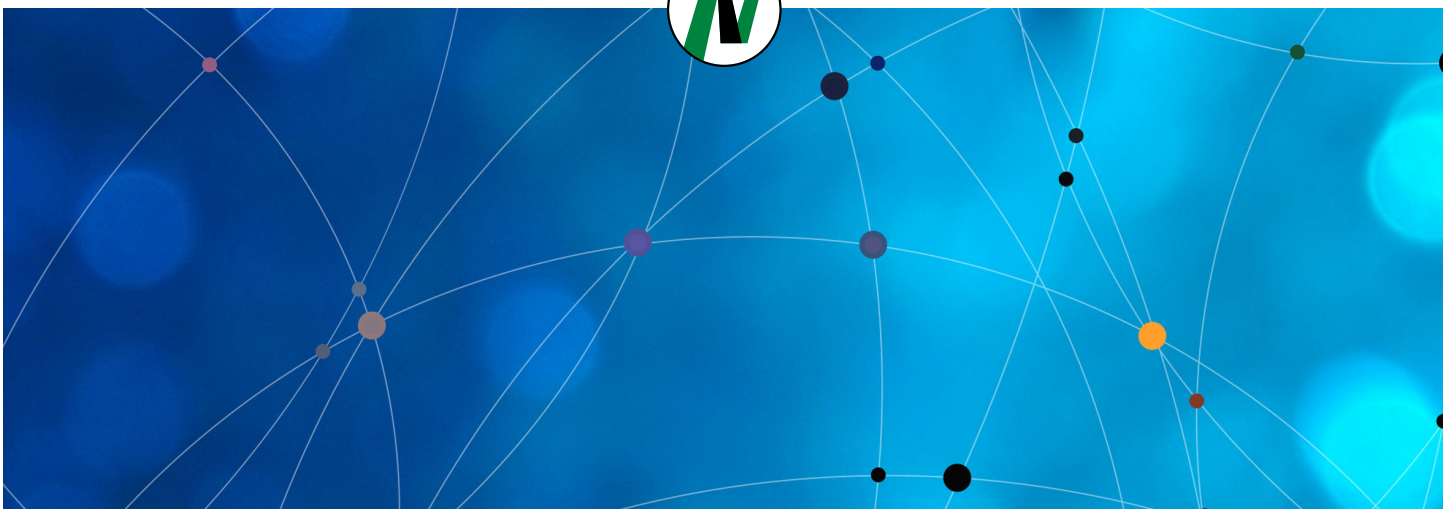

Supreme Court's Skilling Decision: How It Affects Lobbyists and Their Employers

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On June 24, 2010 the U.S. Supreme Court decided *Skilling v. United States*, in which the Court reined in the broad application of the "honest services fraud" statute (18 U.S.C. §1346) used by federal prosecutors to obtain convictions of public officials and corporate executives. In *Skilling*, the Court clarified that "honest services fraud" prosecutions are basically limited to schemes involving bribery or kickbacks. Prior to *Skilling*, prosecutors could charge honest services fraud where the defendant used the mail or telecommunications systems in a scheme to deprive the public of their right to "honest" services performed free from deceit, fraud, concealment bias, conflict of interest, self-enrichment or self-dealing. This standard was so broad and vague that it was difficult for an individual to know where the illegal conduct line was drawn.

A number of the recent guilty pleas of individuals involved in the Jack Abramoff scandal and other high-profile public official prosecutions were based on the pre-*Skilling*, broad application of the honest services fraud statute. To date, one of these trials has been postponed while the court takes another look at the outstanding charges. The sentencing of at least one other cooperating defendant has also been postponed and may be impacted. In many of those cases, the acts alleged to be the object of the scheme were otherwise legal (e.g., obtaining official policy statements, intervening on behalf of a private interest in the legislative process, or accepting campaign contributions.) The prosecutors simply charged that these otherwise legal acts were done by the government officials who put their personal interests ahead of the public good.

Skilling significantly limits the Department of Justice's application of the honest services theory to prosecute public officials. For example, to establish honest services fraud, the government must now prove that an official took a specific action as a result of, or in expectation of, a particular economic benefit. (18 U.S.C. §201 (c)(1)(A) and (B); see also *United States v. Sun Diamond Growers of California*, 526 U.S. 398 (1999)). Post-*Skilling*, a series of improper, random gifts (whether proper or improper) to a public official not connected to an official act, will not support an honest services fraud theory. Accordingly, the legal theories employed by

the Department of Justice in many of the Abramoff related cases and other past cases involving federal and state officials are no longer viable prosecution tools.

Although the *Skilling* decision generally brightens the legal lines for government officials and individuals who interact with public officials, it may not help lobbyists registered at the Federal level and in some states. Effective January 1, 2008, the Lobbying Disclosure Act (LDA), (as amended by the Honest Leadership and Open Government Act (HLOGA)) requires that all lobbyists and their employers sign a sworn statement semi-annually that they understand the Congressional gift and travel rules and have not violated them (2 U.S.C. §1604(d)(1)(G)). The LDA added a new, discreet criminal penalty for willful violations of the LDA by lobbyists ((2 U.S.C. 1606 (b)). For employers, there is robust civil liability (Id. at 1606 (a)). Combined with the certification, this new provision establishes a "strict liability" standard for lobbyists and their employers, which applies regardless of whether any official action is involved. Several states have similar stringent standards. For these federal and state lobbyists, there remains a premium on maintaining the highest levels of compliance with ethics rules.

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