

LOBBYING DISCLOSURE: A RECIPE FOR REFORM

*William V. Luneburg**

*Thomas M. Susman***

I. INTRODUCTION

Regulation or disclosure? Which combination of ingredients is most likely to be effective in addressing the ills afflicting the body politic? Not surprisingly, this perennial debate has no clear-cut winner since both approaches, sometimes working in tandem, have proved their merit in a variety of contexts. Predictably, they were both embraced by the proposals advanced in the 109th Congress to deal with the most recent round of lobbying scandals commonly associated with Jack Abramoff and former House Majority Leader Tom DeLay.

Numerous statutory and congressional rule changes were proposed to restrict the opportunities for lobbyists to gain special access to and favors for their clients from Senators and Representatives. These included provisions barring former Members-turned-lobbyists from using congressional exercise facilities, prohibiting lobbyists from arranging trips for legislators, and extending the “cooling-off” period during which former Members cannot engage in lobbying. There were also calls for significant additions to the disclosure obligations currently imposed on lobbyists. These additions would extend to, for instance, the campaign fundraising routinely conducted by lobbyists for Members and the activities by lobbyists and their public relations firms to encourage the public to contact Congress on specific legislative matters (grassroots lobbying). Indeed, the bills that garnered the most attention and found leadership support in both Houses contained, in varying degrees, both new regulatory measures and mandates for more disclosure of lobbying activities and the lobbyist-legislator linkage.¹

The debate on lobbying reform reached a fever pitch in January 2006 following Abramoff’s guilty pleas to charges of fraud, tax evasion and conspiracy to bribe public officials. Unfortunately, that intensity of congressional interest was not sustained. Although both the House and Senate ultimately adopted “reform bills,”² both fell far

* Mr. Luneburg is Professor of Law at the University of Pittsburgh School of Law. He is co-editor of *THE LOBBYING MANUAL: A COMPLETE GUIDE TO FEDERAL LAW GOVERNING LAWYERS AND LOBBYISTS* (3d ed. 2005) [hereinafter *THE LOBBYING MANUAL*].

** Mr. Susman is a partner in the Washington office of Ropes & Gray LLP and coordinates the firm’s regulatory and legislative practice. He is co-editor of *THE LOBBYING MANUAL*.

1. See S. 2349, 109th Cong. (2006) (as passed in the Senate on March 29, 2006 by a vote of 90–8); H.R. 4975, 109th Cong. (2006) (which passed in the House on May 3, 2006 by a vote of 217–213). It should surprise no one that many of the “fixes” proposed in these and other bills bore absolutely no relationship to the problems raised by the corruption scandals that prompted their introduction.

2. *Id.*

short of what some had hoped for and others feared. Proponents, as well as opponents, of significant reform could, therefore, derive some solace from the fact that ultimately the 109th Congress was unable to forge a compromise bill. The most aggressive advocates for change, such as Public Citizen,³ made it clear that, in their view, lobbyist and legislator misbehavior had reached the point where regulation rather than disclosure should be the principal focus for legislative change. Yet, this point of view was largely ignored by the House leadership in forcing a party-line vote in May 2006 on its much watered-down lobbying bill.

While regulation might well play a crucial role in the lobbying area, the effectiveness of lobbying disclosure as a mechanism to prevent serious abuses and inappropriate behavior has never been adequately tested. However, its use for those prophylactic purposes is routinely invoked during legislative debates with obligatory references to Justice Brandeis's famous aphorism on the "disinfectant" value of "sunlight."⁴ The first generally applicable federal lobbying disclosure statute, the badly drafted Federal Regulation of Lobbying Act of 1946 ("FRLA"), was a disaster. Where complied with—which was rare—the legislation produced reams of irrelevant documentation (such as cab fares, phone bills, and messenger fees) that disguised, rather than revealed, the nature of lobbying efforts. The Act was ignored by the only agency with power to enforce it (the Department of Justice ("DOJ")) following the Supreme Court's narrowing construction in 1954.⁵

Half a century later, when the Lobbying Disclosure Act of 1995 ("LDA")⁶ replaced the FRLA after a bipartisan effort in the House and Senate, there was renewed hope that "sunlight" might work its beneficial effects. While the congressional "findings" underlying the LDA do not expressly refer to deterrence of illegal or otherwise improper behavior, that goal clearly served as an important subtext for the statutory references to the need for "public awareness of the efforts of paid lobbyists to influence the public decision-making process," and the expected increase in "public confidence in the integrity of Government."⁷ However, although LDA-mandated disclosure can, if conscientiously provided, offer a general picture of the scope and focus of lobbying campaigns directed at not just Congress but the executive branch, that "freeze-frame" photo 1) omits crucial components of lobbying campaigns, such as grassroots efforts and the lobbyist-candidate nexus; 2) seriously blurs or even misrepresents important aspects of the lobbying that is covered by the Act; and 3) is not easily or fully accessible to interested members of the public and press. As if these factors do not suffice to undercut seriously the effectiveness of the LDA in achieving its purposes, the Department of Justice appears to devote only token resources to enforcement of the Act. Moreover, the DOJ's efforts in punishing noncompliance are remarkable not simply for their infrequency, but also for their lack of transparency. Only if the LDA is amended

3. See, e.g., Public Citizen, *Proposed Reforms Regarding the Disclosure and Regulation of Federal Lobbying*, available at <http://www.cleanupwashington.org/lobbying/page.cfm?pageid=46> (last visited Dec. 15, 2006).

4. LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY* 62 (National Home Library Foundation ed., 1933).

5. *United States v. Harriss*, 347 U.S. 612 (1954). See William N. Eskridge, Jr., *Federal Lobbying Regulation: History Through 1954*, *THE LOBBYING MANUAL*, *supra* note *, 11–14.

6. 2 U.S.C. § 1601 (2000).

7. *Id.*

to deal effectively with these shortcomings can lobbying disclosure be fairly evaluated as an alternative to more prescriptive regulation for preventing illegal or inappropriate lobbying practices and otherwise contributing to the integrity of government.

Since 1995, the frequent reliance by the news media on LDA records identifying the most profitable of active lobbying firms and the issues on which they focus their efforts has provided tantalizing evidence of the potential value of additional mandatory disclosure. A story appearing in *USA Today* in February 2006 highlighted the ability of LDA filings to spotlight (or at least created a basis for further exploration of) possible abuse or inappropriate behavior. The article suggested that Senator Arlen Specter or his staff had arranged for millions of dollars of “earmarks” for Pennsylvania firms represented by a lobbying firm headed by the husband of one of the Senator’s staff.⁸ LDA reports filed by the firm listing the husband as the lobbyist for particular projects were apparently crucial in directing attention to Specter’s office.⁹ The lobbyist denied contacting the Senator’s office with regard to the earmarks at issue, and while the Senator did not believe that any law or ethics rule had been violated, the matter was referred to the Senate Ethics Committee for review. Ironically, if the LDA had required more specific information—for example, not just the listing of lobbyists and specific issues lobbied, but which Senator’s office had been contacted specifically as part of a lobbying campaign—allegations of a conflict of interest in this case could have potentially been countered more easily.

In light of the various burdens imposed by disclosure schemes, including not only the time and expense necessary to maintain records and to complete and file required forms, but also the potential chilling of the First Amendment rights of free speech and petition, we confront at the outset one likely objection. More detailed disclosure may not have an audience with the ability or willingness to sort through the information provided, make crucial linkages, and formulate insightful conclusions. A similar dilemma confronts voters in both issue and candidate elections who need informative “clues,” rather than volumes of information they lack time to find and absorb, in order to vote intelligently on their preferences.¹⁰

Fortunately, aside from improved accessibility to lobbying information that can be provided by the governmental entities responsible for its collection, much of the work of distilling and linking can be achieved (as it has been in the past) by various watchdog groups. In particular, The Center for Public Integrity, self-described as a “nonpartisan, non-advocacy, independent journalism organization,” has aggressively captured information contained in registration and report forms filed under the LDA, and then published that information in an Internet-accessible database, allowing searches that easily reveal important aspects of federal lobbying activity.¹¹ The application of more advanced search capabilities to an expanded database of information will offer the press and public access to a much more detailed picture of lobbying Congress and the

8. See Matt Kelley, *Firm’s Clients Benefiting From Contracts*, USA TODAY, Feb. 15, 2006, at A2, available at http://www.usatoday.com/news/washington/2006-02-15-specter-inside_x.htm.

9. Maeve Reston, *Specter Denies Lobbying Charge*, PITTSBURGH POST-GAZETTE, Feb. 17, 2006, at A1, 9.

10. Elizabeth Garrett & Daniel A. Smith, *Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy*, 4 ELECTION L. J. 295, 296 (2005).

11. LobbyWatch, The Center For Public Integrity, <http://www.publicintegrity.org/about.aspx?act=mission>.

executive branch with just a few clicks.

Accordingly, if the Lobbying Disclosure Act is to achieve its potential for identifying and, in the process, deterring illegal, abusive, questionable, and otherwise inappropriate conduct by federal decisionmakers, improving and implementing the statute requires some additional ingredients. After outlining the general framework of First Amendment constraints that must be taken into account in crafting a lobbying disclosure scheme and then briefly describing the LDA as it currently exists, we summarize proposals for reform that might provide a focus for debate during future legislative deliberations on needed changes to the LDA.¹² Indeed, from all appearances, the incoming leadership of the 110th Congress appears to be serious about taking up lobbying reform as one of the first items on its agenda.¹³

II. THE FIRST AMENDMENT AND DISCLOSURE REQUIREMENTS

The First Amendment right “to petition the government for a redress of grievances”¹⁴ constrains laws or regulations that impact the attempt to communicate with legislators, their staff, and executive branch officials seeking official action. The Supreme Court has noted that the right to petition is one of “the most precious of the liberties safeguarded by the Bill of Rights,”¹⁵ one that is implicit in “[t]he very idea of a government, republican in form.”¹⁶ While the Court has only occasionally treated it separately from freedom of speech, one of the more noteworthy examples involved lobbying by railroad and trucking companies against each other, including grassroots efforts to influence the public.¹⁷ In construing the Sherman Act as inapplicable to these activities, the Court relied in part on the right to petition, though it failed to illuminate the scope of the distinctive nature (if any) of the protection afforded by that right.

To date, the Court has been called upon only once to determine whether federal lobbying legislation violated the First Amendment. *United States v. Harriss*¹⁸ involved a challenge to the Federal Regulation of Lobbying Act of 1946, which mandated disclosure subject to criminal penalties. Invoking the freedoms of speech and press and the right to petition without differentiation,¹⁹ the Court narrowly construed the statute to apply only to persons whose “main” work was lobbying in the sense of “direct”

12. There are, to be sure, other useful reforms that would help curb some of the corrupting tendencies in the world of legislation and lobbying. See, e.g., Thomas M. Susman, *Reciprocity Underlies Lobbying Scandals*, THE HILL, June 28, 2006, available at http://www.hillnews.com/thehill/export/TheHill/Comment/oped/062806_oped1.html. Those are, for today, beyond the scope of our paper.

13. CENTER FOR MEDIA AND DEMOCRACY, *110th Congress/Democratic Party Agenda*, available at http://www.sourcewatch.org/skins/common/images/CP_left_art.jpg (last visited Dec. 15, 2006).

14. U.S. CONST. amend. I.

15. *United Mine Workers v. Illinois Bar Ass’n*, 389 U.S. 217, 222 (1967).

16. *United States v. Cruikshank*, 92 U.S. 542, 552 (1876).

17. *E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). The Court most recently discussed the line of cases originating in *Noerr* in *BE & K Constr. Co. v. NLRB*, 536 U.S. 516 (2002) (holding that employer’s unsuccessful retaliatory lawsuit against unions could not serve as a basis for unfair labor practice liability, absent finding that the suit was objectively baseless).

18. 347 U.S. 612 (1954).

19. *Id.* at 625.

communication with Congress.²⁰ Noting that Congress had not prohibited lobbying,²¹ though accepting that persons might refrain from lobbying based on fears that they could be prosecuted for violation of the statute,²² the Court found that the statute was justified by a “vital national interest.”²³

Present-day legislative complexities are such that individual members of Congress cannot be expected to explore the myriad pressures to which they are regularly subjected. Yet full realization of the American ideal of government by elected representatives depends to no small extent on their ability to properly evaluate such pressures. Otherwise the voice of the people may all too easily be drowned out by the voice of special interest groups seeking favored treatment while masquerading as proponents of the public weal.²⁴

Interestingly, this rationale was *not* invoked by Congress in adopting the LDA in 1995. The expressly stated “finding” supporting the statute was the need to increase not congressional information, but rather public awareness, regarding lobbying pressures.²⁵ More specifically, in reporting an earlier version of the bill that was ultimately enacted, the Senate Committee on Governmental Affairs noted that:

[t]he purposes of lobbying disclosure include increasing public awareness of and confidence in the functioning of government; ensuring that public officials are fully accountable to the public for their actions; discouraging lobbyists and their clients from engaging in improper activities; and affording interested parties an opportunity to respond to lobbying campaigns.²⁶

This last-listed purpose reflects the more general goal of deterring officials from being “overly compliant” to certain lobbying interests. Because of information made available to interested parties, there will be circumstances where officials will be at a loss to explain their official action, since their chosen rationale or justification is undercut by the increased disclosure.

Aside from the LDA itself, Congress and the federal courts have viewed “sunlight” as a necessary precondition to good government in a variety of contexts. For example, Congress has forbidden *ex parte* communications in formal rulemakings and adjudications;²⁷ at least one court has done the same with respect to informal rulemakings.²⁸ Congress has also mandated that deliberations of various federal agencies²⁹ and federal advisory committees³⁰ be open to the public except in certain circumstances (which exceptions, by the way, do not encompass typical lobbying communications³¹). Like the LDA, these restrictions all directly or indirectly impact

20. *Id.* at 623.

21. *Id.* at 625.

22. *Id.* at 626.

23. 347 U.S. 612, 625.

24. *Id.* at 626.

25. See *supra* text accompanying note 7.

26. S. REP. NO. 103-37, at 23 (1993).

27. 5 U.S.C. § 557(d)(1) (2000).

28. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 53–59 (D.C. Cir. 1977).

29. 5 U.S.C. § 552(b)(a)(1) (2000) (applicable to agencies headed by a “collegial body” composed of two or more individuals).

30. *Id.* app. § 10(a)(1).

31. *Id.* § 552b(c) app. § 10(d).

the right to petition. Not surprisingly, the rationales for this mandated openness correspond nicely with some of those invoked in support of the LDA: “to prevent the appearance of impropriety” and to allow interested persons to “respond effectively and ensure that [their] position is fairly considered.”³²

Based on existing case law, it is impossible to know whether the right to petition plays a distinctive role in protecting the ability of persons outside the government to communicate with Congress or the executive branch in the attempt to influence their decision-making. However, given the “exacting scrutiny” applied to laws that might burden the freedoms of speech and press³³ and the fact that a “petition” for redress of grievances is simply one form of speech, it is difficult to believe that the analysis applied would today significantly differ from the Court’s free speech jurisprudence, even if the Court were to treat the right to petition separately in dealing with the constitutionality of lobbying disclosure law. With regard to the freedoms of speech and press, the Court has noted that:

[d]iscussion of public issues... are [sic] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expression in order ‘to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’³⁴

Whether the exchange of ideas occurs near or far from the center of governmental decision-making, in a public square during an anti-war demonstration, or in the quiet of a Senator’s office before floor debate on a defense appropriation bill, the freedom of speech equally applies, as the *Harriss* case itself accepts.

Since the Supreme Court decided *Harriss*, issues related to the constitutionality of mandatory disclosure have most commonly arisen in the context of the broader public debate that occurs far from the Beltway. In 1976, the Court considered First Amendment challenges to federal election finance law requiring disclosure of the identities of persons and entities contributing money to help elect candidates for federal office. In *Buckley v. Valeo*³⁵ (whose analysis was reaffirmed in 2003 by *McConnell v. Federal Election Commission*³⁶), the Court held that disclosure was justified by a variety of interests, two of which essentially formed the rationale for enactment of the LDA: improving the ability of the electorate to hold public officials accountable and deterring inappropriate or illegal *quid pro quos*.³⁷

First, disclosure provides the electorate with information ‘as to where political campaign money comes from and how it is spent by the candidate’ in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate’s financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.

32. See, e.g., *Prof'l Air Traffic Controllers Org. v. FLRA*, 685 F.2d 547, 563 (D.C. Cir. 1982).

33. See, e.g., *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 346 (1995); *Buckley v. Valeo*, 424 U.S. 1, 64 (1976).

34. *Buckley*, 424 U.S. at 14–15 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)).

35. *Id.* at 1 (*per curiam*).

36. 540 U.S. 93 (2003).

37. 2 U.S.C. § 1601(1), (3) (2000). See *supra* text accompanying note 7.

Second, disclosure requirements deter actual corruption and avoid the appearance of corruption by exposing large contributions and expenditures to the light of publicity. This exposure may discourage those who would use money for improper purposes either before or after the election. A public armed with information about a candidate's most generous supporters is better able to detect any post-election special favors that may be given in return.³⁸

In upholding a ban on national political parties' involvement with "soft money," the Court later noted in *McConnell* that its understanding of "corruption" and its "appearance" extended beyond the obvious case of bribery to where the officeholder was simply "too compliant" to the wishes of those who contributed large sums to his or her election.³⁹

In the years intervening between *Buckley* and *McConnell*, the Court in *McIntyre v. Ohio Elections Commission*⁴⁰ struck down on First Amendment grounds an Ohio law prohibiting the distribution of anonymous campaign literature. The leaflet in question opposed a local ballot measure for a school tax levy. In distinguishing the disclosure requirements involved in *Buckley*, the Court noted:

Though such mandatory reporting [in *Buckley*] undeniably impedes protected First Amendment activity, the intrusion is a far cry from compelled self-identification on all election-related writings. A written election-related document—particularly a leaflet—is often a personally crafted statement of a political viewpoint. Mrs. McIntyre's handbills surely fit that description. As such, identification of the author against her will is particularly intrusive; it reveals unmistakably the content of her thoughts on a controversial issue. Disclosure of an expenditure and its use, without more, reveals far less information. It may be information that a person prefers to keep secret, and undoubtedly it often gives away something about the spender's political views. Nonetheless, even though money may 'talk,' its speech is less specific, less personal, and less provocative than a handbill—and as a result, when money supports an unpopular viewpoint it is less likely to precipitate retaliation.⁴¹

Not only was the state requirement more intrusive than the disclosure requirements upheld in *Buckley*, but the governmental interest implicated was different: to avoid corruption and the appearance of corruption, in the *McConnell* sense of public officials' being overly responsive to the wishes of large contributors.⁴² At this point in the opinion, the Court retrospectively explained its decision upholding the FRLA in *United States v. Harriss* as based, at least in part, on the same rationale: "The activities of lobbyists who have direct access to elected representatives, if undisclosed, may well present the appearance of corruption."⁴³ However, it also cited *Harriss* for the proposition that, at least in some contexts—though not in *McIntyre* itself—disclosure

38. 424 U.S. at 66–67.

39. *McConnell*, 540 U.S. at 143 (quoting *Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 389 (2000)).

40. 514 U.S. 334 (1995).

41. *Id.* at 355.

42. *Id.* at 356. "Disclosure of expenditures lessens the risk that individuals will spend money to support a candidate as a *quid pro quo* for special treatment after the candidate is in office." *Id.*

43. *Id.* at 356 n.20.

of the identities of sources was important in evaluating the arguments they make.⁴⁴

The “marketplace of ideas”⁴⁵ may in most instances be best served by a “profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”⁴⁶ Mandatory disclosure of lobbying pressures fits well with this concept by insuring that most relevant information will be available to the public, Members of Congress, and the executive branch for their consideration in making and implementing public policy.⁴⁷

But too much “sunlight” can have undesirable effects.⁴⁸ In 1958, the Court struck down the attempt by a state court to order disclosure of membership lists of a private association without a showing of a “controlling justification” for such disclosure. That case, *NAACP v. Alabama ex rel. Patterson*,⁴⁹ involved “an uncontroverted showing that on past occasions revelation of the identity of [the NAACP’s] rank-and-file members [had] exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility.”⁵⁰ Justice Harlan’s opinion for the Court noted that advocacy of public and private beliefs, particularly controversial ones, was enhanced by a person’s association with others.⁵¹ In that sense, the freedoms of speech and assembly were inextricably related;⁵² compelled disclosure could deter the willingness of some or many people to associate for advancement of their beliefs because of the personal consequences of that exposure.⁵³ In short, privacy of association was necessary to insure the ability to associate for the advancement of beliefs.

This concern that mandatory disclosure may, in some instances, be antithetical to “the marketplace of ideas” was later reiterated in *Buckley*.⁵⁴ *Buckley*, however, limited the protection of *NAACP* to cases where evidence showed a “reasonable probability that the compelled disclosure of a party’s contributor’s names will subject them to threats, harassment, or reprisals from either Government officials or private parties.”⁵⁵ As the quotation from the *McIntyre* opinion indicates,⁵⁶ it was the potential for harassment of the individual distributing the anonymous election leaflet that figured prominently in the Court’s invalidation of the disclosure requirements in that case.⁵⁷

44. *Id.* at 354 n.18.

45. 514 U.S. 334, 342 (1995).

46. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

47. *See, e.g., McConnell*, 540 U.S. at 197 (noting the First Amendment values served by disclosure of, for example, the members of misleadingly named coalitions).

48. For an examination of some aspects of the relationship between freedom of speech and nondisclosure, *see* William V. Luneburg, *Civic Republicanism, The First Amendment, and Executive Branch Policymaking*, 43 ADMIN. L. REV. 367, 379, 380–89 (1991).

49. 357 U.S. 449 (1958).

50. *Id.* at 462.

51. *Id.* at 460.

52. *Id.*

53. *Id.* at 462–63.

54. *Buckley v. Valeo*, 424 U.S. 1, 74 (1976).

55. *Id.* at 74. That showing was made in *Brown v. Socialist Workers' 74 Campaign Comm. (Ohio)*, 459 U.S. 87 (1982), where the Court found that disclosures required by Ohio’s campaign finance law could not constitutionally be applied to the Socialist Workers Party. *McConnell* later reiterated that limitation on *NAACP*. *McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 197–99 (2003).

56. *See text supra* note 41.

57. In *Watchtower Bible & Tract Society of New York v. Village of Stratton*, the Court again emphasized

III. FEDERAL LOBBYING DISCLOSURE REQUIREMENTS

Disclosure under the LDA is required only if an individual is hired for compensation to influence federal policy or its implementation⁵⁸ through communications to Congress, its staff, its officers or employees, or to high-ranking federal executive branch officials.⁵⁹ But occasional compensated legislative or executive contacts do not necessarily require LDA compliance—even if those contacts have significant impacts on decision-making. There are two specific requirements that must be satisfied: there must be a “lobbyist” as defined by the Act, and a certain amount of money must be earned from, or spent on “lobbying activities.”

First, the person hired must spend at least twenty percent of his or her time during a six month period engaged in “lobbying activities,”⁶⁰ for the client⁶¹ and make more than one “lobbying contact.”⁶² “Lobbying contact” is a statutorily defined term that includes oral and written (including electronic) communications made to covered federal officials regarding the full gamut of federal law-making and administration,⁶³ where those communications do not fall within one of nineteen statutory exceptions.⁶⁴ While there is no express exception for grassroots lobbying, the legislative history of the statute makes crystal clear that Congress did not want it considered as either an LDA “lobbying contact” or “lobbying activity.”⁶⁵ If these criteria for coverage are satisfied, the person hired is considered to be a “lobbyist” within the meaning of the Act.

That person may be employed as part of a firm that represents the interests of individuals, public or private corporations, or other entities; or the lobbyist may be the

the need for anonymity for advocates of unpopular causes in finding that a permitting scheme was unconstitutional. 536 U.S. 150, 167 (2002). Finally, the Court has acknowledged that the administrative costs of disclosure may deter advocacy and raise First Amendment concerns. *See* *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 254–55 (1986).

58. *See* 2 U.S.C. § 1602(8)(A) (1998). *See also* Chapters 3, 4, and 5 of THE LOBBYING MANUAL, *supra* note *, for an exhaustive examination of the requirements of the LDA.

59. *Id.* § 1602(3)-(4). The officials include the President and Vice-President, officers and employees of the Executive Office of the President, Levels I-V of the Executive (salary) Schedule, certain high officers in the uniformed services, and Schedule C employees.

60. “Lobbying activities” include both “lobbying contacts” and efforts in support of such contacts (e.g. preparation and planning activities). *Id.* § 1602(7).

61. In the case of an association or coalition, the “client” for disclosure purposes is the association or coalition, not the individual members. *Id.* § 1602(2).

62. *Id.* § 1602(10).

63. *Id.* § 1602(8)(A) (including the formulation, modification, and adoption of federal legislation, administrative rules, Executive orders, and “any other program, policy, or position of the United States Government,” the “administration or execution of a Federal program or policy,” and appointments requiring Senate confirmation).

64. *See id.* § 1602(8)(B). The exceptions include communications by state and local officials, speeches, articles, administrative requests, communications made as part of federal advisory committee participation, congressional testimony (whether subpoenaed or not), comments filed in rulemaking proceedings, petitions for rulemaking or other administrative action, and protected whistleblower disclosures, to name a few. The exceptions present a vast array of interpretative issues which, for “occasional” lobbyists, may make the need for registration with regard to a particular client a matter of some doubt.

It should be noted, however, that even if one of these exceptions applies so that a particular communication is not a “lobbying contact” (e.g. it involves congressional testimony), that communication, and the preparation for it, may constitute “lobbying activity” that counts in determining whether a person is a “lobbyist” and whether the applicable monetary threshold for registration is met. *See* William V. Luneburg & A.L. Spitzer, *The Lobbying Disclosure Act of 1995: Scope of Coverage*, THE LOBBYING MANUAL, *supra* note *, at 63.

65. *Id.*, at 45–47.

employee of an organization (the client, for LDA purposes) for which he or she conducts lobbying activities. In any event, if that firm or self-lobbying organization employs at least one lobbyist, it (not the lobbyist) must register with both the Clerk of the House of Representatives and the Secretary of the Senate.⁶⁶ However, registration is necessary *only if* the income earned by the firm from lobbying activities for the client (registration is client-by-client) is expected to exceed \$6,000 during a six month period or, alternatively, the expenditures for lobbying activities incurred by the self-lobbying organization are expected to exceed \$24,500 during a semiannual period.⁶⁷

The LDA offers an option to simplify record-keeping and reporting obligations of taxable businesses and trade associations that may not deduct lobbying expenses for income tax purposes, and of certain tax-exempt entities (basically public charities) whose lobbying activities must be limited to avoid sanctions under the Internal Revenue Code ("IRC"). These entities that lobby on their own behalf are permitted to calculate their expenditures for lobbying using IRC definitions of that term in determining whether the monetary threshold for registration is met.⁶⁸ However, if that election is made, when it comes to determining if an employee is a lobbyist (a determination that is also crucial to the need to register), the electing entities must use LDA definitions for lobbying Congress, and IRC definitions for lobbying the federal executive branch.⁶⁹ Because of significant differences between IRC and LDA definitions,⁷⁰ opting for the IRC calculation method may sometimes result in a determination that registration is not necessary, where it would be required if LDA definitions were utilized.

If registration is required, certain basic information must be provided to the Clerk and Secretary (Form LD-1), including the following: 1) the name and address of the registrant and client; 2) the name and address of any "organization" (which does not include individuals) other than the client that both contributes more than \$10,000 toward the lobbying activities of the registrant in a semiannual period and, in whole or major part, plans, supervises or controls those activities (this is known as an "affiliated organization");⁷¹ 3) the name and address of foreign entities (which may include individuals) having certain relationships⁷² to the client or a disclosed affiliated organization, the percentage of the foreign entities' equitable ownership (if any) in the client and, if the foreign entity itself contributes more than \$10,000 to the lobbying activities of the registrant, the amount of such contribution; 4) the general and specific issues as to which lobbying for the client has taken place or is expected; and 5) the

66. See 2 U.S.C. § 1603(a)(1)-(2) (1998).

67. See *id.* § 1603(a)(3). As required by the Act, the thresholds for registration were increased in January 1997, 2001, and, most recently, 2005 to take into account increases in the Consumer Price Index. Section 1603(a)(3)(B), requires such adjustments every four years. *Id.* § 1603(a)(3)(B).

68. *Id.* §§ 1610(a)(1), (b)(1).

69. *Id.* §§ 1610(a)(2), (b)(2).

70. For the best succinct, yet comprehensive, description of these differences and their impact, see U.S. GEN. ACCOUNTING OFFICE, *FEDERAL LOBBYING/DIFFERENCES IN LOBBYING DEFINITIONS AND THEIR IMPACT* GAO/GGD-99-38 (Apr. 1999) [hereinafter "GAO Study"].

71. 2 U.S.C. § 1603(b)(3) (2000).

72. Disclosure of the foreign entity is required if it 1) holds at least twenty percent equitable ownership in the client or any "affiliated organization;" 2) directly or indirectly, in whole or major part, plans, supervises, controls, directs, finances, or subsidizes the activities of the client or any "affiliated organization;" or 3) is an affiliate of the client or any "affiliated organization" and has a direct interest in the outcome of the lobbying activity. *Id.* § 1603(b)(4).

names of employees of the registrant who have acted or are expected to act as lobbyists for the client, along with the identification of those employee-lobbyists that have, within two years, served in the position of a covered executive or legislative branch official.⁷³

Following registration, reports by registered lobbying firms and self-lobbying organizations (Form LD-2) are required to be filed with the Clerk and Secretary to cover semiannual periods (January to June, and July to December).⁷⁴ Those reports must update information found in registration statements and, in addition, provide for each general issue area in which the registrant conducted lobbying activities for the client during the semiannual period: 1) the specific issues as to which lobbyist-employee(s) engaged in lobbying activities; 2) identification of the House(s) of Congress and federal agencies contacted by those lobbyists; 3) the names of the persons who were active as lobbyists during the period; 4) a description of the "interest," if any, of foreign entities identified in the registration statement with regard to specific issues that were lobbied; and 5) a good faith estimate of income earned by a lobbying firm or expenditures incurred by a self-lobbying organization during the six month period related to lobbying activities.⁷⁵ A lobbying firm's income figures must include payments to it by persons other than the client for the lobbying activities on behalf of the client,⁷⁶ which would include payments *in any amount* coming from members of an association or coalition that is deemed to be the client (though the name(s) of the member(s) would have to be disclosed only if they meet the test for an affiliated organization or for a foreign entity that must be disclosed). In the case of a self-lobbying organization, its expense figures must include amounts paid to others for lobbying on its behalf (e.g. fees paid to lobbying firms).⁷⁷ Because the LDA definition of "lobbying activities" does not include grassroots efforts, those expenditures would not include those made by the self-lobbying organization or other entities on its behalf to "stimulate" the grassroots.⁷⁸

For those taxable business and trade associations that may not deduct lobbying expenses and those public charities whose lobbying efforts are limited by the IRC, such self-lobbying organizations may opt to employ the applicable IRC definitions of lobbying in providing the lobbying expense information on Form LD-2. But, for all other information requests on that form, these same entities must employ LDA definitions of "lobbying contact" and "lobbying activities" with regard to congressional lobbying, and IRC definitions with respect to federal executive branch lobbying.⁷⁹ One of the effects of this partial substitution is to avoid the possibility of specific disclosure of grassroots legislative lobbying efforts (which are included in the IRC definitions) beyond their being lumped together with other lobbying expenses for expenditure disclosure purposes.

73. *Id.* § 1603(b).

74. *Id.* § 1604(a).

75. *Id.* § 1604(b).

76. *Id.* § 1604(b)(3). See William V. Luneburg & A.L. Spitzer, *Registration, Reporting, and Related Requirements*, THE LOBBYING MANUAL, *supra* note *, at 110.

77. *Id.* § 1604(b).

78. There is one exception to this, however. Businesses and certain tax-exempt entities exercising the option to use IRC definitions to calculate expenditure levels would have to include grassroots expenses in their aggregated totals. See generally text *infra* following note 79 and text *infra* note 92.

79. 2 U.S.C. § 1610(a)(2) (2000).

The statute assigns to the Clerk and Secretary the responsibilities of: 1) providing “guidance and assistance” for compliance with the LDA; 2) developing “common standards, rules, and procedures for compliance;”⁸⁰ 3) reviewing filed forms and, if necessary, “verifying” and “inquiring” to determine “the accuracy, completeness and timeliness of registration and reports;”⁸¹ 4) developing methods, including computerized systems, to minimize the burden of filing and making information contained in the registration and reports publicly available and easily accessible; and 5) notifying lobbyists of their noncompliance with the Act and, if no “appropriate response” is received within sixty days, notifying the United States Attorney for the District of Columbia.⁸²

The authority to prosecute violations of the LDA is vested solely in the United States Attorney for the District of Columbia.⁸³ No criminal penalties are provided; only civil penalties of up to \$50,000 per violation apply, and those are limited to “knowing” violations of the LDA.⁸⁴

IV. NECESSARY INGREDIENTS FOR LDA REFORM

LDA reform efforts should focus on three general areas: 1) increasing the amount of usable information collected; 2) augmenting the ability to detect violations and undertake and publicize enforcement actions; and; 3) finally, improving the mechanism for making information collected in registration statements and periodic reports readily available and useful to the public and press.

A. Increasing the Amount of Useable Information

A variety of changes fall in the category of increasing the quantity of useful data provided by the LDA. Some of them are simple to implement, while others involve constitutional issues or significant policy debate. The changes certain to provoke more resistance include: 1) expanding disclosure to include information on grassroots lobbying and the lobbyist/candidate/decisionmaker linkage; 2) mandating more specific disclosure with regard to lobbying coalition membership, entities contacted by lobbyists, and the basic nature of lobbying fee arrangements; and 3) eliminating the ability to use IRC definitions of lobbying for LDA registration and reporting purposes. On the other hand, simply rearranging how information is provided on the semiannual

80. One of the alleged failures of the FRLA was the lack of administrative guidance to assist entities seeking to determine whether to register and what to report. The Secretary and Clerk have the authority to issue such guidance and have, to date, issued four generally applicable guidance documents (including one in 1998 that consolidated the interpretations and advice of the first three guidance documents). The 1998 guidance is available at, http://www.senate.gov/legislative/common/briefing/lobby_disc_briefing.htm. The Secretary and Clerk have taken the position, however, that they lack the authority to issue legally binding guidance and regulations.

81. The Secretary and Clerk do *not* have either subpoena power or general audit or investigative authority that could assist in determining if filings are accurate and whether someone who is not registered should register. See 2 U.S.C. § 1607(c). In fact, the LDA does not require that registrants or anyone else maintain files that could be investigated for determining whether filings are correct or registration necessary.

82. 2 U.S.C. § 1605 (2000).

83. *Id.* § 1605(8).

84. *Id.* § 1606.

report forms and requiring a consolidated filing by those self-lobbying organizations that also hire lobbying firms would insure that currently required disclosures shed more light on lobbying campaigns.

1. Disclosure of Grassroots Lobbying

Grassroots efforts are crucial elements of today's lobbying strategies. Given the lack of mandated disclosure, however, estimates with regard to the amount of grassroots lobbying have to be gleaned from other sources. For example, a study by the Annenberg Public Policy Center with respect to issue advocacy during various election cycles concluded that \$135-150 million was spent during the 1996 cycle, \$250-341 million during the 1997-98 cycle, and over \$500 million during the 1999-2000 cycle.⁸⁵

In *Harriss*, the Supreme Court implied that lobbying disclosure presented constitutional difficulties if it applied to attempts to "propagandize the general public."⁸⁶ At the same time, however, the Court construed the FRLA of 1946 to apply to "artificially stimulated letter campaign[s]."⁸⁷ While in this manner suggesting that public "education" programs might be off-limits in terms of disclosure requirements, the Court thus indicated that disclosure of grassroots efforts is acceptable in certain circumstances.

The focus of disclosure of grassroots lobbying should not be the communications generated from members of the public. Rather, legislative disclosure mandates should be directed at the efforts of paid professionals to create that response in support of requests for legislative or executive branch action. That is to say, if an individual or firm is paid significant amounts of money to stimulate the grassroots for its client's interests or, alternatively, if an organization spends significant amounts of money for grassroots work in support of its own legislative or administrative agenda, then reporting of basic information related to those efforts should be mandated.

When a lobbying firm or organization that lobbies on its own behalf earns or expends money for a grassroots effort, it is usually attempting to create leverage in support of its direct lobbying contacts with Congress or the executive branch. In other words, it is attempting "indirectly" to accomplish what it cannot alone achieve by its one-on-one communications with covered officials. Disclosure focused on these grassroots efforts serve the informational interests found sufficient by the Supreme Court to support lobbying and campaign contribution disclosure, even if the anticorruption rationale often invoked to justify such disclosure may not be implicated.⁸⁸ In light of the highly publicized grassroots lobbying abuses implicated in Jack Abramoff's

85. See ANNENBERG PUBLIC POLICY CENTER, *ISSUE ADVERTISING IN THE 1999-2000 ELECTION CYCLE* 1 (2001), available at http://www.annenbergpublicpolicycenter.org/03_political_communication/issueads/2001_1999-2000issueadvocacy.pdf.

86. *United States v. Harriss*, 347 U.S. 612, 620-21 (1954).

87. *Id.* at 620.

88. For a recent argument that grassroots disclosure is inappropriate or unconstitutional as an abridgement of the right to speak anonymously, see STEPHEN M. HOERSTING & BRADLEY A. SMITH, *CTR. FOR COMPETITIVE POLITICS, GRASSROOTS LOBBYING PROPOSALS SEEM NOT TO FURTHER CONGRESS' INTEREST IN CORRECTING LOBBYING ABUSES* 1 (2006), available at http://www.campaignfreedom.org/docLib/20060607_PolicyPrimer.pdf.

opposition to a Texas casino,⁸⁹ the anticorruption rationale may also be satisfied.

With regard to a statutory definition of covered grassroots lobbying, First Amendment concerns would appear to be at their peak, as *Harriss* suggested, where the efforts attempt simply to create a general public “attitude” in favor of certain policies without mentioning what those policies are or should be, or what actions should be taken in terms of contacting federal officials. Arguably, therefore, the more “specifically directed” a campaign is, the less stringent are the First Amendment limits on disclosure obligations. For instance, the campaign may be directed at specific individuals, with regard to an identified legislative or administrative proposal, and with an express request that the contacted individuals communicate their support or opposition to responsible officials. If the specific focus of a grassroots campaign is crucial to avoid serious First Amendment problems, then door-to-door or telephone canvassing and internet campaigns easily fall within the ambit of permissible disclosure requirements.

Should an exception from disclosure apply to grassroots efforts directed at an entity’s own members, employees, or shareholders?⁹⁰ Based on current case law, First Amendment concerns do not militate for such an exception. After all, the focus of concern of the Supreme Court in *NAACP v. Alabama* was to protect the ability of the individual members to express their views anonymously via the associational format. What was *not* involved was the ability of the association as an entity to express its views to its members who would, in turn, individually express their views to federal officials and, thereby, subject themselves to the possible intimidation from which the associational format was supposed to protect them. In that regard, it should be noted that the effectiveness of a grassroots campaign is dependent on the ability of the legislative or executive branch official to know that there is a real person who wrote the letter or e-mail (as opposed to a machine somewhere generating fictitious irate comments). The anonymity of the responder to a grassroots solicitation is not sought, or desired, by the persons in charge of these lobbying campaigns. Moreover, as noted above,⁹¹ the scope of protection of associational privacy afforded by *NAACP v. Alabama* is subject to significant limitations in the face of the governmental interests served by public disclosure. Indeed, the failure to extend disclosure to grassroots efforts directed at an entity’s own members, employees, or shareholders would eliminate disclosure with regard to what are likely to be the most effective of grassroots campaigns—those where the persons contacted have a significant interest in responding to the request that they communicate with Congress or the executive branch.

If some disclosure of grassroots campaigns is required, what level of income earned for conducting them or money spent to finance them should trigger registration and disclosure on periodic reports? There is no suggestion in *Harriss* that a particular expenditure amount is necessary to trigger coverage of a “stimulated letter campaign.” Setting the trigger somewhere in the range of \$25,000-\$50,000 in income earned or expenses incurred will capture the most significant grassroots efforts. In all events,

89. Josephine Hearn, *The Abramoff Probe Could Spur Reforms*, THE HILL, Nov. 24, 2004, available at http://www.hillnews.com/thehill/export/TheHill/Business/112404_probe.html (last visited Dec. 15, 2006).

90. S. 2349, 109th Cong. § 220(a) (as passed by Senate, March 29, 2006).

91. See *supra* text accompanying notes 54–57. See also *infra* note 113.

when registration is required, the amounts of income from and expenses for grassroots work should be identified in filed reports separate from other income earned or expenses incurred.

We note that organizations that opt under Section 15 of the LDA to use IRC definitions of lobbying for determining their LDA registration and reporting obligations must already keep records of their grassroots lobbying efforts and report the expense figures (though aggregated with non-grassroots expenses).⁹² For at least these entities, the recordkeeping burdens flowing from this proposal will not increase significantly.

Under the LDA as it stands now, periodic reporting of lobbying activities by registrants also requires a listing of the general issue area(s) and specific issues within those area(s) lobbied, the names of the persons in charge of the lobbying, the Houses of Congress and federal agencies contacted, and the interest(s) of foreign entities having certain relationships to the LDA registrant in the issues lobbied. In view of the basic nature of these disclosures, extending those requirements to grassroots efforts would not create constitutional problems or impose reporting burdens different in kind from those that exist under current law.

2. Disclosure of the Lobbyist/Candidate/Decisonmaker Linkage

As studies have shown,⁹³ the reciprocity “rule” is pervasive in human culture:⁹⁴ “we should try to repay, in kind, what another person has provided us.”⁹⁵ Despite their denials to the contrary, politicians are no less subject to its sovereignty than the rest of us.⁹⁶ Gifts to Members of Congress or executive branch officials, contributions to (re)election campaigns, service as fundraisers for those campaigns, and payment or reimbursement of travel expenses—to name a few of the favors lobbyists or LDA registrants may bestow—all have a tendency to increase access for the lobbyists or favorable consideration for legislative or executive action sought by them. This is clearly true even where the *quid pro quo* necessary to violate the criminal laws is not present.⁹⁷

Where these favors are not now or in the future prohibited by statute or congressional rule, the case for requiring disclosure is overwhelming in light of the purposes of the LDA. The real problem is a practical one: crafting statutory provisions that call for information sufficient to describe the basic nature of the lobbyist/lawmaker relationship without requiring details of marginal relevance. For example, it is one thing to mandate disclosure of the dollar amount of travel expenses reimbursed at the behest of an LDA registrant; it is quite another matter to require a description of “all

92. Indeed, businesses and nonprofit entities must keep track of grassroots expenditures for IRC purposes regardless of any registration or reporting obligations under the LDA.

93. See, e.g., Dennis T. Regan, *Effects of a Favor and Liking on Compliance*, 7 J. EXPERIMENTAL SOC. PSYCHOL. 627 (1971).

94. ROBERT B. CIALDINI, *INFLUENCE/SCIENCE AND PRACTICE* 20 (4th ed. 2001).

95. *Id.*

96. *Id.* at 26–27.

97. See Jeffrey Birnbaum, *The End of Legal Bribery*, WASH. MONTHLY, June 2006, available at <http://www.washingtonmonthly.com/features/2006/0606.birnbaum.html> (noting the hazy line between an illegal bribe and a lawful campaign contribution).

meetings, tours, events, and outings attended”⁹⁸ during the trip. At a minimum, the LD-2 should require disclosure of campaign contributions made, fundraising events sponsored, and travel expenses or other significant amounts of money paid or disbursed (or arranged to be disbursed) to or for Members by a registrant or its lobbyists.

3. Broadened Disclosure of Membership in Lobbying Coalitions

Public information regarding the funding and nature of coalition lobbying is minimal—and sometimes misleading, as is the case when a coalition’s name belies its true purposes. For example, one group, the “Section 877 Coalition,” focused its efforts on keeping Congress from tightening a section of the IRC applying to the estates of wealthy individuals who give up their American citizenship. The coalition paid more than \$760,000 to two firms in 2000-2001 for their lobbying efforts. As it turns out, it was made up of trusts for members of the family of Ted Arison, founder of Carnival Cruise Lines, who renounced his citizenship and returned to Israel before his death.⁹⁹ Lobbying forms filed under the LDA gave no hint of the identity of the coalition members, though allegedly those forms fully complied with disclosure requirements.¹⁰⁰

It was the perceived need to reveal who is really behind lobbying efforts that prompted Senator Ted Stevens, during debates leading to the LDA’s enactment, to propose a disclosure threshold for coalition members of \$500 contributed semiannually without any further trigger, such as the need for control of the lobbying campaign.¹⁰¹ With regard to control requirements, he acknowledged what is clearly the reality of coalition lobbying: “The [contributor] is not going to be fooling around with supervising and controlling lobbying activity. He wants the client to do that. They are going to put up the money. They want the results. They are not going to manage the activity.”¹⁰² This very practical insight is a compelling reason for eliminating as a condition for disclosure of a coalition member the existing statutory requirement that the member plan, supervise or control the lobbying activities¹⁰³ of the coalition.

Clearly, the associational privacy interests protected by *NAACP v. Alabama* are implicated in disclosure of coalition members. However, the Supreme Court’s limitation of that case to instances where the threat of harassment is real and not hypothetical¹⁰⁴ means that asserted impingements on privacy can be raised in as-applied challenges to an amended LDA.¹⁰⁵ There is no question that broadened coalition membership disclosure serves the purposes identified by *Harriss*, *Buckley*, and

98. See, e.g., S. 2128, 109th Cong. § 106 (2006).

99. See, e.g., Alison Mitchell, *Loophole Lets Lobbyists Hide Clients’ Identity*, N.Y. TIMES, July 5, 2002, at A2.

100. *Id.*

101. 139 CONG. REC. S5561 (May 6, 1993).

102. *Id.* S5564.

103. See *supra* text accompanying note 71.

104. See *supra* text accompanying notes 54–57. The threat of harassment bulked large in the *McIntyre* case, suggesting that the protection of anonymous speech at issue there is a limited one.

105. See Elizabeth Garrett, Ronald M. Levin, & Theodore Ruger, *Constitutional Issues Raised by the 1995 Lobbying Disclosure Act*, THE LOBBYING MANUAL, *supra* note *, at 150–52. Indeed, the LDA expressly provides that “[n]othing in this [Act] shall be construed to prohibit or interfere with—(1) the right to petition the Government for the redress of grievances; (2) the right to express a personal opinion; or (3) the right of association, protected by the first amendment to the Constitution.” 2 U.S.C. § 1607(a) (2000).

McConnell to justify disclosure in the lobbying and campaign finance contexts: providing the public and Congress with information allowing them more accurately to identify persons whose interests may be at stake and deterring corruption and overly compliant responses to those interests by officeholders.

With regard to the monetary threshold for disclosure of a coalition member, reducing the threshold from the current \$10,000 per semiannual period to as low as \$100 would appear to be consistent with, for example, the Supreme Court's decision in *Buckley*, which upheld disclosure of annual political contributions at that level.¹⁰⁶ But, as Senator Levin pointed out in 1993 in objecting to Senator Stevens' proposed \$500 threshold, disclosure of such small amounts in the lobbying context produces information of marginal, if any, value for anyone.¹⁰⁷ At the time he spoke, the proposed contribution limit in Senator Levin's bill was \$5,000 for a semiannual period. That amount in fact conforms better than the current \$10,000 threshold to what most members of the public would likely consider a significant investment deserving disclosure. Moreover, except where the likelihood of harassment or other adverse effects can be demonstrated, there should be no distinction between individuals and artificial entities; disclosure should apply to both types of coalition member.

Strategies to avoid disclosure of coalition membership must be anticipated and countered through congressional formulation of "look-through" rules. For example, a coalition of five members might funnel hundreds of thousands of dollars to a third party that would hire a lobbyist to work purportedly on its own behalf, but effectively to advance the interests of the coalition. Under the LDA as currently written, the third party would be considered the client, which would have to be disclosed, and the coalition itself (but not its individual members) would be considered an "affiliated organization"¹⁰⁸ whose formal name would have to be disclosed if it met the existing "control" requirement. Alternatively, coalitions can be created of still other coalitions like Russian matryoshka dolls, with the result that only the names of contributing coalitions would be disclosed, and not the individual members contributing the requisite amount to a lobbying campaign. Disclosure requirements must penetrate the potential lobbying shields.

Finally, various lobbying reform bills introduced during the 109th Congress specified that associations qualifying for tax exempt treatment under the Internal Revenue Code would not be subject to even the modestly broadened coalition disclosure that they proposed.¹⁰⁹ We disagree. The wisdom of such provisions is questionable in light of congressional investigations of the activities of Jack Abramoff, which identified the blatant misuse of tax-exempt entities as "pass-throughs" to distribute money for lobbying and other purposes.¹¹⁰ If qualification as a tax-exempt entity offered protection from disclosure, coalitions might seek that status for purposes

106. *Buckley v. Valeo*, 424 U.S. 1, 82–84 (1976).

107. 139 CONG. REC. S5563 (May 6, 1993).

108. 2 U.S.C. § 1603(b)(3) (2000) (requires disclosure of the contributing "organization"). See also *id.* § 1602(13), (14) (2000).

109. See, e.g., S. 1398, 109th Cong. § 107(a) (2006); S. 2128, 109th Cong. § 108(a) (2006); H.R. 4575, 109th Cong. § 108(a) (2006).

110. See, e.g., Susan Schmidt & James V. Grimaldi, *Nonprofit Groups Funneled Money for Abramoff*, WASH. POST, June 25, 2006, at A1.

that have nothing to do with the reasons tax-exempt treatment is made available in the first place.

4. Requiring More Specific Identification of the Target(s) of Lobbying

Currently, periodic reports must merely indicate which House of Congress or federal agency was contacted by a lobbyist. Earlier versions of the bill enacted as the LDA required the names of congressional committees contacted, but rejected specific identification of persons contacted based, in part, on the following rationale:

... a requirement to disclose the specific identity of federal officials with whom a lobbyist has met could have a chilling impact on free speech and infringe on protected first amendment rights in at least two ways. First, some government officials might refrain from engaging in communications with certain individuals or groups for fear of being linked with them, thereby restricting the access of citizens to their government officials. Second, such a requirement may reveal an organization's lobbying strategy and political associations, which could, in some cases, violate the first amendment right of free association.¹¹¹

One entirely reasonable reaction to these feared consequences would be that they are exactly what effective lobbying disclosure is supposed to produce; otherwise adequate deterrence of inappropriate behavior will not occur. The constitutional concerns are overstated. There may be a right of citizens to speak their minds to or about government; but there is no corresponding constitutional obligation on the part of federal officials to make themselves available to listen or to speak back. The constitutional right to petition is not as demanding as the Administrative Procedure Act's right to petition for agency action.¹¹² Secondly, there may be constitutional protection in some circumstances from disclosure of information related to the internal affairs of an association, but there is none with regard to the association's external political linkages or the strategies it employs to achieve its purposes. The burdens of disclosing the names of officials contacted provide the more convincing objection; they were also relied upon in drafting the LDA.¹¹³ Meetings or other lobbying contacts are likely to be frequent and often involve numerous officials, some whose covered status may be unclear. The resulting reports would be mountainous. There may also be unintended political consequences caused by gaming of the lobbying process (where, for example, lobbyists representing an unpopular cause loudly report frequent contacts with an unsympathetic Member).

111. S.REP. NO. 103-37, at 35 (1993). The Supreme Court has acknowledged that the administrative costs of disclosure may deter advocacy and present First Amendment issues. See *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 254–55 (1986).

112. See William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 6 (1988). While "privacy" may in some instances optimize freedom of speech, see William V. Luneburg, *Civic Republicanism*, *supra* note 48, at 382–89, the public interests represented by lobbying disclosure can justify congressional restrictions on that privacy.

113. S.REP. NO. 103-37, at 35 (1993).

What is reasonable and potentially helpful is identification of congressional committee(s), subcommittees, and the office(s) within federal agencies contacted by lobbyists employed by the registrant. Even identification of a Member's office might be mandated, without any indication whether staff or the Member was contacted or how often. This information would be useful, with a reasonable burden on the lobbyist and low risk to the lobbying process.

5. Disclosure of the Basis for Compensation Paid to Lobbying Firms

As it stands now, all the LDA requires in terms of income reporting by lobbying firms is the amount earned during a semiannual period.¹¹⁴ While contingent fees are unlawful in certain contexts (e.g. the Foreign Agents Registration Act¹¹⁵), there is no general state or federal ban on such compensation arrangements¹¹⁶ and indeed some federal lobbying is conducted on that basis. However, there is an increased potential for corrupting the lobbying process through the temptations created where a lobbyist is paid only if successful in his or her representation, based on a percentage of what is achieved, or with a "bonus" for success. The best way to address this is through disclosure: the LD-2 should require disclosure of the existence and nature of any contingent fee arrangement, as well as whether and how much reported income was paid or payable on that basis.

6. Elimination of the Section 15 Option to Utilize IRC Definitions

In a nutshell, the option to use IRC definitions permits purposeful avoidance of disclosure or results in disclosure that may be seriously misleading,¹¹⁷ thereby defeating the purposes of the LDA. A few examples will suffice.

Organization "A" is a public charity that invokes the Section 15 option to use IRC definitions. All of its lobbying is directed to high-level federal executive branch officials relating to administrative regulations and costs over \$600,000 annually. Under LDA definitions, the \$24,500 threshold for registration is easily satisfied. But, since the applicable IRC definition of lobbying does not include lobbying executive branch officials on nonlegislative subject matters,¹¹⁸ "A" will not incur any expenditures triggering registration. Moreover, even if "A" did sufficient lobbying on legislative matters so that one of its employees qualified as a lobbyist¹¹⁹ and the monetary threshold for registration was satisfied, its semiannual report would still not provide any disclosure with regard to its significant administrative lobbying. Persons reading its report would have a seriously mistaken sense of its lobbying efforts.

The IRC definitions that preclude a business deduction for lobbying expenditures

114. 2 U.S.C. §1604(b)(3) (2000).

115. 22 U.S.C. §618(h) (2000).

116. See Thomas M. Susman and Margaret Martin, *Contingent Fee Lobbying*, Chapter 20, *THE LOBBYING MANUAL*, *supra* note *, at 342.

117. For a detailed examination of this problem, see GAO STUDY, *supra* note 70.

118. *Id.* at 32.

119. For a non-profit making the Section 15 election, it would use IRC definitions for lobbying executive branch officials, but LDA definitions for lobbying legislative branch officials in determining whether its employee was a lobbyist for registration purposes. See 2 U.S.C. § 1610(a)(2).

include state level lobbying, which is not covered by the LDA. Company “B,” relying on its Section 15 option, reports semiannual lobbying expenditures of \$500,000, \$440,000 of which was for lobbying the Michigan legislature and \$60,000 for lobbying federal executive and legislative officials on auto safety issues. Assume “B” must register regardless of which lobbying definitions apply.¹²⁰ The \$500,000 will be reported in one lump sum on the semiannual report it must file. Another registrant (“C”), an entity either not entitled to invoke Section 15 or one that has chosen not to elect to use it, reports expenses of \$200,000 for federal-level lobbying on the same issues. The semiannual reports for these entities will convey the impression that “B” spent much more on federal level lobbying than “C” when, in fact, that was not the case.¹²¹ Moreover, since reporting of the lobbying activities of “B” other than expenses for the semiannual period will not include state level lobbying, persons examining the LD-2 may improperly infer that “B” spent \$500,000 on those activities that are disclosed. In other words, the Section 15 election can result in organizations reporting expenses that simply do not correspond to other information that is provided.

These effects of the Section 15 option to use IRC definitions would be problematic even if there were some assurance that it would only be invoked where the registrant (or prospective registrant) believed that creating two different sets of records, one for LDA purposes and the other for the Internal Revenue Service (“IRS”), was unduly burdensome for it. Avoiding that burden was the rationale underlying Section 15.¹²² But it is unlikely—indeed it is a virtual certainty—that many entities eligible for the election rely on it for strategic purposes, that is, to eliminate or minimize disclosure of lobbying efforts or even to create misimpressions of the nature of lobbying campaigns. The Act does not prohibit strategic invocation of the option, though such behavior significantly undercuts the statute’s purposes.

Moreover, even if a business or public charity does not make a Section 15 election for the purpose of avoiding disclosure, but simply to avoid duplicate record-keeping, duplicate recordkeeping may still be necessary. Because of a 1998 technical amendment to the LDA, in determining whether a particular employee is a lobbyist for registration purposes and, if registration is required, in providing information with regard to the entity’s lobbying efforts, the registrant or potential registrant must use LDA definitions for lobbying legislative branch officials.¹²³ Accordingly, for example, an electing entity must track the time devoted to lobbying legislative branch officials on both legislative and administrative subjects in order to determine whether their employee(s) meet the LDA’s twenty percent-of-time threshold necessary to qualify as a lobbyist. Simultaneously, it will have to track legislative contact time and associated expenses using IRC definitions, which do not include communications relating to

120. As in the case of public charities, *see* source cited *supra* note 119, for some purposes LDA definitions apply even to businesses making the Section 15 election.

121. This example raises, in part, the question why an entity (like “B”) would opt for IRC definitions when, one might assume, it would prefer to give the impression of limited lobbying work. However, in the case presented, since the IRC coverage of federal administrative officials who can be lobbied is much smaller than those defined by the LDA as covered officials, the IRC definitions may lead to nondisclosure of information that the reporting entity may wish to hide, like the names of lobbyists and agencies contacted on administrative matters.

122. *See supra* text following note 67.

123. 2 U.S.C. §§ 1610(a)(2)(A), (b)(2)(A) (2000).

nonlegislative subjects (e.g. administrative rules) for the purpose of determining whether the monetary threshold for registration is met and what lobbying expenses to report for LDA and IRC purposes.

While it is impossible to know how many entities rely on Section 15 to avoid registration, a 1999 GAO study indicated that only twenty-nine percent of the registered organizations eligible for the election used IRC definitions for expense reporting.¹²⁴ If reliance on Section 15 is uncommon, the case for retaining it is weak. On the other hand, if the option is frequently invoked, the argument for eliminating it is even stronger given its basic inconsistency with the disclosure purposes of the LDA.

7. Requiring Closer Linkage Between the Names of Active Lobbyists, Specific Issues Lobbied, and the Entity/Official Contacted

As it is currently drafted, the LDA requires semiannual reports to provide information regarding lobbying campaigns organized on a general topic basis.¹²⁵ Accordingly, reports do not link a specific issue with the entity contacted or, for that matter, the lobbyist who made the contact. Thus, for example, under the general topic area "Environmental/Superfund," two specific issues might be listed, for example, "EPA new source review regulations under the Clean Air Act" and "wetland protection under Section 404 Clean Water Act," with the Senate and EPA identified as having been contacted. The listing of active lobbyists during the semiannual period may include Lobbyists "A", "B", and "C." There is no way to know, however, which lobbyist(s) contacted EPA on which of the issues listed. The unfocused nature of the information provided significantly undercuts the ability of the Act to deter inappropriate behavior.

Accordingly, the LDA should be amended to require that, instead of a listing by general area topic, information on lobbying activities during a reporting period be arranged by the name of each lobbyist active during the period covered. For each specific issue lobbied by a listed lobbyist, the contacted entity should be disclosed.

8. Consolidated Semiannual Reports for Self-Lobbying Organizations that Hire Lobbying Firms

It is often the case that the same client will both hire a lobbying firm and also use its own employees to conduct lobbying campaigns on its behalf. In that event, assuming the firm and the self-lobbying organization meet the requirements for LDA coverage, two registrations will be on file for the same client. More importantly, persons interested in obtaining a complete picture of the lobbying activities for the client must examine all of the semiannual reports that relate to it for a particular reporting period. While such a search is possible today with the Senate's web-accessible database, such additional investigation should not be required.

Moreover, when undertaken today, such a search results in information that may be

124. See GAO STUDY, *supra* note 70, at 18. There has been no other published study since 1999 to indicate whether this percentage has changed.

125. See 2 U.S.C. § 1604(b)(2) (2000).

misleading. The LDA requires that a self-lobbying organization semiannually report fees paid to third parties for conducting lobbying activities on its behalf.¹²⁶ Those third parties include lobbying firms, whether or not they are required to register under the Act.¹²⁷ As it turns out, many self-lobbying organizations have filed semiannual reports without including such fees.¹²⁸ Unfortunately, even if both the self-lobbying organization and its retained lobbying firm(s) comply with the reporting requirements as they currently exist, persons reviewing the LD-2's for the same client are likely mistakenly to double-count expenses to the extent they add the fees reported by the lobbying firm(s) to the total expenses reported by the self-lobbying entity. Requiring a consolidated semiannual report to be filed jointly by a registered self-lobbying organization and its retained registered lobbying firm(s) would eliminate both the mandated duplicate reporting of lobbying expenses and any related confusion.

Since the self-lobbying organization's expense totals must include amounts paid to lobbying firms for lobbying activities on its behalf, logically it makes sense that the LD-2 include the names of all lobbyists who were active on behalf of the client-organization during the reporting period, whether or not as its employees. Unfortunately, in calling for the names of lobbyists on both registration statements and semiannual reports, the LDA limits the listing to a registrant's "employee[s]," a term that does not include "independent contractors"¹²⁹ such as lobbying firms. A consolidated filing for a client would, therefore, result in a listing of all of the lobbyists working for the client.¹³⁰ A consolidated filing would also require the retained lobbying firm(s) and its client organization to agree on a common description of the specific issues lobbied for LD-2 purposes and thus avoid the confusion that might otherwise result from different issue descriptions in different reports filed for the same client.

B. Improving the Ability and Willingness to Enforce the LDA

The FRLA of 1946 was remarkable, among other things, for the lack of enforcement by the Department of Justice.¹³¹ Shifting to civil, as opposed to criminal, penalties in the LDA was motivated in part by a desire to increase enforcement activities.¹³² However, vigorous enforcement has not been realized. The problem is rooted in the lack of resources, interest, and legal authority.

The Secretary and Clerk's offices have a handful of employees whose duties include not only LDA compliance oversight but general administration, and they receive approximately 100,000 LDA forms a year. Violations appear to be reasonably

126. See *supra* text accompanying note 77.

127. See William V. Luneburg and A.L. Spitzer, *Registration, Reporting, and Related Requirements*, *supra* note 76, at 110.

128. See THE CENTER FOR PUBLIC INTEGRITY/LOBBYWATCH, *Methodology*, <http://www.publicintegrity.org/lobby/default.aspx?act=methodology> (last visited Oct. 9, 2006).

129. 2 U.S.C. § 1602(5)(A) (2000).

130. See text *supra* following note 125, proposing that required periodic reports organize information organized by lobbyist's names.

131. See Statement of Milton J. Socolar, Special Assistant to the Comptroller General, Before the Subcommittee on Oversight of Government Management Committee on Governmental Affairs, United States Senate, *Federal Regulation of Lobbying Act of 1946 is Ineffective*, GAO/T-GGD-91-56, at 2 (1991).

132. See S. REP. NO. 103-37, at 36-37 (1993).

frequent, for instance, late filing and failure to supply required information.¹³³ Where an apparent violation is discovered, a letter is sent to the registrant, identifying the defect(s) and requesting correction. If an “appropriate response” is not received to the letter, the offices must refer the cases to the United States Attorney for the District of Columbia. Indeed, since 2003, the Secretary’s office has allegedly referred over 2,000 such cases.¹³⁴ However, DOJ claims to have received only 200. In three cases, DOJ entered into settlements, with penalties amounting to \$47,000 and a three-year ban on lobbying by one unnamed lobbyist.¹³⁵ Basic information regarding DOJ’s enforcement became publicly available for the first time in 2005 only because of a Freedom of Information Act request that DOJ initially resisted on the basis of the Privacy Act.¹³⁶

While the Secretary and Clerk could be given more resources for compliance oversight, as part of Congress they are unlikely ever to have adequate incentive to become aggressive in light of potential embarrassments that might be suffered by Members themselves. More importantly, Congress cannot give the Secretary and Clerk (or any other entity deemed to be part of Congress) more legal authority to police the LDA because of basic separation-of-powers principles.¹³⁷ DOJ’s anemic and less-than-transparent record to date with regard LDA enforcement suggests, moreover, that reliance on DOJ alone is possibly misplaced.

During the process of the LDA’s development, it was proposed at one point that policing lobbying disclosure compliance be vested in the Federal Election Commission, which oversees the related area of campaign disclosure and whose enforcement efforts are generally publicly disclosed.¹³⁸ While that option was rejected in 1993, Congress should revisit it. This approach could result in an administrative civil penalty procedure that avoids, in the first instance, the need for DOJ involvement.¹³⁹

C. Improving Public Availability of Lobbying Information

As noted above, the LDA mandates that the Secretary of the Senate and Clerk of the House develop “computerized systems designed to minimize the burden of filing and maximize public access to materials filed under” the Act.¹⁴⁰ While the Senate’s Office of Public Records (SOPR) has permitted and encouraged, but not required, Internet filing of registrations and reports for several years and maintains an Internet-

133. See THE CENTER FOR PUBLIC INTEGRITY/LOBBY WATCH, *Industry of Influence Nets Almost \$13 Billion*, <http://www.publicintegrity.org/lobby/default.aspx?act+summary> (last visited Oct. 9, 2006).

134. See *Senate Passed 2,000 Possible LDA Violations to DOJ, Dodd Reports*, BNA REG. & LAW No. 30, at A-5 (February 14, 2006).

135. See *Justice Department Reveals First Cases Settled Under Lobbying Disclosure Statute*, BNA REG. & LAW/DAILY REP. FOR EXECUTIVES No. 157, Aug. 16, 2005 at A-18.

136. See *DOJ Refuses to Disclose Settlements With Those Who Violate Lobbying Law*, BNA REG. & LAW, No. 117 (June 20, 2005) at A-12.

137. See *Buckley v. Valeo*, 424 U.S. 1, 138; *Bowsher v. Synar*, 478 U.S. 714, 733 (1986); *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252 (1991).

138. See, e.g., *DOJ Refuses to Disclose Settlements With Those Who Violate Lobbying Law* *supra* note 135, at A-13.

139. The FEC currently has authority to assess civil penalties. See, e.g., FEDERAL ELECTION COMMISSION, *How the Administrative Fine Program Works*, available at http://www.fec.gov/pages/brochures/admin_fines.shtml (last visited Dec. 15, 2006).

140. *Id.* § 1605(3)(B) (2000).

accessible database of those forms, it was not until 2006 that the Clerk's Legislative Resource Center (HLRC) entered the electronic age when it mandated Internet filing, though via a different system than used by the SOPR.¹⁴¹ Unfortunately, the debut of HLRC's system was marred by glitches that created difficulties for many registrants in meeting the February 2006 filing deadline. Moreover, as of December 2006, there was still no Internet-accessible lobbying database maintained by the Clerk, and the usability of the Senate's database was restricted by the lack of full-text search capability. Also, the search categories made available by the Secretary are limited, omitting significant parameters such as specific issues lobbied.¹⁴² Indeed, manual data entry is a significant resource commitment for the Secretary. Given the lack of staff, the Senate's lobbying database is months behind in the filings that it reflects. Compounding all of these difficulties is the fact that filings are often late. A recent study suggested that 36,000 (or almost 20 percent) of lobbying forms were filed at least three months after the deadline and 3,000 forms were filed six months late, while 1,700 were filed at least a year late.¹⁴³

If electronic filing of both registrations and reports were required with both the Clerk and Secretary in a shared system that permitted immediate posting on the Internet and full-text searches as well as searches by category of information called for by the required forms, there would be a significant reduction in the delays that are currently encountered in gaining access to lobbying data. Indeed, under those circumstances, late-filing would inevitably be reduced. When Congress is in session, six months can be a lifetime for important legislation. Although bills addressing many issues appear to remain on the legislative calendar for years or even decades (tort and bankruptcy reform have in the past suffered that fate), Congress may become energized to act in a matter of weeks. Significant lag-time in making lobbying data available to those who are interested is fatal to fully carrying out the deterrent purposes of the LDA.

It is hard to believe that, more than a decade after the LDA's enactment, the current system of limited disclosure is still in place. Not surprisingly, despite their differences on other important matters, the 2006 Senate and House lobbying reform bills largely agreed that this was a problem that had to be fixed.¹⁴⁴ Statutory amendment should be unnecessary to effect the changes proposed above—though apparently the unwillingness of the Secretary and Clerk to act on their own may require the intervention of their congressional bosses.

Both the Senate and House bills also imposed a quarterly, rather than the current

141. Former House Committee Chairman Bob Ney issued a directive to the Clerk in June 2005 to require electronic filing of LDA registrations, reports, and amendments thereto. See Rep. Bob Ney, Committee on House Administration, *Electronic Filing of Disclosure Reports* (June 29, 2005), available at www.lobbyinginfo.org/documents/NeyLetter.pdf.

142. While the semiannual report form requires the listing of "specific" issues lobbied, the exact formulation of those is up to the registrant with minimal guidance from the Act and administrators, unlike "general issue areas," which also have to be reported, to each of which the Secretary and Clerk have assigned a distinctive code number which can be retrieved by the search engine currently offered by the SOPR. A system that would permit full text searches would avoid the current inability to conduct specific issue searches.

143. See *Industry of Influence Nets Almost \$13 Billion*, *infra* note 133. The SOPR, however, disputes the accuracy of these figures.

144. See S. 2349, 109th Cong. §§ 213, 219 (2005); H.R. 4975, 109th Cong. §§ 102, 103 (2005).

semi-annual, reporting period¹⁴⁵ to further eliminate delays in making lobbying information available. If electronic filing with both the Senate and House were mandated and employed a common system permitting simultaneous lodging of the required forms with both the SOPR and HLRC, the burden imposed on registrants by additional filings would be significantly reduced.¹⁴⁶

V. CONCLUSION

Lobbying disclosure deserves a better chance than it has had so far to prove its ability to deter inappropriate influences on the legislative and executive decision-making processes. While certain administrative changes can insure the public availability of lobbying data and thereby assist in carrying out the purposes of the LDA, the statute must be amended to impose a more effective disclosure scheme. Our proposals are not revolutionary; they recognize the importance of lobbying to responsive and effective congressional and executive decision-making, and they build on what we believe to be the basically sound foundation of the Lobbying Disclosure Act. Thus, even as the recent rash of scandals disappears from the front pages, Congress should nonetheless step up to the stove and add a few new ingredients to make lobbying disclosure a more potent and robust response to some of the important challenges facing our body politic.

145. See S. 2349, 109th Cong. § 211 (2005); H.R. 4975, 109th Cong. § 101 (2005).

146. The requirement for obtaining authorized digital signatures for HLRC, but not SOPR, filings today adds delay to the filing process. See generally, Thomas M. Susman, *Congress's Lobbying Report Electronic Filing Fiasco*, ROLL CALL (Sept. 6, 2006).