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Restrictions on Government Entities Lobbying the Federal Government

The Anti-Lobbying Act

The Anti-Lobbying Act¹ prohibits some forms of lobbying by federal employees. Enacted in 1919, this statute has been amended several times since.² The text of the statute is very broad, but the Department of Justice (DOJ) has narrowed its interpretation of the statute out of constitutional concerns.³

The key provision of the Anti-Lobbying Act (18 USC 1913) reads:

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy or appropriations which they deem necessary for the efficient conduct of the public business, or from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities. Violations of this section shall constitute violations of section 1352(a) of title 31.

The DOJ issued guidelines in 1989⁴ and 1995⁵ for a narrow application of the law (mirroring the legislative intent of the bill in 1919⁶). It expressly permits government entities to make direct communications to other federal officials, including Congress, in support of Administration or agency positions. The DOJ interpretation of the statute, however, prohibits federal employees

¹ 18 U.S.C. 1913

² 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, div. A, title II, 205(b), 116 Stat. 1758, 1778 (Nov. 2, 2002).

³ OLC, *Guidelines on 18 U.S.C. 1913*, at 2 (Apr. 14, 1995).

⁴ 13 Op. OLC 300 (1989).

⁵ OLC, *Guidelines on 18 U.S.C. 1913*, at 2 (Apr. 14, 1995).

⁶ 58 Cong. Rec. 403 (1919) (remarks of Representative Good).

from participating in “substantial grass roots” lobbying campaigns, consisting of private communications designed to encourage the public to contact Members of Congress and pressure them on legislative matters. What is considered a ‘substantial’ campaign has not been codified, but the DOJ guidelines make note that the 1919 legislative history cites an expenditure of \$7,500⁷, which would be worth roughly \$93,000 in 2008.⁸

Most or all federal agencies have a Congressional liaison who legally communicates directly with Congress on behalf of the agency. This is permitted under the DOJ guidelines of the Anti-Lobbying Act as it does not constitute grass roots lobbying. There has been some recent controversy at the time of this writing regarding the Federal Reserve’s plans to hire a former Enron lobbyist, Linda Robertson.⁹ However, she will be joining as a full-time employee, with the title ‘Assistant to the Board for Congressional Affairs’, and as a government employee, she has the authority to directly communicate with Congress on behalf of the agency, though this could easily be construed as lobbying.

The guidelines state further that the Act is only applicable to grass roots lobbying regarding legislation or appropriations.¹⁰ Furthermore, the law does not apply to the lobbying activities undertaken by the President, his aides and assistants within the Executive Office of the president, the Vice President, cabinet members within their areas of responsibility, and other Senate-confirmed officials appointed by the President within their areas of responsibility.¹¹ The Anti-Lobbying Act does not prohibit government agencies from contracting lobbyists as long as they do not engage in grass roots lobbying. Generally speaking, there are no direct prohibitions on federal agencies hiring contract lobbyists.

The Anti-Lobbying Act permits government employees to:¹²

- Directly communicate/ lobby Congress in support of their Administration or agency positions.
- Use public speeches, appearances and published writings to push Administration positions and even urge the public to contact Members of Congress in support of or opposition to legislation.
- Privately communicate with the public to inform or push Administration positions, as long as these communications do not constitute a ‘substantial grass roots’ campaign.
- Lobby without restrictions under the Act, to support Administration positions on nominations, treaties, or any non-legislative, non-appropriations issue.

⁷ OLC, *Guidelines on 18 U.S.C. 1913*, at 2 (Apr. 14, 1995).

⁸ Calculated using the Inflation Calculator on this website: <http://www.westegg.com/inflation/>

⁹ Schmidt, Robert “Fed Intends to Hire Lobbyist in Campaign to Buttress Its Image.” [Bloomberg.com](http://www.bloomberg.com). June, 5, 2009. <http://www.bloomberg.com/apps/news?pid=20601087&sid=aZjQKyLci1AM>

¹⁰ OLC, *Guidelines on 18 U.S.C. 1913*, at 2 (Apr. 14, 1995).

¹¹ *Id.*

¹² *Id.*

The Byrd Amendment

The Byrd Amendment¹³ prohibits the use of appropriated funds through a federal contract, grant, loan or cooperative agreement for lobbying any executive branch or legislative official with respect to extending, renewing, or granting further awards.¹⁴ One complication with the Byrd Amendment is that since appropriated funds are fungible, it is difficult to trace whether lobbying in these areas is being done with appropriated funds or private monies. The Office of Management and Budget has stated in a 1990 Memorandum that no tracing methods will be used and that it will be assumed that any contractor lobbying activities that are prohibited with appropriated funds are being paid through private monies as long as the contractor can prove it has sufficient private monies.¹⁵

The Byrd Amendment may be applicable to formerly private companies of which the government has become the largest shareholder. For example, as of June 25, 2009, General Motors has obtained 60 percent¹⁶ of its funds from government appropriations and some government officials, such as U.S. Rep. Jim Sensenbrenner (R-Wis.), are claiming that if GM continues its lobbying efforts, it may violate the law, in particular the Byrd Amendment.¹⁷ Further clarification on the applicability of the Byrd Amendment to this and other similar situations is awaiting a determination from the Attorney General as of this writing.

Appropriations legislation may sometimes contain riders that place restrictions on using funds derived from that specific appropriations bill for lobbying. For example, a section of the 1999 Treasury and General Government Appropriations Act (section 627) prohibits the use of appropriated funds “other than for normal and recognized executive-legislative relationships, for publicity or propaganda purposes, and for the preparation, distribution or use of any kit, pamphlet, booklet, publication, radio, television or film presentation designed to support or defeat legislation before the Congress, except in presentation to Congress itself.”

The DOJ has not prosecuted anyone for violation of 18 USC 1913 since the statute was enacted in 1919.

State and Local Governments

Lobbyists on behalf of state and local governments who lobby the federal government are subject to the registration requirements under the Lobbyist Disclosure Act. Individual states issue their own rules that often restrict using state funds for lobbying purposes. However, these laws usually only pertain to lobbying the state government with state funds. A full list of state lobbying and ethics rules is available at the following website: http://74.125.47.132/search?q=cache:XyShiE04Q58J:www.abc.org/files/Government_Affairs/StateAffairs/StateLobbyingandCampaignFinanceLaws.pdf+state+lobbying+laws&cd=2&hl=en&ct=clnk&gl=us&client=firefox-a Lobbyists on behalf of State, local or other governmental

¹³ 31 U.S.C. 1352

¹⁴ *Id.* (a)(1)-(2).

¹⁵ Government-wide Guidance for New Restrictions on Lobbying, 55 Fed. Reg. 24, 540, 24, 542 (OMB 1990).

¹⁶ Strumpf, Dan. “GM still to release financial info when ‘private.’” *WTOP.Com*. June 4, 2009.

<http://www.wtop.com/?nid=111&sid=1689386>

¹⁷ “Sensenbrenner urges probe into GM, Chrysler Climate Lobbying Efforts.” June 22, 2009.

<http://republicans.globalwarming.house.gov/Press/PRArticle.aspx?NewsID=2605>

agencies must also follow the interim regulations on lobbying federal agencies for Recovery Act funds,¹⁸ which include requiring federal agencies to document all contacts with lobbyists regarding specific appropriations of Recovery Act funds.

Gift Ban Exemption

Government agencies and public institutions are exempt from the Congressional gift restrictions and prohibitions.¹⁹

Non-Profit and Social Welfare Organizations

Non-profit organizations are prohibited from using money from federal awards for most lobbying efforts, though they may set up a separate account of non-public funds for lobbying purposes.²⁰ Though the Smith-Craig amendment of the Lobbying Disclosure Act provides a sweeping ban on federal grants to any 501(c)(4) that conducts lobbying (2 USC 1611), in practice these types of laws restricting lobbying activity have not been applied literally.²¹ Exemptions are made for the use of non-public funds expended on lobbying.

Prepared by Craig Holman and Jeremy Weissman, Public Citizen (2010)

¹⁸ *Sample Interim Guidance Memorandum for Executive Branch Departments and Agencies*, April 7, 2009.

¹⁹ Dilanian, Ken. "Loophole in gift ban allows for government-funded freebies." *USA Today*. March 14, 2007. http://www.usatoday.com/news/washington/2007-03-14-gift-ban-loophole_N.htm

²⁰ OMB Circular A-122

²¹ H. Rept. 104-339, Pt. 1 at 24