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# Understanding Compliance for Grassroots Public Affairs Council

Skadden, Arps, Slate, Meagher & Flom LLP  
and Affiliates

## The Americas

Boston  
Chicago  
Houston  
Los Angeles  
New York  
Palo Alto  
São Paulo  
Toronto  
Washington, D.C.  
Wilmington

## Europe

Brussels  
Frankfurt  
London  
Moscow  
Munich  
Paris

## Asia Pacific

Beijing  
Hong Kong  
Seoul  
Shanghai  
Singapore  
Tokyo



- Approximately 100 LD-2 random audits per year
- Approximately 160 LD-203 random audits per year
- DOJ is responsible for civil and criminal enforcement
- 2009 through March 2016: 2,417 referrals from Secretary of Senate and Clerk of House to DOJ for LD-2 failure to comply
- Pre-audit online survey asks about documentation and support for lobbying activity and issues, among other disclosures
  - GAO found numerous instances of failure to provide documentation for various disclosures

# Federal Lobbying Law—Lobbying Disclosure Act of 1995 ("LDA") and Honest Leadership and Open Government Act of 2007 ("HLOGA"): LD-1 Report

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- Three requirements must be met to trigger LDA registration and reporting requirements:
  - A company must have at least one employee who spends 20% or more of his or her working time engaging in lobbying activity;
  - That same employee must have 2 or more lobbying contacts; and
  - The company must spend more than \$12,500 on such lobbying activity over a 3-month period.
    - » Lobbying firm threshold: lobbying income for a particular client must exceed \$3,000 over a 3-month period.
- Register only the entity that employs the lobbyists.
- *Foreign-owned entities* – Requirement to list all foreign entities that are 20% equitable owners of the registrant (including intermediate foreign entities), in major part supervise or control the registrant's activities, or are affiliated with the registrant and have a direct interest in the outcome of the lobbying activity.



# What is Lobbying Activity Under the LDA and HLOGA: LD-2 Report



- Lobbying activity
  - Lobbying contacts; and
  - Research and preparation for such contacts (*i.e.*, work done with the intent that the results will be used for lobbying contact).
    - » Includes strategizing, planning, possibly other background work
- Covered officials
  - Lobbying contact includes making the following communications in an attempt to influence legislation, federal contracts, or any other position of the federal government:
    - » Under Methods A and C, communications with Congressional members and staff; and
    - » Under Method A (LDA), communications with Covered Executive Branch Officials (*i.e.*, White House Staff, Military Personnel at or over pay grade O-7, and Presidential and Schedule C Appointees but not career SES employees).
      - > Plum book:  
<https://www.govinfo.gov/app/#contentDetails?packageId=GP-O-PLUMBOOK-2016>

# LDA Method vs. IRC Method



- Under Method C (IRC), lobbying contact includes communications with Covered Executive Branch Officials (*i.e.*, White House Staff, top two officials in any office of the EOP, and Cabinet-level officials and their deputies).
  - » Includes communications with any executive branch official regarding federal legislation
- Other differences between Method A and Method C
  - Method A
    - » Only covers federal lobbying
    - » Does not cover grassroots lobbying
    - » No de minimis exception
  - Method C
    - » Includes federal lobbying plus state legislative and limited local lobbying
    - » Covers grassroots lobbying
    - » The time of employees with no contacts and who spend less than 5% of their time on lobbying activity does not need to be reported

# What is Grassroots Lobbying?



- Is communicating with your own employees grassroots lobbying?
- Do you need a call to action?
- Is a fly-in grassroots or direct lobbying?



- 1<sup>st</sup>: Communication must pertain to legislation being considered or that will be considered in the immediate future, based on objective evidence (not insider knowledge)
  - Federal, state, or local legislation
  - Includes initiatives, constitutional amendments, and referendums
  - Communication need not refer to specific legislation
  - Exceptions
    - » Regulatory and administrative actions, general policy, procurement
    - » Communications after the legislation has been acted upon
    - » Example: “thank you” ads



# IRC Guidance: 3 Components of Grassroots Lobbying



- 2nd: Communication “takes a view” on legislation
  - No need for explicit “call to action”
- If no “call to action,” reasonable person standard
  - Exception: If communication is targeted at group that will understand it takes a view on legislation even if reasonable person would not, that is enough to trigger grassroots lobbying status
- Broad policy statements are unlikely to be grassroots lobbying
- Public or social issue unrelated to legislation is not grassroots, it is goodwill advertising





- 3rd: Communicated in a form and manner to reach the general public as voters or constituents
- IRS Proposed Regulation contrasts this to a communication for academic, scientific, or similar purposes
  - Example: A pharmaceutical company drafts a report on proposed legislation relevant to the company's business and submits it to health science professors without suggesting that the recipient use the report to attempt to influence the public on the proposal
- Public includes “segments thereof”
  - Includes communications to employees and shareholders



- Types of social media communications:
  - Direct messages
  - “Tagging” public officials
  - Grassroots communications
  - Likes and retweets/reposts
- Employee personal activity: when, if ever, is it lobbying for the company?
- State regulators are giving increased consideration to social media activity



- What's New –
  - Upon request of a covered official, an individual making an oral communication must disclose:
    - » Whether registered under LDA
    - » Client
    - » Whether client is a foreign entity
    - » Any foreign entity with a direct interest in the outcome of the lobbying activity which meets particular monetary support and active participation standards
  - Any lobbyist or entity registered under LDA making a written communication must identify whether client is a foreign entity and any foreign entity with a direct interest in the outcome of the lobbying activity which meets particular monetary support and active participation standards
  - Covered officials are also now required to disclose their status upon request





- Washington Office method
  - » Expenses outside D.C. budget, such as:
    - > Fly-ins
    - > Retained consultants not paid out of D.C. budget
    - > Lobbying expenses from headquarters, such as C-Suite salaries

# Filing Dates – Quarterly



- Lobbying reports ("LD-2") are quarterly.
- Reports are electronic and placed on a public database.
- Reports are due 20 days after end of quarter. Upcoming due dates:
  - April 20, 2017
  - July 20, 2017
  - October 20, 2017
  - January 22, 2018



- Disclosure only of lobbyist employer
  - In-House Personnel: Must include internal expenditures (employee salary and overhead). Must include compensation of all employees who lobby. Time tracking.
    - » Does time spent at PAC fundraisers count?
  - Outside Lobbyists: Must include payments made to outside lobbyists.
  - Trade Association and Coalition Dues: Must include the portion of dues payments made to trade associations for lobbying.
    - » Guidance requires reporting of dues in the quarter in which they are paid
  - Travel and Entertainment: Must include travel and entertainment expenses related to lobbying.



# Backup Information and Reporting Issues



- Contemporaneous tracking of time
  - The identity of public officials is not disclosed
  - The issues worked on are disclosed only if a lobbyist works on the issues, not a non-lobbyist employee
- Documentation supporting contacts with covered officials
- Documents reflecting issues lobbied supporting representations on LD-2
- Should include bill and brief description of legislation.



- Disclosure by Trade Associations and Informal Coalitions – HLOGA requires registrants to disclose any entity that:
  - (i) contributes over \$5,000 per reporting period to the lobbying effort of the Registrant; and
  - (ii) "actively participates" in the planning, supervision, or control of the Registrant's lobbying activities (under pre-existing law, the threshold is contribution of \$10,000 per reporting period and "in whole or major part plans, supervises, or controls" lobbying activities).
    - » The term "actively participates" sets a lower threshold than the pre-existing law.
    - » Certain foreign entities affiliated with or interested in such entities must also be disclosed.



- Disclosure by Trade Associations and Informal Coalitions
  - There is an exemption from this disclosure requirement if:
    - » (i) the Registrant lists the member entity on its public website as being a member of the Registrant or a contributor to the Registrant's lobbying effort (the specific Internet address must be provided); and
    - » (ii) the member does not in whole or major part plan, supervise, or control the Registrant's lobbying activities.



# LD-203 Reports – Semi-Annual



- Reports are due 30 days after the end of a semi-annual period. Upcoming due dates:
  - July 31, 2017
  - January 30, 2018
- Semi-Annual Disclosure Report ("LD-203") – Lobbyists, lobbying firms, and lobbyist employers are required to file a semi-annual report detailing political contributions, charitable contributions, and other expenditures related to covered legislative and executive branch officials.
- Even if an employee had no activity or activity that fell below the threshold for becoming a lobbyist, if he or she was listed on an LD-2 report, that employee must file an LD-203 for that semi-annual period.

# LD-203 Report: Expenditure Categories



- The current LD-203 form provides five categories for filers to use when disclosing reportable contributions and expenditures:
  - **"FECA"**
  - **"Honorary Expenses"**
  - **"Meeting Expenses"**
  - **"Presidential Library Expenses"**
  - **"Presidential Inaugural Committee"**



- With each semi-annual report, lobbyists, lobbying firms, and lobbyist employers must provide a certification that (i) they are familiar with the House and Senate gift rules, and (ii) they have not provided, requested, or directed a gift (including travel) to a Member or staff with knowledge that receipt of the gift would violate such rules.



# Due Diligence Regarding Certification



- Who signs the LD-203 report and certification
  - For internal governance purposes, companies should identify who is ultimately responsible for the certification.
- Robust gift policy
- Training
  - Ensure appropriate employees are familiar with gift rules
- Conduct due diligence to support the gift certification
- Conduct gift email confirmation for gift compliance
  - "Negative sign-off" vs. affirmative response



- The LD-203 provides an optional comment box (fits 250 characters)
- With regard to the certification, filers may insert "disclaimer" language such as, "to the best of my knowledge," "after reasonable due diligence" or "after good faith efforts"
- Filers may also insert comments related to other parts of the LD-203
- Note if filer serves on a corporate, trade association, or other PAC Board

# Terminating Registrations and Lobbyists



- Registrations
  - Termination is permitted if an individual has no reasonable expectation of further lobbying contacts, even if the individual continues to meet the 20% threshold.
- Lobbyists
  - A registrant can terminate a lobbyist by listing the lobbyist's name on Line 23 of the LD-2 report
  - The registrant (not the lobbyist) must sign in to the LD-203 Contribution System and update the lobbyist's status to "inactive" and enter an effective date of termination
  - The lobbyist must file an LD-203 report for any reporting period for which he or she was an active lobbyist, even if for only one quarter of the LD-203 semi-annual period
  - When a lobbyist leaves a company or organization, lobbyist should properly terminate registration and make it part of exit interview process

# What Is a Gift Law?



- Prohibition, limit, or restriction on providing personal benefit to public officials.
- Covered gifts include anything of personal value, such as meals, entertainment, transportation, and lodging.
  - Factors to consider
    - » Contacts with campaign staff or office staff?
    - » Content of presentation/meet and greets vs. campaign events
    - » Linkage
- Covered gifts do not include benefits to a governmental entity but a letter of acceptance should be obtained.
- Federal government, each state, and certain cities and counties have their own separate gift laws.
  - FCPA and jurisdiction-specific foreign gift issues
- Special issues
  - Split events (fundraiser/personal)
  - Charitable donations



# Federal Congressional Gift Rules



- Lobbyist/Lobbying Firm/Lobbyist Employer Gift Ban – the gift limit from lobbyists, lobbying firms, and lobbyist employers is \$0.
- Non-Lobbyists/Non-Lobbying Firms/Non-Lobbyist Employers – For those entities that are not lobbyists and do not employ a lobbyist, gifts are limited to \$49.99 per occasion and \$99.99 per year.

# Federal Congressional Gift Rules



- However, many gift exemptions are available, even to lobbyists, lobbying firms, and lobbyist employers, including, but not limited to:
  - Reception exemption
  - Nominal food in certain settings
  - Widely attended gathering
  - Outside activities
  - Friendship (cannot be expensed and subject to increased scrutiny)
  - Site visits: food and local travel outside D.C. (House rules vs. Senate rules)
  - Attendance at events sponsored by charity (House rules vs. Senate rules)
  - Home district products
  - Nominal items (baseball caps, t-shirts, and greeting cards)
  - Training
  - Informational materials
  - Items paid for at market value or promptly returned
  - Commemorative items (allows certain gifts during site visit)
  - Personal hospitality exemption is not permitted for lobbyists
  - Political contributions



- Tickets to sporting or entertainment events: valuation rules
  - Senate: A ticket is valued at face value.
    - » A ticket holder may seek pre-approval of an "equivalent ticket" value for a ticket with no face value (considering the value of tickets with similar seating, parking, food, access to non-public areas, etc.).
    - » Otherwise, tickets with no face value are valued at the highest priced ticket with a face value, as in the House.
  - House: A ticket is valued at face value, but "face value" is face value only if the price is offered to the public.
    - » A ticket without face value is valued at highest cost of a ticket with a face value.



- Factfinding trips vs. site visits
  - Restrictions on Lobbyist Involvement
    - » Lobbyist may not pay for expenses related to otherwise exempt factfinding trip.
    - » Lobbyist may not accompany Member or staffer on trip.
    - » Lobbyist may not have more than de minimis involvement in arranging or organizing trip for employer.
  - Restrictions on Lobbying Firm or Lobbyist Employer Involvement
    - » Firm/Employer may pay for necessary expenses of factfinding trip if one-day event (excluding travel time and overnight stay).
    - » Non-commercial corporate aircraft may not be used for such trips.
  - Member/staffer must certify compliance with above and all factfinding trips must be preapproved by the House or Senate Ethics Committee.



# Federal Executive Branch Gift Rules



- Gifts to executive branch officials and employees are generally limited to \$20 per occasion and \$50 per calendar year.
- Commonly used exceptions include:
  - There is no reception exception
  - Widely attended gathering (but requires pre-clearance from agency)
  - Meals and entertainment from non-prohibited source
  - Personal relationship (factors: personal payment and relationship history)
  - Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal
  - Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation
  - Gifts the receipt of which is specifically authorized by statute (e.g., Foreign Gifts and Decorations Act)
  - Gifts to the President and Vice President

# Obama Executive Order Federal Executive Branch Gift Rules



- Obama Executive Order, which President Trump has not yet overridden, prohibits most gifts to executive branch officials and employees from lobbyists, lobbying firms, and lobbyist employers.
- May not utilize \$20/\$50 or widely attended exceptions, among others.
- Limited exceptions remain, including:
  - Personal relationship (factors: personal payment and relationship history)
  - Modest items of food and refreshments, such as soft drinks, coffee and donuts, offered other than as part of a meal, but not including receptions with alcohol like in the legislative branch
  - Greeting cards and items with little intrinsic value, such as plaques, certificates, and trophies, which are intended solely for presentation
  - Gifts the receipt of which is specifically authorized by statute (e.g., Foreign Gifts and Decorations Act)
  - Gifts to the President and Vice President
- Press and charity exceptions



- Non-political non-constituent visit where Senator or staff pays his or her own travel
  - Reception exemption unless widely attended, in which case meal and local transportation may be provided

# Site Visits: Senate – The 5/50 Rule



- Non-political constituent visit where Senator or staff pays his or her own travel
  - Visit must take place at least 35 miles outside of D.C.
  - Member may speak about issues of the day to all employees. No advocacy of any kind or fundraising.
    - » Can we hand the Senator a PAC check?
  - On-site meal may be served and corporation may provide local transportation
    - » A lobbyist may not participate in the meal
    - » The cost of the meal may not exceed \$50
    - » Five or more non-lobbyist company employees must participate
    - » Lobbyist allowed to accompany local transportation
  - Recommend not having non-political events within 60 days of an election if the Member is up for reelection
  - Commemorative gift permitted
  - Reception permitted





- Non-political visit where Member of Congress or staff pays his or her own travel
  - Visit must take place at least 35 miles outside of D.C.
  - Member may speak about issues of the day to all employees. No advocacy of any kind or fundraising.
  - On-site meal may be served and corporation may provide local transportation
    - » Lobbyist may participate in meal and accompany local transportation
  - Recommend not having non-political events within 60 days of an election if the Member is up for reelection
  - Commemorative gift permitted
  - Reception permitted

# Site Visits: Executive Branch



- Under Obama Executive Order, which President Trump has not yet overridden:
  - Just soft drinks, coffee, and donuts, no widely attended exception
  - No \$20 de minimis
- If not a political appointee:
  - Just soft drinks, coffee, and donuts unless widely attended
  - Small reception if food and beverage is \$20 or less

# HLOGA Enforcement: Criminal and Civil



- Donor Liability – HLOGA amends the Lobbying Disclosure Act ("LDA") to make lobbyists, lobbying firms, and lobbyist employers liable for providing gifts or travel not permitted by Senate or House rules.
- Increased Penalties – HLOGA amends the LDA to increase civil penalties for violations and add criminal penalties (up to 5 years in prison and/or fines under Title 18 of the U.S. Code). HLOGA sets a "knowingly and corruptly" standard for criminal penalties.
- There is still a 60-day cure provision for reporting violations, but not for violations of the gifts law, which are the basis of the LD-203 certification.



- Meeting the good faith standard
  - No definition in the law
  - Rounding (up or down) to the closest \$10,000
    - » GAO found 31% in non-compliance for not rounding
- Random GAO audits
- DOJ recently announced increased focus on HLOGA compliance
  - Carmen Group
    - » \$125,000 fine announced August 2015
  - Mauk
    - » March 2014 complaint filed
    - » Potential fines of \$5.2 million
      - > \$30,000 settlement
  - Biassi Business Services
    - » December 2013: \$200,000 default judgment





- Three categories of activities may trigger lobby registration and reporting requirements at federal, state, and local levels.
  - Attempt to influence legislation.
  - Attempt to influence legislation or formal rulemaking by executive branch agency.
  - Attempt to influence legislation or any decision of executive branch agency, including financial arrangements and contracts (e.g., seeking business from agency).
- Thresholds: Even if activity is considered lobbying activity, must meet thresholds (e.g., \$3,000 compensation in Connecticut; 2 contacts for executive lobbying in Kentucky; and 25 hours or \$2,500 compensation in Massachusetts).
- Special issues when lobbying on behalf of an outside client
- Placement agent restrictions under public pension fund policies

# Traditional Lobbying Laws



- Category 1 lobbying (attempting to influence legislation)

Maine

North Dakota

Montana

Oregon

Nebraska

South Dakota

Nevada

Wyoming

- Category 2 lobbying (attempting to influence legislation or rulemakings)

Alaska

New Mexico

Colorado

South Carolina

District of Columbia

Utah

Hawaii

Vermont

Iowa

Washington

Minnesota

West Virginia

(as to state actions or decisions)

Wisconsin

# Trend Toward Category 3 Lobbying Laws

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- Beyond "traditional" lobbying, trend toward regulation of Category 3 lobbying (including financial arrangements and contracts)

Alabama	Illinois	New Hampshire
Arizona	Indiana	New Jersey
Arkansas	Kansas	New York
California (placement agents only)	Kentucky	North Carolina
Connecticut	Louisiana	Ohio
Delaware	Maryland	Oklahoma
Federal	Massachusetts	Pennsylvania
Florida	Michigan	Rhode Island (eff. 1/1/17)
Georgia	Minnesota*	Tennessee
Idaho	Mississippi	Texas
	Missouri	Virginia

\* Metropolitan governmental units only



- Grassroots lobbying: Communicating with the public or segment of the public, including with vendors and employees, asking them to contact their government representatives regarding legislation.
  - In 29 states, grassroots lobbying triggers registration.
  - In 6 additional states plus D.C., grassroots lobbying does not trigger registration but if already registered, grassroots expenditures must be reported (Alaska, Florida, Kentucky, Maine, Texas, Wisconsin).



# Contingency Fee Bans



- Contingent fee restrictions under the lobbying laws (e.g., restriction in California, Florida, Massachusetts, New York, and Connecticut).
- Types of compensation that may be permissible under a contingency fee ban:
  - Retainer or flat fee
  - Target-based compensation
    - » This approach has some risk
  - Discretionary bonus
    - » Has to be based on a number of factors
    - » Cannot be formula-based
    - » No dollar of compensation should be traceable to a particular contract



- California amended its lobbying regulations to:
  - Narrow the "ride-along" exemption, and
  - Require more detailed disclosures from lobbyist employers on quarterly reports.
- San Francisco lobbyist gift, contribution, and bundling bans effective January 1, 2018.
- In November 2016, Florida House passed a rule requiring electronic notice of appearance.
- Effective September 23, 2016, New York lobby law amendments:
  - Lower applicable thresholds to require a lobbyist client or entity that spends more than \$15,000 (previously \$50,000) to disclose the source of donations over \$2,500 (previously \$5,000), and
  - Exempt membership dues, fees, and assessments from the above disclosure requirement.
- Effective August 24, 2016, New York also amended the definition of "lobbying" to exclude communications with professional journalists.

# Recent State Developments



- On October 13, 2016, New York's JCOPE released proposed regulations defining when social media activity constitutes direct or grassroots lobbying.
- JCOPE issued an advisory opinion clarifying that "opening doors" constitutes lobbying and defining grassroots lobbying.
- Rhode Island covers procurement lobbying, effective January 1, 2017.
- South Dakota enacted a ballot measure, currently enjoined, that:
  - Limits gifts from lobbyists and lobbyist employers to \$100 per calendar year, effective November 16, 2016, and
  - Effective January 1, 2018, amends the definition of "lobbying" to include attempts to influence executive action, regulation, and governmental processes.
- Virginia amended its lobby law to limit covered procurement activity to contracts with a stated or expected value of \$5 million or more.

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