

BEYOND THE TAX CODE:
FEDERAL RESTRICTIONS ON LOBBYING BY NONPROFIT
ORGANIZATIONS

by

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Introduction

Federal law exempts educational, scientific, religious and other charitable organizations from federal taxation and permits tax deductions for gifts to such groups provided that, among other conditions, "no substantial part of the activities...is carrying on propaganda, or otherwise attempting to influence legislation (except as otherwise provided in subsection (h)),¹ and [the organization] does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office."²

¹ Sec. 501(h) provides an elective standard that can be used to determine what constitutes a substantial portion. Because it is based on level of expenditures, it is referred to as an expenditure test. Private foundations and churches cannot make this election. For those entities not choosing the 501(h) election, the vague "insubstantial" lobbying standard holds. A discussion of these two options may be found in Bruce R. Hopkins, The Law of Tax-Exempt Organizations, Sixth Edition (New York: John Wiley & Sons, Inc., 1992, Chapter 14.

² I.R.C. Sec. 501(c)(3) (1988) applies to permitting a tax exemption; I.R.C. Section 170(c)(2)(D) permits charitable deductions from income taxes, Secs. 2055(a)(2) and 2106(a)(2)(A)(ii) permit such deductions from estate taxes, and Sec.2522(a)(2) permits deductions from gift taxes with the identical restrictions on legislative and political activity.

2 Rudder

This language, along with interpretations of it by the Internal Revenue Service (IRS), leaves virtually no room for qualifying organizations to engage in political campaign activity,³ but such groups can engage in lobbying directly or indirectly (i.e., through certain grassroots efforts) if such actions constitute an "insubstantial" part of those entities' work.⁴ Rules pertaining to these restrictions and their enforcement come under the jurisdiction of the IRS.⁵

³ For a discussion of the limitation on political activities limitation generally, see Hopkins, The Law of Tax-Exempt Organizations, Chapter 15. For an excellent, point-by-point consideration of this issue see, Internal Revenue Service, Exempt Organizations Branch, Technical Division, Exempt Organizations, 1992, Chapter N, "Election Year Issues."

⁴ Supra note 1.

⁵ Unless a nonprofit opts for the expenditure test (whose first penalty is to apply an excise tax for violations), the primary enforcement tool available to the IRS is withdrawal of 501(c)(3) status, a blunt instrument. Moreover, while auditing by the IRS of nonprofits has increased, very few are audited. Thus, unscrupulous nonprofits may successfully skirt the law.

To the limited degree that nonprofits are permitted to lobby under the tax code, other statutes and regulations pertain, including the Federal Regulation of Lobbying Act of 1946 ⁶, the Byrd Amendment of 1989 ⁷, the HUD Reform Act of 1989 ⁸, and the Office of Management and Budget regulations of 1984 governing reimbursement of lobbying costs incurred by nonprofit organizations. ⁹ These rules are in varying degrees ineffective (especially in the case of the Lobbying Act), redundant and inconsistent. They do not

⁶ 2 U.S.C. Secs. 261-270 (1988).

⁷ Pub. L. No. 101-21, Sec. 319(d); 31 U.S.C. Sec. 1352 note (Supp. 1991); also see Governmentwide Guidance for New Restrictions on Lobbying, 55 Fed. Reg. 24540, 24541-42 (1990).

⁸ Pub. L. No. 101-235, 103 Stat. 1987 (1989); codified at 42 U.S.C. Sec. 3531 (Supp. 1991).

⁹ OMB Circular A-122--Cost Principals for Nonprofit Organizations, 49 Fed. Reg. 18,260 (April 27, 1984). In using the term "nonprofit organizations," this paper follows the definition in OMB Circular A-122: "any corporation, trust, association, cooperative, or other organization which (1) is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest; (2) is not organized primarily for profit; and (3) uses its net proceeds to maintain, improve, and/or expand its operation" (quoted in Thomas M. Susman, editor, The Lobbying Manual: A Compliance Guide for Lawyers and Lobbyists, (American Bar Association, 1993), p. 127. In general, these are 501(c)(3) public charities.

4 Rudder

effectively regulate lobbying of either nonprofits or other entities, although they probably do prevent the use of federal funds for lobbying purposes.

The overall ineffectiveness of these lobbying laws stems from a variety of sources. Crafting strong lobbying legislation that can also pass constitutional muster and garner the necessary votes for passage poses an almost insuperable challenge to legislators. The Supreme Court upheld the 1946 Act, at first struck down by the lower courts, only by rewriting and eviscerating it.¹⁰ Enforcement of the Lobbying Act is problematic at best: No one has been convicted under that statute since 1956.¹¹

The Lobbying Act, the HUD Reform Act, and the Byrd Amendment were all hastily enacted and are marked by legislative sloppiness. In none of these three cases were adequate hearings held or sufficient committee deliberation permitted before the legislation was brought to the floor. The latter two were enacted to respond to specific perceived abuses and were not written with apparent reference to one another.

¹⁰ United States v. Harriss, 347 U.S. 612 (1954).

¹¹ Susman, The Lobbying Manual, p.13 and note 115.

Whether stronger, enforceable legislation regulating lobbying will be enacted and upheld is an open question, even though the House and Senate have both passed promising Lobbying Disclosure Acts.¹² The 103rd Congress may, however, follow the example of the two houses in 1936 which also each approved a lobbying regulation act that emerged from conference only to be defeated in the House.¹³ Though nonprofits have hardly been affected by the Lobbying Act, the Lobbying Disclosure Act, which would incorporate disclosure provisions of the Byrd Amendment and the HUD Reform Act,¹⁴ is likely to have a more significant impact on nonprofits--should it be enacted in a form resembling either the House or Senate versions. (For a comparative overview of laws and regulations, see attached table.)

¹² The Senate passed S.349 on May 6, 1993, and the House passed S.349, amended by an amendment in the nature of a substitute (H.R., 823, as amended), March 24, 1994. See Richard C. Sachs, Regulating Interest Groups and Lobbyists: 103rd Congress Proposals, CRS Issue Brief (Washington, D.C.: Congressional Research Service, May 12, 1994).

¹³ The act passed in 1946, however, was essentially the 1936 conference compromise. See Susman, The Lobbying Manual, p. 9.

¹⁴ Stanley M. Brand, Stephen M. Ryan, and Margit H. Nahra, "Disclosing 'Lobbying' Activities: A Critical Examination of the Federal Regulation of Lobbying Act and the Byrd Amendment," Administrative Law Review, Fall 1993, 45:4, pp.346, note 9. The Lobbying Disclosure Act, S.349, would amend the disclosure provisions of the Byrd Amendment and would repeal the Lobbying Act and the HUD Reform Act.

6 Rudder

In assessing lobbying restrictions--tax and nontax alike--on nonprofits, three principles ought to be followed. First, lawmakers should be guided by a principle of appropriate consistency. For instance, if nonprofits are severely restricted from lobbying on the grounds that government should not subsidize lobbying, then the rationale of no-government-subsidy should equally apply to all entities. Second, some limited lobbying by nonprofits is defensible and valuable to society and thus should not be made unnecessarily difficult by burdensome or duplicative recordkeeping requirements or rules that create unnecessary financial strains on smaller nonprofits in particular. Finally, in the interest of fairness, as well as compliance, all rules should be clear and consistent internally and across the code so that those who are trying to obey the law have a reasonable chance of doing so.

Challenges in Drafting Constitutional Lobbying Legislation

Lobbying reform efforts in the U.S. typically have arisen from specific scandals (such as attempts to bribe members of Congress or to wield undue or improper influence in congressional business) and are buttressed by a general disdain on the part of the American public toward lobbyists, so-called hired guns, and others attempting to persuade Congress.¹⁵ This contempt for lobbying, especially lobbying by organized groups, is a persistent theme in American politics, notwithstanding First Amendment guarantees of

¹⁵ See Susman, The Lobbying Manual, "Background on Federal Regulation of Lobbying," pp.6-8.

freedom of speech and the right to petition the government, cornerstones of American democracy.

The public's desire to regulate lobbying, even if it stems to some degree from a basic misunderstanding of free government, is consistent with a legitimate interest of the public and of public officials in knowing, and thus being able to evaluate, the source of funds, the individuals and organizations, and the interests involved in lobbying campaigns.

¹⁶ As Chief Justice Warren argued for the majority in United States v. Harriss in 1954, "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."

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Moreover, for government to retain people's trust, and thus to be sustained, rules like lobbying disclosure must be established and enforced to ensure the integrity of governmental processes. This reasoning seems to apply equally to nonprofit organizations as well as others who engage in lobbying. The argument that 501(c)(3)s by their very definition serve public interests does not obviate the need to know who is lobbying for what, how much they are spending and what their sources of funds are.

Balancing public interests in having information and in ensuring the integrity of the government, on the one hand, with constitutional requirements, not only of free speech and the right to petition but also of privacy and due process, on the other, makes lobbying

¹⁶ See Buckley v. Valeo, 424 U.S. 1 (1976). While Buckley applies to campaign finance, its reasoning regarding the "informational interest" of the public is applicable to lobbying disclosure. See Susman, The Lobbying Manual, pp. 14-15.

¹⁷ United States v. Harriss, p. 625, quoted in id., p. 12.

legislation extremely difficult to draft. The hastily written, barely considered Federal Regulation of Lobbying Act of 1946, in hindsight, seemed doomed to failure from the outset.

The Federal Regulation of Lobbying Act of 1946

Congress approved the Federal Regulation of Lobbying Act in 1946 as title III of the Legislative Reorganization Act.¹⁸ The Lobbying Act required most individuals and groups to register with the Clerk of the House and the Secretary of the Senate if they receive any compensation for attempting to influence legislation and to report quarterly on money received and spent on lobbying and indicate the legislation that they are paid to influence.

If the lobbying provisions were not an afterthought of the larger congressional reform legislation, neither were they the central focus. The comprehensive reform bill provided an opportunity and a vehicle to move lobbying legislation that had been stuck in Congress for a decade. At the same time, the attention required by the larger bill dwarfed that given the lobbying provisions.

The Joint Committee on the Organization of Congress held no hearings on this matter and provided the Office of Legislative Counsel little guidance in drafting the legislation.¹⁹ Legislative Counsel, in effect, appropriated most of the conference report that had been defeated in the House ten years earlier and grafted it onto the

¹⁸ S.2177, 79th Cong., 2d Sess. (1946).

¹⁹ Susman, The Lobbying Manual, pp. 8-9.

reorganization act. This scant attention may account for the difficulties associated with the legislation. Its vagueness led to court challenges, and lack of enforcement resulted in its disregard.

The defeat of the first conference report ten years earlier in 1936 was apparently related in part to the proposal's overly broad reach to include, in the words of one Member, "all farm organizations, all patriotic organizations, all women's clubs, all peace societies--in fact to every group or organization which might, directly or indirectly, be interested in the passage or in preventing passage of any given legislation."²⁰ In short, the legislation covered virtually all groups engaged in lobbying, including nonprofits. By 1946 this concern was overshadowed by the political impetus to enact a comprehensive legislative reform bill, and the broad sweep of the 1936 act was retained.

²⁰ 80 Cong. Rec., p. 9746, cited in *id.*, p. 8.

As a consequence, unlike lobbying restrictions set forth in 1934 in Section 501(c)(3) or those in the Byrd Amendment of 1989, the Federal Regulation of Lobbying Act of 1946 evidences little congressional awareness of charitable organizations. Congress focused instead on reining in abusive lobbying practices of public utilities, and business interests and associations and on moving the larger legislation of which the Lobbying Act was a part. Nevertheless, nonprofits are covered in certain circumstances under the Act as are their employees and those with whom they contract for lobbying services²¹, though 501(c)(3) restrictions greatly reduce the likelihood that they engage in sufficient lobbying that they would have to register or report.

Further, though the act requires all lobbyists to lobby, it is estimated that no more than two-fifths of all persons mandated under the act to register as lobbyists actually do so.

²² Of reports filed, half are incomplete and most are late, according to the General Accounting Office.²³ This is not a law that is taken seriously though it is the primary statute regulating lobbying disclosure.

Provisions of the Lobbying Act

²¹ See Lobbying Act Sec. 307, 2 U.S.C. Sec. 266 (1988); see also, Jerald A. Jacobs and David A. Handzo, "Lobbying Registration" in Leland J. Badger et al., Federal Lobbying (1989), p. 4: "In order for the Act to apply, the individual or organization that solicits, collects, or receives money must either obtain the money 'principally to aid' lobbying activities, or else lobbying must be the 'principal purpose' of the individual or organization," quoted in Susman, The Lobbying Manual, p. 39, note 7.

²² Susman, The Lobbying Manual, p. 14.

²³ Id.

The Lobbying Act as enacted in 1946 contains three key overlapping and partially conflicting provisions (sections 305, 307, and 308) that specify registration and reporting requirements of persons engaged in lobbying Congress. (Lobbying of the executive branch, included in the 1936 conference report, is not covered under this Act.) Any person (individual or group) who receives money or other consideration "for the purpose of attempting to influence the passage or defeat of any legislation" must register with the Secretary of the Senate and the Clerk of the House.²⁴ Registrants must indicate who hired them, their compensation, expenses, and the interest the lobbyist represents.²⁵

Registrants must file quarterly reports that indicate the total amount of money they received and spent for lobbying activities during the previous quarter, specify for what purposes money was expended and to whom money was paid, and identify the legislation they are seeking to influence. Individual contributions (or payments) aggregating \$500 or more for the lobbying effort must be reported as well by indicating the name and address of each contributor over \$500. Expenditures of \$10 or more must be reported by specifying the name and address of any person to whom such payments were made. The Clerk and Secretary publish compiled quarterly reports in the Congressional Record.

²⁴ Lobbying Act Sec 3-8(a), 2 U.S.C. Sec. 267(a) (1988), quoted in Susman, The Lobbying Manual, p. 9.

²⁵ Id.

12 Rudder

Clearly, these provisions apply equally to nonprofit organizations and their agents or employees attempting to influence legislation.

The exceptions established by the Lobbying Act apply especially to certain nonprofits like public policy institutes and others with policy-relevant expertise in that merely testifying before a committee of Congress in support of or in opposition to legislation does not require registration or reporting under the Act. Similarly, persons responding to requests for information from Congress are not required to report.²⁶ Further, if nothing of value is solicited, collected or received for the purpose of lobbying, then persons promoting or discouraging legislation are not obligated to register.

²⁶ Nor are public officials, including full-time employees of organizations lobbying on behalf of cities and counties, or newspapers engaging in their normal publishing activities that may include legislative advocacy.

The likelihood that a nonprofit must register or report is further reduced by section 307 which purports to describe to whom the Act applies in a way that conflicts with sections 305 and 308 and that limits applicability of the statute. According to section 307, the title (III or the Lobby Act) only applies to a person who "solicits, collects, or receives money or any other thing of value to be used principally to aid, or the principal purpose of which person is to aid" in influencing the passage or defeat of legislation.²⁷ This language is synonymous with, if not identical to, section 501(c)(3) of the IRC restricting eligible charities to those where "no substantial part of the activities...is carrying on propaganda, or otherwise attempting to influence legislation."²⁸ If one were to single out "principal purpose" as the standard for registering and reporting, by definition a nonprofit would not need to register or report under the Lobby Act under most circumstances.²⁹

²⁷ Lobbying Act Sec. 307, 2 U.S.C. Sec. 266 (1988) (emphasis added), quoted in Susman, The Lobbying Manual, p. 10.

²⁸ I.R.C. Sec. 501(c)(3).

²⁹ If a nonprofit were to solicit specific money for the purpose of lobbying, it should report. Also, even if the nonprofit need not report under the "principal purpose" language, any of its employees whose principal purpose is to aid in passing or defeating legislation should report.

In United States v. Harriss³⁰ the Supreme Court selected exactly the "principal purpose" language to salvage the Lobby Act. In addition to the charge that the act violated First Amendment guarantees of freedom of speech and press and the right to petition, defendants indicted the act on the grounds that it was too vague and thus violated due process.³¹ In response, the Court choose section 307 as the guiding provision to determine applicability of the statute, as follows:

(1) the "person" must have solicited, collected, or received contributions; (2) one of the main purposes of such "person" or one of the main purposes of such contributions, must have been to influence the passage or defeat of legislation by Congress; (3) the intended method of accomplishing this purpose must have been through direct communication with Members of Congress.³²

³⁰ 347 U.S. 612 (1954).

³¹ Susman, The Lobbying Manual, p.12.

³² Harriss, p.623, quoted in id. A person can be an individual or an organization.

Thus, the Court narrowed the Lobbying Act by using "principal purpose" as the controlling language, but it further muddied the waters with the phrase "direct communication with Members of Congress." Apparently, many people have incorrectly interpreted this phrase to exclude grassroots or indirect lobbying and communications with congressional staff.³³ The Office of Records and Administration of the Clerk of the House has offered an informal advisory opinion that the spirit of the legislation does include grassroots lobbying and contact with congressional staff to influence legislation.³⁴

In any case, under the Tax Reform Act of 1976, most nonprofits can elect to have their direct and grassroots lobbying activities set by an expenditures test. This test contains clear measures of activities that are permissible and states specifically what constitutes lobbying (to replace the vague "substantial part of activities" prohibition on lobbying).³⁵

These provisions are considerably stronger than the 1946 Lobbying Act in that they include grassroots lobbying (clearly defined), lobbying the executive branch on legislation as well as any legislative body throughout the federal system (i.e., state and local government as well). The amount of lobbying expenditures (direct and grassroots) must

³³ See Brand, *et al.*, "Disclosing 'Lobbying' Activities," pp. 348-9 for a discussion on staff as an implicit part of Congress and Susman, *The Lobbying Manual* for a discussion of staff (pp. 30-34) and on grassroots lobbying (pp.26-30).

³⁴ Technically, the Office's response does not constitute an "opinion" but a response to questions. The entire text of the Office's response can be found in Appendix C-1 of Susman, *The Lobbying Manual*, beginning at p. 249.

³⁵ P.L. 94-455, Sec. 2503; sec. 501(h) and 4911 of I.R.C. Churches and private foundations are excluded

be disclosed in the electing organization's annual information return, as must the maximum an organization could spend without incurring a tax penalty. An organization that exceeds its maximum permissible expenditure must pay an excise tax of 25% of its excess lobbying expenditures. The IRS can also employ its nuclear weapon of withdrawing 501(c)(3) status of repeat offenders.

from this election.

Most nonprofits do not elect the expenditure test.³⁶ For those that do, however, lobbying disclosure requirements in other statutes seem duplicative and unnecessary with the exception that the reports to IRS should be more easily and readily accessible to the public than they are.³⁷

Nevertheless, nonprofits, regardless of whether they elect to apply the expenditure test, fall under the much more narrow Lobbying Act "if they have solicited, collected, or

³⁶ Fewer than 1% of all nonprofits report lobbying expenditures at all, according to John Bryant, Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives. See letter dated May 16, 1994 to Mr. R.M. "Bob" Tinstman, President, United Way of Texas, from Chairman Bryant (circulated by the American Council on Education).

³⁷ That not all nonprofits take their reporting requirements seriously is made apparent in Douglas Lederman's article, "Some Colleges Refuse to Disclose Payroll Data Despite Federal Law," The Chronicle of Higher Education, September 14, 1994, p.A26. He provides the example of Adelphi University's I.R.S. Form 990 that says "Further Details Available Upon Request" where the university should have indicated the compensation of its officers and other highly paid officials. He writes, "It might as well say, 'None of your business,' because the salary information is not available--not to professors or students, not to inquisitive visitors, not even to the I.R.S. Rather than provide the numbers to the government, Adelphi opts to pay fines of an undisclosed amount each year." Lederman's survey of 420 colleges found that while most of them met their legal obligations, dozens did not.

received money solely or in substantial part for lobbying purposes." ³⁸ Because donors may not deduct such contributions from their income taxes, gifts to nonprofits are unlikely to be earmarked for lobbying. However, a reasonable reading of the Act suggests that employees or agents of nonprofits whose principal purpose is lobbying Congress should register and report.

An informal, nonsystematic check among a few colleagues in nonprofit organizations suggests that almost no one registers or reports under the Lobbying Act. One full-time Washington representative of a major university, when asked about why he did not register, reportedly replied, "My business is education not lobbying." The chief counsel of a leading education association in Washington explained that no one in his shop fell under the Lobbying Act because of the principal purpose test: the principal purpose of his organization, of his own activities or of his staff was not to solicit money for lobbying or to engage in influencing Congress. Large nonprofit organizations, he continued, with large budgets are unlikely to have staff arrangements where the main purpose of any individual is to lobby Congress. Finally, another colleague suggested that the word "lobbyist" is tainted, and most people want to define their activities to avoid such a pejorative designation.

³⁸ Susman, The Lobbying Manual, p. 25.

Another reason, of course, everyone, including nonprofit organizations and their employees, treat the Lobby Act cavalierly is that it is not enforced. The Clerk of the House and the Secretary of the Senate are not empowered to compel registration or reports; that duty presumably falls to the Justice Department. Although Brand, et al.³⁹ argue that Justice misreads the Lobby Act, here is the department's testimony that reads like a coroner's report on the Act:

The Department has not changed its opinion that the 1946 Lobbying Act is ineffective, inadequate, and unenforceable. Ineffective because it does not achieve its intended result; inadequate because the disclosures that result are not commensurate with the lobbying actually taking place; and unenforceable because the focus of the Harriss Court on contributions does not comport with the reality of lobbying practices. In this connection, Harriss has enabled many persons to escape from the Act's provisions because (1) their lobbying activities were not their principal activity, (2) their communi-

³⁹ Brand, et al., "Disclosing 'Lobbying' Activities," p. 351.

cations were with [c]ongressional staff members rather than with Congressmen, or (3) they did not receive contributions for the primary purpose of influencing legislation. The Act thus covers only a small portion of all lobbying activity.⁴⁰

Despite the position of the Justice Department, a position that persists across Administrations, Brand and his colleagues warn that "the Lobbying Act is only one scandal away from being revived."⁴¹ Both Brand, et al. and the American Bar Association advise lobbyists to take the Act seriously and to obey the spirit of the law.

The Byrd Amendment

⁴⁰ Quoted in Id., p. 352.

⁴¹ Id.

The Byrd Amendment of 1989 is reminiscent of Senator Lyndon Johnson's (D-TX) insistence in 1954 that all 501(c)(3)s be prohibited from engaging in political campaign activity because a foundation had apparently supported his opponent.⁴² Personal pique led to inserting a significant provision into the tax code without the benefit of hearings or sufficient congressional deliberation.

In the case of the more recent legislation, Sen. Robert Byrd (D-WV), Chair of the Senate Appropriations Committee and former Majority Leader, was apparently angered when West Virginia University retained a lobbying firm, Cassidy and Associates, at a rate of \$10,000 a month to help the university find \$18 million in federal funding for a research center. No doubt Senator Byrd was puzzled that his own state university had not come directly to him without wasting the state's money on a lobbying firm.⁴³

⁴² Marie B. Morris and Thomas B. Ripy, "Limits on Lobbying and Political Activity by Tax-Exempt Organizations: Historical Background and Continuing Issues," Washington, D.C.: Congressional Research Service, Library of Congress, March 10, 1987, pp. 7-8.

⁴³ 1989 CQ Almanac, Washington, D.C.: Congressional Quarterly, p. 736.

When he read about Cassidy's techniques in The Washington Post, Sen. Byrd withdrew his support for his university's project and struck three other Cassidy projects from the Treasury Department's appropriations bill. Then he amended the fiscal 1990 appropriation for the Interior Department and related agencies⁴⁴ with, according to Congressional Quarterly, "the most sweeping changes in lobbying law since 1946."⁴⁵ This legislation was aimed specifically, but not exclusively, at a large group of Cassidy's clients, 40 colleges, all nonprofit institutions. Byrd had the Interior bill marked up, reported, and through the Senate in three days, catching opponents unprepared to fight the Byrd Amendment but also precluding careful legislative craftsmanship. As a result, questions have persisted over the clarity and scope of the Byrd Amendment, and there appears to be "widespread confusion over the Amendment's requirements."⁴⁶

Essentially, the Byrd Amendment both forbids the use of appropriated funds for lobbying purposes and it requires disclosure of lobbying activities in pursuit of a federal award. More specifically, the Amendment prohibits the use of federal funds to lobby for a contract, grant, loan or cooperative agreement. The Amendment further requires applicants for and recipients of federal awards over \$100,000 to report to the granting agency any nonappropriated funds expended or to be expended to pay anyone to influence the granting of the award. The granting agencies, in turn, must submit to Congress every six months the declarations received. These reports are to be made

⁴⁴ P.L. 101-121; HR 2788.

⁴⁵ 1989 CQ Almanac, p.736.

24 Rudder

publicly available within 30 days. Recipients of awards over \$100,000 must certify that no federal funds have been used for lobbying.⁴⁷

⁴⁶ Susman, The Lobbying Manual, p. 103.

⁴⁷ 31 U.S.C. Sec. 1352 (1988 & Supp. II 1990).

Coverage of the Byrd Amendment is considerably broader than the Lobbying Act in that it includes attempts to influence Congress (Members and staff) or the executive branch (an officer or employee of any agency).⁴⁸ Nonprofit entities are directly targeted, as are state and local governments (not covered by the Lobbying Act), businesses and subcontractors.

This legislation creates a series of problems and questions.⁴⁹ Some of these include:

--The Amendment overlaps but is not coordinated with other statutes like the Lobbying Act and the Federal Acquisitions Regulations⁵⁰ and thus creates confusion.

--To comply with the Amendment recipients must know when appropriations lose their status as appropriations, yet there is no guidance on this matter.

⁴⁸ "Activities to influence the earmarking of funds for a particular program, project or activity in an appropriation, authorization or other bill or in report language would be included within the Amendment's restrictions," 57 Fed. Reg. 24541 (1990), quoted in Susman, The Lobbying Manual, p.106.

⁴⁹ "Questions Regarding Application of Byrd Amendment," Susman, The Lobbying Manual, pp. 106-110.

⁵⁰ For a discussion of the Federal Acquisitions Regulations [48 C.F.R. Sec. 1.301(d) (1991)], see id., pp. 113-115.

26 Rudder

--Lobbying paid for by a third party is not a prohibited use of federal funds under the Byrd Amendment, creating a potentially significant loophole in the application of the law.

--Penalties beginning at \$10,000 seem severe punishments for inadvertent mistakes.

--Because lobbying activities by regularly employed officers or employees are excepted from the reporting requirements, possible abuses may go undetected, and collection of data on who is lobbying, how much they are spending, and what the lobbying targets are will be incomplete. Moreover, this exception seems to benefit large organizations which can afford to employ staff lobbyists.⁵¹

--Only direct appropriations for contracts, grants and loans are covered under the Amendment, ignoring huge areas of federal largesse like tax expenditures and other federal benefits.

One review of the Byrd Amendment found it to be ineffective.⁵² Another has pronounced it a "more a distraction for government agencies and contractors than an inhibition of undesirable political influence-peddling and a source of enlightenment regarding the federal award process."⁵³ Nevertheless, the Amendment specifically applies to nonprofits and penalties for failure to comply can be harsh. Moreover, the idea

⁵¹ The ban on the use of appropriated funds for lobbying for the award does not apply to reasonable payments for "professional or technical services rendered directly in the preparation, submission, or negotiation" of the award, 1352 U.S.C. (e)(1)(B) (Supp. 1991), cited in Susman, The Lobbying Manual, p. 105.

⁵² Susman, The Lobbying Manual, p. 110.

⁵³ Id.

underlying the Amendment that appropriated funds should not be used to secure a grant, contract or loan from the government seems reasonable and probably enjoys widespread public support, as does disclosure of lobbying activities. That the Amendment covers executive branch lobbying, if only partially, extends the principle of disclosure beyond influencing the legislature. Fortunately, the proposed Lobbying Disclosure Act will revise the disclosure provisions of the Byrd Amendment and perhaps improve, if not perfect, it.

The HUD Reform Act of 1989

At the same time that Byrd attached his Amendment to the Interior appropriations bill, Congress was hastily enacting legislation to address influence peddling in the Department of Housing and Urban Development (HUD). An inspector general's report issued in April of 1989 and the Employment and Housing Subcommittee of the House Committee on Government Operations in July both concluded, along with Secretary Jack Kemp, that favoritism, use of inside information and contacts, and other abuses had taken place in the granting of funds connected with HUD's section 8 Moderate Rehabilitation rental subsidy program, its Urban Development Action Grants, and other HUD programs.

⁵⁴

Thus, born of scandal, the HUD Reform Act of 1989 was proposed on the last day of October and enacted before the end of November. Typical of the scanty legislative history that marks other lobbying reform legislation, no hearings were held in the Senate and neither body produced committee reports. Except for state and local officials and

⁵⁴ Id., p. 117.

28 Rudder

political appointees, anyone doing business with HUD--profits and nonprofits alike--are covered by the requirements of this Act. ⁵⁵

⁵⁵ Id., p. 123.

Basically, the legislation requires disclosure under a new section 13, "Registration of Consultants," added to the Department of Housing and Urban Development Act.⁵⁶ This section requires that those who receive expenditures to influence a funding decision or management action at HUD must register with HUD. Both those who make expenditures, as well as those who receive them, must file detailed, exacting annual reports. Moreover, those hired to lobby cannot be paid on a contingency fee basis.

In one sense, the HUD Reform Act is broader than the Byrd Amendment, as both lobbyists and their clients must report, payment arrangements to lobbyists are restricted, reports require more detail, and recordkeeping is more exacting.⁵⁷ However, in other ways the HUD reform is more narrow, as the HUD Act does not address the use of federal funds to lobby, nor does it address lobbying Congress, as Byrd does.

The Byrd Amendment and the HUD Reform Act were devised to address specific abuses and were not written in apparent reference to one another. They suffer, nevertheless, from some of the same disabilities, and they add to the complexity, duplication and inconsistency of rules regarding lobbying. Still, both address a subject neglected by the Lobbying Act, that of executive branch lobbying.

⁵⁶ HUD Reform Act Sec. 13, 42 U.S.C. Sec. 3537b (Supp. 1991).

⁵⁷ Susman, The Lobbying Manual, p. 119. While the lobbying activities of regular employees need not be reported, records on their lobbying activity must be kept indicating portion of salary that pays for the

30 Rudder

Office of Management and Budget Rules Concerning Lobbying Costs Incurred by
Nonprofits

lobbying.

OMB Circular A-122--Cost Principals for Nonprofit Organizations ⁵⁸ constitutes a welcome exception to the pattern of creating rules that show little apparent awareness of, much less consistency with, other related regulations. OMB has set forth rules that govern the allowability of reimbursement for lobbying costs in federal grants and contracts incurred by nonprofits. ⁵⁹ These rules are consistent with the Federal Acquisition Regulations (FAR) ⁶⁰ that control reimbursement of lobbying expenses of private businesses (as well as most other aspects of contracting between government and business).

Like the FAR and to some degree the Byrd Amendment, the OMB regulations are premised on a principle of governmental neutrality; that is, the government should not favor one organization over another by allowing federal grantees to use grant money for lobbying purposes. Such use of federal funds would constitute an unfair subsidy for those

⁵⁸ 49 Fed. Reg. 18,260 (April 27, 1984).

⁵⁹ Supra, note 9.

⁶⁰ Supra, note 50.

32 Rudder

groups' lobbying activities. Of course, groups can use their own money to lobby under this principle.⁶¹

⁶¹ The Supreme Court has held that in giving special tax treatment to 501(c)(3)s, the government can constitutionally limit their lobbying and political activities (Regan v. Taxation with Representation, 461 U.S. 540 (1983)). As a result, regulations directed toward these organizations can be less sensitive to First Amendment guarantees.

Unlike the Byrd Amendment, lobbying under the OMB rules applies to all efforts to influence legislation at both the federal and state level and is not limited to lobbying on a specific federal grant or contract. Nor do the OMB regulations apply to executive branch lobbying, a major target of the Byrd Amendment and the HUD Reform Act.⁶² Also unlike Byrd or HUD Reform, grassroots lobbying for the purpose of inducing the public to act--for example, to write their Members of Congress in support of legislation--is covered.

Because Circular A-122 is a management directive, enforcement is left to the granting agency. Strengthened audit requirements on federal grantees facilitate identifying violations of the rules. Once infractions become apparent, punishment can range from requiring reimbursement of the disallowed expenditure to barring the organization from receiving grants in the future. Under these rules reporting and recordkeeping are not particularly onerous, and punishment can be fashioned to fit the offense.

Three principles underlying the OMB regulations ought to guide future policy making in this area: consistency of treatment, clarity of rules and ease of compliance. By paralleling FAR, businesses and nonprofits are treated equally. By setting up rules that are clear and relatively easy to follow, scarce resources of those nonprofits which do engage in

⁶² However, lobbying to influence a veto decision is prohibited, nor can state and local officials be used as third parties to lobby Congress or state legislatures. See Susman, The Lobbying Manual, pp. 127-130 for a lucid explanation of these regulations.

permissible lobbying are not sapped up by extraneous recordkeeping and extra consultants.

The Future: Lobbying Disclosure

If this history holds any lessons, one of them is to be wary of lobbying reform efforts. Often they are not successful; seldom does significant lobbying reform emerge from Congress even though proposals may abound in committees and may even gain approval of one house or the other. If legislation is enacted, the original impetus of specific perceived abuses or a scandal may lead to a policy that is idiosyncratic and unconnected to existing statutes. To win congressional approval, either the legislation has to be hurried through or attached to a vehicle, both of which methods leave little time or attention for crafting of language, deliberating, or taking appropriate care in creating the final product. Lobbying legislation poses the particular problem that strong reform may collide with First Amendment rights. Thus, for political and constitutional reasons the final result is likely to disappoint reformers and may equally frustrate those to whom the act applies.

If the current 103rd Congress is not confronting a single, defining scandal that will lead to reform of lobbying laws, significant pressure exists for a strengthening of existing rules in order to shore up sagging public trust in the integrity of national institutions and Congress in particular. "The perception among a substantial number of voters is that many politicians are in the pockets of the special interests," according to The Wall Street

Journal.⁶³ As important, however, is the perception on the part of Members of Congress that not addressing the public's concern will lead to defeat at the polls. That Congress cannot agree on campaign finance reform places added pressure to enact lobbying reform.

Both the House and the Senate have overwhelmingly approved significant lobbying bills that are similar in many respects.⁶⁴ Ordinarily their differences--the most contentious of which pertains to gift rules--might be enough to doom the legislation, as Members of both bodies could claim that they voted for and passed a lobbying bill. This year may be different. It is likely that a version of Senator Carl Levin's (D-MI) Lobbying Disclosure Act (S.349) would already be law had the dispute over gifts not arisen. It is also likely that Lobbying Disclosure will reappear next year if a conference report cannot be agreed to this year.

In general, both the House and Senate versions of the Lobbying Disclosure Act would consolidate federal lobbying disclosure laws, including those of the Lobbying Act, the HUD Reform Act and the Byrd Amendment. The Act is intended to cover paid professional lobbyists--both outside and in-house--including lobbyists for nonprofit organizations but not citizens acting on their own behalf. The Act aims to close the loopholes in the Lobbying Act, to streamline disclosure, and to improve administration

⁶³ Aug., 11, 1994, p. A7.

⁶⁴ See Sachs, "Regulating Interest Groups," pp. 6-13.

and enforcement of disclosure provisions, all worthy objectives. Lobbying in Congress and the executive branch is covered, as is grassroots lobbying.

Explicit attention is paid to nonprofits in that the manner in which they report their grassroots expenses to the IRS is acceptable when they report under the Lobbying Act in the Senate version. Despite pleas from the nonprofit community, drafters have not seen fit to exclude nonprofits from coverage altogether or even to use IRS rules to disclose contacts with legislators.⁶⁵

Senate Action

The Senate passed its version of lobbying disclosure, S.349 on May 6, 1993. The bill was clearly designed with past experience with the Lobbying Act in mind. For example: (1) S.349 provides for a precise threshold--\$1,000 in income from or expenses on behalf of a client or \$5,000 from all clients in a six-month period--that must be met before an organization must register. (2) The bill covers lobbying all Members of Congress and their professional staff, as well as the executive branch (White House officials, Senior Executive Service, Schedule C appointees, and senior military officials). (3) Lobbyists must register and provide detailed information concerning their clients, issues of interest, any representation on behalf of coalitions and the names of coalition members, and foreign interests involved. (4) Registrants must submit detailed reports on their activities semi-

⁶⁵ Nan Aron, "Congress Is Overdoing Lobbying Reform," Opinion, The Chronicle of Philanthropy, May 4, 1993, p.37; and "Lobbying Disclosure Act: Not Sunlight But Silence," Pipeline, Alliance for Justice.

annually. (5) In-house lobbyists must estimate total lobbying expenses, and all other lobbyists must report in their semi-annual declarations all income received from each client for lobbying. (6) Grassroots lobbying expenses are explicitly included. (7) A single agency, the Office of Lobbying Registration and Public Disclosure, is established in the Department of Justice, to receive the reports and administer the act. (8) Penalties are exclusively civil, with fines for violations ranging to a maximum of \$200,000; and the new agency has no authority to conduct audits or investigations.

While gifts from lobbyists to Members of Congress were not addressed by the bill before it reached the floor of the Senate. Gift rules have become a major component of this legislation and a central bone of contention between the House and Senate. In keeping with the theme of disclosure, Senator Paul Wellstone (D-MN) offered and had accepted by voice vote an amendment on the floor that would require lobbyists to report any gifts to Members, including meals and travel, worth more than \$20.

A year later on May 11, 1994, the Senate passed S.1935, a stringent act that goes far beyond disclosure and that is now being considered by the conference committee reconciling the House and Senate lobbying disclosure acts. Under S.1935 members and staff are prohibited from receiving gifts. Lobbyists may not give political action committee (PAC) contributions to Senators' campaigns. Neither lobbyists nor non-lobbyists may buy meals for Members, in addition to a number of other strict prohibitions. S.1935 parallels provisions in the Lobbying Disclosure Act passed by the House, though the Senate version is stronger.

House Action

Gifts were not addressed in Rep. John Bryant's (D-TX) original lobbying disclosure bill, H.R. 823. By the time his bill was reported by the two Judiciary subcommittees of jurisdiction on November 22, 1993, it addressed gifts as well as lobbying. Moreover, its intent moved from disclosure to prohibition. This legislation banned lobbyists from giving gifts to Members of Congress, though a list of exceptions, not in the Senate version, were approved and, unlike the Senate, the bill did not prohibit PAC contributions from lobbyists, among other differences.

Once the bill reached the floor, the House passed H.R. 823 in the form of a substitute for S.349 on March 24, 1994 by a large margin. (Hence, both the House and Senate bills, though different, are now designated S.349.)

In addition to the differences in provisions banning and disclosing gifts, the bills are at variance in other ways. From the standpoint of nonprofit organizations, some of the more important features of the House act are: (1) the establishment of the Office of Lobbying Registration and Public Disclosure as an independent agency, not part of the Department of Justice; (2) a lower cumulative threshold (\$2,500 rather than \$5,000) to trigger registration as a lobbyist; (3) more substantial disclosure of grassroots lobbying,

ignoring the IRS definitions that nonprofits must follow; and (4) an explicit exemption of churches from registration.⁶⁶

⁶⁶ See Alliance for Justice, "Background Analysis of the Lobbying Disclosure Act" and "House Subcommittee Amendments to the Lobbying Disclosure Act," both unpublished and undated manuscripts available from the Alliance for Justice, 1601 Connecticut Avenue, N.W. Suite 600, Washington, D.C. 20009. It should be noted that while the cumulative threshold for reporting is lower in the House than in the Senate bill, the threshold for a particular client is higher: \$2,500 in the House version compared with \$1,000 in the Senate.

Unless the language is tightened, however, nonprofits and others may find an important, perhaps fatal loophole in this reform legislation. Under the Senate's S.349, a lobbyist is anyone who is retained to perform lobbying services as long as the lobbyist's activities constitute a significant part of the services provided and are not merely incidental. Brand, et al. make the useful suggestion that "incidental" and "significant" be replaced with an objective test.⁶⁷ Otherwise, the Lobbying Disclosure Act could go the way of the Lobbying Act of 1946.

Conclusion

If the public's image of lobbyists in the nation's capital as one of influence peddlers--who push their selfish positions by way of special privilege, illicit influence, and large sums of campaign cash--is not entirely accurate, that characterization is even less true of nonprofit lobbyists. To some degree the law itself protects nonprofits from the temptation of engaging in such unethical activities. The Internal Revenue Code forbids them to hand out campaign cash (via political action committees) or to become involved in election campaigns at all, and it severely limits their lobbying activity. Most nonprofits have little to offer policy makers beyond their specific expertise and interested viewpoints, and they often represent interests that might not otherwise have a voice.

⁶⁷ Brand, "Disclosing 'Lobbying' Activities," p. 361. The House version may provide some precision in that individuals spending less than 10 percent of their time lobbying for a particular client need not register.

Nevertheless, there is no reason to believe that nonprofit organizations are led by angels or that the public and policy makers do not deserve to hold nonprofits as accountable for their lobbying activities as any other group. However, to ask nonprofits to obey unintelligible, inconsistent, duplicative laws that are expensive and anxiety-producing benefits no one. As policy makers devise laws and regulations to govern nonprofit lobbying, the following three principles ought to be considered.

First, consistent approaches should be applied to nonprofits and other organizations like businesses. If, for example, it is argued that the federal government should remain neutral in the battle of political interests and thus should not subsidize lobbying, then that argument should be equally applicable to all kinds of organizations, not just nonprofits. Thus, the decision to disallow the deductibility of lobbying expenses of businesses⁶⁸ is appropriately consistent with the argument that nonprofits should be highly restricted in their lobbying activities lest the government would be indirectly subsidizing those activities through the tax code. Similarly, it is argued that beyond a certain threshold of spending, the public and policy makers benefit from knowing who is funding lobbying activities, how much they are spending, and the purpose of the expenditures. Nonprofits should be included along with everyone else in reporting such

⁶⁸ Section 13222 of Title XIII of the 1993 Omnibus Budget Reconciliation Act denies the deduction that businesses and associations have taken for lobbying expenses. Admittedly, this action was likely taken for purposes of raising revenue and not necessarily for consistency, but the Supreme Court has upheld the disallowance as constitutional in William B. Cammarano v. United States, 358 US 498 (1959). An intriguing perspective on the potential unconstitutionality of treating entities differently (based on the concept of viewpoint discrimination) can be found in Nell Hoffman, "The Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3): A Proposed First Amendment Analysis," Note in Virginia Law Review, December 1980, 66:8, 1513-1527.

information, to the degree that these requirements are held to be constitutional. Because a special set of rules applies to nonprofits in order for them to retain their special tax status, the precise regulations or the ways they fulfill specific legal requirements might be different for nonprofits.

Second, even if nonprofits must be restricted in their lobbying activities to retain their tax status, the value to the American people of nonprofit lobbying should be acknowledged. By law nonprofits serve public interests, and, in fact, most seem to do so. They provide perspectives that are often different from commercial viewpoints, adding to the pluralism and the richness of policy making. Legal requirements should not be so onerous as to discourage participation by nonprofits in the policy process. Moreover, the thresholds for reporting should be high in order not to discourage small, penurious nonprofits from expressing their views to policy makers and to the public.

The current rules governing nonprofit lobbying overlap. They are duplicative, inconsistent, and cumbersome. The Lobbying Disclosure Act currently before Congress helps but not enough. As it stands, nonprofits will have one set of reporting and recordkeeping requirements under the new Act and a different set under current IRS regulations. This situation serves no one. There should be coordination across the code and across all federal agencies concerning nonprofit lobbying rules. The optimal situation would be to have a single set of regulations covering all aspects of disclosure, recordkeeping, and permissible expenditures.

Third, in the interest of fairness and compliance, the rules that are established should be simple, understandable, and easy-to-follow. Most nonprofits are likely to want

to obey the law, and policy makers should help them do so. When devising recordkeeping rules and punishments, policy makers should take into account the amateurism of smaller nonprofits (which constitutes most of them), as well as their limited budgets.

Finally, regulators should also be willing, if violations by a nonprofit are repeated and serious, to impose severe financial penalties and even withdraw the special tax status of an organization. After all, flagrant violators damage the reputation of the nonprofit community and undermine the claim that nonprofits serve public interests, a claim on which the future of nonprofits rests.

NOTES

1. Sec. 501(h) provides an elective standard that can be used to determine what constitutes a substantial portion. Because it is based on level of expenditures, it is referred to as an expenditure test. Private foundations and churches cannot make this election. For those entities not choosing the 501(h) election, the vague "insubstantial" lobbying standard holds. A discussion of these two options may be found in Bruce R. Hopkins, The Law of Tax-Exempt Organizations, Sixth Edition (New York: John Wiley & Sons, Inc., 1992, Chapter 14.
2. I.R.C. Sec. 501(c)(3) (1988) applies to permitting a tax exemption; I.R.C. Section 170(c)(2)(D) permits charitable deductions from income taxes, Secs. 2055(a)(2) and 2106(a)(2)(A)(ii) permit such deductions from estate taxes, and Sec.2522(a)(2) permits deductions from gift taxes with the identical restrictions on legislative and political activity.
3. For a discussion of the limitation on political activities limitation generally, see Hopkins, The Law of Tax-Exempt Organizations, Chapter 15. For an excellent, point-by-point consideration of this issue see, Internal Revenue Service, Exempt Organizations Branch, Technical Division, Exempt Organizations, 1992, Chapter N, "Election Year Issues."
4. Supra note 1.

5. Unless a nonprofit opts for the expenditure test (whose first penalty is to apply an excise tax for violations), the primary enforcement tool available to the IRS is withdrawal of 501(c)(3) status, a blunt instrument. Moreover, while auditing by the IRS of nonprofits has increased, very few are audited. Thus, unscrupulous nonprofits may successfully skirt the law.

6. 2 U.S.C. Secs. 261-270 (1988).

7. Pub. L. No. 101-21, Sec. 319(d); 31 U.S.C. Sec. 1352 note (Supp. 1991); also see Governmentwide Guidance for New Restrictions on Lobbying, 55 Fed. Reg. 24540, 24541-42 (1990).

8. Pub. L. No. 101-235, 103 Stat. 1987 (1989); codified at 42 U.S.C. Sec. 3531 (Supp. 1991).

9. OMB Circular A-122--Cost Principals for Nonprofit Organizations, 49 Fed. Reg. 18,260 (April 27, 1984). In using the term "nonprofit organizations," this paper follows the definition in OMB Circular A-122: "any corporation, trust, association, cooperative, or other organization which (1) is operated primarily for scientific, educational, service, charitable, or similar purposes in the public interest; (2) is not organized primarily for profit; and (3) uses its net proceeds to maintain, improve, and/or expand its operation" (quoted in Thomas M. Susman, editor, The Lobbying Manual: A Compliance Guide for Lawyers and Lobbyists, (American Bar Association, 1993), p. 127. In general, these are 501(c)(3) public charities.

10. United States v. Harriss, 347 U.S. 612 (1954).

11. Susman, The Lobbying Manual, p.13 and note 115.

46 Rudder

12. The Senate passed S.349 on May 6, 1993, and the House passed S.349, amended by an amendment in the nature of a substitute (H.R., 823, as amended), March 24, 1994.

See Richard C. Sachs, Regulating Interest Groups and Lobbyists: 103rd Congress Proposals, CRS Issue Brief (Washington, D.C.: Congressional Research Service, May 12, 1994).

13. The act passed in 1946, however, was essentially the 1936 conference compromise.

See Susman, The Lobbying Manual, p. 9.

14. Stanley M. Brand, Stephen M. Ryan, and Margit H. Nahra, "Disclosing 'Lobbying' Activities: A Critical Examination of the Federal Regulation of Lobbying Act and the Byrd Amendment," Administrative Law Review, Fall 1993, 45:4, pp.346, note 9. The Lobbying Disclosure Act, S.349, would amend the disclosure provisions of the Byrd Amendment and would repeal the Lobbying Act and the HUD Reform Act.

15. See Susman, The Lobbying Manual, "Background on Federal Regulation of Lobbying," pp.6-8.

16. See Buckley v. Valeo, 424 U.S. 1 (1976). While Buckley applies to campaign finance, its reasoning regarding the "informational interest" of the public is applicable to lobbying disclosure. See Susman, The Lobbying Manual, pp. 14-15.

17. United States v. Harriss, p. 625, quoted in id., p. 12.

18. S.2177, 79th Cong., 2d Sess. (1946).

19. Susman, The Lobbying Manual, pp. 8-9.

20. 80 Cong. Rec., p. 9746, cited in id., p. 8.

21. See Lobbying Act Sec. 307, 2 U.S.C. Sec. 266 (1988); see also, Jerald A. Jacobs and David A. Handzo, "Lobbying Registration" in Leland J. Badger et a., Federal Lobbying (1989), p. 4: "In order for the Act to apply, the individual or organization that solicits, collects, or receives money must either obtain the money 'principally to aid' lobbying activities, or else lobbying must be the 'principal purpose' of the individual or organization," quoted in Susman, The Lobbying Manual, p. 39, note 7.

22. Susman, The Lobbying Manual, p. 14.

23. Id.

24. Lobbying Act Sec 3-8(a), 2 U.S.C. Sec. 267(a) (1988), quoted in Susman, The Lobbying Manual, p. 9.

25. Id.

26. Nor are public officials, including full-time employees of organizations lobbying on behalf of cities and counties, or newspapers engaging in their normal publishing activities that may include legislative advocacy.

27. Lobbying Act Sec. 307, 2 U.S.C. Sec. 266 (1988) (emphasis added), quoted in Susman, The Lobbying Manual, p. 10.

28. I.R.C. Sec. 501(c)(3).

29. If a nonprofit were to solicit specific money for the purpose of lobbying, it should report. Also, even if the nonprofit need not report under the "principal purpose" language, any of its employees whose principal purpose is to aid in passing or defeating legislation should report.

30. 347 U.S. 612 (1954).

48 Rudder

31. Susman, The Lobbying Manual, p.12.

32. Harriss, p.623, quoted in id. A person can be an individual or an organization.

33. See Brand, et al., "Disclosing 'Lobbying' Activities," pp. 348-9 for a discussion on staff as an implicit part of Congress and Susman, The Lobbying Manual for a discussion of staff (pp. 30-34) and on grassroots lobbying (pp.26-30).

34. Technically, the Office's response does not constitute an "opinion" but a response to questions. The entire text of the Office's response can be found in Appendix C-1 of Susman, The Lobbying Manual, beginning at p. 249.

35.

36. Fewer than 1% of all nonprofits report lobbying expenditures at all, according to John Bryant, Chairman, Subcommittee on Administrative Law and Governmental Relations, Committee on the Judiciary, House of Representatives. See letter dated May 16, 1994 to Mr. R.M. "Bob" Tinstman, President, United Way of Texas, from Chairman Bryant (circulated by the American Council on Education).

36a. That not all nonprofits take their reporting requirements seriously is made apparent in Douglas Lederman's article, "Some Colleges Refuse to Disclose Payroll Data Despite Federal Law," The Chronicle of Higher Education, September 14, 1994, p.A26. He provides the example of Adelphi University's I.R.S. Form 990 that says "Further Details Available Upon Request" where the university should have indicated the compensation of its officers and other highly paid officials. He writes, "It might as well say, 'None of your business,' because the salary information is not available--not to professors or students, not to inquisitive visitors, not even to the I.R.S. Rather than provide the numbers to the

government, Adelphi opts to pay fines of an undisclosed amount each year." Lederman's survey of 420 colleges found that while most of them met their legal obligations, dozens did not.

37. Susman, The Lobbying Manual, p. 25.

38. Brand, et al., "Disclosing 'Lobbying' Activities," p. 351.

39. Quoted in Id., p. 352.

40. Id.

41. Marie B. Morris and Thomas B. Ripy, "Limits on Lobbying and Political Activity by Tax-Exempt Organizations: Historical Background and Continuing Issues," Washington, D.C.: Congressional Research Service, Library of Congress, March 10, 1987, pp. 7-8.

42. 1989 CQ Almanac, Washington, D.C.: Congressional Quarterly, p. 736.

43. P.L. 101-121; HR 2788.

44. 1989 CQ Almanac, p.736.

45. Susman, The Lobbying Manual, p. 103.

46. 31 U.S.C. Sec. 1352 (1988 & Supp. II 1990).

47. "Activities to influence the earmarking of funds for a particular program, project or activity in an appropriation, authorization or other bill or in report language would be included within the Amendment's restrictions," 57 Fed. Reg. 24541 (1990), quoted in Susman, The Lobbying Manual, p.106.

48. "Questions Regarding Application of Byrd Amendment," Susman, The Lobbying Manual, pp. 106-110.

50 Rudder

49. For a discussion of the Federal Acquisitions Regulations [48 C.F.R. Sec. 1.301(d) (1991)], see id., pp. 113-115.

50. The ban on the use of appropriated funds for lobbying for the award does not apply to reasonable payments for "professional or technical services rendered directly in the preparation, submission, or negotiation" of the award, 1352 U.S.C. (e)(1)(B) (Supp. 1991), cited in Susman, The Lobbying Manual, p. 105.

51. Susman, The Lobbying Manual, p. 110.

52. Id.

53. Id., p. 117.

54. Id., p. 123.

55. HUD Reform Act Sec. 13, 42 U.S.C. Sec. 3537b (Supp. 1991).

56. Susman, The Lobbying Manual, p. 119. While the lobbying activities of regular employees need not be reported, records on their lobbying activity must be kept indicating portion of salary that pays for the lobbying.

57. 49 Fed. Reg. 18,260 (April 27, 1984).

58. Supra, note 9.

59. Supra, note 49.

60. The Supreme Court has held that in giving special tax treatment to 501(c)(3)s, the government can constitutionally limit their lobbying and political activities (Regan v. Taxation with Representation, 461 U.S. 540 (1983)). As a result, regulations directed toward these organizations can be less sensitive to First Amendment guarantees.

61. However, lobbying to influence a veto decision is prohibited, nor can state and local officials be used as third parties to lobby Congress or state legislatures. See Susman, The Lobbying Manual, pp. 127-130 for a lucid explanation of these regulations.

62. Aug., 11, 1994, p. A7.

63. See Sachs, "Regulating Interest Groups, pp. 6-13.

64. Nan Aron, "Congress Is Overdoing Lobbying Reform," Opinion, The Chronicle of Philanthropy, May 4, 1993, p.37; and "Lobbying Disclosure Act: Not Sunlight But Silence," Pipeline, Alliance for Justice.

65. See Alliance for Justice, "Background Analysis of the Lobbying Disclosure Act" and "House Subcommittee Amendments to the Lobbying Disclosure Act," both unpublished and undated manuscripts available from the Alliance for Justice, 1601 Connecticut Avenue, N.W. Suite 600, Washington, D.C. 20009. It should be noted that while the cumulative threshold for reporting is lower in the House than in the Senate bill, the threshold for a particular client is higher: \$2,500 in the House version compared with \$1,000 in the Senate.

66. Brand, "Disclosing 'Lobbying' Activities," p. 361. The House version may provide some precision in that individuals spending less than 10 percent of their time lobbying for a particular client need not register. This floor, however, should be cumulative so that there should be a threshold based on total lobbying time for all clients.

67. Section 13222 of Title XIII of the 1993 Omnibus Budget Reconciliation Act denies the deduction that businesses and associations have taken for lobbying expenses.

Admittedly, this action was likely taken for purposes of raising revenue and not necessarily

52 Rudder

for consistency, but the Supreme Court has upheld the disallowance as constitutional in William B. Cammarano v. United States, 358 US 498 (1959). An intriguing perspective on the potential unconstitutionality of treating entities differently (based on the concept of viewpoint discrimination) can be found in Nell Hoffman, "The Tax Code's Differential Treatment of Lobbying Under Section 501(c)(3): A Proposed First Amendment Analysis," Note in Virginia Law Review, December 1980, 66:8, 1513-1527.