U.S. House of Representatives
Committee on the Judiciary

Statement of Kenneth A. Gross
Partner
Skadden, Arps, Slate, Meagher & Flom LLP
before the U.S. House of Representatives Judiciary Subcommittee on
the Constitution, Civil Rights, and Civil Liberties
regarding Hearing on "S. 1, the Senate Approach to Lobbying Reform"
March 1, 2007

(with the assistance of Matthew Bobys and Christine Kirk)

Good morning Chairman Nadler, Ranking Member Franks, and Members of the Judiciary Subcommittee on the Constitution, Civil Rights, and Civil Liberties. Thank you for the opportunity to appear before you today to discuss the merits of S. 1 and the Senate approach to lobbying reform.

My name is Kenneth Gross. I am a partner at Skadden, Arps, Slate, Meagher & Flom LLP, where I head the firm's political law practice. I specialize in compliance with campaign finance, lobbying, and ethics laws. Prior to Skadden, I was head of enforcement in the General Counsel's Office of the Federal Election Commission.

S. 1 is, overall, a constructive step toward positive reform of the federal lobbying law. By emphasizing increased disclosure, the bill succeeds in effecting practical change in the way lobbying activities are reported and monitored without infringing upon our First Amendment rights as citizens to petition our government for a redress of grievances.

With regard to gifts, the House has already adopted strong gift rule provisions. However, I continue to believe that there is room for a de minimis provision. It does not have to be $50, the previous threshold which some believe was abused and often exceeded, but a small exemption for meals of $20 or less per occasion would take care of many situations that may arise during, for example, a plant visit or other meetings at which a meal is served but where the requirements for a widely attended event are not met.

The bill undertakes to increase the transparency of lobbying by requiring more frequent disclosure with a shorter lag time (days between the end of a reporting period and the report's due date), and by requiring more substantive disclosure – for example, requiring lobby registrants and their lobbyists to disclose their federal political contributions and those made by their PACs; and requiring the reporting of certain gifts to Members and legislative staff made by lobby registrants, lobbyists, and their PACs. However, there should also be a breakdown of the aggregate amount currently disclosed on a corporate lobby report. The following should be separately itemized: (1) the value of in-house personnel, including overhead expenses for all employees (not just those who meet the 20% threshold); (2) outside lobbyist fees; (3) trade association dues related to lobbying; and (4) travel and entertainment expenses.

S. 1 takes great steps to increase the transparency of governmental decision-making by making electronic filing the standard and requiring reports to be searchable, sortable, and posted quickly for the benefit of the public.

Although the bill does not create an independent enforcement body, it does increase the penalties for violations of the lobbying law and the making of gifts and for the first time exposes donors of gifts to civil enforcement liability. I advocate a meaningful and measured enforcement of the law to ensure compliance with these reforms.

There are three different areas of reform that I would like to address today: bundling, grassroots lobbying, and the revolving door.

Bundling
S. 1 requires lobby registrants and their lobbyists to disclose the recipients of contributions of $200 or more per year that they "collected or arranged" and the aggregate amount of those contributions. "Collected funds" include those that a lobbyist forwards to a campaign. "Arranged funds" include (i) formal and informal agreements to "credit" contributions as being raised, solicited, or directed by a lobbyist or (ii) actual knowledge by the lobbyist that the candidate is aware that the lobbyist raised, solicited, or directed the contributions. A lobbyist must also disclose the aggregate amount or a good faith estimate of the amount of campaign contributions raised at a fundraiser that he or she hosted or sponsored.
Regarding "collected funds," under current federal election law, an individual who bundles contributions must file a conduit report with the Federal Election Commission. It is impermissible for an individual acting as a representative of a corporation, for example as a Vice President for Government Affairs, to collect and forward contributions. However, an individual who has a significant position in a campaign and has been authorized by the campaign to raise funds, is permitted to collect and forward contributions without disclosing this activity. Thus, depending on the circumstance, bundling contributions may be illegal, require special disclosure, or require no disclosure.
What constitutes "arranging" contributions is even more difficult to define in application. It is typical that

contributions received by a committee have more than one individual claiming credit for them; it is up to the committee to sort this out. This provision might have the effect of individuals claiming credit for contributions beyond those they are responsible for raising. For example, an individual could have an agreement with a campaign to raise a certain amount of money, and send out hundreds of e-mails soliciting contributions, and claim credit for all contributions made by the recipients of those e-mails, which would result in an inflated amount of contributions credited to the individual and campaign.
Additionally, much of the money raised for federal campaigns (in particular, for presidential campaigns) is not raised by lobbyists but by friends of a candidate or by senior corporate executives who do not meet the definition of "lobbyist." The bundling rules only apply to contributions collected or arranged by those defined as lobbyists. If Congress is interested in a more complete disclosure provision, it would have to apply to all individuals, not just lobbyists. Consequently, the bundling provision as written in S. 1 is vague and open to misapplication. It should be drafted so it is limited to contributions physically handled by a lobbyist or those forwarded to a campaign in coded envelopes, as is currently required under Federal Election Commission rules.

Grassroots Lobbying
As you know, the Senate deleted the grassroots lobbying provision from S. 1. The concerns over the now-deleted provisions have been generally overstated, but it would be wrong to require disclosure of communications among members or employees of an organization. If the required disclosure is limited to information regarding the cost of artificially stimulated letter-writing or electronic communications, sometimes called "astroturf lobbying," there are fewer constitutional concerns. In 1954, the Supreme Court specifically upheld the disclosure of artificially stimulated letter-writing campaigns, and I believe would do so again if legislation was narrowly drawn to address disclosure of astroturf lobbying with a specific call to action on legislation in the communication. However, an as-applied challenge may succeed if a particular group can demonstrate that disclosure would result in harassment or threats of reprisal against group members.

Revolving Door
Any restrictions on prohibiting Members or certain staff from lobbying after they leave Congress must be narrowly and clearly drawn. Existing restrictions on appearances by Members and senior staff meet that standard. S. 1 contains a provision not previously seen at the federal level. It prohibits appearances as lobbyists and behind-the-scenes lobbying activities of former Members for two years after leaving Congress. At the very least, the enforceability of such a provision may be difficult. At worst, it may constitute an improper infringement on an individual's right to engage in certain lobbying activities.

The proposed changes that we are discussing today only address part of the puzzle; the regulation of lobbying activity is a delicate process. Lobbying is a protected core First Amendment right. Effective disclosure is the only viable method of regulation, and this bill addresses shortcomings in the current law. It is my sincere hope that with the changes proposed in S. 1 and the other issues under discussion here, it will start the process of restoring public confidence in the legislative process.