Congress Passes New Lobbying Reform Legislation

Congress last week passed sweeping lobbying reform legislation. Although it is not yet clear whether the President will sign the bill, we are providing this E-Alert, in response to client requests, to summarize the key lobbying disclosure, campaign finance, and government ethics provisions. We are available to provide our clients with more detailed, client-specific advice.

The optimistically titled Honest Leadership and Open Government Act of 2007 amends the federal Lobbying Disclosure Act of 1995, the Senate rules that regulate gifts to Senators and staff, and the federal criminal statute that defines lobbying restrictions for former government employees. The House previously amended its own gift rules. Other provisions affecting legislative procedure (so-called “earmarking reform”) and related matters are not addressed in this overview of the legislation’s ethics provisions.

Although in many respects the lobbying reform legislation makes only modest changes to the substantive rules previously in effect, for example leaving in place numerous exceptions to the congressional gift rules, it dramatically increases the civil and criminal exposure of lobbyists and their employers. And it is likely to lead to stricter enforcement of the existing rules.

Among the most significant changes are the following:

- For the first time ever, lobbyists and their employers will be liable for violations of the congressional gift rules. Until now, those rules have been nothing more than disciplinary rules of the House and Senate, applicable only to Members of Congress and their staff. Under the new legislation, gift giving in violation of the congressional gift rules can result in criminal exposure for the lobbyist and his or her employer.

- Lobbying firms, corporations, and associations that register under the Lobbying Disclosure Act will, for the first time, have to sign semiannual “certifications” attesting that they have not violated any provision of the notoriously complex House and Senate gift rules. It is likely that this certification requirement will force organizations that register under the LDA to adopt new due diligence procedures, so that there is a record supporting the individual who signs the certification, much the same way that the certification requirement of the Sarbanes-Oxley law caused public corporations to pursue elaborate due diligence before corporate officers could (or would be willing to) sign the certifications.

- Various provisions of the new law seem designed to goad the Department of Justice into much more zealous enforcement of the heretofore loosely enforced LDA. Most notably, it requires the Department of Justice to report to Congress twice annually on the number of enforcement actions taken by the Department under the LDA. (There has been very little LDA enforcement activity to date.) It also requires the Comptroller General of the United States to conduct random audits of LDA filings and to prepare an annual report on compliance with the LDA. It authorizes the Comptroller to “request” information from registrants, and while it stops short of authorizing the Comptroller to subpoena information, it allows the Comptroller to “notify” Congress of any refusal by a registrant to provide the requested information. Such notifications could presumably be made public.
• The long-standing exception to the congressional gift ban, under which a gift valued at less than $50 was permissible, is eliminated for gifts from lobbyists and their employers. While this change makes it much harder (though not impossible) to take a Member or staffer out to lunch, Congress left in place the other well-known and often-invoked exceptions to the gift rules. For example, the exceptions for “personal friendship,” “widely attended” events, certain receptions, and campaign fundraisers are alive and well. (Each of these exceptions is nuanced, and you should seek specific advice before seeking to utilize them.)

• LDA reporting will be required on a quarterly rather than semiannual basis. In addition, lobbyist employers and individual lobbyists will have to file a new semiannual report detailing their political contributions.

• Over time, the new law will require much more extensive and more easily searchable publication of lobbying disclosure information on the Internet. For example, it will require online publication of Foreign Agent Registration Act registrations and reports for the first time. Media and watchdog groups will find it easier to track and critique lobbying activity.

Amendments to the Lobbying Disclosure Act

The new quarterly LDA reports required under the lobbying reform legislation will have to be filed within 20 days of the end of each quarter, which will not allow much time for due diligence in preparing such reports. All reports will have to be filed electronically.

In addition to these quarterly reports, twice annually registrants and individual lobbyists who are listed on LDA registrations will have to file new reports identifying certain of their political contributions. These new semiannual reports will be due within 30 days of the end of each half of the calendar year.

Specifically, these semiannual reports will include:

• The names of all political committees “established” or “controlled by” the registrant or the individual lobbyists.

• The names of federal candidates, leadership PACs, and political party committees to which aggregate contributions of $200 or more were made within the semiannual period by the registrant, individual lobbyist, or a PAC they established or control. The dates and amounts of the contributions must also be reported.

• The recipient, date, and amount of any contribution made to pay the cost of an event to “honor or recognize” a covered official. Covered officials includes all Members of Congress and staff, but only certain executive branch officials.

• The recipient, date, and amount of any contribution to an entity that is “named for a covered legislative branch official” or made to an entity in “recognition” of such official. This disclosure obligation apparently does not apply to contributions to entities named after executive branch officials or made in recognition of them. There may be some question as to what exactly counts as a contribution made in “recognition” of an official.

• The recipient, date, and amount of any contribution made to an entity “established, financed, maintained, or controlled” by covered legislative or executive branch officials. Again, there may be some question as to the circumstances under which an entity may be deemed to be “maintained” or “controlled” by an official, as well as the degree of due diligence that registrants and lobbyists must exercise to determine whether an entity meets these tests.
• The recipient, date, and amount of any contribution made to pay the costs of a meeting, retreat, conference, or similar event held by “or in the name of” one or more covered officials.

• The names of any presidential library or inaugural committee to which contributions of $200 or more are made during a semiannual period, along with the date and amount of such contributions.

As noted above, the bill requires that these semiannual reports filed both by registrants and by individual listed lobbyists must include a certification that the filer has read the House and Senate gift rules and that the filer has not provided nor even “requested” a gift to a Member or staffer with “knowledge” that receipt of the gift would violate the gift rules. Given the exceptionally arcane nature of the gift rules (made even more arcane by this very legislation), prosecutors may find it hard to prove that a lobbyist or his or her employer “knew” that a particular gift could not be accepted under the rules. Nonetheless, this certification provision will place lobbyists on the hook for violations of the gift rules in a way that was never true before. It would be prudent for registrants to adopt procedures for reviewing their gift-giving activity in advance of the semiannual filings, to ensure that lobbyists have a well-documented basis for signing the certifications of compliance.

The semiannual reports filed by LDA registrants and their lobbyists will not include reporting of “bundled” contributions. Federal candidates, leadership PACs, and political party committees will, however, have to report the identity of LDA registrants and listed lobbyists, or PACs established or controlled by them, who are “reasonably known” to have “provided” two or more “bundled” contributions totaling $15,000 or more per semiannual period. This dollar threshold will be indexed for inflation. While it is unclear what due diligence candidates and political committees will have to undertake to determine whether contributions are “reasonably known” to have been bundled by lobbyists, the bill requires the Federal Election Commission to publish regulations providing further guidance on this point.

Contributions are considered “bundled” if they are “forwarded” by or “credited” to a registrant, lobbyist, or their PAC. While it may well be that candidates and political committees will find it easy to avoid crediting contributions in a way that would require disclosure under this provision, it is also possible that the new law will have the perverse effect of actually encouraging lobbyists openly to bundle contributions in order to showcase their now reportable fundraising prowess.

The legislation changes somewhat the treatment of ad hoc coalitions under the LDA. Registrants generally will need to identify any entity that contributes more than $5,000 to fund the registrant’s lobbying activities during a quarterly period and which “actively participates” in the planning, supervision, or control of such lobbying activities.” This is apparently intended to be a lower threshold than the existing standard, which requires disclosure only for affiliated entities that “in whole or in major part” plan, supervise or control the lobbying activity. At the same time, organizations that have publicly disclosed memberships may not be required to list members on their LDA reports. As a general matter, the new legislation will likely require more disclosure of the participants in ad hoc coalitions.

**Changes to Congressional Gift Rules**

Generally, the House and Senate gift rules prohibit Members or staff from receiving gifts. There are numerous exceptions to this gift ban, however.

**“Less Than $50” Exception**

Under the new legislation, the exception for gifts of less than $50 in value (and less than $100 per year in total from a single source) no longer applies to gifts from lobbyists or those who employ
lobbyists, although it still exists for organizations that do not employ lobbyists. It is this change that makes it tougher for lobbyists to take Members and staff out to lunch or dinner.

**New Travel Rules**

Mirroring the travel rules adopted by the House earlier this year (see our January 8, 2007 Client E-Alert, “Changes to House Gift Rules”), the legislation extends to the Senate a rule that generally bans lobbyists and their employers from providing Senators and staff with free travel, but provides for narrow exceptions. The new travel rules are complex, but in essence Senators and Senate staff would be able to accept free travel offered by an employer of lobbyists only from charitable organizations or for one-day events. Free travel may not be accepted for a trip if it was planned, organized or arranged by or even at the request of a lobbyist. Lobbyists must not accompany the Senator or staffer on any segment of the trip. The Senate Ethics Committee will review Senatorial travel and must approve it in advance. The Ethics Committee is required to issue regulations implementing these new travel rules.

Senators will be allowed to pay for travel on corporate and other private aircraft, but will have to pay expensive charter rates. House rules already generally prohibit travel on corporate and private aircraft. The legislation also amends the federal election laws to require that Senators and presidential candidates pay charter rates for use of corporate or private aircraft for campaign travel. It prohibits House candidates from using corporate or private aircraft for campaign travel. (There is an exception allowing federal candidates to use aircraft owned or leased by them or their families.)

There is a special exception allowing free attendance by a Senator or Senate staff at a bona fide constituent event in the Senator’s home state, so long as the cost of any meal provided is less than $50 per person and no registered lobbyist attends.

**National Party Conventions**

The new legislation prohibits members from participating in an event “honoring that Member” during “the dates of the national party convention” of the Member’s party, if the event is “directly paid for” by a lobbyist or lobbyist employer. As drafted, the bill would appear to allow a Member to attend an event scheduled for immediately before or after the official dates of the convention, although it remains to be seen how the ethics committees will interpret this provision. The bill does not specify what would constitute an event “honoring” a Member. The use of the term “directly paid for” may provide some latitude to organizations that do not employ lobbyists but some of whose members do.

**Valuation Of Tickets To Sporting And Entertainment Events**

Although a lobbyist or lobbyist’s employer could no longer provide a free ticket to a sporting event under the “less than $50” exception to the gift ban, a Member or staffer could still buy a ticket from a lobbyist or the lobbyist’s client, including tickets to a skybox or similar venue. The new legislation requires that Senators and their staff must pay the face value of the ticket, or in the case of a ticket without a face value, the value of the ticket with the highest face value for the event (unless the Senate Ethics Committee can be persuaded in advance that the offered ticket is “equivalent” to another ticket that does have a face value).

**Overall Impact Of The New Gift Rules**

As a practical matter, it should be possible for much of the permissible gift activity that took place prior to the new legislation to continue if the activity is properly structured to fall within one of the various significant exceptions to the gift ban. Many events, for example, can be structured as widely attended events or as permissible receptions. Lunch and dinner events, which may not qualify under these exceptions, could nonetheless be structured as political fundraisers that are exempt from the gift rules.
And in appropriate, albeit narrow, circumstances, the “personal friendship” exception may apply to
lunches and dinners with Members and staff.

Apart from the significant changes to the travel rules, what will change under the new legislation is not
so much the substance of the gift rules themselves but rather the rigor with which they will need to be
adhered to. For example, the loose way in which lobbyists have understood and applied the personal
friendship and widely attended event exceptions will have to give way to more precise application of
those exceptions. The requirement to certify compliance with the gift rules twice annually, with
associated civil and criminal penalties for falsely certifying compliance, will require prudent lobbyists
and their employers to interpret the key exceptions to the gift rules conservatively.

**Post-Employment Restrictions**

The federal criminal laws restrict the lobbying activities of legislative and executive branch employees
after they leave government service. The post-employment restrictions for legislative branch
employees currently require a one-year “cooling off” period during which some but not all
Congressional employees are restricted in their freedom to lobby Congress. This cooling off period
does not restrict those former Congressional employees from providing “behind the scenes” legislative
advice to their private sector clients and employers. Earlier versions of the lobbying reform legislation
would have altered this rule dramatically by extending the cooling off period to bar behind the scenes
activity. The final legislation did not include this dramatic change, however.

Under the new legislation, the cooling off period for Senators, during which they cannot lobby
Congress, is extended from one to two years. House Members and senior staff are subject to a one-
year cooling off period during which Members are barred from lobbying Congress and staff are barred
from lobbying their former offices or committees. Senior Senate staff are barred from lobbying the
entire Senate for one year, whereas in the past they were barred only from lobbying their former office
or committee.

The post-employment restriction on lobbying by “very senior” executive branch employees, such as
cabinet secretaries, of their former agencies is extended from one to two years.

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This information is not intended as legal advice, which may often turn on specific facts. Readers should seek
specific legal advice before acting with regard to the subjects mentioned herein.