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Origins, Evolution and Structure of the Lobbying Disclosure Act

by Craig Holman

“The purpose of our lobbying laws is to tell the public who is being paid how much to lobby whom on what. That purpose is not being served under the status quo as we now see it.”

-- Sen. Carl Levin, criticizing the prior
Federal Regulation of Lobbying Act (1992)¹

The Lobbying Disclosure Act (LDA) of 1995 was passed after decades of effort to make the regulation and disclosure of lobbying the federal government more effective. Earlier lobbying regulation laws, most notably the Federal Regulation of Lobbying Act of 1946, became virtually obsolete soon after passage.

“Lobbying” is the process of petitioning government to influence public policy. The right to petition government is one of the most treasured rights in democratic forms of government. Specifically recognized in the Magna Carta of 1215, the right to petition American government was repeatedly affirmed in colonial American treatises, the Declaration of Independence and post-revolutionary federal and state constitutions, including the Bill of Rights.² In colonial times, written petitions to local governments were usually simple and brief and almost always answered.³ Following Independence, several policy proposals, such as establishing a national bank, abolishing slavery,

¹ Sen. Carl Levin, Hearing on S. 2279, Senate Subcommittee on Oversight of Government Management, Committee on Governmental Affairs, Washington, D.C. (Mar. 26, 1992).

² The first American colonial treatise that codified the right to petition was the Body of Liberties by the Massachusetts Bay Colony Assembly in 1641. It was repeated in several pre-revolutionary declarations, including the Stamp Act. In the Declaration of Independence, Thomas Jefferson wrote: “In every stage of these oppressions, we have petitioned for redress, in the most humble terms; our repeated petitions have been answered only by repeated injury.” Declaration of Independence, para. 30 (1776). Eight of the 12 states following Independence specifically adopted the right to petition in their state constitutions. The “right to petition Government for redress of grievances” concludes the First Amendment of the Bill of Rights. Stacie Fatka and Jason Miles Levien, “Protecting the Right to Petition: Why a Lobbying Contingency Fee Prohibition Violates the Constitution,” 35 *Harvard Journal on Legislation* (1998) at 563.

³ Raymond Bailey, POPULAR INFLUENCE UPON PUBLIC POLICY: PETITIONING IN 18TH CENTURY VIRGINIA (1979) at 29-31.

Craig Holman, Ph.D., Legislative Representative

215 Pennsylvania Ave SE • Washington, DC 20003 • (202) 454-5182 • Holman@aol.com

homestead rights, and the abolition of dueling, were presented to Congress via citizen petition.⁴

The days of citizens effectively petitioning government for redress of grievances have long come to a close. Federal and state governments deal with vast numbers of complex economic and political issues, affording limited time for direct constituency contact, and spawning a legion of professional lobbying firms and associations. These lobbying firms and associations leverage the right of petition with the power of economic resources or political networks to catch the attention of officeholders. For generations now, the traditional right of petition at the federal and state levels has become largely the domain of professional lobbyists.⁵

Professional lobbyists are generally more effective than non-lobbyists at petitioning government for a variety of reasons. Professional lobbyists tend to represent wealthy corporate interests or well-connected associations that wield resources critical to the election and staying power of officeholders. Many lobbyists have high levels of expertise and knowledge in the legislative process of the issues of concern to legislators. Members of Congress frequently rely on lobbyists even to draft legislation. Lobbyists are employed full-time to follow specific legislation and hound legislators round-the-clock, an opportunity not available to most citizens. And, increasingly, some professional lobbyists greatly benefit from the phenomenon known as the “revolving door,” in which former government officials cash in on their friendships, inside information and networks established earlier to exert disproportionate influence over the government’s policy agenda.

The rise of the professional lobbyist has meant an incredible – and potentially dangerous – concentration of power over government within a small, elite cadre of persons. This concentration of power, in turn, means it is ever-so essential for legislators and the public to know who is paying the lobbyists how much to lobby whom on what. Legislators need this information to properly evaluate the political pressures to which they are being subjected. The public needs this information to evaluate the integrity of their legislators.

A. Early Efforts at Federal Regulation of Lobbying

The first efforts to regulate lobbying activity at the federal level in the United States came in 1876, when the House of Representatives approved a resolution only for

⁴ Fatka and Levien, *op.cit.* at 565.

⁵ The term “lobbyist” owes its origin to President Ulysses S. Grant. During Grant’s first term as President, his wife disapproved of his drinking, so Grant would regularly slip out of the White House and visit the lounge at the nearby Willard Hotel in downtown Washington, D.C. Grant’s visits to the Willard Hotel soon became common knowledge. Those wishing to catch a minute or two with the President to petition their causes would collect in the hotel lobby to corner Grant as he went to and from the lounge. Frustrated by the ever-growing crowd of petitioners, Grant frequently complained of the “lobbyists” who would get in his way. Ron Smith, “Compelled Cost Disclosure of Grassroots Lobbying Expenses,” 6 *KANSAS JOURNAL OF LAW AND PUBLIC POLICY* (1997) at 115.

that congressional session requiring lobbyists to register with the House Clerk.⁶ Several states had gone a little further by the end of the 19th century and even criminalized lobbying.⁷ But none of these efforts were systematically enforced.

In the 1930s, Senator Hugo Black of Alabama led the fight against corrupt lobbying practices in Washington. Black advocated that lobbyists register their names, salaries, monthly expenses and the intent of their lobbying activities. His concern fell on deaf ears until the spring of 1935, when lobbyists for an association of public utility holding companies attempted to block passage of a bill that would have broken up holding companies into smaller market shares. Lobbyists coordinated their efforts by firebombing Capitol Hill with hundreds of telegrams demanding Senators vote down the measure. Black held a congressional hearing on the source of these telegrams and discovered that lobbyists impersonated constituents by dictating hundreds of unique telegrams to Western Union associates.

As a result of the investigation, the Public Utilities Holding Company Act was amended to require registration of all company agents. Black also introduced a measure to require the registration of all lobbyists generally, but the bill failed to become law. Still, Congress showed signs of concern by adding special provisions for lobbyist registration in some industry-specific legislation, such as the Merchant Marine Act of 1936.

But it was not until World War II that Congress established comprehensive and systematic regulation of lobbying. This came in the form of two very different federal statutes: the Foreign Agents Registration Act of 1938 and the Federal Regulation of Lobbying Act of 1946.

1. Foreign Agents Registration Act of 1938

The first attempt at comprehensive lobbying reform at the federal level was the Foreign Agents Registration Act (FARA) of 1938. FARA's primary purpose was to limit the influence of foreign agents and propaganda on American public policy. The foreign agents act arose specifically in response to a perceived propaganda drive by Adolph Hitler to fan the Nazi movement in the United States. Though there was no explicit evidence, President Franklin Roosevelt and many members of Congress believed that Hitler was helping finance the Nazi movement in the United States.

The enactment of the Foreign Agents Registration Act in the critical period preceding the outbreak of World War II was the result of recommendations by a special committee of Congress (known as the "McCormack committee") investigating "un-American activities" in the United States. The Act originally focused on the Nazi movement. In fact, the words "foreign propaganda" in the Act which was subject to

⁶ Fatka and Levien, *op.cit.* at 569.

⁷ *Id.*

regulation originally read “Nazi propaganda.”⁸ But it was later expanded to include concerns about pro-communist propaganda as well.

FARA sought to lessen the influence of foreign propagandists by requiring that an “agent of a foreign principal” register as such with the Secretary of State and that any literature or information disseminated by the foreign agent be labeled as such. “Foreign agent” covered by the Act was expanded to include any person acting as a lobbyist, public relations representative or attorney for a foreign principal or any domestic organization subsidized by a foreign principal. “Foreign principal” was defined as a foreign government, political party, corporation, entity or individual organized under the laws of, or having a principal place of business in, a foreign nation.

The Act was designed to counteract the influence of foreign propaganda, not by restricting the distribution of such information, but by identifying it as paid for and distributed by foreign agents. Communications by foreign agents intended to influence public policies were required to include a statement including the name and address of the foreign agent and the foreign interest promoting the political communications.

FARA was amended several times in the 1950s and 1960s. The most significant amendment came in 1966, when Congress changed the primary focus of FARA from an anti-propagandist tool into an instrument of regulation over grassroots lobbying as well as lobbying of Congress by foreign agents. The greatest threat perceived by Congress at that time was not so much from foreign subversives attempting to shape American foreign policies, but from foreign economic competitors attempting to influence American business and tax policies.⁹

FARA, including its anti-propagandistic elements, has repeatedly been upheld by the courts.¹⁰

2. Federal Regulation of Lobbying Act of 1946

Following immediately in the footsteps of World War II, Congress also approved the nation’s first comprehensive lobbying disclosure law for domestic lobbyists: the Federal Regulation of Lobbying Act of 1946. The primary objective of the 1946 Act was to establish a system of lobbyist registration and disclosure. Like FARA, the Act did not attempt to regulate the conduct of lobbying or the financial activity of lobbyists.

The Federal Regulation of Lobbying Act provided a system of registration and financial disclosure of those attempting to influence legislation in Congress.¹¹ The Act's

⁸ Michael Spak, “America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Bidder,” 78 *Kentucky Law Journal* (1990) at 242-243.

⁹ Mark Baker, “Updating the Foreign Agents Registration Act to Meet the Current Economic Threat to National Security,” 25 *Texas International Law Journal* (1990) at 24.

¹⁰ See, for example, *Meese v. Keane*, 481 U.S. 465 (1987).

¹¹ Section 308 of the Act provides:

goal was to provide public information on the political pressures influencing legislation, and it recognized that “full realization of the American ideal of government by elected representatives depends to no small extent on [members of Congress] ability to properly evaluate” the political pressures to which they are regularly subjected.¹² Without this public information, “the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.”¹³

The 1946 Act required anyone whose “principal purpose” was to influence the passage or defeat of legislation in Congress to register with the Clerk of the House and the Secretary of the Senate and file quarterly financial reports. The financial reports required the name and address of the lobbyist and all paying clients; how much the lobbyist was paid; all contributors to the lobbying effort and the amount of the contributions; an itemized accounting of expenditures by the lobbyist; the identity of any publications that the lobbyist caused articles or editorials to be printed; and the particular legislation the lobbyist was paid to influence. Violation of these reporting requirements could be punishable by a fine up to \$5,000 or one year imprisonment and a three-year prohibition on lobbying.

The Regulation Act was widely perceived as poorly drafted and ineffective. Just two years after Resident Harry Truman signed the Act into effect, he called for several revisions in the lobbying law to make it more effective. Some of the weaknesses of the Federal Regulation of Lobbying Act are that it did not cover congressional staff or the executive branch nor a great deal of grass-roots lobbying. Importantly, while the Act did require itemized reporting of expenditures, it failed to require disclosure of what the public needs to know most about lobbying: *how much was spent overall and for what policy objective*. Furthermore, the Act was very vague as to who actually had to register. It was not at all clear what constituted lobbying as a “principal purpose” which would trigger the reporting threshold.

Just as problematic was enforcement of the 1946 Act. The Clerk of the House and Secretary of the Senate felt at the time that their role was to serve as a depository of information, not to audit for errors and enforce compliance. The Department of Justice also decided that it would focus on encouraging voluntary compliance to the Act by bringing it to the attention of potential violators rather than prosecute for non-compliance.¹⁴

“(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included”

¹² United States v. Harriss, 347 U.S. 612 (1954) at 625.

¹³ Id.

¹⁴ S. Rep. No. 99-161 (1986) at 51-52.

The 1946 Act was further weakened when the U.S. Supreme Court narrowed its already limited scope. In *United States v. Harriss*,¹⁵ the court narrowed the application of the Act in order to avoid finding it unconstitutional due to poor drafting. Without ruling on the merits of regulating lobbying, the court determined that the Act only applied to “paid lobbyists” who “directly communicate” with Members of Congress on “pending legislation.” Thus, the court interpreted the Act to cover only efforts to influence the passage or defeat of a specific bill, but not other congressional activities, and for only those paid efforts in which lobbyists directly contacted members of Congress, not their congressional staff. Persons who spend less than half of their time contacting members of Congress on legislation were exempt from the reporting requirements.

A 1991 study by the U.S. General Accounting Office (GAO) uncovered just how porous was the 1946 Act.¹⁶ The study found that about 10,000 of the 13,500 individuals and organizations listed as key influence peddlers on Capitol Hill in a book entitled, *Directory of Washington Representatives*, were not registered as lobbyists. The GAO study also concluded that lobbyist disclosure reports were woefully incomplete. The GAO found that: 60% of registered lobbyists reported no financial activity; 90% reported no expenditures for salaries, wages, fees or commissions; 95% reported no public relations or advertising expenditures; and that only 32% of filers reported a specific title or bill number of legislation lobbied.

3. The Byrd Amendment and Miscellaneous Disclosure Laws

In 1989, Sen. Robert Byrd (D-W.Va.) offered an amendment to an Interior appropriations bill prohibiting the use of government funds by any private entity to influence the award of a federal contract, grant or loan.¹⁷ Private recipients of government appropriations can use non-government funds to influence the award of contracts, grants or loans, but the private entity is required to disclose this lobbying activity. Federal regulations implementing the Byrd Amendment require the disclosure of each contact made by the private entity with a federal official through “outside lobbyists” to influence an award decision. In-house lobbyists and the client’s employees are exempt from the Byrd Amendment.

¹⁵ *United States v. Harriss*, 347 U.S. 612 (1954). In subsequent rulings, the U.S. Supreme Court more clearly determined that lobbying is an important means of petitioning government and thus is given some constitutional protection. See, for example, *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) [defending the right of a group of railroads to wage a grassroots lobbying campaign].

¹⁶ General Accounting Office, “Federal Lobbying: Federal Regulation of Lobbying Act of 1946 is Ineffective,” (July 1991). In the study, GAO interviewed a sample of those identified in *Washington Representatives* and found that 75% had contacted both members of Congress and their staffs, dealt with federal legislation, and sought to influence Congress or the Executive Branch.

¹⁷ 31 U.S.C. 1352.

At the time the contract, grant or loan is requested or received, the disclosure reports must be filed with the awarding agency. The awarding agency compiles these reports and submits them to the Clerk of the House and Secretary of the Senate twice each year. Monitoring compliance is the responsibility of the awarding agency and enforcement against violations is the responsibility of the Department of Justice under the Program Fraud Civil Remedies Act.

Similarly, federal employees are also prohibited on lobbying with appropriated moneys.¹⁸ The restriction has been interpreted by the Justice Department to prohibit “grass roots lobbying” -- campaigns in which members of the public are encouraged to contact their Senators or Representatives. Slightly less restrictive rules apply to cabinet members and other Senate-confirmed officials acting within their areas of responsibility. The Justice Department guidance permits Federal employees to do the following:

- communicate with Members and their staffs in support of Administration or Departmental positions;
- communicate with the public through public speeches and published writings;
- communicate privately with individual members of the public, so long as those communications are not part of a grass roots lobbying campaign; and
- lobby Congress or the public on non-legislative or appropriation matters like nominations and treaties.

Over the years, specific agencies adopted various agency-specific requirements on lobbying. Section 112 of the Housing and Urban Development Reform Act, for example, imposed disclosure requirements on persons who make expenditures to influence decisions made by HUD employees, including decisions that affect the status of HUD assistance.¹⁹ Similar reporting requirements were established for those lobbying the Farmers Home Administration and other agencies.

B. Lobbying Disclosure Act of 1995

After decades of failed attempts to close the many loophole of the 1946 Act, Congress finally stepped up to the plate at the end of 1995 and approved the fairly sweeping Lobbying Disclosure Act (LDA) of 1995. LDA represents a comprehensive reform when compared to the earlier regulatory efforts,²⁰ though it certainly was seen as falling short of a complete success by its biggest sponsors.²¹

¹⁸ 18 U.S.C. 1913.

¹⁹ 42 U.S.C. 3537b.

²⁰ One of the lead sponsors of the Lobbying Disclosure Act of 1995, Sen. Carl Levin (D-Mich.), testified before the House Committee on the Judiciary that “decade after decade, Congress has tried to close the loopholes in the lobbying registration laws, and decade after decade, those efforts have failed. This Congress has a chance to be different.” Hearing before the House Committee on the Judiciary, Overhauling the Lobbying Disclosure Law, Testimony of Sen. Carl Levin (September 7, 1995).

²¹ Rep. Christopher Shays (R-Conn.), a major proponent of the Lobbying Disclosure Act of 1995, commented during congressional hearings: “It is possible to write a better bill ... I’m not sure we would

The Lobbying Disclosure Act received unanimous approval in the Senate and was signed into law by President Bill Clinton on December 19, 1995. The new Act took effect on January 1, 1996.²²

LDA marked the first comprehensive reform of federal lobbying laws in 50 years. Congress had been very reluctant to modify the 1946 lobbying law, despite the fact it was widely recognized as a failure in achieving the objectives of registering and disclosing to the public the swelling ranks and financial activity of federal lobbyists.

Several forces came into play in the mid-1990s to compel congressional action. First and foremost, Congress had been enwrapped in a sensational case of corruption touching several members of Congress, known as the Wedtech scandal. In 1987, the Senate Subcommittee on Oversight of Government Management investigated “improper activities in the award of federal contracts to the Wedtech Corporation.”²³ The Subcommittee noted that Wedtech had hired numerous lobbyists, including some former members of Congress, to help land lucrative government contracts. All the lobbying activity went unreported, and even involved bribing government officials. The investigation highlighted inadequacies of federal lobbying laws, prompting the Subcommittee to convene hearings specifically on the lobbying registration and reporting in 1991.

This hearing was the genesis of the Lobbying Disclosure Act, with Sen. Carl Levin (D-Mich.) introducing the first version of the Act in 1992. The bill was revised and reintroduced several times in subsequent congressional sessions. It gained substantial momentum when other scandals in Congress erupted, centering on a few Democratic leaders of the House. Republicans campaigned on the theme of cleaning up Congress and made lobbying disclosure one priority. The Lobbying Disclosure Act was finally codified in 1995 with substantial bipartisan support.

The Lobbying Disclosure Act of 1995 replaced much of the earlier patchwork of lobbying disclosure laws with a single, uniform statute covering the activities of all professional lobbyists. It incorporated FARA, the Byrd Amendment and the Federal Regulation of Lobbying under one law and provided substantial improvements in their definitions, coverage, reporting requirements and enforcement.

1. Improvements in Lobbying Disclosure

The first significant improvement in federal lobbying laws offered by LDA was clarifying key concepts subject to regulation. These definitions include:

pass it....” Hearing before the Subcommittee on the Constitution, House Committee on the Judiciary, Lobbying Reform Proposals (September 7, 1995).

²² 2 U.S.C. 1601.

²³ Senate Committee on Governmental Affairs, Lobbying Disclosure Act of 1993, S. Rep. No. 37 (1993).

“Lobbyist” means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six month period.

“Lobbying activities” means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

“Covered executive branch official” means

- (A) the President;
- (B) the Vice President;
- (C) any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
- (D) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;
- (E) any member of the uniformed services whose pay grade is at or above O-7 under section 201 of title 37; and
- (F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy advocating character.”

The broad definition of lobbying requires that any preparation and supervisory activity for a lobbying contact be counted toward lobbying as well as the contact itself. The more refined definition of lobbyist also remedies the “principal purpose” loophole of the 1946 law, without becoming over-bearing, by requiring that individuals who spend 20% or more of their time on lobbying activity be subject to the reporting requirements.

The new definition of lobbyist recognizes two kinds of lobbyists: in-house lobbyists who promote the interests of the employing organization or business, and “outside” lobbyists who contract with clients outside the organization of business. Both types are required to register and report their financial activities. Organizations or businesses with in-house lobbyists must register report the activities of its employee lobbyists. Outside lobbyists must register and report their activities on behalf of paying clients.

Very importantly, the Lobbying Disclosure Act also expands the set of “covered officials” to include not just members of Congress but also congressional staff and elected officials and senior staff of the executive branch. Executive grade levels I through V include senior members of the executive branch in a decisionmaking capacity. Covered congressional staff includes all congressional employees.

a. Triggering Threshold for Lobbying Registration

Any individual or organization whose combined expenses for lobbying activities does not reach a *de minimis* amount in a six-month period need not register under the LDA.²⁴ For in-house lobbyists, the triggering threshold is \$22,500 in aggregate lobbying activity by the organization. A lobbying firm, including a self-employed lobbyist, does not need to register lobbying on behalf of any particular client who provides less than \$5,500 in income to the firm or lobbyist.

Upon exceeding the *de minimis* threshold, any employee of an organization who serves as a lobbyist, or who works for a lobbying firm or is self-employed and is retained by a client for lobbying activity, must register and report lobbying income and expenses if:

- (i) the person makes more than one lobbying contact in a six-year period; and
- (ii) spends at least 20% on lobbying activity, including the research, preparing and supervision of lobbying contacts.

b. Lobbyist Registration and Reporting Requirements

Under LDA, a lobbyist must register on identical forms filed with the Secretary of the Senate and the Clerk of the House within 45 days of meeting the registration threshold or 45 days of being employed by an organization as a lobbyist. Registration information generally includes the names of the lobbyist, employer and/or client, and any organizations that contribute \$10,000 or more for the lobbying activities within a six-month period and play a substantial role in directing the lobbying activities; any foreign entity with a 20% or greater stake in the lobbying activity; and a list of issues to be lobbied.

An organization that meets the lobbying threshold file as registrants and report all employees who lobbied on the organization's behalf. Self-employed lobbyists and lobbyists of lobbying firms file their own registration reports.

In addition to the registration of lobbyists, organizations and lobbyists are required to file bi-annual financial activity reports, covering January 1–June 30 and July 1–December 31 of each year. These financial activity reports identify the lobbyist, clients and employers; issues or bill numbers that were lobbied; and a “good faith” estimate of aggregate lobbying expenses rounded to the nearest \$20,000. *Reported expenditures are not broken down by particular issue or bill, by lobbying activity or even by lobbyist, if more than one lobbyist is reported on the disclosure form.* However, the amount charged each client above *de minimis* must be disclosed by outside lobbyists and lobbying firms.

Lobbyists are required to identify their clients to any covered official upon request during an oral contact. Furthermore, lobbyists must identify on their own any foreign

²⁴ 2 U.S.C. 1603. The triggering threshold for lobbying registration is adjusted for inflation every four years.

interests for whom they are lobbying in any written contacts, when that foreign interest owns 20% or more stake of the client or organization.

Additional reporting requirements apply to lobbyists representing foreign interests. Under the Lobbying Disclosure Act of 1995, lobbyists representing foreign governments or foreign political parties must continue registering under the Foreign Agents Registration Act and need not register under LDA. Lobbyists representing private foreign interests must register under LDA and need not register under FARA.

Lobbyists registering under FARA report to the Attorney general's office, listing detailed business and financial information and must label all lobbying materials as representing the interests of the foreign government or party. The financial disclosure requirements are considerably more extensive under FARA than under LDA. The amounts of funds spent on specific lobbying issues and bills must be itemized, and the amounts and sources of funds and the lobbying objectives clearly identified. All lobbying communications to covered officials and the public under FARA must be labeled as representing the foreign government or party.

c. Disclosure of Lobbyist Reports

Registration and lobbyist financial activity reports are available to the public on request in paper format from the Clerk of the House at the Legislative Resource Center and the Secretary of Senate's Office of Public Records. While filing forms are available on the Internet from both the House Clerk and the Secretary of Senate's Web pages, only the Senate office has made any effort to provide *Internet disclosure* of lobbyist registration and financial activity reports.

Section 6 of the Lobbying Disclosure Act calls upon the House Clerk and Senate Secretary to develop and implement a system of electronic reporting of lobbyist records. A system of electronic reporting encompasses a dualistic system of *electronic filing* for filers, and *electronic disclosure* of these records to the public. LDA calls for both.

Section 6 of LDA reads, in part, that the Secretary of the Senate and the Clerk of the House shall: "develop filing, coding, and cross-indexing systems to carry out the purposes of this Act, including –

- (A) a publicly available list of all registered lobbyists, lobbying firms, and their clients; and
- (B) computerized systems designed to minimize the burden of filing and maximize public access to materials filed under this Act..."²⁵

During congressional hearings on LDA when the law was being considered, Congress understood the significance of the public disclosure requirements of Section 6. Congress was debating the issue of which governmental agency should be responsible for

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2 U.S.C. 1605(3).

carrying out the disclosure requirements, including the mandate for a modern computerized disclosure system.

Neither the Office of Governmental Ethics nor the Justice Department wanted the task of serving as the lobbyist filing and disclosure agency for LDA. As Stephen Potts, Director of the Office of Governmental Ethics testified in 1993: “We do not currently have the experience or equipment contemplated in the legislation for computer services necessary to handle this volume of lobbyists’ reports, nor to service the volume of requests for information likely to result because of the high visibility of the issue of lobbyists’ registrations.”²⁶

The Federal Election Commission, however, was willing to carry out the mandate of public disclosure of lobbyist financial reports.

Scott Tomas, Chair of the Federal Election Commission (FEC), testified that the elections agency was quite prepared to take over the filing and disclosure responsibilities of the Act. Thomas observed that: “All these functional activities (disclosure requirements) are requirements for regulating campaign finance, and we already have developed the type of staff expertise, procedures, physical plant, and information technology necessary to meet these core elements of the bill.... This parallel is recognized in the bill in section 6 which requires the proposed Department of Justice Office of Lobbying Registration and Public Disclosure to set up computer systems ‘compatible with computer systems developed and maintained by the Federal Election Commission ... [so] that information filed in the two systems can be readily cross-referenced.’ It strikes us easier for all parties concerned if all interested parties can deal with one agency with familiar faces and consistent rules and procedures.”²⁷

In the end, the filing and disclosure responsibilities were given to the House Clerk and the Senate Secretary. Since that time, the FEC has developed a stellar electronic reporting system of campaign finance reports that is searchable, sortable and downloadable, which minimizes the burden on filers and maximizes public access to the records. The Clerk of the House has made almost no effort to computerize its lobbying disclosure records then or now, while the Secretary of the Senate on its own initiative has at least made a modest effort to upload non-searchable photocopies of paper reports in .pdf format onto its Web page.

²⁶ House Subcommittee on Administrative Law and Government Relations, Committee on the Judiciary, Hearing on the Lobbying Disclosure Act of 1993, Testimony of Stephen Potts, Office of Governmental Ethics (March 26, 1993).

²⁷ House Subcommittee on Administrative Law and Government Relations, Committee on the Judiciary, Hearing on the Lobbying Disclosure Act of 1993, Testimony of Scott Thomas, Federal Election Commission (March 26, 1993).

Though it need be added that FEC willingness to assume the responsibility of public recordkeeping of the lobbyist reports came with some reluctance, if no additional funding from Congress were to follow. As Thomas continued to testify: “We wish to emphasize that the Commission is not anxious to take on this new responsibility if the additional funding and staffing necessary to do the job correctly would not be provided... That said, we offer this comment in the hope it will enable your Subcommittee to consider an option that might produce a more economical and efficient result.” Id.

The Secretary of the Senate has also established an electronic filing system, but only about 10% of all filers avail themselves of the filing software program. As a result, the Senate Office of Public Records (SOPR) receives a voluminous amount of paper each filing period that stacks about 36 feet high. Staffers upload .pdf pictures of the reports onto the Senate's Web page; two staffers manually enter some of the data into an internal recordkeeping program not available to the public at a rate of about six inches a day.²⁸ This tedious task is particularly ironic given that most organizations and lobbyists prepare their disclosure reports via electronic software, print out the reports in paper format, and then submit their filings to the House Clerk and the Senate Secretary in paper – and the Senate Secretary then reverts the paper reports back into an electronic format.

Lobbying disclosure forms are available at the Web site of the Senate Office of Public Records (SOPR) [www.sopr.senate.gov]. SOPR's Web site acts more like an electronic card catalog that allows users to retrieve individual forms based on queries. The site furnishes users with computerized images of disclosure forms in .pdf format. These files are essentially computerized photographs of the disclosure forms. Though the names of lobbyists, registrants and clients are searchable – if the user types in the name exactly as spelled, hyphenated or misspelled in the paper filings – the data contained in the reports is not searchable or sortable or subject to calculations. For example, a user cannot search the on-line lobbying disclosure database for who lobbied, when, or how much was spent lobbying, on any specific bill or issue area. Furthermore, the lobbyist disclosure reports are made available to the public usually long after any particular lobbying drive has ended.

Nevertheless, the Secretary of the Senate's Office of Public Records has provided the public this information on lobbyists by its own initiative, without specific appropriations from Congress. The total estimated cost of creating the on-line database system is about \$125,000, with on-going maintenance being absorbed by the office's regular budget. The cost of the program is financed by user fees, charging the public 20 cents per page for reproduction of paper filings, which is put back into the office's budget to support the electronic disclosure system.²⁹

Judging from a survey of state lobbying disclosure programs, the Secretary of the Senate's expenditure for its electronic disclosure system is fairly representative of what it costs to establish such a system. About 10 jurisdictions in North America have electronic reporting programs for lobbying activity, most of which involve fewer filers and less money than at the United States federal level. Nonetheless, the cost of building effective electronic reporting systems in these jurisdictions is indicative of what any jurisdiction can expect to pay for such an electronic reporting system.

²⁸ Personal interview with Pamela Gavin, Superintendent of Records, Secretary of the Senate (Dec. 2003).

²⁹ Telephone interview with Pamela Gavin, Superintendent of Public Records, Office of the Secretary of the Senate (March 28, 2005).

Across North America, six states, the federal government of Canada, the U.S. Senate, and the Canadian province of Ontario, have established functional electronic reporting systems for lobbying activities as of 2001.³⁰ The U.S. states are: California, Connecticut, Indiana, Iowa, Louisiana, Oklahoma, and Pennsylvania. Of all these jurisdictions, the state of Washington clearly has the superior electronic filing and disclosure system for lobbying activities. Washington's lobbyist disclosure site is available at: <http://www.pdc.wa.gov/lobbyistinfo/>

Though the State of Washington's lobbying disclosure system still lacks an on-line database searchable and sortable by issues or bill numbers, it provides very convenient access to itemized and aggregate financial reports of all state lobbyists and lobbying firms. The cost of creating such on-line disclosure system ran about \$200,000. This cost is similar to, or higher than, the start-up costs reported by other states and the Canadian government, with the annual cost of continuing maintenance and upgrades averaging about 10%-to-20% of the initial investment – \$20,000-to-\$40,000 per year – depending on the jurisdiction and the scope of the programs.³¹

2. Weaknesses and Reforms of the Lobbying Disclosure Act of 1995

The Lobbying Disclosure Act of 1995 has provided a fairly successful and comprehensive system of registration of lobbyists and disclosure of lobbying activities. It was the product of a bipartisan effort and embodies the cumulative impact of calls for reforms from academics and legislators alike.

LDA, however, does have some inherent weaknesses that could be remedied by subsequent legislation. One such weakness is that the Act is limited to regulating the *disclosure* of lobbying activities rather than regulating the *conduct* of lobbying. Many lobbying practices today raise serious concerns of undue influence, such as family members of legislators serving as lobbyists, the “revolving door” of former public officials becoming lobbyists for special interests, and gifts and campaign contributions given by lobbyists to federal officeholders. A wide series of legislative reforms are needed for regulating the conduct of lobbying.

LDA has some shortcomings as a disclosure law as well. Though the Act requires the Secretary of the Senate and the Clerk of the House to develop “computerized systems designed to minimize the burden of filing and maximize public access to materials filed

³⁰ Survey of North American electronic reporting systems for lobbying activity by Robin Hittie, Deputy Chief Counsel, Pennsylvania State Ethics Commission, on behalf of the Council on Governmental Ethics Laws (COGEL) (2001).

³¹ Reported start-up costs in 2001 for electronic reporting systems of lobbying activities are as follows: California, inexplicably the most expensive with little to offer -- \$1.4 million; Connecticut, an excellent system -- \$200,000 for both its lobbying and campaign finance reporting system; Indiana -- \$0, the state contracted proprietary rights to a private company; Iowa -- costs absorbed by the state's IT divisions; Louisiana -- \$211,000 for both lobbyist and campaign finance disclosure systems; Oklahoma -- \$70,000, but the system is viewed as inadequate; Pennsylvania -- \$110,000 with an additional \$60,000 upgrade; Canada -- \$40,000, using an outdated computer system; Ontario -- \$120,000 with plans for major upgrades (estimated at \$240,000) in the future. Id.

under this chapter,” lobbyist financial reports are filed in paper format and public accessibility of these reports is far from adequate. The financial disclosure system of lobbying activity can be easily, and vastly, improved. These improvements include:

- **Establishing a Fully Searchable, Downloadable Web-based Lobbying Disclosure Database – Including Searches by Bill Number and Specific Issues Lobbied On.**

Currently, the computerized databases maintained by the Clerk of the House and Secretary of the Senate are not fully searchable. First, the databases are incomplete because they do not include information in the paper (or increasingly electronic) filing of disclosure reports regarding the specific bills and issues a person lobbied on. Therefore, it is impossible to conduct a computer search of reports to discover who spent and received funds to lobby on specific bills and issues. As a result, the only way to discover, for example, all the firms that lobbied on the Patients Bill of Rights in 1997-2000, is to read every single report in the entire system!

Second, the current system responds to computer queries by producing information from specific disclosure reports rather than totaling the information about a specific lobbyist, company or an entire industry. Thus, users must engage in time-consuming calculations, adding data from each individual report, just to answer a question like, “How much money has Microsoft spent on lobbying since 1996 and how has this money been divided between the firm and its outside lobbyists?”

- **Requiring Electronic Filing of Lobbying Reports**

The usefulness of the lobbying reports is severely limited by their general lack of timeliness. The semiannual reports are often filed after all lobbying on a bill has been completed, limiting the value of information about how much is being spent to affect key legislative battles. Furthermore, it usually takes a few months for the congressional offices to manually enter the information into their computerized systems. Mandatory electronic filing would expedite the latter process by eliminating the lag in data entry -- allowing almost instantaneous public access to lobbying information.

- **Strengthening the Accuracy and Timeliness of Disclosure by Modifying the LDA to Allow an Enforcement Role for an Independent and Central Lobbying and Ethics Office.**

There is a need to improve enforcement of legal requirements in order to enhance accurate and timely disclosure. Considerable evidence suggests that LDA registration and reporting forms often are not adequately completed (e.g. specific issues and bills lobbied on are frequently omitted despite clear guidance from the congressional disclosure offices.) Public Citizen asked the Center for Responsive Politics (CRP) to examine such problems in their large database of disclosure reports. CRP found that 45% of firms filing mid-year 2000 reports did not list bill numbers, and 14% of these gave only vague descriptions of specific lobbying issues. In addition, 85% of firms filing end of year 1999 and mid-year 2000 reports failed to check boxes indicating which of two main definitions

of lobbying they were using. These definitions determine what kinds of spending you must include in your report and even whether you meet the threshold for disclosure.

- **Expanding the LDA to Include Paid Grass-Roots Lobbying Activities Directed at the General Public (rather than at an organization’s members, employees, officers or shareholders), While Protecting the Privacy of Unpaid Citizen Lobbyists.**

Beyond traditional “direct lobbying” of officials by paid professional lobbyists, a major and growing amount of money is consumed by “grass roots lobbying” where the general public is encouraged to influence specific policymakers. However, the latter is not currently covered by the LDA.

The LDA should be amended to include separate disclosure of significant grass-roots lobbying activities along the same lines as that currently required for traditional direct lobbying. Reports should require information from paid lobbyists or their employers about their identity, clients, expenditures, and policy foci.

- **Require Lobbyists and Officeholders to Report the Frequency, Duration and Subject of Each Lobbying Contact and Record the Names of the Authors of Legislative Provisions.**

Though most officeholders and lobbyists keep records of each lobbying contact, these records are not required to be disclosed publicly. Very rarely do officeholders and lobbyists reveal their frequency and nature of their one-on-one contacts, other than through infrequent press accounts. Yet, this is precisely when and where most of the special interest deals are negotiated.

Reporting one-on-one lobbying contacts is not an overly burdensome requirement on officeholders and lobbyists. As part of his campaign platform, for example, John Kerry has proposed that all officeholders and lobbyists make such reports and released the names and dates of all lobbying contacts he has held while in the Senate since 1989 to demonstrate its feasibility.

- **Make the Constituent Members of Lobby Associations More Visible.**

Frequently, corporations, unions and special interest groups will form associations to lobby on their behalf. These associations can spend millions on direct lobbying as well as grass-roots lobbying without clearly identifying the major interests financing the lobbying activities. Press accounts and, sometimes, voluntary disclosure by the association itself have helped uncover the identity of an association’s constituent members. But these records currently need not be reported under the Lobbying Disclosure Act.

- **For Executive Branch Lobbying Activity, Expand the Definition of “Lobbying” Subject to Regulation to Include Seeking Government Contracts and Presidential Pardons.**

Lobbying for government contracts rather than legislation—also known as “procurement lobbying”—is a well known practice in many states. Unfortunately, it is also a practice riddled with corruption. Connecticut’s embattled Governor Rowland, for example, currently faces impeachment for allegations involving improper use of public office, including allegedly handing out hundreds of thousands of dollars worth of no-bid state contracts to friends, campaign contributors and professional colleagues. In 2003, governors from Georgia and New York issued executive orders requiring procurement lobbyists—also known as vendor lobbyists—to file special activity reports with an appropriate state agency.³² Amidst recurring scandals and a suspicious public eye, procurement lobbying remains a controversial topic in the news today,³³ and is likely to be a hot issue in future efforts to reform state lobbying statutes.

- **Classifying Governmental Lobbyists as “Public Lobbyists” for Disclosure Reports.**

Arizona is one state that differentiates between lobbyists who lobby for the public body and those that lobby for private entities, requiring these groups to file separately. Most states group these categories under a single lobbying statute or ignore public lobbying altogether.

Because public lobbying is paid for by taxpayer money, it should be monitored separate from lobbyists in the private sector. Such a law fosters useful oversight of government spending, and may lead to tougher regulations of how public officials spend taxpayer money on lobbying fees.

- **Miscellaneous Reporting Requirements: (i) Lobbyists should be required to register with a central lobbying and ethics agency prior to lobbying activity; (ii) Federal lobbyists should file quarterly activity reports; and (iii) Central oversight agency should publish annual reports of total number of registered lobbyists and aggregate lobbying expenditures in each issue area.**

Currently, federal lobbyists are not required to register until 45 days after beginning their lobbying activities. Lobbyists in 20 states are required to register before

³² For example, in June 2003, Governor Pataki of New York signed an executive order to all state agencies and government authorities, ordering that they must track all procurement lobbying efforts for state contracts exceeding \$15,000. For more information, see <http://www.bcny.org/whatsnew/2003/0617prcr.htm>, accessed May 25, 2004. In October 2003, Georgia’s governor issued an executive order mandating that all procurement lobbyists register as vendor lobbyists with the State Ethics Commission in addition to registering as a ‘regular’ lobbyist. For more information, see <http://www.wrf.com/publications/publication.asp?id=1523311132003>, accessed May 25, 2004.

³³ For an example, see this article in Newsday about contract lobbying, at <http://www.newsday.com/news/local/wire/ny-bc-ny--emergencyradio0519may19.0.3128744.story?coll=ny-ap-regional-wire>, accessed May 25, 2004; another article appears in a Utica, NY online magazine, at <http://www.uticaod.com/archive/2004/05/12/news/32121.html>, accessed May 25, 2004.

performing any activities constituting lobbying; in another 17 states lobbyists must register within one to 5 days of lobbying. Furthermore, a federal lobbyist files spending reports only twice a year. Lobbyists in 12 states file monthly spending reports. Federal lobbyists should at least be required to file quarterly activity reports.

The public is largely at a loss in determining how many lobbyists have swarmed on Capitol Hill in any particular year and how much these lobbyists are spending. One provision of LDA already requires the Clerk of the House and Secretary of the Senate to “compile and summarize, with respect to each semiannual period, the information contained in registrations and reports filed with respect to such period in a clear and complete manner ...”³⁴ Despite this mandate, neither congressional office provides the public with summary data on lobbyists and lobbying activity.

May 11, 2006

³⁴

2 U.S.C. 1605.