

# Compliance Training: Filing Your LD-2 and LD-203

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- Approximately 80-100 LD-2 random audits per year
- Approximately 160 LD-203 random audits per year
- DOJ is responsible for civil and criminal enforcement
- 2009 through 2017: 3,213 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



# 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 – definitions apply to all employees. It is not limited to “20-percenters.”
  - Lobbying contacts
  - 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
    - » Does time spent at PAC fundraisers count?
  - Work performed with the intent that it will be used for lobbying purposes at the time it is created
    - » Can documents created for thought leadership be considered lobbying?
  - Education and strategic planning
    - » Strategizing with trade associations, task forces, and others in the industry
  - Must there be pending legislation, rulemaking, or RFP?
  - Ripening of preparation time that does not result in a contact
  - Travel time
  - Subject matter experts
  - Administrative time

# What is Lobbying Activity

## Under the LDA and HLOGA: LD-2 Report



- 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=GPO-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).
  - > 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 now, as a result of the Tax Cuts and Jobs Act of 2017, local direct legislative 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



- Types of social media communications, expanding lobbying footprint:
  - Direct messages
  - “Tagging” public officials
  - Likes and retweets
  - Emails
- Petitions
- Form letters
- Employee personal activity: when, if ever, is it lobbying for the company?
- State regulators are giving increased consideration to social media activity
  - Evolving area
- Customer relationship management (CRMs)
  - Services that combine data regarding elected officials, including votes, tweets, sponsorship, and political contributions. This concentration of data can raise a pay-to-play compliance risk.



- Lobbying reports ("LD-2") are quarterly.
- Reports are electronic and placed on a public database.
- Reports are due 20 days after end of quarter. Due dates for 2018 activity:
  - April 20, 2018
  - July 20, 2018
  - October 22, 2018
  - January 22, 2019





- 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.
    - » Serving on a trade association legislative committee or task force and participating in strategy or policy matters.
    - » When are company personnel wearing a company hat vs. a trade association hat.
  - 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
- Special issues in tracking C-Suite lobbying time



- 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. Due dates for 2018 activity:
  - July 30, 2018
  - January 30, 2019
- 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.



- 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



- 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





- 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

# Trump Executive Order Federal Executive Branch Gift Rules



- Trump Executive Order 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



- Registering under the wrong legal entity name.
- Failure to round to nearest \$10,000 in lobbying expenses.
- Listing executive branch departments whose official(s) are not covered under LDA regulations or especially under the Internal Revenue Code definitions, if applicable.
  - Senior Executive Service ("SES") employees of Executive Branch agencies (e.g., career employees) are generally not covered.
- Proper disclosure of a bill.
  - LDA regulations require the disclosure of the updated bill number, name of legislation, and description of the provisions lobbied.
- Proper termination of a registered lobbyist on Line 23 of the filing.
- For new lobbyists, failing to properly list their covered official positions or repeatedly listing them in each filing for the same principal.
  - It is only required in the initial filing on behalf of a new client.





- Disclosure of company PAC contributions as corporate contributions.
  - Do not list "Self" as the contributor name for FECA contributions. List the name of the PAC.
- Failure to disclose a JFC contribution correctly.
  - The payee is the JFC, while the honoree should be the name of each official whose political committee benefited from the contribution.
- Failure to report corporate donations to an inaugural committee or presidential library.
- Failure to file LD-203 reports for lobbyists who terminate during the middle of a reporting period.
- Failure to use disclaimer language when filing LD-203 reports.
  - “This disclosure is to the best of my knowledge correct and based on reasonable due diligence.”
- For individual filers, neglecting to disclose they are on a PAC Board and/or neglecting to list the name of the PAC on Line 5.



- 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.



- Good faith standard for disclosure of expenditures
  - No definition in the law
  - Rounding (up or down) to the closest \$10,000
    - » GAO found 25% in non-compliance for not rounding
  - Having a reasonable basis for your numbers
  - Be careful of using the same amount or percentage each quarter
- Random GAO audits
- DOJ 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