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Disclosure of Federal Lobbying Activities

Introduction

The Lobbying Disclosure Act of 1995¹ was amended by the Honest Leadership and Open Government Act of 2007² (the “LDA”) to increase the frequency and quantity of disclosure requirements for organizations employing in-house lobbyists, lobbying firms, and registered lobbyists. The LDA applies to the lobbying of both executive and legislative branches.

The threshold registration and reporting requirements hinge on several key definitions. A “lobbyist” is defined as an individual who makes at least two “lobbying contacts” and spends at least 20% of his or her time for his or her employer, over any three-month period, on “lobbying activities.” The “lobbying contacts” trigger registration under the LDA, while “lobbying activities,” which are broader in scope, are the subject of disclosure. An organization employing in-house lobbyists is exempt from registration if its total expenses for lobbying activities do not exceed a certain amount during a quarterly period.³

Under the LDA, one set of reporting requirements applies to lobbyists who work in-house for an organization; slightly different requirements apply to outside lobbying firms or consultants. This brief, for the most part, is limited to a discussion of those requirements that apply to lobbyists who work in-house and lobby exclusively for their employer.

Note that this brief is intended as a reference guide and does not constitute legal advice or represent or otherwise address all applicable authority and guidance on disclosure of lobbying activities. You should consult the relevant laws, rules, and standards of conduct, or engage legal counsel and/or compliance personnel, should you have any questions about disclosing lobbying activities in connection with a specific situation.

The Basic Rule: 2 plus 20%

The LDA generally requires registration and reporting by any organization employing a compensated in-house “lobbyist”:

- who makes at least two federal lobbying contacts over the course of services provided for his or her employer (even if the second contact occurs in a different quarterly period),

¹ 2 U.S.C. § 1601, *et seq.*

² P.L. 110-81.

³ Note that this number is subject to change from time to time based on the Consumer Price Index. As of January 2017, this number is \$13,000..

- whose federal lobbying activities constitute at least 20% of his or her time for his or her employer over any three-month period, and
- who is employed and compensated by an organization that incurs federal lobbying expenses of more than a certain amount within a quarterly period.

Registration is required within 45 days of the second contact, or employment to make the contacts, whichever is earlier. Following registration, the organization must file quarterly and semiannual reports with the Secretary of the Senate (the “Secretary”) and the Clerk of the House of Representatives (the “Clerk”).

A. Who files the registration reports?

An organization employing in-house federal lobbyists files a single registration naming those employees.

A lobbying firm (an entity or self-employed individual who lobbies for outside clients) files one registration for each client.

If a parent entity or national association and its subsidiaries or subordinates are separate legal entities, the parent must determine its registration obligations based on the parent’s activities. Similarly, each subsidiary must determine whether any of its own employees meet the definition of a lobbyist and, if so, whether its lobbying expenses meets the registration threshold.

B. Lobbying Contacts Versus Lobbying Activities

Under the LDA, a lobbying contact consists of “any oral, written, or electronic communication to a covered official that is made on behalf of a client with regard to” certain subjects, including:

- the formulation, modification, or adoption of federal legislation (including legislative proposals), federal rules, regulations, Executive orders, or any other program, policy, or position of the United States government;
- the administration of federal programs (including the negotiation, award or administration of federal contracts, grants, loans, permits, or licenses); or
- the nomination or confirmation of a person subject to confirmation by the Senate.

“Covered executive branch officials” generally include: the President; the Vice President; employees or officers of the Executive Office of the President; any official serving in an Executive Schedule Level I-V or a Schedule C position; and any member of the armed services serving at grade 0-7 or above.

“Covered legislative branch officials” generally include Members of Congress, elected officers of the House or Senate, and any employee or other individual who works for a Member of Congress, a committee, leadership staff, a joint committee of Congress, a working group or caucus organized to provide services to Members of Congress, and other similar legislative branch employees.

Note that lobbying activities include both lobbying contacts and all efforts in support of such contacts, including, for instance: (1) preparation and planning activities; (2) research and other background work intended, at the time it is performed, for use in lobbying contacts; and (3) coordination with the lobbying activities of others.

C. Exempt Contacts

The LDA provides that a number of types of communications will not count as lobbying contacts for the purpose of determining who is a lobbyist. Notable exceptions include:

Administrative requests, specifically:

- requests for appointments, status requests, or similar administrative communications made without attempting to influence a covered official;

Information required or requested by the Government, or provided in the course of an official government proceeding, specifically:

- written information provided in response to an oral or written request by a covered official for specific information;
- communications required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of Congress or a federal agency, including communications compelled by a federal contract, grant, loan, permit, or license;
- communications made to agency officials with regard to judicial proceedings or with regard to criminal or civil law enforcement inquiries, investigations, or proceedings;
- filings or proceedings that the government is specifically required by statute or regulation to maintain or conduct on a confidential basis;
- communications made in compliance with written agency procedures regarding an adjudication conducted by the agency under the Administrative Procedures Act, or substantially similar provisions;
- formal petitions for agency action, made in writing and required to be a matter of public record pursuant to established agency procedures;
- communications made in the course of participation in an advisory committee subject to the Federal Advisory Committee Act;

Inherently public communications, specifically:

- testimony given before a committee, subcommittee, or task force of Congress, or submitted for inclusion in the public record of a congressional hearing;

- written comments, filed in a public docket and other communications that are made on the record in a public proceeding;
- communications in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting public comment and directed to the agency official specifically designated in the notice to receive such communications;

Inherently private communications, specifically:

- certain confidential communications of information, the unauthorized disclosure of which is prohibited by law;
- certain communications made on behalf of an individual with regard to such individual's benefits, employment, other personal matters involving only that individual;
- disclosures by an individual pursuant to whistle-blower statutes; and
- communications by a church or religious order that is exempt from filing federal income tax returns.

Note that expenses associated with the above-mentioned contacts may nonetheless need to be disclosed as lobbying activities.

D. Contents of Registration

Generally, a registration must provide information related to:

- the registrant;
- the client;
- the individuals who have acted, or are expected to act, as lobbyists for the client (including certain information with respect to any employee who served as a covered official within twenty years of acting as a lobbyist for the organization);
- the general lobbying issues on which the registrant (and its lobbyists) will lobby (e.g., BUD (Budget/Appropriations), HCR (Health issues) etc.) and the specific lobbying issues on which the registrant (and its lobbyists) will lobby (e.g., children's hospital graduate medical education), including, without limitation, specific bill numbers and titles, if applicable.

- any organization other than the filer which contributes more than \$5,000 during the quarterly period toward the registrant’s federal lobbying activities, and “actively participates”⁴ in the planning, supervision, or control of such lobbying activities; and
- any foreign entity that contributes more than \$5,000 during the quarterly period and:
 - holds at least 20 percent equitable ownership in the client or in an affiliated organization;
 - directly or indirectly, in whole or in major part, plans, supervises, controls, directs, finances, or subsidizes the activities of the client or of an affiliated organization; or
 - is an affiliate of the client or of a client’s affiliated organization, and has a direct interest in the outcome of the lobbying activity.

E. Quarterly Reporting

Generally, each registrant must file quarterly reports with the Secretary and the Clerk by April 20, July 20, October 20, or January 20 of each year. Note that, if the “effective date” (i.e., the date the lobbyist is hired or retained by a client or first makes a lobbying contact, whichever is earlier) is prior to the end of a quarterly reporting period, the registrant must file a quarterly report for that initial period.

Generally, quarterly reports must identify:

- the registrant;
- any updates to the information provided in the initial registration;
- the general and specific lobbying issues on which the registrant (and its lobbyists) lobbied (including, to the maximum extent practicable, details related to bill numbers and references to specific legislative and executive branch actions);
- a description of the interest, if any, of any foreign entity in these specific issues, if the foreign entity meets the \$5,000 threshold and other criteria described in Section D above;

⁴ According to the LDA Guidance published on the Clerk’s website, “[a]n organization “actively participates” in the planning, supervision, or control of lobbying activities of a client or registrant when that organization (or an employee of the organization in his or her capacity as an employee) engages directly in planning, supervising, or controlling at least some of the lobbying activities of the client or registrant.” Examples may include, among other things, participating in decisions about selecting or retaining lobbyists, formulating priorities among legislative issues, designing lobbying strategies, performing a leadership role in forming an ad hoc coalition, and other similarly substantive planning or managerial roles, such as serving on a committee with responsibility over lobbying decisions.

- a statement regarding the chamber(s) of Congress and the federal agencies contacted by lobbyists employed by the registrant;
- the employees who acted as federal lobbyists on behalf of the organization;
- whether the organization is a state or local government, or an instrumentality controlled by such; and
- if a registrant engaged in lobbying activities on its own behalf: a good faith estimate of the total expenses during the quarterly period that the registrant and its employees incurred for federal lobbying activities.

The estimate of expenses (if not drawn from tax figures (see Section H below)) should include, by way of example and not by way of limitation, appropriate percentages of salaries and overhead, travel expenses, payments to contract lobbyists and other vendors, etc. If tax figures are used, expenses for state lobbying may not be deducted.

Estimates of lobbying income or expenses in excess of \$5,000 must be rounded to the nearest \$10,000.

Where lobbying income or expenses did not exceed \$5,000 for the quarterly reporting period, the registrant must include a statement that income or expenses fell below \$5,000.

Contract lobbyists must file a separate report for each client.

F. Semiannual Reporting

In addition to the quarterly reports described above, registrants and their employees who are registered lobbyists are required to file semiannual reports with the Secretary and the Clerk by July 30 and January 30.⁵ The reports, called Form LD-203 reports, generally must contain:

- the name of the person or organization filing the report (either a registrant or a registrant’s employee who is a registered lobbyist);
- in the case of a filer who is a registered lobbyist, his or her employer;
- the names of all political committees “established or controlled” by the filer (an “affiliated PAC”);
- a certification that the filer:
 - has read and is familiar with the House and Senate gift and travel rules, and
 - has not provided, requested, or directed a gift, including travel, to a Member of Congress or an officer or employee of the House or Senate with knowledge that receipt of the gift would violate House and

⁵ See briefs entitled “Guidance on LDA Reporting” and “LD-203 Disclosure of Events to Honor Covered Officials” for additional information.

Senate gift and travel rules.⁶

- if the filer or an affiliated PAC has contributed \$200 or more within the semiannual period to any federal candidate, leadership political action committee, or party committee, then the date, amount, and recipient of each contribution of \$200 or more must be disclosed.

Among other things, the report also must disclose the filer's or affiliated PAC's payments for the following (subject to certain exceptions):

- payment for events "to honor or recognize" a covered legislative branch official or covered executive branch official under the LDA;
- payment to an entity that is named for a covered legislative branch official;
- payment to a person or entity in recognition of a covered legislative branch official;
- payment to an entity established, financed, maintained, or controlled by a covered legislative branch official or covered executive branch official, or an entity designed by such official; or
- payment for a meeting, retreat, conference, or other similar event held by, or in the name of, one or more covered legislative branch officials or covered executive branch officials.

If the filer or an affiliated PAC has donated \$200 or more within the semiannual period to any Presidential library foundation or Presidential inaugural committee, then the date, amount, and recipient of each donation of \$200 or more must be disclosed.

G. Mandatory Electronic Filing

LDA reports must be filed electronically, and each active lobbyist that lobbies on behalf of a registrant or client must obtain his/her individual user ID number and password in order to file semiannual reports electronically with the Secretary and Clerk.

H. Tax Code Election

Generally, under certain circumstances, a registrant other than a lobbying firm may elect to calculate its reportable lobbying expenses for LDA purposes as its non-deductible lobbying expenses (for a business organization) or its reportable lobbying expenses under tax law (for a non-profit).

I. Other Required Disclosures

A person making an oral federal lobbying contact must disclose, upon request of the official at the time of the contact, the following:

⁶ See brief entitled "Congressional Gift Rules" for additional information.

- whether the lobbyist is registered under the LDA,
- the name of the client represented,
- whether the client is a foreign entity, and
- the name of any foreign entity that has a direct interest in the outcome of the lobbying activity and that meets the \$5,000 threshold and other criteria described in Section D above.

A person making a written federal lobbying contact must disclose:

- any foreign entity on whose behalf the contact has been made, and whether the person is registered on the foreign entity's behalf; and
- any foreign entity that has a direct interest in the outcome of the lobbying activity and that meets the \$5,000 threshold and other criteria described in Section D above.

Upon request by a person or entity making a lobbying contact, the individual who is contacted or the office employing that individual must indicate whether or not the individual is a covered legislative branch official or a covered executive branch official under the LDA.

J. Administration

Among other things, the Secretary and the Clerk are obligated to:

- provide guidance and assistance with respect to the requirements of the LDA;
- develop common standards, rules, and procedures for complying with the LDA;
- review, verify, and inquire into the accuracy, completeness, and timeliness of registration and reports;
- develop filing, coding, and cross-indexing systems;
- retain registrations for at least 6 years after termination, and reports for at least 6 years after filed;⁷
- notify any lobbyist of lobbying firm, in writing, of noncompliance;
- notify the U.S. Attorney for the District of Columbia if the registrant fails to respond within 60 days; and

⁷ Generally, registrants should consider retaining copies of their filings and supporting documentation for at least the same length of time (6 years).

- release publicly, on a semiannual basis, the aggregate number of registrants referred to the U.S. Attorney for noncompliance.

The U.S. Attorney may seek a civil fine of not more than \$200,000 per violation, depending on the extent and gravity of the violation. Whoever “knowingly and corruptly” fails to comply with the LDA also may be subject to imprisonment for up to 5 years.

The Attorney General must report, on a semiannual basis, the aggregate number of enforcement actions taken by the Department of Justice under the LDA, and any sentence imposed.

K. Random Audits Conducted by GAO

The Comptroller General (i.e., the head of the Government Accountability Office) must audit, on an annual basis, the level of compliance with the LDA by conducting random audits of the LDA reports filed by lobbyists, lobbying firms, and registrants.