

# CRS Report for Congress

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## **Lobbying Congress: An Overview of Legal Provisions and Congressional Ethics Rules**

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# Lobbying Congress: An Overview of Legal Provisions and Congressional Ethics Rules

## Summary

This report provides a brief overview and summary of the federal laws, ethical rules and regulations which may be relevant to the activities of those who lobby the United States Congress. The report provides a summary discussion of the federal lobbying registration and disclosure requirements of the Lobbying Disclosure Act of 1995, the Foreign Agents Registration Act, questions on the propriety of contingency fees for lobbying, restrictions on lobbying with federal funds, post-employment (“revolving door”) lobbying activities by former federal officials, and House and Senate ethics rules which may be relevant to contacts with private lobbyists.

The Lobbying Disclosure Act of 1995 was enacted to replace a nearly 50-year old lobbying registration law that was seen as vague and inadequate. The more recent legislation establishes clearer criteria and thresholds for determining when an organization or firm should register its employees or staff as lobbyists. The Act is directed at professional lobbyists, that is, those who receive payments to lobby for an employer or a client, and requires the registration and reporting of certain identifying information and general, broad financial data. In addition to the Lobbying Disclosure Act, the Foreign Agents Registration Act requires the registration and reporting from those who act as agents of a foreign government or foreign political party, and who engage in “lobbying” or other similar political advocacy activities on behalf of their foreign principal.

Various provisions of federal law have been enacted and regulations promulgated to restrict the use of any federal funds for lobbying purposes, either by the agencies of the federal government or by federal contractors or grantees.

In attempts to limit what has been perceived to be potential undue or improper influence in governmental processes, restrictions have been adopted to limit the post-employment lobbying of certain high ranking officials of the federal government for a period of time after those officials leave government service (so-called “revolving door” laws). Similarly, to deal with perceptions of undue or improper influences, both Houses of Congress have adopted strict new rules regarding the acceptance of gifts and favors by Members, officers or employees of the House or Senate from private sources, particularly from registered lobbyists or agents of foreign principals. No gifts may be accepted by Members, officers or employees, except as permitted in the Rules of the respective chamber.

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# Lobbying Congress: An Overview of Legal Provisions and Congressional Ethics Rules

This report is intended to provide a brief overview and summary of the federal laws, ethical rules and regulations which may be relevant to the activities of those who lobby the United States Congress. The report provides a summary discussion of the federal lobbying registration and disclosure requirements of the Lobbying Disclosure Act of 1995, the Foreign Agents Registration Act, the propriety of contingency fees for lobbying, restrictions on lobbying with federal funds, post-employment (“revolving door”) lobbying activities by former federal officials, and House and Senate ethics rules which may be relevant to contacts with private lobbyists by Members, officers and employees of Congress.

Although the term “lobbying” may have developed a somewhat sinister and pejorative connotation over the years, the activities involved in lobbying are intertwined with fundamental First Amendment rights of speech, association and petition,<sup>1</sup> and may facilitate the exchange of important information and ideas between the government and private parties.<sup>2</sup> For those who act in a representative capacity for a client, lobbying the legislature for a change in the state of the law may be an important part of the services provided to the client. However, because of the substantial potential for *undue* or *wrongful* influence from those who are paid to influence the legislative process, there has developed a body of law and rules to regulate lobbying activities, as well as to regulate the activities of public officials in their interactions with those who lobby, particularly with reference to the potentially corrupting effect of large sums of money on the legislative process.<sup>3</sup> There are several federal statutory laws, as well as Rules of the House and Senate, which either apply to lobbying specifically, or which may be relevant to congressional lobbyists because the provisions bear upon a Member’s or employee’s dealings with those who attempt to influence the legislative process.

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<sup>1</sup>*United States v. Harriss*, 347 U.S. 612 (1954); *United States v. Rumely*, 345 U.S. 41 (1953); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-138 (1961); note generally, Hope Eastman, *Lobbying: A Constitutionally Protected Right*, American Enterprise Institute for Public Policy Research (1977).

<sup>2</sup>S. Rept. 99-161, 99<sup>th</sup> Cong., 2d Sess., “Congress and Pressure Groups: Lobbying in a Modern Democracy,” Senate Committee on Governmental Affairs 1-14 (1986).

<sup>3</sup>The Supreme Court expressed concern as early as 1853 with paid lobbying activities and undue influence, finding that a secret contingency contract for lobbying was void and unenforceable as a matter of public policy because it “tends to corrupt or contaminate, by improper influences, the integrity of our ... political institutions” by “creat[ing] and bring[ing] into operation undue influences” by those “stimulated to active partisanship by the strong lure of high profit.” *Marshall v. Baltimore & Ohio Railroad*, 57 U.S. 314, 333-334 (1853).

## The Lobbying Disclosure Act of 1995

In 1995 Congress completely rewrote the 50-year old law (the Federal Regulation of Lobbying Act of 1946) which had required certain registrations and disclosures of lobbying activities directed at Members of Congress. The new “Lobbying Disclosure Act of 1995”<sup>4</sup> provides more specific thresholds, and clearer and broader definitions of “lobbyist” and “lobbying” activities and contacts which will trigger the requirements for the registration and reporting of persons who are compensated to engage in lobbying.

The Lobbying Disclosure Act of 1995 is directed at so-called “professional lobbyists,” that is, those who are compensated to engage in certain lobbying activities on behalf of a client or an employer.<sup>5</sup> In addition to covering only those who are paid to lobby, the initial “triggering” provisions of the law cover only lobbying activities which may be described as “direct” contacts with covered officials. The law’s registration requirements are not separately triggered by “grass roots” lobbying activities. That is, an organization which engages *only* in “grass roots” lobbying, regardless of the extent of “grass roots” lobbying activities, will not be required to register its members, officers or employees who engage in such activities.<sup>6</sup>

The Act recognizes generally two kinds of lobbyists: (1) “in house” lobbyists of an organization or business – employees of that organization or business who are compensated, at least in part, to lobby on its behalf; and (2) “outside” lobbyists – members of a lobbying firm, partnership, or sole proprietorship that engage in lobbying for “outside” clients. When registration is required from a paid “lobbyist” under the lobbying law, such registration is done by the organization or the lobbying firm. That is, a business or organization which has employees who engage in a certain amount of lobbying on its behalf (“in-house” lobbyists), must register and identify its employee/lobbyists. “Lobbying firms” or entities (including a sole practitioner) who lobby or have employees, partners or associates who lobby for “outside” clients, must file a separate registration for each client represented, identifying such things as the lobbyist, the client and the issues.

The previous lobby registration statute enacted in 1946, as interpreted by the Supreme Court in *United States v. Harriss*, *supra*, was criticized for employing a general and equivocal test for registration and reporting, concerning whether lobbying

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<sup>4</sup>P.L. 104-65, December 19, 1995, 109 Stat. 691, as amended by the Lobbying Disclosure Technical Amendments Act, P.L. 105-166, April 6, 1998.

<sup>5</sup>See H. R. Rpt. 104-339, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess., at 2 (1995).

<sup>6</sup>Once an organization has met the threshold requirements for “direct” lobbying and is registered, certain background activities and efforts “in support of” its direct “lobbying contacts,” which may include activities which also support other activities or communications which are *not* lobbying contacts, such as grass roots lobbying efforts, may need to be disclosed generally as “lobbying activities.” 2 U.S.C. § 1602(7). Note H.R. Rpt. No. 104-339, 104<sup>th</sup> Cong., 1<sup>st</sup> Sess., “Lobbying Disclosure Act of 1995,” 13-14 (1995). The instructions of the Clerk of the House and Secretary of the Senate also note that “Communications excepted by Section 3(8)(B) will constitute ‘lobbying activities’ if they are in support of other communications which constitute ‘lobbying contacts.’”

was one's "main" or "principal purpose," and for providing no specific thresholds, or clear measures to trigger the requirements of the law. The new Lobbying Disclosure Act of 1995, however, provides more specific thresholds, triggering measures, and *de minimis* amounts.

*Expenditure Threshold.* Initially, it should be noted that there is a *de minimis* expense threshold below which the requirement for registration by organizations and lobbying groups or firms will not be triggered. Any organization which uses its own employees as lobbyists (in-house lobbyists) will not need to register if the organization's total expenses for lobbying activities do not exceed \$22,500 in a six-month period.<sup>7</sup> A lobbying firm (including a self-employed individual) does not need to register for a particular "outside" client if its total income from that client for lobbying related matters does not exceed \$5,500 in a six month filing period.<sup>8</sup>

*Contact and Time Threshold.* A "lobbyist" under the disclosure law is an organization's employee who engages in lobbying, or is someone who works on his or her own or for a lobbying firm and is retained by an organization or entity to lobby on its behalf, who makes more than one "lobbying contact," and spends at least 20% of his or her total time for that employer or client on "lobbying activities" over a six-month period.<sup>9</sup> A "lobbying contact" is an oral or written communication to a covered official, including a Member of Congress, congressional staff, and certain senior executive branch officials, with respect to the formulation, modification or adoption of a federal law, rule, regulation or policy. The term "lobbying activities" is broader than "lobbying contacts," and includes "lobbying contacts" as well as background activities and other efforts in support of such lobbying contacts.

*Items Disclosed on Registration.* Under the Act a "lobbyist" needs to be registered within 45 days after making the requisite lobbying contacts or within 45 days of being employed to make such contacts, whichever is earlier. Registration will be on identical forms filed with the Secretary of the Senate and Clerk of the House. The information on the registrations will generally include identification of the lobbyist, the client or employer, and any organizations other than the client that contribute more than \$10,000 for the lobbying activities in six months and play a major role in supervising or controlling the lobbying activities; an identification of any foreign entity that owns 20% of the client, controls the activities of the client or is an interested affiliate of the client; a list of the issues on which the registrant expects to engage in lobbying, and those on which he or she has already lobbied for the client or employer.

*Reports.* In addition to the *registration* of lobbyists, semi-annual reports, covering January 1 - June 30, and July 1 - December 31, are required to be filed. These reports will identify the lobbyist, clients and employers, and issues upon which

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<sup>7</sup>2 U.S.C. § 1603(a)(3)(A)(i). The threshold amount is adjusted every four years, 2 U.S.C. § 1603(a)(3)(B), and was adjusted January 1, 2001.

<sup>8</sup>2 U.S.C. § 1603(a)(3)(A)(ii). The threshold amount is adjusted every four years, 2 U.S.C. § 1603(a)(3)(B), and was adjusted January 1, 2001.

<sup>9</sup>2 U.S.C. § 1602(10).

one lobbied, and are to provide a good faith estimate of lobbying costs, rounded to the nearest \$20,000 (if expenses exceed \$10,000).

*Oral or Written Identifications to Officials Being Lobbied.* The Act expressly requires that a lobbyist, upon the request of any “covered official” during an oral contact, provide an identification of his or her client, whether or not the lobbyist is registered under the Act, and a disclosure of any interests of foreign affiliates.<sup>10</sup> If a written lobbying contact is made, the lobbyist is required on his or her *own* to identify any foreign entity on whose behalf the contact is being made, and any foreign entity which owns 20% of the client or organization, controls or supervises the client, or is an affiliate with a direct interest in the lobbying activities.

*Registration and Filing Information.* Registrations, as well as the semi-annual reports from already registered lobbyists, are made to the Clerk of the House of Representatives, Legislative Resource Center, and to the Secretary of the Senate, Office of Public Records. Forms for registration and reporting, and detailed filing instructions for lobbying firms and for organizations with lobbyists are available from the offices of the Clerk of the House and the Secretary of the Senate, and may also be accessed on the Internet for the House at [<http://clerkweb.house.gov>] ; and for the Senate at [[http://www.senate.gov/contacting/contact\\_lobby.html](http://www.senate.gov/contacting/contact_lobby.html)]. The reports and registrations made to these legislative offices are maintained as public records which may be researched and examined by the press, the public, by Members’ offices, and have recently been made available on-line at [<http://sopr.senate.gov>] .

## Foreign Agents Registration Act

In addition to the required registrations under the new federal Lobbying Disclosure Act of 1995, the provisions of the Foreign Agents Registration Act (FARA)<sup>11</sup> may be relevant if one is acting for or on behalf of a foreign government or a foreign political party or entity, or other foreign entity, and is engaging in “lobbying” activities as part of the representation for that foreign client. As amended by the new Lobbying Disclosure Act, if one is representing the interests of a foreign government or a foreign political party, such agent must continue to register under the Foreign Agents Registration Act, but then need not register under the Lobbying Disclosure Act. However, persons representing *private* foreign entities, and who lobby in the United States, should register under the Lobbying Disclosure Act rather than the Foreign Agents Registration Act. Those properly registered under the Lobbying Disclosure Act are exempt from registering under the Foreign Agents Registration Act.

The Foreign Agents Registration Act, as amended by the Lobbying Disclosure Act of 1995, and its amendments, provides that “agents of a foreign principal”<sup>12</sup> must file a registration statement not with the Clerk of the House or the Secretary of the Senate, but with the Attorney General listing detailed financial and business

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<sup>10</sup>2 U.S.C. § 1609.

<sup>11</sup>See now 22 U.S.C. §§ 611 *et seq.*

<sup>12</sup>22 U.S.C. § 611(b) and (c).

information,<sup>13</sup> must file and label all informational materials,<sup>14</sup> and keep detailed books and records open to inspection by public officials.<sup>15</sup> An “agent” is defined in the law as one who acts “at the order, request, or under the direction or control, of a foreign principal, or of a person any of whose activities are directly or indirectly supervised, directed, controlled, financed, or subsidized in whole or in part by a foreign principal ....”<sup>16</sup>

The types of activities on behalf of a “foreign principal” that would subject an “agent” to coverage under the Act include “political activities”; acting as a “public relations counsel,” publicity agent or political consultant; collecting or disbursing contributions for the foreign principal; and representing the interests of the foreign principal “before any agency or official of the Government of the United States.”<sup>17</sup> The term “political activities” also includes activities which may generally be characterized as among those commonly considered to be “lobbying” activities:

The term “political activities” means any activity that the person engaging in believes will, or that the person intends to, in any way influence any agency or official of the Government of the United States or any section of the public within the United States with reference to formulating, adopting, or changing the domestic or foreign policies of the United States . . . .<sup>18</sup>

There are several exemptions to the registration and record-keeping requirements of the Foreign Agents Registration Act, including exemptions for the official activities of diplomats and consular officers and the activities of certain officials of foreign governments; exemptions for persons engaging only in “private and nonpolitical activities in furtherance of bona fide trade or commerce” for such foreign principal; and an exemption for certain legal representation of foreign principals by attorneys in judicial or on-the-record, formal agency proceedings.<sup>19</sup>

## Contingency Fees For Lobbying

A contingency fee arrangement for “lobbying” activities before Congress is one in which the payment for such activities is contingent upon the success of the lobbying efforts to influence the legislative process to have legislation adopted or defeated in the United States Congress. There is no statute under federal law which expressly addresses the issue of contingency fees with respect to all lobbying activities before the Congress. Contingency fees may be expressly barred, however, under certain

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<sup>13</sup>22 U.S.C. § 612.

<sup>14</sup>22 U.S.C. § 614. The Lobbying Disclosure Act of 1995 eliminated the use of and the definition of the term “political propaganda,” now employing the more neutral term “informational material.”

<sup>15</sup>22 U.S.C. § 615.

<sup>16</sup>22 U.S.C. § 611(c)(1).

<sup>17</sup>22 U.S.C. § 611(c)(1)(i)-(iv).

<sup>18</sup>22 U.S.C. § 611(o).

<sup>19</sup>22 U.S.C. § 613.



circumstances. There is in federal law, for example, an express prohibition against contingency fee arrangements with respect to seeking certain contracts with the agencies of the Federal Government.<sup>20</sup> Activities which might generally or colloquially be called “lobbying,” but which involve making representations on behalf of private parties before federal agencies to obtain certain government contracts, may thus be subject to the contingency prohibitions.<sup>21</sup>

Contingency fees are also prohibited for lobbying the Congress by persons who must register as agents of foreign principals under the Foreign Agents Registration Act. The prohibition is upon agreements where the amount of payment “is contingent in whole or in part upon the success of any political activities carried on by such agent.”<sup>22</sup> The covered “political activities” of such agents under the Foreign Agents Registration Act include any activity which the agent “intends to, in any way influence any agency or official of the Government of the United States ... with reference to formulating, adopting, or changing the domestic or foreign policies of the United States ...,” and thus includes the activities of “lobbying” Members and staff of Congress on legislation or appropriations.<sup>23</sup>

Although there is no general federal law expressly barring all contingency fees for successful lobbying before Congress, there is a long history of judicial precedent and traditional judicial opinion which indicates that such contingency fee arrangements, when in reference to “lobbying” and the use of influence before a legislature on general legislation, are void from their origin (*ab initio*) for public policy reasons, and therefore would be denied enforcement in the courts.<sup>24</sup> Explaining the reason for such policy, Justice Oliver Wendell Holmes, writing for the Court,

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<sup>20</sup>41 U.S.C. § 254(a), 10 U.S.C. § 2306(b) (defense contracts). *Note* Federal Acquisition Regulations [FAR], 48 C.F.R. § 3.400 *et seq.* Negotiated solicitations and contracts are required to contain a contractor warranty that no contingent fees were paid. FAR, 48 C.F.R. § 52.203-5.

<sup>21</sup>The reason for this contingency fee ban has been explained as follows: “Contractors’ arrangements to pay contingent fees for soliciting or obtaining Government contracts have long been considered contrary to public policy because such arrangements may lead to attempted or actual exercise of improper influence ....” Nash, Schooner, & O’Brien, *The Government Contract Reference Book, A Comprehensive Guide to the Language of Procurement*, Second Edition, at 119 (George Washington University 1998).

<sup>22</sup>22 U.S.C. § 618(h).

<sup>23</sup>22 U.S.C. § 611(o).

<sup>24</sup> “Contingent fee arrangements, conditioned on the obtaining of favorable legislation, are unenforceable in the courts.” *Luff v. Luff*, 267 F.2d 643, 646 (D.C.Cir. 1959). *See* *Marshall v. Baltimore & Ohio R.R.*, *supra* at 336 (1853); *Tool Company v. Norris*, 69 U.S. (2 Wall.) 45, 54 (1864); *Trist v. Child*, 88 U.S. (21 Wall.) 441 (1874); *Hazelton v. Sheckells*, 202 U.S. 71 (1906); *Noonan v. Gilbert*, 68 F.2d 775 (D.C.Cir. 1934); *Brown v. Gesellschaft Fur Drahtlose Telegraphie*, 104 F.2d 227, 229 (D.C.Cir. 1939), *cert denied* 307 U.S. 640 (1939); *Ewing v. National Airport Corporation*, 115 F.2d 859, 860 (4<sup>th</sup> Cir. 1940), *cert. denied* 312 U.S. 705 (1941); *note also Florida League of Professional Lobbyists, Inc. v. Meggs*, 87 F.3d 457 (11<sup>th</sup> Cir. 1996), upholding against constitutional challenge Florida statute barring contingency fees.

noted that it was the “tendency” in such contract agreements to provide incentives towards corruption, as such agreements “invited and tended to induce improper solicitations ... intensified ... by the contingency of the reward.”<sup>25</sup> It should be noted that the laws of 39 States prohibit outright, and the laws of a 40<sup>th</sup> State limit the amount of, contingency fees for successful legislative lobbying,<sup>26</sup> and this may further limit the probability of judicial enforcement of a contingency fee contract, even one for lobbying the Congress.

While the tradition and practice has been for the courts to look unfavorably upon contingency fee arrangements for successfully influencing public officials in performing discretionary actions, it should be noted that in some instances contingency fee contracts based on the success of legislation have been upheld and enforced in a few courts when the duties contracted for were professional services that did not involve traditional, statutorily defined “lobbying” or the use of personal influence before the legislature,<sup>27</sup> or where the client had a legitimate claim or legal right to be asserted in a matter before the legislature (*e.g.*, “debt legislation”).<sup>28</sup>

As noted in the instructions of the Clerk of the House and Secretary of the Senate, if contingency fees are permitted and used in a lobbying agreement with respect to lobbying before the Congress, the making of such a contract for a contingent fee “triggers a registration requirement at inception.” The fee is disclosed in semi-annual reports in the period “that the registrant becomes entitled to it.”

## Federal Funds Subsidizing or Reimbursing Lobbying

There exist general restrictions under federal law and regulations against the use of federal funds for lobbying activities. Officers and employees of the federal government are expressly barred from using funds appropriated for their agencies for the purposes of certain types of “lobbying” activities and publicity campaigns directed at influencing the Congress on pending legislation.<sup>29</sup> Contractors and grantees of the

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<sup>25</sup>*Hazelton v. Sheckells*, 202 U.S. 71, 79 (1906).

<sup>26</sup>Note survey of State laws in CRS Congressional Distribution Memorandum, “Contingency Fees for Lobbying Activities,” September 21, 2000.

<sup>27</sup>*Weinstein v. Palmer*, 32 NW2d 154 (Minn. 1948); *Johnston v. J.R. Watkins Co.*, 157 P.2d 755, 757 (Okla. 1945): “A contract for purely professional services such as drafting a petition for an act, attending to the taking of testimony, collecting facts ...” is not within Oklahoma’s statutory ban on “lobbying” on a contingent fee basis.

<sup>28</sup>As to as “debt legislation” and claims (as opposed to general or “favor legislation”), see discussion in *Brown v. Gesellschaft*, *supra* at 229; *Grover v. Merritt Development Co.*, 47 F. Supp. 309 (D.Minn. 1942); and 51 Am Jur. 2d, “Lobbying,” § 4 at 995, *citing State ex rel. Hunt v. Okanogan County*, 153 Wash 399, 280 P 31; *Hollister v. Ulvi*, 199 Minn 269, 271 NW 493; *Stansell v. Roach*, 147 Tenn 183, 246 SW 520.

<sup>29</sup>18 U.S.C. § 1913; note also general rider in Treasury, Postal Service and General Governmental Appropriations Acts, and riders on individual yearly appropriations acts. Generally, such prohibited activities would not include *direct* contacts by executive officials to Members or staff of Congress, but rather may reach costly letter-writing or similar

(continued...)

federal government may not be reimbursed out of federal contract or grant money for their lobbying activities, unless authorized by Congress, under the provisions of the Federal Acquisition Regulations (FAR) drafted to encompass the principles set out in an earlier circular from the Office of Management and Budget.<sup>30</sup>

Under the guidelines of provisions known as the “Byrd Amendment,” as amended by the Lobbying Disclosure Act of 1995, federal grantees, contractors, recipients of federal loans or those with cooperative agreements with the federal government, are also prohibited by law from using federal monies to “lobby” the Congress, federal agencies or their employees with respect to the awarding of federal contracts, the making of any grants or loans, the entering into cooperative agreements, or the extension, modification or renewal of these types of awards.<sup>31</sup> Federal contractors, grantees and those receiving federal loans and cooperative agreements must also report lobbying expenditures from non-federal sources which they used to obtain such federal program monies or contracts.<sup>32</sup>

Charitable organizations, including religious organizations, which are exempt from taxation under section 501(c)(3) of the Internal Revenue Code (organizations to which contributions may be tax-deductible for the donor under § 170(c)(2)), are limited in the amount of lobbying in which they may engage if they wish to preserve this preferred tax-exempt status from the federal government.<sup>33</sup>

Section 18 of the Lobbying Disclosure Act of 1995 places statutory restrictions upon the lobbying activities of certain non-profit organizations which are tax-exempt under section 501(c)(4) of the Internal Revenue Code. This provision, which is commonly called the “Simpson Amendment,” prohibits section 501(c)(4) social welfare organizations from engaging in any “lobbying activities,” even with their own

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<sup>29</sup>(...continued)

publicity campaigns directed at the public expressly urging the public to contact Members of Congress about legislation.

<sup>30</sup>48 C.F.R. §§ 31.205-22; 31.701 *et seq.*; note OMB Circular A-122, ¶B21, as added 49 F.R. 18276 (1984).

<sup>31</sup>31 U.S.C. § 1352(a).

<sup>32</sup>31 U.S.C. § 1352(b). See common agency regulations implementing “Byrd Amendment,” at 55 F.R. 6735-6756 (February 26, 1990).

<sup>33</sup>26 U.S.C. §§ 501(c)(3), 501(h), 4911, 6033; *see* IRS Regulations at 55 F.R. 35579-35620 (August 31, 1990), effecting 26 C.F.R. Parts 1, 7, 20, 25, 53, 56, and 602. The Supreme Court has upheld such loss of special tax-exempt privilege for “substantial” lobbying noting that although lobbying is a protected right, and although the government may not indirectly punish an organization for exercising its constitutional rights by denying benefits to those who exercise them, lobbying activities are not one of the contemplated “exempt functions” of these organizations for which they have received the preferred tax status, and that Congress does not have to “subsidize” such lobbying activities of private organizations through preferred tax status of receiving deductible contributions if it does not choose to do so. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544-546 (1983).

private funds, if the organization receives any federal grant, loan, or award.<sup>34</sup> The legislative history of the provision clearly indicates, however, that a 501(c)(4) organization may separately incorporate an affiliated 501(c)(4), which will not receive any federal funds, and which could engage in unlimited lobbying.<sup>35</sup> The method of separately incorporating an affiliate to lobby, which was described by the amendment's sponsor as "splitting," was apparently intended to place a degree of separation between federal money and private lobbying while permitting an organization to have a voice through which to exercise its protected First Amendment rights of speech, expression and petition: "If they decided to split into two separate 501(c)(4)'s, they could have one organization which could both receive funds and lobby without limits."<sup>36</sup>

It may also be noted that while 501(c)(4)'s which receive certain federal funds may not engage in "lobbying activities," the term "lobbying activities" as used in that prohibition is expressly defined in that law to include only direct "lobbying contacts and efforts in support of such contacts," such as preparation, planning, research and other background work intended for use in such contacts.<sup>37</sup> Organizations which engage *only* in grass roots lobbying and public advocacy, and do not make direct contacts or communications with covered officials, would therefore not appear to be engaging in any prohibited "lobbying activities" as defined under this provision.

## Post-Employment Lobbying by Federal Officials

There are various "post-employment" or "revolving door" conflict of interest restrictions upon certain officers and employees of the Federal Government which may work to restrict their lobbying of the Congress on particular matters or for a certain period of time after such officials leave office. In addition to the "switching sides" restrictions which apply generally to all former executive branch employees representing private parties before officers and employees of the executive branch in matters on which the employee had worked or had authority over while with the Government,<sup>38</sup> there are certain so-called "cooling off" or "no contact" periods which may apply to *any* matter before one's former agency, department or branch of Government, regardless of whether or not one had worked on it while with the

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<sup>34</sup>2 U.S.C. § 1611.

<sup>35</sup>H. R. Rpt. 104-339, *supra* at 24.

<sup>36</sup>141 *Congressional Record* 20045, 20053, July 24, 1995, statements of Senator Simpson.

<sup>37</sup>2 U.S.C. § 1602(7).

<sup>38</sup>All officers and employees of the executive branch are prohibited from "switching sides" on a specific case or matter, that is, they are prohibited from ever making "with the intent to influence" any communication or appearance on behalf of a private party before a federal department or agency on a particular matter involving specific parties if the employee had worked personally and substantially on that matter for the government while in its employ. 18 U.S.C. § 207(a)(1). A similar restriction on "switching sides" applies for two years to executive branch personnel who, although they did not work on the matter personally or substantially, had such particular matter involving specific parties under their official responsibility while with the government. 18 U.S.C. § 207(a)(2). See also definitions at 18 U.S.C. § 207(i)(1)(A).

Government. As to those restrictions relevant to lobbying the Congress,<sup>39</sup> the statute prohibits former Members of Congress from making representations, that is, appearances or communications with intent to influence, on any matter before any Member, officer or employee of the entire legislative branch of government for one year after the Member leaves office.<sup>40</sup> The staff of a Member, if compensated above a particular rate, may not “lobby” that Member or his or her staff for one year after leaving employment, and covered staff of committees may not lobby any Members or staff of that committee for one year after leaving employment.<sup>41</sup>

No federal employee or official who has participated in trade or treaty negotiations on behalf of the United States and had access to certain non-public information may, for one year after leaving office, represent, aid or advise any other person with respect to such negotiations.<sup>42</sup> In addition, those high level Government officials who are subject to the one-year “cooling off” or “no contact” bans, are also prohibited, for one year after leaving their positions, from lobbying for, representing, aiding, or advising any official foreign entity with the intent to influence the official actions of any officer or employee of a department or agency of the United States, including Members of Congress.<sup>43</sup>

## Congressional Ethics Rules

In addition to statutory laws applicable to lobbyists and lobbying, there are internal congressional rules in both the House and the Senate which establish and provide ethical guidelines and standards of conduct for Members, officers and employees of those bodies. While these are internal rules and are not necessarily enforceable against, nor applicable directly to private parties who lobby the Congress, these House and Senate Rules will obviously impact and influence the activities and conduct of lobbyists. Ethical guidelines and professional standards for lobbyists expressed by voluntary organizations of professional lobbyists may contain a specific requirement for compliance with congressional ethical standards. The guidelines adopted by the American League of Lobbyists, for example, provide in part that: “A lobbyist should not cause a public official to violate any law, regulation or rule

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<sup>39</sup>Restrictions on high level executive branch officials prohibit such officials from making representational communications and appearances before their former agencies for one year after leaving the Government, and restrict for one year certain very high level officials from making representational or advocacy communications or appearances before their former agency *and* to any individual who occupies an executive level position anywhere in the executive branch. 18 U.S.C. § 207(c) and (d).

<sup>40</sup>18 U.S.C. § 207(e)(1).

<sup>41</sup>18 U.S.C. § 207(e)(2),(3). Senate Rules also still apply to Members and staff regarding one-year post-employment bans on lobbying. All staff of a Senator, if they are registered lobbyists or paid by registered lobbyists, are prohibited from lobbying that Member and staff for one year, and all such former committee staff are barred for one year after leaving from lobbying the Members and staff of that committee. Senate Rule 37, cl. 9.

<sup>42</sup>18 U.S.C. § 207(b).

<sup>43</sup>18 U.S.C. § 207(f); *note* definitions at 18 U.S.C. § 207(i)(1)(B).

applicable to such public official.”<sup>44</sup> It is probably stating the obvious to note that conduct and pressures exerted by a lobbyist which place a Member of Congress or a congressional staffer in a compromising ethical position may in the long run be counterproductive to one’s lobbying goals.

### **Gifts.**

Restrictive rules on the acceptance of gifts from private sources were adopted by both Houses of Congress for their Members and staff in 1995, and the House Rules were amended in 1999.<sup>45</sup> The Rules generally prohibit the receipt or solicitation of most gifts by Members, officers and employees of the Congress from private sources, except in those circumstances expressly permitted in the applicable Senate or House Rule. Although the general rule is that all gifts are prohibited, the House and Senate Rules list over 20 express exceptions to the gift prohibition.

The House and Senate gift rules act, in effect, as both an implementation and exceptions to the statutory gift provisions enacted into law in 1989, as part of the Ethics Reform Act of 1989, prohibiting the solicitation or receipt of gifts from any person doing business with or seeking action from one’s agency, or who is affected by the performance of one’s official duties.<sup>46</sup> Since the exceptions in the House and Senate gift rules allow for the *receipt* of gifts in certain circumstances, but do not authorize the *solicitation* of any such gifts, Members, officers and employees are still prohibited from soliciting gifts from those doing business with or seeking action from the Congress. This discussion is intended only as a summary and overview of the gift restrictions. For specific fact situations, and details on the prohibitions, reference should be made to the actual language of the applicable House or Senate Rule, and to interpretations of the House Committee on Standards of Official Conduct or the Senate Select Committee on Ethics.

**General Restriction.** The House and Senate Rules now provide that Members, employees and officers of the House or Senate may not accept gifts from *any* source, except in narrowly defined circumstances expressly set out in the respective Rules.

The limitations and prohibitions in these Rules apply not only to gifts given directly to the Member, officer or employee of the House or Senate, but also gifts to a family member of the Member, officer or employee, if the gift is given “with the knowledge and acquiescence” of the Member, officer or employee, and the Member, officer or employee “has reason to believe the gift was given because of” his or her official position.<sup>47</sup>

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<sup>44</sup>American League of Lobbyists, “Code of Ethics,” Article 2, Section 2.2, adopted on February 28, 2000.

<sup>45</sup>S. Res. 158, 104th Cong. (July 28, 1995); H. Res. 250, 104th Cong. (November 16, 1995), *see* H. Res. 9, 106<sup>th</sup> Cong., January 6, 1999, providing for *de minimis* exception.

<sup>46</sup>P.L. 101-194, Section 303, 5 U.S.C. § 7353; specifically 5 U.S.C. § 7353(b)(1).

<sup>47</sup>House Rule 25, cl. 5(a)(2)(B)(i); Senate Rule 35, cl. 1(b)(2)(A).

**Gifts From Lobbyists.** While gifts from all private sources are generally covered by the prohibitions and restrictions of the House and Senate gift rules, the provisions may apply to gifts from lobbyists on an even more restrictive basis, as *some* of the exceptions made to the rules will not exempt gifts from registered lobbyists or from agents of foreign principals registered under the Foreign Agents Registration Act. Specifically, while a lobbyist or foreign agent may be a “relative” or a “personal friend” of a Member, officer and employee, and may thus fit within one of those two exceptions to the gift ban, the “personal hospitality” of a lobbyist or a foreign agent is *not* separately exempt from the rules prohibitions, and thus Members and employees may not accept meals or lodging in the home of a lobbyist solely under the “personal hospitality” exemption.<sup>48</sup> Similarly, while contributions to an authorized legal defense fund are permitted from anyone as an express exemption to the gifts rules, such contributions may *not* be received from lobbyists or foreign agents under that exemption;<sup>49</sup> nor may necessary travel or transportation expenses for “fact finding” or other such events in connection with official duties be accepted from lobbyists or from foreign agents.<sup>50</sup>

Lobbyists and agents of foreign principals are expressly prohibited from providing anything to an entity or organization that is “maintained or controlled” by a Member, officer or employee;<sup>51</sup> are prohibited from making charitable contributions on the basis of a recommendation or designation of a Member, officer or employee (other than a contribution in lieu of an honorarium if properly reported within 30 days);<sup>52</sup> and may not make any contribution or expenditure relating to a conference or retreat or the like sponsored by or affiliated with an official congressional organization for or on behalf of Members, officers or employees.<sup>53</sup>

**De Minimis Exception.** Both the House and Senate Rules provide a *de minimis* exception for gifts from private sources, and allow for the acceptance of a gift (including the gift of a meal) if the gift has a value of less than \$50.<sup>54</sup> Gifts aggregating \$100 or more in a year from any one source, however, may not be accepted. Any gift of \$10 or more will be counted toward the yearly aggregate, but no specific accounting or formal record keeping for all such gifts of \$10 or more is expressly required by the Rules. Certain items of “nominal value” or with “little intrinsic value,” such as greeting cards, baseball caps and T-shirts, are also expressly exempt from the gifts limitation.<sup>55</sup>

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<sup>48</sup>House Rule 25, cl. 5(a)(3)(P); Senate Rule 35, cl. 1(c)(17); *see infra* p. 14.

<sup>49</sup>House Rule 25, cl. 5(a)(3)(E) and cl. 5(c)(3); Senate Rule 35, cl. 1(c)(5) and cl. 3(c).

<sup>50</sup>House Rule 25, cl. 5(b)(1)(A); Senate Rule 35, cl. 2(a)(1).

<sup>51</sup>House Rule 25, cl. 5(c)(1); Senate Rule 35, cl. 3(a).

<sup>52</sup>House Rule 25, cl. 5(c)(2) and (d); Senate Rule 35, cl. 3(b) and 4.

<sup>53</sup>House Rule 25, cl. 5(c)(4); Senate Rule 35, cl. 3(d).

<sup>54</sup>House Rule 25, cl. 5(a)(1)(B); Senate Rule 35, cl. 1(a)(2).

<sup>55</sup>House Rule 25, cl. 5(a)(3)(W); Senate Rule 35, cl. 1(c)(23).

**Exception for Gifts from Family and Friends.** One of the major categories of exemption from the strict gifts prohibitions are gifts from one's relatives, and gifts from personal friends. The House and Senate gift bans, seeking not to unduly interfere with normal family and personal relationships, allow the receipt and exchange of gifts from and between family members.<sup>56</sup>

Similarly, Members, officer and employees may continue to exchange gifts with or receive gifts from personal friends.<sup>57</sup> If a gift from a personal friend is to exceed \$250 in value, however, the Member, officer or employee must get a written determination from the House Committee on Standards of Official Conduct in the House, or the Senate Select Committee on Ethics in the Senate, that the exception still applies.<sup>58</sup> In an effort not to create too large a potential "loophole" within the gifts rules by allowing one to merely claim that any gift-giver is a "friend," the rules establish certain criteria or factors to be considered in determining whether one qualifies as a personal "friend," including whether the Member, officer or employee has a history of personal friendship and gift exchange with this individual; whether the individual in question paid personally for the gift, or was reimbursed or claimed a tax deduction for it; whether the Member, officer or employee knew that similar gifts were given by this individual to other Members, officer or employees.<sup>59</sup>

A person who is a lobbyist by profession, but is also a relative or a personal friend (as defined) of a Member of Congress or of a congressional staffer, may therefore continue to participate in normal gift giving and gift exchanges based on that personal relationship with his or her relative, friend or fiancé(e).

**Meals, Food and Refreshments.** A meal provided to the Member, officer or employee is considered a "gift" to that Member, officer or employee, and may not be accepted unless it meets other specific exceptions.<sup>60</sup> Since there is a general exemption for gifts of less than \$50, however, a meal may generally be accepted as long as the value of the meal is below that amount (and does not exceed the \$100 yearly aggregate from that one source). When food or refreshments are offered simultaneously (same time and place) to both a Member, officer or employee and his or her spouse or dependent, only the food provided to the Member, officer or employee will be considered a "gift" for the purpose of figuring the amount of such a gift under the Rules.<sup>61</sup>

It should be noted also that under both the House and Senate Rules refreshments and food of "nominal value," when not part of a meal, are expressly exempt from the

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<sup>56</sup>Family member is defined in the Ethics in Government Act to include a wide variety of relatives and specifically the fiancé(e) of the Member, officer or employee. 5 U.S.C.A. App. 6, § 109(16). House Rule 25, cl.5(a)(3)(C); Senate Rule 35, cl. 1(c)(3).

<sup>57</sup>House Rule 25, cl. 5(a)(3)(D)(i); Senate Rule 35, cl. 1(c)(4)(A).

<sup>58</sup>House Rule 25, cl. 5(a)(5); Senate Rule 35, cl. 1(e).

<sup>59</sup>House Rule 25 cl.5(a)(3)(D)(ii)(I)-(III); Senate Rule 35,cl. 1(c)(4)(B)(i)-(iii).

<sup>60</sup>See definition of "gift," House Rule 25, cl. 5(a)(2)(A); Senate Rule 35, cl. 1(b)(1).

<sup>61</sup>House Rule 25, cl. 5(a)(2)(B)(ii); Senate Rule 35, cl. 1(b)(2)(B).



gifts restriction and may be accepted without violation of the gift rules.<sup>62</sup> This exception would appear to allow one to partake of refreshments, appetizers, or hors d'oeuvres commonly served at receptions and parties, without regard to the gift prohibition, and without regard to whether the sponsor is a “lobbyist,” a lobbying organization, or an entity which employs lobbyists.

Although meals are generally included in the definition of a “gift,” and although free meals from private individuals or organizations are not in themselves exempt from the gift ban, there are a number of situations and instances where a Member, officer or employee may accept such a meal under the House and Senate gift rules, even without regard to the \$50 *de minimis* limitation. Members, officers, and employees would be able to accept such gifts of meals when in connection with attendance at a political fundraising event sponsored by a political organization;<sup>63</sup> from family and personal friends;<sup>64</sup> in connection with outside, private business employment activities, employment discussions with a prospective employer, or when provided by a political organization in connection with a campaign event sponsored by the political organization;<sup>65</sup> in the course of permissible “training” events when served to all attendees as an integral part of the event;<sup>66</sup> when an individual provides “personal hospitality” at his or her personal or family residence (but a registered lobbyist or agent of a foreign principal does not qualify for the personal hospitality exemption);<sup>67</sup> in connection with the permissible attendance at “widely attended” gatherings, including charitable events, when taken in a group setting;<sup>68</sup> or in connection with the acceptance of necessary expenses for approved “fact-finding” or officially connected conference expenses.<sup>69</sup>

**Exception for Personal Hospitality.** In addition to the exceptions for gifts from relatives and gifts made on the basis of “personal friendship,” the House and Senate gift rules also exempt from the gift prohibitions certain gifts of “personal hospitality” provided by an individual who is not a registered lobbyist nor an agent of a foreign principal.<sup>70</sup> The personal hospitality must be provided by an individual, and not a corporation or an organization, for a non-business purpose at the personal residence or on property or facilities owned by the individual or his or her family.

**Exception for Attendance at Widely Attended Gatherings.** Members, officers or employees are expressly permitted, as an exception to the gift rules, to accept an offer of free attendance at a “widely attended” gathering, such as a

<sup>62</sup>House Rule 25, cl. 5(a)(3)(U); Senate Rule 35, cl. 1(c)(22).

<sup>63</sup>House Rule 25, cl. 5(a)(3)(B); Senate Rule 35, cl. 1(c)(2).

<sup>64</sup>House Rule 25, cl. 5(a)(3)(C) and (D); Senate Rule 35, cl. 1(c)(3) and (4).

<sup>65</sup>House Rule 25, cl. 5(a)(3)(G)(i)-(iii); Senate Rule 35, cl. 1(c)(7)(A)-(C).

<sup>66</sup>House Rule 25, cl. 5(a)(3)(L); Senate Rule 35, cl. 1(c)(13).

<sup>67</sup>House Rule 25, cl. 5(a)(3)(P); Senate Rule 35, cl. 1(c)(17).

<sup>68</sup>House Rule 25, cl. 5(a)(4); Senate Rule 35, cl. 1(d).

<sup>69</sup>House Rule 25, cl. 5(b); Senate Rule 35, cl. 2.

<sup>70</sup>House Rule 25, cl. 5(a)(3)(P); Senate Rule 35, cl. 1(c)(17).

“convention, conference, symposium, forum, panel discussion, dinner, viewing, reception, or similar event,” when the free attendance is offered by the sponsor of the event, and when the Member, officer or employee is either to “participate” in the event, or, if the Member, officer or employee is not participating, when the event is deemed “appropriate to the performance of the official duties” or the representative function of the Member, officer or employee attending.<sup>71</sup> A House Member, officer or employee may also bring an accompanying individual to such an event,<sup>72</sup> and a Senator, officer or employee of the Senate may also bring an accompanying individual if others in attendance will be so accompanied, or when appropriate to assist in the representation of the Senate.<sup>73</sup> When permitted to attend, the “free attendance” which one may accept is intended to include the waiver of the conference or other fee, local transportation, and food, refreshments, entertainment and instructional material provided to all the attendees as an integral part of the event. The acceptance of entertainment or food collateral to the event, or not taken in a group setting, is not permitted as part of the exception, and would be considered as a gift and therefore within the gift limitations.<sup>74</sup>

***Exception for Charitable Events.*** The attendance of a Member, officer or employee at a charitable event is generally treated as attendance at a “widely attended” gathering. That is, it appears that Members, officers and employees were intended to be able to accept (for themselves and an accompanying individual) free attendance at charitable events, including the waiver of entrance or other such fees, and the provision of meals, food, and entertainment provided as an integral part of the event to all attendees. In the House, the Member, officer or employee, however, is expressly prohibited from accepting “reimbursement for transportation or lodging” expenses (other than for local transportation) in connection with such event.<sup>75</sup> In the Senate, when a charitable event is *not* substantially recreational in nature (that is, when the event is not, for example, a celebrity golf, tennis, or ski event or the like), and when the Senator, officer or employee meets the requirements for “necessary” expenses for travel regarding “fact-finding” or other officially connected events, such “necessary” expenses may be accepted for charitable fund-raising events.<sup>76</sup>

***Exception for Necessary Travel Expenses for “Fact-Finding” Events and Conferences.*** Members, officers and employees of the House and Senate may, under certain conditions and restrictions, continue to accept (from other than lobbyists or agents of a foreign principal) reimbursement or payment in kind for “necessary transportation, lodging and related expenses for travel” for such things as fact-finding trips, meetings, speeches, conferences or similar events “in connection

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<sup>71</sup>House Rule 25, cl. 5(a)(3)(Q) and cl. 5(a)(4)(A)(i) and (ii); Senate Rule 35, cl. 1(c)(18) and cl. 1(d)(1)(A) and (B).

<sup>72</sup>House Rule 25, cl. 5(a)(4)(B).

<sup>73</sup>Senate Rule 35, cl. 1(d)(2).

<sup>74</sup>House Rule 25, cl. 5(a)(4)(D); Senate Rule 35, cl. 1(d)(4).

<sup>75</sup>House Rule 25, cl.5(a)(4)(C).

<sup>76</sup>Senate Rule 35, cl. 1(d)(3), and Senate Rule 35, cl. 2(a)-(e).

with the duties of the Member, officer or employee as an officeholder.”<sup>77</sup> Such reimbursement, since it is in connection with the official duties of a Member or employee, is considered in theory to be a reimbursement to the House of Representatives or to the Senate, rather than a prohibited personal gift to the Member, officer or employee, when certain conditions and restrictions are observed.

Employees of the House or Senate must receive advance approval to accept any such reimbursements; and Members, officers and employees must provide a detailed disclosure of the expenses reimbursed within 30 days after the travel is completed.<sup>78</sup> In the House of Representatives, transportation expenses may not be accepted for travel for more than 4 days within the United States or 7 days exclusive of travel time outside of the United States, unless approved in advance by the House Committee on Standards of Official Conduct;<sup>79</sup> while in the Senate travel expenses for such events are authorized only for up to 3 days for travel within the United States and 7 days for foreign travel.<sup>80</sup>

The permission to accept “necessary” travel expenses for events “in connection with the duties of a Member, officer or employee as an officeholder” does not apply to any events “which are substantially recreational in nature.”<sup>81</sup> The permissible expenditures which may be reimbursed under the exception are limited to “reasonable expenditures” for “transportation, lodging, conference fees and materials, and food and refreshments,” and expressly do *not* extend to expenditures for “recreational activities,” nor for expenditures for entertainment “other than that provided to all attendees as an integral part of the event.”<sup>82</sup> In the House of Representatives, Members, officers and employees may accept permissible reimbursement expenses for such officially connected events for an accompanying spouse or child,<sup>83</sup> and in the Senate acceptable expenses may include the expenses for a Member’s, officer’s or employee’s spouse or child if attendance is “appropriate to assist in the representation of the Senate.”<sup>84</sup>

**Other Exceptions.** Other exceptions to the strict prohibition on the receipt of any gifts include: anything for which fair market value is paid or anything not used and promptly returned; political contributions or attendance at political fundraisers sponsored by a political organization; payments to legal defense funds (other than those from lobbyists and foreign agents); gifts from another Member, officer or employee of the Senate or House; food, refreshments, lodging, transportation and

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<sup>77</sup>House Rule 25, cl. 5(b)(1), Senate Rule 35, cl. 2(a).

<sup>78</sup>House Rule 25, cl. 5(b)(1)(A)(i) and cl. 5(b)(2) and (3); Senate Rule 35, cl. 2(a)(1)(A) and (B), cl. 2(b) and (c).

<sup>79</sup>House Rule 25, cl. 5(b)(4)(A).

<sup>80</sup>Senate Rule 35, cl. 2(d)(1).

<sup>81</sup>House Rule 25, cl. 5(b)(1)(B); Senate Rule 35, cl. 2(a)(2).

<sup>82</sup>House Rule 25, cl. 5(b)(4)(B) and (C); Senate Rule 35, cl. 2(d)(2) and (3).

<sup>83</sup>House Rule 25, cl. 5(b)(4)(D).

<sup>84</sup>Senate Rule 35, cl. 2(d)(4).

other benefits resulting from outside business or employment activities, from prospective employers, or provided by a political organization in connection with a fundraiser or campaign event; pensions and similar benefits from a former employer; informational materials sent to a Member's office in the form of books, articles, periodicals, written material, or tapes; awards or prizes in events open to the public; honorary degrees and nonmonetary awards for public service; training if in the interest of the House of Representatives or the Senate; bequests and inheritances; items which may be received under the Foreign Gifts and Decorations Act,<sup>85</sup> the Mutual Educational and Cultural Exchange Act,<sup>86</sup> or other statute; anything paid for by federal, State, or local government; opportunities and benefits generally available to the public or to a group of federal or government employees; a plaque, trophy or commemorative item; anything for which the House Committee on Standards of Official Conduct or the Senate Select Committee on Ethics provides a waiver; and home-State products donated to the Member primarily for promotional purposes such as display or free distribution, and which are of minimal value to any individual recipient.

### **Honoraria, Private Compensation.**

It had been a somewhat common practice in the past, although subject to much criticism, for a "special interest" or lobbying group, or a group or organization represented by a lobbyist, to invite a Member of Congress or a senior staffer to speak or appear before the group in connection with subject matters of interest to the organization, and to offer the Member or congressional staffer an "honorarium" for the speech or personal appearance. Under ethics provisions in House and Senate Rules, however, the practice of receiving an "honorarium" for a speech, article, or an appearance is now flatly prohibited for all Members of the House and the Senate, Senate staff, and for senior House employees and officers.<sup>87</sup>

The honoraria prohibitions in the House and Senate exclude the costs of "actual and necessary" travel expenses provided or reimbursed by the sponsor of the event, that is, transportation and subsistence expenses incident to the event provided to the official and his or her spouse or family member may be accepted. In the Senate, a Senator may bring an employee acting as an aide to an event rather than a family member. A contribution to charity of up to \$2,000 may generally be made by the

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<sup>85</sup>U.S.C. § 7342.

<sup>86</sup>22 U.S.C. § 2458a.

<sup>87</sup>House Rule 25, cl. 1(a)(2); Senate Rule 36. House officers and employees compensated less than 120% of the minimum pay for a GS-15 may receive an honorarium if the subject matter is not directly related to their official duties, the payment is not made because of their status as House officials or employees, and the offering entity does not have interests substantially affected by the performance or non-performance of their official duties. Although the statutory honoraria ban was found unconstitutional for federal employees in *United States v. N.T.E.U.*, 513 U.S. 454 (1995), and although the Department of Justice has ruled that it will not enforce the statutory ban against any officer or employee even in the legislative or judicial branches of Government (*see* Office of Legal Counsel Opinion, February 26, 1996), Members and employees of the House and Senate still come within and are subject to the prohibitions in House and Senate Rules.

sponsor of the event in lieu of the payment of an honorarium to the member or employee, without violation of this provision or the new gift rule.<sup>88</sup>

The receipt of any outside earned income or compensation from private parties by Members and staff of Congress will encounter other restrictions and limitations. As a general standard, the congressional rules in the House and in the Senate prohibit a Member or an employee from receiving any compensation or allowing any compensation “to accrue to his beneficial interest from any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress.”<sup>89</sup> Other restrictions exist on the receipt of outside income, such as prohibitions on receiving any compensation (or certain gifts) from foreign governments;<sup>90</sup> Member of Congress contracts with the Federal Government or receipt of any benefits out of Federal Government contracts;<sup>91</sup> receiving compensation for representational services before federal agencies;<sup>92</sup> and tax restrictions concerning “self dealing” with “private foundations,” which are the subject of certain tax restrictions.<sup>93</sup>

Earned income rules and restrictions enacted into law and provided for in House and Senate Rules provide that all Members of Congress and certain senior staff<sup>94</sup> are subject to an outside earned-income cap which is equal to 15% of the official salary of a level II in the Executive Schedule; and they may not (1) affiliate with a firm to provide compensated professional services involving a fiduciary relationship; (2) allow any such firm to use one’s name; (3) practice a profession which involves a fiduciary relationship for compensation; (4) serve for compensation as an officer or board member of any association or corporation; or (5) receive compensation for teaching without prior approval of the Standards of Official Conduct Committee.<sup>95</sup> Income received over certain amounts, as well as certain gifts, and reimbursements for travel, must be publicly disclosed by the recipient official in annual personal financial

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<sup>88</sup>Senate Rule 36, *see* §§ 501(c) and 505(3) of the Ethics in Government Act of 1978, as added by the Ethics Reform Act of 1989; Senate Rule 35, cl. 4; House Rule 25, cl. 1(c), and House Rule 25, cl. 4(b) and cl. 5(d).

<sup>89</sup>House Rule 23, cl. 3; Senate Rule 37, cl. 1.

<sup>90</sup>Constitution, Article I, Section 9, Clause 8.

<sup>91</sup>18 U.S.C. §§ 431, 432; 41 U.S.C. § 22.

<sup>92</sup>18 U.S.C. § 203.

<sup>93</sup>26 U.S.C. §§ 4941, 4946.

<sup>94</sup>The limitations apply to non-career employees in the government who are compensated at a rate equal to or more than 120% of the base salary for a GS-15. 5 U.S.C. App., - Ethics in Government Act, § 501(a); House Rule 25, cl. 4(a); Senate Rule 36.

<sup>95</sup>5 U.S.C. App., - Ethics in Government Act, §§ 501(a), 502. Senate staff earning in excess of \$25,000 are subject to somewhat similar limitations by Senate Rules, and may not affiliate with a firm or partnership to provide professional services for compensation; may not permit one’s name to be used in such a form; may not practice a profession for compensation “to any extent” during regular office hours of the Senate; and may not be an officer or board member of any publicly held or regulated corporation, financial institution or business entity (does not include non-profit, tax-exempt organizations). Senate Rule 37, cl. 5 and 6.

disclosure statements required by the Ethics in Government Act of 1978, as amended.<sup>96</sup>

### **Unwritten Standards of Conduct and Propriety.**

It should be kept in mind that in addition to express written rules, either the House or the Senate may exercise its constitutional authority for the self-protection and integrity of the institution by disciplining a Member or employee of that body for conduct which violates no express House or Senate Rule or law, but which is found contrary to acceptable ethical norms and/or which tends to bring the institution into dishonor or disrepute.<sup>97</sup> The Senate, for example, has censured a Senator for placing a paid lobbyist for a trade association with interests in particular tariff legislation, on the staff of the committee considering such legislation, with access to the confidential committee material. In this censure of Senator Bingham in 1929 for conduct which violated no express rule or law, the resolution noted that the action of the Senator “while not the result of corrupt motives on the part of the Senator from Connecticut, is contrary to good morals and senatorial ethics and tends to bring the Senate into dishonor and disrepute ....”<sup>98</sup> The House of Representatives has disciplined Members based in part on violations of provisions of the “Code of Ethics for Government Service” which states, among other provisions, that an elected or appointed official in the government should not accept favors or benefits “under circumstances which may be construed by reasonable persons as influencing the performance of his government duties.”<sup>99</sup>

Members, staff and those who deal with them on a professional basis must thus be cognizant not only of express ethics rules, regulations and statutory provisions, but must also be sensitive to the perceptions and appearances of impropriety, special access or favoritism that may result from particular transactions and activities.

## **Other Statutory Considerations**

### **Campaign Contributions.**

Lobbyists are not as a class prohibited from making campaign contributions to the campaign of a Member of Congress, nor are there specific limitations on federal campaign contributions because one is a “lobbyist.” However, with respect to campaign contributions in a federal election generally, it should be noted that cash

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<sup>96</sup> U.S.C. App., Ethics in Government Act, §§ 101 *et seq.*; House Rule 26; Senate Rule 34.

<sup>97</sup> Constitution, Article I, Section 5. *Note* H.R.Rpt. 90-27, 90<sup>th</sup> Cong., 1<sup>st</sup> Sess. 24-26, 29 (1967); House Rule 23, cl. 1; *Ethics Manual for Members, Officers and Employees of the U.S. House of Representatives*, 102d Cong., 2d Sess. 12-16 (1992); S. Res. 338, 88<sup>th</sup> Cong., 2d Sess., Sec. 2(a) (1964), Standing Orders of the Senate, *Senate Manual*, § 79; S.Rept. 83-2508, 83<sup>rd</sup> Cong., 2d Sess. 22 (1954); *Senate Ethics Manual*, 106<sup>th</sup> Cong., 2d Sess. 12-14 (2000).

<sup>98</sup> S. Res. 146, 71st Cong. (1929). *Note* S. Doc. No. 92-7, 92d Cong., 1<sup>st</sup> Sess., “Senate Election, Expulsion and Censure Cases from 1793 to 1972” (1972).

<sup>99</sup> 72 Stat. Part II, B12, ¶5.

contributions over \$100 are prohibited by federal law;<sup>100</sup> that political contributions from the treasury funds of corporations, national banks, labor unions, or from federal government contractors are prohibited by federal law;<sup>101</sup> that campaign contributions are prohibited from foreign nationals,<sup>102</sup> or by one in the name of another;<sup>103</sup> that there are limitations on amounts that may be contributed to federal candidates of \$1,000 per election, primary or run-off from individuals, and \$5,000 per election, primary or run-off from political action committees (multi-candidate committees);<sup>104</sup> that political contributions to federal candidates are required to be publicly reported by the recipient campaign committee;<sup>105</sup> and that no campaign contributions may be converted by a Member of Congress to personal use.<sup>106</sup>

### **Bribery, Illegal Gratuities.**

Whenever things of value are offered to a public official, consideration should be given to the federal criminal law provisions which concern bribery and illegal gratuities. Under the bribery law, a federal official may not “corruptly” receive or solicit, and no one may corruptly offer or give, anything of value “in return for ... being influenced in the performance of any official act.”<sup>107</sup> The “corrupt” nature of the transaction is part of the required intent which is characteristic of a “bribe.” This element of the offense – a corrupt agreement or bargain – has been described as requiring some express or implied *quid pro quo* involved in the transaction, that is, something given in exchange for something else.<sup>108</sup> The bribe under these circumstances must be shown to be the thing that is the “prime mover or producer of the official act” performed or agreed to be performed.<sup>109</sup> Even a campaign contribution could be the “thing of value” given in a bribe, since the recipient public official need not benefit personally from a bribe that is received by a third party, such as a campaign committee. In *United States v. Anderson*,<sup>110</sup> the court upheld the conviction of a registered lobbyist for a mail-order company for bribing a Senator with “campaign contributions” to vote on certain postal rate legislation, when the evidence was sufficient to indicate a “corrupt intent” to influence by means of such payments, as opposed to the permissible activity of merely giving “campaign

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<sup>100</sup>2 U.S.C. § 441g.

<sup>101</sup>2 U.S.C. §§ 441b, 441c.

<sup>102</sup>2 U.S.C. § 441e.

<sup>103</sup>2 U.S.C. § 441f.

<sup>104</sup>2 U.S.C. § 441a.

<sup>105</sup>2 U.S.C. § 434.

<sup>106</sup>House Rule 23, cl. 6; Senate Rule 38, cl. 2; *note* 2 U.S.C. § 439a.

<sup>107</sup>18 U.S.C. § 201, *see* specifically 18 U.S.C. § 201(b).

<sup>108</sup> *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 404 (1999); *United States v. Brewster*, 506 F.2d 62, 72 (D.C.Cir. 1974); *United States v. Arthur*, 544 F.2d 730, 734, 735 (4<sup>th</sup> Cir. 1976); *United States v. Tomblin*, 46 F.3d 1369, 1379 (5<sup>th</sup> Cir. 1995).

<sup>109</sup>*United States v. Brewster*, *supra* at 72, 82.

<sup>110</sup>509 F.2d 312 (D.C.Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

contributions inspired by the recipient's general position of support on particular legislation."<sup>111</sup>

In addition to the bribery clause, the so-called "illegal gratuities" section of the same statute prohibits the giving or the receipt of something of value, other than as provided by law, "for or because of" an official act done or to be done.<sup>112</sup> Campaign contributions given for a political candidate who is a federal officeholder are unlikely to be involved in the case of illegal gratuities, since the thing of value given in the case of an illegal gratuity (unlike for a bribe) must be received for the official "personally" or for himself.<sup>113</sup>

However, as to personal gifts to a public official, it should be noted that the "illegal gratuities" clause is less exacting than the bribery clause as to the required intent. The "illegal gratuities" section does not require a specific "corrupt" intent, nor a corrupt bargain or *quid pro quo* such that the gift or other thing of value is the "motivator" or the influence for the official act, as is required in the bribery provision.<sup>114</sup> Rather, the illegal gratuities provision requires merely that the thing of value given or received was "other than as provided by law," and was given or received "for or because of" some identifiable official act. Since the illegal gratuity need not be the motivator of an official act, nor is it required that the illegal gratuity be intended to influence an official act, an illegal gratuity may even be given *after* an act has already been performed, as a "thank you" or in appreciation for the official act. The Supreme Court explained the differing intents required in the two clauses as follows:

The distinguishing feature of each crime is its intent element. Bribery requires intent "to influence" an official act or "to be influenced" in an official act, while illegal gratuity requires only that the gratuity be given or accepted "for or because of" an official act. In other words, for bribery there must be a *quid pro quo* – a specific intent to give or receive something of value *in exchange* for an official act. An illegal gratuity, on the other hand, may constitute merely a reward

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<sup>111</sup>*Id.* at 330-331. Political contributions to entities do not in themselves constitute bribes "even though many contributors hope that the official will act favorably because of their contributions." *United States v. Tomblin*, *supra* at 1379.

<sup>112</sup>18 U.S.C. § 201(c).

<sup>113</sup>*United States v. Brewster*, *supra* at 77. The statute was amended in 1986, P.L. 99-646, §46(f),(g), 100 Stat. 3601-3604, to provide technical amendments to the criminal code, including changing the terms "for himself" to "personally." There is no indication of an intent to change the substance of the elements of the offense. If facts are developed that contributions, ostensibly made to a third party or entity "for or because of" official acts done or to be done by a public official, were in fact used or expended in a manner to financially enrich or financially benefit the official personally, then it might be argued that such funds were received "personally" or "for himself." Contributions to a campaign committee, therefore, which are wrongfully converted to personal use and are used, for example, to pay for personal living expenses of a public official, or other personal expenses such as transportation, clothing, or food, might arguably be considered payments received "personally" for the official.

<sup>114</sup>*Brewster*, *supra* at 72; *United States v. Sun-Diamond Growers*, *supra* at 404 - 405.



for some future act that the public official will take (and may have already determined to take), or for a past act that he has already taken.<sup>115</sup>

Although no specific illegal bargain, or "corrupt" intent, in giving or receiving an illegal gratuity need be shown, there is nevertheless a criminal intent requirement embodied in the characterization "illegal gratuity" (the criminal receipt of a payment) as distinguished from a mere "gift" unrelated to any official act. That intent has been described as knowingly being compensated or rewarded (or intending to compensate or reward an official), other than as provided by law for one's salary, for an official governmental act already performed or to be performed in the future by the official.<sup>116</sup> While some cases in the circuits had gone so far as to find that a specific official act need not be contemplated or identified for a payment or gift to constitute an "illegal gratuity," as long as the payment or gift was given to a recipient who is in a "position to use his authority in a manner which could affect the gift giver,"<sup>117</sup> the Supreme Court in the *Sun-Diamond* case confirmed that such so-called "status gifts," unconnected to any identified official act, were not violative of the criminal illegal gratuities provision.<sup>118</sup> Such so-called "status gifts," without the requisite criminal intent of a connection to any official act, are regulated and controlled by federal regulations and administrative provisions for executive branch officers and employees,<sup>119</sup> and in the case of Members and employees of Congress are governed by the House and Senate Rules discussed above.

## Further Ethical Considerations for Attorneys

As a profession, attorneys may be called upon more often than others to provide legislative representational services for clients. When lobbying the Congress, as in providing other professional services for a client, there are certain ethical rules, guidelines, and considerations which are unique to and need to be recognized and observed by attorneys.

The American Bar Association has promulgated *Model Rules of Professional Conduct*, which have been adopted in one form or another within the various jurisdictions. These rules discuss ethical considerations and norms for attorneys in not only representing clients before courts, but also in representing clients in non-adjudicatory matters, such as before a legislature:

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<sup>115</sup>*United States v. Sun-Diamond Growers, supra* at 404 - 405.

<sup>116</sup>*United States v. Brewster, supra* at 81, 82, quoting earlier Supreme Court decision in *United States v. Brewster*, 408 U.S. 501, 527 (1972); *United States of Irwin*, 354 F.2d 192, 196 (2d Cir. 1965), *cert. denied*, 383 U.S. 967 (1966).

<sup>117</sup>*United States v. Niederberger*, 580 F.2d 63, 69 (3rd Cir. 1978), *cert. denied*, 439 U.S. 980 (1978); *United States v. Alessio*, 528 F.2d 1079, 1082 (9th Cir. 1976), *cert. denied*, 426 U.S. 94 (1976).

<sup>118</sup>*United States v. Sun-Diamond Growers, supra* at 406 - 410. See also *United States v. Brewster*, 506 F.2d 62 (D.C.Cir. 1974).

<sup>119</sup>5 C.F.R. §§ 2635.201 *et seq.*, 5 U.S.C. § 7353.

## RULE 3.9: Advocate in Non-adjudicative Proceedings

A lawyer representing a client before a legislative or administrative tribunal in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

## COMMENT:

[1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rulemaking or policy-making capacity, lawyers present facts, formulate issues and advance argument in the matters under consideration. The decision-making body, like a court, should be able to rely on the integrity of the submissions made to it. A lawyer appearing before such a body should deal with the tribunal honestly and in conformity with applicable rules of procedure.

[2] Lawyers have no exclusive right to appear before non-adjudicative bodies, as they do before a court. The requirements of this Rule therefore may subject lawyers to regulations inapplicable to advocates who are not lawyers. However, legislatures and administrative agencies have a right to expect lawyers to deal with them as they deal with courts.

The ethical rules referenced in Rule 3.9 concern, among other items, duties of attorneys not to knowingly make false statements, or to fail to disclose a material fact to a tribunal when such non-disclosure may further a fraud or criminal act of the client (Rule 3.3), as well as specific prohibitions on improper and undue influence of an officer (Rule 3.5). The Model Rules of Professional Conduct also note that it is “professional misconduct” for a lawyer to “state or imply an ability to influence improperly a government agency or official” (Rule 8.4(e)).

Attorneys should also be aware that in addition to federal post-employment “revolving door” laws, under the American Bar Association Model Rules after a lawyer leaves public employment he “shall not represent a private client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency consents after consultation.”<sup>120</sup> This may in some instances limit the representational activities of attorneys for clients before Congress when the attorneys have left public employment; the issue would most likely not arise in the context of general lobbying activities by the attorney, but rather in his or her capacity as counselor for someone subject to such proceedings as committee investigatory proceedings and hearings.<sup>121</sup>

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<sup>120</sup>ABA Model Rules of Professional Conduct, Rule 1.11.

<sup>121</sup>See discussion, for example, of former rule as it applied to litigation in *General Motors Corp. v. City of New York*, 501 F.2d 639, 648-651 (2d Cir. 1974); *Laker Airways Ltd. v. Pan Am World Airways*, 103 F.R.D. 22 (D.D.C. 1984).