Federal Lobbying Disclosure Act Overview

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The federal Lobbying Disclosure Act (LDA) requires entities that employ one or more in-house lobbyists to register with Congress. Both the employer and the in-house lobbyist are then responsible for filing periodic disclosure reports. This memorandum provides an overview of registration and reporting obligations under the LDA, a brief overview of gift rules applicable to lobbyists and their employers, and recommendations concerning best practices and compliance.

LDA Registration Thresholds and Timing

Entity Registration

Under the LDA, an entity employing one or more in-house lobbyists is required to register with the Clerk of the U.S. House of Representatives and Secretary of the U.S. Senate.[1] The individual lobbyists themselves do *not* separately register; rather, each employee-lobbyist is registered by being listed on the entity's registration and reports. The entity is considered the "client" for LDA purposes. The employer is obligated to register when:

- An employee makes more than one "lobbying contact" with a member of Congress, a congressional staff person, or a covered member of the executive branch
- That employee spends or reasonably anticipates spending at least 20% of his or her time during a three-month period on "lobbying activities" and
- The employer spends or reasonably expects to spend more than $14,000 in a calendar quarter on federal lobbying activities, including employee compensation

The LDA requires that registration be made within 45 days after all of the above prerequisites are satisfied. Once registered, an organization and its employee-lobbyists remain subject to the LDA's reporting and other requirements until properly terminated. In some cases, there is little doubt at the outset of an employer-employee relationship that these three prerequisites are (or will be) satisfied, in which case the trigger for the 45-day period is clearly established. In other cases, it may become clear that the factors are satisfied only after the 45-day period has come and gone, in which case registration is required immediately.

Who Is the Client?

Under the LDA, "[a] person or entity whose employees act as lobbyists on its own behalf is both a client and an employer of such employees." The LDA does not contain any specific definition of an employee; rather, the policy of the LDA is to promote disclosure of real parties in interest. Thus, organizations with complex corporate structures and multiple subsidiaries frequently file one registration. Guidance published by the House and Senate provides for a consolidated filing approach in such circumstances:

"A single filing by a parent corporation may be appropriate in some cases, especially when there are multiple subsidiaries, and the lobbyists address the same issues for all and act under the close control of the parent.

In circumstances in which multiple subsidiaries each have only a fraction of the lobbyist's time and little control over his work, the parent which in fact exercises actual control can be regarded as the 'employer' for lobbying registration purposes. In such cases, the parent may file a single registration, provided that the registration (LD-1) discloses that the listed lobbyists are employees of subsidiaries, and the subsidiaries are identified as affiliated organizations."

1 Note that an entity that only hires outside lobbyists is not required to register and file reports under the LDA. However, payments to outside lobbyists count as lobbying activity expenses, and therefore count toward the entity's registration threshold calculation and are included on the entity's LDA reports if the entity is registered.

Individual Lobbyist Registration Thresholds

As noted above, individual employees do not separately register under the LDA. However, it is important to understand when an individual employee qualifies as a federal lobbyist, because lobbying activity by even just one employee can trigger registration for the employer.

More Than One Lobbying Contact

One prerequisite for qualifying as a federal lobbyist is making more than one "lobbying contact." A "lobbying contact" means any oral or written communication (including e-mail) with a covered federal official through which a person seeks to influence federal legislation or federal government action or policy. There is no temporal limit on when these contacts must occur—if an employee makes two or more lobbying contacts, even if over a span of months or longer, this criterion is satisfied.

To qualify as a lobbying contact, the contact must be with one of the following types of covered officials:

- A member of Congress
- An elected officer of either the House or the Senate
- Any employee of Congress
- The President, Vice President, and officers and employees of the Executive Office of the President (includes, but not limited to, National Security Staff, Domestic Policy Council, Office of Management and Budget, and various offices that exist within the White House office)
- Officials in levels I through V of the Executive Schedule (which includes Cabinet secretaries and other senior officials nominated by the President and confirmed by the Senate)
- Any Schedule C political appointees (typically non-career policymaking or political appointees and confidential secretaries and administrative assistants of key appointees within an agency) and
- Any members of the uniformed services whose pay grade is at or above 0-7

Lobbying is broadly defined. A contact is considered lobbying when the employee communicates directly with a covered federal official to influence the formulation, modification, or adoption of:

- Federal legislation
- Federal rules and regulations
- Executive Orders
- Any policy, program or position of the United States government
- The administration or execution of a federal program or policy (including the negotiation, award, or administration of a federal contract, grant, loan, permit, or license) or
- The nomination or confirmation of a person subject to confirmation by the Senate through communication with federal executive branch officials

Lobbying contacts can occur in any setting. No area is a "lobbying free" zone, and lobbying contacts can be made when attending charity events, political fundraisers, dinner parties, and other social engagements. If the communication is with a covered official and the purpose of the conversation is lobbying, as defined above, it is a lobbying contact, no matter where it occurs.

Lobbying Contact Exceptions

The following types of communications are not "lobbying contacts" under the LDA, although they may constitute "lobbying activities" if they are made in support of other communications that constitute lobbying contacts:

- Requests for meetings, for the status of an action, and similar administrative requests, so long as there is no attempt to influence a covered official
- Information provided *in writing* in response to an oral or written request made by a covered official for specific information
- Speeches, articles, or publications of other material that is made available to the public or is distributed through radio, television, cable television, or other methods of mass communication
- Testimony before a committee or subcommittee of Congress (that is included in the public record)
- Communications in response to a notice in the Federal Register or similar publications and directed toward the agency official listed in the notice
- Communications that are made on the record in a public proceeding
- Written comments filed in the course of a public proceeding
- Petitions for agency action made in writing and made part of the public record

Communications made to an agency official regarding a civil, criminal, or administrative inquiry, investigation, filing, or proceeding, or filings required by statute or regulation.

20% or More of Time Spent on Lobbying Activities

To qualify as a federal lobbyist, an employee must also spend (or anticipate spending) 20% or more of his or her compensated time during a calendar quarter on "lobbying activities." "Lobbying activities" include both lobbying contacts (as defined in the prior section) and all time spent on behind-the-scenes activities in support of those lobbying contacts, such as:

- Preparing for meetings
- Planning and research
- Drafting materials, such as talking points for a meeting
- Participating in the development of lobbying strategy
- Having lunch or coffee with a covered federal official and discussing issues on which the registered organization is lobbying or
- Coordinating lobbying activities of others, either internally, with outside lobbyists, or with trade associations

The key to determining what constitutes "lobbying activities" is to look at *why* the activity is being done. If the intent is to support ongoing or future lobbying, then it falls within the definition of lobbying activities. If, on the other hand, an employee is gathering information or drafting materials for some purpose unrelated to contact with public officials, then it is not.

The definition of lobbying activities is also important for reporting purposes. Once an entity is registered, it must account on a quarterly basis for all expenses incurred for lobbying activities. Even if an employee devotes less than

20% of his or her time to lobbying activities and does not qualify as a lobbyist, the compensation paid to the employee for time spent on lobbying activities must be captured on the entity's quarterly lobbying expense report, as described in more detail below.

LDA Reporting

LDA registrants are required to file quarterly lobbying reports (LD-2s), which disclose total expenses related to lobbying activities by its lobbyists and non-lobbyist employees, list the individuals who are considered lobbyists under the law, and name other entities that qualify as "affiliates" or foreign parents. Additionally, registrants and each of its in-house lobbyists are required to file semi-annual political contributions reports (LD-203s).

The LD-2 Federal Lobbying Expense Report

The LD-2 report is filed by registrant entities every quarter, on January 20, April 20, July 20, and October 20. The following information is reported on the LD-2:

- The subjects and agencies (or houses of Congress) lobbied during the quarter, including the names of specific bills
- The name of each employee who qualified as a lobbyist and lobbied on each listed subject and
- The total (i.e., not itemized) expenses for lobbying activities

Reportable expenses include:

- Salaries and benefits earned during the quarter by any officer or employee, including non-lobbyist employees, who engaged in direct contacts with covered federal officials or performed work in support of the entity's direct contacts
- Other expenses incurred for lobbying activities, including
    - travel
    - allocable office overhead
    - fees or other payments to third parties retained to lobby on behalf of the entity or to support the entity's lobbying efforts and
    - payments to trade associations or coalitions that will be used for lobbying

Expenses are reported when incurred, not when actually paid, and are rounded to the nearest $10,000 on the report. The LDA requires that an entity make a good faith estimate using any reasonable system of recordkeeping.

The LD-2 report is also used to add or remove individual employee-lobbyists of the registered entity after the entity's initial registration has been filed.

Tracking Employee Time for Registration and Reporting

According to guidance published by the Clerk of the House and Secretary of the Senate, "[a]s long as the [LDA] registrant has a reasonable system in place and complies in good faith with that system, the requirement of reporting expenses or income would be met."

It is best practice for *all* employees who are registered as lobbyists or involved in supporting a organization's lobbying efforts to keep time records of their "lobbying activities." For an organization's registered lobbyists, a common approach is for the lobbyist to generously estimate their approximate percentage of time devoted to lobbying activities and multiply that fraction by the total compensation paid to the lobbyist that quarter (salary plus benefits). Alternatively, registered lobbyists and individuals for whom federal lobbying is a primary part of their job can use more detailed daily, weekly, or monthly timesheets, examples of which we can provide.

We generally recommend that non-lobbyist employees keep some type of time record, such as a time log or calendar, which provides a general, good faith estimate of how much time they have spent on lobbying activity. The employee's total hours can then be multiplied by their estimated hourly rate of compensation (salary plus benefits). Alternatively, some companies use an average rate of compensation for officers or employees in a specific pay band.

Another reasonable method is to record time in a shared spreadsheet or other document after a meeting or trip to Washington, D.C., to help each employee keep track of total hours spent on preparation and time at the meeting in a central repository. That document would be reviewed internally at the end of each calendar quarter to determine lobbying time and whether any employee has qualified as a lobbyist.

Notwithstanding the flexibility permitted by the published LDA guidance, bear in mind that lobbying reports are subject to random audits conducted by the Government Accountability Office (GAO). The potential for an audit makes it important that whatever methods you use, they should provide a verifiable picture of lobbying expenses and accurately reflect the basis for other auditable items in the LD-2 report. Because violations may be referred to the Department of Justice for enforcement action, an "audit ready" system should be viewed as part of an effective compliance program, not merely an expense accounting system.

Even the most comprehensive compliance systems may not capture all the time required to be reported on the LD-2. If you have concerns about this in a particular quarter, it may be prudent to round up to the next $10,000. Such an approach may be helpful in the context of an audit.

Finally, we recommend retaining copies of your supporting documentation for at least seven years—one year longer than required by the LDA and the Honest Leadership in Government Act.

The LD-203 Contributions Report

The LD-203 report is a separate, semi-annual report filed by individual federal lobbyists *and* by their employers. This is different from the LD-2 report discussed above, which is filed only by the employer.

LD-203 reports are due on January 30 and July 30. On this report, the lobbyist's employer must disclose certain political contributions, as well as payments made to entities and for events that are related in certain ways to covered federal officials.

For instance, a filing entity must report payments to an entity controlled by covered officials (i.e., covered officials form a majority of the board) and events held to honor or recognize a covered official (e.g., costs for an event where a covered official receives a "Legislator of the Year" award). Contributions to federal candidates or officeholders, leadership PACs, or political party committees registered with the Federal Election Commission made by a registered entity's own federal PAC are also reported if they total $200 or more.

Also, the LD-203 report requires someone to certify on behalf of the entire organization that the organization is familiar with U.S. House and Senate rules governing gifts and travel and to attest that the organization has not knowingly paid for a gift or travel in violation of those rules.

Individual lobbyists must also file the LD-203 report, listing personal political contributions, as well as other covered disbursements. Each lobbyist must also certify that he or she understands and has complied with House and Senate gift rules.

Gift Rules

Under House, Senate, and executive branch rules, registered lobbyists and entities employing or retaining a registered lobbyist are generally prohibited from providing gifts to covered officials—which include anything of value, such as food, beverages, travel, and entertainment, but do not include political contributions. There are various exceptions under House and Senate gift rules, but they generally entail complying with very specific requirements.

For example, a federal lobbyist may not buy a Member or staffer lunch or a cup of coffee, unless it is offered in the context of a "widely attended gathering" or "reception," each of which has specific prerequisites that must be satisfied. It is important to adhere carefully to the available exceptions when considering giving anything of value to a federal official or employee.

In large companies, even the best policies and procedures cannot ensure perfect compliance with time-tracking and congressional gift rules. If a violation occurs, the first thing government investigators or regulators will look at is whether the organization provides periodic training. Indeed, the Department of Justice Manual states that a hallmark of a well-designed compliance program is appropriately tailored training and communications.

Accordingly, we recommend annual training for employee-lobbyists, compliance personnel, and other employees who interact from time to time with government agencies or officials. Such training helps personnel recognize issues and know when and how to seek guidance. It also demonstrates the organization's due diligence in making the required organization-wide certification that the organization "understands" congressional gift rules. We provide training to many of our corporate clients (via webinar, in-person, or some combination) on lobbying reporting and the ethics rules applicable to providing gifts to government officials.

Additional Regulatory or Statutory Considerations

Employee time spent on lobbying needs to be tracked not only for LDA purposes, but also for compliance with Section 162(3) of the Internal Revenue Code ("the Code"). This provision prohibits taxpayers from deducting as ordinary and necessary business expenses certain expenses incurred by the taxpayer in connection with lobbying and political activities. Optiver may already have systems in place for complying with this provision of the tax code, and those systems may be adapted for tracking lobbying time under the LDA.

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Please let us know if you have any questions or need additional assistance with any of the issues raised in this memorandum.

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