

LDA v. IRC Filing Methods

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 80 LD-2 random audits per year
- Approximately 160 LD-203 random audits per year
- DOJ is responsible for civil and criminal enforcement
- 2009 through 2016: 2,709 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



- 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 \$13,000 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>



- 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). Independent agency officials not covered.
 - » 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 (both executive and legislative officials) but generally not 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



- All employees must track their time spent engaging in lobbying activities, only some must register
- Direct lobbying examples
 - Attending a fundraiser and talking about legislation
 - » Generally, the time spent merely attending a fundraiser does not constitute lobbying. However, one-on-one opportunities to influence legislation should be included.
 - Strategizing at a trade association on how to move policy
 - » Official need not be present, just need purpose to be attempting to influence
 - Discussing legislation or policy at a site visit
 - » If there is an attempt to influence
 - » Prep time counts if purpose was to attempt to influence



- Commenting on regulations
- Merely listening in on trade association calls or calls with government officials without participating, unless specific purpose is preparing for another lobbying communication



- 3 prongs
 - Communication must pertain to legislation being considered or that will be considered in the immediate future, based on objective evidence (not insider knowledge)
 - Communication “takes a view” on legislation
 - » No need for explicit “call to action”
 - Communicated in a form and manner to reach the general public as voters or constituents



- Communicating with employees
- Op-eds
- Public advertising



- Are there any exemptions under the IRC?
 - There are a few exemptions, such as:
 - » Lobbying the members of a local council or similar local governing body regarding legislation of direct interest to the filer;
 - » Communications compelled by subpoena or otherwise compelled by federal or state law;
 - » Performing an activity for the purpose of complying with the requirements of any law;
 - » Before evidencing a purpose to influence any specific legislation...
 - > Determining the existence or procedural status of specific legislation,
 - > Determining the time, place, and subject of a hearing to be held by a legislative body on specific legislation, or
 - > Preparing routine, brief summaries of specific legislation;



- » Reading any publications available to the general public or viewing or listening to other mass media communications;
- » Merely attending a widely attended speech; and
- » Expenditures for institutional or "good will" advertising that keeps the filer's name before the public or that presents views on economic, financial, social, or other subjects of a general nature but that does not attempt to influence the public with respect to legislative matters.



- Upon request of a covered official, an individual making an oral communication must disclose:
 - Whether registered under LDA
 - Identity of the client
 - If relevant, identify foreign ownership
- 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



- 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:
 - January 22, 2018
 - April 20, 2018
 - July 20, 2018
 - October 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.
 - 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.



- 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.



- LDA registrants required to identify whether any client is a state or local government or government-controlled entity (e.g., agency, district)
- The interest of any foreign entities listed on the LD-1 with respect to an issue lobbied during the quarter should be disclosed on line 19 of the LD-2
- Updates to registration information are made on the last page (e.g., terminations, address change, etc.)
- Disclosure of Previous Legislative and Executive Branch Employment – Registrants required to disclose certain legislative and executive branch employment during the past 20 years (previous requirement: two-year look back).
 - Disclose only once per client (the first time a new lobbyist is reported).



- If a corporation has an affiliated entity and the affiliate contributes or has a "chargeback" to its profit-and-loss statement of more than \$5,000 in a calendar quarter and an employee of the affiliate actively participates in the planning, supervision, or control of the registrant's lobbying activity, that affiliate must be disclosed on the LD-1 at line 13.
 - Additions are made on the LD-2 at line 25, and deletions are made on the LD-2 at line 26.



- 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.



- Reports are due 30 days after the end of a semi-annual period. Upcoming due dates:
 - January 30, 2018
 - July 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.



- 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"



- FECA
 - The name of all PACs established or controlled by the lobbyist, lobbying firm, or lobbyist employer.
 - Each federal candidate or incumbent, leadership PAC, or party committee that received contributions of \$200 or more (aggregate) from the lobbyist, lobbying firm, lobbyist employer, or their PACs during the semi-annual period.
 - » The date and amount of each contribution is required.
 - When reporting contributions to joint fundraisers, break out ultimate recipients. Merely importing FEC data does not always properly reflect them.



- Honorary Expenses
 - Donations to entities or events related to a covered official (unless required to be reported under FECA), including:
 - » Events held to honor or recognize a covered legislative or executive branch official.
 - » Entities designated by, or established, financed, maintained, or controlled by, such an official.
 - > A charity established by an official prior to becoming a covered official is not covered if the official has no relationship to the organization after becoming a covered official.
 - » Entities named for a legislative branch official.
 - » Any entity in recognition of a legislative branch official.



- Meeting Expenses
 - Any funds paid or contributed by a lobbyist, lobbying firm, lobbyist employer, or their PAC(s) to pay for a meeting, conference, or similar event held by, or in the name of, one or more covered legislative or executive branch officials.
- Presidential Library Expenses and Inaugural Committee
 - Each Presidential library foundation and inaugural committee to which contributions of $\geq \$200$ (aggregate) were made by a lobbyist, lobbying firm, lobbyist employer, or their PAC(s).



- 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.



- 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



- 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



- Prior employer registrant terminates the lobbyist on line 23 of LD-2
- Once the individual meets the registration threshold under new employer, new employer registers the individual by listing the individual's name on Line 18 of the appropriate LD-2 report
- Registrants should not create an account for new lobbyists who already have a lobbyist ID
- The lobbyist must sign in to the LD-203 Contribution System and, in the Manage Your Profile section, click on the Request Employer Transfer link and follow the instructions.



- Lobbyist/Lobbying Firm/Lobbyist Employer Gift Ban – the gift limit from lobbyists, lobbying firms, and lobbyist employers is \$0, except for the following exceptions:
 - 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



- 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 26% in non-compliance for not rounding
- Random GAO audits
- DOJ 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

This information is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice.