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Skadden

LDA vs. IRS Filing Methods

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GAO HLOGA Audits: 2014 Observations



- Approximately 100 LD-2 random audits per year
- Approximately 160 LD-203 random audits per year
- DOJ is responsible for civil and criminal enforcement
- 2009-2014: 2,308 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 \$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: <http://www.gpo.gov/fdsys/pkg/GPO-PLUMBOOK-2012/content-detail.html>

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

Not Lobbying Activity Under Either Method



- 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

What is Grassroots Lobbying?



- 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

Examples of Grassroots Lobbying



- 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.

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. Due dates for 2015-2016 activity are as follows:
 - January 20, 2016
 - April 20, 2016
 - July 20, 2016
 - October 20, 2016
 - January 20, 2017



- 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
- Washington Office method
- 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).

Disclosure of Affiliate Relationship



- 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.

LD-203 Reports – Semi-Annual



- Reports are due 30 days after the end of a semi-annual period. Due dates for 2015 activity are as follows:
 - July 30, 2015
 - February 1, 2016
- 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"**



- 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.

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 Switches Employers



- 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.

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.

HLOGA Enforcement: Criminal and Civil



- Meeting the good faith standard
 - No definition in the law
 - Rounding (up or down) to the closest \$10,000
 - » GAO found 21% 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

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