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Capitol View

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Changes to Ethics and Lobbying Laws Will Impact Business In Washington

Late last week, the House and Senate passed the "Honest Leadership and Open Government Act of 2007." The President is expected to sign the legislation shortly. The Act grew out of several widely reported ethics scandals over the past several years and has moved forward sporadically since the new Congress was sworn in in January.

The House amended its internal rules shortly after the new session started to make changes to the rules governing gifts and travel (most notably, it banned gifts from lobbyists—unless an exemption applied). The Senate then passed a bill (rather than just a resolution) that would have made changes to the Lobbying Disclosure Act ("LDA") and amend its rules. Having already revised its own rules, the House did not act on the Senate bill, and therefore the Senate's amendments—even to its own rules—did not take effect. Thus, the comprehensive "reform" sought by many languished throughout the first half of the year.

As the August recess loomed, Congressional leaders managed to break the impasse and craft a comprehensive set of changes. With the passage of the Act, the Senate's gift rules will be amended to be similar to the House's rules as they were amended earlier this year. In addition, both houses will have similar restrictions on travel provided by lobbyists and on the use of private aircraft. The gift rules will now apply not only to the recipient of the gift, but also to lobbyists who give prohibited gifts.

The Act will make a number of changes to the LDA, including requiring quarterly reporting to replace the current semi-annual reports, new disclosures of "bundled" contributions by lobbyists, and additional disclosures by coalitions. All of these additional reports are to be enforced through significantly higher civil fines and potential criminal penalties.

The legislation includes provisions dealing with the so-called "revolving door" issue of former government officials becoming lobbyists. The Act will limit when such former officials may be involved in lobbying, impose mandatory disclosure of employment negotiations, and place limits on lobbying by former government officials and spouses of Members of Congress. Finally, the Act makes a number of changes to the Senate's sometimes arcane rules in an attempt to bring greater transparency to the legislative process.

This issue of *Capitol View* looks at the various changes included in the Act. Should you have specific questions about the impact the law will have on your political activities, please contact Ronald M. Jacobs at 202-344-8215.

Changes to the Gift Rules

Gifts from Lobbyists— In January, the House amended its rules to prohibit Members and staff from accepting gifts from lobbyists and agents of foreign principals. The Senate has now made a similar change to its rules. Therefore, effective upon the President's signature, all staff and members of both houses of Congress may not "knowingly accept a gift from a registered lobbyist, agent of a foreign principal, or a private entity that retains or employs a registered lobbyist or agent of a foreign principal."

Gifts from lobbyists are still permissible in either chamber if they fit into an exemption. For example, an entity that retains a lobbyist may still host a "widely attended event" and provide a meal as part of the event. Other exemptions include food that is not part of a meal (e.g., stand-up receptions), training events, certain charitable functions, and items of nominal value. In addition, the exemption for gifts given for personal friendship still applies. However, it is important to note that if the gift—such as a meal—is being reimbursed or deducted as a business expense, it is not likely to be considered a gift given out of friendship.

Previous versions of the gift rules applied only to Members of Congress and their staff. The Act, however, prohibits registered lobbyists from giving a gift to a legislative branch official "if the person has knowledge that the gift or travel may not be accepted by that covered legislative branch official under the Rules of the House of Representatives or the Standing Rules of the Senate." This provision applies to lobbyists, entities that employ lobbyists (e.g., a company with an in-house lobbyist), and any employee that is listed on a lobbying registration. As part of the Lobbying Disclosure Act, this prohibition on giving prohibited gifts is subject to civil fines of up to $200,000 and criminal enforcement for "knowing and corrupt" violations. Thus, the giver of a prohibited gift is now subject to more severe sanctions than the recipient.

Valuation of Tickets—Following changes to the House rules to value tickets to sports and entertainment events given to Members and staff, the Act makes similar changes to the Senate rules. The rules do differ, however, so a ticket given to an employee of the Senate may be acceptable under the rules while a ticket given to House staff member may not. Both rules look first to the "face value of the ticket" for the proper valuation. The House rules specify that if the face value of the value printed on the ticket is not "the price at which the issuer offers that ticket for sale to the public," the value is the "highest cost of a ticket with a face value for the event." The Senate rules have no corresponding provision.

Both rules provide that if there is not a price printed on the ticket, then the value is the ticket with the highest face value printed on it for the event. The Senate rules will include a provision allowing the Senate Ethics Committee to set a lower value based on evidence presented by the person who wishes to accept the ticket.

Receptions During Conventions—The Act includes provisions for both the House and Senate rules prohibiting lobbyists or entities that employ lobbyists from sponsoring certain functions during the national conventions.

More Frequent and Detailed LDA Reports

The Act made a number of changes to the LDA that are designed to increase the amount of information available to the public, including more frequent filing, requiring additional information to be disclosed, requiring filings to be done electronically, and mandating that the information be made available through searchable databases. All of this is backed up by higher fines, the potential for criminal sanctions, random compliance audits, and reports about cases referred to the Department of Justice for prosecution.

Quarterly Filing—The most visible, and potentially cumbersome, change will be the Act's requirement that all LDA reports be filed quarterly, rather than semi-annually as the law currently requires. In addition, the reports will be due 20 days after the close of the quarter, instead of the current 45 days after the end of the six-month reporting period.

In addition, the triggers for registration, which used to be keyed to six-month reporting periods, now look to the three-month period, and thus the Act reduces the various monetary thresholds for registering in half. For example, previously, a person who made more than one lobbying contact had to register if that individual spent more than 20% of his or her time on "lobbying activities" during the six-month period and if the registrant had income for lobbying of $5,000 in that period. Now, registration will be required if a lobbying firm receives $2,500 from a client (or an entity employing an in-house lobbyist spends $10,000) in a three-month period and if an individual who makes more than one lobbying contact spends more than 20% of his time for that three-month period on lobbying activities. This make registration much more likely for short-duration, high-intensity lobbying projects.

Coalition Disclosures—If a coalition or association that must register accepts more than $5,000 in a three-month period from an entity, it must now disclose the name, address, and principal place of business of any organization that "actively participates in the planning, supervision, or control of such lobbying activities." Previously, only those entities that gave $10,000 over a six-month period that "in major part" planned, supervised, or controlled such lobbying activities had to be disclosed. There are also provisions dealing with whether membership lists must be disclosed as part of this provision.

Electronic Filing (LDA & FARA)—The Act mandates electronic filing for both LDA (the House already required such filing) and also the Foreign Agents Registration Act. The Act also requires registrations and reports to be made available electronically in a searchable and downloadable format.

Penalties & Enforcement—The Act makes several changes to the LDA that are designed to increase compliance. First, it raises the potential civil penalty for non-compliance from $50,000 to $200,000. It also makes "knowingly and corruptly fail[ing] to comply" with the LDA subject to criminal enforcement, with a term of prison of up to five years.

There are several other additions to the LDA in the Act that will likely increase enforcement and compliance. First, the Comptroller General is required to conduct a random audit of registrants for compliance and prepare an annual report for Congress. As part of these auditing powers, the Comptroller General may request information from registrants.

In addition, the Clerk of the House and Secretary of the Senate must publicly reveal, twice a year, the number of referrals for noncompliance they have made to the U.S. Attorney for the District of Colum-

bia. The Attorney General is then required to report to several congressional committees the number of enforcement actions it takes as a result of these referrals, and the disposition of the cases.

Disclosing Political Contributions & Fundraising Efforts

There are two provisions in the Act that are designed to disclose those individuals who raise funds for candidates and other political organizations.

LDA Reporting— First, lobbyists must now disclose, on a semiannual basis (the Clerk is to provide a report to Congress as to whether this should be changed to a quarterly report), the following information:

- All political committees established or controlled by the lobbyist;
- A list of all contributions of $200 or more made to federal candidates, leadership PACs, or a political party by the individual or the political committees that individual controls;
- Funds contributed or disbursed for events honoring covered executive or legislative branch officials;
- Funds contributed or disbursed to entities named after a covered legislative branch official;
- Funds contributed or disbursed to entities established, financed, maintained, or controlled by a covered legislative branch official;
- Funds contributed or disbursed to pay the costs of a meeting, retreat, conference, or other event held by or in the name of one or more covered legislative branch officials;
- A list of contributions of $200 or more made to Presidential libraries; and
- A list of contributions of $200 or more made to Presidential inaugural committees.

These disclosures must be made by all organizations that are registered as a lobbyist as well as separately by any employees of the organization listed as individual lobbyists.

FECA Reporting—In addition, the Act amends the Federal Election Campaign Act to require candidates and leadership PACs to disclose any individuals "reasonably known by the committee to be a [registered lobbyist or political committee controlled by a registered lobbyist] who provided 2 or more bundled contributions" of more than $15,000 from January 1 to June 30 and from July 1 to December 31 of each year. Contributions by the individual and his or her spouse are exempted from the $15,000 threshold, and the $15,000 will be indexed to inflation every two years.

The Act has a two-part definition of "bundled contribution." First, a bundled contribution includes a contribution that is forwarded to the candidate's committee by the registered lobbyist. It is important to note that in many cases, such forwarding could implicate a number of other campaign finance laws, including the prohibition on a corporation facilitating contributions. Second, the definition includes contributions received directly by the candidate's committee but that are "credited" by the candidate to the lobbyist "through records, designations, or other means of recognizing that a certain amount of money has been raised by the person."

The Act requires the FEC to create regulations explaining this provision within six months, and makes this provision effective three months after the regulations become final. The Act makes clear that the FEC cannot exempt individuals "on the grounds that the person is authorized to engage in fundraising for the committee or any similar grounds." Existing regulations provide some leeway for indi-

viduals who have authority to raise funds for candidates.

Limits on Travel

As part of the changes to the House rules enacted in January, lobbyists, foreign agents, and the entities that employ or retain lobbyists and foreign agents were prohibited from paying for travel. The Act amends the Senate rules to impose similar restrictions.

In addition, the Act restricts how candidates and Members pay for travel on private aircraft. In the past, under FEC regulations, candidates could reimburse a company for a flight on a private plane by paying the value of a first-class ticket. The Act now requires candidates to pay the pro rata share of the normal and usual charter fare within a commercially reasonable time after the flight is taken. In addition, the Act prohibits the campaign committee or leadership PAC of a House Member from paying for any flight other than on a commercial airline or if the campaign charters the flight itself (i.e., a candidate for the House cannot use his campaign to reimburse a company for a trip on that company's private plane).

Senators are allowed to pay for official travel on private aircraft based on the pro rata share of the normal and usual charter fare. Under the changes the House adopted in January, House members were prohibited from flying on private planes in most circumstances.

Employment Restrictions

The Act places several restrictions on former officials' ability to lobby and the disclosures that covered executive and legislative branch officials must make when they register to lobby. It also prohibits Members of Congress and employees from influencing "solely on the basis of partisan political affiliation, an employment decision or employment practice of any private entity," by taking or withholding or offering or threatening to take or withhold an official act or by influencing or offering or threatening to influence an official act of another. This provision is enforced under the criminal code and the rules of each chamber and is designed to prevent Members of Congress from forcing organizations to hire specific lobbyists.

In addition, the Act requires Members and Senators and certain staff to disclose when they are negotiating for private employment. Members must notify the House Committee on Standards of Official Conduct (commonly known as the Ethics Committee) and Senators must notify the Secretary of the Senate within three days of the start of negotiations if their successor has not yet been elected. Staff in both houses making more than 75% of a Member or Senator's pay must also disclose negotiations. In addition, Senators may not enter into negotiations to take a job involving "lobbying activities" until after their successors are elected. Finally, Members and Senators must recuse (and notify the Clerk or Senate Ethics Committee of the recusal) themselves if there is a conflict of interest or a potential conflict of interest

The Act also includes provisions banning contact by staff with a Member's spouse who is acting as a lobbyist and strips Members of their Congressional pension if they are convicted of crimes involving the performance of their official duties.

Inside Baseball Changes

The Act makes a number of changes to Senate procedures that are designed to "increase transparency" in the legislative process.

First, it makes several changes to the conference committee process by:

- Preventing conference committees from adding anything to a piece of legislation that was not in either the House or Senate version of the bill;
- Suggesting that conference committees hold regular, formal meetings, that are open to the public; and
- Requiring conference committee reports to be made publicly available for 48 hours before the Senate votes on the final bill.

Second, the Act makes changes to the anonymous hold procedures that Senators may use to stop legislation (or other Senate activities, such as nominations). The Act will require such holds to be made public in the Congressional Record, with a specific reason included with the Senator's name.

Third, the Act requires all committees and subcommittees to make transcripts or audio or video archives of their hearings available through the internet, unless the hearing is closed or there is a specific technical or logistical problem.

Finally, the Act makes changes to the Senate rules to publicize "earmarks." Earmarks include congressionally directed spending, limited tax benefits, and limited tariff benefits. Each of these items is specifically defined in the Act. The rules will allow Senators to object to legislation that contains an earmark that has not been disclosed on a publicly available congressional website for 48 hours with the requesting Senator's name included. This provision is similar to changes made in the House rules in January.

About the Author: Ronald M. Jacobs practices in Venable's regulatory and legislative groups, where he advises clients on all aspects of compliance with campaign finance law and regulations, LDA, FARA, House and Senate ethics rules, and tax laws applicable to lobbying and political activity.

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Ethics Changes Quick Reference

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House & Senate Rules

House	Senate
Spouses may not contact staff of lawmaker for lobbying	Spouses may not contact staff except if registered one year before marriage or election
May not fly on private planes	Must pay charter rate for flights on private planes
Tickets valued at highest face price	Highest face price, but Ethics Committee may set different value

Both

All gifts from lobbyists prohibited (unless exemption applies)
Members may not attend convention parties paid for by lobbyists

Lobbying Disclosure

- √ Registration triggers look to quarter rather than semi-annual period
- √ Quarterly filing mandated for lobbying activities
- √ Lobbyists (individuals and firms) must disclose contributions made to candidates, certain events, presidential libraries, presidential inaugural committees, and certain conferences with members of Congress
- √ Lobbyists must disclose all political committees they establish or control
- √ Electronic filing mandated
- √ Increased fines
- √ Potential audits by GAO

Campaign Finance Disclosure

- √ Campaign committees (and leadership PACs) must disclose bundlers