

Lobbying Law in the Spotlight:
Challenges and Proposed Improvements

Report of the Task Force on Federal Lobbying Laws
Section of Administrative Law and Regulatory Practice
American Bar Association

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The views expressed in this report are presented only on behalf of the Task Force on Federal Lobbying Laws. They have not been approved by the Council of the Section of Administrative Law and Regulatory Practice, nor by the House of Delegates or the Board of Governors of the American Bar Association. Accordingly, they should not be construed as representing the policy of the Section or the Association.

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ⁱ The views contained in this report are those of the members of the Task Force in their individual capacities and do not necessarily reflect the views of their organizations, firms, or clients.

ⁱⁱ The views contained in this report do not represent the views of the District of Columbia Bar, any Bar committee, any section of the Bar, or any section committee.

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January 3, 2011

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Dear Jon,

We are pleased to present the attached report of the Task Force on Federal Lobbying Laws, entitled "Lobbying Law in the Spotlight: Challenges and Proposed Improvements." We believe it should make a useful contribution to the public debate about ways in which the federal government can improve its system of lobbying regulation, so that transparency in lobbying can be enhanced and conflicts of interest ameliorated (while fully honoring the First Amendment right of petition).

Beginning in October 2009, the Task Force held eleven meetings. Option and position papers were drafted and circulated, straw votes on central issues were conducted, and discussions were reopened where substantial disagreements persisted. The Task Force's procedure was that no proposal went forward without broad support (at least two-thirds), and the recommendations reflected in this report are the result of those deliberations and that consensus. The breadth and depth of the Task Force's recommendations testify to the expertise and experience of its members.

We appreciate Ron Levin's invaluable service as Reporter for the Task Force. As Reporter he took charge of producing all the many drafts of the report as well as of the final product, for which he deserves very special acknowledgment. We also thank Bill Luneburg, who improved the entire report with background material, documentation, and a technical edit throughout the text. Section Director Anne Kiefer provided her usual high level of support assistance. Finally, his co-chairs thank Trevor Potter for his leadership and coordination of the entire endeavor.

We will look forward to the Council's consideration of our proposals in the near future.

Respectfully submitted,

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PREFACE

by Charles Fried*

One of the first gestures of the incoming Obama administration was to issue an executive order and memoranda with the intention of dramatically and drastically lowering the prestige, access, and influence of lobbyists. This initiative was one element of a broader wave of anti-lobbying enactments and proposals that have emerged in recent years at both the federal and state levels. Whatever the substantive merits and efficacy of these measures, they have grown out of a conviction – widely shared in the media, by political figures in both major parties, and by the public – that “special interests” have come to dominate and distort the processes of government. The result, it is thought, is that few important issues are decided rationally and deliberately on their merits, and the people's work does not get done. And the agents and conduits of this nefarious influence are said to be the lobbyists. What is frequently overlooked by this sort of criticism, and by the accompanying urge to somehow make lobbyists disappear from the political scene, is an inescapable reality. Lobbying, and therefore lobbyists, are indispensable to the functioning of government, and they embody a constitutional right of the highest order, enshrined in the First Amendment: “the right of the people . . . to petition the Government for a redress of grievances.”

The government — whether it be the executive or the legislative branch — simply cannot know the intricate details of the myriad aspects of national life that its actions might affect unless it has access to the expert contributions of the persons and interests involved. One cannot readily imagine legislators and administrators diligent and expert enough to learn on their own all they need to know to make the laws and draft the rules and apply them in a way that accomplishes whatever good they seek. And even if one could, those affected by government have the constitutional right to make their contribution to the process, to make their views known, and to head off intended and unintended effects. The First Amendment says they may do this in the press and in public gatherings, and the petitioning clause says that the people may do this not only by spreading their views broadcast but also by seeking to address their governors directly.

To be sure, the Constitution only gives the people a right to write and seek to call on those who govern them; whether officers and legislators must listen, answer their mail, return their phone calls is another matter. The anti-lobbying measures of our day do not usually gainsay the right of lobbyists to ring the officials' bell; but some of them come quite close to decreeing that no one in the executive branch may come to the door. And this comes perilously close to infringing the very right the First Amendment establishes. Quite apart from that, some of these initiatives express a disdain for a whole class of persons, many of whom perform a useful and important function.

* Beneficial Professor of Law, Harvard Law School, and Co-Chair of the Task Force. This preface is a statement of Professor Fried's individual views, but the Task Force regards it as an apt introduction to the report.

Notwithstanding some excesses, however, the critics of lobbying have raised issues that require serious attention. After all, many of these lobbyists are lawyers. Just as courtroom and law office lawyers advocate for and counsel their clients in the law that is, so do other lawyers serve as public policy advocates and counselors in the law that will or may be. As it is frequently put, ours is an honorable profession.

The proposals the Task Force offers are intended to restore the honor and enhance the efficacy of those in our profession who advocate for clients in the forum of public policy. Its proposals have two main themes. One is quite familiar: that public policy advocates should work in the open, just as their colleagues who advocate before courts work in the open, on the record. In aid of this goal, the Task Force proposes a number of improvements to the existing regime of disclosure, in ways that will make that regime more efficacious-not in silencing lobbyists, but in letting the public know who is talking to their government and about what.

The second theme is less familiar but no less important: to separate the function of urging elected officers of government to take action from the function of raising funds for and transmitting money to those officers. Nothing so contributes to the perception of lobbyists as agents of corruption, rather than as public policy advocates, as the confounding of these two functions. Conversely, nothing will go further to restoring the honor of this branch of our profession than a determined effort to separate, so far as constitutionally and practically possible, the roles of advocate and fundraiser. The Supreme Court has made abundantly clear that the contributing of funds to, and therefore the raising of funds for, elected officials is a constitutionally protected right. The Task Force does not propose to suppress that right. Rather, it proposes that, so far as practicable, those who advocate to elected officials do not raise funds for them, and those who raise funds for them do not advocate to them. If this guideline and related proposals of the Task Force are put into place, the status and value, perhaps even the efficacy, of public policy advocacy in our nation will be greatly enhanced.

Executive Summary

Lobbying plays an essential and consequential role in governmental decisionmaking, but its influence on legislative and executive actions also gives rise to apprehensions and controversy in society at large. The landmark Lobbying Disclosure Act of 1995 (LDA) took significant strides in the direction of promoting transparency and regularity in the practice of lobbying. Even in the wake of strengthening amendments in 2007, however, the LDA remains decidedly limited in scope and effectiveness. The present Task Force – a broadly based group of lobbyists, lawyers, public interest organization representatives, and academics – has developed a package of proposed reforms that would lay the groundwork for the next chapter in the development of lobbying regulation.

A principal focus of the task force’s discussion has been on weak spots in the LDA that allow much lobbying activity to go unreported. For example, today a lobbying firm is exempt from having to register under the LDA unless it employs a lobbyist for whom lobbying activities constitute twenty percent or more of the time that he or she spends in working for a particular client. The Task Force recommends that this twenty-percent threshold test be eliminated, although monetary thresholds based on the amounts the lobbying firm expects to receive from the client should be retained. Furthermore, the LDA does not now require registrants to identify the specific legislative or executive offices to which they make a lobbying contact. Under the Task Force recommendation, that information would, in general, have to be reported.

Moreover, a modern lobbying operation is often a joint effort among multiple entities – not only a lobbying firm, but also firms that handle strategy, public relations, polling, coalition building, etc. At present, however, a lobbying firm reports only its own activities. Under the Task Force’s recommendation, the firm and its client would each be responsible for reporting the activities of these additional entities that they have respectively retained. These additional “lobbying supporters,” however, would not be characterized as “lobbyists,” a label that carries a variety of collateral consequences. The hope is that, by not using that term to refer to lobbying supporters, the amended scheme would elicit more disclosure. Nevertheless, individuals who are principally involved in the “lobbying support” efforts would be identified by name on these reports. In addition, certain former high-ranking officials would be identified even if they were more incidentally involved in lobbying support.

The Task Force is also concerned about the leverage that lobbyists can acquire, and the unseemly appearances they create, when they participate in campaign fundraising for the same Members of Congress whom they also lobby. The Task Force proposes that a lobbyist should not be permitted to lobby a Member of Congress for whom he or she has engaged in campaign fundraising during the past two years. Conversely, if the lobbyist engages in fundraising for a Member, he or she should not be permitted to lobby that Member for a two-year period. These prohibitions would not apply to personal monetary contributions to the campaign unless the total reaches a high aggregate figure. The proposed rules aim principally to limit lobbyists’ fundraising from others, not to eliminate their ability to contribute to campaigns themselves.

Lobbying for earmarks also gives rise to risks of corruption and the appearance of corruption. The Task Force proposes that lobbyists who are retained to lobby for earmarks must certify in their LDA disclosure reports that they have not solicited contributions for the campaigns of the Members lobbied, nor made contributions to those campaigns (or perhaps only nominal contributions). On a related note, the Task Force proposes that a lobbyist should not be permitted to enter into a contingent fee contract when the object of the lobbying is to obtain an earmark, individualized tax relief, targeted loan or grant, or a similar narrow financial benefit for the client. Additionally, the Byrd Amendment, which prohibits the use of funds appropriated by Congress to lobby for federal benefits, is in need of legislative or administrative clarification.

Finally, the Task Force believes that a major reason why the LDA is poorly enforced is that it is administered by House and Senate staff and the United States Attorney for the District of Columbia, rather than by an administrative agency that can deploy typical regulatory tools such as rulemaking, administrative penalties, administrative investigatory powers, etc. The Task Force recommends that responsibility for LDA enforcement be shifted to a regulatory body, such as the Civil Division of the Department of Justice, and appropriate authority conferred to make enforcement effective.

LOBBYING LAW IN THE SPOTLIGHT: CHALLENGES AND PROPOSED IMPROVEMENTS

AMERICAN BAR ASSOCIATION SECTION OF ADMINISTRATIVE LAW AND REGULATORY PRACTICE TASK FORCE ON FEDERAL LOBBYING LAWS

I. INTRODUCTION

The Task Force on Federal Lobbying Laws presents herewith its final report on the condition of the nation's lobbying laws, together with its suggestions for improvements.

The Task Force was appointed in 2009 under the auspices of the Section of Administrative Law and Regulatory Practice of the American Bar Association. The Section has served for years as a focal point for discussions within the ABA on lobbying regulation. It has published a very successful compliance manual on federal lobbying law and practice (now in its fourth edition)¹ and has also sponsored lobbying reform proposals in the ABA House of Delegates.²

A preliminary version of this report was considered by the Council of the Section at the ABA Annual Meeting on August 7-8, 2010. The Council intends to consider a resolution based on the Task Force's work and forward it for adoption by the ABA's House of Delegates in August 2011.

II. THE DEVELOPMENT AND PRESENT SCOPE OF LOBBYING REGULATION

The first general law applicable to lobbying the federal government passed almost as an afterthought to the congressional reorganization efforts that followed World War II.³ Overshadowed in importance by the Administrative Procedure Act and the Federal Tort Claims Act that were enacted the same year, the Federal Regulation of Lobbying Act of 1946 (FRLA)⁴ soon became almost irrelevant to the practice of lobbying and was largely ignored on all sides. The FRLA was in essence a disclosure regime administered by the Clerk of the House of Representatives and the Secretary of the Senate.⁵ It applied only to those seeking to influence Members of Congress, but

¹ See ABA Sec. of Admin. L. & Reg. Prac., *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LOBBYING LAW AND PRACTICE* (William V. Luneburg, Thomas M. Susman & Rebecca H. Gordon eds.) (4th ed. 2009) (hereinafter "THE LOBBYING MANUAL").

² See, e.g., Recommendation 119, ABA House of Delegates (August 2006) (advocating more expansive LDA disclosure of lobbying coalitions and coverage of paid grassroots lobbying efforts).

³ See William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, Chapter 1, *THE LOBBYING MANUAL*, *supra* note 1, at 9-10.

⁴ Pub. L. No. 79-601, §§ 301-11, 60 Stat. 812, 839-42 (1946) (formerly codified at 2 U.S.C. §§261-270 (1994)) (repealed 1995).

⁵ For a succinct description of the FRLA's requirements, see William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, Chapter 1, *THE LOBBYING MANUAL*, *supra* note 1, at 10-11.

probably not their staffs, and without any coverage of the Executive Branch. The requirement to disclose lobbying activities extended to large and small expenditures (including cab fares), so that, even if a lobbyist fully adhered to the law's requirements (as few did), the level of detail required could easily overwhelm the ability of anyone examining the records to obtain an overall sense of lobbying in the Nation's Capital.⁶ In 1954, in *United States v. Harriss*,⁷ the Supreme Court substantially weakened the Act by narrowly construing it.⁸ Thereafter, the Department of Justice abandoned any attempt to enforce the FRLA.⁹ Efforts to enact an effective federal lobbying statute continued for more than forty years without success.¹⁰

A. The Lobbying Disclosure Act

In the mid-1990s, a rare constellation of political events and publicized lobbying abuses resulted in the interment of the FRLA and the enactment of the Lobbying Disclosure Act of 1995 (LDA).¹¹ Like the FRLA, the LDA was, as originally adopted, purely a disclosure regime. It is applicable both to lobbying firms¹² and to entities that lobby on their own behalf.¹³ Where coverage requirements are met, such firms and organizations must register with the Secretary and Clerk¹⁴ and thereafter periodically file reports of lobbying activities,¹⁵ regardless of whether those activities are aimed at Congress, its staff, or the Executive Branch.

The duty of a lobbying firm or other entity to register largely depends on whether it employs a “lobbyist” as that term is defined in the Act.¹⁶ To qualify as a “lobbyist,” an individual has to (1)

⁶ See William V. Luneburg & A.L. (Lorry) Spitzer, *The Lobbying Disclosure Act of 1995: Scope of Coverage*, Chapter 3, THE LOBBYING MANUAL, *supra* note 1, at 44.

⁷ 347 U.S. 612 (1954).

⁸ See William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, Chapter 1, THE LOBBYING MANUAL, *supra* note 1, at 12-14.

⁹ *Id.* at 14-15.

¹⁰ See Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals since 1955*, Chapter 2, THE LOBBYING MANUAL, *supra* note 1, at 23-30.

¹¹ See William V. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85, 86 (2009).

¹² 2 U.S.C. § 1602(9) (2006) (defining “lobbying firm” to include persons and entities with one or more employees who are “lobbyists” as defined in the Act as well as self-employed “lobbyists”; in both cases such a firm works on behalf of others for compensation).

¹³ *Id.* § 1603(a)(1), (2) (2006 & Supp. III 2009).

¹⁴ *Id.* The registration form is denominated the LD-1.

¹⁵ *Id.* §1604 (including quarterly reports of lobbying activities--the LD-2 form--and semiannual reports of various contributions and disbursements to or on behalf of federal legislative and executive branch “covered” officials, the LD-203).

¹⁶ *Id.* §1603(a). Note that the statutory definition of “lobbyist” differs from the concept of a “registered lobbyist.” The captions of the registration and reporting sections of the LDA refer to “registration of lobbyists” and “reports by registered lobbyists,” thus suggesting that the statute requires individual persons who meet the definition of “lobbyist” to register. *Id.* §§ 1603, 1604. Actually, however, the operative provisions of the LDA require registration by the *employer* of such individuals (i.e. the lobbying firm or the organization that lobbies on its own behalf). Under specified circumstances, individuals who qualify as “lobbyists” are listed by that employer on either the registration form, its updates, or the quarterly reports of lobbying activities. Recent measures that govern federal lobbying, *see infra* Part II.B., are frequently directed at persons who have been listed in this fashion. *See, e.g., id.* § 1613(b) (lobbyist liability for

make more than one “lobbying contact” for the client over the course of its representation, and (2) spend at least twenty per cent of his or her time for the client on “lobbyist activities.”¹⁷ A “lobbying contact” is a communication with a Member or staff of Congress or with certain high Executive Branch officials (subject to some nineteen exceptions).¹⁸ “Lobbying activities” include not only lobbying contacts, but also efforts in support thereof.¹⁹ But a firm or entity is not required to register unless, in addition to employing a “lobbyist” as so defined, it meets certain monetary thresholds. In 1995, those were \$5,000 in income earned by a lobbying firm during a semiannual period, or \$20,000 in expenses for lobbying activities incurred over that same period by an entity that lobbies on its own behalf.²⁰ (As will be explained momentarily, the figures are higher today.) Businesses and various public charities that lobby on their own behalf can opt to use definitions of lobbying provided in the Internal Revenue Code to determine if these expense levels are met and for certain (but not all) disclosures where registration is required.²¹

The LDA registration form (the LD-1) requires certain basic information: the name and address of the registrant and its client; the names of lobbyists employed by the registrant and former congressional and executive branch positions held by those individuals; areas of projected lobbying activity; the names of organizations providing significant funding to the registrant for its lobbying activities on behalf of the client; and the names of foreign entities affiliated in various ways with the client and contributing organizations.²²

The periodic reports (the LD-2) update information provided on the registration form; give the total of income earned by a lobbying firm from the client over the covered period and aggregated expense totals for that same period in the case of a registrant that lobbies on its own behalf; specify general and specific areas of lobbying activities engaged in by lobbyists employed by the registrant; identify the Houses of Congress and federal agencies with which a lobbyist made a lobbying contact for the client during the period; list those lobbyists active during the period; and specify foreign entities with interests in issues lobbied.²³ This information is very basic and conveys only a barebones outline of lobbying activities undertaken. However, in fairness to the drafters of the LDA, one of the perceived beneficial purposes of the statute was to give a better overall sense of lobbying activity than provided by the detailed itemization of expenses mandated by the FRLA.²⁴ It should be

breaching congressional gift rules); 2 U.S.C. § 434(i)(7)(B) (disclosure of contributions bundled by lobbyists). The term “registered lobbyist” is commonly used to refer to persons who have been so listed. For example, the term is used in the Obama Administration’s executive orders and other implementation guidance applicable to lobbying, as well as in discussions of lobbying regulation in the media and in other contexts.

¹⁷ 2 U.S.C. § 1602(10).

¹⁸ *Id.* § 1602(8).

¹⁹ *Id.* § 1602(7).

²⁰ 2 U.S.C. § 1602(a)(3)(A) (2006).

²¹ *Id.* § 1610(a), (b) (2006 & Supp. III 2009).

²² *Id.* § 1603(b).

²³ *Id.*

²⁴ See H.R. REP. NO. 104-339, PART 1, at 4 (1995) (“Lobbyists who comply with this requirement [of the FRLA] file sheets of paper listing expenditures such as \$45 phone bills, \$6 cab fares, \$16 messenger fees, and even prorated salaries, in one case for as little as \$1.31. Some lobbyists provide lists of restaurants where they have paid for lunch.

noted that grassroots lobbying does not trigger LDA registration and is not subject to disclosure where registration is required,²⁵ except in those instances where businesses or public charities elect to use IRC definitions of lobbying activity.²⁶

The LDA also amended another statute, the Byrd Amendment,²⁷ which regulates a specific type of lobbying activity. That statute prohibits the use of funds appropriated by Congress to lobby for federal contracts, grants, loans, and cooperative agreements.²⁸ Before enactment of the LDA, the Amendment required contractors and awardees to file a complicated disclosure certification stating that no appropriated funds were used for prohibited purposes and detailing payments made from the contractor's or awardee's own funds to influence awards.²⁹ For awards made on or after January 1, 1996, the LDA simplified the disclosure requirements by requiring only a declaration that must (1) state the name of any lobbyist who has made lobbying contacts on behalf of the contractor and (2) contain a certification that the declarant has not made, and will not make, any prohibited payments.³⁰ However, the Byrd Amendment remains to this day vague in many important respects and a source of confusion for those to whom it may apply.³¹

B. HLOGA and Beyond

The series of scandals associated with lobbyist Jack Abramoff that came to light from 2004 to 2006³² so captured press and public attention that both Democrats and Republicans in Congress proposed significant changes to the LDA and other rules governing federal lobbying, including congressional gift and travel rules.³³ Following a tortuous process, the Honest Leadership and Open Government Act (HLOGA)³⁴ became law on September 14, 2007 on a bipartisan vote that followed intense partisan battles.³⁵ Thereafter, the LDA was more than a mere disclosure statute; registrants

At the same time, however, the Act falls short of requiring disclosure of what the Act seeks most to know about lobbying—how much is spent overall and for what purpose.”)

²⁵ See William V. Luneburg & A.L. (Lorry) Spitzer, *The Lobbying Disclosure Act of 1995: Scope of Coverage*, Chapter 3, THE LOBBYING MANUAL, *supra* note 1, at 57-59, 77.

²⁶ *Id.* at 84-86.

²⁷ 31 U.S.C. § 1352 (2006).

²⁸ *Id.* § 1352(a).

²⁹ See Thomas M. Susman, *The Byrd Amendment*, Chapter 15, THE LOBBYING MANUAL, *supra* note 1, at 353.

³⁰ 31 U.S.C. § 1352(b).

³¹ See Thomas M. Susman, *The Byrd Amendment*, Chapter 15, THE LOBBYING MANUAL, *supra* note 1, at 360.

³² Abramoff was sentenced to five years and ten months in prison on March 29, 2006, after pleading guilty to charges of fraud, tax evasion, and conspiracy to bribe public officials. THE WASHINGTON POST covered the developments in detail. Those stories and a rich store of other information on the Abramoff scandals are found on the Washington Post's website. See Susan Schmidt et al., *Investigating Abramoff—Special Report*, <http://www.washingtonpost.com/wp-dyn/content/linkset/2005/06/22/LI2005062200936.html> (last visited Dec. 15, 2010).

³³ See Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals since 1955*, Chapter 2, THE LOBBYING MANUAL, *supra* note 1, at 32-36; Robert F. Bauer & Rebecca H. Gordon, *Congressional Ethics: Gifts, Travel, Income, and Post-Employment Restrictions*, Chapter 23, THE LOBBYING MANUAL, *supra* note 1, at 481-82.

³⁴ Pub. L. No. 110-81, 121 Stat. 735 (Sept. 14, 2007).

³⁵ See Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals since 1955*, Chapter 2, THE LOBBYING MANUAL, *supra* note 1, at 36-37.

and their lobbyists commit criminal and civil offenses by giving gifts in knowing violation of congressional rules.³⁶ Moreover, they have to file a semiannual report (the LD-203) regarding their and their PACs' political contributions to federal candidates and certain disbursements that they make to or for the benefit of covered congressional and executive branch officials, certifying (subject to criminal and civil penalties) that those contributions and disbursements do not violate congressional gift and travel rules.³⁷ HLOGA also created an online reporting regime in which lobbying data is electronically filed and disclosed.³⁸

In addition, under HLOGA the LDA reporting cycle changed from every six months to every three months, resulting in a reduction of the monetary threshold for lobbying firm registration to \$2,500 and the threshold for entities lobbying on their own behalf to \$10,000³⁹ (both of which amounts increase with the Consumer Price Index every four years; they are now, respectively, \$3,000 and \$11,500). Disclosure obligations for registrants were also broadened to capture more contributors to lobbying campaigns (i.e. those giving more than \$5,000 per quarter who also actively participate in the planning, supervision and control of lobbying activities).⁴⁰ Finally, political committees receiving more than \$15,000 (now \$16,000 based on CPI adjustment) in contributions credited to the fundraising efforts of LDA registrants or lobbyists must file periodic reports of that bundling under the Federal Election Campaign Act of 1971 as amended in 2007.⁴¹

Enforcement of the LDA remains modest, to say the least. The Clerk of the House and Secretary of the Senate have only the limited function of sending notices to those they believe may not be complying with the Act and thereafter notifying the United States Attorney for the District of Columbia of possible noncompliance.⁴² Frontline enforcement authority in terms of seeking civil and criminal penalties is lodged solely in the United States Attorney.⁴³ To date there have been no formal enforcement actions filed and only three formal settlements entered into.⁴⁴ Dissatisfied with the lack of enforcement action prior to 2007, Congress mandated that the Government Accountability Office (GAO) prepare an annual audit of lobbyist compliance with the Act⁴⁵ and that the Department of Justice semiannually report its enforcement activity to Congress.⁴⁶ To date, those reforms have yet to result in the filing of any enforcement actions, though the United States Attorney has made more effort to identify repeat LDA violators.⁴⁷

³⁶ 2 U.S.C. §§ 1606, 1613 (2006 & Supp. III 2009).

³⁷ *Id.* § 1604(d) (Supp. III 2009).

³⁸ *Id.* §§ 1604(e), 1605(a)(9).

³⁹ *Id.* § 1603(a)(3)(A) (Supp. III 2009).

⁴⁰ *Id.* § 1603(b)(3).

⁴¹ *Id.* § 434(i) (Supp. III 2009). See Trevor Potter & Matthew T. Sanderson, *Lobbyist Bundling of Campaign Contributions*, Chapter 22, *THE LOBBYING MANUAL*, *supra* note 1.

⁴² 2 U.S.C. § 1605(a)(7) and (8) (2006 & Supp. III 2009).

⁴³ See *id.* § 1605(a)(8).

⁴⁴ See U.S. GOVERNMENT ACCOUNTABILITY OFFICE, 2009 LOBBYING DISCLOSURE/OBSERVATIONS ON LOBBYISTS' COMPLIANCE WITH DISCLOSURE REQUIREMENTS, GAO-10-499 at 17 (Apr. 2010) (hereinafter "2009 GAO STUDY").

⁴⁵ 2 U.S.C. § 1614 (Supp. III 2009).

⁴⁶ *Id.* § 1605(b)(1).

⁴⁷ See 2009 GAO STUDY, *supra* note 44, at 13.

Finally, recent executive measures have extended lobbying regulation beyond the congressionally defined scope of the LDA. The Obama Administration took office promising to limit the influence of special interests on governmental decision-making.⁴⁸ Its initiatives have relied on the LDA concept of a “registered lobbyist” in (1) restricting gifts to executive branch officials;⁴⁹ (2) limiting the recruitment of former lobbyists into government positions;⁵⁰ (3) requiring the posting on the Internet of communications from lobbyists related to applications for funding under the American Recovery and Reinvestment Act;⁵¹ and (4) prohibiting service of lobbyists on advisory committees and other executive agency boards and commissions.⁵²

III. IMPROVING REGISTRATION AND REPORTING UNDER THE LOBBYING DISCLOSURE ACT

A. Current Trends and Concerns

A continuing and pervasive concern of the Task Force has been to consider ways in which the registration and reporting system established by the LDA can be strengthened. Recent lobbying-related scandals, notably the Abramoff affair, provide the most visible illustrations of the need for transparency. More broadly, however, the LDA reflects recognition that organized interest groups, which commonly act through lobbyists, exert enormous influence on the legislative and executive branches of government.⁵³ Society has a recognized interest in shining light on lobbying activities, so as to facilitate informed political dialogue about the extent and nature of this influence.

At the same time, lobbying is a legitimate form of petitioning the government for redress of grievances, and it can contribute in many ways to more informed and democratically responsive

⁴⁸ See ORGANIZING FOR AMERICA, http://www.barackobama.com/issues/ethics/index_campaign.php (last visited Dec. 16, 2010).

⁴⁹ See Exec. Order No. 13,490, §1, 74 Fed. Reg. 4673 (Jan. 21, 2009)

⁵⁰ *Id.*

⁵¹ See Memorandum from the President to the Heads of Executive Departments and Agencies, *Ensuring Responsible Spending of Recovery Act Funds* (Mar. 20, 2009), available at http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-20-09 (last visited Dec. 16, 2010).

⁵² Memorandum for Heads of Executive Departments and Agencies, *Lobbyists on Agency Boards and Commissions* (June 18, 2010), available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-lobbyists-agency-boards-and-commissions> (last visited Dec. 16, 2010).

⁵³ In enacting the LDA, Congress made the following three findings:

- (1) responsible representative Government requires public awareness of the efforts of paid lobbyists to influence the public decisionmaking process in both the legislative and executive branches of the Federal Government;
- (2) existing lobbying disclosure statutes have been ineffective because of unclear statutory language, weak administrative and enforcement provisions, and an absence of clear guidance as to who is required to register and what they are required to disclose; and
- (3) the effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions will increase public confidence in the integrity of Government.

2 U.S.C. § 1601 (2006).

decision-making.⁵⁴ Providing a counterweight to official power, lobbyists often serve to keep government itself accountable. However, one need not posit that lobbying as such is sinister or suspect to believe that it should be accompanied by transparency that helps to assure accountability. In the only case to date in which the LDA has been challenged as invalid under the First Amendment, the court relied on this reasoning to uphold the Act.⁵⁵ The challenge, therefore, is to devise approaches to effective disclosure that do not impede the beneficial roles that lobbyists play.⁵⁶ Today, as attorneys increasingly find themselves providing analysis, advice, and advocacy in the policy realm, the bar has a natural interest in ensuring that the regulatory balance is struck wisely.

The Task Force believes that the LDA disclosure system is in need of improvement. The need stems in part from limitations in the law itself and in part from circumstances in the political environment that make compliance with the law less effective than it should be.

The Task Force's discussions highlighted several ways in which the universe of lobbying firms and organizations that are required to register could be and should be broadened. For example, an individual who spends less than twenty percent of his or her time on lobbying activities for a particular client during a given quarter is not captured by the LDA disclosure scheme,⁵⁷ although this gap in coverage allows quite a bit of lobbying activity to go unreported. Similarly, the LDA requires less information from those lobbyists and organizations that do register than it should. For example, the Act does not *require* these registrants to identify the specific congressional offices that they have lobbied.⁵⁸ Yet the objective of promoting the accountability of these offices should arguably be deemed as important a public purpose of the LDA as the objective of promoting the accountability of private actors.

Above and beyond these relatively straightforward debates about the proper scope of lobbying firms' and organizations' obligations under the LDA is a more fundamental problem to which the Task Force devoted much attention. In a modern, sophisticated lobbying operation, the work is frequently divided among multiple firms. For example, the client may retain a "strategy firm" to manage the lobbying campaign. The strategy firm, perhaps led by a former member of Congress or other well-known Washington figure, may make critical decisions for the overall effort. Yet, if no one employed by that firm engages in any lobbying contacts (i.e., direct communication

⁵⁴ See, e.g., Nicholas W. Allard, *Lobbying is an Honorable Profession: The Right to Petition and the Competition to be Right*, 19 STAN. L. & POL'Y REV. 23 (2008).

⁵⁵ Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1 (D.C. Cir. 2009).

⁵⁶ Cf. Canada's Lobbying Act, R.S., 1985, c. 44 (4th Supp.), which commences with the following preambulatory recitals: "WHEREAS free and open access to government is an important matter of public interest; AND WHEREAS lobbying public office holders is a legitimate activity; AND WHEREAS it is desirable that public office holders and the public be able to know who is engaged in lobbying activities; AND WHEREAS a system for the registration of paid lobbyists should not impede free and open access to government. . . ."

⁵⁷ 2 U.S.C. § 1602(10) (Supp. III 2009).

⁵⁸ See *id.* § 1604(b)(2)(B) (requiring merely "a statement of the Houses of Congress and the Federal agencies contacted by lobbyists employed by the registrant on behalf of the client").

with a “covered official” in the government), its actions will not have to be disclosed.⁵⁹ Similarly, the client may retain a pollster, a public relations firm to handle communications with the public, and other entities to increase the effectiveness of its lobbying efforts, none of whom makes lobbying contacts. These agents' roles will remain obscured from public view because the only disclosure obligation falls on the lobbyist's employer with regard to the actions of its “employees”;⁶⁰ independent contractors do not fit within that term under the LDA.⁶¹ In this respect, the LDA system contains a substantial gap in coverage that warrants a remedy if the public is to have a grasp of the nature and scope of the typical lobbying campaigns conducted on behalf of the clients of LDA registrants.

The background factors that militate against broad compliance with the obligations that the LDA does impose begin with the low level of enforcement effort exerted to date by the Department of Justice.⁶² The absence of meaningful consequences for failure to comply with the Act not only prevents this regulatory scheme from fulfilling its declared objectives; it also breeds further noncompliance. Potential registrants who might otherwise be willing to file required disclosure forms under the LDA could have trouble justifying such compliance if their competitors are seen to be violating the Act without consequences. Weak enforcement of the lobbying laws has been the target of public criticism for more than half a century; indeed it was one of the reasons behind the enactment of the LDA in the first place.⁶³ Moreover, in 2007 Congress expressed its frustration with the lack of enforcement by requiring annual audits of lobbyist compliance by the GAO and semiannual reports to Congress by the Department of Justice with regard to its LDA enforcement activity.⁶⁴ From all outward appearances, these statutory changes have had little effect on DOJ's willingness to aggressively prosecute LDA violations.

Recently, the incentives to avoid LDA registration have increased. An objective of the LDA was to make registration and reporting relatively simple and straightforward in order to encourage broad compliance with the disclosure regime.⁶⁵ However, HLOGA shortened the reporting cycle; required registrants and lobbyists not only to certify their compliance with congressional gift rules, but also to obey those rules subject to civil and criminal penalties; mandated the semiannual reporting of political and other contributions; and imposed new requirements on political committees to report bundling of campaign contributions by registrants and their lobbyists.⁶⁶ This statute was followed by the Obama Administration's orders premised on the LDA definition of “lobbyist,”

⁵⁹ The employment of a “lobbyist” as defined in the LDA is one of the necessary triggers to registration. *See supra* text at note 16. More than one lobbying contact is necessary for an individual to be counted a lobbyist. *See supra* text at note 17.

⁶⁰ *See* 2 U.S.C. §§ 1603(b)(6) and 1604(b)(2)(A)-(C)(2006 & Supp. III 2009).

⁶¹ *Id.* § 1602(5)(A).

⁶² *See* 2010 GAO STUDY, *supra* note 44, at 13-17.

⁶³ *See* William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 53 (2006).

⁶⁴ *See supra* text at notes 45 & 46.

⁶⁵ *See, e.g.*, H.R. REP. 104-339, PART 1, at 2 (1995) (noting that “[t]he Act streamlines disclosure requirements to ensure that meaningful information is provided and requires all professional lobbyists to register and file regular, semiannual reports identifying their clients, the issues on which they lobby, and the amount of their compensation.”)

⁶⁶ *See supra* text at notes 36-41.

including those banning gifts to high level executive branch appointees, limiting appointment opportunities for former lobbyists, requiring Internet disclosure of lobbyist communications regarding stimulus and TARP funding, and restricting lobbyists from being appointed or reappointed by executive branch agencies to agency advisory boards and committees.⁶⁷ According to some (though not all) accounts, the collective consequence of these actions has been to encourage, in some cases, former registrants to terminate their registrations and to remove individuals from their lists of active lobbyists and, in others, to deter registration in the first place.⁶⁸ To the extent that lobbyists may have responded to this incentive, the result has been reduced transparency in government, as well as the unhappy consequence of leaving people who comply with the LDA worse off than those who bypass it, either lawfully or otherwise.

The Task Force's focus has not been on whether these restrictions have been wise,⁶⁹ but rather on the challenge of designing a lobbying disclosure system that takes account of their effects while not undercutting the principal purposes of the LDA. It believes, for instance, that information about the activities of at least some participants in a lobbying campaign might be more successfully achieved if the disclosure obligations imposed do not require characterizing them as “lobbyists.”

In this and other contexts in this report, the Task Force has, consistently with its charge, focused on the *law* of lobbying regulation. The Task Force did not consider whether ethics rules could or should cover some of the same territory. Those issues remain open for possible consideration by national and state bar associations.

B. Recommendations

To strengthen lobbying disclosure laws and adapt them to the new circumstances discussed above, we propose several revisions to the existing system for LDA registration and reporting.

⁶⁷ See *supra* text at notes 49-52.

⁶⁸ See, e.g., Bara Vaida, *Lobbyists Shed The Scarlet 'L'*, Nat'l J., July 11, 2009; David D. Kirkpatrick, *Law to Curb Lobbying Sends It Underground*, N.Y. TIMES, January 17, 2010, available at <http://www.nytimes.com/2010/01/18/us/politics/18lobby.html> (last visited Dec. 16, 2010). One empirical study indicates that most of the deregistration in recent years predated the Obama restrictions and thus is attributable primarily to the impact of HLOGA. See Ctr. for Responsive Politics, *The Deregistration Dilemma: Are Lobbyists Quitting the Business as Federal Disclosure Rules Tighten?* (June 30, 2010), available at <http://www.opensecrets.org/news/2010/06/the-deregistration-dilemma-are-lobb.html> (last visited Dec. 16, 2010). However, even if most registered lobbyists who could potentially have been induced to drop their registrations had already done so when the Obama restrictions were imposed, those restrictions do appear to have contributed to lobbyists' reluctance to be associated with that label. Thus, the restrictions probably do serve as a deterrent to future registrations.

⁶⁹The Task Force has not specifically evaluated the Administration's initiative to curtail lobbyists' service on agency advisory committees, but the Section of Administrative Law and Regulatory Practice has sent a letter to the Administration suggesting that this policy is in tension with the purposes of the Federal Advisory Committee Act. The letter is available at <http://new.abanet.org/sections/adminlaw/Blanket%20Authority/Letter%20to%20Norman%20Eisen%20on%20FACA%20March%2009.pdf>.

1. Who should be registered?

We propose the following criteria for determining whether a lobbying firm (i.e., a firm with an outside client) or lobbying organization (i.e., an entity that employs in-house lobbyists to work on its behalf) would be required to register:

A lobbying firm will be required to register if, on behalf of a particular client:

- (a) employees of the firm in the aggregate make 2 or more lobbying contacts at any time on behalf of the client; AND
- (b) the firm receives or expects to receive from that client for matters related to lobbying activities, at least the amount specified in 2 U.S.C. §1603(a)(3)(A) (currently \$3,000) in the quarterly period during which registration would be made.

A lobbying organization will be required to register if:

- (a) employees of that organization in the aggregate make 2 or more lobbying contacts at any time on its behalf; AND
- (b) the organization expends in connection with lobbying activities at least the amount specified in 2 U.S.C. §1603(a)(3)(B) (currently \$11,500) in the quarterly period during which registration would be made.

For purposes of these criteria, “employee,” “lobbying contacts” and “lobbying activities” would be defined as under current law (2 U.S.C. §§1602(5), (7) & (8)).

The most notable feature of these criteria is what they do not contain. We propose to broaden the provision in current law that pins registration in part on employment of an individual who makes more than one lobbying contact *and* whose lobbying activities constitute twenty percent or more of the time he or she devotes to services for the client during a quarterly period.⁷⁰ Those two conditions are embedded in the LDA’s definition of “lobbyist”; we propose that Congress retain the first condition (two or more lobbying contacts) but delete the second (the twenty percent rule). The second precondition to registration renders the LDA significantly under-inclusive. For example, a law firm might divide work between a partner who engages in lobbying contacts, but spends less than twenty percent of her time on lobbying activities, and an associate who spends a great deal of time on the subject, but does not personally engage in any direct contacts with covered officials. Similarly, the firm might engage in considerable lobbying contacts, but divide up the work so that none of the individual employees exceeds the twenty percent threshold. Finally, the twenty percent test applies only to “lobbying activities,” which is a broad term, but nevertheless does not encompass significant aspects of a lobbying campaign such as providing strategic advice to clients and stimulating grassroots support for the lobbying campaign.⁷¹

Although this change in the law would constitute an expansion of the scope of the registration requirement, its incidence would fall primarily on firms and organizations that engage in

⁷⁰ 2 U.S.C. §§1602(10), 1603(a) (2006 and Supp.III 2009).

⁷¹ See *supra* at notes 25-26.

significant lobbying work, including direct contacts with covered officials. Such entities should not be surprised by a regulatory regime that makes their activities to influence the government a matter of public record. Moreover, on a practical level, many of these entities will already be familiar with LDA requirements and will be in a position to provide the necessary legal and accounting support necessary to fill out forms and undertake the other work necessitated by LDA registration.

The elimination of the twenty percent test from the LDA definition of "lobbyist" does not necessarily mean that every individual who engages in more than one lobbying contact for a client will or should automatically be treated as a "registered lobbyist" for purposes of the LDA and other lobbying-related laws. As discussed above, under the structure of the LDA, registration forms are filed by employers, not by individuals. One's status as a registered lobbyist depends on whether one has been listed by the employer on a registration or quarterly reporting form.⁷² Specifically, § 1603(b)(6) of the LDA requires a registrant to list on the LD-1 "the name of each employee of the registrant who has acted or whom the registrant expects to act as a lobbyist on behalf of the client."

In order to prevent an undue expansion in the number of individuals who would be characterized as registered lobbyists, we propose that § 1603(b)(6) be amended to provide that a person who meets the amended statutory definition of "lobbyist" need not be listed on a registration form unless the registrant anticipates that the person will spend (or has already spent) at least twelve hours engaged in lobbying activities or lobbying support for the client in a quarterly reporting period. This limitation would harmonize with our proposal in Part III.B.2 that the registrant should not be required to list an individual as a lobbyist on a given quarterly report unless he or she actually did spend twelve or more hours on lobbying activities or lobbying support during that period. (As we explain in that section, however, the registrant would be expected to identify the person and disclose these activities even if the twelve-hour threshold test is not met.)⁷³

We propose to retain, at least in their essential characteristics, the other LDA criteria for registration, namely the requirements of two direct lobbying contacts with covered officials and a monetary expense threshold. (Notice, however, that the basis for registering is two contacts made by members of the firm or organization, but not necessarily by the same individual in both instances.) The benchmark of direct lobbying contacts corresponds to what has traditionally been deemed "lobbying in its commonly accepted sense."⁷⁴ One implication of this criterion is that a campaign to influence government action that operates solely through efforts to stimulate public opinion at the grassroots level would not trigger LDA registration requirements. (Such a requirement, if imposed, would undoubtedly be very controversial, as past struggles over extending LDA coverage to

⁷² See *supra* at notes 16-17.

⁷³ In practice, employers may well often be conservative in their predictions as to whether particular employees will at some point surpass the twelve-hour benchmark. However, as under the current § 1603(b)(6), the absence of those employees from the public record of "registered lobbyists" would be only temporary, because their satisfaction of that criterion would ultimately have to be reported on the LD-2 for the period in which the requisite quantum of lobbying activities actually occurred.

⁷⁴ *United States v. Harriss*, 347 U.S. 612, 620 (1954) (*quoting* *United States v. Rumely*, 345 U.S. 41, 47 (1953)).

grassroots lobbying have amply demonstrated.⁷⁵⁾ As will be seen below, however, we do contemplate a system in which much of that activity would be disclosed if performed for a client that also meets the standard registration requirements.

As for the monetary threshold criteria, we believe they should remain in place as one factor used for determining the need to register under the LDA. Although the determination of how high to set the triggers intrinsically involves somewhat arbitrary line-drawing, monetary thresholds have been recognized since the enactment of the LDA as a reasonable means for separating professional lobbying operations, which fall within the intended rationale of the statute, from contacts by which occasional advocates, even those acting for compensation, reach out to the government. The latter pose fewer risks of undue influence and have a stronger claim to being left unregulated by government. The Task Force does not, in principle, seek to relax the monetary thresholds reflected in current law, but some adjustments in these amounts might as a practical matter be necessitated by the elimination of the twenty-percent-of-time criterion and the wider range of activities that would be reportable under the regime we are proposing.

A final issue relating to one of the monetary thresholds for registration, and the reporting obligations that follow, arises from a provision of the LDA (Section 15) that gives businesses, trade associations, and public charities the option to use the definition of lobbying applicable for Internal Revenue Service purposes in two contexts: (1) estimating lobbying expenses to determine whether the monetary threshold for LDA registration is met and, if it is, to report quarterly lobbying expenses under the LDA; and (2) providing certain other information on the quarterly LDA report of lobbying activities.⁷⁶ In 1995, this option was included purportedly to simplify the reporting obligations of these entities by enabling them to make a single calculation for IRC and LDA purposes.⁷⁷ However, any advantage that the provision may offer in this regard comes at a significant cost in terms of the benefits of informative disclosure of lobbying activities.⁷⁸ Unlike the LDA, the IRC definition of lobbying does not, for example in the case of public charities, include lobbying of executive officials on nonlegislative subject matters. On the other hand, it does include lobbying at the state level, including grassroots lobbying. Thus, an entity that can rely on the IRC option can file reports that are seriously misleading, when compared with other LDA quarterly reports submitted by filers that cannot or do not use the IRC definitions. Moreover, after the 1998 Technical Amendments to the LDA, even those entities electing to use the Section 15 option must employ the LDA definition of lobbying in quarterly reports for lobbying activities involving Congress (outside the area of expense

⁷⁵ See Thomas M. Susman & William V. Luneburg, *History of Lobbying Disclosure Reform Proposals since 1955*, Chapter 2, THE LOBBYING MANUAL, *supra* note 1, at 30-31, 32-36. The ABA has recommended that entities that engage in grassroots lobbying that results in more than \$25,000 in income or expenses within a three-month period should be required to register under the LDA and to make suitable disclosures pursuant to that status. ABA House of Delegates Recommendation 119, *supra* note 2 (August 2006).

⁷⁶ 2 U.S.C. §1610 (2006 & Supp. III 2009).

⁷⁷ See, e.g., H.R. REP. NO. 104-339, at 23 (1995).

⁷⁸ See U.S. GENERAL ACCOUNTING OFFICE, FEDERAL LOBBYING/DIFFERENCES IN LOBBYING DEFINITIONS AND THEIR IMPACT, GAO/GGD-99-38 (Apr. 1999). For more detailed description of the impact of the IRC option on LDA disclosure, see William V. Luneburg & Thomas M. Susman, *Lobbying Disclosure: A Recipe for Reform*, 33 J. LEGIS. 32, 50-52 (2006).

reporting).⁷⁹ Accordingly, even the original purpose of the provision -- to avoid the need to track expenditures under two different definitions -- has been significantly compromised. In order to promote more reliable comparisons among the lobbying disclosures of similar entities, the Task Force recommends that the IRC option be repealed.

2. What should lobbying firms and organizations disclose?

We propose the following standard for disclosure on quarterly reports filed by LDA registrants:

Once a firm or organization is required to register, it would have to disclose in its LD-2:

- (a) the bills and topics with respect to which lobbying activity was conducted;
- (b) all congressional offices, congressional committees, and federal agencies and offices contacted;
- (c) all individuals employed by the firm or organization who both made any “lobbying contact” and also devoted at least twelve (12) hours during the quarterly reporting period to “lobbying activities” or “lobbying support” (as hereinafter defined) on behalf of the client;
- (d) all other individuals employed by the firm or organization who engaged in “lobbying activities” or “lobbying support”; and
- (e) all other persons and entities retained by the registrant firm or organization that engaged in “lobbying support” along with a statement of--
 - (1) the nature of the “lobbying support” rendered with a short narrative summary of work performed;
 - (2) the amount paid to such other person or entity for “lobbying support”; and
 - (3) the names of individuals employed by that other person or entity who supervised the provision of “lobbying support” or devoted more than a specified number of hours to “lobbying support” during the quarterly reporting period.

A few points about this set of criteria should be highlighted. The first is that the required set of disclosures includes “lobbying support,” a term defined in detail below. Under current law, the term “lobbying activities” already includes “efforts in support of [lobbying] 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.”⁸⁰ Thus, although our concept of lobbying support is somewhat broader, the requirement in paragraph (d) does not entail a conceptual shift in the nature of the Act’s coverage. What is more innovative is the expectation in paragraph (e) that registrant entities will disclose not only support activities that they themselves perform, but also activities performed by outside firms that they retain. As noted above, this expectation responds to the modern reality that much of the effort in a lobbying campaign may be dispersed among multiple entities. Required disclosure of this wider picture would directly serve the purposes of the LDA.

⁷⁹ 2 U.S.C. §1610(a)(2)(A), (b)(2)(A)(2006 & Supp.III 2009).

⁸⁰ 2 U.S.C. §1602(7) (2006).

Second, the intent of the proposal is that only the persons described in paragraph (c), that is, an individual who both made at least one “lobbying contact” (a direct communication to a covered official) and also devoted at least 12 hours of his or her time during the quarterly period to lobbying activities or support, would be considered a registered (listed) “lobbyist” for purposes of other provisions of federal lobbying law (e.g. the congressional gift rule ban, the bundling provisions, etc.) and Executive orders.

In contrast to the persons identified under (c), the individuals described in paragraph (d) and the firms described in paragraph (e) would not themselves be deemed lobbyists or lobbying firms, and they would not be required to register or file any reports (except that a limited class of persons providing lobbying support would have to file reports similar to the LD-203, as discussed below). As to this wider class, we think it preferable that they *not* be formally classified as “lobbyists.”. Despite their importance to what can be accurately described as a lobbying campaign, such a characterization would not comport with their reasonable expectations. More importantly, such a characterization now carries a variety of collateral consequences, such as ineligibility for certain positions in government and on advisory committees, exposure to penalties for violation of congressional gift rules, etc. The prospects for enhanced compliance with the amended LDA will be increased if the broader disclosure requirements we propose are decoupled from that set of consequences.

There may be an argument for an additional exemption from this category of “registered lobbyist.” The exemption would benefit employees of a registrant organization that lobbies on its own behalf, if they lobby only on a very sporadic and limited basis during the year. A company may, for example, have a large number of employees who make a single-shot, one-day visit to Congress to promote a cause favored by the firm. Arguably, the participants in such an exercise are simply not the kind of “lobbyists” that the HLOGA and Obama restrictions are intended to reach. The exemption could be circumscribed by an upper limit (such as spending ten to fifteen hours per year on lobbying contacts).

Third, another innovation in our proposal is the recommendation that disclosure forms must identify all congressional offices, congressional committees, and federal agencies and offices to which a lobbying contact was made. This is an extension beyond current law, which requires “a statement of the Houses of Congress and the Federal agencies contacted. . . .”⁸¹ More extensive disclosure as proposed would directly serve the social interest in tracing the impact of lobbying on public decisionmaking. In theory, this interest could be promoted even more fully if lobbyists were required to identify every specific individual whom they contacted during a lobbying campaign and what was said during the contact. The obligation to keep track of conversations with multiple staff members in a given office would be burdensome, however, and it is not clear that the materiality of this level of detail would justify this burden. Thus, a requirement to identify particular offices contacted seems to be an acceptable middle ground.

To be sure, especially in these days of electronic communications, contacts are often made on

⁸¹ *Id.* § 1604(b)(2)(B) (2006 & Supp. III 2009).

a mass basis. An obligation to list the 535 Members of Congress on a disclosure form could prove unwieldy. That difficulty could be alleviated by allowing filers to identify recipients of their contacts using generic descriptions such as “all Members of Congress” or “all Members of the Senate Finance Committee.” On the executive side, the obligation to identify all “offices” contacted should also be manageable. It would not extend literally to any office in the vast bureaucracy of a large federal agency because the scope of covered executive branch officials in the LDA is limited to high-ranking officials.⁸²

We have a few additional proposals that do not relate directly to the criteria for disclosures. First, most of our recommendations in this section seek to improve transparency by *broadening* the scope of disclosure under the LDA. In at least one respect, however, a clearer understanding of lobbying realities can be achieved by facilitating a *reduction* in the number of persons who are identified in LDA records as lobbyists. Under the LDA, as we have noted, registrations are filed by employers of lobbyists, not by the individual lobbyists themselves.⁸³ Sometimes listings of lobbyists on the LD-1 and LD-2 forms become obsolete because, for instance, the listed individuals cease to be engaged in lobbying contacts or activities for the client or even leave for non-lobbying jobs. Yet those listings can persist indefinitely where the registrant does not take the initiative to remove the name of the individual from its list of active lobbyists. Current practice does not afford such individuals themselves any easy way to leave the public rolls of current lobbyists. We propose, therefore, that the Clerk and Secretary should make available a simple form that individuals can file on their own initiative to deregister themselves as lobbyists. This step would serve to make the public record more accurate and, at the same time, enable individuals to disavow the sometimes unwelcome label of “lobbyist” after it has ceased to describe their actual status.⁸⁴

Second, a public disclosure database is only as good as its usability—and the LDA electronic records system is greatly in need of improvement. The system is not compatible with all office and personal computers’ operating systems, a situation that creates inconvenience for both filers of

⁸² *Id.* §1602(3) (2006), which includes:

- (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 [on] the Executive Schedule [i.e., Cabinet and subcabinet policymakers and their counterparts in independent agencies], as designated by statute or Executive order;
- (E) any member of the uniformed services whose pay grade is at [the level of admiral or general]; and
- (F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character [as determined by executive decision].

⁸³ *See supra* note 16.

⁸⁴ In proposed guidance interpreting the presidential memorandum that generally prohibits lobbyists from serving on advisory committees and other boards and commissions, OMB has tentatively stated that the ban does not apply to registrants who “have not appeared on a quarterly lobbying report for three consecutive quarters as a result of their actual cessation of lobbying activities.” *Proposed Guidance on Appointment of Lobbyists to Federal Boards and Commissions*, 75 Fed. Reg. 67397, 67398 (2010). This qualification, however, mitigates only one of the collateral consequences of being listed on public records as a lobbyist.

lobbying reports and users of the information.⁸⁵ Users of lobbying reports should not have to rekey the information they download from the public databases in order to use it. In effect, the government's failure to employ up-to-date technology imposes unnecessary economic burdens on citizens who should not have to bear those costs. Standardized, user-friendly software is already in use at other government agencies and should be incorporated into the LDA records system.

Moreover, the process of compiling information on particular individuals is sometimes made unnecessarily difficult because of the similarity between their names and those of other filers. That difficulty could be alleviated if users were able to track filings pertaining to any given individual by reference to a single identifying number (i.e., a unique identifier) that would retrieve information from both the House and Senate records. In fact, a numbering system of this general kind already exists. The congressional offices should, however, make such numbers publicly available and should enable members of the public to search the lobbying report databases using them.

3. Client disclosure of lobbying support

As discussed above, modern professional lobbying campaigns often involve the participation of multiple firms. Their actions may provide polling, public relations work, coalition building, and even the major strategic planning for a lobbying campaign, and they may include the participation of well-known public figures whose involvement in the cause would be of great interest to the public. The full scope of these efforts is not now subject to disclosure under the LDA, which applies only to lobbying firms and organizations that lobby on their own behalf. Our proposal would partially alleviate this gap in coverage by the requirement (*supra* Section III.B.2, paragraph (f)) that those entities must disclose the lobbying activities and lobbying support of firms that these entities have retained to perform those functions. In many instances, however, the support activities would fall outside the scope of that requirement because they are arranged by the lobbying client, not by its outside lobbying firm.

As a further step toward disclosure of the extent of these multifaceted lobbying campaigns, we propose that the client of a firm that is required to register under the LDA should also be required to file reports, similar to the LD-2, disclosing lobbying support that it has procured or performed itself. These reports should be filed on the same quarterly schedule as the LD-2s and made available online with the same "searchability" as we propose to be provided for other lobbying reports. The disclosure should identify the firms that were hired, the individuals principally involved, the sums expended, and other information similar to that required of registrants on their LD-2s with regard to the same types of services. Since the lobbying firm may not even know the full cost or extent of these activities, the burden of disclosing them should logically fall on the client. Although the client that does the hiring may also not know who worked on its behalf, it should have the responsibility of obtaining that information from the firm that did the work. (A law firm would probably include on

⁸⁵ For a general discussion of this system and some of the usability issues presented, see Craig Holman, *Public Access to Lobbying Records: The Online Lobbying Disclosure Databases*, Chapter 38, THE LOBBYING MANUAL, *supra* note 1.

its bill the names of lawyers who worked on the matter; but a pollster or public relations firm, for example, would not necessarily offer the names as a matter of course, and the client would have to take the initiative in order to obtain the needed information.)

The rule of thumb should be that the client and the lobbying firm should each be responsible for reporting activities that they respectively procured. However, the client should not have to report activities of the lobbying firm itself because the latter would be required to report those activities on its own LD-2 form.⁸⁶ Identification of the lobbying firm, which would enable a researcher to consult that firm's reports, should suffice.

As in the case of lobbying support arranged by the lobbying firm, individuals who engage in lobbying support activities arranged by the client should not have to be characterized as "lobbyists." Avoidance of that label should remove the disincentives to registration that we have described previously.

Although, in most instances, the client would need to identify only those individuals who are "principally involved" in lobbying support, that obligation should be supplemented by a requirement that, in general, any involvement by a former LDA covered official should also be reported.⁸⁷ This requirement would reflect the distinctive significance that members of the public ordinarily attach to their participation. The requirement should be qualified by a reasonable cooling-off period and, possibly, by an exemption for lower-ranking former officials, such as committee staff, whose governmental responsibilities bore no relationship to the matter being lobbied. The general point, however, is that material information about the identities of lobbying supporters should be reported, and in the case of former covered officials that category cannot be limited to those individuals who are "principally involved" in the lobbying support.

4. Particulars of "lobbying support"

We propose that the term "lobbying support" should be defined to include:

- (a) provision of strategic advice;
- (b) monitoring of legislative and administrative developments related to lobbying goals;
- (c) advice and assistance with earned media (press/communications) related to bills or topics disclosed by the registrant on one or more lobbying reports;

⁸⁶ This allocation of responsibilities would ameliorate some duplicative, and potentially confusing, reporting now required under the LDA. The aggregated expenses reported on the LD-2s of entities that lobby on their own behalf include fees paid to registered lobbying firms, which themselves also report those fees as income earned on their LD-2s. Accordingly, a search of the LDA databases under a client's name may result in the researcher's adding those totals together. The result may be a misleading picture of the full lobbying effort expended on behalf of the client.

⁸⁷ Covered legislative branch officials include Members of Congress and congressional staff members. *See* 2 U.S.C. § 1602(4). *See supra* note 82 for a listing of covered executive branch officials. Currently, the LD-1s and LD-2s must report the covered positions previously (back to 20 years) held by active lobbyists for the client. *Id.* § 1603(b)(6) (2006 & Supp. III 2009).

- (d) polling related to lobbying goals;
- (e) expenditures for advice on or production of public communications (paid media, phone banks, mass emails, websites, advertising, etc.) related to bills or issues disclosed by the registrant on one or more lobbying reports; and
- (f) expenditures for coalition building, that is, payments provided or received for the purpose of encouraging organizations to support or oppose the bills or take action with regard to the topics identified by the registrant on one or more lobbying reports, including, but not limited to, the costs of creating formal or informal coalitions of organizations for such purposes

This definition is broadly drawn to embrace a multitude of support activities, reflecting the realities of modern lobbying campaigns. The list is basically self-explanatory.

As noted earlier, actions taken to shape public opinion at the grassroots level in favor of or in opposition to government action would not, on their own terms, trigger any registration requirement. However, if a client otherwise meets the registration triggers, expenditures for phone banks, websites, advertising, and the like should be disclosed as “lobbying support” under paragraph (e) of the above definition. Individuals who provide these services would not, however, themselves be deemed “lobbyists.” The definition is intended to be a bounded one. General image advertising would not have to be disclosed, but advertisements that specifically relate to the subject of a lobbying campaign should be.

Coalition building, disclosed pursuant to paragraph (f), is another vital component of lobbying as it is currently practiced. This is not to say that the coalition itself would necessarily need to register. The LDA does provide that a coalition or association can be the “client” for purposes of the Act⁸⁸ and it will have to register if thresholds are met. However, a more informal entity that simply provides a loose structure for cooperation among clients is different. The difficult task of defining such an entity for regulatory purposes can likely be avoided, assuming that the law can be written to ensure that the members of the coalition do have filing obligations and will furnish the relevant information.

5. Additional filings

As a general matter, our report envisions that activities that comprise lobbying support will be disclosed by a lobbying firm and its client, not by affiliated organizations or their employees that actually provide the support. The lobbying firm and the client will typically be repeat players who have good reasons to become familiar with LDA requirements; persons in the affiliate category might be involved with a lobbying project only on an incidental or sporadic basis.

Nevertheless, as to a limited class of lobbying supporters, we do propose a periodic filing requirement:

Persons identified on LD-2s as providing “lobbying support” should file semiannual reports, similar

⁸⁸ *Id.* §1602(2) (2006).

to the LD-203, if they meet any of the following criteria:

- (1) they qualify as “bundlers” for the purposes of the Federal Election Campaign Act⁸⁹;
- (2) they have made federal political contributions (including contributions to so-called 527 organizations) of more than \$10,000 in either the calendar year in which they provide the lobbying support or in the previous calendar year;
- (3) they provide advice on lobbying strategy and that advice constitutes ten percent or more of their work for that registrant or client; or
- (4) the person has previously served as a Member of Congress or as a Senate-confirmed Presidential appointee, or has served within the last five years as an employee of Congress or the Executive Office of the President.

The public interest in disclosure of information about these persons is relatively high because of the prominence or sensitivity of their roles in the lobbying enterprise. This interest in disclosure warrants an expectation that they should personally take responsibility for furnishing and vouching for the reliability of the information on an LDA form. Again, however, they would not for legal purposes be deemed “registered lobbyists,” a term that we are wary of expanding, for reasons discussed previously in this report.

IV. RECOMMENDATIONS FOR STRENGTHENED REGULATION OF LOBBYING-RELATED ACTIVITIES

A. Lobbyist Participation in Political Fundraising

The interplay of lobbying and the political money machine inevitably creates the potential for special interest influence and governmental decisions based on inappropriate criteria. In order to dampen the risks of corruption and the appearance of corruption inherent in this situation, the Task Force favors measures that would largely separate these two spheres of political activity.

1. Separation of lobbying and campaign participation

The Task Force distinguishes in this connection between lobbyists' personal monetary contributions to campaigns, on the one hand, and participation in campaign fundraising, on the other. There is precedent for prohibiting lobbyists' own contributions to candidates, including restrictions at the state level and in the pay-to-play area.⁹⁰ However, the Task Force is not disposed to extend these precedents to the limits of their logic within the entire field of federal lobbying regulation. To prohibit lobbyists from contributing to a Member's campaign in an amount that is no higher than ordinary citizens can lawfully make would implicate First Amendment interests. And, in any event,

⁸⁹ There are two types of bundlers, those covered by FECA regulations as they existed prior to HLOGA and a more extensive group encompassed by HLOGA. See Trevor Potter & Matthew T. Sanderson, *Lobbyist Bundling of Campaign Contributions*, Chapter 22, THE LOBBYING MANUAL, *supra* note 1, at 471-73; Joseph E. Sandler, *Lobbyists and Election Law: The New Challenge*, Chapter 36, THE LOBBYING MANUAL, *supra* note 1, at 760-61.

⁹⁰ See Joseph E. Sandler, *Lobbyists and Election Law: The New Challenge*, Chapter 36, THE LOBBYING MANUAL, *supra* note 1, at 755-56 (discussing cases).

the dollar amounts attributable to any particular individual's own contributions to a single campaign are relatively low and thus are not the heart of the difficulty. Extending this same logic, we do not propose to prevent lobbyists from making contributions to any given party committee if the amount in question is no higher than ordinary citizens can make to such committees. Nor do we advocate restraints on lobbyists' ability to support campaigns of their choice in intangible ways, such as making endorsements and volunteering their time in get-out-the-vote efforts.

In contrast to the impact of personal contributions to a candidate, the multiplier effect of a lobbyist's participation in *fundraising* for a Member's campaign (or the Member's leadership PAC) can be quite substantial, and the Task Force believes that this activity should be substantially curtailed. A lobbyist who solicits and then "bundles" large numbers of individual donations for the benefit of a particular Member of Congress, or who leads a fundraising effort on behalf of that Member's campaign, becomes an extremely valuable asset to that politician. In many instances, this role enables the lobbyist to wield particularly strong influence when he or she makes a "lobbying contact" with the Member. Even if the lobbying occurs first, the expectation that the lobbyist may later serve as an important figure in raising money for the Member's campaign can result in undue influence in the legislative arena. Thus, a self-reinforcing cycle of mutual financial dependency has become a deeply troubling source of corruption in our government.⁹¹ In addition, public awareness of this interplay has contributed to an appearance of corruption and, thus, to widespread mistrust of the legislature.

We propose, therefore, that an individual lobbyist should be prohibited from conducting certain fundraising activity to support the campaign of any Member of Congress, or candidate for Congress, with whom that lobbyist has made a "lobbying contact" within the past two years. We also propose, conversely, that an individual lobbyist should be prohibited from making a "lobbying contact" with a Member of Congress (including the Member's staff), or a candidate for Congress, if that lobbyist has conducted any covered fundraising activity for that person within the past two years. For this purpose, covered "fundraising" activity would include hosting or organizing fundraising events, serving on a campaign fundraising committee, sending communications (phone, print, email) soliciting contributions for the Member's campaign, or participating in the "bundling" of campaign contributions for the Member's campaign. Further details of the proposal are set forth in section IV.A.3 below.

Occupying a middle ground between the two general types of political participation just discussed—contributing to individual campaigns and fundraising—is the role of a lobbyist's cumulative contributions to multiple campaigns or party committees. In the aggregate, a lobbyist's contributions to multiple campaigns may give rise to disproportionate political influence, particularly if the lobbyist contributes up to the legal maximum to all campaigns (as not many citizens do). We support reasonable measures that are designed to make this source of influence less likely. Specifically, under current law an individual's aggregate contributions to all campaigns are subject to statutory caps, although the FEC adjusts the precise amounts of these caps for inflation over

⁹¹ See Thomas M. Susman, *Private Ethics, Public Conduct: An Essay on Ethical Lobbying, Campaign Contributions, Reciprocity, and the Public Good*, 19 STAN. L. & POL'Y REV. 10, 15-21 (2008).

time.⁹² At present the amounts are capped at \$45,600 per election cycle for contributions to all candidates and \$69,900 for contributions to all PACs and parties.⁹³ We believe that a lobbyist's biennial aggregate contributions should be limited to half of the amounts allowed to other citizens by this statutory framework. If a limitation on the size of lobbyists' donations to individual campaigns should prove necessary, as a practical matter, in order to implement these aggregate caps effectively, that step should also be considered.

2. Constitutional considerations

Any discussion of legislation relating to campaign finance must devote some consideration to the substantial body of First Amendment doctrine that has grown up around this subject during the last several decades. The constitutionality of a proposal such as ours cannot be determined with certainty, nor evaluated here in detail,⁹⁴ but a discussion of two court of appeals cases dealing with related issues will shed light on the range of judicial responses that might be anticipated.

In *North Carolina Right to Life, Inc. v. Bartlett*,⁹⁵ the Fourth Circuit upheld a North Carolina statute that prohibited lobbyists from contributing to campaigns of members or candidates for the General Assembly while the legislature was in session. The court found that this measure served the compelling state interest in preventing corruption and the appearance of corruption, noting that “[i]f lobbyists are free to contribute to legislators while pet projects sit before them, the temptation to exchange ‘dollars for political favors’ can be powerful”⁹⁶ and that “the appearance of corruption may persist whenever a favorable legislative outcome follows closely on the heels of a financial contribution.”⁹⁷ The court also rejected the objection that the statute forced lobbyists to forego one constitutional right (to petition the government) in order to assert another (to contribute to candidates and incumbents), citing to the analogous tradeoff required by the Hatch Act, which the Supreme Court has upheld.⁹⁸

In contrast is the recent decision in *Green Party of Conn. v. Garfield*.⁹⁹ The Second Circuit reviewed a Connecticut statute that prohibited state contractors and lobbyists from contributing to legislators' campaigns. The court found this ban allowable as to contractors, some of whom had been implicated in recent corruption scandals, but not allowable as to lobbyists. Since the latter had

⁹² See Trevor Potter & Matthew T. Sanderson, *Federal Campaign-Finance Law: A Primer for the Lobbyist*, Chapter 21, THE LOBBYING MANUAL, *supra* note 1, at 431-32.

⁹³ *Id.* at 432.

⁹⁴ For a survey of cases in this area, which have been largely, though not entirely, supportive of state-law restrictions on lobbyists' participation in campaign finance, see Joseph E. Sandler, *Lobbyists and Election Law: The New Challenge*, Chapter 36, THE LOBBYING MANUAL, *supra* note 1, at 751, 756-57 (2009).

⁹⁵ 168 F.3d 705 (4th Cir. 1999).

⁹⁶ *Id.* at 716.

⁹⁷ *Id.*

⁹⁸ *Id.* at 717-18. For additional case authority supporting regulation, see *Preston v. Leake*, 2010 WL 4153295 (E.D.N.C. 2010); *Institute of Gov'tal Advocates v. Fair Pol. Practices Comm'n*, 164 F. Supp. 2d 1183, 1189-94 (E.D. Cal. 2001).

⁹⁹ 616 F.3d 189 (2d Cir. 2010).

not been involved in the recent scandals, a total ban on contributions was impermissible.¹⁰⁰ A limitation on contributions would adequately serve the state's interests.¹⁰¹ Moreover, neither contractors nor lobbyists could be prohibited from *soliciting* contributions, as another part of the statute had provided.¹⁰² The court said that solicitation is, after all, "speech," and thus was subject to strict scrutiny.¹⁰³ Although the district court had upheld the solicitation bans by contending that a contractor's or lobbyist's bundling of many contributions could exert improper influence, the court of appeals disagreed. It noted that the statute reached not only bundling, but also all other solicitations, including small-scale ones, and for this reason, among others, was not the "least restrictive alternative."¹⁰⁴

These two court of appeals decisions aptly illustrate the uncertainties that accompany the case law in this area, but the Task Force believes that its proposal stands up well against the body of First Amendment doctrine as a whole. In the first place, the goal is not to regulate the lobbyist's speech, in the sense of expression of opinion. The primary target is the *conduct* inherent in the kind of organized fundraising activities that can trigger inordinate influence for the lobbyist who engages in them on behalf of a Member or other candidate. Under standard election law principles, a contribution to the campaign of a candidate, thereby augmenting *that candidate's* ability to speak, is not equivalent to an expenditure of money to express one's own views. Legislatures are generally entitled to somewhat more flexibility when they seek to regulate the former as opposed to the latter, especially since direct contributions to a campaign are deemed to carry a greater potential for corruption than are independent expenditures in support of the candidate.¹⁰⁵

Second, the Task Force's proposal addresses a well known – indeed notorious – real-world problem of inordinate influence and unseemly appearances. Presumably a legislative or judicial record could be assembled to substantiate it in a manner that could reassure a reviewing court, much as Connecticut's experience with scandal among its government contractors became the basis for the portion of that state's statute that the Second Circuit did uphold.

Third, our proposal (more fully elaborated below) has been constructed to address this problem in a balanced and limited fashion. We do not seek to eliminate the lobbyist's own contributions to a legislator's or other candidate's campaign; even the aggregate limitations that we propose are not very confining. Indeed, in this regard our proposal is narrower than both the North Carolina and Connecticut laws involved in the cases discussed above.

To be sure, should the courts ultimately decide that the proposal sweeps too broadly, it could be narrowed in various ways without departing from the basic concept. For example, in the *Green Party* case, the district court defended the Connecticut solicitation ban as a means of preventing

¹⁰⁰ *Id.* at 206-07.

¹⁰¹ *Id.* at 206.

¹⁰² *Id.* at 207-210.

¹⁰³ *Id.* at 208.

¹⁰⁴ *Id.* at 209-10.

¹⁰⁵ *See, e.g.*, *FEC v. Colo. Repub. Fed. Campaign Comm.*, 531 U.S. 431, 437-38, 440-42 (2001); *Buckley v. Valeo*, 424 U.S. 1, 14-23, 45-47 (1976).

lobbyists from bundling contributions by their “deep-pocketed clients.” “If that is the case,” the court of appeals responded, “then a less restrictive means to address the bundling problem would be simply to ban lobbyists from soliciting contributions from their clients”¹⁰⁶ The solicitation ban in our proposal could potentially be circumscribed in that same fashion. Similarly, the Second Circuit suggested that a less restrictive alternative to the Connecticut statute would be “to ban only large-scale efforts to solicit contributions”¹⁰⁷ This idea, too, might be taken into account in the development and refinement of our proposal. In the end, however, advance speculation about the degree of “narrow tailoring” that some reviewing court might eventually demand is somewhat fruitless. On the basis of what can be known now, the Task Force believes that its proposal is reasonably framed in relation to the problem it aims to alleviate, and for that reason stands a good chance of surviving First Amendment scrutiny, either in its entirety or at least in its essential features.

3. Implementation issues

The Task Force has given extended consideration to several of the implementation questions that our proposed limitations on lobbyist fundraising would entail. Thus, we have identified several subsidiary principles that would seek to prevent circumvention of the basic objective of the plan, but that also would avoid unnecessary burdens on both lobbying and campaign fundraising activities. Elaboration of these details should be helpful to the ultimate construction of a plan that would be politically acceptable and also demonstrate the care in drafting that a reviewing court would expect. Other details, however, will probably have to be worked out in the drafting process. For example, the two-year cooling-off periods envisioned by our proposal may require some adjustments in order to avoid practical difficulties (such as problems that might ensue from expiration of a ban in the middle of a congressional term).

Challengers. A detail noted in our description of the basic proposal is that it should apply to *candidates* for Congress, in addition to incumbents and their staff. In many situations, of course, it could not apply on a completely equal basis because a lobbying contact with someone who is not a “covered official” is, by definition, impossible. However, where the circumstances do permit parity between challengers and incumbents, we believe it should be maintained. Such parity would be important to the political acceptability of the proposal and is not uncommon in election regulation. (For example, in *North Carolina Right to Life* the Fourth Circuit squarely upheld an aspect of the North Carolina statute that forbade lobbyists from contributing to challengers.) It also has functional justifications. For example, an executive branch official who intends to run for Congress might be especially receptive to a lobbying contact today if motivated by the hope (or worse, the assurance) of fundraising assistance from the lobbyist in next year’s congressional campaign. Similarly, a lobbyist’s fundraising for a challenger today might lead easily to gratitude and reciprocation when the lobbyist later brings a legislative matter to the newly elected Member.

Imputation. Another set of issues concerns the extent to which actions of an individual

¹⁰⁶ 616 F.3d at 209.

¹⁰⁷ *Id.*

lobbyist should be imputed to the lobbyist's employer or other members of the same firm. We believe that, when a registered lobbyist makes a lobbying contact with a Member, that contact should not prevent *nonlobbyist colleagues* from raising money for that Member during the ensuing two years. To that extent the disqualification is personal to the lobbyist. However, when a registered lobbyist makes a lobbying contact with a Member and is thereby disqualified from fundraising for that Member for the next two years, the same disqualification should apply to other registered lobbyists in the same firm. Without such a rule, the basic prohibition could be easily circumvented: one lobbyist in the firm could lobby for Senator A and raise money for Senator B, while a colleague could lobby Senator B and raise money for Senator A. Moreover, anyone who is employed as a registered lobbyist can reasonably be expected to anticipate that this status would lead to restraints on his or her future behavior. (The Hatch Act analogy suggested by the Fourth Circuit¹⁰⁸ seems pertinent to this rationale.) The disqualification should also prevent the firm *as an entity* from raising funds for a Member, staffer, or candidate, such as by sponsoring a fundraising event. The Task Force considered a less restrictive alternative—permitting the firm to raise funds for the Member, but shielding the lobbyist from participating in that decision; however, it deemed that option unmanageable. When one bears in mind that individual nonlobbyist members of the firm would not be constrained in their fundraising, this proscription on the firm as an entity does not seem overly onerous.

In the converse situation, when a registered lobbyist has engaged in fundraising for a Member, neither that lobbyist nor the employer firm or company as a whole should be permitted to lobby that Member during the next two years. On the other hand, no ban should apply if a nonlobbyist at the same firm did the fundraising.

Fundraising. For purposes of these recommendations, fundraising activity “for the campaign” of a Member should include fundraising for any other political committee controlled by that Member, such as a leadership PAC. A track record of having recently lobbied a particular Member should not foreclose a lobbyist from raising money for a national party committee, except that the lobbyist should not be permitted to designate that Member as an ultimate recipient of the funds.

Fundraising for an organization that intends to spend independently, rather than to funnel the funds to the Member's own campaign, is not covered by our recommendation (due to First Amendment concerns), but consultation by the lobbyist with the Member or the Member's personal or campaign staff about such fundraising should trigger the ban on lobbying the Member.

Finally, these proscriptions should apply only to fundraising for election or reelection campaigns for Congress, not to an official's campaign for the presidency or vice presidency.

"Solicitation" of financial support for a candidate should be distinguished from generally “talking up” the candidate. Established FEC rules defining solicitation could provide a backdrop for

¹⁰⁸ 168 F.3d at 717-18.

drawing this distinction.¹⁰⁹ Relatedly, consideration should be given to ways in which isolated or casual acts of soliciting contributions might be exempted from the general rules of disqualification envisioned by our recommendations. Such an exemption would assuage one of the concerns expressed by the Second Circuit in *Green Party*. The court gave the hypothetical example of a contractor (or presumably lobbyist) “advising his mother about whether she should contribute to a particular . . . candidate.”¹¹⁰ We would support an exemption for family members and such other exemptions as are thought constitutionally necessary. Such limitations would, nevertheless, be consistent with the basic objective of the proposal, which is designed to dissipate the interplay between lobbying and a lobbyist's substantial, rather than minimal, involvement in the fundraising process.

B. Earmarks

Earmarks in congressional legislation, and lobbyists' role in promoting them, have elicited vigorous criticisms, particularly in recent years.¹¹¹ The controversy has developed to the point that outright abolition of earmarks is currently under serious consideration, although the prospects for their disappearance are uncertain at best.¹¹² Regardless, the area seems ripe for reform. However, the connection between earmarking problems and lobbying problems is somewhat indirect, and consequently not all of the potential reforms lie within the purview of the Task Force.

Earmarks are provisions in appropriations bills that specifically direct that funds be spent on a particular local project or use. They can be seen in positive terms, as a normal expression of the congressional power of the purse. Earmarks can serve to ensure that the benefits of a spending bill will be shared widely, which may be unavoidable as a means of securing sufficient support for it to pass. It can also be argued that members of Congress, who understand the needs of their respective districts, often have an advantage in allotting expenditures over executive agency staff members who would otherwise make spending decisions. Furthermore, earmarks represent a small percentage of overall federal spending, and they often consist in reallocating spending rather than increasing the total amount. These facts cast doubt on any notion that earmark reform would contribute substantially to improvement of the nation's fiscal problems.

Nevertheless, the Task Force recognizes the force of several criticisms of earmarks. In some statutory contexts, they can result in an end-run around relatively rigorous, merit-based review

¹⁰⁹ See 11 C.F.R. § 300.2(m).

¹¹⁰ 616 F.3d at 209.

¹¹¹ See, e.g., Kevin Bogardus, *Lobbyists and Watchdog Groups Form Coalition to Push for Earmark Reforms*, THE HILL, Sept. 28, 2010, available at <http://thehill.com/business-a-lobbying/121495-lobbyists-and-watchdogs-push-for-earmark-reforms> (last visited Dec. 16, 2010).

¹¹² The House Republican Conference voted in November to establish a two-year moratorium on earmarks, effective in the 112th Congress, GOP.GOV, Nov. 18, 2010, available at <http://www.gop.gov/blog/10/11/18/house-gop-unanimously-adopts-earmark>, but a similar moratorium was defeated in the Senate soon afterwards. Felicia Sonmez, *Senate rejects earmark moratorium*, THE WASHINGTON POST, Nov. 30, 2010, available at <http://voices.washingtonpost.com/44/2010/11/senate-rejects-earmark-morator.html>.

processes, such as the peer review procedures used in the funding of scientific research. Moreover, earmarks often have been inserted into appropriations measures anonymously and with little or no review. Under these circumstances, members of appropriations committees or subcommittees often wield disproportionate influence, and money may be allocated to projects that would probably be rejected as wasteful if Congress were to examine them more closely. The lack of transparency and of effective procedural checks can also induce members to arrange for special interest spending at the behest of lobbyists, sometimes in response to campaign contributions or other favors, to the detriment of the public interest.¹¹³ The last of these dangers is directly relevant to the mission of our Task Force.

Congress has recently taken steps to limit earmarks, but the situation has remained in flux.¹¹⁴ Even if it does not ultimately decide to institute a permanent ban on all earmarks, it could ban them in certain contexts, particularly where they supersede a plainly superior method of allocating funds. The House and Senate might also consider revamping their internal procedures to ensure that earmark requests will receive more timely public disclosure and will not be adopted without meaningful consideration by, and the concurrence of, a wider range of congressional participants. For example, the proposed Earmark Transparency Act of 2010, H.R. 5258 and S. 3335, would have created a single, searchable online database for all earmark requests and provided for a point of order to be raised against any bill or joint resolution, or amendment thereto or conference report thereon, unless it met these disclosure requirements. Measures of these kinds, however, are not squarely within the Task Force's mandate, and we make no specific recommendations with regard to them.

To address the specific issue of lobbyists' participation in promoting earmarks, we recommend that Congress require all individuals who are retained to lobby for earmarks to certify in their LD-203 filings ("Lobbyist Contribution Report") that they have not contributed to, nor sought individual or PAC contributions for, those Members whom they have lobbied for earmarks during

¹¹³ See, e.g., R. Jeffrey Smith, *Thin Wall Separates Lobbyist Contributions and Earmarks*, THE WASHINGTON POST, March 7, 2010, A06, available at http://www.washingtonpost.com/wp-dyn/content/article/2010/03/06/AR2010030602374_pf.html (last visited Dec. 16, 2010). See also Pete Yost, *Prosecutors Recommend 57 Months for Ex-Lobbyist*, THE ASSOCIATED PRESS, Dec. 13, 2010, available at http://www.salon.com/wires/politics/12/13/D9K3C0A80_us_lobbyist_campaign_money/index.html.

¹¹⁴ Under HLOGA, Members of Congress are required to post information about their earmark requests on their websites. See, e.g., Pub. L. No. 110-81, § 521, 121 Stat. 760 (Sept. 14, 2007). However, some Members' disclosures seem to have been obscure and not consistent with the spirit of this requirement. See Matt Viser, *Uneven Response on House Earmarks*, BOSTON GLOBE, July 12, 2010, available at http://www.boston.com/news/nation/washington/articles/2010/07/12/uneven_response_on_house_earmarks (last visited Dec. 16, 2010). Also, in March 2010 the House Appropriations Committee instituted a ban on allowing earmarks to for-profit enterprises. See Committee on Appropriations, U.S. House of Representatives, *Appropriations Committee Bans For-Profit Earmarks*, March 10, 2010, available at http://appropriations.house.gov/images/stories/pdf/2010_Earmark_Reforms_Release-3.10.2010.pdf (last visited Dec. 16, 2010). In the abstract, this measure was at least roughly consonant with the above-mentioned concerns about money influence and the appearance of corruption in the enactment of earmarks. In practice, however, this prohibition was sometimes circumvented through the creation of nonprofit affiliates to receive the earmarked funds. See Eric Lipton & Ron Nixon, *Companies Find Ways to Bypass Ban on Earmarks*, N.Y. TIMES, July 4, 2010, available at <http://www.nytimes.com/2010/07/05/us/politics/05earmarks.html> (last visited Dec. 16, 2010). In any event, only a small proportion of all earmarks have generally been bestowed for the benefit of for-profit enterprises. For more recent developments, see *supra* note 112.

the current session of Congress. Employers of these lobbyists should be required to make a similar certification. If it is concluded that an outright ban on lobbyists' contributions to these Members' campaigns is constitutionally problematic, Congress could instead decide to allow these contributions up to a modest amount, such as \$250. This measure would permit the lobbyist to make a symbolic statement of support for the campaign—which is sometimes deemed important to the constitutionality of limitations on campaign contributions—but it would also take a strong stand against the conflicts of interest inherent in the interplay between lobbying for earmarks and supporting political campaigns.

A measure regulating lobbyists' contributions will not, of course, deal definitively with the public policy issues surrounding earmarks. With or without lobbyists' involvement, Members will continue to have strong incentives to pursue spending measures that benefit their particular districts, but have a questionable relationship with the broader national interest. Yet, by the same token, Congress could plausibly adopt this proposal in the interest of dispelling troubling conflicts of interest and appearances, without having first resolved broader questions about the proper role of earmarks in the appropriations process.

C. Contingent Fees

Approximately thirty-eight states broadly prohibit contingent-fee contracts for lobbying services.¹¹⁵ In addition, federal procurement contracts (other than those awarded by sealed bids) have for almost a century been required to contain a "Covenant against Contingent Fees," whereby government contractors must, in general, warrant that contingent fees or commissions have not been used to secure the contract.¹¹⁶ It is true that these measures were to some degree a product of an earlier era in which public policy was driven by misgivings about lobbying itself, as distinguished from abusive lobbying.¹¹⁷ Nevertheless, even in our day, in which lobbying has become more professionalized, these longstanding prohibitions appear to rest on an apprehension that still has resonance. The apprehension is that lobbyists may be more likely to overreach, or engage in unethical behavior, if they know during the course of their efforts that they will not earn a fee unless their efforts are successful.¹¹⁸ The impact of this pressure may, however, vary depending on the context in which the lobbying occurs.

Accordingly, the Task Force proposes a ban on contingent fees in lobbying in a relatively limited context—where the object of the lobbying is to obtain an earmark, tax relief, or similar authorization of a targeted loan, grant, contract, or guarantee. Where the lobbyist is seeking a narrow financial benefit for the client, the temptations for unethical behavior are probably at their greatest. The appearance of unseemliness, driven by public apprehensions about a possible corrupt

¹¹⁵ See Thomas M. Susman & Margaret H. Martin, *Contingent-Fee Lobbying*, Chapter 33, THE LOBBYING MANUAL, *supra* note 1, at 670 n.7. Canada's Lobbying Act also forbids contingent payment arrangements for lobbying. R.S. 1985, c.44 (4th Supp.), § 10.1 (as amended in 2006).

¹¹⁶ Susman & Martin, *supra* note 115, at 670-72.

¹¹⁷ *Id.* at 673-74.

¹¹⁸ *Id.* at 679-80.

exchange, is likely to be particularly strong in that setting also, as taxpayer dollars are directly involved. Indeed, in a number of situations involving earmarks, as discussed above, there are reasons to think that this type of legislative action should not be occurring in the first place. In those circumstances, the contingent fee contract could be faulted for possibly making the lobbyist more determined to press for the arrangement to be made.

The ban proposed here would not be cost-free. The opportunity to resort to a contingency fee contract may enable some private persons to obtain representation that they could not otherwise afford. It might, for example, enable a town to assure citizens that it will not have to pay a lobbyist's bill unless it obtains the sought-for relief. In this regard, contingency fee arrangements may promote norms of equal access to justice. However, the Task Force believes that, at least in the limited circumstances to which its proposal would apply, the benefits of a prohibition justify these costs, because the ban may head off overly aggressive advocacy as well as an improvident payment from the public treasury.

Finally, with respect to types of lobbying to which the ban would not apply, and also in the event the proposed ban is not adopted, we recommend that a lobbyist who enters into a contingent fee contract should be required to file a copy of it as an attachment to the relevant LD-1 or LD-2 form. This requirement would induce responsible behavior by deterring fee arrangements that could not withstand public scrutiny. It would also serve the central purpose of the LDA, because a contingent fee by its nature would not otherwise be disclosed until the job is finished. Thus, early disclosure of the fee arrangement would result in the kind of timely transparency that the LDA is designed to elicit with respect to lobbying generally.

D. Byrd Amendment

As discussed in Part II.A, the Byrd Amendment remains an especially troublesome feature of lobbying regulation. Drafted hastily and with much less than the customary degree of public vetting, the Amendment contains a host of ambiguities. The Office of Management and Budget, which has implementation authority, issued "interim" rules many years ago, without public proceedings, and it has never finalized them.¹¹⁹

There are valid arguments for strengthening the Amendment, as well as for narrowing or repealing it, but in any event Congress should revisit the statute and make a searching reappraisal of its ends and means. Pending that legislative review, OMB should proceed to issue final rules that will dissipate much of the uncertainty and thereby facilitate compliance with the statute.

¹¹⁹ For a detailed discussion of these problems, see Thomas M. Susman, *The Byrd Amendment*, Chapter 15, THE LOBBYING MANUAL, *supra* note 1.

V. ENFORCEMENT

As we suggested in Part III.A, the lack of vigorous enforcement of the LDA remains a matter of continuing concern for the Task Force.¹²⁰ Indeed, without more effective enforcement, controversy over reform of the substantive requirements of the LDA and related legislation may prove academic.¹²¹

Since the enactment of the LDA, the Offices of the Clerk of the House of Representatives and the Secretary of the Senate have forwarded thousands of cases to the Department of Justice for consideration of apparent noncompliance with the LDA, but the results of these referrals have been disappointing, to say the least. While the Department has sent out hundreds of noncompliance letters, there has been no significant follow-up in terms of commencing enforcement actions where LDA registrants do not rectify identified violations.¹²² Moreover, there is no sustained effort to uncover cases of lobbyists who should register and file disclosure forms, but do not do so. The Department, in fact, “has never filed a criminal case or civil lawsuit to enforce the 15-year-old lobbying law and has reached out-of-court settlements in only three cases, which are now five years old.”¹²³ Even these three cases were unaccompanied by the kind of written explanations that other agencies regularly provide with settlement orders, with the result that members of the lobbying community are unable to use them to infer the working law of the agency. (In fact, information on these three cases became public only as the result of a Freedom of Information Act request by a journalist; DOJ never made a formal disclosure of them on its own initiative.)

The Department’s continuing lackluster performance suggests that at least some of the obstacles to effective LDA enforcement are structural. The U.S. Attorney’s office specializes in criminal and civil enforcement actions in court—a mode of adjudication that is disproportionate to the severity of most LDA violations. A well-designed LDA enforcement agency would be able to resort to proceedings such as rulemaking and administrative penalty actions, which are better suited to resolving issues and allegations of violation that are, in many instances, relatively small-scale in terms of overall importance. The rulemaking process would also be conducive to the promulgation of anti-circumvention rules, which would serve to prevent regulated persons from doing indirectly what they are prohibited from doing directly. In short, the basic responsibility for enforcing the Act should be given a new home.

What agency, then, should be entrusted with this revamped set of powers? One potential candidate would be the Federal Election Commission, which already administers a disclosure system that relates to a kindred part of the political process. Our proposed restrictions on lobbyists’

¹²⁰ For an examination of LDA enforcement history and some options for statutory changes to improve enforcement efforts, see William V. Luneburg, *The Evolution of Federal Lobbying Regulation: Where We Are Now and Where We Should Be Going*, 41 MCGEORGE L. REV. 85, 119-30 (2009).

¹²¹ *Id.* at 119-20.

¹²² See 2009 GAO Study, *supra* note 44, at 16-17 and Table 5.

¹²³ Kenneth P. Doyle, *DOJ Official Cites Progress on LDA, Says Compliance Action Coming Soon*, BNA MONEY & POL. REP., April 9, 2010.

fundraising for political campaigns, as outlined in Part IV.A. above, would arguably make an especially good fit with the FEC's other responsibilities. Much can be said for the FEC's capacity to dispose of routine, bureaucratic matters effectively at the staff level. At the agency head level, however, the FEC's unique structure of evenly balanced partisan membership can lead to paralysis on policy questions, especially during periods when the philosophical premises of the commissioners are widely split (as at present).

A better solution, therefore, may be to entrust responsibility for LDA enforcement to an executive branch agency. One distinct advantage of such an assignment is that the new or reconstituted agency would have political accountability if it did a poor job of enforcing the Act. The capacity to call upon an administrator to defend the agency's enforcement record would create an incentive to deliver satisfactory results that does not exist at present. The recipient of this responsibility should be given an appropriate set of tools, including rulemaking and administrative civil penalty authority, as well as the capacity to conduct investigation of suspected violators. The Civil Division of the Department of Justice might, for example, be a reasonable candidate. Assignment to the Civil Division would be consistent with the Department's tradition of separating civil and criminal responsibilities. Thus, the unit that wields rulemaking and adjudicatory authority should be able to consult, when necessary, with prosecutors (presumably in the Public Integrity Section), but it should not be able to threaten regulated parties with prosecution on its own.

In the end, the substantive and enforcement dimensions of LDA reform are somewhat interdependent. An improved set of procedures for implementing the Act seems essential. However, the level of enforcement of any regulatory program is often related to the moral authority and credibility of the program itself. We hope that implementation of our substantive recommendations will contribute to the creation of a revised LDA that will be broadly perceived as establishing a more rationally drawn, credible, and uniform body of rules than now exists. In turn, this development may lead to more vigorous enforcement of the Act against persons who do not comply with it.