FOIA Number: 2013-0365-F

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Mexico City: Research on "Lobbying" [3]

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S	115	4	9	2

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Duff Gillespie
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1. Indep study
2. IPPF
3. Across Bd ~~[illegible]~~ 5 mils
4. $50 off top + IPPF out
5. narrow lobby w/ penalty

(3) LIMITATION. – In the event that the waiver authority in paragraph 1 is exercised, any organization that fails to provide the certifications required in subsection (b) shall be eligible to receive not more than 95% of the funding obligated to it under title II of this Act for population planning activities or other population assistance in FY 98 or FY 99, whichever amount is greater.

(d) SUNSET. – This provision shall cease to be effective on September 30, 2000.

Variations on Limitations

Tougher Terms: Instead of choosing the larger of FY 98 and FY 99 to serve as the base for calculating the FY 00 grant, if pushed to make a further concession, we might offer to take the average of both years. Language follows:

> LIMITATION. – In the event that the waiver authority in paragraph 1 is exercised, any organization that fails to provide the certifications required in subsection (b) shall be eligible to receive not more than 95% of the average of the funding obligated to it under title II of this Act for population planning activities or other population assistance in FY 98 or FY 99.

Other Tough terms: As drafted, once the President exercises the waiver, organizations that do not provide the certification will see the amount of USG funding they are eligible to receive drop by some fixed percentage. The decline is the same regardless of whether they perform abortion, promote abortion or do both. Presumably Conservatives would want to hit those that do both harder than those that just perform or just promote. The language that follows would provide for a two tier reduction of USG funding:

> LIMITATION. – In the event that the waiver authority in paragraph 1 is exercised, any organization that provides only one of the certifications required in subsection (b) shall be eligible to receive not more than 95% of the funding obligated to it under title II of this Act for population planning activities or other population assistance in FY 98 or FY 99, whichever amount is greater. Any organization that fails to provide both of the certifications required in subsection (b) shall be eligible to receive not more than 90% of the funding obligated to it under title II of this Act for population planning activities or other population assistance in FY 98 or FY 99, whichever amount is greater.

The New Grantee Problem: The limitation provision assumes that grantees who receive funding as a result of the President's exercise of the waiver received funding in FY 98 or FY 99 and reduces USG funding by a percentage of either base year. There may be some waiver beneficiaries that did not receive funding in those years but did so in previous years. There may be still other waiver beneficiaries that have never received USG funding. The language below attempts to address this issue, albeit imperfectly, by looking as the base from which any reduction would be made any other fiscal year or, if necessary, the grant request made by the organization.

LIMITATION. – In the event that the waiver authority in paragraph 1 is exercised, any organization that fails to provide the certifications required in subsection (b) shall be eligible to receive not more than 95% of the funding obligated to it under title II of this Act for population planning activities or other population assistance in any prior fiscal year, whichever amount is greatest, or, if the organization has never received population planning funds, 95% of the amount the organization requests.

March 5, 1998

To: Bill Marshall

Fr: Janis Crum

Re: Federal Lobbying Disclosure Act; Related lobbying provisions for nonprofits

---

Lobbying Disclosure Act, 2 U.S.C. §1601, et.seq.

The Lobbying Disclosure Act applies to individuals and entities who lobby "covered" executive branch officials (the President, Vice President, officers and employees of the Executive Branch) and Members of Congress, their employees, committee and caucus staff.

The statute allows nonprofit tax exempt entities to be governed by the definitions of lobbying and "grass roots lobbying" in 26 U.S.C. § 4911(d) (the U.S.Internal Revenue Code). See 2 U.S.C. § 1610 (a), (b). Thus, even if nonprofit organizations qualify as lobbyists defined below, they have the option of using the broader definition of lobbying under the tax code and filing pursuant to 26 U.S.C. § 4911. (See Internal Revenue Code definitions of grass lobbying below.)

A "lobbying contact" is defined as: Any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to:

- the formulation, modification, or adoption of Federal legislation (including legislative proposals) and Federal rules, including regulations, executive orders, or any other program, policy, or position of the United States government;
- the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or
- the nomination or confirmation of a person subject to Senate approval.

Exceptions: ***"Lobbying contact" does not include communications***:

- made by a public official acting in an official capacity;
- made by members of the press if acting in a news gathering capacity;
- made in a speech, article or other material if it is delivered to the public through radio, television or other mass media;

- made on behalf of a government of a foreign country or a foreign political party;
- requesting a meeting, the status of an action, so long as the request is not an attempt to influence a covered public official;
- made during testimony given before a congressional committee, subcommittee or task force or submitted for inclusion in the public record of a congressional hearing;
- made in response to a request for information by a covered public official;
- required by subpoena, civil investigation or otherwise compelled by law.

I. Who Must Register:

A. ***Individual lobbyists***: Any person "who is employed . . . by a client for financial or other compensation for services that include more than one lobbying contact." 2 U.S.C. § 1603(a). The registration threshold is met when an individual spends more than 20 percent of his or her time lobbying within a six month period. Individual lobbyists must register within 45 days of reaching the threshold.

B. ***Lobbyist Firms***: The registration threshold is met for lobbyist firms when the entity employs one or more lobbyists. If a lobbyist is employed by a lobbyist firm, only the firm is required to register and file disclosure reports on behalf of the individual lobbyist.

c) ***Exemptions***: If individuals or entities meet the following criteria, they are not subject to federal registration and disclosure requirements:

> 1) If a person's or entity's total income for matters relating to lobbying on behalf of a single client does not exceed $5,000; or
>
> 2) in the case of an organization employing lobbyists, the entity's total expenses for lobbying activities do not exceed $20,000.

II. Content of Registration and Disclosure Statements:

Registration statements must include:

A. Name, address, telephone number of the place of business of the registrant;

B. a general description of business activities, including the general issue areas in which the registrant expects to engage and specific issues that will be addressed during lobbying.

C. In cases where the lobbyist receives money from individuals or entities which "supervise, plan or control" the lobbyist's activities AND the individual or entity contributes at least $10,000 to the registrant in any six month period, the lobbyist must disclose the name, address and principle place of business of that individual or entity.

D. The above registration requirements also apply to lobbyists who deal with foreign entities that:

- Contribute more than $10,000 to the lobbyist or lobbyist firm or
- holds at least 20% equitable ownership in the lobbyist's client organization or
- directly or indirectly plans, controls, directs, finances or subsidizes the activities of the client; or
- is an affiliate of the client and has a direct interest in the outcome of the lobbying activity.

("Foreign entity" is not defined in the statute.)

Disclosure Statements

A. Semiannual statements are filed with the Secretary of the Senate and Clerk of the House of Representatives, and must include:

- Name of the client and the lobbyist;
- Specific issues that the lobbyist discussed, including bill numbers or specific executive branch actions;
- a list of Federal agencies contacted;
- a description of the interest of any foreign entity described in section D, including a list of specific issues;
- payments from clients for matters relating to lobbying and a good faith estimate of the total expenses that the lobbyist incurred in connection with lobbying activities.

Tax Exempt (Nonprofit) Organizations: Disclosure Requirements Pursuant to 26 U.S.C § 4911

Nonprofit tax exempt organizations are permitted to engage in a limited amount of lobbying activities (defined below) according to the amount of an organization's "exempt purpose expenditures." However, when tax exempt entities exceed this limit, any amount spent in excess of that limit is subject to a 25% tax. See 2 U.S.C. §4911.

Definition of "influencing legislation":

(A) "Any attempt to affect the opinions of the general public or any segment thereof, and

(B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation." 2 U.S.C. 4911 (d).

Exceptions: "Influencing legislation" does not include:

(A) making available nonpartisan analysis, study or research (i.e., polling);

(B) providing of technical advice or assistance to a governmental body or to a committee or other subdivision thereof in response to a written request by the governmental body;

(C) appearances before or communications to any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax exempt status, or the deducation of contributions to the organization;

(D) communications between the organization and its bona fide members with respect to legislation or direct interest to the organization (i.e., notifying all members of votes made by public officials on legislation of interest to the organization's members);

(E) any communication with a government official or employee that is not an attempt to influence. Fix this

Definition of "legislation":

Includes action with respect to Acts, bills, resolutions, or similar items by the Congress, any state legislature, any local council, or by the public in a referedum, initiative, constitutional amendment, or similar procedure.

2 USCS @ 1602 (1997) printed in FULL format.

UNITED STATES CODE SERVICE

*** THIS SECTION IS CURRENT THROUGH 105-145, APPROVED 12/15/97 ***
*** WITH GAPS OF 85, 92, 101, 102, 106, 111-114, 119, 127 ***
*** 129, 134, 135, 137-139 & 142 ***

TITLE 2. THE CONGRESS
CHAPTER 26. DISCLOSURE OF LOBBYING ACTIVITIES

2 USCS @ 1602 (1997)

@ 1602. Definitions

As used in this Act:

(1) Agency. The term "agency" has the meaning given that term in section 551(1) of title 5, United States Code.

(2) Client. The term "client" means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. A person or entity whose employees act as lobbyists on its own behalf is both a client and an employer of such employees. In the case of a coalition or association that employs or retains other persons to conduct lobbying activities, the client is the coalition or association and not its individual members.

(3) Covered executive branch official. The term "covered executive branch official" means--

(A) the President;

(B) the 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, United States Code; and

(F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2) of title 5, United States Code.

(4) Covered legislative branch official. The term "covered legislative branch official" means--

(A) a Member of Congress;

(B) an elected officer of either House of Congress;

(C) any employee of, or any other individual functioning in the capacity of an employee of--

(i) a Member of Congress;

(ii) a committee of either House of Congress;

(iii) the leadership staff of the House of Representatives or the leadership staff of the Senate;

(iv) a joint committee of Congress; and

(v) a working group or caucus organized to provide legislative services or other assistance to Members of Congress; and

(D) any other legislative branch employee serving in a position described under section 109(13) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(5) Employee. The term "employee" means any individual who is an officer, employee, partner, director, or proprietor of a person or entity, but does not include--

(A) independent contractors; or

(B) volunteers who receive no financial or other compensation from the person or entity for their services.

(6) Foreign entity. The term "foreign entity" means a foreign principal (as defined in section 1(b) of the Foreign Agents Registration Act of 1938 (22 U.S.C. 611(b)).

(7) Lobbying activities. The term "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.

(8) Lobbying contact.

(A) Definition. The term "lobbying contact" means any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to--

(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);

(ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;

(iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or

(iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

(B) Exceptions. The term "lobbying contact" does not include a communication that is--

(i) made by a public official acting in the public official's official capacity;

(ii) made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public;

(iii) made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication;

(iv) made on behalf of a government of a foreign country or a foreign political party and disclosed under the Foreign Agents Registration Act of 1938 (22 U.S.C. 611 et seq.);

(v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official;

(vi) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act [5 USCS Appx.];

(vii) testimony given before a committee, subcommittee, or task force of the Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or task force;

(viii) information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information;

(ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency;

(x) made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications;

(xi) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law;

(xii) made to an official in an agency with regard to--

(I) a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or

(II) a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis, if that agency is charged with responsibility for such proceeding, inquiry, investigation, or filing;

(xiii) made in compliance with written agency procedures regarding an adjudication conducted by the agency under section 554 of title 5, United States Code, or substantially similar provisions;

(xiv) a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding;

(xv) a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures;

(xvi) made on behalf of an individual with regard to that individual's benefits, employment, or other personal matters involving only that individual, except that this clause does not apply to any communication with--

(I) a covered executive branch official, or

(II) a covered legislative branch official (other than the individual's elected Members of Congress or employees who work under such Members' direct supervision),

with respect to the formulation, modification, or adoption of private legislation for the relief of that individual;

(xvii) a disclosure by an individual that is protected under the amendments made by the Whistleblower Protection Act of 1989, under the Inspector General Act of 1978 [5 USCS Appx.], or under another provision of law;

(xviii) made by--

(I) a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(i) of section 6033(a) of the Internal Revenue Code of 1986 [26 USCS @ 6033(a)(2)(A)(i)], or

(II) a religious order that is exempt from filing a Federal income tax return under paragraph (2)(A)(iii) of such section 6033(a) [26 USCS @ 6033(a)(2)(A)(iii)]; and

(xix) between--

(I) officials of a self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act [15 USCS @ 78c(a)(26)]) that is registered with or established by the Securities and Exchange Commission as required by that Act or a similar organization that is designated by or registered with the Commodities Future Trading Commission as provided under the Commodity Exchange Act [7 USCS @@ 1 et seq.]; and

(II) the Securities and Exchange Commission or the Commodities Future Trading Commission, respectively;

relating to the regulatory responsibilities of such organization under that Act.

(9) Lobbying firm. The term "lobbying firm" means a person or entity that has 1 or more employees who are lobbyists on behalf of a client other than that person or entity. The term also includes a self-employed individual who is a lobbyist.

(10) Lobbyist. The term "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.

(11) Media organization. The term "media organization" means a person or entity engaged in disseminating information to the general public through a newspaper, magazine, other publication, radio, television, cable television, or other medium of mass communication.

(12) Member of Congress. The term "Member of Congress" means a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress.

(13) Organization. The term "organization" means a person or entity other than an individual.

(14) Person or entity. The term "person or entity" means any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or State or local government.

(15) Public official. The term "public official" means any elected official, appointed official, or employee of--

(A) a Federal, State, or local unit of government in the United States other than--

(i) a college or university;

(ii) a government-sponsored enterprise (as defined in section 3(8) of the Congressional Budget and Impoundment Control Act of 1974 [2 USCS @ 622(8)]);

(iii) a public utility that provides gas, electricity, water, or communications;

(iv) a guaranty agency (as defined in section 435(j) of the Higher Education Act of 1965 (20 U.S.C. 1085(j))), including any affiliate of such an agency; or

(v) an agency of any State functioning as a student loan secondary market pursuant to section 435(d)(1)(F) of the Higher Education Act of 1965 (20 U.S.C. 1085(d)(1)(F));

(B) a Government corporation (as defined in section 9101 of title 31, United States Code);

(C) an organization of State or local elected or appointed officials other than officials of an entity described in clause (i), (ii), (iii), (iv), or (v) of subparagraph (A);

(D) an Indian tribe (as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e));

(E) a national or State political party or any organizational unit thereof; or

(F) a national, regional, or local unit of any foreign government.

(16) State. The term "State" means each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

HISTORY: (Dec. 19, 1995, P.L. 104-65, @ 3, 109 Stat. 691.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

REFERENCES IN TEXT:
With respect to the "Executive Schedule", referred to in this section, see 5 USCS @@ 5311 et seq.
The "Securities Exchange Act", referred to in this section, is Act June 6, 1934, ch 404, 48 Stat. 881, which appears generally as 15 USCS @@ 77b et seq. For full classification of such Act, consult USCS Tables volumes.
The "Whistleblower Protection Act of 1989", referred to in this section, is Act April 10, 1989, P.L. 101-12, 103 Stat. 16. For full classification of this Act, consult USCS Tables volumes.

EFFECTIVE DATE OF SECTION:
This section became effective on Jan. 1, 1996, pursuant to Act Dec. 19, 1995, P.L. 104-65, @ 24(a), 109 Stat. 705, which appears as 2 USCS @ 1601 note.

NOTES:

RESEARCH GUIDE

FEDERAL PROCEDURE L ED:
10 Fed Proc L Ed, Declaratory Judgments @ 23:13.

AM JUR:
16 Am Jur 2d, Constitutional Law @ 349.
22A Am Jur 2d, Declaratory Judgments @ 48.
51 Am Jur 2d, Lobbying @ 9.

ANNOTATIONS:
The Supreme Court and the right of free speech and press. 2 L Ed 2d 1706.

INTERPRETIVE NOTES AND DECISIONS

Influencing of legislative processes by virtue of distribution of literature to members of public and legislature does not come within term lobbying, since lobbying is influencing of legislative processes by contact with legislators. United States v Rumely (1953) 345 US 41, 97 L Ed 770, 73 S Ct 543.

DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20220

January 8, 1998

MEMORANDUM FOR WILLIAM MARSHALL
ASSOCIATE COUNSEL TO THE PRESIDENT
GENERAL COUNSEL OFFICE

CC: MARTHA FOLEY
NATIONAL SECURITY COUNCIL

FROM: JOSEPH H. GUTTENTAG
DEPUTY ASSISTANT SECRETARY (INTERNATIONAL TAX)

SUBJECT: **International Family Planning**

At our meeting on Tuesday we promised to provide you with some additional materials. Enclosed is an analysis of the different definitions of lobbying in federal laws. We also draw your attention to a portion of the income tax regulations dealing with lobbying activities of section 501(c)(3) organizations which reads as follows:

> "Lobbying communications do not include public discussion, or communications with members of legislative bodies or governmental employees, the general subject of which is also the subject of legislation before a legislative body, so long as such discussion does not address itself to the merits of a specific legislative proposal and so long as such discussion does not directly encourage recipients to take actions with respect to legislation." U.S. Treasury Regulations section 56.4911-2(c)(2).

We have read the Atwood memo which you furnished to us.

We also had promised to respond to certain questions you raised. You inquired as to limitations on U.S. charities which provide funds overseas to organizations which engage in lobbying. First, the IRS takes the position that lobbying a foreign government is the same as lobbying a government in the US for purposes of the limitations imposed by section 501(c)(3). Second, if a U.S. organization provides funds to a foreign entity earmarked for lobbying, the funds would count as lobbying expenses in calculating the U.S. entity's lobbying expense limitations. U.S. law gets rather fuzzy beyond these issues.

Based on our meeting and our understanding of the various issues, our recommendations are as follows:

Proposal

1. We should propose that recipients of AID funds be prohibited from engaging in lobbying.

2. For a definition of lobbying we should refer to section 501(c)(3) of the Internal Revenue Code and the corresponding regulations.

Reasons for Proposal

This approach ties in with the Smith approach but provides a much more limited restriction on lobbying as described in the materials we have furnished to you. In particular, the organizations receiving grants could address issues and propose programs so long as their efforts are not tied to a particular piece of legislation or legislative proposal. Read on however, for our reasons.

Having given further thought to the proposal to limit the restriction to abortion lobbying we vote against it. We think that real enforcement of such a limitation is perilous and unlikely to be effective, and accordingly will come back to haunt us when Congress seeks evidence that we are enforcing the standard. The IRS might even be forced to say that a content-based limitation would be unadministrable. We think that the general limitation is less obtrusive and can be administered without doing a time-consuming detailed review of the content of each lobbying communication. It can be defended on the grounds that we think it wrong to use AID grants to subsidize lobbying of foreign governments. (At the same time we could continue to maintain our domestic opposition to the legislation championed by Congressman Istook which would prevent nonprofits receiving federal grants from engaging in lobbying on the grounds that receipt of a federal grant should not limit an organization's ability to participate in our own democratic process.) The limited abortion lobbying proposal is harder to defend as we are thrusting our policies into the legislative debate in a foreign country. These are issues more in your court than ours.

We also suggest, though this would not be in the original proposal, that foreign entities adversely affected by our proposal could adopt regimes similar to those adopted in the United States of bifurcating activities as we do between a (c)(3) and a (c)(4). Through this mechanism, they could preserve their lobbying activities in organizations that are to no degree supported by U.S. funds.

There is a quick fix on the issues. Give me a call if I can be of any help.

3RD DOCUMENT of Level 1 printed in FULL format.

The Exempt Organization Tax Review

MAY 1997

LENGTH: 10597 words

DEPARTMENT: CONFERENCE NOTES (SPR)

CITE: 16 Exempt Org. Tax Rev. 795

HEADLINE: 16 Exempt Org. Tax Rev. 795 - ANALYSIS OF THE DIFFERING DEFINITIONS OF 'LOBBYING' IN FEDERAL LAW.

AUTHOR: Troyer, Thomas A.,
Boisture, Robert A.,
Lauber, Albert G.
Caplan & Drysdale

SUMMARY:
[*795]

Thomas A. Troyer, Robert A. Boisture, and Albert G. Lauber, all of Caplan & Drysdale, Washington, prepared the report for INDEPENDENT SECTOR in preparation for the anticipated release of a General Accounting Office report on a perceived need to 'harmonize' three definitions of lobbying (under sections 4911 and 162(e)) and the Lobbying Disclosure Act of 1995. They conclude that the definitions serve different purposes and should not be 'harmonized.'

Mr. Troyer presented the report at a briefing hosted by INDEPENDENT SECTOR April 7.

TEXT:
INDEPENDENT SECTOR has asked us to review the subject of the current examination by the General Accounting Office of the differing definitions of the term 'lobbying' in three separate parts of federal law, with a particular view to determining whether any revision of the definition of that term in section 4911 of the Internal Revenue Code, concerning charitable organizations, is desirable. /1/

Our research of the relevant legislative history and other authorities and our analysis of the issues involved lead us to conclude, most importantly, that no such revision is either desirable or appropriate. Accordingly, INDEPENDENT SECTOR urges GAO to recommend that Congress make no such change.

I. Background and Summary of Analysis

INDEPENDENT SECTOR (IS) is a national coalition of public charities, foundations, corporations, and voluntary organizations that serves as a forum to encourage charitable giving, volunteering, and nonprofit initiative. It currently has approximately 800 member organizations.

As part of the Lobbying Disclosure Act of 1995 (the 'LDA'), Congress directed the General Accounting Office to prepare a report comparing the definitions of the term 'lobbying' in three distinct statutory contexts: IRC section 4911, which governs lobbying by certain public charities; IRC section 162(e), which governs lobbying by for-profit businesses; and the Lobbying Disclosure Act, which governs registration of paid lobbyists and public disclosure of their lobbying activities. See 2 U.S.C. section 1610(d)(1). The act also asks GAO to report any statutory changes to the LDA or the code 'that the Comptroller General may recommend to harmonize the definitions. ' Id. section 1610(d)(3).

Our research and analysis strongly suggest that 'harmonization' should not be an important goal in approaching these issues. The definitions of 'lobbying' in section 4911, 162(e), and the LDA belong to separate statutory regimes, animated by wholly different legislative purposes. In each case, Congress defined 'lobbying' in a manner appropriate to the specific and distinct goals it sought to accomplish. Hence, because of the fundamental differences in the policies and purposes underlying the three definitions, IS recommends that GAO report to Congress that 'harmonization' of the three ought not to be an important objective of any congressional reconsideration of them.

Beyond that, our research and analysis disclose that no sound basis exists for revising section 4911. Congress enacted this provision for the plainly stated purpose of encouraging charities to participate more fully in the legislative process within carefully specified limits. The section 4911 definition of 'lobbying' has been carefully crafted, by Congress, the Treasury Department, and the Internal Revenue Service, to achieve that objective. Examination of the legislative histories and purposes of the definitions of 'lobbying' in IRC section

[*796]

162(e) and the LDA -- altogether different as they are from the history and purpose of section 4911 -- demonstrates that their differences from the section 4911 definition afford no justification for change of the section 4911 definition. Accordingly, INDEPENDENT SECTOR urges GAO to recommend that Congress make no such change.

INDEPENDENT SECTOR takes no position on whether the section 162(e) definition should be modified. With a single, limited exception, it also takes no position on whether the LDA definition should be modified. However, to the extent that harmonization is thought desirable despite the different legislative purposes underlying the three laws, analysis indicates that it should be accomplished by aligning the definition of 'lobbying' in section 162(e) more closely with the section 4911 definition in two respects.

II. The Section 4911 Definition of 'Lobbying'

A. Application of the Definition

The definition of 'lobbying' in IRC section 4911 applies only to charitable organizations that have elected to have their legislative expenditures governed by IRC section 501(h). In order to make this election, a charity must be tax-exempt under IRC section 501(c)(3) and must be recognized as a 'public charity' under section 509(a). Thus, the section 4911 definition applies generally to charities that have widespread public support and are eligible to receive tax-deductible contributions. /2/

Public charities, by their nature and tax status, are barred from conferring any sort of private benefit, financial or otherwise. They must be organized and operated exclusively for religious, educational, or other charitable purposes -- all purposes that the law has long determined to serve public, not private, interests. Since its inception, the federal tax law has specified that 'no part of the net earnings' of any charity may 'inure to the benefit of any private shareholder or individual.' IRC section 501(c)(3). Last year Congress amended the code to provide powerful additional assurance -- in the form of so-called 'intermediate sanctions' -- that charities' assets will be strictly confined to use for public purposes. IRC section 4958.

Moreover, section 501(c)(3) has long prohibited charities from engaging in political campaign activities. That bar is strict and absolute. A charity may not contribute to a political campaign; endorse a candidate for public office; or support or oppose a political candidate in any way, directly or indirectly. Nor may a charity contribute to, organize, manage, or be identified with a Political Action Committee (PAC).

A charity that violates any of these rules loses its tax exemption and its qualification to receive tax-deductible contributions. A private party who diverts charitable assets to private benefit becomes subject to a series of sanctions carefully tailored to enforce restoration of those assets to the charity for their intended public purposes. See IRC section 4958. Violation of the political prohibition also triggers penalty taxes on the charity and (in certain circumstances) the individuals who manage it. See IRC section 4955. To afford an additional safeguard, the code grants the IRS the special, highly unusual power to seek prompt court injunctions against proscribed political activities without awaiting the end of the offending charity's tax year, as the IRS must do in most other civil or criminal proceedings. See IRC section 7409.

Consistent with these legal rules requiring charities to operate in the public interest, charities can play critically important roles in the formation of public policy. In providing a vehicle by which individual citizens can come together and express their views on issues of public concern, charities constitute a unique component of our democratic process. In contrast to business interests, ordinary citizens often lack the ability, inclination, or means to participate individually in legislative debates. Thus, when charities bring their members and supporters into the policymaking process, they provide legislators with citizens' views that otherwise would not be expressed. Further, charities often possess data, experience, and expertise, gained through hands-on provision of public services, that can provide legislators key ingredients for fully informed exercise of their legislative functions.

B. Background of Section 4911

1. Prior Law: The 'Substantial Part' Test

In 1934, Congress amended the statutory predecessor of section 501(c)(3) to include the restriction that 'no substantial part' of an organization's activities may constitute 'carrying on propaganda, or otherwise attempting, to influence legislation.'

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The legislative history is scant. /3/ The committee reports contain no description whatever of the grounds for the amendment. In explaining the amendment on the Senate floor, its sponsor, Sen. David Reed, R-Pa., stated that the statutory language 'goes much further than the Senate Finance Committee intended to go' and that the Committee intended the restriction on lobbying to deny deductions only for 'selfish' contributions 'made to advance the personal interests of the giver.' 78 Cong. Rec. 5861 (1934). The language was, however, enacted without refinement or further explanation.

In the four decades between 1934 and the enactment of section 4911, neither the courts nor the IRS ever succeeded in developing a clear definition of the 'substantial part' test. In particular, the IRS and the courts refused to adopt any bright-line standard based on the percentage of an organization's total expenditures devoted to lobbying. See, e.g., Christian Echoes National Ministry v. United States, 470 F.2d 849 (10th Cir. 1972); Haswell v. United States, 500 F.2d 1133 (Ct. Cl. 1974); GCM 36148 (Jan. 28, 1975). Instead, a vague 'facts and circumstances' analysis was applied to determine whether a charity's lobbying was 'substantial,' with inevitably unpredictable results. Besides creating quantitative problems, this approach created uncertainty of a qualitative nature: difficult line-drawing problems arose as judges attempted to distinguish between 'lobbying' and 'educational activities.' See, e.g., Kuper v. Commissioner, 332 F.2d 562 (3d Cir. 1964); League of Women Voters v. United States, 180 F. Supp. 379 (Ct. Cl. 1960).

Not surprisingly, the uncertainty surrounding application of the 'substantial part' test caused most charities to steer altogether clear of legislative debates. This reluctance was exacerbated by the extreme sanction for any miscalculation: revocation of the charity's tax exemption and its qualification to raise tax-deductible contributions. In practical terms, the 'substantial part' test thus erected a near-absolute bar against charities' participation in the formation of public policy.

2. The Enactment of Section 4911

In 1971, Congress began what became a six-year effort to address the fundamental irony inherent in recognizing charities' essential contribution to public welfare, while simultaneously denying them any meaningful role in formulating public policy. In March 1971, Sen. Muskie, D-Maine, introduced the first of a succession of bills designed to clarify and liberalize the tax-law restriction against lobbying by public charities -- and thus encourage them to participate more fully in the legislative process at the national, state, and local levels. S. 1408, 92d Cong., 1st Sess. (1971). The legislative history leaves no doubt about the purpose of this congressional initiative:

Senator Muskie:

> 'It makes no sense to decide that these organizations operate in the public interest and grant them tax-exempt status and then silence them when they attempt to speak to those who must decide public policy.' 117 Cong. Rec. 8517 (1971).
> 'These organizations can be a valuable source of information; they can broaden legislators' understanding of proposed legislation, and they can suggest valuable legislative alternatives.' 121 Cong. Rec. 42028 (1975).

Sen. Nelson, D-Wis.:

'The present law governing legislative activities of public charities is unduly restrictive, difficult to administer, and undemocratic. The present law effectively inhibits a diverse, informed, and important segment of our society from presenting its views either to Congress or State and local legislative bodies, and deprives legislators of the experience and knowledge of these charities.' 119 Cong. Rec. 5746 (1973)

' Charities represent the public in many important areas such as health, education, and the environment. These groups have much information to contribute and a wide range of helpful experience that could greatly assist the consideration and enactment of this country's laws.' 119 Cong. Rec. 5749 (1973).

Sen. Bob Dole, R-Kan.:

'Charities can be and should be important sources of information on legislative issues.' 121 Cong. Rec. 42032 (1975).

Rep. Barber Conable, R-N.Y.:

'The role of the charities in a pluralistic society -- something we are all dedicated to -- is constructive and the charities should not be muzzled.' 119 Cong. Rec. 42632 (1973).

The process by which Congress codified its intent to encourage lobbying by charities was careful and deliberate. In 1972, bills designed to achieve this objective were introduced in both the House and the Senate. See S. 3036, 92d Cong., 2d Sess. (1972); H.R. 13270, 92d Cong., 2d Sess. (1972). The Ways and Means Committee held three full days of hearings on the subject, and more than 100 witnesses submitted testimony. See Hearings on H.R. 13720 Before the House Comm. on Ways and Means, 92d Cong., 2d Sess. (May 3-5, 1972). Representatives of leading charitable institutions testified about their capacity to make useful contributions to the consideration of public policy -- specifically, legislative policy -- and urged the Committee to allow them sufficient freedom to make those contributions. Members of Congress, the Chairman of the ABA Tax Section, the Chairman of President Nixon's Council on Environmental Quality, and a wide range of other witnesses testified in favor of liberalizing the existing tax restraint on charities' legislative activities. Id.

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At least eight other bills with the same objective were introduced during the next four years. After numerous revisions of the draft legislation, additional hearings were held in 1976. See Hearings on H.R. 13500 Before the House Comm. on Ways and Means, 94th Cong. 2d Sess. (May 12, 1976). The Coalition of Concerned Charities, consisting of some 80 public charities, expressed its support for the final bill. The Treasury Department supported the bill without reservation, stating its understanding that the bill comprised both a clarification and a liberalization of existing law. Id. at 10-12 (statement of William M. Goldstein, Dept. Asst. Sec'y for Tax Policy).

The statute that emerged from this painstaking process -- IRC section 4911 and its companion provision, IRC section 501(h) -- enjoyed broad bipartisan support. Chairman Ullman, D-Ore., had long been a vigorous proponent of the legislation. The Committee's senior Republican, Rep. Barber Conable, led the effort to press the legislation to enactment and introduced the final bill. Among the members of the Ways and Means Committee who sponsored that bill were

Reps. Gibbons, D-Fla.; Rangel, D-N.Y.; Vanderjagt, R-Mich.; and Frenzel, R-Minn. The 43 Senators who joined in sponsoring the Senate version included Sens. Muskie; Dole; Baker, R-Tenn.; Cranston, D-Calif.; Stevens, R-Alaska.; and Leahy, D-Vt. The bill passed both Houses of Congress without opposition.

C. The Section 4911 Statutory Framework

Under section 4911 and its companion provision, section 501(h), eligible public charities can elect to have the limitation on their lobbying specified in dollar terms, with the limits computed as fixed percentages of the organization's annual charitable-purpose expenditures. The overall lobbying ceiling equals 20 percent of the first $ 500,000 of such charitable expenditures. The percentage declines as expenditures rise, and the ceiling reaches a maximum allowance of $ 1 million per year for organizations with annual budgets exceeding $ 17 million. /4/ Only 25 percent of this amount may be devoted to 'grassroots' lobbying. Expenditures that exceed either the grassroots or overall lobbying limits are subject to a 25 percent penalty tax. An organization loses its tax-qualified status if it exceeds either of these ceilings by more than 50 percent over a four-year period.

The linchpin of this regime is the section 4911 definition of 'lobbying.' Under this definition, 'influencing legislation' includes both 'grassroots' and 'direct' lobbying, defined as follows:

> Grassroots: 'any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof' IRC section 4911(d) (1)(A) .
> Direct: 'any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation' IRC section 4911(d)(1)(B) .

The statute defines 'legislation' to include 'action with respect to Acts, bills, resolutions, or similar items by the Congress, any State legislature, any local council, or similar governing body, or by the public in a referendum, initiative, constitutional amendment, or similar procedure' IRC section 4911(e)(2) .

Section 4911 also codifies five important exceptions to the definition of lobbying. Thus, even if a communication would constitute 'lobbying' under the general definitions above, it is excluded by IRC section 4911(d)(2) if it falls within any of the following categories:

(A) Making available the results of 'nonpartisan analysis, study, or research';
(B) Providing 'technical assistance' to a governmental body (or committee thereof) in response to a written request from that body;
(C) Appearances before, or communications to, a legislative body with respect to legislation affecting 'the existence of a charity , its powers and duties, tax-exempt status, or the deduction of contributions to it ';

(D) Certain communications with a charity's members concerning legislation of interest to them; and

(E) Communications with executive branch officials and employees, unless the primary purpose is to influence legislation.

These exceptions have a long history in the tax law affecting charities. The phrase 'nonpartisan analysis, study, or research' entered the tax law in 1959 as an exception to a regulatory description of 'action' organizations. See Treas. reg. section 1.501(c)(3)-1(c)(3)(iv). In 1969, Congress enacted IRC section 4945(e), which defines 'lobbying' for purposes of the ban against legislative activities by private foundations. Like section 4911, section 4945(e) defines 'lobbying' to exclude 'nonpartisan analysis,' 'technical assistance,' self-defense lobbying, and executive-branch communications. (Because private foundations rarely have members, an exception for membership communications was not included in section 4945(e)). Both the legislative history and subsequent IRS interpretations indicate that Congress viewed section 4945(e) -- and the exceptions in particular -- as codifying existing law that was applicable to all charities, not just private foundations. See S. Rep. No. 91-552, 91 Cong. 1st Sess. 48 (1969); Technical Memorandum of Treasury Position on H.R. 13270, at 11 (Sept. 30, 1969). Accord GCM 36127 (Jan. 2, 1975); GCM 34289 (May 3, 1970).

D. The Treasury Department Regulations

In 1986, the Treasury Department issued proposed regulations defining 'lobbying' for purposes of section 4911. Prop. reg. section 56.4911-2 (1986). This definition was drawn almost verbatim from regulations that Treasury had proposed in 1980, under section 162(e) of the code, to define

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'lobbying' by for-profit businesses. See Prop. reg. section 1.162- 20(c)(4) (1980). The 1986 proposed regulations thus represented an early effort by Treasury to harmonize the definitions of 'lobbying' applicable respectively to business taxpayers and to charities.

The 1986 proposed regulations defined 'lobbying' broadly, using terms that commentors found vague and difficult to apply. Specifically, the proposed regulations defined 'lobbying' to include communications that merely 'pertained' to legislation. They also treated any communication pertaining to legislation (other than 'academic or scientific' material) that was distributed to the public as grassroots lobbying, whether or not the communication urged recipients to take any action on legislation.

The response to the proposed regulations was immediate and overwhelmingly negative. By the spring of 1987, Treasury and the IRS had received well over 4,000 written comments on the 1986 proposals, almost all of which urged that they be withdrawn or modified. Congress itself was sharply critical of Treasury's first attempt to interpret section 4911, finding the proposed regulations at odds with the clarifying and remedial purposes of the 1976 legislation. In an extraordinary display of congressional unanimity, the Senate Finance Committee, the House Ways and Means Committee, and the Senate Committee on Appropriations each sent letters to the IRS in early 1987 urging that the proposed regulations be withdrawn. /5/ Numerous other members of Congress wrote individual letters to the same effect. /6/

These letters criticized the proposed regulations for reintroducing into the tax law the very ambiguity -- and resulting deterrent to charities' active participation in the legislative process -- that Congress had sought to eliminate by enacting section 4911 in 1976. Members of Congress objected strongly to Treasury's proposed definition for its overbreadth, noting that it swept into 'lobbying' many educational and permissible advocacy activities that charities had traditionally conducted. The letters insisted that the section 4911 definition of 'lobbying' had to be sufficiently clear to allow charities to participate in public policy debates with confidence that they would not be putting their tax-qualified status at risk. The following excerpts are representative of the views expressed by Congress:

Senate Finance Committee:

' Sections 501(h) and 4911 , enacted with strong bipartisan support, clarified the lobbying rights of nonprofit groups. We are concerned that the proposed regulations do the opposite. They appear to introduce ambiguity about what activities constitute lobbying by such groups and we feel they restrict lobbying in ways not intended by the 1976 Act.' Finance Comm. Letter, at 1

House Ways and Means Committee:

'The proposed regulations have already dramatically affected the operations of many public and private charitable organizations by inhibiting their traditional educational and advocacy and fund raising activities. * * * Members of Congress depend on information provided by nonprofit organizations. Their information and expression of opinion enrich our ability to make well-informed public policy decisions. Any administrative decision by the Service that would inhibit the ability of these organizations to conduct their legitimate exempt activities would constitute a disservice to all.' W&M Comm. Letter, at 1.

Senate Appropriations Committee:

' T he proposed rules are so ambiguous and broad that they threaten to severely limit present beneficial activities of public charities. Specifically, the regulations' definition of grassroots lobbying and the inclusion of education and research under the lobbying umbrella could serve to undermine much of the important work carried out by public charities.' Appropriations Comm. Letter, at 1.

Rep. Brooks, D-Texas:

'Public charities are the situs of an enormous wealth of expertise and information on matters of vital interest to this nation. To prevent these groups from sharing their expertise and information with the general public would be tragic. To prevent them sharing their expertise and information with federal, state, and local legislators -- the makers of this nation's policy -- would be disastrous.' Letter from Chairman Brooks to Commissioner Gibbs (Feb. 19, 1987), at 1.

By April 1987, it was clear that the proposed regulations were unacceptable, and IRS instructed its examiners to use pre-1986 standards until revised final regulations were issued. IRS Announcement IR-87-49 (April 9, 1987). Public hearings were held, and IRS Commissioner Gibbs established an Exempt Organization Advisory Group to provide assistance with the redrafting process. See IRS News Release (IR-87-71)

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(June 3, 1987). Former IRS Commissioner Donald C. Alexander chaired the Advisory Group, which included legal experts and academics specializing in the exempt organization field and representatives of tax-exempt charities (including INDEPENDENT SECTOR). Id. In December 1988, after several public meetings of the Advisory Group, Treasury issued revised proposed regulations interpreting section 4911.

Treasury solicited and received additional public comments on the revised proposed regulations, and an additional public hearing was held on them. See Preamble to the 1990 Final Regulations, 55 Fed. Reg. 35579, 35580 (1990). The Commissioner's Exempt Organization Advisory Group met further. Building on this additional analysis and commentary, the Treasury and IRS drafters worked out further revisions and refinements of the 1988 proposals. The process culminated in the finalization of regulations in 1990. Id.

The 1990 regulations, which remain in effect, consist of a carefully organized and articulated set of rules establishing objective and generally easy-to-apply criteria for determining whether an activity is, or is not, lobbying. In contrast to the 1986 proposed regulations, which defined lobbying to include any communication 'pertaining to' legislation, the 1990 regulations provide that a communication will be lobbying only if it 'refers to specific legislation' and 'reflects a view on such legislation.' Treas. reg. section 56.4911-2(b)(1)(ii). 'Specific legislation' is defined to include both pending bills and 'specific legislative proposal s .' Treas. reg. section 56.4911-2(d)(1)(ii). Furthermore, a communication does not constitute grassroots lobbying unless it contains a 'call to action' -- generally, an encouragement for members of the public to contact legislators. See Treas. reg. section 56.4911-2(b)(ii). Each of these rules is extensively illustrated by examples.

A second key aspect of the current regulations is the detailed guidance they provide for the allocation of expenditures (in whole or in part) to lobbying. In general, charities must count as lobbying expenditures all direct costs of producing a lobbying communication (including salaries and deferred compensation), as well as an allocable share of overhead costs. See Treas. reg. section 56.4911-3(a)(1). The regulations also deal with the issue of when the subsequent legislative use of nonlobbying materials, such as 'nonpartisan analysis,' will cause the cost of producing such materials to be allocated in part to lobbying. See Treas. reg. section 56.4911-2(b)(v). These rules provide unambiguous directions to charities about how to characterize the various aspects of their operations which bear on legislation and on the computation of their permissible lobbying amounts.

In sum, the legislative history of section 4911, amplified by the congressional reaction to the 1986 proposed regulations, makes three points abundantly clear:

First, Congress in enacting section 4911 intended to clarify and liberalize the tax-law restrictions on charitable lobbying. Congress accordingly insisted that the term 'lobbying' should be defined as unambiguously as possible and in a manner that did not inhibit charities from expressing their views on public policy.

Second, all but one of the exceptions to the definition of lobbying incorporated in section 4911(e)(2) -- in particular those for 'nonpartisan analysis,' 'technical assistance,' and 'self-defense' -- had been part of the tax law for many years. /7/ Those exceptions cover educational work, research, policy analysis and other activities which have long been part of charities' essential public-service mission. In its 1987 reaction against Treasury's first proposed regulations, Congress strongly reaffirmed its intention that such activities should not be swept into the definition of charitable lobbying.

Third, Congress made its intent clear that 'lobbying' by charities should appropriately be defined more narrowly than 'lobbying' by for-profit businesses. Section 4911 on its face includes five exceptions to lobbying that have no counterpart in section 162(e). And Congress explicitly stated that Treasury's 1986 definition of 'lobbying' for charities was too broad, even though it mirrored the definition that prior regulations had developed for business taxpayers.

III. The Section 162(e) Definition of 'Lobbying'

The Lobbying Disclosure Act directs GAO to consider a second tax-law definition of lobbying, that contained in section 162(e). Unlike the lobbying provisions affecting charities, section 162(e) does not prohibit businesses from lobbying, nor does it limit the amount of lobbying they may do. Rather, it denies a deduction for lobbying costs as an 'ordinary and necessary' business expense. As explained more fully below, section 162(e) was a revenue-raising provision designed principally to discourage business lobbying. As befits a code provision designed to discourage lobbying rather than to encourage it, the section 162(e) definition of 'lobbying' is more inclusive than the section 4911 definition for charities. Any objective comparison of the two definitions must recognize the quite different -- indeed, largely contrary -- roles that these two provisions play in the tax law.

A. The Section 162(e) Statutory Framework

Section 162(e), as amended in 1993, generally bars taxpayers from claiming a business expense deduction for state and federal lobbying costs. The only exceptions to this otherwise blanket disallowance are communications directed to 'local councils' and de minimis lobbying entailing costs of less than $ 2,000 per year. See IRC section 162(e)(2) & (5)(B). Specifically, section 162(e)(1) provides that no deduction shall be allowed for:

Influencing legislation;
Any attempt to influence the general public, or segments thereof, with respect to elections, legislative matters, or referendums; or

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> Any direct communication with a covered executive branch official in an attempt to influence his or her official actions or positions. 'Covered executive branch officials' are defined narrowly to include only the president, vice president, key White House officers, cabinet-level officials, and certain other high-level individuals. IRC section 162(e)(6).

The section 162(e) definition of 'lobbying' has some points in common with the section 4911 definition. The term 'legislation' in section 162(e)(4)(B) is defined by cross-reference to section 4911(e)(2). And the meaning of 'influencing legislation' in section 162(e)(4)(A) follows verbatim the definition of direct lobbying in section 4911(d)(1)(B).

Significantly, however, section 162(e) includes none of the five exceptions to lobbying found in section 4911(d)(2). Thus, businesses may not deduct the costs of preparing and distributing 'nonpartisan analysis'; of furnishing 'technical assistance' to a legislative body; or of lobbying in their own self-defense. Further, the costs of high-level executive branch contacts are nondeductible by businesses even if those contacts do not concern legislation.

The legislative history shows that Congress considered including in section 162(e) a variety of exceptions to the definition of 'lobbying.' The Conference Report discusses the section 4911 exceptions at some length. See H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. 598-599 (1993). A 'technical assistance' exception modeled on section 4911(d) (2)(B) was included in the House bill. See H.R. Conf. Rep. No. 103-213, supra, at 601. And a range of exceptions to the definition of executive branch lobbying were contained in the Senate amendment. See id. at 602-603. As the report explains, however, ' t he conference agreement does not include any of the statutory exceptions to the general disallowance rule,' apart from a narrow exclusion for communications compelled by law or subpoena. Id. at 607. Congress thus made a deliberate decision to define 'lobbying' more broadly in section 162(e) than in section 4911.

B. Congress's Purpose in Amending Section 162(e)

Prior to 1993, businesses had been allowed to deduct the costs of direct (but not grassroots) lobbying with respect to legislation of 'direct interest to the taxpayer.' See Treas. reg. section 1.162-20(c)(2). Congress's reasons for eliminating this deduction are not discussed in the committee reports, but they can easily be surmised. In proposing the amendment, the administration stated that ' t he deduction for lobbying expenses inappropriately subsidizes corporations and special interest groups for intervening in the legislative process.' Department of the Treasury, Administration Revenue Proposals 45 (February 1993).

Important impetus for eliminating the lobbying deduction for businesses stemmed from the 1992 presidential campaign, which focused negative attention and public hostility on paid lobbyists. Featuring prominently in that campaign were charges that persons with money -- and thus the ability to buy influence -- were able to obtain governmental favors unavailable to ordinary citizens. This political atmosphere made the lobbying deduction for business a natural target for elimination.

Further, Congress viewed a subsidy for business lobbying as inappropriate during a time of fiscal constraint:

> The Committee has determined that in the context of deficit reduction, it is appropriate to limit the business deduction for lobbying expenses. H.R. Rept. 103-111, 103rd Cong., 1st Sess. 659 (1993).

Congress and the administration, in other words, assumed that businesses have sufficient motivation and resources to lobby wholly apart from any tax incentive, and simply withdrew the federal subsidy for that activity. Unlike section 4911, section 162(e) imposes no limit or restriction on taxpayers' ability to lobby: businesses have always been able to lobby, both at the direct and the grassroots levels, to a degree limited only by their resources. Section 162(e) requires only that the expenses associated with their lobbying be paid with post-tax, as distinguished from pre-tax, dollars.

C. The Rationale for Defining Business and
Charitable Lobbying Differently

In view of its different legislative purposes, it is hardly surprising that Congress deliberately defined 'lobbying' more expansively in section 162(e) than in section 4911. Congress enacted section 4911 to encourage charities to participate more fully in the legislative process, subject to specified dollar limits on their expenditures. Since Congress wished to give charities broad scope for lobbying within those limits, Congress naturally defined 'lobbying' relatively narrowly. By contrast, the 1993 amendment to section 162(e) was a revenue-raising measure aimed at discouraging business lobbying by increasing its after-tax cost. Given those legislative goals, a more expansive definition of lobbying is exactly what one would expect.

The quite different effects that section 162(e) and section 4911 have on the organizations to which they apply also explain the different definitions of 'lobbying.' Section 4911 categorically bars charities from engaging in legislative activities beyond specified dollar limits -- on pain of losing their tax exemption and qualification to raise tax-deductible contributions. The effect of defining lobbying more broadly in section 4911, therefore, would be flatly and entirely to curtail the amount of lobbying charities can do. Section 162(e), by contrast, while requiring businesses to fund their lobbying with after-tax dollars, leaves them free to lobby as much as they wish. A broader definition of business lobbying thus has no preclusive effects; it simply raises the cost of lobbying at the margin by 35 percent.

The chief differences between the definitions of business and charitable lobbying arise from Congress's decision not to include in section 162(e) any of the five exceptions to lobbying that are contained in section 4911(d)(2). The absence of these exceptions is explained by the different legislative purposes animating the two provisions, as well as by key distinctions between businesses and charities.

The exception for 'nonpartisan analysis' (IRC section 4911(d)(2)(A)) has been well established in the charitable
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tax law since as early as 1959. It covers educational activities traditionally performed by charities. That is also at least very largely true of the 'technical assistance' exception. In enacting these exceptions, Congress guarded against the risk of inhibiting charities' performance of activities lying at the core of their public-service mission. By contrast, educational activities are no more than peripheral to the purposes of most for-profit corporations. And section 162(e) in any event does not prohibit businesses from engaging in legislatively directed educational activities; it simply increases their after-tax cost.

The exception for 'self-defense' lobbying (IRC section 4911(d)(2)(C)) is a necessary corollary of the section 4911 statutory framework, which categorically prohibits lobbying beyond specified dollar limits. Were it not for this exception, a charity that petitioned Congress to protect its tax-exempt status could face the risk of losing its exemption by the very act of lobbying. /8/ Section 162(e), on the other hand, leaves business taxpayers free to lobby as much as they want, and there is little risk that they will be deterred from lobbying in their own self-defense by the necessity of using after-tax dollars.

As distinguished from section 4911(d)(2)(E), restricting the limits on charities' direct lobbying to contacts with legislators, their employees, and executive branch personnel participating in the legislative process, section 162(e)(6) includes high-level executive branch contacts within the scope of business lobbying even if those contacts do not concern legislation. This difference is traceable to one of Congress's key purposes in amending section 162(e): to end the suspicion that moneyed interests can use tax-subsidized expenditures to buy governmental favors unavailable to ordinary citizens. That risk theoretically exists with high-level executive branch officials no less than with the legislative branch, and section 162(e) accordingly covers both. Charities, by contrast, have never been perceived as attempting to 'buy influence,' and this congressional purpose thus has no application to section 4911.

The exception for membership communications (IRC section 4911(d)(2)(D)) has no direct application to business taxpayers; and if by analogy it were extended to communications between business corporations and their shareholders, it could produce serious erosion of the fundamental section 162(e) rule. It is, accordingly, absent from section 162(e).

Congress's decision to treat business and charitable lobbying differently rests on sound policy grounds. A key basis for the difference is the essentially different legal character of the organizations involved. Businesses entities, by their very nature, exist to produce private benefit; and that motive virtually guarantees their commitment of time and resources to lobbying. The laws that govern charities, on the other hand, confine them strictly to public purposes; and those purposes can make them a uniquely valuable resource for the legislative process.

Again, when charities do lobby, their voices are far more muted than those of business groups. A recently completed IS survey of the Lobbying Disclosure Act reports of Fortune 500 companies for the first six months of 1996 and charitable organization reports to the IRS of lobbying expenditures for all of 1992 (the latest year for which IRS data are available) discloses Fortune 500 lobbying expenditures totaling approximately $ 208 million, compared with total charitable lobbying expenditures of $ 52 million. This survey is far from definitive; indeed, its results provide only the roughest of approximations of the lobbying expenditures of the two classes of organizations. But when one bears in mind that (1) the $ 208 million total for the Fortune 500 is for six months only, and the total for charities is for a full year, (2) the total for the Fortune 500 includes only federal lobbying, while the total for charities is for lobbying at the federal, state, and local levels, and (3) the Fortune 500 reports represent only a fraction of total business lobbying even at the federal level, while the figure reported for charities represents at least most of the charitable universe, /9/ it is difficult to escape the conclusion that businesses' lobbying expenditures are massively larger than charities'.

For all of these reasons, then, there is sound justification for Congress's decision to define lobbying more expansively for businesses than for charities; and 'harmonization' of the two definitions would be fundamentally contrary both to the policy differences underlying the two sections and to their specific, quite distinct purposes.

However, to the extent that greater harmonization of the two definitions is thought desirable, that objective would seem better accomplished by aligning section 162(e) more closely with section 4911 than the reverse. The deliberately broad definition of section 162(e) is inherently inconsistent with the purpose of section 4911 to encourage charities to participate robustly in the legislative process. On the other hand, two specific revisions of the section 162(e) definition appear possible within the policy of that section. So long as the stringent requirements for 'nonpartisan analysis, study,

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or research' are met, the preparation and distribution of such materials by businesses may yield public benefit for the legislative process without significantly undermining the section 162(e) goal of ruling out lobbying subsidized by the government. Again, the section 4911 exception for 'technical assistance' provided to government bodies at the written request of those bodies would seem sufficiently under the control of the requesting government entities to leave limited margin for the promotion of special interests and, at the same time, to possess a realistic possibility of advancing public interests in the functioning of the government bodies involved. Hence, modification of the section 162(e) definition on these two points, derived from the section 4911 definition, would seem possible without serious dilution of the policies underlying section 162(e).

IV. The Definition of 'Lobbying' in the Lobbying Disclosure Act

Congress has also asked GAO to address a third definition of 'lobbying,' that contained in the LDA itself. See 2 U.S.C. section 1601 et seq. Congress's reasons for enacting this legislation are stated plainly in the statutory text. Section 1601 specifies that Congress enacted the LDA to make the process of representative government work better -- and increase public confidence in the integrity of that process -- by requiring public disclosure of paid lobbyists' efforts to influence government action. See also S. Rep. No. 103-37, 103d Cong., 1st Sess. 23 (1993). In the words of Sen. Cohen, R-Maine, the legislation aimed to address the public's suspicion that 'high paid hired guns' gain preferential access to public officials 'behind the closed doors of government.' Ibid. The LDA achieves its objective by requiring paid lobbyists to register with Congress and file semiannual statements listing their lobbying activities and the amount of money spent on them. The LDA does not restrict lobbying in any way, nor does it affect (apart from paperwork and bookkeeping costs) the after-tax costs of lobbying. Simply put, the LDA is a 'sunshine law.'

A. The LDA Statutory Framework

The LDA defines 'lobbying' to include both 'lobbying contacts' and efforts in support of such contacts, including planning activities, research, and other background preparatory work intended, at the time performed, for use in lobbying. See 2 U.S.C. 1602(7). Subject to the exceptions noted below, lobbying contacts include all oral or written communications by a person who is a lobbyist /10/ with 'covered officials' in the executive or legislative branch concerning the formulation, modification, or adoption of federal legislation, regulations, executive orders, or other policy positions. 2 U.S.C. 1602(8). Lobbying also includes contacts with a 'covered official' concerning: (1) the negotiation, award, or administration of a federal program, policy, contract, grant, loan, permit, or license; and (2) nominations subject to Senate confirmation. Ibid. The legislative history makes clear that 'lobbying' for LDA purposes includes only direct lobbying; grassroots lobbying does not trigger registration or reporting under the act. 141 Cong. Rec. S10511, S10550-S10551 (daily ed. July 24, 1995) (statements of Sen. McConnell, R-Ky., and Sen. Levin, D-Mich.).

The LDA defines 'covered legislative branch officials' broadly to include Members of Congress and their staffs, as well as staff of any congressional committees or caucuses. 2 U.S.C. section 1602(4). The term 'covered executive branch official' is defined considerably more broadly than in section 162(e): it includes not only White House and cabinet-level officials, but also personnel at or above the assistant secretary or deputy director level, as well as high-ranking military personnel. 2 U.S.C. section 1602(3). Contacts with less senior federal officials -- even if expressly intended to influence government action -- do not constitute lobbying contacts and, thus, are not subject to reporting under the LDA.

The LDA expressly excludes from the definition of 'lobbying contact' 19 different types of communications. See 2 U.S.C. section 1602(8)(B). The following exceptions have greatest practical significance: statements to the media; ministerial contacts involving no attempt to influence legislation; testimony presented to congressional committees or subcommittees; written responses to specific oral or written requests from covered officials; responses to published government requests for public comments; and communications filed in (or otherwise included in the record of) any public proceeding.

B. Rationale for the LDA's Distinct Definition of 'Lobbying'

Generally, the LDA definition of 'lobbying' is narrower, in two respects, than the section 4911 and section 162(e) definitions: it excludes lobbying at the state and local levels, /11/ and it excludes all grassroots lobbying. Grassroots lobbying, by its nature, does not raise concerns about 'closed door' dealings between moneyed private interests and public officials; and in view of its purpose to deal with that concern, Congress appropriately excepted such lobbying from the act. Again, the prior registration law which the act was designed to replace concerned only federal lobbying, and in developing the act, Congress made no effort to address the complex issues of federalism which would attend national regulation of state and local lobbying. Hence, state and local lobbying also falls properly outside the LDA.

On the other hand, the LDA defines lobbying at the federal level more broadly than either section 4911 or section 162(e). The differences are numerous and often technical. For present purposes a summary of the most significant variations will suffice. The LDA defines 'lobbying' to include communications about policy initiatives, even though they have not yet become sufficiently concrete to constitute 'specific legislative proposals' within the meaning of sections 4911 and 162(e).

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The LDA covers attempts to influence executive branch action on matters unrelated to legislation; such attempts are excluded from 'lobbying' altogether by section 4911, and are covered by section 162(e) to a lesser extent. The LDA definition, unlike section 162(e), incorporates several 'technical assistance' exceptions. But their scope differs from the 'technical assistance' exception applicable to charities under section 4911(d)(2)(B). In the case of charities, technical assistance may take the form of written responses or (as is often the case) of participation by charities' personnel in brainstorming sessions with committee staffs. The LDA, on the other hand, excludes only written responses; participation in oral give-and-take discussions appear to be reportable.

Most of these differences are easily understandable in light of the wholly different purposes that section 4911, section 162(e), and the LDA were enacted to serve. As a sunshine law, the LDA is designed to bring paid lobbyists' governmental contacts out from behind closed doors. This purpose is best served by a broad definition reaching all circumstances in which such efforts might conceivably occur. As the legislative history observes, previous disclosure statutes had failed precisely because their coverage was too narrow. See, e.g., S. Rep. No.103-37, supra, at 24. The breadth of the LDA definition is also justified by the modest burdens it imposes: broader registration and reporting requirements. By contrast, the effect of defining 'lobbying' more broadly under section 162(e) would be to increase businesses' after-tax lobbying costs and, under 4911, to prohibit some charitable lobbying altogether.

The legislative history explains the LDA's more expansive definition of executive branch lobbying. The HUD/Wedtec scandal, which involved government contracts rather than legislation, appears to have been an archetype for the activity Congress intended the LDA to bring to light. See 141 Cong. Rec. S10511, S10550 (statement of Sen. Levin). The Wedtec case dramatically illustrated that influencing administrative action, no less than influencing legislative action, falls naturally within the ambit of a sunshine statute like the LDA.

As Congress explicitly noted, the broad LDA definition of 'lobbying' follows from the purposes underlying that law, and it was not intended to reflect any judgment about the narrower scope of the section 4911 definition of that term. As stated in the 1993 Senate Report:

> The Committee recognizes that the Internal Revenue Code uses a different definition of lobbying, which excludes lobbying on matters other than legislation. In crafting a broad definition of lobbying for the purpose of ensuring that efforts to influence Congress and the executive branch are subject to public scrutiny, we do not intend to suggest that the definitions currently in use in the Internal Revenue Code are deficient. Unlike this bill, the Internal Revenue Code is not primarily intended for the purpose of ensuring public disclosure, and the Committee recognizes that the different purposes of the tax law justify a different definition of lobbying. S. Rep. No. 103-37, supra, at 29.

This judgment by Congress is surely correct. In each instance where the section 4911 and LDA definitions differ, the differences are clearly justified by reference to congressional intent. For example:

> Given the LDA's broad prophylactic purpose, 'lobbying' is appropriately defined to include communications concerning policy initiatives even before they have ripened into pending or proposed legislation. But it would be wholly contrary to Congress's intent to inject such ambiguity into the section 4911 definition of 'lobbying,' which appropriately includes only communications concerning 'specific legislative proposals' and legislation already pending in a legislative body. As the congressional letters to Treasury and the IRS in reaction against the proposed 1986 regulations repeatedly emphasize, a major reason for the enactment of section 4911 was the need for a clear and objective definition of 'lobbying' in order to encourage charities to participate confidently in legislative debates. /12/
>
> The exception for 'nonpartisan analysis, study, or research' (IRC section 4911(d)(2)(A)) in the tax law avoids inhibiting charities' performance of educational activities at the core of their public-service mission. That risk does not arise in the case of paid business lobbyists covered by the LDA. Congress's fundamental objective in the LDA was to expose the extent of such lobbyists' legislative contacts, without regard to the character of those communications.
>
> Prompted in part by the Wedtec scandal, the LDA appropriately defines 'lobbying' to include high-level executive branch contacts. Section 4911(d)(2)(E), by contrast, excepts such contacts from the definition of 'lobbying' unless they explicitly concern legislation. The tax law has never limited charities' ability to engage in such executive branch communications, and charities have never been accused of abuses in that arena. From the time of the Slee decision in 1930, the tax limitations on lobbying have been concerned exclusively with attempts to influence legislation. Many federal agencies

> rely heavily on charities as service providers and sources of information (as do executive and administrative bodies at the state and local levels). If charities were required to include the costs of such executive branch contacts under their lobbying ceilings -- ceilings that are relatively modest, have been heavily eroded by inflation, and in any event were enacted to cover legislative action only -- a number of charities might well be forced to curtail significantly their participation in the legislative process. That result would be plainly inconsistent with Congress's intent in enacting section 4911.

The unique and relatively broad definition of 'lobbying' set forth in the LDA, then, is specifically suited to Congress's prophylactic purpose in enacting that law.

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From the standpoint of public charities, moreover, there is little need to 'harmonize' the LDA definition with the section 4911 definition to reduce duplicative paperwork requirements. Congress has already recognized that requiring charities to compute their lobbying expenditures under two different definitions would be burdensome. The LDA accordingly allows charities which have filed a section 501(h) election to use the section 4911 definition of 'lobbying' when they report their lobbying expenditures to Congress. See 2 U.S.C. section 1610. INDEPENDENT SECTOR supported this latter provision of the LDA while the act was under consideration in Congress, and it continues to do so now.

Conclusion

The definition of 'lobbying' contained in section 4911 has resulted from a long and deliberate effort by Congress, the Treasury Department, and the Internal Revenue Service to craft rules that encourage charities to participate in the legislative process within carefully stated limits. The definitions of 'lobbying' in section 162(e) and the LDA are components of very different statutory schemes, animated by very different legislative purposes. In each case, Congress has defined 'lobbying' in a manner appropriate to the particular goals it sought to accomplish. An effort to 'harmonize' the definitions would very likely do violence to the policies and purposes underlying one or more of the statutory regimes. Accordingly, INDEPENDENT SECTOR recommends that GAO report to Congress that 'harmonization' should not be an important objective of any congressional reconsideration of the definitions.

Furthermore, INDEPENDENT SECTOR urges GAO to recommend that Congress make no change in section 4911. The clear and unique legislative intent underlying this section, coupled with the long and painstaking work of Congress, Treasury, and the IRS to carry out that intent, solidly supports the distinct definition of 'lobbying' applicable to public charities.

INDEPENDENT SECTOR takes no position on whether the definition of 'lobbying' contained in section 162(e) should be modified. It urges retention of the LDA provision permitting charities which elect the section 4911 definition for tax purposes to use that definition for LDA purposes also; but it otherwise takes no position on whether the LDA definition should be revised. To the extent that harmonization of the definitions is thought desirable despite the critical examination of that objective here, analysis reveals that it should be accomplished by aligning the definition of 'lobbying' in section 162(e) more closely with the definition in section 4911 in two specific respects.

/1/ Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1986, as amended (the 'code' or 'IRC'). All references to regulations are to the Treasury regulations in effect under the code (Treas. reg.). The terms 'charity' and 'charitable' are used in their generic sense throughout, including all organizations described in IRC section 170(c)(2).

/2/ Certain entities, despite their status as public charities, are not eligible to elect coverage under IRC section 501(h). They include churches and their affiliates (which raise special First Amendment concerns); organizations engaged in testing for public safety; and section 509(a)(3) supporting organizations operated to benefit labor unions, trade associations, and social welfare organizations exempt under section 501(c)(4).

/3/ A leading case antedating the statutory amendment distinguished between lobbying for general social reform (which it found impermissible) and lobbying on legislation that would directly affect a charity's ability to carry out its charitable purposes (which the court found permissible). Slee v. Commissioner, 42 F.2d 184 (2nd Cir. 1930), aff'g 15 B.T.A. 710 (1929). In contemporary terms, the Slee decision established a broad version of the 'self defense' exception that Congress ultimately incorporated in section 4911.

/4/ Section 4911 was enacted before Congress began routinely to index tax provisions for inflation, and as a result the real value of the lobbying expenditure limits has been eroded by more than 60 percent.

/5/ See letter from Sen. Moynihan, D-N.Y., et al. to IRS Commissioner Lawrence B. Gibbs (Feb. 24, 1987) (16 of 20 members signing) (Finance Comm. Letter); letter from Rep. Rangel, et al. to IRS Commissioner Lawrence B. Gibbs (Mar. 3, 1987) (20 of 36 members signing) (W&M Comm. Letter); Letter from Sen. DeConcini, D-Ariz., et al. to IRS Commissioner Lawrence B. Gibbs (Feb. 19, 1987) (16 of 27 members signing) (Appropriations Comm. Letter).

/6/ Letter from Chairman Rostenkowski, D-Ill., to Commissioner Gibbs (Feb. 25, 1987); letter from Chairman Brooks, D-Texas, to Commissioner Gibbs (Feb. 19, 1987); letter from Sen. Simon, D-Ill., to Secretary Baker (Jan. 30, 1987); letter from Rep. Boucher, R-Va., to Secretary Baker (Feb. 5, 1987); letter from Rep. Clarke, D-N.C., to Secretary Baker (May 11, 1987); letter from Rep. English, Okla., to Secretary Baker (Mar. 4, 1987); letter from Rep. Howard, D-Tenn., to Secretary Baker (Feb. 12, 1987); letter from Rep. Kildee, D-Mich., to Secretary Baker (Mar. 12, 1987); letter from Rep. Ravenel, R-S.C., to Secretary Baker (Feb. 23, 1987). See also 'Sen. Melcher Says That Public Charities' Lobbying Rules Are Out of Line With Statute, Tax Notes, Mar. 30, 1987, p. 1265 (describing letter from Sen. Melcher, D-Mont., criticizing the proposed regulations as violating the spirit of the 1976 legislation); 'Writers Voice Opposition to Proposed Regulations on Lobbying by Public Charities,' Tax Notes, Mar. 23, 1987, p. 1160 (describing letter from Rep. Quillen, R-Tenn., urging that an advisory committee be created to help draft new regulations).

/7/ Of the five exceptions, only that for membership communications had no antecedent in prior tax law.

/8/ Doubtless for the same reason, an analogue to the exception was recognized in the charitable tax law even before the introduction of the 'substantial part' test into the statute in 1934 (see discussion of Slee v. Commissioner, 42 F.2d 184 (2nd Cir. 1930), aff'g 15 B.T.A. 710 (1929), in Part II.B.1. above), and neither Treasury nor the IRS attempted to apply the substantial part limitation to the legislative efforts of private foundations in their own behalf in the period of the 1960s during which the special restrictions on private foundations, ultimately adopted in the Tax Reform Act of 1969, were evolving, being formulated, and, finally, proceeding to enactment. The statutory self-defense exception first appeared in the code as a part of the 1969 foundation law, recognizing the exclusion of self-defense activities of private foundations from the general restriction on foundation lobbying. IRC section 4945(e).

/9/ Because churches, their integrated auxiliaries, and conventions and associations of churches are not required to file returns with the IRS, the reported figure does not include their lobbying expenditures.

/10/ A 'lobbyist' for this purpose is an employee who makes at least two lobbying contacts and devotes at least 20 percent of his/her time to lobbying. 2 U.S.C. 1602(10). This definition is intended to rule out registration and reporting duties for persons who engage in de minimis lobbying.

/11/ Section 162(e)(2) also excepts direct lobbying at the local level.

/12/ See text above at pages 14-16.

**************** End of Document ****************

Runquist & Associates Los Angeles, California

2 USCS § 1602 (1997) printed in FULL format.

*** THIS SECTION IS CURRENT THROUGH 105-56, APPROVED 10/8/97 ***
*** WITH A GAP OF 105-33 ***

TITLE 2. THE CONGRESS
CHAPTER 26. DISCLOSURE OF LOBBYING ACTIVITIES

2 USCS § 1602 (1997)

§ 1602. Definitions

As used in this Act:

(1) Agency. The term "agency" has the meaning given that term in section 551(1) of title 5, United States Code.

(2) Client. The term "client" means any person or entity that employs or retains another person for financial or other compensation to conduct lobbying activities on behalf of that person or entity. A person or entity whose employees act as lobbyists on its own behalf is both a client and an employer of such employees. In the case of a coalition or association that employs or retains other persons to conduct lobbying activities, the client is the coalition or association and not its individual members.

(3) Covered executive branch official. The term "covered executive branch official" means--

(A) the President;

(B) the 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, United States Code; and

(F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2) of title 5, United States Code.

(4) Covered legislative branch official. The term "covered legislative branch official" means--

(A) a Member of Congress;

(B) an elected officer of either House of Congress;

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(C) any employee of, or any other individual functioning in the capacity of an employee of--

(i) a Member of Congress;

(ii) a committee of either House of Congress;

(iii) the leadership staff of the House of Representatives or the leadership staff of the Senate;

(iv) a joint committee of Congress; and

(v) a working group or caucus organized to provide legislative services or other assistance to Members of Congress; and

(D) any other legislative branch employee serving in a position described under section 109(13) of the Ethics in Government Act of 1978 (5 U.S.C. App.).

(5) Employee. The term "employee" means any individual who is an officer, employee, partner, director, or proprietor of a person or entity, but does not include--

(A) independent contractors; or

(B) volunteers who receive no financial or other compensation from the person or entity for their services.

(6) Foreign entity. The term "foreign entity" means a foreign principal (as defined in section 1(b) of the Foreign Agents Registration Act of 1938 *(22 U.S.C. 611*(b)).

(7) Lobbying activities. The term "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.

(8) Lobbying contact.

(A) Definition. The term "lobbying contact" means any oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to--

(i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);

(ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;

(iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license); or

(iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.

(B) Exceptions. The term "lobbying contact" does not include a communication that is--

(i) made by a public official acting in the public official's official capacity;

(ii) made by a representative of a media organization if the purpose of the communication is gathering and disseminating news and information to the public;

(iii) made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication;

(iv) made on behalf of a government of a foreign country or a foreign political party and disclosed under the Foreign Agents Registration Act of 1938 *(22 U.S.C. 611* et seq.);

(v) a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official;

(vi) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act [5 USCS Appx.];

(vii) testimony given before a committee, subcommittee, or task force of the Congress, or submitted for inclusion in the public record of a hearing conducted by such committee, subcommittee, or task force;

(viii) information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information;

(ix) required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency;

(x) made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications;

(xi) not possible to report without disclosing information, the unauthorized disclosure of which is prohibited by law;

(xii) made to an official in an agency with regard to--

(I) a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding; or

(II) a filing or proceeding that the Government is specifically required by statute or regulation to maintain or conduct on a confidential basis, if that agency is charged with responsibility for such proceeding, inquiry, §investigation, or filing;

(xiii) made in compliance with written agency procedures regarding an adjudication conducted by the agency under section 554 of title 5, United States Code, or substantially similar provisions;

(xiv) a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding;

(xv) a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures;

(xvi) made on behalf of an individual with regard to that individual's benefits, employment, or other personal matters involving only that individual, except that this clause does not apply to any communication with--

(I) a covered executive branch official, or

(II) a covered legislative branch official (other than the individual's elected Members of Congress or employees who work under such Members' direct supervision),

with respect to the formulation, modification, or adoption of private legislation for the relief of that individual;

(xvii) a disclosure by an individual that is protected under the amendments made by the Whistleblower Protection Act of 1989, under the Inspector General Act of 1978 [5 USCS Appx.], or under another provision of law;

(xviii) made by--

(I) a church, its integrated auxiliary, or a convention or association of churches that is exempt from filing a Federal income tax return under paragraph 2(A)(i) of section 6033(a) of the Internal Revenue Code of 1986 [*26 USCS § 6033*(a)(2)(A)(i)], or

(II) a religious order that is exempt from filing a Federal income tax return under paragraph (2)(A)(iii) of such section 6033(a) [*26 USCS § 6033*(a)(2)(A)(iii)]; and

(xix) between--

(I) officials of a self-regulatory organization (as defined in section 3(a)(26) of the Securities Exchange Act [*15 USCS § 78c*(a)(26)]) that is registered with or established by the Securities and Exchange Commission as required by that Act or a similar organization that is designated by or registered with the Commodities Future Trading Commission as provided under the Commodity Exchange Act [*7 USCS §§ 1* et seq.]; and

(II) the Securities and Exchange Commission or the Commodities Future Trading Commission, respectively;

relating to the regulatory responsibilities of such organization under that Act.

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(9) Lobbying firm. The term "lobbying firm" means a person or entity that has 1 or more employees who are lobbyists on behalf of a client other than that person or entity. The term also includes a self-employed individual who is a lobbyist.

(10) Lobbyist. The term "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.

(11) Media organization. The term "media organization" means a person or entity engaged in disseminating information to the general public through a newspaper, magazine, other publication, radio, television, cable television, or other medium of mass communication.

(12) Member of Congress. The term "Member of Congress" means a Senator or a Representative in, or Delegate or Resident Commissioner to, the Congress.

(13) Organization. The term "organization" means a person or entity other than an individual.

(14) Person or entity. The term "person or entity" means any individual, corporation, company, foundation, association, labor organization, firm, partnership, society, joint stock company, group of organizations, or State or local government.

(15) Public official. The term "public official" means any elected official, appointed official, or employee of--

(A) a Federal, State, or local unit of government in the United States other than--

(i) a college or university;

(ii) a government-sponsored enterprise (as defined in section 3(8) of the Congressional Budget and Impoundment Control Act of 1974 [*2 USCS § 622*(8)]);

(iii) a public utility that provides gas, electricity, water, or communications;

(iv) a guaranty agency (as defined in section 435(j) of the Higher Education Act of 1965 *(20 U.S.C. 1085*(j))), including any affiliate of such an agency; or

(v) an agency of any State functioning as a student loan secondary market pursuant to section 435(d)(1)(F) of the Higher Education Act of 1965 *(20 U.S.C. 1085*(d)(1)(F));

(B) a Government corporation (as defined in section 9101 of title 31, United States Code);

(C) an organization of State or local elected or appointed officials other than officials of an entity described in clause (i), (ii), (iii), (iv), or (v) of subparagraph (A);

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(D) an Indian tribe (as defined in section 4(e) of the Indian Self-Determination and Education Assistance Act *(25 U.S.C. 450b*(e));

(E) a national or State political party or any organizational unit thereof; or

(F) a national, regional, or local unit of any foreign government.

(16) State. The term "State" means each of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

HISTORY: (Dec. 19, 1995, P.L. 104-65, § 3, 109 Stat. 691.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

REFERENCES IN TEXT:

With respect to the "Executive Schedule", referred to in this section, see *5 USCS §§ 5311* et seq.

The "Securities Exchange Act", referred to in this section, is Act June 6, 1934, ch 404, 48 Stat. 881, which appears generally as *15 USCS §§ 77b* et seq. For full classification of such Act, consult USCS Tables volumes.

The "Whistleblower Protection Act of 1989", referred to in this section, is Act April 10, 1989, P.L. 101-12, 103 Stat. 16. For full classification of this Act, consult USCS Tables volumes.

EFFECTIVE DATE OF SECTION:

This section became effective on Jan. 1, 1996, pursuant to Act Dec. 19, 1995, P.L. 104-65, § 24(a), 109 Stat. 705, which appears as *2 USCS § 1601* note.

NOTES:

RESEARCH GUIDE

FEDERAL PROCEDURE L ED:

10 Fed Proc L Ed, Declaratory Judgments § 23:13.

AM JUR:

16 Am Jur 2d, Constitutional Law § 349.
22A Am Jur 2d, Declaratory Judgments § 48.
51 Am Jur 2d, Lobbying § 9.

ANNOTATIONS:

The Supreme Court and the right of free speech and press. *2 L Ed 2d 1706.*

INTERPRETIVE NOTES AND DECISIONS

Influencing of legislative processes by virtue of distribution of literature

Over $ 1,500,000	$ 225,000 plus 5 percent of the excess of the exempt purpose expenditures over $ 1,500,000.

Ignore

(3) Grass roots expenditures. The term "grass roots expenditures" means expenditures for the purpose of influencing legislation (as defined in subsection (d) without regard to paragraph (1)(B) thereof).

(4) Grass-roots nontaxable amount. The grass roots nontaxable amount for any organization for any taxable year is 25 percent of the lobbying nontaxable amount (determined under paragraph (2)) for such organization for such taxable year.

(d) Influencing legislation.

(1) General rule. Except as otherwise provided in paragraph (2), for purposes of this section, the term "influencing legislation" means--

(A) any attempt to influence any legislation through an attempt to affect the opinions of the general public or any segment thereof, and

(B) any attempt to influence any legislation through communication with any member or employee of a legislative body, or with any government official or employee who may participate in the formulation of the legislation.

(2) Exceptions. For purposes of this section, the term "influencing

legislation", with respect to an organization, does not include--

(A) making available the results of nonpartisan analysis, study, or research;

(B) providing of technical advice or assistance (where such advice would otherwise constitute the influencing of legislation) to a governmental body or to a committee or other subdivision thereof in response to a written request by such body or subdivision, as the case may be;

(C) appearances before, or communications to, any legislative body with respect to a possible decision of such body which might affect the existence of the organization, its powers and duties, tax-exempt status, or the deduction of contributions to the organization;

(D) communications between the organization and its bona fide members with respect to legislation or proposed legislation of direct interest to the organization and such members, other than communications described in paragraph (3); and

(E) any communication with a government official or employee, other than--

(i) a communication with a member or employee of a legislative body (where such communication would otherwise constitute the influencing of legislation), or

(ii) a communication the principal purpose of which is to influence legislation.

(3) Communications with members.

(A) A communication between an organization and any bona fide member of such organization to directly encourage such member to communicate as provided in paragraph (1)(B) shall be treated as a communication described in paragraph (1)(B).

(B) A communication between an organization and any bona fide member of such organization to directly encourage such member to urge persons other than members to communicate as provided in either subparagraph (A) or subparagraph (B) of paragraph (1) shall be treated as a communication described in paragraph (1)(A).

(e) Other definitions and special rules. For purposes of this section--

(1) Exempt purpose expenditures.

(A) In general. The term "exempt purpose expenditures" means, with respect to any organization for any taxable year, the total of the amounts paid or incurred by such organization to accomplish purposes described in section 170(c)(2)(B) (relating to religious, charitable, educational, etc., purposes).

(B) Certain amounts included. The term "exempt purpose expenditures" includes--

(i) administrative expenses paid or incurred for purposes described in section 170(c)(2)(B), and

(ii) amounts paid or incurred for the purpose of influencing legislation (whether or not for purposes described in section 170(c)(2)(B)).