

# New Lobbying And Gift Laws Signed Into Law

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With President Bush's signature, the Honest Leadership and Open Government Act of 2007 (formerly S. 1) was enacted on September 14, 2007. Many provisions in this new law affect corporations, trade associations, and other organizations that employ or retain lobbyists through changes in federal gift laws, lobbyist reporting requirements, and post-employment cooling-off periods, among other things. Several of the changes became effective immediately, although others don't kick in until January 1, 2008, or later in 2008. The first Lobbying Disclosure Act (LDA) report under the new regime is not due until April 21, 2008, although a report under the old rules is still due on February 14, 2008. Below we highlight some of the provisions included in the new law.

### Enforcement

- The new law increases civil penalties for violations of the LDA to \$200,000 and adds criminal penalties.
- Under the new law, the Comptroller General is instructed to conduct random audits of LDA registrations and reports.

### Gifts

- The new law directly prohibits the giving of a gift by a lobbyist or lobbyist employer that is not permissible under the applicable Congressional gift rules.
- Changes to the Senate gift rules ban

gifts to Senators and Senate staff from lobbyists and entities that employ or retain lobbyists except as provided for in specific exceptions, including a new exception for home-state constituent events.

- The new law requires a lobbyist employer and its lobbyists to certify they have not provided any travel or gift to Congressional Members or staff that violates the applicable Congressional gift rules.

- Changes to relevant gift rules ban Members of Congress from attending convention events in their honor if paid for by lobbyists or entities that employ or retain lobbyists.

### Lobbyist Reporting

- The new law requires quarterly LDA filings, beginning with the 1st quarter of 2008.

- Changes to the LDA require an analysis of whether in-house employees qualify as lobbyists (*i.e.*, the 20% lobbying activities threshold) over a three-month period instead of a six-month period.

- The LDA now requires lobbyist employers to list all of the past covered executive and legislative branch positions held by their listed lobbyists in the past 20 years. Currently, only the positions held in the past two years are required to be listed.

- The new law requires lobbyist employers and lobbyists to certify that they have read and are familiar with the gift and travel rules of the Senate and the House.

- One provision in the new law changes the statutory language that pertains to affiliated entities, coalitions and associations, thereby determining what entities must be disclosed on LDA registrations and reports. The former statutory language required coalitions to disclose persons who contributed over \$10,000 in a semiannual period to the coalition's lobbying activities and "in whole or in major part plan[ne]d, super-

vise[d], or control[le]d such lobbying activities." The new law requires disclosure of any person who contributes more than \$5,000 in a calendar quarter to the lobbying activities of a coalition and "actively participates in the planning, supervision or control of such lobbying activities."

Congress added additional semiannual reporting of lobbyist employer and lobbyist activity (including a corporation's PAC) with respect to the following:

- Contributions to federal candidates or officeholders, leadership PACs, and political party committees;
- Events to honor covered officials;
- Payments to an entity named for a covered legislative branch official;
- Payments to an entity established, financed, maintained, or controlled by a covered official;
- Certain meetings, retreat, conferences, and other events for covered officials; and
- Donations to Presidential libraries and inaugural committees.

### Restrictions on Lobbying

- Rule changes prohibit "lobbying contacts" by a Senator's spouse or immediate family member with the personal, committee, or leadership staff of that Senator if the spouse or immediate family member is a registered lobbyist or retained or employed by an entity that employs or retains lobbyists.

- House rule changes prohibit "lobbying contacts" by the spouse of a Member of the House with the personal, committee, or leadership staff of that Member if the spouse is a registered lobbyist or employed or retained by a lobbyist for the purpose of influencing legislation.

- Statutory and rule changes increase to two years the post-employment cooling-off period for very senior executive branch personnel and Senators.

- Statutory and rule changes also expand the post-employment cooling-off period for Senate officers and highly paid Senate staff to encompass contacts with the entire Senate.

- The House prohibits an entity whose employee or member is a party to a consultant contract with the House of Representatives from lobbying the contracting committee or Members or staff of the contracting committee on any topic during the term of the contract.

### Political Activities

- Starting sometime in 2008, candidate committees, party committees, and leadership PACs will be required to report certain contributions bundled by lobbyists, lobbying firms, employers of in-house lobbyists, employee-lobbyists, and PACs established or controlled by any of the aforementioned persons.

- Changes to the Federal Election Campaign Act (FECA) prohibit House candidates and the leadership PACs of House candidates from using private aircraft for campaign travel, with an exception for aircraft owned or leased by a candidate or his or her immediate family.

- Other changes to the FECA require Presidential and Senate candidates to pay the pro rata share of the normal charter or rental charge for the use of a private aircraft.

### Travel

- Changes to the Senate's gift rules limit travel for Senators and Senate staff that is paid for by a lobbyist client. Trips sponsored by 501(c)(3) organizations would not be limited to one day. (Note that the House adopted a similar travel rule in January.)

- Changes to the Senate rules ban the acceptance of free travel on private aircraft for officially connected travel.

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# New Life for Corporate Speech – Wisconsin Right To Life

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Political speech by corporations and labor unions during election periods received a major boost in the U.S. Supreme Court's June 25, 2007, decision in *FEC v. Wisconsin Right to Life, Inc.* ("WRTL"). This case was of intense interest by those who represent business organizations in Washington. We modestly note that Wiley Rein's *amicus curiae* brief on behalf of the U.S. Chamber of Commerce was mentioned by the controlling opinion as a sign of the importance of the case.

Under *WRTL*, corporations and unions still may not expressly advocate the election or defeat of clearly identified candidates or coordinate their ads with candidates. However, they now may refer to candidates while independently broadcasting issue ads during election periods, unless "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."

The *WRTL* test is narrowly and strictly applied. It focuses on what is said, rather than the speaker's subjective intent or the likely effect of the speech. Advocacy cannot

be forbidden solely because it addresses issues relevant to the election. The speech must be allowed if it has any reasonable meaning other than advocating a candidate vote. And if there is room for debate "the tie is resolved in favor of protecting speech."

Chief Justice Roberts wrote the controlling opinion, joined by Justice Alito, Justices Scalia, Kennedy, and Thomas joined in a concurring opinion that wanted to go even further to overrule previously sustained limits on corporate speech. Significantly, Justice Alito indicated he would be willing to go along if the present holding proves unworkable. The remaining four justices dissented. Because there was no majority opinion and Chief Justice Roberts' opinion provides the narrowest rationale for the outcome, it functions as the opinion of the Court.

*WRTL* points in a very different direction from the 2003 *McConnell v. FEC* decision. There five justices (including the four current dissenters) displayed little concern for the speech rights of corporations. They held that a new statutory limit on corporate and labor union broadcasts that mentioned candidates in the months before elections – "electioneering communications" – was not invalid on its face.

Interestingly, the *WRTL* decision does not squarely overrule *McConnell*. Instead, it assumes the electioneering communications standard is a *facially* valid standard, but holds that it may not constitutionally be applied to speech that has any meaning other than a call to vote for or against a specific candidate.

However, seven Justices described the *WRTL* holding as effectively overruling *McConnell*. The four dissenters said the practical effect of the new "as applied" standard is to reinstate the "express advocacy" test Congress sought to replace by enacting the "electioneering communication" provision affirmed in *McConnell*. Similarly, Justice Scalia noted in his three-Justice concurring opinion that Chief Justice Roberts' opinion "effectively overrules *McConnell* without saying so."

Exactly how corporations should apply this new standard – "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate" – in light of the opinions by Justice Souter and Scalia is not immediately apparent. In explaining why the particular ads at issue were not subject to regulation, Justice Roberts referred to various "indicia of express advocacy" – e.g., a focus on the character and quality of the mentioned candidates – that the ads lacked. Foreseeably, pro-regulatory advocates are attempting to graft those comments onto the basic test.

Some guidance may be in the offing. On August 31, the FEC initiated a rulemaking proceeding to not only conform its regulation of "electioneering communications" to *WRTL*, but to address whether the FEC's regulatory definition of "express advocacy" should also be reexamined in light of *WRTL*. A large number of written comments were submitted in response, and witnesses appeared before the Commission on October 17-18. (Author Jan Baran testified for the

U.S. Chamber of Commerce.)

While every party to the rulemaking appears to recognize that some change in the FEC's regulation of "electioneering communications" is required in the wake of *WRTL*, no similar consensus has emerged regarding the FEC's definition of "express advocacy." The written comments and witnesses generally agreed that subpart (a) of the FEC's present definition, which focuses on the express meaning of the explicit words used, is consistent with *WRTL*. However, proponents of free speech for business (including Mr. Baran) contended that subsection (b) – which turns on what a reasonable person would understand in light of the circumstances – is impermissible. (Interestingly, several federal courts struck down subsection (b) before *McConnell* was decided.)

The FEC doubtless will try hard to complete its rulemaking. However, four of the present five Commissioners (two Republicans and three Democrats with one seat vacant) must agree to adopt a rule, and agreement may prove elusive.

One lesson of the new case is that corporations charged with improper electoral speech should carefully consider an "as applied" challenge to whatever standard is being applied. Also, in an appropriate case, consideration should be given to squarely challenging existing restrictive precedent that slights the First Amendment. And until more guidance arrives, consideration should be given to avoiding unnecessary "indicia of express advocacy" in corporate issue speech.

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