



November 27, 2007

The Honorable Nancy Erickson  
Secretary of the Senate  
U.S. Capitol, Room S-312  
Washington, DC 20510

The Honorable Lorraine C. Miller  
Clerk of the U.S. House of Representatives  
U.S. Capitol, Room H-154  
Washington, DC 20515

Dear Ms. Erickson and Ms. Miller:

We are writing to request guidance from your offices with respect to the recently enacted "Honest Leadership and Open Government Act of 2007," P.L. 110-81.

As you know, Section 207 of the Act, titled "Disclosure of Lobbying Activities by Certain Coalitions and Associations," imposes new requirements which could have a unique impact on thousands of trade and professional associations and chambers of commerce that play an invaluable role in building policy consensus, informing the legislative process, and advancing the democratic ideals of citizen participation and responsive government.

The undersigned organizations therefore respectfully urge you to provide interpretive guidance that addresses the concerns we raise below. Foremost among our concerns are the paramount need for clarity in a statute that imposes new criminal sanctions, and the equally significant need to preserve the ability of private entities to associate – and share their views on public policy issues – without triggering burdensome regulatory requirements.

Section 207 amends Section 4(b)(3) of the Lobbying Disclosure Act of 1995, 2 U.S.C. 1603(b)(3), to require disclosure of any organization or entity that contributes more than \$5,000 in a quarterly period to the lobbying activities of the registrant and, further, that "actively participates in the planning, supervision, or control of such lobbying activities." §207(a)(1)(B). Given the breadth and vagueness of this provision, it is vital that your offices issue clear interpretation to ensure proper compliance, and to conform the provision to the expressed intentions of the legislation's principal sponsors.

Fortunately, the record provides specific guidance regarding the intended scope of Section 207. Just prior to the Senate vote on final passage of the 2007 Act, Senator Feinstein

introduced into the *Congressional Record* an extensive section-by-section analysis of the bill and what she characterized as a “legislative history endorsed by the three principal Senate authors of the legislation: myself [Senator Feinstein], Chairman [of the Senate Homeland Security and Governmental Affairs Committee] Lieberman and Majority Leader Reid.” Concerning Section 207, the endorsed section-by-section analysis and legislative history states:

This section amends existing rules in section 4(b)(3) of the Lobbying Disclosure Act requiring reporting of “affiliated organizations.” The bill closes a loophole that has allowed *so-called “stealth coalitions,”* often with innocuous-sounding names, to operate without identifying the interests engaged in lobbying activities.

*Congressional Record*, August 2, 2007, page S10709, emphasis added.

The plain intent of the managers was to enact a new requirement aimed at enhancing disclosure of members of so-called “stealth coalitions.” As you know, these are short-term, *ad hoc* affiliations of entities, many of which are based in Washington and *already register under the Lobbying Disclosure Act* under their own names. Most *ad hoc* coalitions are formed for the *sole purpose* of advancing or opposing a legislative or regulatory issue. All their activities and expenditures are focused on affecting government action on that issue, and once the issue is resolved one way or the other, they usually cease to exist.

Trade and professional associations and chambers of commerce are totally different from the temporary groups highlighted by the Senate managers of the new Act. While many associations and chambers engage in at least some government advocacy, they also perform a wide variety of other services for their industries and memberships. The existence of these organizations, and the activities they undertake, transcend any single issue.

At the same time, many associations and chamber members participate in activities that touch at least tangentially on the government relations functions of the organization. For example, members of some associations engage in scientific and professional standard-setting activities that produce useful information for government standard-setting bodies. Associations and chambers frequently convene committees of their members to achieve internal consensus on policy positions. Most associations and chambers of commerce also hold annual meetings with their members at which the organization’s government affairs staff makes a presentation on their activities and engages in discussion with the members.

The impact of all these activities is overwhelmingly salutary. Moreover, the right of private citizens to participate in them, unencumbered by invasive government requirements, is a core freedom protected by the First Amendment.\* According to the Supreme Court’s

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\* As Justice Harlan wrote for the U.S. Supreme Court in *NAACP v. Alabama*: “It is beyond debate that the freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the “liberty” assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. See, *Gitlow v. New York*, 268 U.S. 652, 666; *Palko v. Connecticut*, 302 U.S. 319, 324; *Cantwell v. Connecticut*, 310 U.S. 296, 303; *Staub v. City of Baxley*, 355 U.S. 313, 321. Of course, it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.” 357 U.S. 449 at 460-461 (1958).

landmark decision in *NAACP v. Alabama*, 357 U.S. 449 (1958), the constitutional right of freedom of association prevents government agencies from requiring public disclosure of association members, absent a clear and compelling government interest in obtaining that information. The Supreme Court held, in essence, that the *confidentiality* of association membership was intrinsic to the right of free association. In fact, many associations and chambers assiduously protect their membership lists and regard them as proprietary.

Our principal concern with Section 207 is that, without further guidance, it is both so vague as to create endless “traps for the unwary” and inadvertent technical violations of the law, and also so broad as to require disclosure of large groups of entities that have little or no contact with government officials, and would not otherwise be classified as “lobbyists” on their own. Thus, without further guidance, the practical effect of Section 207 would be to delve far more deeply into the membership lists of private associations than Congress has ever established a compelling interest to seek.

The first part of Section 207’s disclosure “test” is fairly clear: to trigger disclosure, an entity must have contributed \$5,000 or more to the lobbying activities of the registrant in the reporting period. However, now that Congress has halved the reporting period, we request guidance from your offices on whether *annual* contributions should be divided among the quarterly reporting periods, or whether the disclosure requirement would be triggered only for the reporting period in which the contribution was made. We also request guidance on the application of this provision to associations that recognize dues revenue over an entire accounting year, using the accrual method of accounting.

The second part of Section 207’s disclosure “test” is far less clear and more sweeping, appearing to capture even internal discussions in which our members routinely participate, to help determine policies, goals, priorities and day-to-day responsibilities for our organizations. Therefore, we seek guidance from your offices to clarify the meaning of the phrase, “actively participates in the planning, supervision, or control of such lobbying activities.”

As you know, “lobbying activities” is defined elsewhere in the lobbying disclosure statute to mean “lobbying contacts and any efforts in support of such contacts, including preparation or planning activities, research and other background work that is intended, at the time of its preparation, for use in contacts and coordination with the lobbying activities of others.” The use of this term in Section 207 only compounds its vagueness. Because Section 207 covers the “planning...of...lobbying activities,” it would require disclosure of members who “actively participate[] in the planning” of “preparation or planning activities.” This could refer to almost anything.

Section 207 also covers “supervision...of...lobbying activities,” thereby appearing to require disclosure of members who supervise generic activities such as “research and other background work” that is only tangentially related to the organization’s lobbying operations. Lastly, the phrase “actively participates” conveys no objective meaning on its own, especially when paired with other vague terms such as “planning” and “supervision.”

Our organizations are democratic institutions. Members, many of whom contribute more than \$5,000, may sit on internal policy committees that set policies, goals and priorities, which are typically reviewed and affirmed by the board of directors or equivalent body. This

consensus-building, agenda-setting process may include legislative issues and provide broad guidance to our government affairs activities. However, if the vague language of Section 207 is our only guide, associations and chambers of commerce will have no way of determining with certainty which members they are obligated to disclose.

As a result, Section 207 would force associations and chambers of commerce to *over-disclose* – *thus eroding the confidentiality of association membership that is intrinsic to the constitutional right of free association*. While we need not resolve here what compelling government interest there may be in giving information to the public about lobbying activities, Section 207 would require the disclosure of many association and chamber members that would *not* otherwise be classified as lobbyists (or entities that retain lobbyists) under the Lobbying Disclosure Act.

Therefore, we respectfully request that you furnish guidance that cures the vagueness and overbreadth of Section 207, including examples of conduct that would *not* be considered “active participat[ion] in the planning, supervision, or control of such lobbying activities.” The following non-exhaustive list shows instances where a member’s engagement may touch on lobbying activities but would not trigger lobbying registration obligations under the Act:

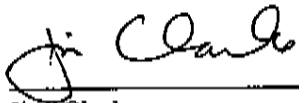
- (1) an entity that is a member of an association or chamber, whose representative attends semi-annual policy committee meetings and helps the committee craft policy recommendations on issues;
- (2) a corporate member that participates in the association’s annual meetings and offers comments and ideas during the government affairs staff presentation;
- (3) an entity that is represented on the board of directors of an association, where the board approves overall budgets, administrative and personnel actions (such as executive appointments), and policy positions of the association, but which does not give specific direction to the association’s lobbying activities;
- (4) a member whose technical expert is frequently called upon to provide scientific data that helps shape the association’s policy positions and testimony;
- (5) a member of an association’s management or compensation committee, which has general managerial oversight of the association’s registered lobbyists;
- (6) a member that volunteers to contact members of Congress on a legislative issue, but does not otherwise meet the statutory threshold for conducting reportable “lobbying activities;”
- (7) a member that expresses views on a legislative issue in an association-sponsored magazine column, letter to the editor, or blog; and
- (8) a member that participates in a purely internal meeting of the association’s senior leadership, in which legislative and lobbying issues are discussed.

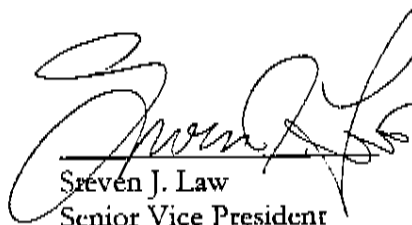
We look forward to obtaining guidance from your office that allows our members (just like the *individual* members who are **already expressly exempted** from any disclosure obligations under the new law) to participate in policy discussions, management activities, regular organizational meetings, contributions of “real world” expertise, and various other beneficial activities that may indirectly affect the government affairs activities of associations and chambers of commerce – without creating new disclosure obligations.

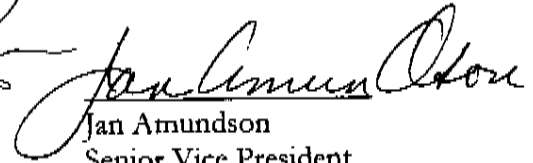
Finally, we respectfully request that you issue such guidance *immediately*. On January 1, 2008, we will need to implement extensive tracking and reporting systems to capture the

participation of our members in anything that impacts our organizations' lobbying activities. We welcome any dialogue on how to best accomplish the mandate of Congress in the new Act – while preserving the vitality of associations and chambers of commerce *and* protecting the constitutional right of private citizens and entities to engage in free associational activity.

Sincerely,

  
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Senior Vice President,  
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