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Lobbying Regulations on Non-Profit Organizations

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Summary

Charitable, religious or educational organizations which are exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)), which have the privilege of receiving contributions from private parties that are tax-deductible for the *contributor*, may not engage in lobbying activities which constitute a "substantial part" of their activities if they wish to preserve this preferred tax-exempt status. "Civic leagues or organizations not operated for profit but operated exclusively for the promotion of social welfare ....," tax exempt under Section 501(c)(4) of the Internal Revenue Code, on the other hand, have no tax consequence for lobbying or advocacy activities. (If a 501(c)(4) organization receives federal funds in the form of a "grant" or loan, however, then there are further restrictions on its "lobbying activities," discussed below.) Labor and agricultural organizations, tax-exempt under Section 501(c)(5) of the Internal Revenue Code, and business trade associations and chambers of commerce, exempt from federal income taxation under Section 501(c)(6), also have no specific limitations upon their lobbying activities as a result of their tax-exempt status.

A provision of law enacted in 1995 as Section 18 of the Lobbying Disclosure Act, commonly called the "Simpson Amendment," prohibits section 501(c)(4) civic leagues and social welfare organizations from engaging in any "lobbying activities," even with their *own* private funds, if the organization receives any federal grant, loan, or award. Because of the definitions under the Lobbying Disclosure Act, however, the "Simpson Amendment" limitations do not appear to apply to "grass roots" lobbying or public advocacy, nor to lobbying State or local officials. Similarly exempt are: testifying before a congressional committee, subcommittee, or task force; submitting written testimony for inclusion in the public record; or responding to notices such as in the Federal Register which solicit communications from the public.

Federal contract or grant money may not be used for any lobbying, unless authorized by Congress. Under current federal provisions, no organization, regardless of tax status, may be reimbursed out of federal contract or grant money for any lobbying activities, or for other advocacy or political activities, unless authorized by Congress. This applies to direct or "grass roots" lobbying campaigns at the State, local or federal level (but exempts providing technical and/or factual information related to the performance of a grant or contract when in response to a documented request). The provision of law commonly referred to as the "Byrd Amendment" also expressly prohibits federal grantees, contractors, recipients of federal loans or cooperative agreements from using federal monies to "lobby" with respect to the awarding or modification of such contracts, grants, loans, or agreements.

Finally, organizations, other than churches or their affiliates, which meet the threshold expenditure requirements must register employees who are paid to lobby Congress or certain executive branch officials, when those employees make direct lobbying contacts and engage in lobbying over a certain percentage of their time. Registration and reporting are required under the Lobbying Disclosure Act of 1995.

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This report is intended to provide a brief overview of the various potential restrictions, rules or regulations upon lobbying activities of non-profit organizations.

There are several overlapping laws, rules and regulations which may apply to non-profit organizations that engage in lobbying activities. In some instances, the rules and restrictions that apply may be determined by the section of the Internal Revenue Code under which the organization holds its tax-exempt status. In other instances, certain rules and regulations may apply depending on whether the organization receives federal grants, or federal contracts. It should be noted that the definitions of the terms "lobbying" or "advocacy" activities, and what those activities may encompass under the several regulations or statutes, may vary among the different regulations and rules.

Section 501(c)(3) Charitable Organizations

Organizations which are exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code (26 U.S.C. § 501(c)(3)) are community chests, funds, corporations or foundations "organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes." These charitable organizations, which have the privilege of receiving contributions from private parties which are tax-deductible for the *contributor* under 26 U.S.C. § 170(a)), are limited in the amount of lobbying in which they may engage if they wish to preserve this preferred tax-exempt status from the federal government.[1]

A charitable organization exempt from federal taxation under § 501(c)(3) may not engage in lobbying activities which constitute a "substantial part" of its activities. In 1976, a "safe harbor" was given to 501(c)(3) organizations where they could elect to come within specific percentage limitations on expenditures to assure that no violations of the "substantial part" test would incur, or could remain under the old, unspecified "substantial part" test.[2] The limitations upon organizational expenditures for covered lobbying activities are 20% of the first $500,000 of total exempt purpose expenditures of the organization, then 15% of the next $500,000 in exempt purposes expenditures, then 10% of the next $500,000 in expenditures, and 5% of the organization's expenditures over $1,500,000. In no event may a covered charitable

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[1] 26 U.S.C. §§ 501(c)(3), 501(h), 4911, 6033; see IRS Regulations at 55 F.R. 35579-35620 (August 31, 1990), 26 C.F.R. Parts 1, 7, 20, 25, 53, 56, and 602.

[2] Religious organizations are not permitted to make the election to come within the specific monetary lobbying guidelines under 26 U.S.C. § 501(h), 26 U.S.C. § 501(h)(5).

organization spend more than $1,000,000 on lobbying activities. There is a separate "grass roots" expenditure limit of 25% of the direct lobbying limits.[3]

The activities covered under the limitations on lobbying by charitable organizations generally encompass direct or indirect "grass roots" lobbying, but exempt nonpartisan analysis, study or research; advice or assistance given at the request of a governmental body; "self-defense" communications before governmental bodies; contacts with the organization's *bona fide* members; and contacts unrelated to affecting legislation.

Section 501(c)(4) Civic Organizations

Organizations which are tax exempt under section 501(c)(4) of the Internal Revenue Code are generally described as "[c]ivic leagues or organizations not operated for profit but operated exclusively for the promotion of social welfare ...." If a civic league or social welfare organization is tax exempt under § 501(c)(4) of the Internal Revenue Code, there is generally no tax consequence for lobbying or advocacy activities. In fact, in upholding the limitations on lobbying by 501(c)(3) charitable organizations against First Amendment challenges, the Supreme Court noted that a 501(c)(3) organization could establish a 501(c)(4) affiliate through which its First Amendment expression could be exercised through unlimited lobbying and advocacy.[4] If a 501(c)(4) organization receives federal funds in the form of a "grant" or loan, however, then there are further restrictions on its "lobbying activities," discussed below.

Section 501(c)(5) Labor Organizations and 501(c)(6) Trade Associations

Labor and agricultural organizations are tax-exempt under section 501(c)(5) of the Internal Revenue Code, and business trade associations and chambers of commerce are exempt from federal income taxation under section 501(c)(6). Neither labor or agricultural organizations, nor business trade associations or chambers of

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[3] See 26 U.S.C. § 4911. The Supreme Court has upheld such loss of special tax-exempt privilege for "substantial" lobbying, noting that although lobbying is a protected First Amendment right, and although the government may not indirectly punish an organization for exercising its constitutional rights by denying benefits to those who exercise them, lobbying activities are not one of the contemplated "exempt functions" of these charitable, educational organizations for which they have received the preferred tax status. Since contributions to the organization by private individuals are eligible for a deduction from the donor's federal income tax, the Government is in effect subsidizing those private contributions to the organization, and the Court found that Congress does not have to "subsidize" such lobbying activities of private organizations through preferred tax status of receiving deductible contributions if it does not chose to do so, as long as other outlets for the organization's unlimited, protected First Amendment expression exist. *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 544-546 (1983).

[4] *Regan v. Taxation With Representation of Washington, supra* at 544-546 (Opinion of the Court), see also 552-553 (Blackmun concurring).

commerce, have any specific limitations upon their lobbying activities as a result of their tax-exempt status.[5]

Non-profit Organizations Which Receive Federal Funds

501(c)(4) Organizations Receiving Grants. Restrictions on "lobbying activities" by certain non-profit groups, as a condition to receiving federal grants and loans, were enacted into law in 1995. Section 18 of the Lobbying Disclosure Act of 1995[6] places statutory restrictions upon the lobbying activities of non-profit civic and social welfare organizations which are tax-exempt under section 501(c)(4) of the Internal Revenue Code. This provision, which is commonly called the "Simpson Amendment," prohibits section 501(c)(4) civic leagues and social welfare organizations from engaging in any "lobbying activities," even with their *own* private funds, if the organization receives any federal grant, loan, or award. 2 U.S.C. § 1611.

The restrictions of the Simpson Amendment originally covered all 501(c)(4) organizations which received federal monies by way of an "award, grant, *contract*, loan or any other form."[7] The term "contract," however, was subsequently removed from the provision by P.L. 104-99, Section 129, leaving the prohibition on lobbying activities with an organization's own funds as a condition to the receipt of federal moneys only upon 501(c)(4) grantees and those seeking an award or loan, but allowing unlimited lobbying activities with organizational funds for 501(c)(4) contractors of the federal government. The Simpson Amendment now reads:

> An organization described in section 501(c)(4) of the Internal Revenue Code of 1986 which engages in lobbying activities shall not be eligible for the receipt of Federal funds constituting an award, grant, or loan.

The legislative history of the provision clearly indicates that a 501(c)(4) organization may separately incorporate an affiliated 501(c)(4), which would not receive any federal funds, and which could engage in unlimited lobbying.[8] The method of separately incorporating an affiliate to lobby, which was described by the amendment's sponsor as "splitting," was apparently intended to place a degree of separation between federal grant money and private lobbying, while permitting an organization to have a voice through which to exercise its protected First Amendment

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[5] Note, however, pass-through rules concerning reporting requirements and non-deductibility as business expenses of dues paid to associations which lobby. Omnibus Budget Reconciliation Act of 1993, 26 U.S.C § 162(e)(3), 26 U.S.C. § 6033(e)(1). See discussion in Hopkins, *The Law of Tax-Exempt Organizations*, 6th Edition, § 29.5 (1995 Cumulative Supplement 125-131) (1992).

[6] P.L. 104-65, 109 Stat. 691, 703-704, as amended by P.L. 104-99, Section 129, 110 Stat. 34.

[7] P.L. 104-65, Section 18, 109 Stat. 704. Emphasis added.

[8] H.R. Rpt. No. 104-339, 104th Congress, 1st Session, at 24 (1995).

rights of speech, expression and petition.[9] As stated by Senator Simpson: "If they decided to split into two separate 501(c)(4)'s, they could have one organization which could both receive funds and lobby without limits."[10]

It may also be noted that while § 501(c)(4)'s which receive certain federal funds may not engage in "lobbying activities," the term "lobbying activities" as used in the "Simpson Amendment" prohibition in Section 18 of the Lobbying Disclosure Act is defined in Section 3 of that legislation to include only direct "lobbying contacts and efforts in support of such contacts" such as preparation, planning, research and other background work intended for use in such direct contacts.[11] A "lobbying contact" is an "oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official" which concerns the formulation, modification or adoption of legislation, rules, regulations, policies or programs of the federal government.[12] Organizations which use their own private resources to engage only in "grass roots" lobbying and public advocacy (including specifically any communication that is "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")[13] would, therefore, not appear to be engaging in any prohibited "lobbying activities" under this provision. The Lobbying Disclosure Act's definitions of "lobbying activities" and "lobbying contacts" exclude, and do *not* independently apply to activities which consist only of "grass roots" lobbying and public advocacy.[14]

Similarly, since the term "lobbying activities" relates only to the direct lobbying of covered federal officials, the "Simpson Amendment" would not appear to limit in any way an organization's use of its own private resources to lobby State or local legislators or other State of local governmental bodies or units. While direct lobbying of the Congress, or of certain high level executive branch officials, is covered under the Lobbying Disclosure Act as a "lobbying contact," and thus by definition a "lobbying activity," the acts of testifying before a congressional committee, subcommittee, or task force, or of submitting written testimony for inclusion in the public record of any such body, or of responding to notices in the Federal Register or other such publication soliciting communications from the public

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[9] See comments by the sponsors of provision, Senator Simpson and Senator Craig, at 141 *Congressional Record* S10547, S10556, July 24, 1995 (daily ed.).

[10] 141 *Congressional Record, supra* at S10555 (Senator Simpson).

[11] 2 U.S.C. § 1602(7), P.L. 104-65, Section 3(7).

[12] 2 U.S.C. § 1602(8), P.L. 104-65, Section 3(8).

[13] Note this express exception to the term "lobbying contact," at 2 U.S.C. § 1602(8)(B)(iii), P.L. 104-65, Section 3(8)(B)(iii).

[14] Broader limitations on public advocacy and lobbying by organizations receiving federal grant money, and on entities wishing to do business with federal grantees, which had passed the House as appropriations riders in the 104th Congress (commonly known as the "Istook Amendment," e.g., H.R. 2127, 104th Congress, H.J. Res. 114, 104th Congress), have not as of this writing been enacted into law.

to an agency, are expressly exempt from the definition of a "lobbying contact," and thus in themselves can not qualify as a "lobbying activity."[15]

Restrictions on Use of Federal Funds Generally. Broad prohibitions on the use of *federal* monies for lobbying or political activities have been in force for a number of years. Express restrictions on the use of grant funds by non-profit organizations were adopted in 1984 as part of uniform cost principles for non-profit organizations issued by the Office of Management and Budget (OMB) in OMB Circular A-122, and are now incorporated into the Federal Acquisition Regulations. Under current federal provisions, no contractor or grantee of the federal government, regardless of tax status, may be reimbursed out of federal contract or grant money for their lobbying activities, or for political activities, unless authorized by Congress.[16] These restrictions generally apply to attempts to influence any federal or State legislation through direct or "grass roots" lobbying campaigns, political campaign contributions or expenditures, but exempt any activity authorized by Congress, or when providing technical and/or factual information related to the performance of a grant or contract when in response to a documented request.

In addition to these restrictions of general applicability on the use of federal contract or grant money for lobbying activities, there may be specific statutory limitations and prohibitions on particular federal moneys or on particular federal programs.[17] Appropriation riders, for example, may also expressly limit the use of federal monies appropriated in a particular appropriations law for lobbying, or "publicity or propaganda" campaigns directed at Congress by private grant or contract recipients.[18]

Under the provisions of federal law commonly referred to as the "Byrd Amendment," federal grantees, contractors, recipients of federal loans or those with cooperative agreements with the federal government, are expressly prohibited by law from using federal monies to "lobby" the Congress, federal agencies, or their employees, with respect to the awarding of federal contracts, the making of any grants or loans, the entering into cooperative agreements, or the extension, modification or renewal of these types of awards. 31 U.S.C. § 1352(a). Federal contractors, grantees and those receiving federal loans and cooperative agreements

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[15] See 2 U.S.C. 1602(8)(B), P.L. 104-65, Section 3(8)(B) for list of 18 express exceptions to the term "lobbying contacts."

[16] See Federal Acquisition Regulations (FAR) 48 C.F.R. §§ 31.205-22; 31.701 *et seq.*; drafted to encompass the principles set out in OMB Circular A-122, ¶B21, as added 49 F.R. 18276 (1984).

[17] See, for example, 42 U.S.C. § 2996(f)(a)(5), re grantees and contractors of the Legal Services Corporation.

[18] Note discussion of anti-lobbying appropriations provisions and grant funds in General Accounting Office, *Principles of Federal Appropriations Law*, Second Edition, at 4-179 to 4-184 (July 1991). It should be noted that the federal criminal statutory provision on lobbying with appropriated monies, 18 U.S.C. § 1913, applies only to federal officers and employees, and not to the private recipients of federal grants, contracts or other federal disbursements. See *Grassly v. Legal Services Corporation*, 535 F. Supp. 818, 826, n.6 (S.D. Iowa 1982).

must also report lobbying expenditures from non-federal sources which they used to obtain such federal program monies or contracts. 31 U.S.C. § 1352(b). Agencies of the federal government which administer loans, grants and cooperative agreements have issued common regulations implementing the "Byrd Amendment."[19] The restrictions of the "Byrd Amendment" apply to the making, with an intent to influence, any communication to or appearances before Congress or an agency on a covered matter. Any "information specifically requested by an agency or Congress is allowable at any time" (56 F.R. 6739), and certain other contacts are allowable depending on the timing and nature of the communication with respect to a particular solicitation for a federal grant, contract or agreement.

Lobbying Disclosure Requirements for Non-Profit Organizations

Organizations which engage in a certain amount of lobbying activities through personnel compensated to lobby on the organization's behalf, will be required to register and to file disclosure reports under the new Lobbying Disclosure Act of 1995.[20] There is no general exclusion or exception from the disclosure and registration requirements for non-profit organizations who otherwise meet the threshold requirements on lobbying contacts, except for churches and their integrated auxiliaries which are exempt from reporting and disclosure.[21]

The Lobbying Disclosure Act of 1995 was intended to reach so-called "professional lobbyists," that is, those who are *compensated* to engage in lobbying activities on behalf of an employer or on behalf of a client.[22] When registration is required for organizations which lobby, such registration is done by the organization, however, rather than by the individual employee/lobbyist. That is, the *organization* which has employees who qualify as lobbyists for the organization (in-house lobbyists), must register and identify its employee/lobbyists.

An organization will be required to register its employee/lobbyists when it meets two general conditions. First, it must have one or more compensated employees who engage in "lobbying," that is, who make more than one "lobbying contact," and who spend at least 20% of their total time for that employer on "lobbying activities," over

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[19] Note 55 F.R. 6735-6756 (February 26, 1990).

[20] P.L. 104-65, December 19, 1995, 109 Stat. 691. In 1995 Congress completely rewrote the 50-year old law (the Federal Regulation of Lobbying Act of 1946) which had required certain registrations and disclosures of lobbying activities directed at Members of Congress. Beginning in 1996, the new Lobbying Disclosure Act of 1995 will provide more specific thresholds, and clearer and broader definitions of "lobbyist" and "lobbying activities," which will trigger the requirements for the registration and reporting of persons who are compensated to engage in lobbying activities.

[21] See exemptions from definition of covered "lobbying contact," 2 U.S.C. § 1602(8)(B)(xviii), for churches and religious orders that are exempt from filing federal income tax returns under 26 U.S.C. § 6033(a)(2)(A).

[22] See H.R. Rpt. 104-339, 104th Cong., 1st Sess., "Lobbying Disclosure Act of 1995," at 2 (1995).

a six month reporting period.[23] A "lobbying contact" is an oral or written communication to a covered official, including a Member of Congress, congressional staff, and certain senior executive branch officials, with respect to the formulation, modification or adoption of a federal law, rule, regulation or policy. The term "lobbying activities" is broader than "lobbying contacts," and includes "lobbying contacts" as well as background activities and other efforts in support of such lobbying contacts.

Secondly, for an organization to register its lobbyist/employees, the organization must have spent, in total expenses for lobbying activities, $20,000 or more in a six-month reporting period.[24] The $20,000 amount will include any money paid to an outside lobbyist to lobby on the organization's behalf during the reporting period.[25]

Under the Act a "lobbyist" needs to be registered within 45 days after first making a lobbying contact or being employed to make such a contact. Registration will be on identical forms filed with the Secretary of the Senate and Clerk of the House. The information on the registrations will generally include identification of the lobbyist, the employer or the client, and any organizations other than the client that contribute more than $10,000 for the lobbying activities in six months and plays a major role in supervising or controlling the lobbying activities; an identification of any foreign entity that owns 20% of the client, controls the activities of the client or is an interested affiliate of the client; a list of the issues in which the lobbyist is interested, and those on which he or she has already lobbied for the client or employer. In addition to the *registration* of lobbyists, semi-annual reports, covering January 1 - June 30, and July 1 - December 31, are required to be filed. These reports will identify the lobbyist, clients and employers, and issues upon which one lobbied, and the reports are to provide a good faith estimate of lobbying costs, rounded to the nearest $20,000 (if expenses exceed $10,000).

Certain public charities will have the option of using the Internal Revenue Code definitions of "influencing legislation" rather than the Lobbying Disclosure Act definitions of "lobbying activities" to determine the organization's reporting obligations.[26] This option was provided so that such organizations would only need to have one set of internal record controls and standards dealing with "influencing legislation," under both the tax code and the Lobbying Disclosure Act of 1995.[27] Since the definition of "influencing legislation" under the Tax Code, and the definition of "lobbying activities" under the Lobbying Disclosure Act are different, an eligible organization may need to decide which definition is more advantageous

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[23] 2 U.S.C. § 1602(10).

[24] 2 U.S.C. § 1603(a)(3).

[25] An outside lobbyist needs to register for a particular client if its total income from that client for lobbying related matters exceeds $5,000 in a six month filing period.

[26] 2 U.S.C. § 1610.

[27] H.R. Rpt. No. 104-339, *supra* at 23.

to use, from both a tax standpoint, as well as in relation to its planned public policy activities.[28]

In addition to covering only those who are hired or retained to lobby, the provisions of the Lobbying Disclosure Act of 1995 cover as a threshold only activities which may be described as "direct" lobbying, that is, direct communications or contacts with covered officials. The registration and disclosure requirements of the law are not separately triggered by "grass roots" lobbying by persons or organizations. That is, an organization or entity which engages only in grassroots lobbying, regardless of the amount of "grass roots" lobbying activities, will not be required to register its members, officers or employees who engage in such activities.[29] Once qualified or covered as a lobbyist, however, grass roots lobbying efforts and other background activities which support direct "lobbying contacts" may have to be disclosed as "lobbying activities."

The Lobbying Disclosure Act also exempts from the definition of "lobbying contacts" the activities of lobbying State or local legislators or other State or local governmental bodies or units. While direct lobbying of the Congress, or of certain high level executive branch officials, is covered under the Lobbying Disclosure Act as a "lobbying contact," the acts of testifying before a congressional committee, subcommittee, or task force, or of submitting written testimony for inclusion in the public record of any such body, or of responding to notices in the Federal Register or other such publication soliciting communications from the public to an agency, are expressly exempt from the definition of a "lobbying contact," and thus in themselves can not qualify as a "lobbying activity."[30]

Additional Reading

Robert A. Boisture, for Independent Sector, "What Charities Need to Know To Comply With the Lobbying Disclosure Act of 1995," in *Complying With the Lobbying Disclosure Act of '95 and the New Gift Act Restrictions* 185-208 (Glasser Legal Works 1996).

Comment, "Guiding Lobbying Charities Into A Safe Harbor: Final Section 501(h) and 4911 Regulations Set Limits for Tax-Exempt Organizations," 61 *Miss. L.J.* 157 (Spring 1991).

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[28] For detailed discussions of several considerations and factors, see Richard L. Winston, "The Lobbying Disclosure Act of 1995 and the Tax Code Elections," *Tax Notes*, 1391-1399 (June 3, 1996); Robert A. Boisture, for Independent Sector, "What Charities Need to Know To Comply With the Lobbying Disclosure Act of 1995," in *Complying With the Lobbying Disclosure Act of '95 and the New Gift Act Restrictions*, 185-208 (Glasser Legal Works, 1996).

[29] Specifically excluded is any communication "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." 2 U.S.C. § 1602((8)(B)(iii).

[30] See 2 U.S.C. 1602(8)(B), P.L. 104-65, Section 3(8)(B) for list of 18 express exceptions to the term "lobbying contacts."

Bruce H. Hopkins, *The Law of Tax-Exempt Organizations*, Sixth Edition (1992)(1995 Cumulative Supplement).

Bruce R. Hopkins, *Charity, Advocacy and the Law* (1992).

Richard L. Winston, "The Lobbying Disclosure Act of 1995 and the Tax Code Elections," *Tax Notes*, 1391-1399 (June 3, 1996).

CRS Reports

CRS Report 96-264. *Frequently Asked Questions About Tax-Exempt Organizations*, by Marie B. Morris and Felicia Kolp.

CRS Report 96-210. *Legal and Congressional Ethics Standards of Relevance to Those Who Lobby Congress*, by Jack Maskell.