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Citizens' Rights and Constitutional Affairs

Making the U.S. Lobbying Disclosure Act Work as Intended:

Implications for the European Transparency Initiative

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**Directorate-General Internal Policies
Policy Department C
Citizens' Rights and Constitutional Affairs**

Making the U.S. Lobbying Disclosure Act Work as Intended: Implications for the European Transparency Initiative

Briefing paper

Summary:

This paper provides an analytical description of the experiences made in the United States of America with the last two revisions of legislation controlling lobbyists and their activities, in particular the US Lobbying Disclosure Act. Conclusions with respect to the ongoing debate in the EU on new rules governing European interest representation are also drawn.

The briefing expresses a preference for mandatory registration regimes and full financial disclosure of all professional lobbying actors.

This paper was requested by the European Parliament's Committee on constitutional affairs.

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Making the U.S. Lobbying Disclosure Act Work as Intended:

Implications for the European Transparency Initiative

*“We will adapt to the changing environment, as we have
adapted before.”*

*—Brian Pallasch, President,¹
American League of Lobbyists*

On September 14, 2007, President George Bush reluctantly signed into law the “Honest Leadership and Open Government Act” (S. 1), a sweeping series of lobbying and governmental ethics reforms. The legislation marked the culmination of work that began three years ago with little fan-fare and even less congressional support. Only a small handful of dedicated reformers in Congress – namely, Rep. Marty Meehan (D-Mass.) and Sen. Russell Feingold (D-Wisc.) – would sponsor the legislation. But without any more support, the bills quietly perished.

All that changed in January 2006, when super-lobbyist Jack Abramoff pleaded guilty to corruption, and in a plea bargain agreed to point the finger at lawmakers he bribed in exchange for a lighter sentence.

Suddenly, most members of Congress were eager to sign on to lobbying reform legislation. No one knew at whom Abramoff was going to point the finger (Abramoff is still cooperating with the FBI even from his prison cell as of this writing). It turned out that Abramoff’s largess of campaign contributions, gifts, free travel and promises of lucrative private sector employment – some of the most effective tools for influence-peddling in a lobbyist’s arsenal – had been spread far and wide across Capitol Hill, especially for the benefit of Republican lawmakers who controlled all branches of the federal government at the time.

A year and a half later, about two dozen members of Congress, congressional staff or executive branch officials have been convicted or indicted on corruption charges, a disgusted electorate changed party control of Congress – and a sweeping set of lobbying and ethics reforms has been signed into law. Will the lobbying disclosure law work as intended this time around?

¹ Ken Doyle, “Love It or Hate It, Ethics Bill Seen as Sea Change,” *BNA Money and Politics Report* (Aug. 20, 2007).

EVOLUTION OF LOBBYING TRANSPARENCY IN THE UNITED STATES

The fact of the matter is that the Lobbying Disclosure Act of 1995 (LDA) – the law that governed during Jack Abramoff’s indiscretions – achieved its primary but limited purpose: *disclosure of the potentially corrupting nexus between lobbyists, money and lawmakers.*

Abramoff met his match in the system of mandatory registration and Web-based disclosure of lobbyist financial activity required of all American lobbyists. In the course of his short career laundering money and buying off lawmakers, the registration and disclosure requirements that Abramoff could not avoid left a money trail. Although it took several years, that money trail led investigators back to Abramoff. He could hide no longer.

The disclosure regime of LDA that finally broke the circle of lobbyist corruption on Capitol Hill is little more than a decade old. The United States had long attempted to cast sunlight on lobbying activity at least since World War II. But earlier lobbying regulation laws, most notably the Foreign Agents Registration Act of 1938 and the Federal Regulation of Lobbying Act of 1946, became virtually obsolete soon after passage.

The key shortcomings in these early laws were: (i) absence of clear definitions of lobbying activity subject to reporting; (ii) failure to cover the breadth of public officials in a decisionmaking capacity subject to lobbying; (iii) inadequate disclosure of lobbyist financial activity and policy objectives; and (iv) incoherent enforcement authority.

A. Early Efforts at Federal Regulation of Lobbying

The first attempt at comprehensive lobbying reform at the federal level was the Foreign Agents Registration Act (FARA) of 1938. FARA’s primary purpose was to limit the influence of foreign agents and propaganda on American public policy. The foreign agents act arose specifically in response to a perceived propaganda drive by Adolph Hitler to fan the Nazi movement in the United States. Though there was no explicit evidence, President Franklin Roosevelt and many members of Congress believed that Hitler was helping finance the Nazi movement in the United States.

The enactment of the Foreign Agents Registration Act in the critical period preceding the outbreak of World War II was the result of recommendations by a special committee of Congress (known as the “McCormack committee”) investigating “un-American activities” in the United States. The Act originally focused on the Nazi movement. In fact, the words “foreign propaganda” in the Act which was subject to regulation originally read “Nazi propaganda.”² But it was later expanded to include concerns about pro-communist propaganda as well.

² Michael Spak, “America for Sale: When Well-Connected Former Federal Officials Peddle Their Influence to the Highest Bidder,” 78 *Kentucky Law Journal* (1990) at 242-243.

FARA was designed to counteract the influence of foreign propaganda, not by restricting the distribution of such information, but by identifying it as paid for and distributed by foreign agents. Communications by foreign agents intended to influence public policies were required to include a statement giving the name and address of the foreign agent and the foreign interest promoting the political communications.

1. Federal Regulation of Lobbying Act of 1946

Following immediately in the footsteps of World War II, Congress also approved the nation's first comprehensive lobbying disclosure law for domestic lobbyists: the Federal Regulation of Lobbying Act of 1946. The primary objective of the 1946 Act was to establish a system of lobbyist registration and disclosure. Like FARA, *the Act did not attempt to regulate the conduct of lobbying or restrict the financial activity of lobbyists.*

The Federal Regulation of Lobbying Act provided a system of registration and financial disclosure of those attempting to influence legislation in Congress.³ The Act's goal was to provide public information on the political pressures influencing legislation, and it recognized that "full realization of the American ideal of government by elected representatives depends to no small extent on [members of Congress] ability to properly evaluate" the political pressures to which they are regularly subjected.⁴ Without this public information, "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."⁵

The 1946 Act required anyone whose "principal purpose" was to influence the passage or defeat of legislation in Congress to register with the Clerk of the House and the Secretary of the Senate and file quarterly financial reports. The financial reports required the name and address of the lobbyist and all paying clients; how much the lobbyist was paid; all contributors to the lobbying effort and the amount of the contributions; an itemized accounting of expenditures by the lobbyist; the identity of any publications that the lobbyist

³ Section 308 of the Act provides:

"(a) Any person who shall engage himself for pay or for any consideration for the purpose of attempting to influence the passage or defeat of any legislation by the Congress of the United States shall, before doing anything in furtherance of such object, register with the Clerk of the House of Representatives and the Secretary of the Senate and shall give to those officers in writing and under oath, his name and business address, the name and address of the person by whom he is employed, and in whose interest he appears or works, the duration of such employment, how much he is paid and is to receive, by whom he is paid or is to be paid, how much he is to be paid for expenses, and what expenses are to be included"

⁴ United States v. Harriss, 347 U.S. 612 (1954) at 625.

⁵ Id.

caused articles or editorials to be printed; and the particular legislation the lobbyist was paid to influence. Violation of these reporting requirements could be punishable by a fine up to \$5,000 or one year imprisonment and a three-year prohibition on lobbying.

2. Failures of the Early Lobbying Acts

The early lobbying regulation acts were widely perceived as poorly drafted and ineffective. Just two years after President Harry Truman signed the 1946 Act into effect, he called for several revisions in the lobbying law to make it more effective. Some of the weaknesses of the Federal Regulation of Lobbying Act are that it did not cover congressional staff or the executive branch nor a great deal of “grassroots lobbying” (public opinion campaigns that encourage citizens to contact Congress about pending legislation). Importantly, while the Act did require itemized reporting of expenditures, it failed to require disclosure of what the public needs to know most about lobbying: *how much was spent overall and for what policy objective*. Furthermore, the Act was very vague as to who actually had to register. It was not at all clear what constituted lobbying as a “principal purpose” which would trigger the reporting threshold.

Just as problematic was enforcement of the 1946 Act. The Clerk of the House and Secretary of the Senate felt at the time that their role was to serve as a depository of information, not to audit for errors and enforce compliance. The Department of Justice also decided that it would focus on encouraging voluntary compliance to the Act by bringing it to the attention of potential violators rather than prosecute for non-compliance.⁶

The 1946 Act was further weakened when the U.S. Supreme Court narrowed its already limited scope. In *United States v. Harriss*,⁷ the court narrowed the application of the Act in order to avoid finding it unconstitutional due to poor drafting. Without ruling on the merits of regulating lobbying, the court determined that the Act only applied to “paid lobbyists” who “directly communicate” with Members of Congress on “pending legislation.” Thus, the court interpreted the Act to cover only efforts to influence the passage or defeat of a specific bill, but not other congressional activities, and for only those paid efforts in which lobbyists directly contacted members of Congress, not their congressional staff. Persons who spent less than half of their time contacting members of Congress on legislation were exempt from the reporting requirements.

⁶ S. Rep. No. 99-161 (1986) at 51-52.

⁷ *United States v. Harriss*, 347 U.S. 612 (1954). In subsequent rulings, the U.S. Supreme Court more clearly determined that lobbying is an important means of petitioning government and thus is given some constitutional protection. See, for example, *Eastern Railroad Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961) [defending the right of a group of railroads to wage a grassroots lobbying campaign].

A 1991 study by the U.S. General Accounting Office (GAO) uncovered just how porous was the 1946 Act.⁸ The study found that about 10,000 of the 13,500 individuals and organizations listed as key influence peddlers on Capitol Hill in a book entitled, *Directory of Washington Representatives*, were not registered as lobbyists. The GAO study also concluded that lobbyist disclosure reports were woefully incomplete. The GAO found that: 60% of registered lobbyists reported no financial activity; 90% reported no expenditures for salaries, wages, fees or commissions; 95% reported no public relations or advertising expenditures; and that only 32% of filers reported a specific title or bill number of legislation lobbied.

B. Making Disclosure Work with the Lobbying Disclosure Act of 1995

After decades of failed attempts to close the many loophole of the 1946 Act, Congress finally stepped up to the plate at the end of 1995 and approved the fairly sweeping Lobbying Disclosure Act (LDA) of 1995. LDA represents a comprehensive reform when compared to the earlier regulatory efforts,⁹ though it certainly was seen as falling short of a complete success by its biggest sponsors.¹⁰

The Lobbying Disclosure Act received unanimous approval in the Senate and was signed into law by President Bill Clinton on December 19, 1995.¹¹ The new Act took effect on January 1, 1996.¹²

LDA marked the first comprehensive reform of federal lobbying laws in 50 years. Congress had been very reluctant to modify the 1946 lobbying law, despite the fact it was widely recognized as a failure in achieving the objectives of registering and disclosing to the public the swelling ranks and financial activity of federal lobbyists.

⁸ General Accounting Office, “Federal Lobbying: Federal Regulation of Lobbying Act of 1946 is Ineffective,” (July 1991). In the study, GAO interviewed a sample of those identified in *Washington Representatives* and found that 75% had contacted both members of Congress and their staffs, dealt with federal legislation, and sought to influence Congress or the Executive Branch.

⁹ One of the lead sponsors of the Lobbying Disclosure Act of 1995, Sen. Carl Levin (D-Mich.), testified before the House Committee on the Judiciary that “decade after decade, Congress has tried to close the loopholes in the lobbying registration laws, and decade after decade, those efforts have failed. This Congress has a chance to be different.” Hearing before the House Committee on the Judiciary, Overhauling the Lobbying Disclosure Law, Testimony of Sen. Carl Levin (September 7, 1995).

¹⁰ Rep. Christopher Shays (R-Conn.), a major proponent of the Lobbying Disclosure Act of 1995, commented during congressional hearings: “It is possible to write a better bill ... I’m not sure we would pass it...” Hearing before the Subcommittee on the Constitution, House Committee on the Judiciary, Lobbying Reform Proposals (September 7, 1995).

¹¹ The Lobbying Disclosure Act nearly failed in Congress, until the bill was amended to delete a provision requiring disclosure of “grassroots lobbying.” One of the architects of LDA, Peter Levine, then a congressional staffer for Sen. Carl Levin (D-Mich.), said in 2005 that if there was anything he could change about LDA, it would be to include a grassroots disclosure provision. Phone interview with Peter Levine, April 4, 2005.

¹² 2 U.S.C. 1601.

Several forces came into play in the mid-1990s to compel congressional action. First and foremost, Congress had been enwrapped in a sensational case of corruption touching several members of Congress, known as the Wedtech scandal. In 1987, the Senate Subcommittee on Oversight of Government Management investigated “improper activities in the award of federal contracts to the Wedtech Corporation.”¹³ The Subcommittee noted that Wedtech had hired numerous lobbyists, including some former members of Congress, to help land lucrative government contracts. All the lobbying activity went unreported, and even involved bribing government officials. The investigation highlighted inadequacies of federal lobbying laws, prompting the Subcommittee to convene hearings specifically on the lobbying registration and reporting in 1991.

This hearing was the genesis of the Lobbying Disclosure Act, with Sen. Carl Levin (D-Mich.) introducing the first version of the Act in 1992. The bill was revised and reintroduced several times in subsequent congressional sessions. It gained substantial momentum when other scandals in Congress erupted, centering on a few Democratic leaders of the House. Republicans campaigned on the theme of cleaning up Congress and made lobbying disclosure one priority. The Lobbying Disclosure Act was finally codified in 1995 with substantial bipartisan support.

The Lobbying Disclosure Act of 1995 replaced much of the earlier patchwork of lobbying disclosure laws with a single, uniform statute covering the activities of all professional lobbyists. It incorporated FARA, the Byrd Amendment and the Federal Regulation of Lobbying under one law and provided substantial improvements in their definitions, coverage, reporting requirements and enforcement.

1. Improvements in Lobbying Disclosure

The first significant improvement in federal lobbying laws offered by LDA was clarifying key concepts subject to regulation. *Clear definitions are crucial to an effective disclosure regime.* These definitions include:

“Lobbyist” means any individual who is employed or retained by a client for financial or other compensation for services that include more than one lobbying contact, other than an individual whose lobbying activities constitute less than 20 percent of the time engaged in the services provided by such individual to that client over a six month period.

“Lobbying activities” means lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.

“Covered executive branch official” means

¹³ Senate Committee on Governmental Affairs, Lobbying Disclosure Act of 1993, S. Rep. No. 37 (1993).

- (A) President;
- (B) Vice President;
- (C) any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
- (D) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;
- (E) any member of the uniformed services whose pay grade is at or above O-7 under section 201 of title 37; and
- (F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy advocating character.”

The broad definition of lobbying requires that any preparation and supervisory activity for a lobbying contact be counted toward lobbying as well as the contact itself. The more refined definition of lobbyist also remedies the “principal purpose” loophole of the 1946 law, without becoming over-bearing, by requiring that individuals who spend 20% or more of their time on lobbying activity be subject to the reporting requirements.

The new definition of lobbyist recognizes two kinds of lobbyists: in-house lobbyists who promote the interests of the employing organization or business, and “outside” lobbyists who contract with clients outside the organization of business. Both types are required to register and report their financial activities. Organizations or businesses with in-house lobbyists must register report the activities of its employee lobbyists. Outside lobbyists must register and report their activities on behalf of paying clients.

Very importantly, the Lobbying Disclosure Act also expands the set of “covered officials” to include not just members of Congress but also congressional staff and elected officials and senior staff of the executive branch. Executive grade levels I through V include senior members of the executive branch in a decisionmaking capacity. Covered congressional staff includes all congressional employees.

a. Triggering Threshold for Lobbying Registration

Any individual or organization whose combined expenses for lobbying activities does not reach a *de minimis* amount in a six-month period need not register under the LDA.¹⁴ For in-house lobbyists, the triggering threshold is \$22,500 in aggregate lobbying activity by the organization. A lobbying firm, including a self-employed lobbyist, does not need to register lobbying on behalf of any particular client who provides less than \$5,500 in income to the firm or lobbyist.

Upon exceeding the *de minimis* threshold, any employee of an organization who serves as a lobbyist, or who works for a lobbying firm or is

¹⁴ 2 U.S.C. 1603. The triggering threshold for lobbying registration is adjusted for inflation every four years.

self-employed and is retained by a client for lobbying activity, must register and report lobbying income and expenses if:

- (i) Receives significant compensation;
- (ii) makes more than one lobbying contact in a six-year period; and
- (iii) spends at least 20% of their time on lobbying activity in a six-month period on behalf of any particular client, including the research, preparation and supervision of lobbying contacts.

b. Lobbyist Registration and Reporting Requirements

Under LDA, a lobbyist must register on identical forms filed with the Secretary of the Senate and the Clerk of the House within 45 days of meeting the registration threshold or 45 days of being employed by an organization as a lobbyist. Registration information generally includes the names of the lobbyist, employer and/or client, and any organizations that contribute \$10,000 or more for the lobbying activities within a six-month period and play a substantial role in directing the lobbying activities; any foreign entity with a 20% or greater stake in the lobbying activity; and a list of issues to be lobbied.

An organization that meets the lobbying threshold file as registrants and report all employees who lobbied on the organization's behalf. Self-employed lobbyists and lobbyists of lobbying firms file their own registration reports.

In addition to the registration of lobbyists, organizations and lobbyists are required to file bi-annual financial activity reports, covering January 1–June 30 and July 1–December 31 of each year. These financial activity reports identify the lobbyist, clients and employers; issues or bill numbers that were lobbied; and a “good faith” estimate of aggregate lobbying expenses rounded to the nearest \$20,000. *Reported expenditures are not broken down by particular issue or bill, by lobbying activity or even by lobbyist, if more than one lobbyist is reported on the disclosure form.* However, the amount charged each client above *de minimis* must be disclosed by outside lobbyists and lobbying firms.

c. Electronic Disclosure of Lobbyist Reports

LDA is essentially a disclosure law. In order to achieve its principal purpose, section 6 of the law calls upon the House Clerk and Senate Secretary to develop and implement a system of electronic reporting of lobbyist records. A system of electronic reporting encompasses a dualistic system of *electronic filing* for filers, and *electronic disclosure* of these records to the public.

During congressional hearings on LDA when the law was being considered, Congress understood the significance of the electronic disclosure requirements of the Act. Congress was debating the issue of which governmental agency should be responsible for carrying out the disclosure

requirements, including the mandate for a modern computerized disclosure system.

Neither the Office of Governmental Ethics nor the Justice Department wanted the task of serving as the lobbyist filing and disclosure agency for LDA. As Stephen Potts, Director of the Office of Governmental Ethics testified in 1993: “We do not currently have the experience or equipment contemplated in the legislation for computer services necessary to handle this volume of lobbyists’ reports, nor to service the volume of requests for information likely to result because of the high visibility of the issue of lobbyists’ registrations.”¹⁵

The Federal Election Commission, however, was willing to carry out the mandate of public disclosure of lobbyist financial reports. Scott Tomas, Chair of the Federal Election Commission (FEC), testified that the elections agency was quite prepared to take over the filing and disclosure responsibilities of the Act. Thomas observed that: “All these functional activities (disclosure requirements) are requirements for regulating campaign finance, and we already have developed the type of staff expertise, procedures, physical plant, and information technology necessary to meet these core elements of the bill.... This parallel is recognized in the bill in section 6 which requires the proposed Department of Justice Office of Lobbying Registration and Public Disclosure to set up computer systems ‘compatible with computer systems developed and maintained by the Federal Election Commission ... [so] that information filed in the two systems can be readily cross-referenced.’ It strikes us easier for all parties concerned if all interested parties can deal with one agency with familiar faces and consistent rules and procedures.”¹⁶

The fact that the FEC was fully capable and willing to make the lobbying financial activities records readily available to the public and press on-line apparently made Congress nervous. In the end, Congress delegated the responsibility to the Clerk of the House and the Secretary of the Senate, two offices that never asked for the responsibility and that are directly under the control of Congress itself.

Neither the House Clerk nor the Senate Secretary had any familiarity with electronic reporting systems, and Congress neglected to allocate a budget to finance development of such systems. As a result, electronic

¹⁵ House Subcommittee on Administrative Law and Government Relations, Committee on the Judiciary, Hearing on the Lobbying Disclosure Act of 1993, Testimony of Stephen Potts, Office of Governmental Ethics (March 26, 1993).

¹⁶ House Subcommittee on Administrative Law and Government Relations, Committee on the Judiciary, Hearing on the Lobbying Disclosure Act of 1993, Testimony of Scott Thomas, Federal Election Commission (March 26, 1993).

Though it need be added that FEC willingness to assume the responsibility of public recordkeeping of the lobbyist reports came with some reluctance, if no additional funding from Congress were to follow. As Thomas continued to testify: “We wish to emphasize that the Commission is not anxious to take on this new responsibility if the additional funding and staffing necessary to do the job correctly would not be provided... That said, we offer this comment in the hope it will enable your Subcommittee to consider an option that might produce a more economical and efficient result.” Id.

reporting of lobbyist financial activity reports languished for years, although the reports were available in paper format for inspection in the offices of the House Clerk and Senate Secretary.

Due primarily to the efforts of a single individual in the Secretary of the Senate's office, Pam Gavin, lobbyists reports eventually were made available on the Internet in .pdf format. The Senate Office of Public Records (SOPR) received a voluminous amount of paper reports each filing period that stacked about 36 feet high. Staffers uploaded .pdf pictures of the reports onto the Senate's Web page.¹⁷ This tedious task was particularly ironic given that most organizations and lobbyists prepared their disclosure reports via electronic software, printed out the reports in paper format, and then submitted their filings to the House Clerk and the Senate Secretary in paper – and the Senate Secretary then reverted the paper reports back into an electronic format.

The Internet disclosure system of the Senate Office of Public Records [www.sopr.gov] was antiquated as soon as it began. SOPR's Web site acted more like an electronic card catalog that allowed users to retrieve individual forms based on queries. Tough the names of lobbyists, registrants and clients were searchable – if the user typed in the name exactly as spelled, hyphenated or misspelled in the paper filings – the data contained in the reports was not searchable or sortable or subject to calculations.

In 2005, proponents of an electronic reporting system for the European Union, ALTER-EU, once wanted to demonstrate to members of the European Parliament how well the system in the United States functioned. They typed in the name of one of America's largest lobbying firms in the SOPR Internet system, the NRA, and found no record in the lobbying disclosure database. When they called the author to find out what was wrong, it was explained that they had to type in the name exactly as filed by the NRA for the records to show up – “Natl Rifle Association.”

Furthermore, a user could not search the on-line lobbying disclosure database for who lobbied, when, or how much was spent lobbying, on any specific bill or issue area. And because lobbyists filed paper reports which then had to be converted back into an electronic format, the lobbyist disclosure reports were made available to the public usually long after any particular lobbying drive had ended.

THE 2007 LOBBYING AND ETHICS REFORMS

The Lobbying Disclosure Act of 1995 was intended primarily as a disclosure regime, to uncover potential corruption between lobbyists, money and lawmakers. Of all the shortcomings of LDA – and there were many – transparency was not one of them. All persons who accepted significant payments and made large expenditures to influence lawmakers had to register as professional lobbyists. These registered lobbyists then had to regularly file financial disclosure reports twice yearly that documented who

¹⁷ Personal interview with Pamela Gavin, Superintendent of Records, Secretary of the Senate (Dec. 2003).

was paying them, how much they were getting paid, and which legislative measures or government contracts they were lobbying. This information then, eventually, got posted on the Internet for all to see.

This is how the world came to know of Jack Abramoff and of his sullen activities. It may have taken a few years before the press, the public and the Department of Justice connected the dots of Abramoff's money trail. But once we all started looking at Abramoff's public record, his house of cards quickly fell. And the public record is continuing to expose other players involved in lobbying corruption to this day, both inside and outside of government.

LDA achieved its objective. Due to clear and concise definitions of who is lobbyist and what lobbying activities must be reported, its coverage of lawmakers, key staff and executive branch personnel in a decisionmaking capacity, and its focus on following the money trail and making the information available to the public, LDA exposed the worst corruption scandals we have seen in decades on Capitol Hill.

But the fact that the scandals occurred at all highlighted where improvements in the law could be made. Congress responded with passage of the "Honest Leadership and Open Government Act of 2007."

The new law first and foremost enhances the *disclosure* of lobbying activities, but also regulates some of the *conduct* of lobbying and lawmaking. The disclosure regime is now made more frequent, more thorough, and more readily available to the public on the Internet. At the same time, many of the potentially corrupting tools used by lobbyists to buy influence among lawmakers are curtailed or banned altogether. All of these reforms focus on the *money*, the very source of potential corruption.

Some of the most important components of the new lobbying and ethics reforms include:

- **Requiring electronic *filing* of lobbyist reports.**

It was absolutely ridiculous that professional lobbyists, who keep records of their financial activity in electronic format on their personal computers, printed out those same records and filed them in paper format with the disclosure agencies. In order to make these paper records available to the public on the Internet, the disclosure agencies then had to spend time and money re-converting them back into electronic format to post on-line.

The new lobbying reforms mandates that all lobbyists file their reports electronically. Both the Clerk of the House and the Secretary of the Senate have now cooperated in developing an electronic filing program, which is now in full use by the lobbying community. It simplifies the burden of filing for lobbyists, and makes these records almost immediately available on the disclosure agencies' Web site.

- **Establishing a fully searchable, sortable and downloadable electronic *disclosure* database on the Internet**

Hand-in-hand with electronic filing of lobbying activity reports, the Clerk of the House and Secretary of the Senate now have been able to develop an Internet disclosure system of these records that is searchable, sortable and downloadable. It is no longer necessary to type in the exact name of a lobbyist to search for the lobbyist records. "NRA" will work just as fine as "Natl Rife Association" to find the filing of the National Rifle Association.

As the Web-based system becomes further developed next year, it will also allow searches by issue and bill number. The user will be able to sort the database according to preferred criteria, and download the database into their own data management program.

- **Expanding the frequency and amount of information lobbyists must file.**

Under the new law, lobbyists are now required to file their financial activity reports every three months rather than semi-annually, giving the public greater real-time information coinciding with a lobbying drive. Individual organizations and companies that are members of a lobbying coalition must also be disclosed to the public.

- **Requiring that campaign fundraising by lobbyists be disclosed to the public and posted on the Internet.**

The most important tool for lobbyists to peddle their wares on Capitol Hill is to make campaign contributions, solicit bundled contributions from others, and host fundraising events for lawmakers whom they are attempting to influence. While such fundraising is still allowed, all fundraising by each lobbyist for a candidate, lawmaker's political committee, party committee, and even presidential library committee must now be disclosed to the public on the Internet every six months.

- **Prohibiting gifts and travel by lobbyists and lobbying organizations for lawmakers.**

A common tool for influence peddling of which Jack Abramoff made extensive use was giving gifts, meals and free travel to lawmakers and their staff, including the infamous golf junkets to Scotland and priceless box seats at the Super Bowl. Gifts and meals used to be the lobbyists' common currency for buying legislative favors. Former lobbyist Jack Abramoff plied his trade with a special table in his restaurant for free wining and dining of lawmakers. Some congressional staffers even used to hand their Capitol Grille lunch checks to the closest available lobbyist, whom willingly obliged.

Free trips often included free airfare on a corporate jet, in which the company lobbyist got special one-on-one time with the lawmaker. In all,

organizations provided some \$50 million worth of free travel across the globe for lawmakers and their staff since 1989.

Under the new law, lobbyists, and even companies and organizations that employ lobbyists (such as Boeing Corp. as well as Public Citizen), are now banned from giving gifts of any value to lawmakers and congressional staff. The primary exceptions are gifts of *de minimis* value, such as a cup of coffee or “finger food” at an event, or meals of the same value provided to everyone at an event that is “widely attended” – in other words, the public generally is invited to the event and the event is not organized around the attendance of the public official (such as a conference of a trade association).

Free travel is also severely restricted. Lobbying organizations may pay only for one-day trips for lawmakers, just long enough to fly a lawmaker to a conference to make a speech. (Two days trips are permissible if distance requires.) These trips must be pre-approved by the congressional ethics committee, and the sponsors, cost and itineraries posted on the Internet. Travel on corporate jets is effectively banned. Registered lobbyists are not allowed to organize or sponsor such trips; they are not even allowed to tag along.

- **Slowing the revolving door.**

Another influence peddling tool in the lobbyist arsenal is promises of future lucrative employment once a lawmaker leaves office. About 43 percent of all retiring members of Congress – those who retire for reasons other than death or conviction – spin through the revolving door and become well-paid lobbyists representing the same special interests that had business before them while in office.¹⁸ This “revolving door” provides well-financed special interest groups with ample opportunity to unduly influence the loyalties of lawmakers.

While the new legislation should have addressed this problem further, it does require that lawmakers and staff disclose to the public any employment negotiations underway while in public office, and for House members to recuse themselves from official actions that may pose a conflict of interest with their future employers. Former senators and senior executive branch officials are prohibited from lobbying their colleagues for two years after leaving office.

IMPLICATIONS FOR THE EUROPEAN TRANSPARENCY INITIATIVE

Without a doubt, the differences in governance between the European Union and the United States are stark. The EU is an international institution, encompassing many different forms of national governments, many more

¹⁸ Revolving Door Working Group, A MATTER OF TRUST: HOW THE REVOLVING DOOR UNDERMINES PUBLIC CONFIDENCE IN OUR GOVERNMENT – AND WHAT TO DO ABOUT IT (October 2005).

national issues, and at least 20 different languages. The administration of the EU is much smaller than the federal administration in the US. And the EU works with a comparatively smaller budget than the US.

But the similarities in governance, especially when it comes to lobbying the government, also are stark. Both the EU and US governments operate according to basic principles of federalism, in which different layers of government have different responsibilities and jurisdictions. Though the comparative sizes of budgets are different, both the EU and US governments preside over huge budgets, providing funding allocations and government contracts on a massive scale.

And with all the money come the lobbyists. Brussels is swarming with lobbyists, as is Washington. In fact, Brussels is swarming with well-financed Washington (K Street) lobbyists. Though no one knows for sure how many Washington lobbyists are based in Brussels because there is as yet no registration system, news accounts suggest that many of the wealthiest American lobbying firms have set up shop in Brussels: APCO Worldwide, Burson-Marsteller, Dutco Worldwide, Hill and Knowlton, to name a few. Many more American businesses, ranging from Honeywell, General Motors, the aerospace industry, cosmetics industry, food giants and others, have hired their own in-house lobbyists to manage EU regulatory policies and win government contracts. Even former European Parliament President Pat Cox has set up a shop in Washington to woo American business clientele for lobbying representation in Brussels.¹⁹

The primary purpose of US lobbying laws is to tell the public who is being paid how much to lobby whom on what. If transparency in influence peddling is an objective that the EU also chooses to pursue, there are a few things that can be learned from the American experience.

Keep in mind that successful disclosure of the business of lobbying is relatively new in the United States. Though lobbying disclosure laws existed as early as World War II, they failed miserably until replaced by LDA in 1995. In the course of correcting decades of failure in lobbying transparency, the US has learned that an effective lobbying disclosure program must have the following elements.

First, lobbyist registration must be mandatory. When lobbyists could pretty much choose for themselves whether they passed the threshold for registration under the 1946 law, only about 25 percent of lobbyists bothered to register. Furthermore, if registration and disclosure is not uniform across all sectors and business interests, the registration records will not reflect the reality of money and influence peddling. Those who have reason to hide, will likely do so.

¹⁹ Tory Newmyer, "Let's Go Europe: K Street Builds a New Beachhead in the European Union," *Roll Call* (April 11, 2005).

The European Transparency Initiative thus far is a voluntary program to be implemented in 2008. But once it becomes obvious that many, if not most, special interests are not participating in the program, ETI should promptly be made mandatory.

Second – and I cannot stress this point enough – the transparency law must clearly and concisely define who is a lobbyist and what lobbying activity must be reported. Definitions are key to the success of the lobbying disclosure law. Without clear definitions of who is a lobbyist, those who want to evade disclosure will simply argue they do not meet the registration threshold. More importantly, the absence of clear definitions raises all sorts of alarms and exaggerated fears among businesses and special interest groups. Lawyers will falsely claim that a disclosure law will require them to violate their oath of confidentiality to their clients. Businesses and lobbying firms will decry that they cannot possibly give a dollar figure to all the external and internal activities that go into an advocacy effort. Government officials will argue that the disclosure law impedes upon state (or in the case of the EU, national) sovereignty.

The LDA successfully addressed these problems and these fears by attempting to provide definitions that are as empirical and quantifiable as possible, rather than subjective. The most critical definitions offered by LDA are as follows:

a. Who is a “Lobbyist”

Lobbyists subject to the registration and reporting requirements should include both “in-house” lobbyists who are employed by an entity to lobby on its behalf, and “outside” lobbyists who are sole practitioners of work in a lobbying firm and are hired by clients. The definition of lobbyist should be quantifiable as (i) receiving more than *de minimis* financial compensation for their lobbying, (ii) make more than one lobbying contact with “covered officials”, and (iii) spend at least 20% of work time over a six-month period on behalf of any particular client or organization on lobbying activities.

This definition ensures that registrants are paid a significant fee for lobbying, rather than citizens voluntarily expressing concern over political issues. It ensures that registrants are lobbying specifically identified officials (“covered officials”) who exercise authority over federal legislation or regulations (as opposed to state or local legislation). In the case of the European Union, “covered officials” should include those directly involved in EU decision-making and not include national officials whose efforts are directed at national policies rather than the promulgation and development of EU policies.

The 20% threshold is intended to capture attorneys who spend at least 20% of their time on behalf of any individual client conducting lobbying activity. Many attorneys spend the vast majority of their time working on litigation. But some will exert a significant lobbying campaign on behalf of a single client, and these attorneys are captured under LDA. They must register as lobbyists

and file disclosure forms identifying that particular client on behalf of whom they lobby, but not any other clients.

b. What is a “Lobbying Contact”

Lobbying contact is any direct communication – written, oral or in person – to a covered official intended to influence legislation or public policy, awarding government contracts or affecting governmental appointments.

c. What is “Lobbying Activity”

Lobbying activity includes any research, preparation, strategizing, supervising and communications that, *at the time they are being done*, are specifically intended to facilitate a lobbying contact.

Research or any other activity that is not specifically intended to facilitate a lobbying contact at the time it is being done does not qualify as reportable lobbying activity. So, for example, writing books or papers that are done for general public education, even though they may be presented to covered officials as part of a lobbying campaign at some later time, does not qualify as reportable lobbying activity.

There are also several categories of activities that are exempt from the definition of lobbying activity or lobbying contact. These include:

- Congressional testimony.
- Petitions for agency action.
- Compelled statements, such as subpoenaed testimony.
- Public comments solicited by governmental agencies.
- Public statements or media-broadcast statements.
- Written responses to government information requests.
- Communication directed solely to the intended agency regarding judicial, criminal or civil law proceedings.

d. Who is a “Covered Official?”

The category of covered officials triggers the registration and reporting requirements for lobbyists. Covered officials should include both the executive and legislative branches of government and senior staff as well as elected or appointed officials. In the legislative branch, covered staff could include all full-time employees of the official as well as staff of legislative committees.

Again, the definition of “covered official” specifically excludes governmental officials who do not work in the federal government, and who are not significant players in influencing policy decisions in the federal government. For the European Union, a definition of covered officials would include only those who work within the EU institutional structure, and are significant players in influencing policy decisions in the EU.

e. How is the financial value of lobbying to be quantified?

The value of lobbying expenditures to be reported is a good faith estimate of any expenditures made on “lobbying activities,” including the cost of research and preparation for making a lobbying contact, and a good faith estimate of the amount of compensation for the lobbyist, based on the lobbyist’s time conducting lobbying activity and lobbying contacts.

For “in-house” lobbyists – say, a CEO of a company who passed the registration threshold – the average salary and benefits of the CEO are estimated on a per hour basis, and the amount of time the CEO spends on lobbying activity and lobbying contacts is calculated accordingly. An organization is exempt from registration if its total expenses for lobbying activities do not exceed \$24,500 during a semiannual period. As long as the registrant has a reasonable system for estimating lobbying expenditures in place and complies in good faith with that system, the requirement of reporting bottom line expenses or income is satisfied.

For “outside” lobbyists and lobbying firms, the formula is usually simplified by just reporting the amount of compensation received from the client or clients for lobbying work.

Third, sunlight is the best disinfectant. An effective lobbying disclosure program should be administered by a single agency, which monitors compliance to the law, collects all reports, and administers a centralized public disclosure system on the Internet of these reports. (This is an objective that is only now being fully realized in the United States with the 2007 reforms.) But no single agency can possibly ensure that all the reports are accurate or that all lobbyists are in fact registered. By placing what information is available to the agency on the Internet for all to see, the public provides critical backup for monitoring compliance. Jack Abramoff was caught because members of the same tribe who hired him saw on the Internet exactly how much tribal leaders were paying Abramoff, and they questioned how the money was being spent.

CONCLUSION: WITH CLEAR DEFINITIONS, LOBBYING DISCLOSURE REQUIREMENTS ARE MANAGEABLE AND EFFECTIVE

Even though the United States has had lobbyist reporting requirements on the books since the Second World War, the old lobbying laws failed to offer clear definitions and empirical thresholds for determining who had to register. In 1995, all that was changed with passage of the Lobbying Disclosure Act, which amended the old law to include the definitions and thresholds discussed above. With implementation of LDA, compliance with the mandatory registration and reporting requirements is at an all-time high, and the reporting burdensome manageable and understandable by those who qualify as lobbyists.

In 1995, the American lobbying community initially opposed the lobbying disclosure requirement of LDA. But that opposition has fallen to the wayside. Today, mandatory registration of lobbyists and disclosure of their financial activity is nearly universally accepted as an important pillar of open and honest government in the United States. Even the American League of Lobbyists is “100% supportive of LDA”,²⁰ finding its mandatory reporting requirements only a minor burden, and strongly recommending full electronic disclosure of lobbyist financial activity reports. In its statement of principles for good lobbying reform, the US professional league of lobbyists declares:

The general public has come to believe that politicians and lobbyists deliberately seek to operate in a furtive and largely covert manner. This perception, whether right or wrong, has contributed in large measure to the antipathy and distrust that exists towards our system of government and those in the lobbying profession. In an effort to try and change this perception, ALL supports full online access to all lobbying disclosure forms.²¹

Clear definitions in LDA, coupled with a reliance on “good faith” efforts to estimate reasonable lobbying expenditures, has made mandatory lobbyist registration and disclosure efficient and effective, and an acceptable burden to the lobbying community.

²⁰ Paul Miller, “You Can’t Legislate Personal Responsibility,” in Tom Spencer and Conor McGrath, eds. CHALLENGE & RESPONSE (European Centre for Public Affairs, 2006).

²¹ American League of Lobbyists, Statement of Principles on the Lobbying Reform Act of 1995 (August 4, 2005).