

AMERICAN BAR ASSOCIATION

ADOPTED BY THE HOUSE OF DELEGATES

AUGUST 8-9, 2011

RESOLUTION

RESOLVED, That the American Bar Association urges Congress to:

(1) Amend the Lobbying Disclosure Act (LDA) by:

(a) narrowing the current threshold language under which a lobbying firm or organization need not register under the LDA unless it employs a person whose lobbying activities constitute twenty percent or more of the time that he or she spends in working for a particular client during a quarterly period, provided that Congress should establish reasonable threshold limitations on the obligation to list any particular individual as a federally registered lobbyist, including measures designed to avoid imposing undue financial burdens on small entities;

(b) requiring LDA registrants and their clients to disclose in quarterly reports the lobbying support activities in which they have engaged, as well as the lobbying support activities performed by firms that they have retained, including strategy, polling, coalition building, and public relations activities;

(c) requiring on quarterly reports the identification of (i) individuals principally involved in planning, directing, or coordinating lobbying support activities, as well as (ii) individuals with any level of involvement in such activities who have recently served as high-ranking federal officials; and

(d) requiring LDA registrants to disclose, subject to current exemptions, on quarterly reports all congressional offices, congressional committees, and federal agencies and offices contacted by lobbyists employed by those registrants.

(2) Provide that a federally registered lobbyist may not:

(a) lobby a member of Congress for whom he or she has engaged in campaign fundraising during the past two years;

(b) engage in campaign fundraising for a member of Congress whom he or she has lobbied during the past two years;

(c) make or solicit financial contributions to the reelection campaign of a member of Congress whom the lobbyist has been retained to lobby for an earmark or other narrow financial benefit; or

104B

(d) enter into a contingent fee contract with a client to lobby for an earmark or other narrow financial benefit for that client.

(3) Transfer authority to enforce the LDA to a suitable administrative authority and empower that agency to utilize appropriate tools such as rulemaking, investigation, and imposition of civil or administrative penalties.

REPORT

The state of the Nation’s lobbying laws, and the role of lawyers in the practice of lobbying, has been widely debated in recent years. Restraints imposed on lobbyists in recent legislation and in a series of executive orders and policies adopted by President Obama have responded to this controversy, but these measures have failed to quell the debate and in some ways have fueled it.

In 2009, the Section of Administrative Law and Regulatory Practice¹ appointed a Task Force on Federal Lobbying Laws to review the condition of the Nation’s lobbying laws and to make suggestions for improvements. The Task Force completed its final report in January 2011. The present report and resolution give the House of Delegates an opportunity to review issues raised by the Task Force and to adopt certain of its specific proposals as ABA policy.

The Task Force consisted of a distinguished, bipartisan group of lawyers (some of whom are registered lobbyists),² members of public interest organizations,³ and academics.⁴ Also contributing to the Task Force’s deliberations were several nonvoting liaisons and observers.⁵ Several of the participants in this process are editors of or contributors to the Section’s authoritative compliance manual on federal lobbying law and practice (now in its fourth edition).⁶ The Task Force held eleven meetings in 2009 and 2010 and ultimately released its recommendations in a detailed thirty-page report, “Lobbying Law in the Spotlight: Challenges and Proposed Improvements.”⁷ The breadth and depth of the Task Force’s recommendations testify to

¹ The Section has long served as a focal point for discussions within the ABA on lobbying regulation and has sponsored other lobbying reform proposals in the House of Delegates. *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).

² Nicholas W. Allard, Patton Boggs LLP; H. Russell Frisby, Jr., Stinson Morrison Hecker LLP; Rebecca H. Gordon (*Co-Chair of Task Force*), Perkins Coie LLP; Deborah J. Jeffrey, Zuckerman Spaeder LLP; Thurgood Marshall, Jr., Bingham McCutchen LLP; Trevor Potter (*Co-Chair of Task Force*), Caplin & Drysdale; Joseph E. Sandler (*Co-Chair of Task Force*), Sandler Reiff & Young; John Hardin Young, Sandler Reiff & Young.

³ Meredith McGehee, Policy Director, The Campaign Legal Center; Melanie Sloan, Executive Director, Citizens for Responsibility and Ethics in Washington; Michael Stern, Co-Chair, Administrative Law and Agency Practice Section, District of Columbia Bar.

⁴ Charles Fried (*Co-Chair of Task Force*), Beneficial Professor of Law, Harvard Law School; Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Law School, Los Angeles; Ronald M. Levin (*Reporter for Task Force*), William R. Orthwein Distinguished Professor of Law, Washington University School of Law; William V. Luneburg, Professor of Law, University of Pittsburgh School of Law; James Thurber, Distinguished Professor and Director, Center for Congressional and Presidential Studies, American University.

⁵ Thomas M. Susman, Director, ABA Governmental Affairs Office, served as Counsel to the Task Force. Also serving as liaisons were Lisa Ellman, Senior Counsel, Office of Legal Policy, U.S. Department of Justice; Spencer Overton (liaison until July 2010), Principal Deputy Assistant Attorney General, Office of Legal Policy, U.S. Department of Justice; and Daniel Schuman, Policy Counsel, Sunlight Foundation.

⁶ *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*”).

⁷ Report of the Task Force on Federal Lobbying Laws, “[Lobbying Law in the Spotlight: Challenges and Proposed Improvements](#)” (ABA Sec. of Admin. L. & Reg. Prac.) (scheduled for publication in 63 ADMIN. L. REV. #3 (Summer

104B

the expertise and experience of its members.

The present resolution would put the ABA on record in support of certain of the Task Force's proposals that the Section believes are particularly important. These proposals relate to improvements in (1) registration and reporting under the Lobbying Disclosure Act (LDA)⁸; (2) regulation of lobbying-related activities to ameliorate conflicts of interest; and (3) enforcement of the LDA.

I. REGISTRATION AND REPORTING UNDER THE LOBBYING DISCLOSURE ACT

A. Background on the LDA

Debate about disclosure of lobbying activities naturally centers on the LDA. Indeed, the Act is primarily a disclosure regime. It is applicable both to lobbying firms and to entities that lobby on their own behalf. Where coverage requirements are met, such firms and organizations must register with the Secretary of the Senate and Clerk of the House and thereafter periodically file reports of lobbying activities, 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. To qualify as a "lobbyist," an individual has to (1) make more than one "lobbying contact" for the client over the course of the representation, and (2) spend at least twenty per cent of his or her time for the client on "lobbyist activities."⁹ 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).¹⁰ "Lobbying activities" include not only lobbying contacts, but also efforts in support thereof. 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, currently \$3000 per quarter for lobbying firms and \$11,500 per quarter for entities lobbying on their own behalf.

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.

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

2011) (hereinafter *Task Force Report*). The present report keeps citations to a minimum in the interest of readability, but its factual premises are extensively documented in the Task Force Report.

⁸ 2 U.S.C. § 1601 et seq. (2006).

⁹ *Id.* § 1602(10).

¹⁰ *Id.* § 1602(8).

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. It should be noted that grassroots lobbying does not usually trigger LDA registration and is not subject to disclosure where registration is required.

B. Premises of the Present Proposals

A major objective of the Task Force was to consider ways in which the registration and reporting system established by the LDA could be strengthened. Recent lobbying-related scandals, notably those related to Jack Abramoff,¹¹ 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.¹² 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 decision-making. 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.¹³ The challenge, therefore, is to devise approaches to effective disclosure that do not impede the beneficial roles that lobbyists play.¹⁴ Today, as attorneys increasingly find themselves providing analysis, advice, and advocacy

¹¹ 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.

¹² 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).

¹³ Nat'l Ass'n of Mfrs. v. Taylor, 582 F.3d 1 (D.C. Cir. 2009). The recent case of *Citizens United v. FEC*, 130 S.Ct. 878 (2010), does not call this holding into question. On the contrary, although that case invalidated certain prohibitions on corporate speech, it also *upheld*, by an 8-1 vote, disclosure and reporting obligations of corporations under the Federal Election Campaign Act. *Id.* at 913-16.

¹⁴ *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

104B

in the policy realm, the Bar has a natural interest in ensuring that the regulatory balance is struck wisely.

Recent government actions that have been designed to impose greater accountability upon lobbyists have complicated this inquiry. 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.¹⁵ However, the Honest Leadership and Open Government Act of 2007¹⁶ shortened the LDA 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 disclosure of political and other contributions on a semi-annual report (the LD-203); and imposed new requirements on political committees to report bundling of campaign contributions by registrants and their lobbyists. This statute was followed by several Obama Administration orders premised on the LDA concept of a “registered lobbyist,” including those banning gifts to high level executive branch appointees,¹⁷ limiting appointment opportunities for former lobbyists,¹⁸ requiring Internet disclosure of lobbyist communications regarding stimulus and TARP funding,¹⁹ and restricting lobbyists from being appointed or reappointed by executive branch agencies to agency advisory boards and committees.²⁰

According to some (though not all) accounts, the collective consequence of these actions has been, in some cases, to encourage 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. 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 focus of the present report is not on these restrictions as such,²¹ 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. For example, the presence of these restrictions suggests that information about the activities of at least some participants in a lobbying campaign

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. . . .”

¹⁵ 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.”).

¹⁶ Pub. L. No. 110-81, 121 Stat. 735 (Sept. 14, 2007).

¹⁷ See Exec. Order No. 13,490, § 1, 74 Fed. Reg. 4673 (Jan. 21, 2009).

¹⁸ *Id.*

¹⁹ See Memorandum from the President to the Heads of Executive Departments and Agencies, *Ensuring Responsible Spending of Recovery Act Funds*, 74 Fed. Reg. 12,531 (Mar. 20, 2009).

²⁰ Memorandum for Heads of Executive Departments and Agencies, *Lobbyists on Agency Boards and Commissions*, 75 Fed. Reg. 35,955 (June 18, 2010).

²¹ Using blanket authority procedures, the Section of Administrative Law and Regulatory Practice has sent a letter to the Administration suggesting that the presidential directive to curtail lobbyists' service on agency advisory committees is in tension with the purposes of the Federal Advisory Committee Act. See <http://www2.americanbar.org/sections/adminlaw/Blanket%20Authority/Letter%20to%20Norman%20Eisen%20on%20FACA%20March%2009.pdf>.

might be more successfully achieved if the disclosure obligations imposed do not require characterizing them as “lobbyists” and with respect to those individuals and organizations characterized as “lobbyists,” revisiting the negative collateral consequences of such characterization.

C. Broadening LDA Registration

The Task Force concluded²² that the universe of lobbying firms and organizations that are required to register under the LDA could be and should be broadened. Specifically, it urged that Congress should revise 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. Those two conditions are embedded in the LDA’s definition of “lobbyist.”²³ The Task Force recommended that Congress should retain the first condition (two or more lobbying contacts) but delete the second (the twenty-percent rule). The present resolution does not call for total elimination of the second condition, but it does maintain that the exemption should be narrowed.

In some ways, the second precondition to registration does render 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.

Although a change in this aspect of the LDA would constitute an expansion of the scope of the registration requirement, it could be structured in such a way that its incidence would fall primarily on firms and organizations that while not currently required to register, engage in significant lobbying work, including direct contacts with covered officials. Many 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, some 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.

Notwithstanding the proposed narrowing of the twenty-percent test in the LDA definition of “lobbyist” Congress need not require that every individual who engages in more than one lobbying contact for a registrant should automatically be treated as a “registered lobbyist” for purposes of the LDA and other lobbying-related laws. Under the structure of the LDA, registration forms are filed

²² *Task Force Report, supra* note 7, at 10-11.

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

104B

by employers, not by individuals. Status as a registered lobbyist depends on whether that individual has been *listed* by the employer on a registration or quarterly reporting form. Specifically, section 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." The Task Force suggested²⁴ that section 1603(b)(6) be amended to provide that a person need not be listed on a registration form as a lobbyist for a client unless the registrant anticipates that that 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. (The same threshold for listing was suggested for those persons who would be identified on quarterly reports as participating in lobbying activities or support.)

The present resolution takes a more global approach to the same issue, and is not recommending adoption of the twelve hours measure, or any specific reduction in the threshold applicable to individuals at all. It recommends that Congress establish "reasonable threshold limitations" on the registrant's obligation to list any particular individual as a federally registered lobbyist. The number of hours spent on lobbying activities is not the only relevant factor in that determination. Identification of an individual as a lobbyist on an LDA form can impair political participation through collateral consequences such as making him or her ineligible for certain positions in government or as an advisor to government. Congress should regard this impact as a cautionary factor when it determines the scope of the listing requirement. Moreover, an expansion of LDA coverage, effected through a reduction in the twenty percent threshold, may have a deleterious impact on small entities that have limited resources at their command. Furthermore, as with individuals, identification of any entity as a lobbying organization may have negative collateral consequences for that entity. Congress should take care to avoid imposing undue financial and other burdens on these entities.

D. Broadening LDA Disclosure

A fundamental problem with the present LDA disclosure requirements is that, 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 with a "covered official" in the government), its actions will not have to be disclosed. 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";²⁵ independent contractors do not fit within that term under the LDA.²⁶ In this respect, the LDA system contains a substantial gap in coverage that warrants a remedy if the public is to have an accurate grasp of the nature and scope of the typical lobbying campaigns conducted on behalf of the clients of LDA registrants.

²⁴ *Task Force Report, supra* note 7, at 11.

²⁵ *See* 2 U.S.C. §§ 1603(b)(6) and 1604(b)(2)(A)-(C) (2006 & Supp. III 2009).

²⁶ *Id.* § 1602(5)(A).

To ameliorate this gap, several steps should be taken. First, the range of covered activities should be broadened. 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.”²⁷ The statute should be expanded to encompass “lobbying support.” As stated in the resolution, this category should encompass such activities as mapping strategy, polling, coalition building, and public relations activity that may today not be captured as “lobbying activities.” The information to be reported regarding these support activities should be similar in its nature and scope to the disclosures already required regarding “lobbying activities.”

Second, registrants should be required to 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.

Third, a portion of the reporting obligation should be borne by clients. Many lobbying support activities would fall outside the scope of the requirement just described because they are arranged by the lobbying client, not by its outside lobbying firm. Accordingly, 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 as much “searchability” as is provided for other lobbying reports. 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. Thus, the client and the lobbying firm should each be responsible for reporting activities that they respectively procured, paid for, etc.

For the most part, clients should be required to identify only those individuals who are “principally involved in planning, directing, or coordinating” lobbying support. However, that obligation should be supplemented by a requirement that, in general, any involvement by a former LDA covered official should also be reported.²⁸ This requirement would reflect the distinctive

²⁷ *Id.* §1602(7) (2006).

²⁸ Covered legislative branch officials include Members of Congress and congressional staff members. *See id.* § 1602(4). Covered executive branch officials are listed in §1602(3) (2006). The list 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].

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).

104B

significance that the public ordinarily attaches to the participation of former high governmental officials in a lobbying campaign. 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.

As noted above in the discussion of the registration requirements, the proposals offered here are not intended to imply that all individuals who would be identified on LDA reports must also be considered registered (listed) "lobbyists" for purposes of other provisions of federal lobbying law (e.g. the congressional gift rule ban, the bundling provisions, etc.) and executive orders. The Task Force contemplated that only an individual who both makes at least one "lobbying contact" (a direct communication to a covered official) and also devotes at least twelve hours of his or her time during the quarterly period to lobbying activities or support should be classified as a lobbyist in that sense.²⁹ This report outlined a broader approach in the preceding section, but it may be added here that the case for a limiting criterion is especially strong in regard to lobbying supporters who do not, themselves, lobby. Characterization of such individuals as "lobbyists" would not comport with their reasonable expectations, despite their importance to what can be accurately described as a lobbying campaign. More importantly, as emphasized above, that characterization now carries a variety of collateral consequences, including 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 broadened disclosure requirements proposed here are decoupled from that set of consequences.

Finally, Congress should require that, subject to current exemptions, disclosure forms should 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. . .".³⁰ The extension would directly serve the societal interest in tracing the impact of lobbying on public decisionmaking. Indeed, the objective of promoting the accountability of congressional and executive offices lobbied should arguably be deemed as important a public purpose of the LDA as the objective of promoting the accountability of private actors. In the abstract, 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 appropriate middle ground.

II. REGULATION OF LOBBYING-RELATED ACTIVITIES

A. Lobbyist Participation in Political Fundraising

²⁹ *Task Force Report*, *supra* note 7, at 14.

³⁰ 2 U.S.C. § 1604(b)(2)(B) (2006 & Supp. III 2009).

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, Congress should adopt measures that would tend to separate these two spheres of political activity.

(1) *Separation of lobbying and campaign fundraising*

The resolution 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.³¹ However, the resolution does not seek 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 raise First Amendment concerns. And, in any event, 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, the resolution does 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 does it envision 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 resolution takes the position 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. In addition, public awareness of this interplay has contributed to an appearance of corruption and, thus, to widespread mistrust of the legislature.

The resolution proposes, therefore, that an individual lobbyist should be prohibited from conducting 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. It also proposes, 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

³¹ See Joseph E. Sandler, *Lobbyists and Election Law: The New Challenge*, Chapter 36, THE LOBBYING MANUAL, *supra* note 6, at 755-56 (discussing cases).

104B

years. For this purpose, “fundraising” activity should be understood to include such actions as 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.³²

The Task Force report contained a lengthy discussion of implementation issues presented by this proposal.³³ It recommended, for example, that the restrictions should, insofar as practicable, apply to candidates for Congress as well as to incumbents; that the two-year disqualification of lobbyists from fundraising should also apply to other lobbyists in the same firm, but not to non-lobbyists in that firm; and that the ban on fundraising for a Member’s campaign should also apply to fundraising for that Member’s leadership PAC. The report also suggested that consideration be given to exempting isolated or casual acts of soliciting contributions from the general rules of disqualification envisioned by the proposal. Solicitation from family members, for example, could be exempted.

The present resolution is written in general terms and does not require the House of Delegates to pass upon the proposal at the level of detail just described. The point is simply that the proposal is capable of being refined through a process of enactment and administrative implementation. The Task Force’s analysis offers at least a substantial start toward the drafting of provisions that would be politically acceptable and that would demonstrate the care that a reviewing court would expect in dealing with any constitutional challenges that might be presented.

(2) *Constitutional considerations*

This discussion of potential legislation relating to campaign finance inevitably leads to questions about its compatibility with 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 this cannot be determined with certainty, nor evaluated here in detail, 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*,³⁴ 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”³⁵ and that “the appearance of corruption may persist whenever a favorable legislative outcome follows closely on the heels of a financial contribution.”³⁶ In contrast is the recent decision in *Green Party of Conn. v. Garfield*³⁷

³² “Lobbying contact” is a term defined at length in the LDA. See 2 U.S.C. § 1602(8) (2006).

³³ *Task Force Report*, *supra* note 7, at 23-25.

³⁴ 168 F.3d 705 (4th Cir. 1999).

³⁵ *Id.* at 716.

³⁶ *Id.*

³⁷ 616 F.3d 189 (2d Cir. 2010).

where 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 not been involved in the recent scandals, a total ban on contributions was impermissible.³⁸ A limitation on contributions would adequately serve the state's interests.³⁹

These two courts of appeals decisions aptly illustrate the uncertainties that accompany the case law in this area, but there is good reason to think that the proposal under discussion 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 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.⁴⁰

The recent and much discussed case of *Citizens United v. FEC*⁴¹ casts no doubt on this analysis. The essential holding of that decision was that corporations should enjoy free speech rights on a par with those of natural persons. As such, it has little bearing on the argument presented here, which deals solely with natural persons and rests on principles that predated that case. Furthermore, *Citizens United* was a case about independent expenditures, which would not be affected by the resolution. In fact, the Court expressly acknowledged and relied on precisely the same well-established distinction between direct contributions and independent expenditures as was explained in the preceding paragraph.⁴²

Second, the 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, the proposed restrictions are susceptible of being constructed to address this problem in a balanced and limited fashion. The carefully drawn model devised by the Task Force can serve

³⁸ *Id.* at 206-07.

³⁹ *Id.* at 206.

⁴⁰ *See, e.g.,* *FEC v. Colo. Repub. Fed. Campaign Comm.*, 533 U.S. 431, 437-38, 440-42 (2001); *Buckley v. Valeo*, 424 U.S. 1, 14-23, 45-47 (1976).

⁴¹ 130 S. Ct. 876 (2010).

⁴² *Id.* at 901-02, 908-09.

104B

as a starting point. Notably, it does not seek to limit the lobbyist's own contributions to a legislator's or other candidate's campaign. Indeed, in this regard the proposal is narrower than both the North Carolina and Connecticut laws involved in the cases discussed above.

To be sure, should the courts later decide that the provisions that ultimately emerge from the enactment and implementation process sweep too broadly, those provisions could be narrowed in various ways without departing from the basic concept. On the basis of what can be known now, the resolution's proposal appears 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.

B. Earmarks and Other Narrow Financial Benefits.

Earmarks in congressional legislation, and lobbyists' role in promoting them, have elicited vigorous criticisms, particularly in recent years. The controversy has developed to the point that each House of Congress has instituted a moratorium on earmarks for the duration of the current Congress,⁴³ although the prospects for their permanent abolition are uncertain at best. Regardless, other forms of legislation and executive actions that confer narrow financial benefits on particular entities or constituencies, such as tax relief or targeted loans, grants, and contracts, continue unabated. 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 present report.

Strictly speaking, earmarks are provisions in appropriations bills that specifically direct that funds be spent on a particular 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, several criticisms of earmarks have evident force. In some statutory contexts, they can result in an end-run around relatively rigorous, merit-based review 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. Monitoring by other participants in the decisionmaking process (including other lobbyists) is often less intense than in other contexts. 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-

⁴³ The House Republican Conference voted in November 2010 to establish a two-year moratorium on earmarks, effective in the 112th Congress. A similar proposal was defeated in the Senate soon afterwards, but in February 2011 the Senate Appropriations Committee voluntarily instituted a moratorium on earmarks for the duration of the current Congress.

interest spending at the behest of lobbyists, sometimes in response to campaign contributions or other favors, to the detriment of the public interest.⁴⁴ The last of these dangers is directly relevant to the concerns of the present resolution.

Assuming for present purposes that Congress will not ultimately decide to institute a permanent ban on all earmarks and similar targeted financial benefits, it should at least provide that a lobbyist may not make or solicit financial contributions to the reelection campaign of a member of Congress whom the lobbyist has been retained to lobby for such a measure. The Task Force suggested one means by which Congress could effectuate this goal: It could require all individuals who are retained to lobby for such benefits 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 those benefits during the current session of Congress. Employers of these lobbyists would be required to make a similar certification. Other means of achieving the same end may also be worthy of consideration. 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 narrow benefits and providing financial support for political campaigns.

A measure regulating lobbyists’ contributions will not, of course, deal definitively with the public policy issues surrounding earmarks and the like. 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, even if broader questions about the proper role of earmarks in the appropriations process remain unresolved for the indefinite future.

C. Contingent Fees

Approximately thirty-eight states broadly prohibit contingent-fee contracts for lobbying services.⁴⁵ 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.⁴⁶ 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

⁴⁴ See, e.g., R. Jeffrey Smith, Thin Wall Separates Lobbyist Contributions and Earmarks, *THE WASHINGTON POST*, March 7, 2010, A06.

⁴⁵ See Thomas M. Susman & Margaret H. Martin, *Contingent-Fee Lobbying*, Chapter 33, *THE LOBBYING MANUAL*, *supra* note 6, 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).

⁴⁶ Susman & Martin, *supra* note 45, at 670-72.

104B

distinguished from abusive lobbying. 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 (or will earn a bonus only if) their efforts are successful. The impact of this pressure may, however, vary depending on the context in which the lobbying occurs.

Accordingly, the resolution calls for 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 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, at least in the limited circumstances to which the present proposal would apply, the benefits of a prohibition appear to justify these costs, because the ban may head off overly aggressive advocacy as well as an improvident payment from the public treasury.

III. ENFORCEMENT

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. Frontline enforcement authority in terms of seeking civil and criminal penalties is lodged solely in the United States Attorney. To date the Department of Justice has filed no formal enforcement actions and entered into only three formal settlements since the LDA was enacted more than 15 years ago.⁴⁷

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. 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.

The Department's continuing lackluster performance suggests that at least some of the

⁴⁷ See U.S. Government Accountability Office, 2009 Lobbying Disclosure/Observations on Lobbyists' Compliance with Disclosure Requirements, GAO-10-499 at 17 (Apr. 2010).

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.

An advantage of entrusting responsibility for LDA enforcement to an executive branch agency 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 or civil penalty authority, as well as the capacity to conduct investigation of suspected violators.

Respectfully submitted,

Michael Herz, Chair-Elect*
Section of Administrative Law and Regulatory Practice
August 2011

* The Section Chair is recused.

GENERAL INFORMATION FORM

Submitting Entity: Section of Administrative Law and Regulatory Practice

Submitted By: Michael Herz, Section Chair-Elect

1. Summary of Resolution(s).

The resolution urges Congress to update and strengthen federal lobbying laws by requiring fuller reporting of lobbying activities, forbidding certain conflicts of interest, and providing for more effective enforcement of the Lobbying Disclosure Act of 1995.

2. Approval by Submitting Entity.

The Council of the Section of Administrative Law and Regulatory Practice voted to approve the resolution at its spring meeting on April 10, 2011.

3. Has this or a similar resolution been submitted to the House or Board previously?

No.

4. What existing Association policies are relevant to this resolution and how would they be affected by its adoption?

None are directly relevant.

5. What urgency exists which requires action at this meeting of the House?

Issues addressed in the resolution, including the appropriate roles of lobbyists, campaign contributions, and earmarks, are subjects of active, ongoing debate.

6. Status of Legislation. (If applicable)

No bills containing the specific measures proposed in the resolution are known to exist.

7. Cost to the Association. (Both direct and indirect costs)

None.

104B

8. Disclosure of Interest. (If applicable)

Section Chair Jonathan Rusch abstained from voting on this Resolution due to his employment by the Department of Justice.

9. Referrals.

Section of Business Law

Section of Individual Rights and Responsibilities

Section of Public Contract Law

Tax Section - An earlier version of the resolution was revised to address concerns voiced from within the Tax Section.

Standing Committee on Election Law

Standing Committee on Ethics and Professional Responsibility

10. Contact Name and Address Information. (Prior to the meeting)

Professor Ronald M. Levin

Washington University School of Law

Campus Box 1120

St. Louis, MO 63130

(314) 935-6490 (tel)

levin@wulaw.wustl.edu

11. Contact Name and Address Information. (Who will present the report to the House?)

Randolph J. May

The Free State Foundation

P. O. Box 60680

Potomac, MD 20859

(301) 984-8253 (tel)

(202) 285-9926 (cell)

rmay@freestatefoundation.org

John M. Vittone

2017 Lanier Drive

Silver Spring, Md. 20910

(301) 585-0592 (tel)

(301) 580-8164 (cell)

vittone.john@gmail.com

EXECUTIVE SUMMARY

1. Summary of the Resolution

The resolution urges Congress to update and strengthen federal lobbying laws by requiring fuller reporting of lobbying activities, forbidding certain conflicts of interest, and providing for more effective enforcement of the Lobbying Disclosure Act of 1995 (LDA).

2. Summary of the Issue that the Resolution Addresses

Statutory limits on the scope of the LDA leave much lobbying activity unreported. Moreover, the practice of lobbying is often intertwined with fundraising for political campaigns or other conflicts of interest. In addition, the enforcement structure of the LDA is inadequate to ensure broad compliance with the Act.

3. Please Explain How the Proposed Policy Position will address the issue

The resolution urges Congress to amend the LDA so that more lobbyists will be obliged to register and their reports will be more informative. It also seeks to separate the practice of lobbying from solicitation of political contributions, as well as to forbid political contributions and contingent fee contracts when a lobbyist seeks an earmark or other narrow financial benefit for a client. In addition, the resolution urges Congress to entrust enforcement of the LDA to an administrative agency and to confer appropriate powers upon that agency.

4. Summary of Minority Views

No minority or opposing views are known to exist. An earlier version of the resolution was revised to address concerns voiced from within the Tax Section.