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COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

IN REPLY REFER TO: B-129874

January 18, 1980

The Honorable Abraham A. Ribicoff
Chairman, Committee on Governmental Affairs
United States Senate

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Dear Mr. Chairman:

This responds to your request for our views on S. 1782, ~~a bill entitled~~ the "Lobbying Disclosure Act of 1979." We provided our views and recommendations on S. 1564, the more demanding and comprehensive of the disclosure proposals, in testimony before the Committee on September 26, 1979. We note that many of those recommendations have been incorporated in S. 2160, a successor bill to S. 1564.

S. 1782, like the other lobbying bills pending before the Congress, would replace the present lobbying disclosure law, the Federal Regulation of Lobbying Act (2 U.S.C. §§261 et seq.), with a new statute defining the organizations that must register and report as lobbyists, and specifically describing the information that those organizations must disclose. Although we believe S. 1782 would represent an improvement over the existing disclosure law, there are certain ambiguities, omissions, and shortcomings in the bill that should be corrected.

I. Scope of Coverage (Section 4)

Section 4 would define who must comply with the bill's registration, recordkeeping, and reporting requirements. S. 1782 would apply to any "organization," a term defined by subsection 3(10) of the bill, whose lobbying activities during a quarterly filing period satisfied one of two so-called threshold tests.

A. Threshold Tests (Section 4)

1. Retained Lobbyist Quarterly Expenditure Threshold (§4(a))

Under subsection 4(a), the bill would apply to any organization that spends in excess of $5,000 in any quarterly

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filing period to retain another person or persons to engage in certain lobbying activities on the retaining organization's behalf.

Although we have no opinion on the precise minimum expenditure that should be required before an organization must register and report, a quarterly expenditure threshold applicable to organizations who retain others to lobby does seem desirable. Expenditures to retained lobbyists should not be difficult for the retaining organization to determine, particularly since the definition of "expenditure" excludes the costs of general operating overhead such as the costs of office equipment, utilities, rental, and mortgage payments. In addition, the dollar level of the threshold set by the bill is intended to be at a level sufficiently high to exclude from coverage organizations whose efforts to influence the Congress are neither regular, intense, nor costly. We think the $5,000 quarterly expenditure threshold in S. 1782 could accomplish this objective.

We do have a reservation, however, with the present wording of the bill's retained lobbyist quarterly expenditure threshold. This threshold only applies to retention expenditures "to make" lobbying communications, and arguably cannot be crossed if the organization's retained lobbyists receive in excess of $5,000 to draft lobbying communications to be made exclusively by the retaining organization. We recommend the Committee clarify the threshold's intended operation in such a situation.

2. Employed Lobbyist Threshold (§4(b))

Under subsection 4(b), the bill also would apply to any organization which, acting through its paid officers, directors, or employees, made over a set period of days a prescribed minimum number of oral or written lobbying communications, and spent in excess of $5,000 on lobbying during the quarterly filing period in which the communications were made. General overhead costs would not be computed in determining whether an organization crossed this threshold.

Although lobbying organizations should be able to determine with comparative ease when the employed lobbyist threshold has been crossed, we believe this threshold suffers from the same deficiency as the retained lobbyist threshold. Both

thresholds are ambiguous in terms of the inclusion of drafting costs. The employed lobbyist threshold also should be clarified to state explicitly whether the $5,000 expenditure must be spent on the minimum number of communications required to cross the threshold or, alternatively, whether it is keyed to all of the lobbying communications made by the organization during the quarterly filing period.

B. Coverage of Lobbying Communications Directed to Legislative and Executive Branch Agencies

The registration, recordkeeping, and reporting requirements of the bill apply only to organizations whose lobbying activities include the retention of another or the use of an organization's employees to make lobbying communications directed to any Senator, Representative, congressional officer or employee on an issue, pending or proposed, before the Congress.

The bill does not cover lobbying of executive branch agencies or of legislative branch agencies such as the General Accounting Office, Office of Technology Assessment, the Congressional Budget Office, and others. We cannot speak for other legislative branch agencies but insofar as the General Accounting Office and the Cost Accounting Standards Board are concerned, we recommend they be covered when lobbied on legislation along the same lines as they and the executive agencies are in all other pending versions of the lobbying legislation. As for the executive branch, we see no convincing reason why it is less susceptible than the legislative branch to the pressures of special interest groups seeking favored treatment.

We also believe the Congress should consider disclosure legislation that covers the lobbying by private interest groups of matters that are not legislative, but instead, are matters of administration or of activities peculiar to the executive branch. Adding the dimension of all aspects of executive branch lobbying to lobbying disclosure, however, will require time and careful study. The principal thrust of S. 1782 concerns lobbying on legislative issues. This subject, unlike lobbying on nonlegislative issues, has already received exhaustive attention by the 94th, 95th and 96th Congresses. We recognize, therefore, that the Committee may prefer to study and cover lobbying on nonlegislative issues through a vehicle other than S. 1782.

C. Coverage of Lobbying Communications

S. 1782's registration and reporting requirements apply to organizations whose lobbying activities involve the retention of another or the use of an organization's employees to make lobbying communications "directed to" a Member, officer, or employee of the Congress. Thus, to the extent an organization lobbies the general public to communicate a viewpoint on legislation to the Congress, such lobbying would not be "directed to" the Congress, and would neither trigger a threshold nor be subject to disclosure.

This type of lobbying, called indirect or grassroots lobbying, also is excluded from coverage under the current Federal Regulation of Lobbying Act, and some criticism has focused on this exclusion due to the significant role indirect lobbying plays in contemporary lobbying campaigns. We note that S. 1564 and S. 2160 cover indirect lobbying, but do so only as a reporting requirement.

D. Exempt Communications

Certain communications that could otherwise qualify as "lobbying communications" are specifically excluded from the bill's coverage.

Under subsection 3(8)(A), for example, communications by an individual for "redress of grievances to express his own personal opinion" are excluded from the definition of "lobbying communication" and, therefore, will not be included in a threshold tally or be subject to disclosure. We recommend the Committee clarify the intended operation of this exemption when, for example, the chief executive officer of a lobbying organization shares the same views as the organization he represents, and claims to be lobbying Congress for the adoption of those views in his personal capacity.

Another exemption, contained in subsection 3(8)(C), provides that the bill shall not apply to:

> "testimony given before a committee
> * * * of the Congress or submitted
> * * * for inclusion in the public

> record of a hearing * * * or a communication made at the request of a Member, officer, or employee of the Congress."

We believe the exclusion of testimony and communications submitted for the public record is both necessary and wise. This type of lobbying is almost always conducted in such a manner as to be visible to the public eye, and it is recorded in documents that are available for public inspection.

We have serious reservations, however, with the language of the exclusion for "a communication made at the request of a Member, officer, or employee of the Congress." A literal construction of this exemption would exempt from disclosure communications made by a lobbying organization if the communications were made at the request of a Congressman. Under this exemption, any Congressman or congressional employee could request an organization to lobby other congressmen. Since the resultant communication would be made "at the request" of a Member, officer, or employee of the Congress, the lobbying organization could escape the bill's registration and disclosure requirements. Although this exemption may have been intended to be limited to communications made to the requesting Congressman or congressional employee, we recommend the provision be amended to specifically exempt only those communications made to the requesting official.

Subsection 3(8)(F) of S. 1782 also would exempt from coverage a communication by an organization on any subject if the communication is directed to a Member of the Senate or of the House of Represenatives that represents the State where the organization maintains its principal place of business. This exemption is commonly referred to as the "home-State" exemption.

This particular version of the home-state exemption recognizes that because of the interdependent nature of many areas of a state, an organization may in one sense be a constituent of Members of Congress other than those that represent its congressional district. On the other hand, we might point out that organizations located in a State having a large congressional delegation will be able to communicate with more representatives without registering or reporting than an organization whose principal place

of business is located in a State having a smaller congressional delegation.

Finally, S. 1782 does not include several exemptions contained in the other lobbying disclosure bills. For example, the bill does not exclude communications by a Federal officer or employee from its definition of "lobbying communication." It may be that communications between officers and employees of the executive and legislative branches are exempt under other provisions of S. 1782, such as the definition of "organization" in subsection 3(10). We believe, however, that clarification of the bill's application to this special category of communication would be desirable. Since subsection 3(8) defines the term "organization" as including "any corporation," we also recommend clarification of the bill's applicability to communications by Government corporations.

II. Registration (Section 5)

Section 5 of the bill would require each organization that had crossed a lobbying threshold to register with the Comptroller General within 30 days after becoming a lobbyist. A registration in any calendar year would be effective until January 1 of the succeeding calendar year.

A. Retained Lobbyist and Parent/Affiliate Registration Responsibilities

S. 1782 would place the primary responsibility for registration on the organization on whose behalf lobbying services are performed. There is one situation, however, where the bill appears to place a responsibility to register on both the organization on whose behalf services are performed and the organization performing the service. This situation could occur if one organization retained another organization to lobby on its behalf. The retaining organization could meet the retained lobbyist threshold in subsection 4(a). And the retained organization could employ individuals to perform the services for which it was retained and cross the employed lobbyist threshold in subsection 4(b)(1). Both organizations, as the bill is presently drafted, apparently would be required to register.

We are not certain that the sponsors of S. 1782 intended a dual registration requirement that could result in two organizations disclosing the same information. For this reason, we recommend the Committee clarify the applicability of the bill's registration requirements to organizations that cross an employed lobbyist threshold solely as a result of performing lobbying services for a registered lobbying organization.

The registration responsibilities of parent organizations and their affiliates also need the Committee's attention. The term "affiliate" (§3(1)) is broadly defined:

> "(a) [the term 'affiliate' means] organizations which are associated through a formal relationship based upon ownership or an agreement (including a charter, franchise agreement, or bylaws) under which (A) the governing instrument of one such organization requires it to be bound by decisions of the other organization on legislative issues, or (B) the governing board of one such organization includes persons who--
>
> "(i) are specifically designated representatives of another such organization or are members of the governing board, officers, or paid executive staff members of such other organization, and
>
> "(ii) by aggregating their votes, have sufficient voting power to cause or prevent action on legislative issues by the first such organization."

Some organizations or associations will undoubtedly consider certain parts of their organizational structure, such as subsidiary corporations and interlocking directorates, to be "affiliates" under this definition. Other provisions of the bill make clear that an affiliate, like its parent, may be an organization subject to the bill's registration requirements. Also, the lobbying activities of an affiliate are not by force of law chargeable to the

parent for threshold or reporting purposes. The parent may in its discretion elect to report for its affiliates and if it does, the affiliates need not register or file quarterly reports.

Since the bill's registration provisions only apply to organizations that cross a threshold, a parent organization conceivably could avoid registration by directing its affiliates to lobby, and elect not to report for those affiliates. The resulting lobbying activity ordinarily would not cause the parent to cross a threshold and, in view of the home-State exemption, the same could be true for the affiliates. We believe one way to avoid this result would be to charge an affiliate's lobbying activities to its parent if the affiliate's lobbying was parent-initiated.

B. Registration Disclosure Requirements

The amount and types of information that an organization must disclose when registering under S. 1782 would simplify the process of registration substantially.

Subsection 5(b) of the bill would require that an organization's registration statement contain (1) an identification of the organization; (2) a description of the types of issues the organization intends to lobby; (3) the approximate number of individuals and organizations who are members of the registrant; and (4) an identification of certain of the persons retained or employed by the registrant to lobby.

These registration disclosure requirements generally seem clear and not overly burdensome. However, we suggest the Committee consider deletion of the requirement that issues to be lobbied be described when registering. As the bill is presently drafted, this registration disclosure requirement duplicates information required to be disclosed in the registrant's quarterly report.

III. Recordkeeping (Section 6)

Section 6 of S. 1782 would require lobbying organizations, retainees, and, in certain circumstances, affiliates to maintain such records as are necessary to comply with the bill's registration and reporting requirements. Records

must be retained for 3 years after the close of the quarterly filing period to which the records relate. This record retention period corresponds to the 3-year statute of limitations for initiating a civil action under section 12 of the bill. We consider the section 6 record maintenance requirements, together with the record retention period, essential to the effective administration and enforcement of the new lobbying disclosure law.

S. 1782 seems to recognize the importance of reducing paperwork burdens and keeping to a minimum the additional records that must be maintained to comply with a new lobbying law. To comply with the bill's reporting requirements, taxpayer and certain tax-exempt organizations should be able to draw to some extent upon records and accounting systems already maintained under the Internal Revenue Code. Under subsection 7(b)(2) of the bill, certain tax exempt organizations may satisfy the bill's expenditure disclosure obligations by following substantially the same accounting and reporting procedures as are followed when filing IRS statements. As for taxpayer organizations, the IRS Code generally allows deductions for direct lobbying, but disallows deductions for indirect lobbying. To the extent existing record and accounting systems are used to document or identify deductible and nondeductible lobbying expenditures, these systems could be used to facilitate compliance with S. 1782.

IV. Quarterly Reports (Section 7)

Section 7 of the bill would require registered lobbying organizations to file quarterly reports with the Comptroller General. The information required in these reports would be considerably more detailed than the information required for registration. However, the reporting requirements of S. 1782 are limited when compared to those of the other lobbying disclosure bills.

Quarterly reports filed under section 7 would contain (1) an identification of the reporting organization; (2) an estimate of the total direct lobbying expenditures made during the quarter to which the report relates; (3) an identification of certain of the reporting organization's retained and employed lobbyists, together with a statement disclosing the retainers and salaries paid for lobbying; and (4) a description of the ten issues which

the organization estimates accounted for the greatest proportion of its time spent in direct lobbying activities.

Unlike the disclosure requirements of S. 1564 and S. 2160, a report filed under S. 1782 would not disclose gifts in excess of $35 that were made to Members of Congress, or report receptions, dinners, and similar events that cost in excess of $500 and which were held for the benefit of congressional officals. Since in the context of a particular lobbying campaign these costs may represent a significant and not otherwise disclosed component of the total lobbying effort, we recommend S. 1782 be amended to include a disclosure requirement applicable to gifts and social events costing in excess of a prescribed dollar amount.

S. 1782 differs from S. 1564 and S. 2160 in two other important particulars, namely, contributions by one organization to finance the lobbying activities of the reporting organization will not be disclosed under S. 1782, and solicitations for indirect lobbying, regardless of their cost, are not reportable. We recognize that inclusion of a reporting requirement for solicitations and contributions are among the more significant and controversial issues facing the Congress in its deliberations upon the pending disclosure proposals. As we indicated in testimony before the Committee, however, it is our view that any contributor disclosure requirement should cover contributions only to the extent such contributions are used to finance an organization's lobbying effort. As for coverage of solicitations, we recommended in testimony on S. 1564 that the Committee place a ceiling, comparable to that applicable to direct lobbying, on the number of indirectly lobbied issues that must be disclosed. We see no persuasive reason why indirect lobbying warrants the reporting of more comprehensive and detailed information than direct lobbying.

In the interest of simplifying quarterly reports and reducing paperwork, we might also point out that under subsection 7(b)(3) of the bill, employed lobbyists who do not individually meet a lobbying threshold will not be disclosed in an organization's registration statement. For example, an organization may become a lobbyist if just two of its employees make at least one lobbying contact on each of any seven days in a quarter. The bill would require the employing organization to identify these employees when it reports as

a lobbyist. If other employees of the registering organization only lobby for six days each, they would not have individually met a threshold and under subsection 7(b)(3), they would not be identified.

Although subsection 7(b)(3) operates in a way that limits the amount of information an organization must disclose when reporting, it should be recognized that once an organization crosses a threshold it will still be necessary to maintain daily records of contacts. Only in this way will an organization be able to determine when the identity of its employed lobbyists must be disclosed. We think it would be comparatively easy for organizations that have already crossed a threshold to simply identify employees who have lobbied on its behalf during a quarterly filing period. This would ease the administrative and paperwork burden that would result from the bill's present requirement that only those employed individuals who have spent a prescribed number of days making lobbying contacts be identified in an organization's quarterly report.

Finally, we believe S. 1782's issue disclosure requirement needs the Committee's attention. Under subsection 7 (b)(4) of the bill, reporting organizations would disclose the "ten issues which the organization estimates accounted for the greatest proportion of its time * * *." To comply with this disclosure provision, organizations will be required by section 6 of the bill to maintain records of time spent lobbying particular issues. By defining reportable issues in terms of the greatest proportion of time spent on each issue, S. 1782, in our view, imposes an unnecessary recordkeeping requirement. All other provisions of the bill are keyed not to time spent lobbying, but to lobbying contacts and lobbying expenditures. In our opinion, the more practical approach to issue disclosure would be to retain the numerical ceiling on reportable issues, and to identify those which must be reported through a percentage approximation of the amount of money expended on the issues involved.

V. Administration and Enforcement (Sections 8 and 9)

S. 1782 would designate the Comptroller General as the official with primary responsibility for administering the new lobbying law.

The duties of the Comptroller General would include maintaining registration statements and reports, making them available to the public for inspection and copying, cross-indexing lobbying information, and compiling and summarizing on a quarterly basis the information contained in registration statements and quarterly reports. In addition, the Comptroller General would be authorized to issue rules and regulations, and provide substantive and procedural guidance to lobbyists on the bill's registration, recordkeeping, and reporting requirements.

The administrative powers and procedures prescribed in S. 1782 should improve the effectiveness of lobbying disclosure. However, the enforcement scheme envisioned by the bill would vest exclusive authority for compliance with the Attorney General, with the Comptroller General playing the limited role of referring violations. In view of the experience with the present law, we have serious reservations whether this allocation of authority would prove to be workable or effective. Our specific reservations are discussed below.

S. 1782, like its predecessors in the 94th and 95th Congress, designates the Comptroller General as the official responsible for ensuring, among other matters, that lobbying information is available to and accurately summarized for the Congress and the public. We, the Justice Department, and others have recognized that one unusual and crippling feature of the present law is that the officials responsible for administration act only as repositories of information. They lack authority to provide meaningful assistance and guidance to lobbyists, to issue implementing regulations, to provide oversight to ensure that information received is reported in a timely, accurate and complete manner, or to handle minor compliance problems for which prosecution is not appropriate. Our 1975 report on the present law, as well as studies performed by others, confirmed the near total ineffectiveness of this kind of administration. The problems encountered in administering and enforcing the very limited requirements of the Federal Regulation of Lobbying Act would be compounded if a new and more comprehensive lobbying law were to retain the present law's administrative and enforcement mechanisms. It therefore has been our consistent position that unless the Comptroller General is given the tools to administer the law effectively, he should not be designated as the official responsible for administration and for providing complete lobbying information to the Congress.

S. 1564 and its successor bill, S. 2160, would correct the bulk of the administrative and enforcement deficiencies of the present law. These bills authorize the Comptroller General, after consulting with the Attorney General, to promulgate implementing rules, regulations, and forms. The Comptroller General also would be in a position to provide meaningful assistance and guidance to lobbying organizations, to review and verify filings, and he would be empowered to administratively correct compliance problems for which prosecution by the Department of Justice is neither necessary nor desirable. We endorse these authorizations, and consider them essential to sound administration and effective enforcement.

S. 1782's administrative and enforcement machinery is similar to that of S. 1564 and S. 2160 in two respects, namely, the bill authorizes the Comptroller General to promulgate implementing rules and regulations, and to provide guidance on the lobbying law's registration, recordkeeping, and reporting requirements. For reasons that are not clear to us, however, S. 1782, unlike both S. 1564 and S. 2160, vests no review and verification function with the Comptroller General, nor does it provide the Comptroller General with the authority necessary to correct compliance problems for which prosecution would be inappropriate. We consider both of these functions essential components of the administrative and enforcement scheme of any new lobbying law.

Several provisions of the bill underscore the importance of timely and accurate disclosure of lobbyists' activities. Experience with the present law has shown the relationship between the accuracy and timeliness of filings and the absence of a review and verification authorization for the administering officials. As our 1975 report indicated, of the nearly 2,000 lobbyists who filed in one 3-month period in 1974, over 60 percent filed late and nearly 50 percent of the filings were defective on their face. If the administering officials are not empowered to review and verify filings under the new law, these compliance problems may be expected to recur and go uncorrected. We recognize that the omission of such an authorization from S. 1782 may not have been intended, since in section 3 of the bill lobbying-related investigations by the Comptroller General are excluded from the definition of "lobbying communication." We recommend, therefore, that section 7 be amended to include an explicit review and verification authorization.

So that this review function may not be frustrated by an organization's refusal to verify or document its filing or to explain an inconsistent report, we also recommend that the Comptroller General be provided limited authority to subpoena records that are required to be maintained and that relate to filed registration statements and filed quarterly reports. We recommend that the Attorney General and the Comptroller General be authorized to petition for judicial review and enforcement of such subpoenas.

The subpoena authorization we recommend would be narrower in scope than the Comptroller General's existing subpoena powers in the energy and social security areas, and would apply only when a registered organization refused access to its lobbying records. See 15 U.S.C. §§761, 771; 42 U.S.C. §6384; See also Department of Energy Organization Act, Pub. L. No. 95-91, Title II, §207, 91 Stat. 565, 574; Medicare-Medicaid, Fraud and Abuse Amendments of 1977, Pub. L. No. 95-142, §6, 91 Stat. 1175, 1192. Although we believe use of this authorization would be extremely rare, we also recognize that some reasonably effective means of ensuring access to required records will be necessary if filings by lobbying organizations are to be responsibly monitored and reviewed.

The omission from S. 1782 of an authorization for the Comptroller General to administratively correct compliance problems for which prosecution is not appropriate also needs the Committee's attention. Section 9 of the bill seems to vest this responsibility exclusively with the Department of Justice.

The Department of Justice and its investigative arm, the Federal Bureau of Investigation, have enforcement responsibilities for substantially the entire Federal Criminal Code, and litigative responsibilities for most civil offenses. From the standpoint of its resources and existing responsibilities, we doubt whether the Department would be in a position to resolve all or even substantially all of the compliance problems, most of them relatively minor, that may be expected to arise in the administration of an expanded and comprehensive disclosure law.

When problems such as the inadvertent, unknowing, or negligent omission of information from a quarterly report do

arise, the Comptroller General should be in a position to correct such matters administratively in a timely and effective manner. But as S. 1782 is presently drafted, the Comptroller General is not given the necessary authority even to inquire of an organization whether it had inadvertently failed to file its quarterly report. Under the bill, routine matters of this and lesser gravity would be referred to the Attorney General for investigation and corrective action. We consider reliance on the administering officials for resolution of these problems, rather than the prosecutive arm of government, to be a more realistic and effective approach to compliance. In this way, the lobbying law's enforcement scheme would be more in line with that of other disclosure statutes, and would afford lobbying organizations optimum opportunities to comply with the new law before a civil prosecution by the Attorney General would be necessary or desirable. We therefore recommend section 8 of the bill be amended to include an authorization for the Comptroller General to administratively correct compliance problems for which prosecution is not appropriate. A similar authorization, which we endorse, is contained in S. 1564 and S. 2160.

We hope this expression of views will prove useful to the Committee, and we will be pleased to provide whatever additional assistance you might require.

Sincerely yours,

Elmer B. Staats

Comptroller General
of the United States

cc: The Honorable Lawton Chiles
The Honorable Charles McC. Mathias, Jr.
The Honorable Edmund S. Muskie
The Honorable David Pryor