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## Lobbying in the United States – The North-American regulation experience

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**God wills, Man dreams, the Work is born.**

Fernando Pessoa

**All the world's a stage, and all the men and women merely players: they have their  
exits and their entrances; and one man in his time plays many parts, his acts being  
seven ages.**

William Shakespeare

## **Lobbying in the United States –The North-American regulation experience**

### **Introduction**

Lobbying can be understood as a very important tool to improve and preserve democracy. It is a way in which different groups can let others know about their interests and provide information to the ones that will make political decisions. Unfortunately, people often use these tools in a way that distorts the moral and democratic views, creating an image of lobbying as a non-legal way of getting favors from authorities and decision-makers.

Although Brazil is a country almost as old as the United States, its history is completely different, especially regarding to the political and democratic aspects. There has been a constant change between democratic and authoritarian regimes since its independence and only after 1985 the country moved toward a consolidated democracy. In this process, there is a strong need of developing new forms of improving the political maturity of the Brazilian system. Brazil has still much to improve on politics and even more on the particular subject of lobbying. Because the United States has more experience studying and understanding the importance of this activity it may serve as model to the development of a Brazilian lobbying legislation.

The North American society is (or at least was until a few years ago) able to see the importance of the lobbying activity, unlike most of other countries, and encourage its people to use this tool to pursue their beliefs. It was even included at the constitution, on its first amendment which states: *‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances’*. When individuals or groups lobby in the United States, they are exercising their basic right that was granted by the American Constitution.

After some cases of the misuse of lobbying, its image inside the American society seems to have changed into a prejudicial attitude, most similar to the one adopted in the international context. This change in attitude may cause some modifications in the way lobbying is seen, and most of all in the way it is regulated. President Barak Obama, while still in his campaign for office, often used the lobbying activity as an example of the things he would like to change once elected.

The tradition of freedom and the pursuit of the best way to live have made the lobbying activity in the United States a unique experience. The main focus of this paper is to study its model in order to understand it better. The way it is being used and specially the regulations the country developed in order to attempt to make the activity as noble as it can be, are relevant lessons that must be carefully analyzed. In these areas, also, the study of North American trajectory is very rich because the United States has the longest history of lobbying regulation of all modern states with provisions dating back to 1935.

This paper was developed particularly with the purpose of analyzing the mistakes and successes of the American experience. For such, it was divided into four parts, which not only focuses on achieving a better understanding about the North American experience, but also on trying to learn about their process in order to develop a Brazilian way to deal with the subject.

The first part the paper is dedicated to understand what is the lobbying, who are the main parts involved and how they perform in order to develop their activity. This is a more conceptual part, not focusing especially on the American experience, but mainly on the international way of seeing the lobbying activity, although some examples of the American regulation are already being used.

The second part is more related to the American experience. Starting with some ideas about how lobbying had been developed in the United States and the current legislation and its ideas: the registration of the lobbyists, the disclosure reports, the “revolving doors” policy, among many other very

distinguished concepts. At the end of this second part, there is a small analysis of the current situation, such as the problems detected and the difficulties to implement modifications.

The third part of this paper is dedicated to the examination some of the American statistics that were obtained by combining the results, in the last ten years, of the disclosure reports. The changes (or the absence of them), the number of registered lobbyists, the amounts invested in the activity, the companies that invest more in lobbying are shown. It is a valuable source of information about how lobbying is developing in the North American political scenario, especially when strict regulations took effect. There will also be an analysis of some interesting cases related to lobbying activity. These cases are reported in order to illustrate that even the most regulated society can have problems, and it also tries to provide a general idea about how it is seen and performed.

Finally, in the fourth and last part, there are some conclusions about the importance of examining the American experience and the lessons that can be learned to best develop a Brazilian model. The differences and the similarities, as well as some proposals to better way with the lobbying activity will be presented. Despite of the suggestions, it is necessary to keep in mind that every country has its own reality and every experience should be unique in order to reach the best possible results to every different society.

## 1. The Lobbying Activity

This paper uses the concept of lobbying as the attempt to influence decision makers in choosing a wide range of courses of action. It may be to pass or amend certain legislation, or to oppose its passage through Parliament. It may be to oppose, adopt or amend a government policy, or to influence the awarding of a government contract, or the allocation of fundings.

In this chapter, the institution of lobbying in its international form will be analyzed, but already trying to examine some of the American concepts. To better find a way to use this political mechanism in order to improve the democratic process, a key element is to define what is lobbying, who is a lobbyist and how people develop their activities in order to achieve their goals.

### 1.1 Lobbying Definitions

There is a persistent belief that the word lobbying began to be used between 1869 and 1877, during the administration of President Ulysses Grant. Not allowed to smoke in the White House by his wife, Grant enjoyed his cigars in the lobby of the nearby Willard Hotel. Having been spotted there often, all kinds of people, from politicians to industrials, wanting political favors began to frequent this place during this time of repose, while he was in high spirits. However, the term seems to be really originated in the United Kingdom from approaches made to the Members of Parliament in the lobbies of the House of Commons. Usage of the word in this sense in the United States occurred well before the Grant Administration; the practice itself is much older.

Lobbying is understood as an attempt to influence specific legislation. The word legislation in this context can be understood as any action taken by a "legislative body," which may be the Government in its executive branch, the Congress, a state legislature, or a local legislative body such as a city council.

Significantly, a "legislative body", in most legislation, does not include judicial or administrative bodies, such as zoning and school boards. The judicial body produces sentences, decisions, but not legislation. Obviously these decisions can suffer influences, but most of the time it is performed by lawyers, not lobbyists, being a completely different situation, with its own characteristics. The study of these influences is large enough to be object of several studies so it will not be included in this one. For now, it is only important to establish that they are not the same.

The administrative bodies are so called the small decisions taken by the community on its own interest, without government participation. This is a very common situation in the United States, but not so usual elsewhere. For example, zoning in Brazil is mostly decided by local governments. It means that in Brazil these decisions would be considered as legislation and would be influenced by lobbyists. And, in fact, they are.

It is also important that to constitute "lobbying," one must either support or oppose legislation. In other words, a general statement that, for example, government has a role in supporting low-income people, or that the growth in inequality should be halted, cannot be considered as a lobbying activity.

Using, already, the North American model as a base, there is a concept used by their legislation at the federal level on **the 1995 Lobbying Disclosure Act**. This legislation has the definition of lobbying activities, which includes oral, written or electronic communications to a government regarding:

- *“Formulation, modification or adoption of federal legislation;*
- *the administration or execution of a federal program or policy;*
- *the formulation, modification or adoption of a federal rule, regulation, Executive order, policy or position of the government;*
- *the nomination or confirmation or a person subject to confirmation by the Senate.”* <sup>1</sup>The 1995 Lobbying Disclosure Act

The same legislation concludes that lobbying activities does not include:



- *“a speech, article, publication or other material that is distributed and made available to the public through a medium of mass communication;*
- *a request for a meeting, a request for the status of an action or other similar administrative request;*
- *testimony given before Congress or submitted for inclusion in the public record response to a request for public comments in the federal register;*
- *requires by subpoena or civil investigative demand;*
- *a written comment filed in the course of a public proceeding – made by the media – if the purpose is gathering and disseminating news and information to the public.”* 2. *The 1995 Lobbying Disclosure Act*

While lobbying is a legitimate activity, there is a perception that lobbyists can sometimes wield undue influence and that their activities may shift political decisions in an undesired way. Under these circumstances, two key issues arise: the first is if effective regulation of the lobbying activity can be designed in a way that avoids anti-democratic excesses. The second would be the particular concern relating to post-separation employment for Congressmen, Secretaries or other executive-branch employees, where former public office holders are recruited to the lobbying industry.

Governments have been trying to avoid those issues in different ways, but always investing in the idea that the most important factor is to avoid decisions to be made in order to benefit some in detriment of the people well-being. No matter the path chosen, there are always two main elements to pursue: transparency and accountability.

On the transparency and accountability issue, the Independent Commission Against Corruption (ICAC is a governmental agency created by the ICAC Act of 1988, that aims to protect the public interest, preventing breaches of public trust and guiding the conduct of public officials) commented in its discussion paper, *Managing Post Separation Employment: “a public official who is still in office, but who is thinking of working as a lobbyist, may be tempted to make decisions that favor prospective clients or employers. A former public official who is now a*

*lobbyist may be tempted to use information or contacts that are not generally available for personal benefit, or to benefit an employer or client. Former colleagues may regard the lobbyist as an insider and grant special access and therefore give lobbyists an unfair advantage.”* 3. Managing Post separation Employment. ICAC.

The world of politics is a small one. Many prominent figures from both sides of politics have become leading lobbyists, in several different countries. This is as true for former politicians as it is for those they employed, as chiefs of staff and in other high-ranking positions. Of course, that does not mean that lobbying is not a perfectly legitimate activity. In a representative democracy, it is normal that individuals and groups should seek to press their views on elected officials. A particular argument is that lobbyists have an expertise that politicians do not have. So they can influence politicians by strategically sharing their knowledge with them. Such activity is a natural part of the democratic process of communication between people and government. Ideas and views of interested parties belong to the policy mix from which decisions emerge. More generically, lobbying fits comfortably within the pluralist theory of politics, which sustains that power in western society is distributed between several groups. These groups may be trade unions, pressure groups, business organizations, and any of a multitude of formal and informal coalitions, all of them trying to have their say on policy issues of their interest.

But there must be limits. The line between legitimate influence and corruption must be clearly drawn. Legislation and the making of governmental decisions must serve and must be seen to serve the public, not the sectional, commercial or private interest. The debate about the most efficient way to deal with the participation of the society within government decisions is still new. Different countries found different ways to deal with this subject, but no consensus is formed inside, neither at the academic nor the political arena.

## 1.2 Lobbyists and the Lobbying Activity

As difficult as defining lobby is defining who a lobbyist is. What kind of activity differs, for example, the ones who are just talking about a subject with a decision-maker from someone who is indeed trying to convince this person to take a determined decision instead of another? And how often does this person engage in these activities define if he or she is a lobbyist? Those are questions that countries and governments are still trying to define in a fair way.

Interest groups are an element of political life of every organized modern society. The term "interest groups" cover a wide spectrum of people and issues. David Truman defines an interest group as "*a shared attitude group that makes certain claims upon other groups in society*", by acting through the institutions of government. Some interest groups are transient, whereas others are more permanently organized. Many are solely interests in influencing the government's public policy, while others are only sporadically concerned with political decisions. Some groups work directly through the executive or administrative agencies while others work through the judicial or legislative branches, or even through public opinion. But one factor is common to all interest groups: they are all non-publicly accountable organizations witch attempt to promote shared private interest by influencing public policy outcomes that affect them. Although they seem very much alike, interest groups differ from political parties for their goals, the nature of their membership and their almost unlimited number of participants. 4. David Truman, The governmental process.

As Tocqueville observed in 1830`s, *"in no country in the world has the principle of association been more successfully used or applied to a greater multitude of objects than the Americans."* It was accurate at that time and is also true nowadays. That would be already a good reason to use the United States as a study case on the political participation of interest groups. 5. Alexis de Tocqueville. Democracy in America. 1831.

Although lobbying is not the only strategy of interest groups, it is the one that receives more attention. Unlike many other countries, the United States

took its own conclusions about the acting of these interest groups, especially regarding to the lobbying activity and established them in its law.

**The 1995 Lobbying Disclosure Act** has a definition for who should be considered lobbyists. Although the legislation had suffered a lot of changes in recent, this concept of lobbyist still remains in place: *“someone who is employed or retained for financial or other than an individual whose lobbying activities constitute less lobbying contact, other than an individual whose lobbying activities constitute less than twenty per cent of the time engaged in the services provided by individual to the client or employer over a six-month period.”* 6. The Lobbying Disclosure Act.

Lobbying contacts does not include requests for meetings or status reports that do not attempt to influence a legislative or executive official; testimony in a congressional panel; information provided at the request of a government official; or communications made in response to government notices requesting comment from the public.

Political lobbyists come in many shapes and forms. Lobbying is something that big business, trade unions and non-government organizations share. They all want to get heard by the government by one mean or another. To achieve their goals, several lobby groups were created, as varied, as it is large. As a part of it, there are professional lobbyists, also called “hired guns”, who represent organizations or individuals on a third party basis. These persons undertake lobbying activity on a more or less continual basis and for a variety of clients. Other professional lobbyists are employed directly to represent a corporation, an organization or a cause. This kind of lobbying activity may also be more or less a full-time job. There is a multitude of individuals and coalitions with an interest in a particular issue, who may come and go from the lobbying scene. The lobbyists may be ordinary members of the public like, for instance, representatives of community groups operating as volunteers at a grassroots level. Alternatively, they may also be members of a society with a mandate to argue for or against a proposed amendment to a determined bill. All of this might be said to engage in political lobbying at one level or another.

Indeed, it is argued that the word “lobbyist” should include anyone trying to influence government policy, whether they are business associations and leaders, NGOs, trade unions, churches or independent fee for service lobbyists.

Therefore, the boundary lines around political lobbying are not easy to draw. The same might be said about the methods used by lobbyists. There is no standard or agreed *modus operandi* for the lobbyists. Lobbying can be conducted through direct dealing with such political institutions as the government and the public service, or indirectly through the media, public opinion or the electoral process. John Warhurst in his article ‘Limits to reigning in the lobbyists’ defended that: *“Lobbying has both closed and open connotations. Lobbying can be described as insider work; that is, gaining private access to government. NGO often rely on outsider work, that is, public campaigning through speaking out. Those who seek to influence government often try to do both. Advocates of each would argue that they make for better democracy and public policy. Both are ways of the community communicating better with government.”* <sup>7</sup> *Limits to reigning in the lobbyists by John Warhurst.*

The main problem nowadays is that there is confusion between lobbying and unethical behavior and that is not correct at all. Lobbyists use their insider knowledge and connections to make money from special interests and because they do it so directly (calling their former colleagues, for example), they must register as lobbyists. Most lobbyists are good citizens representing real people and defending their interests. Without lobbyists government could not function efficiently or perhaps not function at all. The representation of the interest of citizens is a necessary attribute of democracy. According to the Public Affairs Council based in Washington DC, the leading association for public affairs professionals or lobbyists, as *“the government has grown in size and complexity, more lobbyists have been needed to explain how business operates, how technology works, how legislation would affect various interests, and how consensus can be achieved in public policy-making”*. <sup>8</sup> Public Affairs Council.

is an international association for public affairs professionals. Its mission is to advance the field of public affairs and to provide tools and resources that enable public affairs executives and managers to achieve their business and professional goals. Launched in 1954 at the urging of President Dwight D. Eisenhower, the Council provides unique

information, training and other resources to its members to support their effective participation in government, community and public relations activities at all levels.

Lobbyists have a wide variety of lobbying techniques at their disposal. Some of the most common techniques are: testify at legislative hearings, meet personally with legislators and their aides, doing favors and providing gifts for legislators. Lobbyists spend most of their time with members of Congress and their staff providing factual and expert information about legislation that affects their clients. The clients are companies that employ real people who deserve to be also considered when laws are made. The first Amendment protects petitioning and communicating with government and lobbyists work to make this communication easier.

So, there is no such thing as “bad lobbyist,” also called “black hat lobbyists” for some, and “good lobbyist” or “white hat lobbyists” for others. Lobbying is responsible, serious and helpful to the decision process or it is not lobbying at all; It is crime. What can be negative about lobbying is the absence of transparency when the powerful and the wealthy have secret influence on members of Congress or the Executive bench.

### **1.3 The Participation of Outside Entities on the Decision Process**

Once described the meaning of the word lobbying and the different people who can carry out this task, it is important to know the choices that pressure groups have to try in order to achieve their goal in the decision-making process.

As an organization decides that lobbying would be an important tool to be used to achieve their goal, it may have to choose whether to work directly or to hire a lobbying firm, a law firm or a public affairs firm.

It is possible to work directly by establishing an office in the locality where the decisions are made or creating (or joining) an association or union or even a special-interest organization. It can also be done by using the support of people with the same interest, that acts isolated but toward the same goal. Each entity

has to define the best way considering mainly their budget and the kind of decision it needs to influence.

### **1.3.1 Forms of political representation**

There are different kinds of interest groups acting in order to obtain changes (or to maintain the *status quo*) in legislation or in political decisions. These groups work in very different ways. For example, some political organizations do not spend money on lobbying while others spend significant amounts on it, yet spending nothing on political campaigns. In fact most of the nonprofit organizations are not allowed to participate in any electioneering activity (like public interest, social welfare organizations, philanthropic organizations or universities), because of their nonprofit, tax-exempt status, given by the government (IR 501(c)(3)). Again, there are major differences among the legislation around the world. Some countries do not allow any political participation from the entities that receive tax exemptions.

In the United States, there is a set of rules allowing different levels of participation to different organizations. Nowadays, American legislation allows two basic forms of representation, besides the individual interest by citizens themselves. These forms are: direct organization representation and surrogate representation through lobbying firms. There is also a third way of lobbying without establishing an office or contracting someone to represent one's interest, which is called grassroots lobbying. Grassroots lobbying is a very interesting and powerful way to try to influence a political decision by using the participation of a large number of persons who are interested in the same subject and are willing to take actions in order to achieve it.

**Direct Representation** - One interest group, once decided to influence directly some political decision, may choose one of three forms of acting (or all of them):

- Establish an office within the corporation (normally in Washington) - Companies are likely to have their own office taking care of the subject of their interest. They have a full-time lobbyist team and a complete structure working. It is, most of the time, very effective but also expensive. Not every company has conditions, nor will to spend all that money over a subject, so other ways can be used to have their interest represented.
  
- Form or be part of an association or union - This is an old form of protecting and representing some group`s interests. Associations provide cost-effective representation and other political and economic services to their members (individual citizens, economic interest or trade groups). The most recent trend in expansion of associational representation is of political minorities within business trades and professions. Union representation in Washington is similar to Association representation, because these economic organizations are also organized by craft, trade, profession and industry. Moreover, there is a layering of representation, from individual locals, national and international unions to umbrella organizations. Like corporations, many associations and unions, in addition to lobbying on public policy issues, are active in electoral politics.
  
- Form or be part of a special-interest organization - Besides joining unions or economic organizations, citizens may choose to be part of organizations that defend noneconomic goals, such as clean environment, consumer protections or family values. Many ideological perspectives are often represented in policy debates, although not always with the same space or strength. Public interest nonprofit organizations are granted special status by the federal government; they are exempt from corporate taxation, they benefit from subsidized postal rates and some of the contributions they receive are tax-deductible. However, social movements can also be part of the electoral process, creating committees to raise funds and organize fund-raisers in order to help a candidate`s campaign.



These forms seem to be the most effective organized interest in politics once they are permanent and have the advantage of being in the front lines of federal policy making. Some of them are not allowed by the law to participate in the electoral activities, contribute with money or raise funds for issue advocacy.

**Lobbying firms** - Having a direct and permanent physical presence in Washington, for example, may seem too expensive or demanding for some companies or interest groups. In that case, corporations or political organizations can contract lobbying services. The choice might be between a multiple-client firm, a law firm or a public affairs firm (or they can choose all three types depending on interest, moment or size of the represented).

There are a lot of multiple-client lobbying operations in Washington. Some of them are organized to work in a determined area, serving a homogeneous client base and others serving for several different purpose, regardless of the policy focus.

The main asset to a lobbying firm tends to be the participation of a former member of Congress or a former high-ranking administration official. Today more than 150 former Congressmen are registered as lobbyists, most of them working for lobbying firms and the remaining in major law firms. As Ronald Shaiko wrote: *“because few multiple client-firms are able to cater the entire spectrum of political interest, these firms have focused their lobbying efforts on specialized sets of policy or client interest; as such they are known as ‘boutiques’ or specialized shops. A recent trend in the lobbying industry is the acquisition of those boutique firms by large public relations firms.”* 9. Ronald

*Shaiko*. The Interest Group Connection: Electioneering, Lobbying, and Policymaking in Washington, 2nd Edition, co-edited with Paul S. Herrnson and Clyde Wilcox, Washington, DC: Congressional Quarterly Press, 2005.

**Grassroots Lobbying** - This is a third and different way of trying to affect political decisions. It means trying to influence the public to express a particular view to their legislators about a specific legislative proposal. Grassroots lobbying means the voluntary efforts of members of the general public to communicate their own views on an issue to Federal officials or to encourage other members of the general public to do the same.

A communication is considered lobbying (a "grassroots call to action") if it states that the reader should contact a legislator, or if it provides the legislator's address and/or telephone number, or provides a post card or petition that the person can use. It is also considered a lobbying communication if it simply identifies legislators who are opposed to or undecided about a piece of legislation, or identifies that an individual's legislator is on the committee that will vote on the legislation. (This is called "indirect encouragement.") Simply identifying a bill's sponsor (referring to the "Istook amendment," for example) is not considered indirect encouragement.

## 2 North American recent experience in the Lobbying activity regulation

On the late 1980`s, a series of factors, such as high salaries for lobbyists, an increasing demand for lobbyists, greater turnover in Congress and a change in the control of the House, contributed to a change in attitude about the appropriateness of former elected officials becoming lobbyists. Former lawmakers were (and still are) eagerly hired as lobbyists because of their relationships with their former colleagues as well as other contacts.

The Public Citizen Report included a case study of one successful lobbyist, Bob Livingstone, who *“stepped down as Speaker-elected and resigned after a sex scandal. In the six years since his resignation, his lobbying group grew into the 12<sup>th</sup> largest non-law lobbying firm, earning nearly US\$ 40 million by the end of 2004. During almost the same time period, Livingstone, his wife and his two political committees contributed over US\$ 500,000 for various candidates.”* 10.

Public Citizen Report is a publication from Public Citizen, a national non-profit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. With two offices in Washington, DC and state offices in Texas and California.

Currently, there are over 17,000 registered federal lobbyists based in Washington, DC. While many are employed by lobbying and law firms and retain outside clients, others are employed by trade associations, companies and state and local governments.

## 2.1 Historical Process of Lobbying Regulation in the United States

Since the end of the civil war, lobbying has been an issue never far from the political arena and its regulation remain extremely contentious to this day. Starting in the 1870s with the populist movement, the pressure for changing the system, adapting it to the morals prevailing at the time has generally come from the public.

Questionable practices used by railroad lobbyist's right after the civil war led to consistent demands to regulate those who sought to influence the prices of railroad building that took place across the United States. In the post civil war period (1876), the House of Representatives attempted, without success, to require lobbyists to register. The subject kept being discussed in every session of the Congress since 1911, but no regulatory system was created until the presidency of Franklin Roosevelt.

This situation changed with the *Public Utilities Holding Company Act of 1935*, a legislation that dealt with electricity provisions, where a requirement had been included for *"anyone employed or retained by a registered holding company to file reports with the Securities and Exchange Commission before attempting to influence Congress, the SEC or the federal Exchange Commission"*. <sup>11</sup>. *Utilities Holding Company Act of 1935*.

It was the first piece of legislation created by the American Congress especially directed to lobbying government agencies. ON the following year, Congress included a lobby registration provision inside the *Merchant Marine Act of 1936*, requiring that *"lobbyists of shipping corporations and shipyards receiving governmental subsidies should report their income, expenses and interests on a monthly basis"*. <sup>12</sup>. *Merchant Marine Act of 1936*.

This act was a reaction to scandals in the shipping industry over the granting of maritime mail hauling contracts and the lobbying practices of the industry in attempting to influence a maritime subsidy bill.

These initial efforts of lobbying regulation were, however, deeply flawed by the limited coverage they achieved (the power and maritime industries). Two more pieces of legislation were also passed at the time: *The Foreign Agents Registration Act of 1938* and the *Legislative Reorganization Act of 1946*. The former determined the registration of anyone representing a foreign government. The latter, which included the first general federal lobby registration law, required the registration of any person hired by someone else for the principal purpose of lobbying Congress, requesting the submission of financial reports of lobbying expenditures.

The 1946 Act was widely considered inadequate. It covered only Congress leaving the executive branch, the regulatory agencies and other governmental organizations out of reach of the law. There was also the problem that the Act left the financial reports at the discretion of lobbyists and investigation and enforcement of the provisions of the law were almost nonexistent.

According to Professor Clive Thomas “*this registration law accounted for between one sixth and one third of lobbyist working in Washington DC, with only 1% of the total money spent on lobbying being reported.*” The main shortcoming of the act was its vague language which gave rise to a number of loopholes. Many lobbyists refused to register as they did not regard lobbying as their principal purpose while others did because they used their own money to finance the activity.

13. Clive Thomas is a Professor of Political Science from the University of Alaska Southeast. His teaching and research interests include: American politics, American state politics, Western European politics, and particularly special interest groups. He has published ten books and over forty articles and chapters in books mainly in the fields of interest groups, state politics, legislative process, and intergovernmental relations. In addition, he has done extensive work over the past twenty-five years as a political consultant mainly through developing and conducting surveys for political candidates, advising various interest groups on strategy and tactics, and teaching seminars on lobbying and the legislative process. This passage is from his book *Interest Group Regulation Across the United States*.

Even with all the problems, the 1946 Act remained in place for almost 50 years and was only replaced in November 1995 by the *Lobbying Disclosure Act*.

## 2.2 Current Legislation

The United States is known nowadays to have one of the more highly regulated lobbying systems of the world. Their legislation tries to cover almost all situations regarding to the attempts to influencing any political or governmental decision. With a set of acts regulating the federal level, there are other rules not necessarily similar at the state and local levels.

At the current time, lobbyists are working federally under some different legislation that complements each other. **The Lobbying Disclosure Act of 1995, The Lobbying Technical Amendments Act of 1998, the Legislative Transparency and Accountability Act of 2006** and **the Honest Leadership and Open Government Act of 2007** are regulating the activity, defining several concepts, demanding a different set of conducts and requiring the filing of reports. Their rules demand strict registration and reporting requirements for all professional lobbyists. All these acts were done considering **the Ethics in Government Act of 1978** that regulates the other side of the lobbying activity: the decision makers.

Spending disclosure requirements are in place, as are enforcement mechanisms. Criminal penalties for failure to comply with reporting requirements are also imposed. Post-separation or “revolving doors” provisions are a further feature of US regulatory systems. Federally, the system operates under **the Ethics in Government Act of 1978** involving lifetime bans on lobbying in some cases, and one or two year bans in others. For example, as amended in 2007, the act places a two-year ban that continues to apply to former Members of the House of Representatives, elected officers of the House, and the Senate officers, or senior Senate employees.

**The Honest Leadership and Open Government Act from 2007** -the last bill elaborated by the American Congress. It amended the former acts, requiring the lobbyists to follow some new rules regarding ethics legislation and placing restrictions on federal lawmakers, their staff and outside entities. This law also includes a requirement to file quarterly reports (instead of semiannual)

within 20 days after the end of a reporting period. The changes from the new law effect reporting periods beginning January 1, 2008.

### **2.2.1 The Ethics in Government Act of 1978**

**The Ethics in Government Act of 1978** is a United States federal law passed in the wake of the Watergate Scandal. These events prompted calls for ethics and openness in government that led to the edition of a bill that would set financial disclosure requirements for public officials and restrictions on former government employees' lobbying activities. These rules were designed to reduce corruption and prevent the improper use of knowledge gained while in the government's employ.

There are two most significant provisions of the law. The first defines that some members of the upper levels of all three branches of government (including the President, the Vice President, members of Congress, federal judges and certain staff members in each branch) must file annual public financial disclosure reports that shall list:

- *“The sources and amount of all earned income; all income from stocks, bonds, and property; any investments or large debts; the same information for spouse and dependent children;*
- *Any position or offices held in any business, labor, or nonprofit organization.”* <sup>13</sup>. Ethics in Government Act of 1978.

The second important subject of the act prohibits former employees of the executive branch from representing anyone before an agency for two years after leaving government service on matters that came within the former employees' sphere or responsibility, even if the employees were not personally involved with the matter. They also are not allowed to represent anyone on any matter before their former agency for one year after leaving it, even if the former

employees had no connection with the matter while in the government. In addition, the act imposed limits on gifts and honoraria (payments at a set price for speeches or other services) and created new administrative procedures for enforcing ethics provisions.

### **2.2.2 The Lobbying Disclosure Act of 1995 (LDA)**

After a series of scandals, this legislation was created aiming to bring a level of accountability to the practice of lobbying at least on the federal level. **The Lobbying Disclosure Act** is, still today, the most important piece of legislation about the lobbying activity and regulation. The terms of the act were substantially changed by **the Honest Leadership and Open Government of 2007**, but there is still a great part of it being used at the present day. It defines a number of provisions attempting to maintain a degree of transparency in the activities of lobbyists.

The following are some of the main provisions of the law:

*-“ A lobbyist must register with the secretary of the Senate and the clerk of the House of Representatives.*

*- The lobbyists that receive more than US\$ 5,000 in a six-month period or organizations that spends more than US\$ 20,000 for the same period, must file semi-annual disclosure reports.*

*- These semi-annual reports cover lobbying expenditures, payment to contract lobbyists, and the income a contract lobbyist receives for lobbying. A list of the institutions contacted, the lobbyists involved and the involvement of any foreign interest such as a foreign government or organization.*

*- The definition of lobbyist was widened to include all those who seek to influence congress, congressional staff and policy-making officials of the executive branch including the President, senior White House staff, Cabinet members and their deputies and independent agency administrators and their assistants.”* 14. The Lobbying Disclosure Act of 1995.



The LDA also defines a number of provisions attempting to maintain a degree of transparency in the activities of lobbyists. The legislation defines a client as: *"...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...."* 15. The Lobbying Disclosure Act of 1995.

The legislation also includes definition about lobbyists, limiting the ones that are affected by the act: *"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."* 16. The Lobbying Disclosure Act of 1995.

The act failed to regulate grassroots that define what must be recorded by not including the lobbyists whose *"activities constitute less than 20% of the time engaged in services"*.

Any organization that contributes more than US\$10,000 towards lobbying activities must also be registered. Amounts even slightly below this threshold are exempt from reporting.

The outline for registration includes *"the name, address, business telephone number, and principal place of business of the registrant, and a general description of its business or activities"* as well as of the client. The register must also include a statement of on what issues the registrant expects to lobby or what may have already been lobbied. After the registry occurs, the records are maintained by the Clerk of the House and the Secretary of the Senate. Due to severe understaffing, these two offices are unable to check for illegal activities or corrupt practices. This was considered the main failure of this bill. 17. The Lobbying Disclosure Act of 1995.

Also included in the legislation are the definitions of what actions must be disclosed, which includes lobbying to certain members of the Executive Branch and Congress who are included on specific payrolls.

### 2.2.3 The Lobbying Technical Amendments Act of 1998 (LTAA)

The **Technical Amendments Act** enacted on April 6, 1998, changes the **Lobbying Disclosure Act of 1995** in four areas. These changes were made in response to questions that had been raised during the first year of experience under the LDA.

- Definition of Covered Executive Branch Officials - The application of coverage of the LDA ("who is a covered executive branch official?") was intended for employees only. Senior Executive Service employees are not covered executive branch officials as defined in the Act unless they fall within one of the categories below. Covered executive branch officials are:

1. *"The President*
2. *The Vice President*
3. *Officers and employees of the Executive Office of the President*
4. *Any official serving in an Executive Level I-V position*
5. *Any member of the uniformed services serving at grade 0-7 or above*
6. *"Schedule C" employees.*" 18. The Technical Amendments act of 1998.

- Clarification of Exception to Lobbying Contact - Section 3 of the Guide to the Lobbying Disclosure Act excepts from the definition of "lobbying contact" communications "*required by subpoena, civil investigative demand, or otherwise compelled by statute, regulations, or other action of the Congress or an agency*". The LTAA clarifies that communications that are compelled by the action of a Federal agency would include communications that are required by a Federal agency contract, grant, loan, permit, or license. 19. The Technical Amendments act of 1998.

- Estimates Based on Tax Reporting System - The LTAA does not change the optional expense reporting methods available to an organization employing in-house lobbyists. For all other LDA purposes, the LTAA clarifies that registrants making an election must use the Guide's Definitions for Executive Branch Lobbying and the LDA definitions for legislative branch lobbying.

The LTAA should be read in order to extend the group entitled to use the "safe harbor" to a small number of trade associations not required by the IRC to report nondeductible lobbying expenses to their members (i.e., those whose members are tax exempt).

- Exemption from the *Foreign Agents Registration Act* based on Registration under the LDA - *The Foreign Agents Registration Act* ("FARA") was amended by the LTAA to clarify that any agent of a foreign principal engaged in lobbying activities (other than an agent of a foreign government or foreign political party) who registers under the LDA would be exempt from the requirements of FARA. Such lobbyists could register under the LDA even if their lobbying activities did not meet the registration threshold under the LDA. This change corrects an anomaly in which less active foreign commercial lobbyists (those not meeting the "*de minimis*" thresholds for registration under the LDA) were subject to the more rigorous reporting requirements of FARA, while more active foreign commercial lobbyists registered and reported under the LDA.

#### **2.2.4 The Legislative Transparency and Accountability Act of 2006**

In July 2005, the Non-Governmental Organization Public Citizen published a report entitled "*The Journey From Congress to K Street*" (this street is known for having most of the Lobbying firms in Washington). The report analyzed hundreds of lobbyists registration documents filed in compliance with the Act of 1995 and its amendments. It found that since 1998, 43% of the 198 members of the Congress who left government to join private life have registered to lobby. The Washington Post described these results as reflecting

the “*sea of change that has occurred in lawmakers` attitudes towards lobbying in recent years.*” The newspaper noted that “*Congressional historians say that lawmakers rarely become lobbyists as recently as two decades ago. They considered the profession to be attained and unworthy of once-elected officials such as themselves. And lobbying firms and trade groups were leery of hiring former member of Congress because they were reputed to be lazy as lobbyists, unwilling to ask former colleagues for favors.*”

20. The Washington Post is the newspaper with the largest circulation in Washington, D.C. and is the city's oldest paper, founded in 1877. The citation is from an article called “*Hill a Steppingstone to K Street. For some more ex-lawmakers who join private sector are becoming lobbyists, study says*”, published on July 27, 2005.

The Act had been a response to various scandals, including the one involving former lobbyist Jack Abramoff has inspired the American Congress to create the 2006 Act. Jack Abramoff built a lobbying empire during the Republican rise to power in Congress in the 1990s and expanded his influence when George W. Bush became President in 2000.

This bill curbed trips and meals paid by lobbyists and required increase disclosure for special funding provisions added late in the legislative process. It also increases disclosure for lobbyists` campaign contributions; grassroots lobbying; travel paid by lobbyists; and gifts to members of Congress. (During floor consideration of the bill, the Senate rejected an amendment to create an office of public integrity to investigate ethics rules, but adopted another to require Senators to publicly disclose holds they have on bills.) Some senators and a coalition of good-government groups assailed the bill as being too weak.

### **2.2.5 The Honest Leadership and Open Government Act of 2007**

**The Lobbying Disclosure Act of 2005** was further tightened by **The Honest Leadership and Open Government Act of 2007**, as were internal House of Representatives and Senate rules on such matters as gifts, travels and contacts with lobbyists.

This Act tries to strengthen public disclosure requirements concerning lobbying activity and funding by placing more restrictions on gifts for members of Congress and their staff, and establishing mandatory disclosure of several kinds of expenditure bills. The HLOG is a comprehensive ethics and lobbying reform bill that amended a wide range of statutes and rules applying to such integrity related matters as donations to campaign funding. It also amended the Lobbying disclosure scheme in specific ways, including extending the scheme's "revolving door" provisions and increasing the penalties for wrongdoing.

It was enacted on September 2007 substantially altering the former *Lobbying Disclosure Act* and its Amendment in eight major ways:

- Changing the filling of lobbying reports from semiannual to quarterly;
- Changing the amounts that require registration and reporting thresholds (to US\$ 2,500.00 income for lobbying firms and US\$ 10,000.00 for organizations that employ in-house lobbyists);
- Requiring of additional disclosure of a client as a state or local government or instrumentality;
- Imposing semiannual reports of certain contributions, separating reports which detail various expenses (such as honorary, presidential library and event costs);
- Revising definition of affiliation (all affiliated entities that contribute more than US\$ 5,000.00 to the registrant's activities in the quarterly period and actively participate in the planning, supervision or control must be disclosed on the report);
- Additional disclosure of past governmental employment lengthen the covered period of service as a Executive Branch official in the 20 years before the date he first acted as a lobbyist;
- Making the electronic filling of the reports mandatory;

- Increasing civil and criminal penalties (whoever failure to correct the report's filling within 60 days after notice of a defect by the Secretary of the Senate or the Clerk of the House or to comply with any other provision of the Act, may be subject to a civil fine of no more than US\$ 200,000.00. A specific criminal penalty was also added for knowing and corrupt failure to comply, an offense carrying a penalty of imprisonment of up to 5 years or a fine, or both.

In the subject of post separation employment, also known as "revolving doors" provisions, as they are often called in the US, it was were also revised in the 2007 Act. These are located under the Ethics in Government Act of 1978 and contain both specific and more general prohibitions. Specifically, this legislation introduced limitation on the future employment of members of the executive government, including office holders equivalent to Minister or Secretary. These prohibitions principally target lobbying and advocacy and include:

- *"A permanent restriction on lobbying or advocacy in transactions in which the government is a party and the official "participated personally and substantially" while in office;*

- *A two year restriction on lobbying or advocacy in transactions in which the government is a party and the official "knows or reasonably should know was actually pending under his or her official responsibly" in the last year of his or her office."* 21. The Honest Leadership and Open Government Act of 2007.

In addition, a general one year prohibition or "cooling off" period, was in place for top officials, whereby they could not lobby or make communications with intent to influence someone in their former department or agency. These rules were partially amended in 2007, extending from one to two years the ban on lobbying contacts by former Senators and "very senior" Executive officials. The 2007 Act continued the general one year ban on lobbying contacts by former members of the House of Representatives, elected officers of the House, Senate officers, or senior Senates employees.

The Lobbying Disclosure Act was amended to expressly prohibit registered lobbyists and other relevant persons and organizations from making a gift or providing travel to a “covered legislative branch official” if it is known that the gift or travel offered may not be accepted under the rules of the House or Senate.

### **2.2.6 State Level Regulation**

At the heart of the American political tradition since the adoption of the republican system of government, there has been a tension between the federal government and the states. The 50 states have their own constitutions, governments and laws as a way of maintaining most of the power they used to have as a confederation. The United States government operates at a simple federal level with a national government while state governments with significant power and also have representatives in the Congress.

Lobbying activities are also performed at state and municipal levels. Each of the 50 states has its own legislation and the federal acts do not apply to them. With the diversity of *“political sub-cultures, histories and levels of political development, experience with lobby regulation in the states is quite diverse”*. 22.

Clive Thomas. Interest group Regulation at the United States

At the municipal level some lobbying activities occur with city council members and county commissioners, especially in large and more populous counties. Many local municipalities are requiring legislative agents to register as lobbyists to represent the interests of their clients, like Columbus and Cincinnati in the state of Ohio.

The Center of Public Integrity reported in 2003 that US federal law regulating lobbying are less strict compared to most States. *“Through federal laws are often considered more stringent than state laws, this is not the case with federal Lobby Disclosure Law. The Center for Public Integrity survey shows that only three states – New Hampshire, Pennsylvania and Wyoming – have*

*lobby disclosure rules that are as weak as or weaker than those applying to the hired guns registered to lobby Congress.”*

23. The Center for Public Integrity is a nonprofit organization dedicated to producing original, investigative journalism on issues of public issues to make institutional power more transparent and accountable. This paragraph is from their article called “no more stringent laws” published on march 2003.

As reported in the 2002 survey conducted by the Center for Ethics in Government of the National Conference of State Legislature, in at least 20 states, lobbyists and their employees had to report the legislative and administrative actions they lobbied for and against. Lobbyists in these states had also to report such actions by subject area or individually with the name of each bill, resolution or other legislative activity that the lobbyist engaged in supporting or opposing.

24. The Center for Ethics in Government is a nonpartisan, nonprofit organization. It was organized in 1999 to address the loss of public trust and confidence in representative democracy. The Center is located at the National Conference of State Legislatures (NCSL) in Denver, Colorado, and funded by NCSL's Foundation for State Legislatures. The mission of the Center is to be a leader in restoring confidence in representative government by promoting ethical behavior for state legislators, staff, lobbyists and advocates.

For example, states require lobbyists to disclosure:

- A list of supported or opposed legislation by category– Alabama.
- A list of each client, bill or administrative action with regard to someone in the firm who was engaged in direct communication – California.
- The subject of proposed legislation and the number of each resolution or other legislative activity that the lobbyist has been engaged in supporting or opposing. For appropriation bills, lobbyists must enumerate specific sections supported or opposed - Idaho.
- Include all bill numbers of legislation the lobbyist acted to promote, oppose or influence – Massachusetts.
- Confirmation of the continuing existence of each engagement described in an initial registration Statement; a list of the specific bill or resolution system decision that the lobbyist sought to influence under the engagement during the period; a statement of expenditure and details of any financial transaction – Washington (considered the hardest legislation of all 50 states).



## **2.3 Current Situation and Possible Future Changes in the Lobbying Regulation**

President Obama, who campaigned with the promise of government transparency, said in remarks that *“the way to make government responsible is to hold it accountable”*. So it was not a surprise that he took action in this direction as soon as he started his mandate. The new lobbying and records rules issued appear to go far beyond the changes implemented by previous presidents. Obama laid out stringent lobbying limits that will bar any appointees from seeking lobbying jobs while he is in the presidency and will ban gifts from lobbyists to anyone in the administration. He also ordered agencies to presume that records should be publicly released unless there are compelling reasons not to do so, and he loosened restrictions on the release of records related to former presidents and vice presidents.

The relevant fact is that the chief of the Executive branch is applying even more rigid rules to his team than the current legislation demands. It would be a clear sign that he has the intention of changing the legislation in order to make even more strict. Obviously, the economic crisis and many other problems are the priorities of his agenda, so any change in the current situation must not be expected soon.

Anyway, more strict rules were applied during the transition period. The rules prevented officials on President Obama’s transition team from handling any issues in areas of policy where they had lobbied for the last 12 months or from seeking to influence the same agencies for the next 12 months were. They also prevent officials to work on matters where family or recent business associates may have a direct conflict of interest. In cases where there is even an “appearance of conflict”, officials must seek a waiver from the transition’s executive director.

It was not the first attempt of a Democrat President in this direction. President Bill Clinton barred senior appointees from leaving and then, lobbying former colleagues in the agency where they had worked for the next five years.

(He reversed the order a month before leaving office, as aides complained about the difficulty on finding jobs).

Obama`s order applies more broadly to “*every appointee in every executive agency*” barring them from leaving and lobbying at any other executive branch official or senior appointee for the remainder of his administration. The rule also bars new officials from making policy on any matter involving their former employer or clients for a period of two years, or from working at an agency they had lobbied within the past two years. “*We should never forget that we are here as public servants*”, he observed.

The public reaction was immediate and very positive to the idea, showing the terrible image of lobbying activity among the common people . It was considered by Democracy 21 to be “*a major step in setting a new tone and attitude from Washington that challenges the lobbyist, special interest culture.*” The Citizen for Ethics and Responsibility in Washington said that the order signals “*a return to the rule of law*” and adherence to the terms that Congress originally spelled out in the Presidential Records Act.

24. Democracy 21 is a nonprofit, nonpartisan organization dedicated to making democracy work for all Americans, founded by Fred Wertheimer in 1997. It aims to eliminate the undue influence of “big money” in American politics and to ensure the integrity and fairness of government decisions and elections. The organization promotes campaign finance reform and other political reforms to accomplish these goals.

25. Citizens for Responsibility and Ethics in Washington (CREW) is a nonprofit organization dedicated to promoting ethics and accountability in government and public life by targeting government officials, who sacrifice the common good to special interests. CREW advances its mission using a combination of research, litigation and media outreach. CREW employs the law as a tool to force officials to act ethically and lawfully and to bring unethical conduct to the public’s attention.

The only thing that these nonprofit groups are not taking into consideration is that they are also part of the lobbying system. Because of this system they are having the right and the means to defend their own point of view. So they are not really fighting against the lobbying activity, but rather they are trying to ban the “bad lobbying” (and that is not a good expression, because if it is bad it is not lobbying, it is crime) by using “good lobbying”.

## First challenges towards banning lobbyists

Once elected, President Obama imposed a strict conflict-of-interest restriction on his White House transition team. A list of the transition team members publicized by his office includes a complicated tangle of ties to private influence-seekers. Among the full roster of about 150 staff-members being assigned to government agencies, there were several former lobbyists and some of them were registered as recently as 2008. Others were executives and partners at firms that pay lobbyists, and former government officials who work as consultants or advisers to those seeking influence.

26. According to the Herald Tribune in an article called "Obama's new team has links to influence-seekers", written by David Kirkpatrick, published on November 15, 2008.

At least one official initially involved in the transition appears to have been reassigned because of the concern about its lobbying work. Henry Rivera, a former democratic commissioner on the federal Communication Commission who was involved in planning for the agency transition, has dropped out of that role because he had represented clients on communication policy in the last year.

Since the beginning, the Obama's team realized that the complete abolishment any lobbying influence from the public administration would be more difficult than they imagined. The idea of bringing more transparency to the government is strongly supported by the population, but taking out everybody who is or was remotely connected to the subject would leave the executive almost with no candidates.

Stephanie Cutter, a transition spokeswoman regretting the lack of participation of some good people, but at the same time stressing the necessity of transparency and accountability, said: "*while these rules disqualify many well-qualified professionals from participating in the transition as a result, they put in place the right safeguards to prevent any potential conflict of interest*"

27. Stephanie Cutter, spokeswoman for the transition, in a written statement on November 15, 2008.

After the Inauguration, questions about lobbyist's participation in the administration still continues. Obama's remarks revoked criticism from the republicans which noted that Obama has nominated a former Raytheon lobbyist (William Lynn III) as Deputy Secretary of Defense. Lobbying reports state that Lynn was part of a group that lobbied Congress and the Pentagon in 2007 and 2008. The "lobbying Loophole", as the Time Magazine described the case, was allowed because Lynn is uniquely qualified for the job at the Administration officials' point of view. The story was commented differently by the opposition, that said the President was simply acknowledging that people who know how to run the Pentagon generally have been involved in the process. Lynn got high marks for struggling to bring some accountability to Pentagon's expenditures when he served as its top money manager from 1997 and 2001. But the idea of *"uniquely qualified" does not only mean merely good or talented; it means that he was, of all the possible candidates for the position, the only person who could fill it. There would be plenty of other people with far greater business management experience than that of a lobbyist* as stated by Project Government Oversight, a nonprofit watchdog group from Washington.

28. According to Time Magazine in an article called "Obama's Lobbyist Ban Meets a Loophole: William Lynn", written by Mark Thompson, published on January 27, 2009.

29. POGO is an independent nonprofit that investigates and exposes corruption and other misconduct in order to achieve a more accountable federal government.

Worse was the case of the nomination of Tom Daschle, a key figure in the Senate and Obama's pick for a major role in the new administration as Secretary of Health and Human Services. He was forced to withdraw his name because of two major scandals related to his name: he failed to pay his taxes and also failed to fill the disclosure reports after developing some lobbying activities. This case is better exposed on the item 3.2.3 of this paper.

These examples show that even in the United States the question about what is the better way to deal with the lobbying activity is still unanswered. It is a process of constant improvement. As society develops, legislation must follow. The aim of this process is trying to find the best way to help people to participate in the political decision process and, at the same time, enforcing the

idea that decisions must be taken in order to help people as a whole and not only a determined sector or specific person.

### 3. Information about Lobbying in the United States

This chapter was developed in order to analyze some of the results of the lobbying activity regulations on the North American society. At the first part, some statistics regarding the lobbyists and their clients are shown as well as the amounts spent on it. The second part brings some interesting situations related with the lobbying activity.

#### 3.1 Statistics about the Lobbying Activity

Opensecrets.org spent a significant effort analyzing the disclosure reports filed by the lobbyists and delivered to the Clerk of the House and the Secretary of the Senate. These data deal with the data obtained by the Lobbying Disclosure reports from 1998 till 2008.

Last year (2008) about 15,150 lobbyists registered under the Lobbyist Disclosure Act. It means that a lot of people declared themselves as lobbyists based on the legal point of view. But it also shows a decrease compared with the previous year.

30. OpenSecrets.org is a non-profit, independent, non-partisan guide to money's influence on U.S. elections and public policy. It aims to create a more educated voter, an involved citizenry and a more responsive government.

Recent estimates suggest that between 60,000 and 90,000 lobbyists operate in Washington, DC. Many more, perhaps as many as 200,000 are estimated to operate in states and localities throughout the country. Comparing these numbers with the results obtained with the analysis of the Disclosure reports from 1998 to 2008, one can verify that they are too different. This difference is due to many causes: estimates are not very precise simply because it is an informal activity, no records, no documents; it is simply the author perception from his observations. Also, on these numbers many people are counted, despite of the fact that they lobby only sporadically and are not required to fill up the Disclosure forms. And there are still the ones who deliberately choose not to register, counting that they are not going to be caught.

31. Writer Kevin Philips estimative published on the article: Making democracy work, written by Hedrick Smith in 2007 to PBS.org.

Total of professionals who declared themselves as lobbyists to the American congress:

<b>Lobbyists</b>	
(declared to Congress)	
1998	10,690
1999	13,341
2000	12,763
2001	12,077
2002	12,347
2003	13,162
2004	13,403
2005	14,440
2006	14,880
2007	15,405
2008	15,150

Source:

On the second table there are the declared amounts of money invested on the lobbying activity on the last ten years. These sums are limited to the information declared on the Disclosure reports. It is estimated that at least as much as twice of these amounts is used on the task of trying to influence political decisions. Once again the difference is due to the requirement of the law.

The total amount spent in lobbying from 1998 to 2008:

<b>Lobbying Spending</b>	
(per year, in billions)	
1998	1.44
1999	1.44
2000	1.54
2001	1.63
2002	1.81
2003	2.04
2004	2.17
2005	2.42
2006	2.60
2007	2.84
2008	3.23

The presence of so many lobbyists and the investment of large amounts of money, showed in the previous chart, raise the question: what kind of organization is engaged in lobbying? The answer seems simple: all kinds. Political Scientists have found twelve basic types of organized interest groups engaged in lobbying: business firms, trade associations, professional associations, citizen groups, labor unions, governmental entities, think tanks (institutions that conduct and disseminate research), charities, coalitions, hospitals and churches. 32. Anthony J. Nownes in his book *Totally Lobbying*.

In the table below, twelve of the top investor sectors are shown, as well as the average amount each one of them invest a year in lobbying activities.

The top sectors and their total spending between 1.998 and 2.008:

	<b>Sector</b>	<b>Total (US\$)</b>	<b>Year average</b>
1	Finance, insurance and real state	3,439,717,751	429,964,718.88
2	Health	3,289,639,056	411,20,882.00
3	Business (various )	3,116,182,344	389,522,793.00
4	Communications and electronics	2,796,495,936	349,561,992.00
5	Energy and natural resources	2,372,496,552	296,562,069.00
6	Transportation	1,822,259,477	227,782,434.63
7	Others	1,782,904,105	222,863,013.13
8	Ideological and single-issues	1,173,386,431	146,673,303.88
9	Agribusiness	1,038,346,862	129,793,357.75
10	Defense	981,619,260	122,702,407.50
11	Construction	390,276,514	48,784,564.25
12	Labor	352,123,328	44,015,416.00
13	Lawyers and lobbyists	276,525,378	34,565,672.25

The number thirteen on the above list mentions lawyers and lobbyists themselves. In this title here are included consulting firms, law firms, lobbying firms, public relations firms that operate across the country and employ thousands of lobbyists. Most of these firms do not operate as organized interests *per se*. Instead, they are for-profit business organizations that employ lobbyists for hiring basis. The lobbyists who work for such organizations



generally represent the organized interests that hire them, rather than the organizations that technically employ them when they lobby.

On the next chart, the top 20 lobbying client organizations are listed. Between the top five organizations in amounts spent for lobbying from 1998 to 2008 there are the US Chamber of Commerce, The American Medical Association, General Electric, the American Hospital Association and the American Association of Retired Person. It is interesting that those are very well respected institutions by the ordinary people point of view. And this information is available to everyone. This is valuable information because it shows to the common people that lobbying is not an activity restricted to a small group trying to take advantages from governmental decisions. It is also a tool used for respected institutions, with respectable purposes. It helps to legitimate the activity to the public opinion.

Top clients of Lobby activity from 1998 and 2008:

<b>Lobbying Clients</b>		<b>Total</b>
1	US Chamber of Commerce	461,509,680
2	American Medical Assn	200,002,500
3	General Electric	182,468,000
4	American Hospital Assn	163,621,485
5	AARP	154,692,064
6	Pharmaceutical Research	147,253,400
7	Northrop Grumman	127,385,253
8	Edison Electric Institute	123,495,999
9	Business Roundtable	120,620,000
10	National Assn of Realtors	118,360,380
11	Blue Cross/Blue Shield	111,193,172
12	Exxon Mobil	111,036,942
13	Lockheed Martin	109,471,641
14	Boeing Co	103,748,310
15	Verizon Communications	102,983,908
16	General Motors	99,831,483
17	Freddie Mac	96,164,048
18	Southern Co	94,710,694
19	Ford Motor Co	82,569,808
20	Microsoft Co	82,115,000

NOTE: OpenSecrets.org's lobbying data now includes Fourth Quarter reports filed Jan. 20, 2009, with the Senate Office of Public Records.

### **3.2 Examples of Lobbying Discussions in the United States**

In this part of the study, some cases of lobbying are going to be discussed. These cases happened in the United States and helped to form what this paper refers to as “the American lobbying experience”. In one of the cases – The Jack Abramoff scandal – the impact in the American public opinion was so strong that it resulted in a significant change in the legislation.

Other examples deal with the public opinion, public figures or Supreme Court’s opinion about what is acceptable or not in the relationship of the lobbyists and the political or governmental power.

#### **3.2.1 President Bill Clinton’s opinion about donations to political campaigns.**

It can be argued that lobbying is undesirable because it allows people with particular interests who represent a minority to gain special access to lawmakers and through contributions and favors have controversial relationships with representatives. This is a danger to democracy as described in Article 22 of the Federalist Papers. Though many see lobbying as a potential corruption to the system, others disagree. Former President Bill Clinton defended his wife’s reception of lobbyist money for her campaign by saying:

*“Lobbyists are registered, they register with the federal government and can give the same amount of money, US\$2.300, anybody else can. That’s not going to influence you. What gives the lobbyists influence is the people who hire them to work for them. It’s all the people they represent. So all these people who don’t take money from lobbyists, they take money from the lobbyists’ spouses, their children, their brothers, their sisters, from all the people they represent. It’s a distinction without a difference, I think. There’s no significant financial gain, because there are not that many lobbyists. If we’re going to take money from the guys who pay the lobbyists, why treat them [the lobbyists] as less than full citizens?”*

### **3.2.2 The Lobby Scandal that Originated the Changes in the Lobbying Disclosure Act of 1995**

The Jack Abramoff Indian lobbying scandal was an American political scandal that led to several discussions that finally ended with the approval of **The Legislative Transparency and Accountability Act, of 2006.**

The basis of the accusations were related to the work performed by political lobbyists Jack Abramoff, Ralph Reed Jr., Grover Norquist, and Michael Scanlon on Indian casino gambling interests for an estimated US\$85 million in fees. Abramoff and Scanlon grossly overbilled their clients, secretly splitting the multimillion-dollar profits. In one case, they secretly orchestrated lobbying against their own clients in order to force them to pay for lobbying services.

In the course of the scheme, lobbyists were accused of illegally giving gifts and making campaign donations to legislators in return for votes or support of legislation. Representative Bob Ney (Republican from Ohio) and two aides to Tom DeLay (Republican from Texas) have been directly implicated; other politicians, mostly Republican lawmakers, with connections to Indian affairs seemed to have various ties.

Finally, the government charged Jack Abramoff for directing the tribes to hire Michael Scanlon's public relations firm without telling them he would get a 50 percent kickback of Scanlon's profits, among many other crimes. The government also charged the two men for providing "things of value" to public officials, particularly one Republican congressional Committee chairman, in exchange for an agreement to help the two men's clients.

Besides all discussions and changes in the legislation, the causes of the scandal could not have been avoided even if all the new legislation were already in use at the time the crimes were committed. The Jack Abramoff scandal is a typical example of the so called "black-hat lobby". This kind of

conduct cannot be considered as a lobbying activity. It is crime and the only kind of law able to deal with it is the criminal law.

### **3.2.3 Lobbyists Participation in President Barak Obama's Team - Tom Daschle's Nomination**

The nomination of Tom Daschle, a key figure in the Senate and Obama's pick for a major role in the new administration as Secretary of Health and Human Services was the source of many problems to President Obama. At first, he repeatedly affirmed, during his campaign, that there would be very little space for lobbyists in his government.

Affiliated with the firm Alston & Bird, Daschle has operated in the gap between the popular understanding and legal definition of a lobbyist. There is no evidence that he directly sought to influence his former colleagues or other government officials in ways that would have required him to register as a lobbyist or could have run afoul of the restrictions on former lobbyists entering the Obama administration. But the rules still left plenty of room for him to advise businessmen seeking to influence the government or to profit otherwise from the fame and insights he acquired in public life.

Officials in Washington underestimated the public's opinion in this case. Offices have been inundated with telephone calls, emails, letters and faxes expressing concern about Daschle - not only his failure to pay back taxes, but because of his relationships with major players in the health care industry and his rich consulting contracts with the private sector since leaving the Senate, and even the fact that a *Car and Driver* magazine was given by one of the Senators.

At the end, President Barack Obama abruptly abandoned Daschle's nomination fight (a second major appointee who failed to pay all their taxes), telling: *"I screwed up. I've got to own up to my mistake. Ultimately, it's important for this administration to send a message that there aren't two sets of rules —*

*you know, one for prominent people and one for ordinary folks who have to pay their taxes".*

### **3.2.4 Lobbying and Political Activity by Tax-Exempt Organizations**

Lobbying is a natural process of the democratic society, but even in the United States federal law sometimes treats it with some differentiation. There are twenty-two different types of organizational tax exemptions granted by the Internal Revenue Service (IRS) under section 501 of its Code. The 501(c)(3) is a just one of them. It is used for exemptions destined for "*charitable, educational, and religious*" organizations. There are two advantages of being recognized as a 501(c)(3) over other types of tax exempt status, both of which relate to fund raising ability: contributions are tax deductible for the donor and only 501(c)(3) organizations qualify for foundation grants. The other (less desirable) types of exemptions are for organizations such as civic leagues, social welfare labor unions, business leagues, social clubs, farmer's coops, etc.

Lobbying is the first main issue to be examined in order to verify if an organization would be considered exempt. Tax-exempt nonprofit organizations categorized under IRC 501(c)(3) are generally permitted to lobby to some extent, but are absolutely prohibited from engaging in "*political activity*". The distinction between these two activities is crucial, but not always simple to make. Under federal law, lobbying to an extent beyond an insubstantial amount is only permitted by exempt organizations that may and do elect to qualify under IRC 501(c)(3) rules, which provides strict financial limits for lobbying expenditures. Violations of the law and regulations can result in fines to organization and their managers, as well as the loss of federal tax-exemption recognition.

In IRC 501(c)(3), lobbying is described as "*carrying on propaganda, or attempting to influence legislation*", while political activity is described as "*participating in, or intervening in, any political campaign on behalf of any candidate for public office.*" In short, these organizations may take sides with

respect of political issues, but not political candidates. Organizations that plan to make lobbying a very substantial part of their activities are often advised not to apply for federal tax-exempt status, which prescribes strict limits to this type of activity, but rather under another classification.

31. Tax Code, Regulations and Official Guidance - Internal Revenue Code. Federal tax law begins with the Internal Revenue Code (IRC), enacted by Congress in Title 26 of the United States Code (26 U.S.C.).

## **Conclusion**

We live in a time that requires the system to be designed in order to promote ethical standards in public life. The ideals that underpin the system of democratic politics are now taken seriously enough to invest money, time and energy on transforming the rhetoric of good governance into semblance of political reality. Imperfections and loopholes will probably always exist, which is not to say that the adoption of best available system should be sought in order to deliver to the people the most democratic and efficient decisions.

There is nothing new about using political influence. It has been happening since before the democratic governments appeared in the international scenario. The difference is that those days are historically known to be a time when every political office was known to have its price. The assumption is that society has advanced in a number of ways, specially acquiring a certain political maturity. At democratic governments, important decisions cannot be taken by a small social circle of upper class persons operating by more or less clandestine methods without reference to public scrutiny or accountability. In democratic systems, there are expectations of transparency for open decision-making. There is, in addition, a demand for ethical standards in public life. Decisions are supposed to be made objectively and on merit, without reference to private gain or personal interest.

Transparency and accountability are the watchwords of one age. In this context, there are strong grounds for arguing that lobbying should be as open as subject to meaningful scrutiny as any other part of political life. The point is that, if confidence in the system is to be safeguarded, the decisions made by public officials must be seen to be objective and based fairly on established procedures and the merits of each individual case. Likewise, if respect is to be accorded to public offices, the perception needs to be countered soon after retirement from public life.

The intent of this study was to analyze the North American system of lobbying regulation and verify what could be used to build a Brazilian model. It is a topic of many debates if it is really necessary to regulate the lobbying activity. Nowadays there is no type of regulation and the press is always bringing to light cases of misconduct among the ones who deal with the subject. The main point of this discussion is that it does not matter if the lobbying is regulated or not in Brazil; it will continue to happen even if the political decision is to ignore it legally. The lack of regulation will not prevent the pressure groups from acting to defend their interests. The importance of the regulation is in trying to minimize the negative effects from the undue exercise of the lobbying activity.

This subject is discussed since 1989, but for several reasons the proposed bills never got to be voted. One of the reasons, and maybe the most significant of all, is the social prejudice regarding to the word “lobbying”. Unfortunately, the term is seen as a synthesis of everything that is wrong regarding to political relationships. It is important to keep the discussion flowing as an attempt to bring more political maturity to the country, and hopefully in the future the discussion will be more open and less ideological, with a more technical view of the lobbying activity.

The first conclusion of this paper is that Brazil cannot just copy a model, American, Canadian, Australian or any other. It is important to use other countries experiences, but it is even more important to develop a system that takes into consideration the Brazilian unique characteristics. The American model cannot be used as a finished model to be copied. It can only be used as a foundation to the built of a Brazilian legislation, observing the features of a complex society.

The analysis of the North American experience on regulating the lobbying activity shows that no regulatory system is perfect and complete. Some undermining established rules would always be found. Nonetheless it is also suggested that a regulated system is more likely to ensure accountability in government. At least it seems to have worked reasonably well in the United States, although there is already a social consensus about the need of



improving the current regulations. As society is always changing, the legislative framework will always need to be in constant improvement once it should reflect the shifts of society. So this need of change is just a demonstration of the social evolutionary process.

Brazil is in this social and political evolutionary process. The discussion about the need of lobbying regulation is only one of many topics that demonstrate the search for political maturity. The lobbying regulation in Brazil will face several obstacles, and among them there will be: defining what is lobbying, who is (or isn't) a lobbyist and the things that characterize a pressure group. Another major problem is the fact that only a consensual legislation would effectively make some difference. Otherwise, all the effort of developing a new regulation could not work. Meaning that if the participants really don't want to follow the rules there will always be a way to defend interests on the political arena, since the lobbying is an activity full of subtle meanders to develop.

There are three main objectives for the lobbying regulation: minimize the non-ethical conducts; generate more access to information by the lobbyists, public agents, press and public in general, and; limit the campaign financing in a way that can guarantee the subsidies to politicians but also can generate security to the population about the decisions of their public figures.

The final objective of lobbying regulation is that authorities from the legislative or executive branches become more responsible about their decisions. Motivated by their knowledge of the rule as much as by the disclosure of the decision making process.

There are many differences between the American and the Brazilian political culture. Those differences must be taken into consideration while examining the American Lobbying regulation system and trying to adapt some of its concepts to create a model that works for the Brazilian society.

The most visible difference is in the way the American society sees the lobbying activity. In spite of the worsen image of the category over the last years, there is still the idea that their work is essential to the maintenance of the democratic institutions. In the opposite direction, Brazilian society always connects the word “lobby” with illegal activities related to the public decision process. For this reason, people in the United States study even in undergraduate and graduate levels to develop the lobbying activity the best way possible. And the more people are prepared to lobbying, the least probable they are willing to jeopardize it by using unethical methods. As a contrast, many of the Brazilian lobbyists are from different backgrounds and they have already to deal with the difficult “label” of lobbyists.

If there is one thing that can be learned by the comparison of the two different societies is that Brazil cannot use the exact same system because it would be too strict. The amount of details demanded on the lobbyists disclosure report would surely discourage the support of people who don't have to submit to any regulation at all. One of the main points that should be achieved with the new legislation in order to the system work properly would be a relative consensus among the parts involved in the process. The level of information demanded would be a negative factor almost causing a binding into the system, and could be considered a requirement beyond the limits of reasonable.

The major challenge for regulate this activity in Brazil may be finding a way to avoid legislators and public servants to be captured by private interests. Their main concern should always be to try to develop the best public policy, or political decision, focusing on the people well-being. To avoid those private interests interfering on this goal, there is a strong need to provide continuous information about the ethic bounds to everyone who is directly or indirectly working in a position to be dealing with private interests.

The perspective of regulation must be especially taking facing a democratic way to spread information about political decisions better than controlling activities. Looking for a way to clarify the concepts to the public, in a way that people can understand really what is a lobbyist and why there is no

crime on doing that. Once the concept is clear, people will be able to participate in the decision making process. Pleas that are founded in ethical and legal precepts can surely be defended inside the government in a clear and open way.

There are some major obstacles with the idea of regulating the lobbying activity. The first is that regulation can create a “market reserve”, selecting the ones that can act as lobbyists, although everyone is entitled to manifest their interest, especially at the Congress. That is a right that does not need any regulation. So the right of the small groups, the common citizen, and the humble should also be protected. They must be assured to have the right to talk to their representatives in order to explain their demands.

Creating an Ethical Council or an ethics manual (code) would be another way to restrict the activity in order it could be done inside ethical bounds. It would be in charge of constrain and limit the illicit among public agents. As a base for further studies, this proposed code of ethics could use the main ideas contained on the “Código de Ética do Executivo” (Executive Decree number 1.171, issued on June 22<sup>nd</sup>, 1994) but focusing the lobbyists` activities. The lobbyists and the public servants should not have to make an individual interpretation as to whether that representation of private interests is legitimate or not. by this way, legitimate lobbying activity can be clearly distinguished from lobbying that goes in the shadows, often in an illicit manner.

It would also be important to get people to know the important role played by the lobbyists, mainly their knowledge of the legislative and executive process and their role of interpreting the business language. One must also say that civil authorities need to have their information. Changing the way people see the lobbying activity would shift the negative image of people trying to get advantage of the political decisions. Better, they would start to see them as legitimate parts which help to improve the democratic process. It would make the achieving of a consensus easier focusing an increasing efficacy on the regulation.

The lobbying process is better summed by the act of carrying information to public authorities in order to help them to make a decision, always recognizing that there are interests in those actions. For this, the regulation must be as simple as possible. Easy to be understood and applied, in a way that does not hamper the dialogue between society and the government.

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