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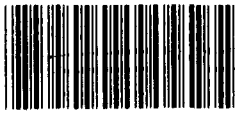

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FEDERAL LOBBYING

Lobbying the Executive Branch

Statement of
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LOBBYING THE EXECUTIVE BRANCH

Summary of Statement by
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Enacted in October 1989, the Byrd amendment prohibits the use of federal funds for lobbying agency employees or Members or employees of Congress in connection with the awarding of contracts, making of grants and loans, and entering cooperative agreements. Persons requesting or receiving these kinds of awards, as well as certain others, over specified dollar values must make certifications and disclosures regarding the use of federal and private funds for lobbying.

Twenty-eight of the 31 agencies we surveyed in April and May of 1991 implemented the Byrd amendment. Three agencies -- the Federal Deposit Insurance Corporation (FDIC), Resolution Trust Corporation (RTC), and the Export-Import Bank -- had not. FDIC began to implement the law in July 1991. RTC and the Export-Import Bank plan to do so soon. The Office of Thrift Supervision (OTS) in Treasury had not implemented the act because OTS contended the law did not apply to it. Treasury and we disagree with OTS; OTS has now implemented the law.

The law requires Inspectors General (IGs) or comparable officials to report annually on their agencies' compliance with and the effectiveness of the act. Twenty-eight of the 31 IGs we surveyed reported on their evaluations for 1990. Three did not.

We and many IGs identified problems with the act's implementation and effectiveness. Required certifications and disclosure forms were not always made and disclosure forms that were filed were often incomplete, lacking such required information as payments to lobbyists, the names of persons lobbied, and the dates of service.

Reasons for these problems include the newness of the law, the voluntary nature of compliance, ambiguity in the definition of lobbying, exclusion of certain types of program advocacy from the act, and ambiguity in the law and the Office of Management and Budget's (OMB) guidance to agencies on the act's implementation. Refinements to the law and OMB's guidance can help reduce some of these problems. For example, OMB should specifically require a statement that filers did or did not use nonappropriated funds for lobbying and require federal agencies to ensure disclosure forms are complete. Further, Congress should clarify when disclosure forms are due -- at the time of application or receipt.

None of the disclosure forms filed with the Secretary of the Senate to date related to contracts awarded by the Federal Aviation Administration (FAA). Yet, high-level officials we contacted at FAA said they had frequent contacts with contractors or their representatives relating to contract awards. This raises questions about compliance at FAA which need to be further investigated.

Mr. Chairman and Members of the Subcommittee:

We are pleased to testify today on our work relating to compliance and administration of the lobbying disclosure requirements of the Byrd amendment and certain other federal laws requiring disclosure of contingency fee arrangements for obtaining contracts.

More specifically, we determined (1) the status of agency and Inspector General (IG) implementation of the Byrd amendment in selected agencies, (2) compliance with Byrd amendment certification and disclosure requirements, and (3) explanations for the relatively low number of lobby disclosure forms filed compared to the number of funding actions of federal agencies and perceived high level of lobbying activities. You also asked that we do a limited test of compliance with contingency fee disclosure requirements associated with obtaining contracts.

BACKGROUND

Enacted October 23, 1989, the Byrd amendment (section 1352 of P.L. 101-121) prohibits the use of federally appropriated funds to influence or attempt to influence federal officials or Members or employees of Congress in the awarding or making of contracts, grants, loans and cooperative agreements. The amendment also requires those requesting or receiving these types of federal awards, as well

as loans and commitments to insure and guarantee loans, over specified dollar amounts to disclose whether they have paid or have agreed to pay lobbyists using nonappropriated funds. In addition, those requesting or receiving these types of awards, except for loan guarantees or insurance, must certify to agencies that they have not and will not use appropriated funds for lobbying. If persons requesting or receiving covered awards make a prohibited expenditure or fail to certify and disclose, they are subject to a civil penalty of not less than $10,000 and not more than $100,000. Agency heads are required to compile and send disclosure forms to the Clerk of the House and Secretary of the Senate semi-annually. The amendment also requires agency IGs or comparable officials (hereafter referred to as IGs) to report annually to Congress on their agencies' compliance with and effectiveness of the amendment.

The Byrd amendment required the Office of Management and Budget (OMB) to issue guidance to all federal agencies within 60 days following the enactment of the amendment. OMB issued its initial guidance on December 20, 1989, before expiration of the 60 days. It issued supplemental guidance in March and June 1990. In compliance with the Conference Report on the amendment, OMB also designated major agencies to adopt certain common rules for implementing the amendment.

STATUS OF IMPLEMENTATION OF BYRD AMENDMENT

To determine the status of implementation of the Byrd amendment, we surveyed IGs in 31 agencies in April and May 1991. (See app. I.) These included the 29 major agencies designated by OMB and two -- Federal Deposit Insurance Corporation (FDIC) and Resolution Trust Corporation (RTC) -- we chose because of their large funding activities. In addition, we contacted seven agencies to do a limited test of the amendment's implementation. Due to time and resource constraints, we focused our test on contract actions. We did not look at grants, loans, or other actions covered under the amendment. Neither did we do an in-depth evaluation at the agencies or review records of persons or organizations requesting or receiving funds from these agencies.

Based on the information provided by the IGs, 28 of the 31 agencies covered in our survey had initiated efforts to implement the amendment. According to the IGs, implementation included such steps as distributing instructions or guidance and requiring submission of certifications and disclosure forms. However, we cannot determine from the IG reports the complete extent to which agencies had implemented the amendment because the scope of the IG reviews was generally very limited.

FDIC and RTC officials said their agencies had not implemented the amendment as of the time of our survey because they did not know the amendment applied to them. The Export-Import Bank said it was developing procedures to implement the amendment and expected to have them in place soon. FDIC began to implement the amendment in July 1991. An RTC representative told us that RTC plans to implement it soon.

In addition, in its January 1991 report on the Byrd amendment, the Treasury IG reported that the Office of Thrift Supervision (OTS) had not implemented it. OTS contended that it was funded with nonappropriated funds and thus not subject to the amendment. In March 1991, the Treasury General Counsel ruled that OTS is subject to the Byrd amendment. We agree.

Twenty-eight of the 31 IGs we surveyed issued reports on the Byrd amendment covering 1990. IGs at FDIC and RTC said they did not do an evaluation. Labor's IG also did not submit a report as required by the amendment. In January 1991, Labor's IG sent a letter to OMB advising that its preliminary survey work did not reveal any apparent problems and noting he was still wrestling with the evaluation requirement. Labor's IG's office subsequently said an evaluation was being done in 1991.

In addition to surveying the IGs, we contacted seven agencies to determine first

hand what they had done to implement the amendment[1]. Each had issued guidance and/or instructions and had procedures to collect and compile certifications and disclosure forms.

COMPLIANCE WITH BYRD AMENDMENT'S CERTIFICATION AND DISCLOSURE REQUIREMENTS

We looked at compliance from two perspectives: (1) submission of required certifications and disclosure forms and (2) completeness of disclosure forms filed.

Submission of Required Certifications and Disclosure Forms

Fifteen IGs reported their work disclosed that certifications were not always obtained for the various types of actions (contracts, grants, etc.). Of those 15, only the Department of State Inspector General reported the failure to obtain a certification and disclosure form as potential violations of the amendment. The

[1]The 7 agencies were the Department of Energy (DOE), Department of Transportation's Federal Aviation Administration (FAA), General Services Administration (GSA), Department of the Treasury's U.S. Customs Service, Department of Commerce's National Oceanic and Atmospheric Administration (NOAA), Tennessee Valley Authority, and Department of Justice.

State IG said the agency had failed to include the required certification clause in the solicitation document, but he did not recommend a penalty because of the newness of the amendment. The remaining 14 IGs did not specifically address the penalty issue in their reports. The Conference Report on the Byrd amendment discusses several factors agency heads should consider, such as the circumstances involved, in determining whether to impose, and the amount of, a civil penalty for violations.

Seven IGs said that they evaluated the effectiveness of the amendment, and six of these raised concerns for various reasons, such as the voluntary nature of compliance, about the amendment's effectiveness in identifying and disclosing lobbying activities. The other 21 IGs said they had not evaluated the effectiveness of the amendment.

Certifications that appropriated funds were not used for lobbying were made for 6 of the 7 contracts we selected for review. An FAA contracting official stated that no certification was filed for the $24 million contract awarded by FAA in September 1990. According to this official, the certification was not obtained due to an oversight.

According to agency procurement personnel in 5 of the 7 agencies we contacted, no disclosure forms were filed for 5 of the 7 contracts we selected. None of the

disclosure forms forwarded to the Secretary of the Senate for the three reporting periods between December 23, 1989 and March 31, 1991 pertained to these 5 contracts. Disclosure forms for the two contracts we selected at GSA and NOAA were filed, but they had not been forwarded to the Secretary of the Senate. In an attempt to determine whether disclosure forms should have been filed in accordance with OMB's guidance for 3 of the 7 contracts, we contacted contract and program personnel at DOE, FAA, and GSA. They told us that they were not approached by contractors or their representatives in connection with the three contract awards we reviewed.

We also contacted 12 high-level officials at DOE, FAA, and GSA to determine if they had ever been lobbied for awards of contracts or grants. Eight of the high-level officials we contacted at DOE and GSA said neither contractors, grantees, nor their representatives had approached them about specific award actions.

At FAA, three high-level officials would not answer our specific questions. However, they wrote us stating that their federal positions required extensive industry contacts and meetings with contractor representatives at practically every step of an acquisition. They said that the number of such corporate representatives was too large to enumerate. A fourth FAA official did respond to our specific questions and said that she had been approached by contractors, grantees, or their representatives seeking to influence the award of specific

contracts or grants. This official believed that almost every time a contractor meets, it is an attempt to influence, but she did not consider it to be undue influence. The degree of influence is not a factor under the amendment. None of the disclosure forms filed during the reporting periods covered in our review related to FAA contracts.

Completeness of Disclosure Forms

We examined all 257 disclosure forms on file with the Secretary of the Senate for the three reporting periods since the amendment's effective date (December 23, 1989) to determine whether they contained the information required by OMB's instructions. We focused on two items -- payments to lobbyists and descriptions of service provided by lobbyists. We could not completely determine whether the forms were properly filled out because of ambiguity in OMB's instructions.

OMB's disclosure form calls for the planned or actual amount of payment for lobbying services. Neither the form nor the instructions specify, however, whether the total amount of payment or the rate of payment is to be reported. A breakdown of the 257 forms revealed that 151 showed a lobbying entity and 106 did not. (See app. II.) Of the 151 forms showing a lobbying entity, 6 had no payment listed. Of the remaining 145, 41 reported a total dollar figure, and 105 had varying rates of payment. For example, 27 forms indicated a yearly rate, 30

an hourly rate, and 21 a monthly rate.

OMB's disclosure form calls for a brief description of services performed or to be performed by the lobbyists. It also calls for dates of each service and persons contacted. OMB's instructions on the back of the form call for a specific and detailed description of the services performed or expected to be performed, and for an identification of federal personnel contacted. Of the 78 disclosure forms we examined for completeness of the description of service category, 45 lacked the identity of the persons contacted, 65 lacked the dates of service, and 2 lacked descriptions of services performed or to be performed.

Neither the amendment nor OMB's guidance requires agencies to ensure that disclosure forms are complete. Agencies are only required to compile and send disclosure forms to the Clerk of the House and Secretary of the Senate.

Given the newness of the amendment and limited time -- 60 days -- OMB had to prepare its guidance, these types of problems can be expected. We believe our review as well as IG reviews will provide OMB information needed to refine and improve its guidance and instructions.

OMB Guidance on Certification Is Confusing

A difference between OMB's guidance and the amendment's reporting requirements appears to be creating confusion. According to section 1352(b) of the Byrd amendment, a person must file a statement disclosing "whether" he has paid or agreed to pay a lobbyist with nonappropriated funds in connection with a federal contract, grant, loan or any other covered federal action. But OMB's guidance instructs a person to disclose only "if" the person has paid or agreed to pay a lobbyist in connection with such actions. OMB's guidance does not instruct a person to indicate that nonappropriated funds have not been used for lobbying, other than through the absence of the disclosure form.

For example, we found that some persons had filed disclosure forms in which they indicated that no lobbyist was used. This was the case for 106 of the 257 disclosure forms filed over the last three reporting periods since the amendment's effective date. OMB should be able to eliminate confusion and reduce the number of unnecessary disclosure forms filed by (1) amending the certification statement to require persons to indicate whether nonappropriated funds were or were not used to lobby and (2) emphasizing that a disclosure form is only necessary when a lobbyist was engaged using nonappropriated funds.

REASONS FOR RELATIVELY LOW NUMBER OF DISCLOSURE FILINGS

After three reporting periods covering the period December 23, 1989, through March 31, 1991, the Secretary of the Senate received 257 disclosure forms filed with 18 agencies for all types of funding actions. (See app. III). Another 20 agencies reported no disclosure forms were received. To illustrate the relatively low number of forms filed, we compared the total number of new contracts awarded over $100,000 by 36 agencies which reported to GSA's Federal Procurement Data System to the total number of disclosure forms pertaining to contracts each received. The 36 agencies reported that they awarded 19,130 new contracts during the period April through September 1990. By comparison, only 78 disclosure forms were filed with these agencies. (See app. IV.)

You expressed concern about the relatively small number of disclosure forms filed compared to the large number of federal funding actions and wanted to know why the number is so small. Reasons include the newness of the amendment, ambiguity in the definition of lobbying, the failure of some agencies to implement the amendment, and lack of systems in agencies for routinely reporting lobbying contacts of program or management officials. Three other possible explanations follow:

-- Certain types of program advocacy are not covered under the amendment. For example, in our opinion, a person lobbying for funding of an entire program in which the person is one of many possible recipients of grants, contracts, etc., would not be subject to the amendment. A question arises, however, when a person advocating a program or budget matter is the sole source provider of goods or services involved or is already receiving funding under the program.

Some agency officials told us that this type of lobbying occurs frequently. The two high-level officials at DOE and the one FAA official who responded to our specific questions said that they have been contacted by contractors, grantees, or their representatives to either advocate a particular federal program or express concern about a budget matter affecting a federal program. Without knowing more details of the circumstances, we could not determine whether these activities would be covered under the amendment. The five GSA officials we contacted said they were not contacted by contractors or grantees advocating or expressing concern about a federal program or budget.

-- Ambiguity exists in the amendment and OMB guidance on when disclosure forms are due. The amendment provides that a person requesting or receiving a federal contract, grant, or other federal action should file a certification (1) with each submission initiating agency consideration and (2) upon receipt of the contract, grant, or other federal action unless previously filed. We held in

a bid protest decision that although the amendment requires submission of the certification with the bid, it also provides for submission upon award, which indicates that submission of a completed certification was not intended as a prerequisite to consideration of the bid. If it is intended that submissions without the certification be rejected, the amendment and the guidelines need to be clarified.

-- Organizations using their own employees to lobby do not have to disclose the use of nonappropriated funds for such activity.

COMPARISON OF COMPLIANCE UNDER BYRD AMENDMENT AND CONTINGENT FEE PROVISIONS

In addition to Byrd amendment disclosure requirements, other federal laws (10 U.S.C. 2306(b) and 41 U.S.C. 254(a)) require, with certain exceptions, that every negotiated contract contain a warranty that the contractor has not agreed to a contingent fee arrangement with any person or agency to solicit or secure the contract. If the warranty is violated, the government may void the contract or deduct the full amount of the contingent fee from the contract price. Under the Federal Acquisition Regulation (FAR), a certification is required by all contractors acknowledging whether they have or have not used a lobbyist. If they answer in the affirmative, contractors are also required to submit a form to the agency

contracting officer disclosing information regarding the contingency fee agreement with the lobbyist.

For six of the seven contracts that we selected for review, the contractors reported that they had not used a lobbyist to solicit or obtain a contract. One contractor did. However, this contractor did not file a disclosure form under the Byrd amendment.

RECOMMENDATIONS

To correct the problems we identified, we recommend that:

-- The Director, OMB, (1) amend its guidance on certification to require a statement on whether persons did or did not use nonappropriated funds for lobbying, (2) clarify its disclosure form instructions to ensure that total dollars paid to lobbyists are reported and to eliminate the inconsistency between the form and its instructions regarding descriptions of service and (3) require agencies to ensure disclosure forms are complete.

-- The DOT IG further investigate FAA's compliance with the Byrd amendment. Statements by four FAA high-level officials that they frequently were contacted by contractors or their representatives concerning awards raise

questions about compliance with the amendment's requirements.

-- The Congress clarify the Byrd amendment to specify when disclosure forms are due -- at the time of application for funds or at the time of receipt.

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Mr. Chairman, that concludes our prepared statement. We would be pleased to answer any questions.

List of 31 Agencies for Which Inspectors General Annual Reports Were Requested

Department of Agriculture
Department of Commerce
Department of Defense
Department of Education
Department of Energy
Department of Health and Human Services
Department of Housing and Urban Development
Department of the Interior
Department of Justice
Department of Labor
Department of State
Department of Transportation
Department of the Treasury
Department of Veterans Affairs
ACTION
Agency for International Development
Environmental Protection Agency
Export-Import Bank of the United States
Federal Emergency Management Agency
General Services Administration
National Aeronautics and Space Administration
National Endowment for the Arts
National Endowment for the Humanities
National Science Foundation
Overseas Private Investment Corporation
Peace Corps
Small Business Administration
Tennessee Valley Authority
United States Information Agency
Federal Deposit Insurance Corporation
Resolution Trust Corporation

APPENDIX II

Breakdown of Disclosure Forms Identifying Lobbyists by Federal Action Type

Type of federal action	Total	Lobbyist reported	No lobbyist reported
All actions	257[a]	151	106
Contracts	79	24	55
Grants	119	107	12
Cooperative agreements	14	5	9
Loans	4	2	2
Loan guarantees	1	1	0
Loan insurance	2	2	0
No action identified	38	10	28

[a]This figure represents the total number of disclosure forms submitted to the Secretary of the Senate for the periods ending March 31, 1990, September 30, 1990, and March 31, 1991.

Source: Office of Public Records, Secretary of the Senate

APPENDIX III

TOTAL NUMBER OF LOBBY DISCLOSURE FORMS FOR THREE REPORTING PERIODS ENDING MARCH 31, 1990, SEPTEMBER 30, 1990, AND MARCH 31, 1991 BY FEDERAL ACTION AND BY AGENCY

	Contracts	Grants	Cooperative agreements	Loans	Loan guarantees	Loan insurance	Unknown	Agency Totals
General Services Administration	32	10	0	0	0	0	18	60
Department of Agriculture	24	8	6	0	0	0	4	42
Department of Transportation	3	33	0	1	0	0	5	42
Department of Education	2	24	0	2	0	0	2	30
Department of Health and Human Services	1	14	0	0	0	0	0	15
Department of Housing and Urban Development	6	2	0	1	0	2	4	15
Department of Commerce	0	11	2	0	0	0	1	14
Department of Defense	5	5	0	0	0	0	0	10
Environmental Protection Agency	2	3	3	0	0	0	1	9
Department of Justice	0	3	1	0	1	0	1	6
Department of Energy	1	1	1	0	0	0	0	3
Department of Labor	0	3	0	0	0	0	0	3
Department of the Interior	0	0	0	0	0	0	2	2
United States Information Agency	1	0	1	0	0	0	0	2
Department of the Treasury	0	1	0	0	0	0	0	1
National Endowment of the Arts	0	1	0	0	0	0	0	1
United States Arms Control and Disarmament Agency	1	0	0	0	0	0	0	1
International Trade Commission	1	0	0	0	0	0	0	1
TOTALS	79	119	14	4	1	2	38	257

COMPARISON OF NEW CONTRACTS OVER $100,000 AWARDED BY 36 AGENCIES FROM APRIL 1, 1990 THROUGH SEPTEMBER 30, 1990 WITH THE NUMBER OF DISCLOSURE FORMS FILED FOR THE PERIODS ENDING MARCH 31, 1990, SEPTEMBER 30, 1990, AND MARCH 31, 1991

	Number of actions	New contract dollars awarded ($000)	Number of disclosure forms received[a]
Department of Defense	13,965	$18,959,416	5
Department of Agriculture	1,041	493,791	24
Department of Veterans Affairs	619	370,737	0
Department of Health and Human Services	492	249,430	1
National Aeronautics and Space Administration	467	371,668	0
Department of Transportation	431	412,504	3
General Services Administration	417	341,249	32
Department of the Interior	347	178,597	0
Tennessee Valley Authority	272	537,618	0
Department of Energy	203	767,414	1
Department of Justice	180	163,238	0
Department of the Treasury	142	162,864	0
Agency for International Development	115	86,568	0
Department of Commerce	98	38,810	0
Federal Emergency Management Agency	61	22,741	0
Department of Education	56	33,877	2
Department of State	49	53,663	0
Environmental Protection Agency	45	26,856	2
Department of Labor	26	27,236	0
SUBTOTALS	19,026	$23,298,277	70

Subtotals forwarded	19,026	$23,298,277	70
Smithsonian Institution	25	329,906	0
Nuclear Regulatory Commission	21	3,743	0
United States Information Agency	13	11,631	1
Department of Housing and Urban Development	10	2,641	6
Equal Employment Opportunity Commission	7	2,235	0
National Science Foundation	6	1,443	0
Small Business Administration	6	1,658	0
Executive Office of the President	4	934	0
Commodity Futures Trading Commission	3	2,630	0
Office of Personnel Management	2	612	0
National Endowment for the Humanities	1	178	0
National Endowment for the Arts	1	104	0
Securities and Exchange Commission	1	190	0
Consumer Product Safety Commission	1	102	0
Selective Service System	1	168	0
Peace Corps	1	200	0
International Trade Commission	1	129	1
TOTALS	19,130	$23,656,781	78[b]

[a]Disclosure forms are for contracts that include initial awards and modifications.

[b]The United States Arms Control and Disarmament Agency also reported one disclosure form involving a contract for the March 31, 1991 reporting period; however, as of April 22, 1991, this contract had not yet been reported to the Federal Procurement Data System.

Source: Federal Procurement Data System