

Understanding the New Rules of Lobbying

Companies, beware: Taking a member of Congress out to lunch or to a game can land you in a heap of trouble.

BY SONIA P. FOIS

Recent changes in lobbying and ethics rules have caused companies to face an important fact: Managing the political and legal risks that accompany interaction with public officials now has as high a priority as other business risks.

With the enactment of the Honest Leadership and Open Government Act of 2007 (and new House ethics rules shortly before that), the stakes have been raised. For the first time, the private sector is subject to legal liability under the federal lobbying law for violations of internal congressional ethics rules.

Moreover, the rules themselves have been tightened, for example, to effectively prohibit any registered lobbyist and foreign agent, and the businesses that employ or retain them ("lobbyist employers"), from taking a member of Congress or staffer to lunch or dinner or giving them tickets to a sporting or cultural event. The 2007 act also heavily restricts congressional travel when paid for by a lobbyist employer or involving lobbyists. Fund-raising by lobbyists, which used to fly under the legal radar because of a narrow definition of so-called "bundling," will now be disclosed to the public by the recipient candidates or committees if the fund-raising exceeds \$15,000 in a six-month period. This will become effective once the Federal Election Commission issues regulations.

Most significantly, registered lobbyists and lobbyist employers now will be required to certify that they have not knowingly violated the congressional gift and travel rules. The law also sets steep new penalties of up to \$200,000 and up to five years in jail for violations of the federal law. In addition, despite the failure of the act to delegate traditional regulatory powers to an existing or new entity, the act nevertheless grants amorphously defined audit powers to the comptroller general. Among such authorities is the ability to request documents from registrants that are relevant to the act's purposes of improving compliance and strengthening enforcement.

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While it is clear that the comptroller general itself has no power to prosecute violations of the lobbying law, it is unclear whether and how this power could serve as a conduit for referrals to the agency with such authority—the Justice Department.

A RULES ROAD MAP

While we wait for more guidance on the details of the act, businesses need to demonstrate to enforcement officials that they have a reliable and documented compliance system. Here are some suggested guidelines.

- Impose zero tolerance on gifts. In the new law, lobbyists, foreign agents, and their clients or employers will no longer have the benefit of the dollar exception that permits a congressional official to accept a meal, entertainment event, or other single gift if it is under \$50 and the aggregate total of gifts from the same source is under \$100 for the calendar year.

Because the ban extends to lobbyist employers and not just the lobbyists, no employees may obtain reimbursement for a meal with a congressional official from a business that retains or employs lobbyists. Going even further, the House Committee on Standards, under some circumstances, interprets the rules as covering an individual nonlobbyist who uses personal funds to pay for such a meal. The committee cites this example: "A nonlobbyist employee of a constituent company that retains lobbyists offers to take the district director to a \$40 lunch. The company's employee says that he intends to use personal funds instead of company funds to avoid the prohibition on gifts from entities that retain or employ lobbyists. The district director may not accept the lunch."

'NO GIFT' POLICY

Accordingly, it behooves businesses that retain or employ lobbyists to institute a "no gift" policy—no reimbursement

of expenses made on behalf of members of Congress and staffers. Any use of personal funds should only be in the context of the “personal friendship” exception (which still applies to lobbyists), where there is a history of a personal relationship between the employee and the official, including reciprocal gift-giving. Lobbyist and nonlobbyist employees, of course, can always take congressional officials out to lunch if the official picks up his or her own expenses.

- Establish a preapproval system. More than 20 existing gift exceptions under congressional rules continue to be available, even to lobbyists, lobbyist employers, and foreign agents. These include, for example, exceptions permitting members or their staff to attend “widely attended” events (as defined by the rules) or charity events at the invitation of the event’s sponsor, and they also may accept reception-type food (but not sit-down meals) at any type of event.

Moreover, while the act generally bans registered lobbyists, foreign agents, and their clients or employers from paying for a member’s or staff’s travel, there are limited exceptions. The House exempts trips sponsored by institutions of higher learning, whereas the Senate excludes 501(c)(3) nonprofit entities.

Both bodies, however, allow the entities that employ or retain lobbyists or foreign agents (but not the lobbyists or agents themselves) to sponsor and pay for one-day trips, or a second day if the extra stay is deemed necessary by the Senate Select Committee on Ethics and the House Standards Committee. With respect to all trips, regardless of the source, written advance approval from these committees is required, and the trip sponsor must certify in writing that no lobbyist or foreign agent will accompany the member or staffer on the trip or helped plan or organize it.

Businesses that routinely interact with members and staff inevitably will want to continue to sponsor events and trips within these exceptions. But to ensure that the criteria for the exceptions are met, it will be necessary for the business to set up a preapproval process for congressional travel and other events permitted by the rules.

- Track all lobbying expenses and audit yourself first. With the comptroller general’s new auditing functions and document request powers, companies must be prepared to demonstrate their due diligence in complying with the federal lobbying law. While the new law still requires only a good-faith estimate of lobbying expenses (no itemization) in the reports now due quarterly, it nevertheless may be prudent to require the retention of records relating to all lobbying expenses over a certain dollar amount.

More critically, however, lobbyist employers need to be able to document the methodology used to arrive at the good faith estimate disclosed in its reports. This would include an employee’s time spent on “lobbying activities” (both lobbying contacts and background work) and a percentage of overhead and operating expenses attributable to lobbying activity.

In addition, payments made to entities benefiting members and staffers, or made at their request, will be reportable in

the new semiannual reports. This could include, for example, a contribution to a member’s favorite charity or to an entity established in a member’s name. Accordingly, these payments will have to be tracked throughout the company.

A company should stay on top of its compliance program by conducting its own periodic audits. It also should establish mechanisms for employees to report violations and it should provide accompanying whistle-blower type protection. Violations should be addressed and quickly referred to designated persons in the organization and employees should be made aware of disciplinary actions that will result.

- Develop a process for certification. The semiannual filing must include a certification that the lobbying firm, registrant, or each employee listed as a lobbyist of an organization or firm, is familiar with congressional rules and has not “provided, requested or directed” a gift (including travel) to a member or employee of Congress with knowledge that the gift would violate House or Senate gift-giving rules.

Until further guidance is provided by the clerk of the House and the secretary of the Senate, it is not clear how this certification process will work. What we do know, however, is that an organization must have due diligence procedures in place that are sufficient to allow the certifying official to sign the certification. The no gift policy and preapproval procedures discussed above are just some examples of the type of due diligence that will be needed.

- Review lobbying reports. With increased liability for violations of the law, including false filings or certifications, a company’s lobbying filings should be reviewed and approved by a company official with compliance authority. These reports include the quarterly reports filed by the company itself for its in-house lobbyists, the quarterly reports filed by outside consultants, and the new semiannual reports filed by the company and its registered lobbyists.

- Train and inform employees. These policies and procedures have little meaning if they are not communicated in a clear and understandable manner to employees and consultants. The goal should be for employees to learn when to ask the right questions from the proper folks within the company and identify trouble spots, rather than to grasp legal nuances. Policies and procedures in this area should be widely distributed to anyone who could potentially be “lobbying” in a particular area or engaged in other political activities. Distribution therefore should not be restricted to government affairs employees and consultants.

- Employees and consultants should be educated and trained, and they should know whom to approach to have their questions answered. Requiring employees and consultants to certify their compliance with the law therefore may be prudent. This training process should be dynamic as the laws and policies evolve, and as employees come and go or their responsibilities change.

THE LOBBYING CZAR

- Appoint a lobbying and gifts compliance “czar.” A company’s political risk management program should be overseen by a high-level official with day-to-day responsibility—pref-

erably not someone employed solely within the government affairs sphere. This demonstrates that the program is a top priority of the company. Designating compliance officers by specific business or practice areas or by specific regions can facilitate and streamline compliance initiatives.

In closing, lobbying and ethics laws are applied in a political context as well as a legal one. An unfavorable news story can quickly make a company “radioactive” with public officials and thus seriously thwart its legislative and political objectives.

In the ethics area in particular, where the laws are so vague and fact-specific, a common sense and practical approach, rather than an overly lawyerly one that relies on technical arguments, may sometimes be in order.

Sonia P. Fois is a partner in the D.C. office of Arnold & Porter, specializing in the areas of political law compliance and government relations at the federal, state, and local levels of government.