Lobbying regulation: a global phenomenon

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There is an old D.C. legend that the term 'lobbyist' originated from those who would gather in the lobby of the Willard Hotel, across the street from the White House, to petition President Ulysses S. Grant during his evening cigar-and-brandy visits. In fact, the term's origin goes back a few centuries earlier to the people who would congregate in the lobby of the English House of Commons to appeal to Members of Parliament.

Although the term may have been an import, the legal regulation of lobbyists developed first in, and was for many years unique to, the U.S. However, in recent years it is increasingly being exported around the world.

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The U.S. federal government made its first attempt to regulate lobbying in 1876 when the House of Representatives approved a resolution requiring lobbyists to register with the House Clerk. Then, after World War II Congress enacted the Federal Regulation of Lobbying Act of 1946, which established a system of lobbyist registration and disclosure.

The Act required anyone whose "principal purpose" was to influence the passage or rejection of legislation in Congress to register and file quarterly financial reports. Violating any of the reporting requirements was punishable by a fine up to $5,000 or one year imprisonment and a three-year ban on lobbying. Being the nation's first attempt to legislatively address lobbying, the Act did not cover Congressional staff, the executive branch, or a large amount of grassroots lobbying. There was also broad non-compliance with the Act.

Nearly 50 years later, Congress enacted the Lobbying Disclosure Act of 1995 (LDA) which created sweeping reform to the way lobbying activity was regulated. Driven in part by lobbying and corruption scandals, such as the Wedtech federal contracting scandal in the late 1980s, the LDA expanded the definition of lobbyists to include both in-house lobbyists (employees lobbying on behalf of their employer's interests) and outside lobbyists (persons lobbying on behalf of a third-party client), while also expanding the scope of covered officials to include not just Members of Congress but also Congressional staff and political appointees in the executive branch. It also covers attempts to influence executive branch decisions.

The LDA was further amended in 2007 by the Honest Leadership and Open Government Act, which significantly strengthened disclosure requirements and increased penalties for violations, as well as banned gifts and entertainment of Congressional officials. A company must register if any employee spends at least 20 percent of their time lobbying in a three-month period and makes two or more lobbying contacts during their employment with the company and the company spends at least $14,000 on lobbying in a three-month period.

Outside lobbyists have a lower trigger as the 20-percent threshold is calculated based on their work for any one client and instead of a $14,000 expenditure threshold, registration is triggered by receiving $3,000 in lobbying compensation.

While lobbying regulation was increasing in the U.S., it was also expanding internationally. Expansion started slowly — from the 1940s to the early 2000s, only four countries regulated lobbying practices: the United States (1946), Germany (1951), Australia (1983), and Canada (1989). However, since then, the number of countries with lobbying laws exploded, again often in response to political scandals. Today there are lobbying laws in at least 29 countries. They are common across Europe, and making inroads in Asia (e.g., Taiwan) and South America (e.g., Peru).

Indeed, we expect the prevalence of these laws to continue to increase as international organizations, such as the Organisation for Economic Co-operation and Development, recommend that countries adopt lobbyist registration regimes. Beyond the growth in these laws, there has also been a shift in existing laws away from voluntary registries to enforceable legal requirements.

These laws generally promote transparency and minimize clandestine influence on government processes. However, there are differences in who must register, the types of activities regulated, how activities are disclosed, and how violations are punished. To illustrate, we compare and contrast several lobbyist registration regimes: the United Kingdom, France, Germany, and European Union.

The laws vary in terms of who is required to register. The UK's Transparency of Lobbying, Non-Party Campaigning and Trade

Union Administration Act only applies to external consultant lobbyists who are registered under the Value Added Tax Act 1994 (i.e., having annual turnover in excess of £85,000), whereas the other laws can apply to both consultant and in-house lobbyists. Indeed, Germany's Lobby Register Act is similar to the LDA, in that it sets a lower threshold for triggering registration for external lobbyists than employees lobbying on behalf of their own employer.

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There is no registration threshold for companies in Germany that lobby on a professional basis for a third party, whereas companies lobbying on their own behalf need only register if they do so regularly or by making more than 50 lobbying contacts in a three-month period. Lobbying includes attempting to influence the decisions of the Bundestag, its Members, and subdivisions as well as the Chancellor, federal department heads, and state secretaries.

France and the EU do not explicitly distinguish between external and in-house lobbyists, though in practice it may still be more likely for external consultants to trigger registration given the nature of their activity and the laws' registration threshold. France's Second Sapin Law only requires registration if one spends more than half of their time engaged in lobbying activities during a six-month period or during a 12-month period, carrying out more than 10 lobbying activities. Lobbying activity is defined as communication initiated by a lobbyist toward a public official relating to a regulation, legislation, or individual public decision for the purpose of influencing such decision.

There are also differences regarding what type of activity constitutes lobbying as not all interaction with government officials is necessarily covered. For example, the EU's lobby law covers seeking to influence EU decision-making, participating in consultations and hearings, organizing communication campaigns and grassroots initiatives, and preparing policy papers and other types of communication, but exempts submissions within the framework of a legal or administrative procedure, responses to requests for information, and even spontaneous meetings.

The UK's definition is limited to communications with a Minister of the Crown or Permanent Secretary (or equivalents), while Germany requires contact with the Bundestag or parliamentary state secretaries, state secretaries, heads of departments and heads of subdepartments. France's law also limits the government officials who are covered, and exempts communications initiated by a public official.

Each of these laws requires some form of ongoing reporting for registrants. The EU and German laws require ongoing updates to the information contained in their registries, such as the issues promoted, the clients represented, and the resources spent. France requires annual reporting, while the UK matches the LDA's cadence of quarterly reports.

Violations of these laws can all be punished with monetary penalties, except for the EU where the enforcement mechanism for violations is denial of access and lobbyist privileges. But even these non-monetary consequences are an evolution from the EU's prior voluntary registration regime. French law and the LDA also permit criminal enforcement under certain circumstances. Moreover, there is always potential reputational harm that can come from a violation of any of these laws.

These laws have a great deal in common as well as their own unique nuances. For a company operating cross-borders, it is increasingly important to understand both the big-picture concepts common to lobby laws in different jurisdictions (such as categories of covered activity and registration thresholds we compare and contrast above) as well as the particulars of the laws of a particular country in which the company operates. Indeed, companies should design compliance programs and develop teams — whether internal or external — that are fluent in the principles of lobbying regulation while having a global reach to coordinate filings and advice in the countries where the company and its employees trigger registration.

Lobbying, and its regulation, has come a long way from the smoke-filled lobby at the Willard.

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