

# Compliance Webinar: LDA Versus IRC Filing Methods

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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



- 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



- 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:
  - October 20, 2021
  - January 20, 2022
  - April 20, 2022
  - July 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
  - Overreporting may raise the same accuracy issues as underreporting
- 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)
  - September 2021 guidance, among other reminders, restates it is inappropriate to identify a filer's current privately held position



- 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.





- 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.



- 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 31, 2022
  - August 1, 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 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



- 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





- Foreign Agents Registration Act (FARA)
  - Lobbying on behalf of a foreign private entity may trigger a FARA registration. Generally, for direct lobbying, the LDA exemption applies. However, the LDA exemption is not available for grassroots activity that does not involve any direct lobbying.
  - Any person who attempts to influence any U.S. government policy or position on behalf of a foreign government or foreign political party must register and report with DOJ as an agent of a foreign principal
- Proposed legislation

# 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
- 2010 through 2020: 3,956 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 2020 GAO Report on federal lobbying released in April 2021.
  - 21% of LDA reports were not properly rounded to the nearest \$10,000.
  - 91% of lobbyists who filed new registrations also filed LD-2 reports for the quarter in which they first registered
  - 29% of all LD-2 reports did not properly disclose one or more previously held covered positions
  - 8% of LD-203 reports were missing reportable contributions





- Good faith standard for disclosure of expenditures
  - No definition in the law
  - Having a reasonable basis for your numbers
  - “Due diligence”
  - 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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