MEMORANDUM TO:	Interested Parties
FROM:	Susan Muskett, J.D. Congressional Liaison, NRLC, 202-626-8820 Legfederal@aol.com
SUBJECT:	Conference on "lobbying reform" – the Coalitions/Associations sections in S. 1 (Section 217) and H.R. 2316 (Section 206)
DATE:	June 4, 2007

This memo addresses the sections of the House and Senate-passed lobbying bills that pertain to disclosure of lobbying activities by certain "coalitions and associations" – specifically, Section 217 of the Senate-passed bill (S. 1) and Section 206 of the House-passed bill (H.R. 2316).

A large portion of the language in the House-passed Section 206 was inserted into the bill in committee by a last-minute "manager's amendment," in an attempt to address the concerns of numerous tax-exempt 501(c)'s that Section 206 would require the disclosure of members and donors to a tax-exempt 501(c) that "employs or retains other persons to conduct lobbying activities." While it initially appeared that those late changes (made less than a week before the bill came to the floor) might prevent misapplication of the section, it has since become evident that the language of Section 206 is subject to multiple conflicting interpretations, some of which would place 501(c) tax-exempt organization's at risk of criminal prosecution for failure to disclose their members and donors, in violation of their First Amendment right of association.

Of particular concern are statements, following passage of H.R. 2316, by House Speaker Nancy Pelosi and House Democratic Caucus Chair Rep. Rahm Emanuel (quoted below), both of whom interpreted Section 206 to cover certain communications to the general public about issues under consideration in Congress.

In order to prevent the misapplication of the language of Section 206, the conference committee should be urged to take the Senate-passed Section 217, and delete the House-passed Section 206. The Senate-passed Section 217 requires the disclosure of the names of organizations that play a controlling role in the lobbying activities of an entity (including a coalition or association), but Section 217 clearly delineates that the required disclosure applies solely to organizational donors that contribute more than $5,000 per quarter and that participate "in a substantial way in the planning, supervision, or control of such lobbying activities." Thus, Section 217 would require the disclosure of the identities of *organizations* that participate in a coalition that actually engages in lobbying Congress, but is not subject to the interpretation that it could be applied to communications to the public (so-called "grassroots lobbying"), nor to disclosure of the identities of donors or members who exert no control over the 501(c).

House-passed Section 206 and grassroots communications.

Despite the clear rejection of efforts in the House and Senate to expand the definition of "lobbying activities" to include grassroots communications, both Speaker Nancy Pelosi and Rep. Rahm Emanuel now appear to be interpreting Section 206 to cover some communications to the public (which some call "grassroots lobbying"). This is puzzling since the current definition of "lobbying activities" was not changed, and Section 206 only applies to the "direct" lobbying activities of coalitions and associations – meaning, direct communication with members of Congress or their staff regarding pending or proposed legislation. Upon passage of this legislation by the House, Speaker Pelosi issued a press release saying that the legislation "closes a loophole in current law that permits coalitions such as the one that funded the so-called 'Harry and Louise' health care ads to avoid disclosing their clients," (see http://www.speaker.gov/newsroom/pressreleases?id=0191). Likewise, during floor consideration of the House bill, Rep. Rahm Emanuel compared this year's bill to last year's bill and said: "The Harry and Louise disclosures, so interest groups could hide behind phony names and advertise against Members: This bill has it. Last year's did not." [Cong. Rec. H5763 (May 24, 2007)].

This reference to the "Harry and Louise" ad campaign is especially puzzling since the funding source behind the "Harry and Louise" ad campaign would have been covered by the current LDA if the LDA had been in effect at the time of the ads. Under the current LDA, the coalition is the "client" for registration purposes, but the lobbyist registrant must also report "organizations other than the client which contribute more than $10,000 toward the lobbying activities of the registrant in [the] semiannual period, and in whole or major part plan, supervise or control the lobbying activities." (See the House Guide to the Lobbying Disclosure Act at http://lobbyingdisclosure.house.gov/lda_guide.html) This threshold is even more expansive in S.1, the Senate-passed bill, in that it sweeps in any organization that contributes more than $5,000 per quarter towards the lobbying activities of the registrant, and which "participates in a substantial way in the planning, supervision, or control of such lobbying activities." This Senate-passed language provides for this disclosure, but without requiring 501(c)'s to disclose the identity of individuals who are their donors, or to disclose of the identities of lower-level donors or members who exert no control over the 501(c).

House-passed Section 206 and the construction of "employs or retains other persons to conduct lobbying activities."

There is also a difference of opinion regarding the meaning of clause (i) of subparagraph (B) when it refers to "a coalition or association that employs or retains other persons to conduct lobbying activities." It would appear that the purpose of Section 206 is to address the scenario wherein several organizations come together to form a coalition or loosely-structured association and retain an outside lobbyist to conduct direct lobbying activities, but do not disclose the organizations that are members of the coalition. However, this language could also be read to apply to the retention of an outside lobbyist by a 501(c) tax-exempt organization, or worse yet, to the employment of an in-house lobbyist by a 501(c), thereby making "each of the individual members of the coalition or association . . . the client" for purposes of registration under the

Lobbying Disclosure Act (there are some muddled limitations on this that will be discussed further below).

House-passed Section 206 and the exception for tax-exempt associations.

During the May 17 House Judiciary Committee markup, Chairman Conyers said that he "never intended that [Section 206] would apply to nonprofit or not-for-profit organizations" and that Section 206 "will now exclude all entities subject to section 501(c) of the Internal Revenue Code." Although that was Chairman Conyers' clear goal, the language of Section 206 fails to accomplish that goal, and is subject to differing interpretations. Under Section 206, each "coalition or association that employs or retains other persons to conduct lobbying activities" must register their individual members as a "client." Clause (ii) provides a blanket exception for tax-exempt 501(c)(3)'s, and an exception for other tax-exempt 501(c)'s that conduct "substantial exempt activities other than lobbying with respect to the specific issue" for which it engaged the lobbyist. Thus, only 501(c)'s that fall within one of these two categories would be excepted from disclosing their donors and members who contribute more than $500 per quarter. And even for those 501(c)'s that would fall within the second exception under clause (ii), its undefined criteria leaves those 501(c)'s vulnerable to potential criminal penalties if they think they've met the test of having "substantial exempt activities other than lobbying," but a prosecutor believes otherwise. Even OMB Watch noted in 2005, with reference to a similar provision, "[t]he term 'substantial' is undefined. It is unclear whether it refers to an entire subject area, such as children, or sub-topics such as child health or child nutrition."

House-passed Section 206 and the rule of construction to protect against the required disclosure of individuals who are members or donors.

The rule of construction at the end of Section 206 is also problematic. It reads: "Nothing in this subparagraph shall be construed to require the disclosure of any information about individuals who are members of, or donors to, an entity treated as a client by this Act or an organization identified under this subparagraph." If a 501(c) isn't sure if it meets the vague exception for 501(c)'s that conduct "substantial exempt activities other than lobbying" and it doesn't want to risk criminal prosecution, can it rely on this rule of construction to protect the identity of the individuals who are its members or donors? If so, how? And even for those 501(c)'s that fall within the exceptions described in clause (ii), a concern has been raised that by limiting the specific language of this rule of construction to "individuals" who are members of, or donors to, a client or organization, this language could be interpreted to mean that the non-individual donors to 501(c)'s might need to be disclosed under Section 206. Note, this same rule of construction is not a concern in the Senate-passed bill, as the Senate language (section 217) is very clear in its application and disclosure requirements.

Conclusion

In light of the House-passed Section 206's possible serious impingements on the First Amendment right to freedom of association, if construed in line with the statements by Pelosi and Emanuel quoted above, the conference committee should be urged to take the Senate-passed Section 217, and delete the House-passed Section 206.