

# LOBBYING FOR HOUSING

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In light of the passage and implementation of NAHASDA and the soon-to-occur implementation of NAHASDA regulations, this seems an appropriate time to consider whether Tribally Designated Housing Entities ("TDHEs"), formerly Indian Housing Authorities ("IHAs"), can or should lobby in Washington, D.C. In the past, IHAs have been led to believe that their federal funds could not be used to influence federal employees or members of Congress. The tacit assumption was that lobbying was prohibited by either 18 U.S.C. § 1913, the general federal criminal prohibition against lobbying with federal funds, or 31 U.S.C. § 1352 (also called the Byrd Amendment). However, after extensive review of relevant provisions, we conclude that TDHEs and their lobbyists are not restricted from using NAHASDA or other funds for lobbying purposes.<sup>1</sup>

While Public Law 104-65, the Lobbying Disclosure Act of 1995, 2 U.S.C. §§ 1601 *et seq.*<sup>2</sup> established uniform definitions related to lobbying, it did not end or even explain the application of restrictions. As it happens, most restrictions on lobbying relate to federal contracts and programs.

Lobbying activities are primarily intended to influence (1) the formulation, modification or adoption of Federal legislation (including legislative proposals); (2) the formulation, modification or adoption of a Federal rule, regulation, executive order, or any other program, policy or position of the United States Government; (3) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit or license); or (4) the nomination or confirmation of a person for a position subject to a confirmation by the Senate. Statutes purporting to restrict the lobbying activities of non-Federal agents in fact only limit the third type of activity, the administration or execution of Federal contracts and programs. *Participation in the unrestricted activities*

*clearly has a direct and substantial impact on the development of federal laws and policies.*

So that TDHEs can make informed choices in respect to lobbying, it is important to know the Federal definition of lobbying. Pursuant to the Lobbying Disclosure Act, lobbying activities include "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research, and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others." 2 U.S.C. § 1602. A *lobbying contact* is defined as:

Any oral or written communication (including an electronic communication) to a covered executive branch official<sup>3</sup> or a covered legislative branch official<sup>4</sup> that is made on behalf of a client with regard to:

(a) the formulation, modification, or adoption of Federal legislation (including legislative proposals);

(b) the formulation, modification, or adoption of a Federal rule, regulation, executive order, or any other program, policy, or position of the United States Government;

(c) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license);<sup>5</sup> or

(d) the nomination or confirmation of a person for a position subject to confirmation by the Senate.<sup>6</sup>

As related to activities that may support the plans and goals of Indian tribes and tribal entities, in general lobbying

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1. HUD was asked by both IHA attorneys and internally by HUD counsel to provide its legal opinion and guidance on this subject but declined to do so.

2. The Act also specifically repealed the Federal Regulation of Lobbying Act, 2 U.S.C. §§ 261 *et seq.*, lobbying regulatory provisions; Section 13 of the Department of Housing and Urban Development Act, 42 U.S.C. § 3537b, related to registration of, and reports by, persons spending money to influence HUD decisions; and Section 536(d) of the Housing Act of 1949, 42 U.S.C. § 1490(d), related to regulation of lobbyists and consultants.

3. The term "covered executive branch official" means: (A) the President; (B) the Vice President; (C) any officer or employee, or any other individual functioning in the capacity of such an officer or employee, in the Executive Office of the President; (D) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order; (E) any member of the uniformed services whose pay grade is at or above O-7 under section 201 of title 37; and (F) any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2) of title 5. 2 U.S.C. § 1602(3).

4. The term "covered legislative branch official" means: (A) a Member of Congress; (B) an elected officer of either House of Congress; (C) any employee of, or any other individual functioning in the capacity of an employee of (i) a Member of Congress, (ii) a committee of either House of Congress, (iii) the leadership staff of the House of Representatives or the leadership staff of the Senate; (iv) a joint committee of Congress; and (v) a working group or caucus organized to provide legislative services or other assistance to Members of Congress; and (D) any other legislative branch employee serving in a position described under section 109(13) of the Ethics in Government Act of 1978 (5 U.S.C. App.). 2 U.S.C. § 1602(4).

5. Of all provisions included in the definition of Lobbying Contact, only the parenthetical language contained in Subsection (C) actually is restricted. Limitations on attempts to influence "the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license" is included in 31 U.S.C. § 1352, the Byrd Amendment.

6. 2 U.S.C. § 1602(8)(A).

contacts do *not* include communications: (1) made by public officials<sup>7</sup> acting in their official capacity; (2) made by members of the media when gathering and disseminating news and information; (3) made in a speech, article, publication or other material distributed to the public through the mass media; (4) made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act; (5) testimony given before Congress or submitted for inclusion in the public record, required by subpoena, civil investigative demand or otherwise compelled by Congress or an Executive agency; (6) submitted in response to a Federal entity's request for comments; (7) a written comment or other communication made on the record in a public proceeding; or (8) a petition for agency action that is made in writing and required to be a matter of public record. 2 U.S.C. § 1602(8)(B).

18 U.S.C. § 1913, a criminal prohibition, is most often cited to justify limitations on lobbying. In relevant part, this Federal criminal law provides:

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended to influence in any manner a Member of Congress, to favor or oppose, by voice vote or otherwise, any legislation or appropriation by Congress, whether before or after the introduction of any bill or resolution proposing such legislation or appropriation ...

At first blush, this provision would seem an absolute limitation on the use of federally appropriated funds for lobbying unless Congress specifically has authorized such expenditures; however, it provides an exception for lobbying for legislation and appropriations.<sup>8</sup> *Importantly, further reading of the statute also limits its application to federal officers and employees.*<sup>9</sup>

If federal criminal provisions do not prohibit lobbying by tribal entities, what then does? Most, if not all, regulations limiting lobbying are derived from the language of the Byrd Amendment, 31 U.S.C. 1352. However, the Byrd Amendment restricts only lobbying for the procurement or continuation of contracts, grants, loans or cooperative agreements. Such activity is only one of the four types of activities defined by the Act; the other three defined activities are neither prohibited nor limited. The Byrd Amendment specifically states:

None of the funds appropriated by any Act may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay a person for influencing or attempting to influence an officer or

employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress, or an employee of a Member of Congress in connection with any Federal action described in paragraph (a)(2).

Paragraph (a)(2) provides that this prohibition applies solely to: (a) the awarding of any Federal contract; (b) the making of any Federal grant; (c) the making of any Federal loan; (d) the entering into of any cooperative agreement; and (e) the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

The prohibitions in the Byrd Amendment, however, do not apply (1) in the case of a payment of reasonable compensation made to an officer or employee of a person requesting or receiving a Federal contract, grant, loan, or cooperative agreement *to the extent that the payment is for agency and legislative liaison activities not directly related to a Federal action referred to in paragraph (a)(2)*; or (2) to any reasonable payment to a person in connection with, or any payment of reasonable compensation to an officer or employee of a person requesting or receiving, a Federal contract, grant, loan, or cooperative agreement or an extension, continuation, renewal, amendment, or modification of same *if the payment is for professional or technical services rendered directly in the preparation, submission or negotiation of any bid, proposal, or application for that Federal contract, grant, loan, or cooperative agreement or for meeting requirements imposed by or pursuant to law as a condition for receiving same*. 31 USC § 1352(d)(1).

Under a strict reading of the Byrd Amendment, it seems that lobbying by tribal entities need be limited only in relation to active pursuit of contracts, grants and programs. *However, the terms "recipient" and "person" as used in the restrictions found in 31 USC § 1352(a)(1) do not include an Indian Tribe, tribal organization, or any other Indian organization eligible to receive Federal contracts grants, cooperative agreements, or loans from an agency, but only with respect to expenditures by such tribe or organization that are made for purposes specified in subsection (a) and are permitted by other Federal law.*" 31 USC §§ 1352(g)(1) and (3). *Thus, not even the Byrd Amendment actually limits the lobbying activities of tribal entities.*

While no direct *statutory* restriction against tribal lobbying seems to exist, *regulatory* provisions need to be considered. In relation to housing programs, the Department of Housing and Urban Development (HUD) lobbying

7. For the purposes of the Act, "public official" includes any elected or appointed official and any employee of an Indian Tribe. 2 U.S.C. § 1602(15). Thus, if acting in his or her official capacity, communications to a covered executive or legislative branch official is not considered lobbying under the Act.

8. "[T]his shall not prevent officers or employees of the United States or of its departments or agencies from communicating to Members of Congress on the request of any Member or to Congress, through the proper official channels, requests for legislation or appropriations which they deem necessary for the efficient conduct of the public business." 18 U.S.C. § 1913.

9. "Whoever, being an officer or employee of the United States or of any department or agency thereof, violates or attempts to violate this section, shall be fined under this title or imprisoned not more than one year, or both; and after notice and hearing by the superior officer vested with the power of removing him, shall be removed from office or employment." *Id.* This interpretation of the statute is supported by a recent Comptroller General's Opinion, Number B-270875, July 5, 1996.

prohibitions generally are found at 24 C.F.R. Part 87. Section 87.100(a) provides that no appropriated funds may be expended by the recipient of a Federal contract, grant, loan, or cooperative agreement to pay any person for influencing or attempting to influence an officer or employee of any agency, Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with any of the following covered Federal actions: the awarding of a federal contract, the making of any federal grant, the making of any federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any federal contract, grant, loan, or cooperative agreement. This merely is a restatement of the Byrd Amendment. While HUD regulations are silent on the issue, the statutory exceptions contained in the Byrd Amendment, allowing Indian entities to lobby, arguably apply. The rest of the HUD regulations either specifically require disclosures related to lobbying for the stated federal actions or require "anti-lobbying" certifications reciting compliance with 24 C.F.R. Part 87.

Other federal regulatory provisions can be compared to HUD's. The Department of Justice promulgated 28 C.F.R. Part 69, New Restrictions on Lobbying, which contains restrictions substantively identical to those found in HUD's lobbying regulations. As required of HUD programs, Department of Justice grantees must execute and submit an "anti-lobbying" certification. Such certifications only restrict lobbying pursuant to the Byrd Amendment and 28 C.F.R. Part 69. These C.F.R. provisions, as with those found in 24 C.F.R. Part 87, relate only to spending federal appropriations to influence employees of Agencies and Congress in relation to contracts, grants, loans, and cooperative agreements. Once again the use of federal funds for lobbying activities by tribal entities receiving federal grants from the Department of Justice are limited only to the extent limitations under the Byrd Amendment are applicable. Though 28 C.F.R. Part 69 is silent as to tribes, because it derives from the Byrd Amendment, Indian exceptions imbedded in the statutory language would seem to apply.

Lobbying restrictions also may be included in annual appropriations acts, prohibiting the use of appropriated funds for certain lobbying activities. *Comptroller General of the United States*, Opinion Number B-270875, July 5, 1996. To determine whether an appropriations act does limit lobbying, the entire act would of course have to be reviewed to determine if, and to what extent, lobbying would be acceptable. The Comptroller General's Opinion suggests that to be barred a lobbying activity would have to be specifically identified. So unless lobbying restrictions are specifically set out in appropriations language, prohibitions are limited to activities related to awarding federal contracts, loans, grants or cooperative agreements. Even then, *tribal entities* are exempt from such restrictions.

In the past, lobbying with federal housing funds was thought to be restricted, even though lobbying efforts may have been an appropriate use of such funds. Under NAHASDA's block grant program, tribal entities will have more discretion in determining

how funds are allocated and spent. Plainly continued availability of housing funds and continued tribal housing autonomy will, in the present and foreseeable atmosphere in Washington, require strong and concerted lobbying.

If tribes wish either to lobby by themselves or to hire lobbyists to advance their views, priorities, and concerns in Washington, laws exist to *regulate*, if not prohibit, such activities. Tribal lobbyists must comply with the registration requirements found in the Lobbying Disclosure Act of 1995. Generally, no later than 45 days after a lobbyist first makes a lobbying contact or is employed or retained to make a lobbying contact, whichever is earlier, the lobbyist must register with the Secretary of the Senate and the Clerk of the House of Representatives. Any tribal organization that has one or more *employees* who are lobbyists shall file a single registration on behalf of such employees for each tribe on whose behalf the employees act as lobbyists.

*However, if the tribal spokesperson is a tribal official, under the Lobbying Disclosure Act as long as he or she is acting within the scope of his or her office, actions to influence the executive or legislative branches of the federal government are not lobbying activities,<sup>10</sup> and so registration is not required.*

Though a tribal or TDHE official may be permitted to lobby, "winging it" is rarely advisable. Tribal officials and staff must prepare and, to be most effective, function as a part of a well-conceived, coordinated lobbying effort. Of course, in addition to doing one's homework, sincerity and natural interpersonal communication skills go far toward assuring the desired outcome.

Developing a lobbying strategy requires, first, doing the factual, legal and political research necessary to identify the constituencies that support your goal. It includes identifying both your allies *and your opponents*. It requires that you become familiar with the protocols and procedures followed in the House and the Senate and their various committees and subcommittees, for this makes up the rule book that everyone else will be following.

We recommend, before you go to "the Hill," that you prepare an analysis of the issues, including a description of what the other side says and how you intend to respond. Annotate your responses, using any and all useful footnotes, charts and citations. If more than one person is going, orchestrate who says what, when, and to whom. Develop an action plan, then make your itinerary, with information about whom you are meeting.

Here are a few ideas and suggestions to guide you in your lobbying effort:

1. Prior to going to the Hill, send letters. Treat your visit as a follow-up to the letters.

2. Coordinate any letter writing campaign to be sure you know who says what and to whom. Do not use form letters. The number of letters received by staff often has quite an effect on the final outcome. Staff reads a letter first and

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10. See Footnote 5.

decides who gets it, so limit letters to two pages maximum. Include a one page fact sheet.

3. Direct letters solely to those who can affect the issues; rarely do you need to write to all Congressmen and Senators.

4. Make appointments in advance. Be thoughtful and patient when telling them the subject matter and when the person you are meeting with does not show up on time, or does not show up at all. Exchange business cards. Leave behind extra copies of your letters and your one page fact sheet. Have two oral presentations prepared; a fifteen minute one and a one minute one. Be prepared to make your points and your requests very quickly if necessary, and be prepared to make them walking down the hall or sitting in a committee side room with other people all around making their pitches.

5. Know your own personal style. Don't hide it or fake it; use it.

6. Understand that, in *Washington talk*, "yes" does not necessarily mean "yes," and a promise is not a commitment. "No" is only an interim response. You rarely will hear "no" when you don't want to hear it, but it's often there, lurking beneath the surface. The Silent No sounds an awful lot like "Yes."

7. Get a Congressional Directory.

8. Understand the purpose of staffers and how to use them. Their job is not to serve you but to serve their bosses. This means they want to protect the legislator from interruptions, from reading massive amounts of mail, from the need to look up facts and research issues, from positions that will have a negative political effect back home. They are often quite young, so the average lobbyist tendency is to treat them disrespectfully. Don't. They are in a position to hurt you if they don't like you. More importantly, they can help you if they do like you. Make yourself the kind of appointment they look forward to and respect.

9. UNDER NO CIRCUMSTANCES should you anger a staffer. You will do this by going over his or her head or bypassing him or her (intentionally or by mistake) and going

directly to the Senator or Congressman. Remember, the staffers usually have the information and are expected to brief the Senator or Congressman. If you meet with a Senator or Congressman without preparing (and going through) the staffer, you are likely to be speaking to a brick wall.

10. Do your homework. Know the practical issues as well as the legal and factual issues. KNOW YOUR OPPONENT'S BEST POINTS AND BE PREPARED TO DEAL WITH THEM. Know the risks - especially the political risks - the person you are lobbying can be expected to face, and be straightforward about them. Do not ignore or, worse, hide the risks. If you can avoid it, don't ask a politician to take a risk for you.

11. Get specific commitments, not vague promises. Affirm commitments in writing.

12. Reward good legislators. This is where fundraising, letters of thanks, and positive words of praise back home come in. Free publicity is a reward. Offer to publicize the Senator's or Congressman's favorable actions in your community and in the publications you have control of. Present the Senator or Congressman with a tribal resolution of appreciation.

13. Follow-up every meeting in writing; say thank you. Take stamped notecards with you and, when possible, write thank yous while waiting to be seen by the next appointment.

14. Follow-up weekly, if possible, until the issue is resolved. Do not count on the legislators or staffers to call you when something moves.

15. If you have a close and constructive friendship with a Senator or Representative, it still makes sense to follow these guidelines.

In summary, TDHES have substantial latitude to lobby, using NAHASDA Indian housing block grant funds, to affect legislative and administrative outcomes in Washington, DC. Tribal leaders who are clear on their objectives and who are supplied by their staffs with the necessary information should be the most successful lobbyists on the Hill.



(Continued from "Housing on Indian Lands," page 10)  
pursuant to a limited partnership agreement.

The more education a tribe provides to its partners, along with its success stories, the more banks and other partners will be willing to work with tribes to develop alternative housing programs, including home loans in Indian Country. Success breeds success. Together, solutions to the most difficult challenges can be found.

