

Compliance Webinar: LD-2 and LD-203

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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 \$14,000 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
 - Education and strategic planning
 - » Strategizing with trade associations, task forces, and others in the industry

What is Lobbying Activity

Under the LDA and HLOGA: LD-2 Report



- Must there be pending legislation, rulemaking, or RFP?
- Ripening of preparation time that does not result in a contact
- Travel time
- Subject matter experts
- Door-opening
- Administrative time
- Hide-behind lobbying
- Shadow lobbying

Who is a Covered Official Under the LDA and HLOGA: LD-2 Report



- Lobbying contact includes making the following communications in an attempt to influence legislation, federal contracts, or any other position of the federal government:
 - Method A – Covered Officials
 - » Communications with Congressional members and staff; and
 - » 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/content/pkg/GPO-PLUMBOOK-2020/pdf/GPO-PLUMBOOK-2020.pdf>

Who is a Covered Official

Under the LDA and HLOGA: LD-2 Report



- Method C – Covered Officials: federal
 - » Communications with Congressional members and staff and any executive branch official (regardless of position) regarding federal legislation
 - » Communications regarding executive branch decisions with White House Staff, top two officials in any office of the EOP, and Cabinet-level officials and their deputies
 - > Independent agency officials not covered
- Method C – Covered Officials: state/local
 - » Communications with any official (legislative or executive) on state/local legislative decisions
 - > Communicating on non-legislative decisions such as rules, regulations, executive orders, policies, programs, or other official decisions, is not covered
- Other notable Method C differences:
 - Federal and state grassroots lobbying (legislative only)
 - 5% de minimis rule for employees with no contacts



- Types of social media communications, expanding lobbying footprint:
 - Direct lobbying
 - » Direct messages
 - » “Tagging” public officials
 - » Emails
 - Grassroots lobbying
 - » Tweets
 - » Likes and retweets
 - » Facebook
- Electronic petitions and form letters



- 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, 2021
 - July 20, 2021
 - October 20, 2021
 - January 20, 2022



- 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)



- Effective January 3, 2019, LDA registrants must disclose on the LD-1 (line 15) and LD-2 (line 29) any federal and state convictions of listed lobbyists for bribery, extortion, embezzlement, kickbacks, tax evasion, fraud, a conflict of interest, making a false statement, perjury, or money laundering
 - Date and description of the offense, including jurisdiction, and either a list of the covered predicate offense (e.g., bribery, extortion) or the code section convicted under
 - Once a disclosure is required for a listed lobbyist, the disclosure must be repeated on every subsequent LD-2 filing listing that lobbyist
 - If an organization is filing, or has filed an LD-1 since January 3 for the first time, the LD-1 may need to be amended to capture required disclosures
 - If the organization filed the LD-1 prior to January 3, the convictions will need to be disclosed on subsequent LD-2 filings beginning with the first quarter of 2019



- 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:
 - July 30, 2021
 - January 31, 2022
- 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 (e.g., Congressional Black Caucus, Congressional Hispanic Caucus)
 - > 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 continuing 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, with 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 per se
 - 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

Biden Executive Order

Federal Executive Branch Gift Rules



- Biden 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

Government Accountability Office – Lobbying Disclosure Act and Honest Leadership and Open Government Act (HLOGA) Audits



- Approximately 80-100 LD-2 random audits per year
- Approximately 160 LD-203 random audits per year
- Department of Justice (DOJ) is responsible for civil and criminal enforcement
- 2009 through 2019: 4,220 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

Government Accountability Office – Lobbying Disclosure Act and Honest Leadership and Open Government Act (HLOGA) Audits



- Statistically significant findings in the 2019 GAO Report on federal lobbying released in March 2020
 - 20% of LD-2 reports did not properly disclose prior-held covered positions
 - 23% of LDA reports were not properly rounded to the nearest \$10,000



- Good faith standard for disclosure of expenditures
 - No definition in the law
 - 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
 - Alleged bribe-for-pardon scheme
 - Abramoff criminal plea
 - 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



- 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

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