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

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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, as amended by the "Honest Leadership and Open Government Act of 2007," P.L. 110-81 (S. 1, 110th Congress); the Foreign Agents Registration Act; the issue of 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 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 current lobbying registration and disclosure provisions establish clearer criteria and thresholds for determining when an organization should register its employees or staff as lobbyists or when a lobbying firm or individual lobbyist needs to register and identify clients. 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 they leave government service ("revolving door" laws). Additionally, to deal with similar perceptions of undue or improper influence and access, both Houses of Congress have adopted internal 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, or their clients. No gifts may be accepted by Members, officers, or employees except as permitted in the rules of the respective chamber; and thus even small gifts, as well as more significant travel expenses for conferences or "fact finding" events provided to congressional Members and staff from private parties such as lobbyists and their clients, are regulated and restricted by the provisions of House and Senate rule. Under the new "ethics and lobbying" law (P.L. 110-81), registered lobbyists must be familiar with these restrictions and regulations on gifts to Members of Congress in House and Senate rules, and must certify to the Government that they have not offered gifts or things of value to Members or staff which would violate these rules.

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Introduction/Background

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,[1] and may facilitate the exchange of important information and ideas between the government and private parties.[2] 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.[3] There are

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[1] *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), and discussion in Browne, "The Constitutionality of Lobby Reform: Implicating Associational Privacy and the Right to Petition the Government," 4:2 *William & Mary Bill of Rights Journal* 717(1995).

[2] S.Rept. 99-161, 99th Cong., 2d Sess., "Congress and Pressure Groups: Lobbying in a Modern Democracy," Senate Committee on Governmental Affairs 1-14 (1986).

[3] 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

(continued...)

several federal statutory laws, as well as rules of the House and Senate, which either apply to lobbying directly, or which are relevant to congressional lobbyists because the provisions bear upon a Member's or congressional employee's dealings with those who attempt to influence the legislative process. Although the internal House and Senate rules apply directly only to those who come within their respective jurisdictions, the new *statutory* provisions amending the Lobbying Disclosure Act of 1995 require a registered lobbyist to be familiar with the House and Senate ethics rules on gifts and reimbursements, prohibit lobbyists from offering gifts the receipt of which would violate those congressional rules, and require lobbyists to certify that no gifts have been offered to Members of Congress or staff which would be in violation of the chamber's rules.[4]

Concerning the regulation of lobbying generally, because of First Amendment protections and guarantees, the federal "regulation" of lobbying activities engaged in by private citizens principally takes the form of disclosure and reporting of such activities and the financing behind those activities, as opposed to any specific limitations or restrictions on advocacy. Even when regulation on lobbying merely requires disclosures and reporting, such regulation, in the area of political and public-policy advocacy, may still be subject to careful scrutiny by the courts. Court decisions in this and related areas have looked to determine whether there exists any "chilling" of, or deterrent to the exercise of, citizens' First Amendment rights caused by such required disclosures, and if so, whether any theoretical or indirect chilling of speech is counter-balanced by important governmental and societal interests promoted by the regulations, such as transparency and openness in government, and the protection of basic governmental processes from undue influences.[5]

The Lobbying Disclosure Act of 1995, As Amended

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 "Lobbying Disclosure Act of 1995"[6] now provides more specific thresholds, and clearer and broader definitions of who is a "lobbyist" and what "lobbying" activities and contacts

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[3] (...continued)
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).

[4] P.L. 110-81, 121 Stat. 735, September 14, 2007 (S. 1, 110th Congress), sections 203(a) (certification) and 206 (prohibition).

[5] *United States v. Harriss,* 347 U.S. 612 (1954); *McConnell v. Federal Election Commission,* 540 U.S. 93, 143, 150 (2003); *Buckley v. Valeo,* 424 U.S. 1, 65 (1976); *NAACP v. Button,* 371 U.S. 415 (1963); *NAACP v. Alabama,* 357 U.S. 449, 460 (1958); *Gibson v. Florida Legislative Investigation Committee,* 372 U.S. 539, 544 (1963); *Bates v. Little Rock,* 361 U.S. 516 (1960); *Shelton v. Tucker,* 364 U.S. 479 (1960).

[6] 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, and the "Honest Leadership and Open Government Act of 2007," P.L. 110-81, 121 Stat. 735, September 14, 2007.

will trigger the requirements for the registration and reporting of persons who are compensated to engage in lobbying.

The lobbying disclosure law was amended substantially in 2007 in the "Honest Leadership and Open Government Act of 2007,"[7] to provide further and more frequent disclosures, information, and reporting from those professional lobbyists covered by the Lobbying Disclosure Act of 1995. The new reporting and disclosures will generally apply to the information which is required to be filed in the calendar quarters beginning after January 1, 2008.[8] Other information to be included in reports, concerning particularly the interaction of covered lobbyists and government officials in the making or offering of gifts, donations, payments or contributions from such lobbyists and their clients to or on behalf of federal public officials, will be filed semi-annually concerning those six-month periods after January 1, 2008.[9]

The 2007 amendments to the lobbying disclosure laws were not intended primarily to increase the number of persons who are required to register and report as "lobbyists" under the LDA. Thus, the definitions of who is a covered "lobbyist," and of what are "lobbying contacts" and "lobbying activities" — and therefore who must register and report under the law — were not substantively amended by the 2007 Act.[10] Rather, the amendments in 2007 were substantially directed at providing more "transparency" — broader disclosures, more information, and more frequent reporting — on lobbying activities from those "lobbyists" already required to register and report under the law. Additionally, the new lobbying law amendments require lobbyists to be familiar with the restrictions, limitations, and prohibitions in internal House and Senate rules on the receipt of gifts from private sources by Members and staff of Congress, as the new lobbying laws expressly prohibit lobbyists and organizations with employee/lobbyists from offering gifts and travel prohibited by such rules, and requires certification by registrants that no such gifts have been offered.

Who Is Covered Under the Act. 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.[11] In addition to covering only those who are paid to lobby, the initial "triggering" provisions of the law cover only the conduct of lobbying which involves "direct" contacts with covered officials. The law's registration requirements are not

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[7] P.L. 110-81, 121 Stat. 735, September 14, 2007 (S. 1, 110th Congress).

[8] P.L. 110-81, Sections 201, 202, 205, 207-210, 215.

[9] P.L. 110-81, Section 203.

[10] The threshold amounts of time and money spent or received to qualify one as a "lobbyist" are adjusted (halved) in P.L. 110-81 to conform to the new quarterly (rather than semi-annual) filing, but the thresholds are not otherwise lowered with the intention of covering more persons as "lobbyists." (Assuming a *pro rata* expenditure of time and money, more persons will not necessarily qualify as "lobbyists" under the amended law, but the new provisions do have the effect of lowering by half the thresholds for minimum or sporadic lobbying efforts).

[11] *See* H.Rept. 104-339, 104th Cong., 1st Sess., at 2 (1995).

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.[12]

For purposes of discussing the LDA requirements, it is useful to recognize two general categories 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 employing that individual/lobbyist, or by an outside lobbying firm, including an individual, sole practitioner who is a lobbyist for outside clients. A business or organization which has employees who engage in a certain amount of lobbying on its behalf ("in-house" lobbyists) must thus register and identify its employee/lobbyists.[13] "Lobbying firms" or entities (including sole practitioners) 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.[14]

Expenditure/Income Threshold. The previous lobby registration statute which had been 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 was one's "main" or "principal purpose," and for providing no specific thresholds, or clear measures to trigger the requirements of the law. The Lobbying Disclosure Act of 1995, as amended, however, provides more specific thresholds, triggering measures, and *de minimis* amounts.

There is a *de minimis* expense and a *de minimis* income threshold below which the requirement for registration by organizations, and by lobbying groups or firms, will not be triggered. Any organization which uses its own employees as lobbyists

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[12] 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.Rept. 104-339, 104th Cong.,1st 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.'"

[13] 2 U.S.C. § 1603(a)(2).

[14] 2 U.S.C. § 1603(a)(1).

(in-house lobbyists) will not need to register if the organization's total *expenses* for lobbying activities do not, for the quarterly reporting period beginning January 1, 2008, exceed the statutory amount of $10,000 (or, if past adjustments are considered, $12,225) in the applicable three-month reporting period.[15] 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, for the applicable quarterly reporting period beginning January 1, 2008, exceed the statutory threshold amount of $2,500 (or, if past adjustments are considered, $3,000) in a 3- month filing period.[16]

Contact and Time Threshold. A "lobbyist" under the disclosure law is an organization's employee who engages in lobbying (an "in-house" lobbyist), 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 (an "outside" lobbyist), 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 three- month period.[17]

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.[18] Thus, by definition, a "lobbying contact" involves a direct communication to policy and decision makers, and does not include indirect

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[15] 2 U.S.C. § 1603(a)(3)(A)(i), as amended by P.L. 110-81. The statutory amount was changed from $20,000 in a six-month period to $10,000 in a three-month period. However, the amount is adjusted every four years (2 U.S.C. § 1603(a)(3)(B)), and the $20,000 amount was last adjusted January 1, 2005, to $24,500. If the adjusted amount is merely halved under the new three-month reporting periods established in P.L. 110-81, the new three-month threshold amount for expenditures will be $12,225. However, if the actual amount stated in the new statute is used, without the past adjustments (and then adjusted every four years from the date of the new law), then the new three-month threshold amount for expenditures will be $10,000.

[16] 2 U.S.C. § 1603(a)(3)(A)(ii), as amended by P.L. 110-81. The statutory income threshold amount was changed from $5,000 in a six-month period to $2,500 in a three-month period. However, the amount is adjusted every four years, 2 U.S.C. § 1603(a)(3)(B), and the $5,000 amount was adjusted January 1, 2005, to $6,000. If the adjusted amount is merely halved under the new three-month reporting periods established in P.L. 110-81, the new three-month threshold amount for income will be $3,000. However, if the actual amount stated in the new statute is used, without the past adjustments (and then adjusted every four years from the date of the new law), then the new three-month threshold amount for income will be $2,500.

[17] 2 U.S.C. § 1602(10), as amended by P.L. 110-81, substituting the three-month reporting period for previous six-month period.

[18] 2 U.S.C. § 1602(8)(A).

or "grass roots" lobbying activities,[19] and does not include behind-the-scenes support activities. The term "lobbying activities," however, for which reporting of expenditures must be made and for which the 20% of time threshold is applicable, is broader than the meaning of "lobbying contacts," and includes such "lobbying contacts" as well as background activities and other efforts in support of those lobbying contacts.[20]

Information 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.[21] The required registration statements are filed with the Secretary of the Senate and the Clerk of the House, and will be made available by those offices, free to the public, over the Internet. The information on the registrations will generally include identification of the lobbyist, or organization with employee/lobbyists; the client or employer; an identification of any foreign entity, and disclosure of its contributions of over $5,000, if the foreign entity owns 20% of the client and controls, plans or supervises the activities of the client, or is an interested affiliate of the client; and a list of the "general issue areas" on which the registrant expects to engage in lobbying, and those on which he or she has already lobbied for the client or employer.[22] In additional to listing the "client" of a lobbyist in the case of, for example, a "coalition" or association which hires a lobbyist, identification must also be made of any organization other than that client-coalition which contributes more than $5,000 for the lobbying activities of the lobbyist in a three-month reporting period and actively participates in the planning, supervision or control of the lobbying activities.[23]

Quarterly Reports. Beginning in the reporting periods after January 1, 2008, lobbyists and organizations required to register under LDA are also required to file periodic reports on a quarterly basis covering the periods January 1 - March 31, April 1 - June 30, July 1 - September 30, and October 1 - December 31. These reports are to be filed within 20 days of the end of the applicable period, and will identify the registrant/lobbyist, identify the clients, and provide any needed updates to the information in the registration; identify the specific issues upon which one lobbied, including bill numbers, earmarks, and any specific executive branch actions; employees who lobbied; Houses of Congress and federal agencies contacted; any covered interest of a foreign entity; and provide a good faith estimate of lobbying expenditures (by organizations using their own employees to lobby), or income from

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[19] 2 U.S.C. § 1602(8)(B)(iii).

[20] 2 U.S.C. § 1602(7).

[21] 2 U.S.C. § 1603(a)(1).

[22] 2 U.S.C. § 1604(b).

[23] 2 U.S.C. § 1603(b)(3), as amended by P.L. 110-81, Section 207. There are certain exceptions to listing separately participating organizations if such groups are listed publicly on the coalition's website (unless the organization plans, supervises or controls the activities of the coalition, and then it must be listed in the registration statement).

clients (estimated by outside lobbying firms/practitioners) in excess of $5,000 (and rounded to the nearest $10,000.[24]

Semi-Annual Reports. The 2007 amendments to LDA included several new, additional items of expenditures, activities, and funding that are required to be disclosed and reported by registrants on a semi-annual basis.[25] The additional items to be reported upon include:

political committees — the names of all political committees established or controlled by the lobbyist or registered organization;

campaign contributions — the name of each federal candidate or officeholder, leadership PAC, or political party committee to which contributions of more than $200 were made in the semi-annual period;

payments for events or to entities connected with government officials — the date, recipient, and the amount of funds disbursed (i) to pay the costs of an event to honor or recognize a covered government official; (ii) to an entity that is named for a covered legislative branch official, or to a person or entity "in recognition" of such official; (iii) to an entity established, maintained, or controlled by a covered government official, or an entity designated by such official; (iv) to pay the costs of a meeting, conference, or other similar event held by or in the name of one or more covered government officials, unless the events, expenses or payments are in a campaign context such that the funds provided are to a person required to report their receipt under the Federal Election Campaign Act (2 U.S.C. § 434);

payments to presidential libraries or for inaugurations — the name of each presidential library foundation and each presidential inaugural committee to whom contributions of $200 or more were made in the semi-annual reporting period;

certifications concerning House and Senate gift rules — registrants are required to provide a certification that the person or organization filing (i) "has read and is familiar with" the rules of the House and Senate regarding gifts and travel, and (ii) had not provided, requested or directed that a gift or travel be offered to a Member or employee of Congress "with knowledge that the receipt of the gift would violate" the respective House or Senate rule on gifts and travel.

Oral or Written Identifications to Officials Being Lobbied. The LDA 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

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[24] 2 U.S.C. § 1604(a)-(c), as amended by P.L. 110-81, Sections 201(a) and 202.

[25] 2 U.S.C. § 1604(d), as added by P.L. 110-81, Section 203. The feasibility of reporting such items on a quarterly, rather than semi-annual, basis is to be reported upon by the Clerk of the House and Secretary of the Senate in the first year of these amendments' operation, and the "sense of the Congress" has been expressed that such reporting should be made quarterly after two years of the amendments' operation. P.L. 110-81, Section 203(c),(d).

affiliates.[26] 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.

Availability of Registration and Filing Information. Registrations, as well as the quarterly and semi-annual reports from 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. The 2007 amendments to the Lobbying Disclosure Act now require, after the first reporting period for the quarter beginning after January 1, 2008, electronic filing of lobbying reports.[27] The Clerk of the House and the Secretary of the Senate are required to maintain data bases of registrations and reports that are to be available, searchable, sortable and downloadable for free to the public over the Internet, to link certain information to the Federal Election Commission data bases, and to preserve the lobbying information for six years.[28] Forms for registration and reporting, and detailed filing instructions for lobbying firms and organizations with lobbyists, are available from the offices of the Clerk of the House and the Secretary of the Senate, and may be accessed online on their respective websites.

"Bundling" of Campaign Contributions. The 2007 amendments to the LDA did not prohibit or further limit or restrict the practice of "bundling" of campaign contributions by lobbyists or registrants to or on behalf of federal candidates. The "bundling" of contributions might generally be described as the practice of forwarding by, or otherwise crediting to, a person or organization a number of lawful campaign contributions that have been collected, organized, or directed by that person or organization to a federal candidate. Under the 2007 amendments, when such "bundling" is done by a registrant under LDA, by a person listed as a lobbyist by an organization registered under LDA, or by a political committee controlled by such registrant or person, then the *recipient* political committee (and not the LDA-registrant or lobbyist) must disclose in a separate schedule such bundled campaign contributions, and must identify the "bundler," when the contributions total more than $15,000 in a six-month period (excluding the personal contributions of the bundler and his or her spouse), and when the bundler is "reasonably known" by the recipient to be a lobbyist, a registered organization with lobbyists, or a committee controlled by them.[29] This disclosure is done by the appropriate recipient campaign committee under the provisions of the Federal Election Campaign Act, and under regulations to be promulgated by the Federal Election Commission.

Prohibitions on Gifts to Legislators. The 2007 amendments to the LDA now place an express prohibition within the federal lobbying law on any registered

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[26] 2 U.S.C. § 1609.

[27] P.L. 110-81, Section 205, adding 2 U.S.C. § 1604(e).

[28] P.L. 110-81, Section 209, amending 2 U.S.C. § 1605.

[29] P.L. 110-81, Section 204, amending the Federal Election Campaign Act of 1971 (2 U.S.C. § 434).

lobbyist, any organization which employs one or more lobbyists and is required to register, and any employee required to be listed as a lobbyist by a registrant, from making a gift to, or reimbursing or paying travel expenses of, a Member or staffer of Congress if the person has knowledge that the gift or travel offered may not be accepted under the applicable rules of the House or Senate.[30] As noted earlier, registrants are also required to certify on a semi-annual basis that they are familiar with the House and Senate rules on gifts and travel, and have not provided or offered such gifts or travel in violation of those rules.[31]

Enforcement and Penalties. The LDA, as amended, now has express criminal penalties for knowing and corrupt failure to comply with the law.[32] The civil penalty for failure to rectify a defective filing after notice, or to knowingly fail to comply with any provision of the lobbying law, has been increased to a fine of up to $200,000.[33] It may also be noted that an omission or a false statement to any agency or department of the federal government concerning a matter within its jurisdiction, if material and done intentionally with intent to deceive, could be subject to a prosecution for false statements and fraud under federal criminal law.[34]

Foreign Agents Registration Act

In addition to the required registrations under the federal Lobbying Disclosure Act of 1995, as amended, the provisions of the Foreign Agents Registration Act (FARA)[35] 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. Under the Lobbying Disclosure Act, as amended, 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. Under amendments adopted in 2007, the registrations and supplemental statements from foreign agents under FARA will now be available on-line in a searchable, sortable, and downloadable format.[36]

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[30] P.L. 110-81, Section 206, adding Section 25 to the Lobbying Disclosure Act of 1995.

[31] P.L. 110-81, Section 203(a), adding 2 U.S.C. § 1604(d)(1)(G).

[32] P.L. 110-81, Section 211(b), providing up to five years imprisonment, and a fine of up to $250,000 for an individual and $500,000 for an organization (18 U.S.C. § 3571).

[33] P.L. 110-81, Section 211(a), amending 2 U.S.C. § 1606.

[34] 18 U.S.C. § 1001.

[35] *See* now 22 U.S.C. §§ 611 *et seq.*

[36] P.L. 110-81, Section 212, amending 22 U.S.C. §§ 612, 616.

The Foreign Agents Registration Act, as amended by the Lobbying Disclosure Act of 1995, and its amendments, provides that "agents of a foreign principal"[37] 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 information,[38] must file and label all informational materials,[39] and keep detailed books and records open to inspection by public officials.[40] 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...."[41]

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."[42] 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....[43]

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

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[37] 22 U.S.C. § 611(b) and (c).

[38] 22 U.S.C. § 612. Under the provisions of P.L. 110-81, Section 212(a), the registrations and filings required by FARA to the Department of Justice shall be filed in electronic form, and shall be compiled and maintained by the Attorney General on a data base available to the public over the Internet, without fee, in a searchable, sortable, and downloadable manner. P.L. 110-81, Section 212(b).

[39] 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."

[40] 22 U.S.C. § 615.

[41] 22 U.S.C. § 611(c)(1).

[42] 22 U.S.C. § 611(c)(1)(i)-(iv).

[43] 22 U.S.C. § 611(o).

foreign principal; and an exemption for certain legal representation of foreign principals by attorneys in judicial or on-the-record, formal agency proceedings.[44]

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 by having 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 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.[45] 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.[46]

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."[47] 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.[48]

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

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[44] 22 U.S.C. § 613.

[45] 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.

[46] 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).

[47] 22 U.S.C. § 618(h).

[48] 22 U.S.C. § 611(o).

policy reasons, and therefore would be denied enforcement in the courts.[49] Explaining the reason for such policy, Justice Oliver Wendell Holmes, writing for the Court, 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."[50] It should be noted that the laws of 39 States prohibit outright, and the laws of a 40th State limit the amount of, contingency fees for successful legislative lobbying,[51] 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 have been for the courts to look disfavorably 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,[52] or where the client had a legitimate claim or legal right to be asserted in a matter before the legislature (e.g., "debt legislation").[53]

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 the required reports for the period "that the registrant becomes entitled to it."

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[49] "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 (4th Cir. 1940), *cert. denied* 312 U.S. 705 (1941); *note* also *Florida League of Professional Lobbyists, Inc. v. Meggs,* 87 F.3d 457 (11th Cir. 1996), upholding against constitutional challenge Florida statute barring contingency fees.

[50] *Hazelton v. Sheckells,* 202 U.S. 71, 79 (1906).

[51] *Note* survey of State laws in CRS Congressional Distribution Memorandum, "Contingency Fees for Lobbying Activities," September 21, 2000.

[52] *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.

[53] As to "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.

Federal Funds Subsidizing or Reimbursing Lobbying

There are general restrictions under federal law and regulations against the use of federal funds for lobbying activities. Federal criminal law states a general prohibition against the use of funds appropriated by Congress for the purposes of certain "lobbying" activities and publicity campaigns directed at influencing Congress or state or local legislatures on pending legislation.[54] Contractors and grantees of the 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 that applies to non-profit grantees of the federal government.[55]

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.[56] 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. [57]

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

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[54] 18 U.S.C. § 1913, as amended by P.L. 107-273, § 205(a), 116 Stat. 1778 (November 2, 2002); *note* also general appropriations riders in yearly appropriations acts prohibiting the use of appropriations for "propaganda or publicity purposes" not authorized by Congress, *see e.g.*, P.L. 109-115, Sections 821, 824 (119 Stat. 2501); and P.L. 108-199, Division F, "Transportation, Treasury, and Independent Agency Appropriations, 2004," Sections 621, 624, 118 Stat. 355, 356 (January 23, 2004). Generally, this language is thought to permit executive branch officials to contact Members of Congress and their staffs *directly*, but to prohibit executive branch officials from conducting costly letter-writing or similar publicity campaigns urging the public to contact Members of Congress about legislation. 2 Op. O.L.C. 30 (1978); 5 Op. O.L.C. 180 (1981); 13 Op. O.L.C. 300 (1989); Office of Legal Counsel, Department of Justice, "Guidelines on 18 U.S.C. § 1913" (April 14, 1995); and GAO opinions, B-302504, March 10, 2004; B-212069, October 6, 1983; B-284226.2, August 17, 2000; and GAO, B-301022, March 10, 2004. The criminal statute was enacted originally in 1919 and there is no record of any prosecution under the law.

[55] 48 C.F.R. §§ 31.205-22; 31.701 *et seq.*; note OMB Circular A-122, ¶B21, as added 49 F.R. 18276 (1984).

[56] 31 U.S.C. § 1352(a).

[57] 31 U.S.C. § 1352(b). See common agency regulations implementing "Byrd Amendment," at 55 F.R. 6735-6756 (February 26, 1990).

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.[58]

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 private funds, if the organization receives any federal grant, loan, or award.[59] 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.[60] 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."[61]

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.[62] 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

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[58] 26 U.S.C. §§ 501(c)(3), 501(h), 4911, 6033; *see* IRS Regulations at 55 F.R. 35579-35620 (August 31, 1990), affecting 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).

[59] 2 U.S.C. § 1611.

[60] H.Rept. 104-339, *supra* at 24.

[61] 141 *Congressional Record* 20045, 20053, July 24, 1995, statements of Senator Simpson.

[62] 2 U.S.C. § 1602(7).

may work to restrict their lobbying of the Congress, or of executive branch agencies or personnel, 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,[63] 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 government.

As to those restrictions relevant to lobbying the Congress, the statute prohibits former Members of the House 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.[64] Senators are now prohibited from such post-employment lobbying of the Congress for *two* years after leaving the Senate.[65]

In the House of Representatives, 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.[66] In the Senate, covered "senior" Senate employees may not lobby the entire Senate (and not just their employing office) for one year after leaving congressional employment.[67] The "cooling off" periods for former *executive* branch officials, however, apply only to lobbying those in the executive branch, and would not restrict such former officials

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[63] 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).

[64] 18 U.S.C. § 207(e)(1)(B), as amended by P.L. 110-81, Section 101.

[65] 18 U.S.C. § 207(e)(1)(A), as amended by P.L. 110-81, Section 101.

[66] 18 U.S.C. § 207(e)(3) - (7). Covered "senior" staff are those employed for at least six months in a one year period and compensated at a rate equal to or greater than of 75% of the salary of a Member of Congress.

[67] 18 U.S.C. § 207(e)(2). In addition, Senate rules impose a one-year post-employment ban on lobbying by Members and staff. All former 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.

from general lobbying directed at the U.S. Congress immediately after their government employment.[68]

In addition to the "cooling off" periods that apply to a broad range of matters, for former government officials, including Members of Congress, there are restrictions specifically applicable to foreign trade, treaties, or foreign governmental representations. Under such restrictions, no federal employee or official, including a Member or employee of Congress, 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 ongoing trade or treaty negotiations.[69] In addition, those high-level government officials who are subject to the "cooling off" or "no contact" bans, including Members of Congress and certain congressional staff, are also prohibited, for one year after leaving the government, 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.[70]

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, changes in 2007 to the Lobbying Disclosure Act of 1995 now provide a statutory relevance concerning some of these ethical standards and rules for a registered lobbyist, registered organization employing one or more employee/lobbyists, and those who lobby on behalf of such organizations.

In the past, ethical guidelines and professional standards for lobbyists expressed by voluntary organizations of professional lobbyists had contained references to complying with the requirements of 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 applicable to such public official."[71] Now, however, because of the change to the

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[68] 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 two years 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, but does not apply to lobbying Congress. 18 U.S.C. § 207(c) and (d).

[69] 18 U.S.C. § 207(b).

[70] 18 U.S.C. § 207(f); *note* definitions at 18 U.S.C. § 207(i)(1)(B).

[71] American League of Lobbyists, "Code of Ethics," Article 2, Section 2.2, adopted on February 28, 2000. See [http://www.alldc.org/ethicscode.cfm] (last visited on October 16,

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lobbying law in the "Honest Leadership and Open Government Act of 2007," the conduct of a lobbyist which could bring a Member of Congress or a congressional staff employee in violation of such internal, congressional rules on gifts and travel reimbursements, may result in criminal and/or civil penalties for the lobbyist.

Registrants under LDA are now required by law to provide a certification in writing that the person or organization filing (i) "has read and is familiar with" the rules of the House and Senate regarding gifts and travel, and (ii) has not provided, requested or directed that a gift or travel be offered to a Member or employee of Congress "with knowledge that the receipt of the gift would violate" the respective House or Senate rule on gifts and travel.[72] Additionally, there is now a specific prohibition within the federal lobbying law on any registered lobbyist, any organization which employs one or more lobbyists and is required to register, and any employee required to be listed as a lobbyist by a registrant, from making a gift to, or reimbursing or paying travel expenses of, a Member or staffer of Congress if the person has knowledge that the gift or travel offered may not be accepted under the respective, applicable rules of the House or Senate.[73] The penalties for failing to comply with the LDA include civil penalties of fines of up to $200,000, and criminal penalties for knowing and corrupt failure to comply with the law of up to five years' imprisonment.[74] Intentional false statements or material omissions in required certifications to any agency or department of the federal government concerning a material matter within that federal office's jurisdiction, may also be prosecuted under the general false statements and fraud statute.[75]

Gifts and Travel. The House and Senate rules on the receipt of gifts from outside, private sources serve, 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, which generally prohibits federal officials from soliciting or receiving 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.[76] That statute allows a federal employee's "supervisory ethics office" to promulgate, in rules and regulations, exceptions to the general statutory prohibition, and to set out the circumstances in which it would be permissible for employees to accept certain payments, gifts or reimbursements from outside private sources.[77] It should be noted, however, that 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 by law from

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[71] (...continued)
2007).

[72] P.L. 110-81, Section 203(a), adding 2 U.S.C. § 1604(d)(1)(G).

[73] P.L. 110-81, Section 206, adding Section 25 to the Lobbying Disclosure Act of 1995.

[74] P.L. 110-81, Section 211, amending 2 U.S.C. § 1606.

[75] 18 U.S.C. § 1001.

[76] P.L. 101-194, Section 303, 5 U.S.C. § 7353(a).

[77] 5 U.S.C. § 7353(b)(1).

soliciting any gifts from those doing business with or seeking action from the Congress.

Members, officers and employees of the House and the Senate have since 1995 been under restrictive rules on gifts and travel reimbursements somewhat similar to the current rules put in place in 2007.[78] The 2007 changes implemented further restrictions on the interaction of registered lobbyists or their clients with Members and staff of Congress, particularly with reference to *de minimis* gifts and travel reimbursements, but perhaps even more significantly, also instituted procedures and requirements which will allow for more oversight, disclosure and enforcement of the existing prohibitions.

This discussion of the House and Senate ethics rules 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 general, or "default" rule in the House and the Senate is that *no* gifts may be accepted by Members and staff from outside, private sources unless specifically permitted by the rules of the respective body.[79] Although the general rule is that the receipt of all gifts is generally prohibited unless authorized by the rules, the House and Senate rules list over 20 express exceptions to the gift prohibition (23 in the House and 24 in the Senate), including an additional category of exception for the receipt of travel expenses or reimbursements in certain cases for "officially connected" travel.

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 if the Member, officer, or employee "has reason to believe the gift was given because of" his or her official position.[80]

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 congressional rule provisions may apply to gifts from lobbyists on an even more restrictive basis. Certain exceptions to the general prohibitions might allow Members and staff to receive particular kinds of gifts from the general public, but will *not* exempt such gifts if they are from registered lobbyists, from agents of foreign principals registered under the Foreign Agents Registration Act, or from their clients.

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[78] S.Res. 158, 104th Cong. (July 28, 1995); H.Res. 250, 104th Cong. (November 16, 1995), *see* H.Res. 9, 106th Cong., January 6, 1999, providing for *de minimis* exception. The House gift rules were changed significantly by H.Res. 6, 110th Congress (January 4, 2007), and the Senate gift rules by P.L. 110-81, Title V (Sept. 14, 2007).

[79] House Rule 25, cl. 5(a)(1)(A)(i); Senate Rule 35, para. 1(a)(1).

[80] House Rule 25, cl. 5(a)(2)(B)(i); Senate Rule 35, para. 1(b)(2)(A).

For example, the "under-$50" exception in the House and Senate gift rules which allows Members and staff to generally accept gifts from private sources if a gift is valued under $50, and which had in the past allowed Members and staff to accept gifts such as a bottle of liquor or wine, tickets to certain sporting or entertainment events, and meals, regardless of the source of such gifts, will no longer allow the receipt of such gifts under this exception if the gift is provided by a lobbyist, a foreign agent, or a private client of the lobbyist or foreign agent.[81]

Additionally, 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.[82] Similarly, while contributions to an authorized legal defense fund are generally permitted as an express exemption to the gifts rules, such contributions may *not* be received from lobbyists or foreign agents under that exemption.[83]

Members and staff of the House and Senate are expressly prohibited from receiving anything from lobbyists and agents of foreign principals for an entity or organization that is "maintained or controlled" by a Member, officer, or employee;[84] are prohibited from directing or designating charitable contributions from a lobbyist or foreign agent (other than a contribution in lieu of an honorarium if properly reported within 30 days);[85] and may not accept a financial contribution or expenditure from a lobbyist or foreign agent for 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.[86] Under recent amendments, Members of the House and Senate are not allowed to participate in any event honoring that Member during the national political convention of that Member's political party, if the event is sponsored by a registered lobbyist or private entity retaining such registered lobbyist.[87]

Regarding the provision of travel expenses, or reimbursement for such expenses to Members, officers and employees of Congress, the general exception which allows, in certain limited circumstances and under particular guidelines, Members and staff to participate in "officially connected" travel activities, conferences, fact-findings, and symposia paid for by outside, private sources, will not apply (and the receipt of such expenses or reimbursements will be *prohibited*) if a registered

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[81] House Rule 25, cl. 5(a)(1)(A)(ii) and 5(a)(1)(B)(i); Senate Rule 35, para. 1(a)(2)(A),(B).

[82] House Rule 25, cl. 5(a)(3)(P); Senate Rule 35, para. 1(c)(17).

[83] House Rule 25, cl. 5(a)(3)(E) and cl. 5(e)(3); Senate Rule 35, para. 1(c)(5) and para. 3(c).

[84] House Rule 25, cl. 5(e)(1); Senate Rule 35, para. 3(a).

[85] House Rule 25, cl. 5(e)(2) and (f); Senate Rule 35, para. 3(b) and 4.

[86] House Rule 25, cl. 5(e)(4); Senate Rule 35, para. 3(d).

[87] P.L. 110-81, Sections 305 and 542, amending House Rule 25, cl. 8, and Senate Rule 35, para. 1(d)(5).

lobbyist, a foreign agent, or a client of such lobbyist or foreign agent pays for such travel, or where a lobbyist is involved in the planning of or participation in the event. This, and the other exceptions to the general prohibition on receiving gifts from outside, private sources, are discussed in more detail following:

Under-$50 De Minimis Exception. Both the House and Senate rules currently provide a general *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.[88] 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.

Although this exception generally allows acceptance of under-$50 gifts from many sources, this general exception for gifts of under $50 is not available to allow such a gift from a registered lobbyist, an agent of a foreign principal, or their private clients.[89] This does not necessarily mean that absolutely "no gifts" may be given or offered to, or accepted by, a Member or employee of Congress from registered lobbyists or their clients, but rather that any such gift, to be permitted, must be given, offered or accepted under another exception different than the "under-$50" exception to the gift rule. For example, 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, and there is no limitation of this exception for gifts of nominal value or little intrinsic value from a lobbyist, foreign agent, or client.[90] Furthermore, "food and refreshments of nominal value," when not taken as part of a meal, are also exempt from the gift ban and may be received from any source, including lobbyists.

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 and from a broadly defined category of "relatives."[91]

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[88] House Rule 25, cl. 5(a)(1)(B); Senate Rule 35, para. 1(a)(2).

[89] House Rule 25, cl. 5(a)(1)(A)(ii) and 5(a)(1)(B)(i); Senate Rule 35, para. 1(a)(2)(A),(B).

[90] House Rule 25, cl. 5(a)(3)(W); Senate Rule 35, para. 1(c)(23).

[91] Family member is defined in the Ethics in Government Act to include a wide variety of relatives and, specifically includes the fiance(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, para. 1(c)(3). Thus, contrary to popular myth as expressed in the press, a congressional staffer may accept an engagement ring from a fiance (who may even be a "lobbyist") without the "approval" of either her boss or the ethics committee.

Similarly, Members, officers and employees may continue to exchange gifts with or receive gifts from personal friends.[92] 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.[93] 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 more objective criteria 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; and whether the Member, officer, or employee knew that similar gifts were given by this individual to other Members, officer or employees.[94]

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 fiance(e).

Meals, Food, and Refreshments. A meal provided to a 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.[95] 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), and is not offered by a lobbyist, a foreign agent, or a private client of the lobbyist or foreign agent.[96] 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

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[92] House Rule 25, cl. 5(a)(3)(D)(i); Senate Rule 35, para. 1(c)(4)(A).

[93] House Rule 25, cl. 5(a)(5); Senate Rule 35, para. 1(e). This requirement does *not* apply to gifts from "relatives," including from one's fiancee.

[94] House Rule 25 cl. 5(a)(3)(D)(ii)(I)-(III); Senate Rule 35, para. 1(c)(4)(B)(i)-(iii).

[95] *See* definition of "gift," House Rule 25, cl. 5(a)(2)(A); Senate Rule 35, para. 1(b)(1).

[96] In the House, a gift rule change in 2003 provides that the *value* of food sent by an outside, private source to a congressional office for the staff will be prorated among the employees sharing the items, to determine if such value is less than $50 per staff employee, rather than having the entire amount attributable to the employing Member (as previously done). House Rule 25, clause 5(a)(1)(B), H.Res. 5, 108th Congress, January 7, 2003. The House Committee on Standards of Official Conduct has noted certain caveats in this provision, including the direction that food must be refused entirely "if the person offering it has a direct interest in the particular legislation or other official business on which staff is working at the time"; and that any such gifts may *not* be solicited. "Recent Gift Rule Amendment," Memorandum, April 11, 2003, at 1 - 2. Even *de minimis*, "under-$50" gifts, however, may no longer be accepted from lobbyists, foreign agents, or their private clients.

the Member, officer, or employee will be considered a "gift" for the purpose of figuring the amount of such a gift under the rules.[97]

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 also expressly exempt from the gifts restriction and may be accepted without violation of the gift rules.[98] This exception would appear to allow one to partake of refreshments, appetizers, hors d'oeuvres, and drinks 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 fund-raising event sponsored by a political organization;[99] from family and personal friends;[100] 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;[101] in the course of permissible "training" events when served to all attendees as an integral part of the event;[102] 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);[103] in connection with the permissible attendance at "widely attended" gatherings, including charitable events, when taken in a group setting;[104] or in connection with the acceptance of necessary expenses for approved fact-finding or other "officially connected" travel or conference expenses under the specific rules and restrictions for such "officially connected" events.[105]

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

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[97] House Rule 25, cl. 5(a)(2)(B)(ii); Senate Rule 35, para. 1(b)(2)(B).

[98] House Rule 25, cl. 5(a)(3)(U); Senate Rule 35, para. 1(c)(22).

[99] House Rule 25, cl. 5(a)(3)(B) and 5(a)(3)(G)(iii); Senate Rule 35, para. 1(c)(2) and 1(c)(7)(C).

[100] House Rule 25, cl. 5(a)(3)(C) and (D); Senate Rule 35, para. 1(c)(3) and (4).

[101] House Rule 25, cl. 5(a)(3)(G)(i)-(iii); Senate Rule 35, para. 1(c)(7)(A)-(C).

[102] House Rule 25, cl. 5(a)(3)(L); Senate Rule 35, para. 1(c)(13).

[103] House Rule 25, cl. 5(a)(3)(P); Senate Rule 35, para. 1(c)(17).

[104] House Rule 25, cl. 5(a)(3)(Q) and 5(a)(4); Senate Rule 35, para. 1(a)(2)(B) and 1(d).

[105] House Rule 25, cl. 5(b); Senate Rule 35, para. 2.

of a foreign principal.[106] The personal hospitality must be provided by an *individual*, and not a corporation, a business entity, 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 "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.[107] A "widely attended event" has been interpreted in the House and the Senate to be the type of event described above which is open to a broad range of persons interested in the subject matter or is open to individuals of a particular industry or profession, where more than 25 non-congressional attendees are expected.[108] If an event meets the criteria of a "widely attended" gathering, a House Member, officer, or employee may, in addition to accepting "free attendance," also bring an accompanying individual to such an event,[109] 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."[110] When permitted to attend, the "free attendance" which one may accept includes the waiver of any attendance 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 a "gift" coming within the gift limitations and prohibitions, unless otherwise exempt.[111]

Exception for Charitable Events. Members, officers, or employees have traditionally been allowed to participate in charitable events, including charitable fund-raisers. Under current House and Senate rules, Members, officers, and employees may continue to accept (for themselves and a spouse or dependent) "free attendance" at charitable events provided by the sponsor of the event, including the waiver of entrance or other such fees, and the provision of meals, food, and

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[106] House Rule 25, cl. 5(a)(3)(P); Senate Rule 35, para. 1(c)(17).

[107] House Rule 25, cl. 5(a)(3)(Q) and cl. 5(a)(4)(A)(i) and (ii); Senate Rule 35, para. 1(c)(18) and para. 1(d)(1)(A) and (B).

[108] House Committee on Standards of Official Conduct, *Rules of the U.S. House of Representatives on Gifts and Travel*, 106th Cong., 2d Sess. at 22 (April 2000); Senate Select Committee on Ethics, *Senate Ethics Manual*, S. Pub. 108-1, at 38 (2003).

[109] House Rule 25, cl. 5(a)(4)(B).

[110] Senate Rule 35, para. 1(d)(2).

[111] House Rule 25, cl. 5(a)(4)(D); Senate Rule 35, para. 1(d)(4).

entertainment provided as an integral part of the event to all attendees.[112] In the House, the Member, officer, or employee is expressly prohibited from accepting "reimbursement for transportation and lodging" expenses (other than for local transportation) in connection with such event unless certain criteria are met.[113] 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 event and travel meet the stricter requirements for "necessary" transportation expenses for "officially connected" travel, such transportation and lodging expenses may be accepted for charitable fund-raising events.[114]

Exception for Necessary Expenses for "Officially Connected" Travel, "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, agents of a foreign principal, or their private clients) reimbursement or payment for "necessary transportation, lodging and related expenses for travel" for such things as fact-finding trips, meetings, speeches, conferences or similar events which are "in connection with the duties of the Member, officer or employee as an officeholder."[115] Such reimbursement when permitted, 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.

General Prohibition: No Payments/Sponsorship By Lobbyists, Foreign Agents, or Their Private Clients. The general rule in the House and in the Senate is that expenses or reimbursements for "officially connected" travel may *not* be accepted from a lobbyist, an agent of a foreign principal, or from a private client of a lobbyist or foreign agent (that is, a private organization retaining one or more lobbyists or foreign agents).[116] Furthermore, the receipt of expenses for this kind of travel may generally not be accepted if the trip were, "in any part," planned, organized, *requested or arranged* by a registered lobbyist or a foreign agent.[117] To avoid a situation where lobbyists, foreign agents, or their clients are "indirectly"

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[112] House Rule 25, cl. 5(a)(3)(Q), as amended by H.Res. 437, 110th Cong., Sec. 4, and House Rule 25, cl. 5(a)(4)(C); Senate Rule 35, para. 1(a)(2)(B), and 1

[113] House Rule 25, cl.5(a)(4)(C)(i)-(iii). All proceeds for such event must go to a 501(c)(3) organization, which must also offer and pay for the "transportation and lodging."

[114] Senate Rule 35, para. 1(d)(3), and Senate Rule 35, para. 2(a)-(e).

[115] House Rule 25, cl. 5(b)(1), Senate Rule 35, para. 2(a).

[116] House Rule 25, cl. 5(b)(1)(A); Senate Rule 35, para. 2(a)(1).

[117] House Rule 25, cl. 5(c)(3), see also House Rule 25, cl. 5(d)(1)(E); Senate Rule 35, para. 2(d)(1)(A), see also Senate Rule 35, para. 2(e)(1)(D). While some lobbyists may believe the rule can be circumvented by requesting an assistant to organize travel for lawmakers (see Birnbaum, "Seeing the Ethics Rules and Raising an Exception," The Washington Post, October 23, 2007, at A 17), the source of travel funds must certify that the travel has not "in any part" been "planned, organized, requested, or arranged" by a registered lobbyist. Intentional false certifications and statements to the Federal Government may be prosecuted under the general false statements and fraud statute, 18 U.S.C. § 1001.

providing sponsorship or payment for otherwise permissible travel, part of the certification required for pre-approval of any privately financed "officially connected" trip is that the sponsoring entity has not and will not accept funds from a lobbyist, foreign agent, or their clients, which are "earmarked" for the purpose of financing the proposed travel.[118]

Certification and Pre-Approval. Under the restrictions adopted in 2007, all Members and employees of the House or Senate, before accepting any payments or reimbursements from private sources for "officially connected" travel, must now provide sponsor certifications to, and receive advance approval from, the appropriate ethics committee (House Committee on Standards of Official Conduct or the Senate Select Committee on Ethics);[119] and Members, officers and employees, after the completion of such travel, must provide a detailed disclosure of the expenses reimbursed and the events in which they participated.[120] In the certifications that must be submitted to the appropriate ethics committees, the sponsor must certify that the travel will not be paid for by a lobbyist or a foreign principal; that the source of the funding either does not retain a lobbyist or foreign agent or is an exempt organization permitted under House or Senate rules to provide travel expenses; that the trip meets the requirements and restrictions of House or Senate rules; that the congressional traveler will not be accompanied on any segment of the trip by a lobbyist as prohibited by rule ; and that no lobbyist or foreign agent has requested or arranged for the travel to be provided.[121]

Exceptions for Certain Organizations to Restrictions on Sponsorship of Trips. There are two exceptions made to the congressional rules restrictions on sponsorship of or payment for officially connected travel by certain organizations. These two exceptions are relevant to an organization or group which would otherwise be prohibited from paying for or sponsoring such travel because the group employs or retains one or more persons who lobby on behalf of that organization.

Educational (House) or Charitable (Senate) Groups. Groups or organizations that employ a lobbyist or foreign agent *may* provide sponsorship or payment of officially connected travel if, in the House, the group is an accredited "institution of higher education," or, in the Senate, the group is in the broader category of a 501(c)(3) charitable, educational or scientific organization approved by the Senate Select Committee on Ethics.[122] In such cases, the group, like all other permissible sponsors of such "officially connected" travel, may provide, in the case of travel by those in the House of Representatives, travel expenses for up to four days for events within the United States or seven days exclusive of travel time outside of the United

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[118] House Rule 25, cl. 5(d)(1)(C); Senate Rule 35, para. 2(e)(1)(C).

[119] House Rule 25, cl. 5(d), Senate Rule 35, para. 2(e). Employees must also receive advance approval for travel from their supervising Member or office.

[120] House Rule 25, cl. 5(b)(1)(A)(ii) and cl. 5(b)(2) and (3); Senate Rule 35, para. 2(c) and 2(e).

[121] House Rule 25, cl. 5(d); Senate Rule 35, para. 2(e).

[122] House Rule 25, cl. 5(b)(1)(C)(i); Senate Rule 35, para. 2(a)(2)(A)(ii).

States,[123] and for those in the Senate, travel expenses for up to three days for travel within the United States and seven days for foreign travel.[124] Under the House exception which allows "institutions of higher education" employing lobbyists to provide travel expenses, it appears to be permissible for a lobbyist to accompany a House Member or staffer on such travel.[125] When charitable, § 501(c)(3) groups employing lobbyists are permitted to provide transportation expenses under the Senate rules, however, it is *prohibited* for a lobbyist to accompany a Senator or staffer "at any point throughout the trip."[126] Under House interpretations, it is also apparently permitted for a lobbyist to be involved in the planning, organization, request or arrangement of travel sponsored by an "institution of higher education";[127] while under Senate rules, the Senate Select Committee on Ethics is instructed to issue regulations identifying when activities of lobbyists are to be considered *de minimis* and not in violation of the restriction on lobbyists' participation in the planning, organizing or arranging of such events.[128]

One-Day Events. There is a second exception to the sponsor limitation, and that is for one-day officially connected events. Expenses for such events may be provided by any group or organization, even one that retains a lobbyist or foreign agent.[129] The one-day event may include an overnight stay,[130] and the respective ethics committee in the House or Senate may approve two nights' stay for a one-day event when appropriate.[131] When a one-day event is allowed to be financed by a group or organization, although no lobbyist is allowed to accompany the Member or staffer "on any segment" of such travel, actual attendance of a lobbyist at the site of the event is not prohibited.[132] Participation of a lobbyist in the planning, organization, request or arrangement of such one-day events must, in the House, be only *de minimis.*[133] In the Senate, the Senate Select Committee on Ethics is instructed to issue regulations identifying when activities of lobbyists are to be considered *de*

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[123] House Rule 25, cl. 5(b)(4)(A).

[124] Senate Rule 35, para. 2(f)(1).

[125] House Rule 25, cl. 5(c)(1)(B), see also certifications in Rule 25, cl. 5(d)(1)(D).

[126] Senate Rule 35, para. 2(d)(1)(B)(ii).

[127] House Rule 25, cl. 5(c)(3), see House Committee on Standards of Official Conduct, "Travel Guidelines and Regulations," para. F, at p. 4 (February 20, 2007).

[128] Senate Rule 35, para. 2(d)(2)

[129] House Rule 25, cl. 5(b)(1)(C)(ii); Senate Rule 35, para. 2(a)(2)(A)(i).

[130] House Rule 25, cl. 5(b)(1)(C)(ii); Senate Rule 35, para. 2(a)(2)(A)(i).

[131] House Rule 25, cl. 5(b)(1)(C); Senate Rule 35, para. 2(a)(2)(B).

[132] House Rule 25, cl. 5(c)(1)(A), see House Committee on Standards of Official Conduct, "Instructions for Filling Out the Private Sponsor Travel Certification Form", at para. 12, p. 2; Senate Rule 35, para. 2(d)(1)(B)(i).

[133] House Rule 25, cl. 5(c)(2).

minimis and not in violation of the restriction on lobbyists' participation in the planning, organizing or arranging of such events.[134]

Necessary and Reasonable Expenses; Recreation, Entertainment Expenses. The permission to accept "necessary" travel expenses for events "in connection with the duties of a Member, officer or employee as an officeholder" permits Members and staff to accept "reasonable expenses" for such travel. As described in congressional rules, such expenses would generally cover items such as "transportation, lodging, conference fees and materials, and food and refreshments."[135] The permission to accept "necessary" and "reasonable" expenses does not allow, however, nor had it previously allowed for, the acceptance of travel expenses for any events "which are substantially recreational in nature,"[136] nor does the permission extend to the acceptance of expenses for any "recreational activities," or for expenditures for entertainment "other than that provided to all attendees as an integral part of the event."[137] Thus, even on legitimate, "officially connected" travel, the expenses for one's recreational activities during one's "free time," such as golfing green fees or for recreational equipment rentals, are subject to the "under-$50" gift limitation or other restrictions and prohibitions in the House and Senate rules on "gifts" and would, in most cases, be required to be paid "out of pocket" by the individual traveler himself or herself.

Regulations and guidelines have been adopted in the House, and will be forthcoming in the Senate, as to what transportation, lodging, food and miscellaneous expenses are deemed "reasonable" in connection with permissible "officially connected" travel.[138] In the House of Representatives, Members, officers and employees may accept permissible reimbursement expenses for such officially connected events for an accompanying relative,[139] 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."[140]

Other Exceptions to General Gift Rule. 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 fund-raises 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 other benefits resulting from outside business or employment activities, from prospective employers, or provided by a political

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[134] Senate Rule 35, para. 2(d)(1)(A) and para. 2(d)(2).

[135] House Rule 25, cl. 5(b)(4); Senate Rule 35, para. 2(f).

[136] House Rule 25, cl. 5(b)(1)(B); Senate Rule 35, para. 2(a)(3).

[137] House Rule 25, cl. 5(b)(4)(B) and (C); Senate Rule 35, para. 2(f)(2) and (3).

[138] House Committee on Standards of Official Conduct, "Travel Guidelines and Regulations," para. B, at pp. 2-3 (February 20, 2007).

[139] House Rule 25, cl. 5(b)(4)(D).

[140] Senate Rule 35, para. 2(d)(4).

organization in connection with a fund-raise 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 non-monetary 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,[141] the Mutual Educational and Cultural Exchange Act,[142] 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. An additional exception has been added to the Senate rules for certain permissible "constituent events" in one's home State, and a similar exception for events with constituent organizations had previously been adopted in interpretations in the House.[143]

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.[144]

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

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[141] 5 U.S.C. § 7342.

[142] 22 U.S.C. § 2458a.

[143] See now Senate Rule 35, para. 1(c)(24), and 1(g); and House Committee on Standards of Official Conduct, "Gifts and Travel," *supra* at 30-31.

[144] 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.

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 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.[145]

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."[146] Other restrictions exist on the receipt of outside income, such as prohibitions on receiving any compensation (or certain gifts) from foreign governments;[147] Member of Congress contracts with the federal government or receipt of any benefits out of federal government contracts;[148] receiving compensation for representational services before federal agencies;[149] and "self dealing" with "private foundations," which are the subject of certain tax restrictions.[150]

Earned income rules and restrictions enacted into law and contained in House and Senate rules provide that all Members of Congress and certain senior staff[151] 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.[152] Income received over certain amounts, as well as certain gifts, and reimbursements

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[145] 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, para. 4; House Rule 25, cl. 1(c), and House Rule 25, cl. 4(b) and cl. 5(f)(1).

[146] House Rule 23, cl. 3; Senate Rule 37, para. l.

[147] Constitution, Article I, Section 9, Clause 8.

[148] 18 U.S.C. §§ 431, 432; 41 U.S.C. § 22.

[149] 18 U.S.C. § 203.

[150] 26 U.S.C. §§ 4941, 4946.

[151] 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.

[152] 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.

for travel, must be publicly disclosed by the recipient official in annual personal financial disclosure statements required by the Ethics in Government Act of 1978, as amended.[153]

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.[154] For example, the Senate 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 that 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...."[155] 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."[156]

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 to a Member of Congress, and in a federal election generally, it should be noted that cash

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[153] 5 U.S.C. app., Ethics in Government Act, §§ 101 *et seq.;* House Rule 26; Senate Rule 34.

[154] Constitution, Article I, Section 5. *Note* H.Rept. 90-27, 90th Cong., 1st 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, 88th Cong., 2d Sess., Sec. 2(a) (1964), Standing Orders of the Senate, *Senate Manual*, § 79; S.Rept. 83-2508, 83rd Cong., 2d Sess. 22 (1954); *Senate Ethics Manual*, 108th Cong., 1st Sess. 12-14 (2003).

[155] S.Res. 146, 71st Cong. (1929). *Note* S. Doc. No. 92-7, 92d Cong., 1st Sess., "Senate Election, Expulsion and Censure Cases from 1793 to 1972" (1972).

[156] 72 Stat. Part II, B12, ¶5.

contributions over $100 are prohibited by federal law;[157] that political contributions from the treasury funds of corporations, national banks, labor unions, or from federal government contractors are prohibited by federal law;[158] that campaign contributions are prohibited from foreign nationals,[159] or by one in the name of another;[160] that there are limitations on amounts that may be contributed to federal candidates per election, primary or run-off from individuals ($2,000 indexed for inflation, currently $2,300), and from political action committees ($5,000 from multi-candidate committees);[161] that political contributions to federal candidates are required to be publicly reported by the recipient campaign committee of the candidate;[162] and that no campaign contributions may be converted by a Member of Congress to personal use.[163] As noted earlier in this report, the "bundling" of otherwise legitimate campaign contributions from several individuals by a lobbyist for or on behalf of a federal candidate, is not prohibited by law or House or Senate rule. However, under certain circumstances, when the bundled campaign contributions exceed $15,000 (excluding the individual's own contribution and that of his or her spouse) in a six-month reporting period, the *recipient* campaign committee, when the bundler is "reasonably known" by the recipient to be a lobbyist, a registered organization with lobbyists, or a committee controlled by them, must separately report the bundled contributions in the required campaign reports.[164]

Bribery, Illegal Gratuities, and "Honest Services" Fraud. Whenever things of value are offered to a public official, consideration should be given to the federal criminal law provisions that concern bribery and illegal gratuities, and to those provisions of federal criminal law proscribing fraudulent deprivation of the "honest services" of a public official.

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."[165] 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,

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[157] 2 U.S.C. § 441g.

[158] 2 U.S.C. §§ 441b, 441c.

[159] 2 U.S.C. § 441e.

[160] 2 U.S.C. § 441f.

[161] 2 U.S.C. § 441a; *see* Federal Election Commission press release, January 23, 2007, "FEC Announces Updated Contribution Limits."

[162] 2 U.S.C. § 434. For a general overview of current federal campaign finance law, see CRS Report RL31402, *Bipartisan Campaign Reform Act of 2002: Summary and Comparison with Previous Law*, by Joseph E. Cantor and L. Paige Whitaker.

[163] House Rule 23, cl. 6; Senate Rule 38, cl. 2; *note* 2 U.S.C. § 439a.

[164] P.L. 110-81, Section 204, amending the Federal Election Campaign Act of 1971 (2 U.S.C. § 434).

[165] 18 U.S.C. § 201, *see* specifically 18 U.S.C. § 201(b).

something given in exchange for something else.[166] 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.[167] Even a campaign contribution could be the "thing of value" given as 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*,[168] 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 contributions inspired by the recipient's general position of support on particular legislation."[169]

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.[170] 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.[171]

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

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[166] *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 (4th Cir. 1976); *United States v. Tomblin*, 46 F.3d 1369, 1379 (5th Cir. 1995).

[167] *United States v. Brewster, supra* at 72, 82.

[168] 509 F.2d 312 (D.C.Cir. 1974), *cert. denied*, 420 U.S. 991 (1975).

[169] *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.

[170] 18 U.S.C. § 201(c).

[171] *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 or by the official.

provision.[172] 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 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.[173]

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.[174] 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,"[175] 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.[176] 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,[177] and in the case of Members and employees of Congress are governed by the House and Senate rules discussed above.

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[172] *Brewster, supra* at 72; *United States v. Sun-Diamond Growers, supra* at 404 - 405.

[173] *United States v. Sun-Diamond Growers, supra* at 404 - 405.

[174] *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).

[175] *United States v. Niederberger,* 580 F.2d 63, 69 (3rd Cir. 1978), *cert. denied,* 439 U.S. 980 (1978); *United States v. Allessio,* 528 F.2d 1079, 1082 (9th Cir. 1976), *cert. denied,* 426 U.S. 94 (1976).

[176] *United States v. Sun-Diamond Growers, supra* at 406 - 410. *See* also *United States v. Brewster,* 506 F.2d 62 (D.C.Cir. 1974).

[177] 5 C.F.R. §§ 2635.201 *et seq.*, 5 U.S.C. § 7353.

It should be noted that Congress in 1988 amended the mail fraud and wire fraud statutes to expressly include within the scope of those criminal laws a "a scheme or artifice to deprive another of the intangible right of honest services."[178] Under the current mail fraud and wire fraud statutes, therefore, when a Member of Congress receives something of value, such as a "gift" from a lobbyist or another private individual, and there can be shown some connection between the gift and public services provided, or some influence intended by the donor or recipient on the performance of an official "service" by the Member of Congress, then a violation of this law might be established. The exact parameters of the prohibition, the required connection or "nexus" of the gift to a particular "service," and the precise kinds of "official acts" that would constitute the "services" contemplated by the law are, however, not entirely settled as matters of federal law.[179]

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:

> RULE 3.9: Advocate in Non-adjudicative Proceedings
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> 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.
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> COMMENT:
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> [1] In representation before bodies such as legislatures, municipal councils, and executive and administrative agencies acting in a rule-making 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

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[178] 18 U.S.C. §§ 1341, 1343, 1346. The "honest services" provision was added by Congress in 1988 to rectify the gap in the law pointed out in the *McNally* decision (*McNally v. United States*, 483 U.S. 350, 359 (1987)), which had found that the mail fraud and wire fraud laws, as then worded, did not include the deprivation of the "intangible" right of honest services of a public official. P.L. 100-690, Title VII, § 7603(a), 102 Stat. 4508, November 18, 1988.

[179] *Compare, e.g.,United States v. Espy*, 23 F.Supp.2d 1, 6-7 (D.D.C. 1998); *United States v. Sawyer*, 85 F.3d 713, 728 (1st Cir. 1996); *United States v. Rabbitt*, 583 F.2d 1014, 1020, 1024-1026 (8th Cir. 1978), *cert. denied*, 439 U.S. 116 (1979); and *United States v. Ney*, Criminal Information, (D.D.C. September 15, 2006).

> 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."[180] 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.[181]

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[180] ABA Model Rules of Professional Conduct, Rule 1.11.

[181] *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).