solicit, arrange, direct or deliver a contribution, donation, or transfer of funds or any other thing of value, to any candidate, political committee or party committee described under the Federal Election Campaign Act, or political organization described under Section 527 of the Internal Revenue Code, with respect to any election for Federal office, or any organization described under Section 501(c) of the Internal Revenue Code established or controlled by a member of Congress;
  - (B) arrange, host, co-host or otherwise sponsor a fundraising event for any candidate, political committee or party committee described under the Federal Election Campaign Act, or political organization described under Section 527 of the Internal Revenue Code, with respect to any election for Federal office, or any organization described under Section 501(c) of the Internal Revenue Code established or controlled by a member of Congress.”

**C. Lobbyists Serving as Fundraising Officers for Candidates or Officeholders**

*2 U.S.C. §441k is added to read –*

- “§441k. No registered lobbyist nor person employed by a registrant and listed as a lobbyist shall serve as an officer on a fundraising committee for any candidate with respect to any election to Federal office, or as an officer on a fundraising organization controlled by any Federal officeholder.”

**Constitutional Analysis**

**Restrictions on Campaign Contributions.**

While bans and restrictions on campaign contributions from lobbyists across the board to all candidates have not fared well in the courts, the courts have shown much greater leniency toward tailoring such bans to particular situations in which the potential for corruption may arise. For example, the California Supreme Court recognized that a state did have a compelling interest in “ridding the political system of both apparent and actual corruption and improper influence” in banning all contributions from lobbyists, but the

court invalidated the statute as overly broad. 25 Cal. 3d 33 (1979). The court noted that while “either apparent or actual corruption might warrant some restriction of lobbyist associational freedom, it does not warrant total prohibition of all contributions by all lobbyists to all candidates.” Id.

In response, California implemented a somewhat more narrowly drawn statute, prohibiting lobbyists from making campaign contributions to those whom they lobby. Cal. Govt Code §85702. The Fair Political Practices Commission (FPPC) interpreted this provision to mean that lobbyists are banned from making contributions to candidates for elective office in the branch of government that they lobby. In other words, lobbyists are prohibited from making campaign contributions to candidates for the legislature, if they are registered to lobby the legislature, of candidates for executive office, if they are registered to lobby the executive branch, or both. A federal district court upheld this interpretation of the law to ban lobbyist contributions only if the lobbyist is registered to lobby the office for which the candidate seeks election. *Institute of Gov’tal Advocates v. FPPC*, 164 F. Supp. 2d 1183 (E.D. Cal. 2001).

South Carolina has had a ban on campaign contributions from lobbyists to state candidates on the books since 1991. Kentucky prohibits those who lobby the legislature from making contributions to legislative candidates, and Alaska allows lobbyists to make campaign contributions but only to their own representatives. On February 15, 2006, Tennessee joined these four states when it approved its own reform legislation prohibiting direct campaign contributions from lobbyists to state candidates and officeholders.

In Alaska, the state Supreme Court upheld the restriction against campaign contributions from lobbyists to state legislators outside the district in which the lobbyist resides. The court held that lobbyist contributions to those outside their own district appears to have more to do with influence peddling and are “especially susceptible to creating an appearance of corruption.” *State v. Alaska Civil Liberties Union*, 978 P.2d 618 (1999).

The courts have shown a willingness to uphold contribution bans that apply to particular sectors with a demonstrated history of corruption or the appearance of corruption. A “pay-to-play” restriction that bans campaign contributions from potential contractors to those responsible for awarding the contracts has been upheld by the courts. *Blount v. SEC*, 61 F.3d 938 (D.C. Cir. 1995) cert. denied by the U.S. Supreme Court.

Eight states have banned contributions from gaming interests. These include:

- Indiana prohibits contributions from any officer or person who holds an interest in a gaming entity (Ind. Stats. 4-33-10-2.1);
- Iowa prohibits contributions from riverboat gambling corporations (Iowa Stats. 99F.6(4)(a));

- Kentucky prohibits contributions from persons owning lottery contracts (KY Rev. Stats. 154(a).160);
- Louisiana prohibits contributions from casino officers or key employees (La. Rev. Stats. 18:1505.2)
- Michigan prohibits contributions from any licensee or person who has an interest in a gaming entity (Mich. Stats. 7(b)(4)-(5));
- Nebraska prohibits contributions from lottery contractors for duration of contract and three years after (Neb. Stats. 49-1469.01);
- New Jersey prohibits contributions from casino officers or key employees (NJ Perm. Stats. §5:12-138); and
- Virginia prohibits contributions from pari-mutual corporations, executives and their spouses and families (VA Stats. §59.1-375, 376).

Louisiana's and New Jersey's bans on contributions from those involved in the gaming industry have been upheld in the courts. *Casino Association of Louisiana Inc. v. Louisiana*, 537 U.S. 1226, cert. denied by the U.S. Supreme Court; and *Petition by Soto*, 236 N.J.Super. 303, 565 A.2d 1088, cert. also denied by the U.S. Supreme Court. In Michigan, the Attorney General has opined as to the constitutionality of that state's ban on gaming contributions. Michigan AG Opinion 7002 (Dec. 17, 1998).

In addition to the broader bans on campaign contributions from regulated sectors such as the gambling industry, several states have implemented more narrowly tailored restrictions on campaign contributions from regulated sectors to those whom are the regulators:

- Delaware, Florida, Montana, and Washington prohibit insurance agents from making contributions to candidates for the Office of Insurance Commissioner. Delaware Code 18 §2304(6), Florida Statutes Title XXXVII §627.0623, Montana Code Ann. 33-18-305, and Washington RCW 48 -30.110.
- Florida also prohibits licensed food outlets and convenience stores from contributing to candidates for Commissioner of Agriculture. Florida Statutes Title IX §106.082.
- Georgia prohibits public utilities from contributing to any political campaign. Official Code of Georgia Ann. 21-5-30(f).

- Georgia law further prohibits any regulated entity from contributing to any candidate for the office that regulates that entity. Official Code of Georgia Ann. 21-5 30.1.<sup>3</sup>

### **Restrictions on Soliciting Funds.**

None of the states or court decisions discussed above focused on restrictions of particular classes of persons soliciting or arranging campaign contributions from others. However, there would appear to be a fairly firm constitutional basis for restricting comparable classes of persons from soliciting or arranging campaign contributions with other people's money. The First Amendment issues raised in the landmark court decisions on campaign financing, such as the *Buckley* and *McConnell* decisions, have focused on how contribution restrictions may impact a person's ability to exercise their own free speech with their own money.<sup>4</sup>

The *McConnell* decision went even further and explicitly upheld the bans on national party committees and federal officeholders soliciting and raising "soft money" and directing these contributions to others. As stated in *McConnell*:

"Nor is §323(a)'s prohibition on national parties. soliciting or directing soft-money contributions substantially overbroad. That prohibition's reach is limited, in that it bars only soft-money solicitations by national party committees and party officers acting in their official capacities; the committees themselves remain free to solicit hard money on their own behalf or that of state committees and state and local candidates and to contribute hard money to state committees and candidates."<sup>5</sup>

The *McConnell* court reiterated the justification for banning the solicitation of soft money by national party committees:

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<sup>3</sup> Most states that have some form of ban on lobbyist contributions to candidates have applied such bans only during particular time periods, such as while the legislature is in session. These bans are really time limits on contributions and not restrictions on lobbyists *per se*. These time limits on contributions, especially when they have applied to all persons rather than just lobbyists, have faced mixed results in the courts. Only two bans on contributions to legislative candidates while the legislature is in session have survived court challenge, in North Carolina and in Vermont. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705 (4th Cir.1999), *cert. denied*, 528 U.S. 1153, 120 S.Ct. 1156, 145 L.Ed.2d 1069 (2000); *Kimbell v. Hooper*, 665 A.2d 44 (Vt. 1995).

Similar bans have been invalidated in Arkansas, Tennessee, Missouri, and Florida. *Arkansas Right to Life v. Butler*, 983 F.Supp. 1209 (W.D. Ark. 1997), *cert. denied* by the U.S. Supreme Court; *Emison v. Catalano*, 951 F.Supp. 714 (E.D. Tenn. 1996); *Shrink Missouri v. Maupin*, 922 F. Supp. 1413 (E.D. Mo. 1996); *State v. Dodd*, 561 So. 2d 263 (Fla. 1990). Nevertheless, many states continue the practice of banning contributions while the legislature is in session for lobbyists as well as for all other persons.

<sup>4</sup> See, generally, *Buckley v. Valeo*, 424 U.S. 1 (1976); *McConnell v. FEC*, 540 U.S. 93 (2003).

<sup>5</sup> *McConnell v. FEC*, at 96.

“Section 323(d)’s restriction on solicitations is a valid anti-circumvention measure. Absent this provision, national, state, and local party committees would have significant incentives to mobilize their formidable fundraising apparatuses, including the peddling of access to federal officeholders, into the service of like-minded tax-exempt organizations that conduct activities benefiting their candidates. All of the corruption and the appearance of corruption attendant on the operation of those fundraising apparatuses would follow.”<sup>6</sup>

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<sup>6</sup> McConnell v. FEC, at 100.