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Lobbying Disclosure Act: A Brief Synopsis of Key Components

What is a Lobbyist?

As defined by the Lobbying Disclosure Act of 1995, a lobbyist has been clarified to include any person who: 1) receives financial or other compensation for lobbying in excess of \$2,500 per three month period; 2) makes more than one lobbying contact; and 3) spends twenty per cent or more of his or her time over a three month period on lobbying activities on behalf of an employer or individual client. Unless each of these criteria is met, there is no registration requirement for that individual. If an organization or lobbyist is lobbying on their own behalf, they have the option of using the definition of lobbying provided in the Internal Revenue Code (IRC) provision—section 4911 or 162(e)—that are used for tax purposes. Everyone else must use the definition provided in the LDA.

An organization is required to register under the LDA if it plans to engage in lobbying activities during any three-month period and during that period incurs at least \$10,000 in lobbying expenses.¹ However, the calculus used to determine this figure can be supplemented with the IRC definition and vice versa, meaning that organizations can use either definition to prove their expenses were below \$10,000. The 1999 GAO report on federal lobbying points out that no data exists on the number of organizations which benefited from the dual definitions, meaning we have no way of determining whether this potential loophole has allowed lobbyists to skirt registration.

The LDA definition of lobbying differs from the definition provided by IRC sections 4911 and 162(e),² namely in the scope and coverage of its provisions. Whereas the LDA covers exclusively contacts with federal officials, the IRC's definition includes contacts made with federal, state and local officials. In addition, the IRC addresses the influence of grassroots lobbying. There is also a discrepancy in the nature of lobbying activity; in some instances, the LDA does not discern between lobbying contacts made for legislative or nonlegislative issues, whereas the IRC section 4911 does not cover such contacts (IRC section 162(e) covers these activities, but to a much lesser extent than the LDA).

¹ United States General Accounting Office, Report to Congressional Committee. "Federal Lobbying: Differences in Lobbying Definitions and Their Impact," April 1999, p. 2.

² United States General Accounting Office, Report to Congressional Committee. "Federal Lobbying: Differences in Lobbying Definitions and Their Impact," April 1999, p. 2.

The LDA and the IRC sections 4911 and 162(e) also carry different disclosure requirements. The IRC requires an organization to disclose all lobbying expenses covered by that definition, including grassroots lobbying and federal, state and local government lobbying.³ However, these expenses are not required to be itemized, meaning that one can not determine the amount spent on certain activities or clients. The 1999 GAO report also found that organizations using the IRC definition must only report issues on which they lobbied on the federal level, meaning that expense reporting (which includes federal, state and local jurisdictions) does not align properly with issue disclosure. In other words, a lobbying firm may spend \$100,000 on state-based lobbying activity, and \$1,000 on the federal level, yet it is only required to disclose issues advocated for its federal lobbying activities.

In general, the LDA requires a greater amount of disclosure than the IRC. This is because the LDA was intended to identify the amount of money behind efforts to influence federal legislative matters. There are instances, however, in which the IRC captures more information than its counterpart. For example, if an organization contacts lower level executive branch officials about legislation, then using an IRC definition could require more information disclosure.

What are Lobbying Activities?

The term “lobbying activities includes not only the time spent on a lobbying contact, but also “efforts in support of such contacts, including the preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others.”

What Are Lobbying Contacts?

The registration threshold of making two or more lobbying contacts on behalf of a paying client is not limited to any specific time period. Under the LDA, virtually any communication written or oral, with either “covered legislative branch officials” or “covered executive branch officials” regarding the “formulation, modification, or adoption” of policy or legislation constitutes a “lobbying contact.” Also included are communications relating to the 1) administration or execution of a federal program or policy (including contracts, grants, loans or permits) and 2) the nomination or confirmation of a person subject to confirmation by the Senate.

The question of which officials are covered is quite simply with respect to Congress and somewhat problematic with regard to the Executive Branch. Let’s start with Congress.

Covered Legislative Branch Officials:

- Members of Congress
- An elected officer of either House

³ United States General Accounting Office, Report to Congressional Committee. “Federal Lobbying: Differences in Lobbying Definitions and Their Impact,” April 1999, p. 2.

- Any employee of, or any other individual functioning in the capacity of (but not volunteers or contractors), a Member of Congress, a committee, a leadership staff, or a working group or caucus; or
- A senior employee of the Clerk of the House or Secretary of the Senate

Covered Executive Branch Officials:

- The President, Vice President, and any employee in the Executive Office of the President;
- Any officer serving in level I-V of the Executive Schedule; agency heads, assistant secretaries, deputy assistant secretaries, general counsels of agencies, and so forth;
- Any member of the uniformed services whose pay grade is at or above 0-7 under section 201 of title 37 United States Code; and
- Any other employee serving in a “confidential, policy determining, policy-making, or policy-advocating” position as described in section 7511 (b)(2) of title 5, United States Code. This includes so-called “Schedule C” employees.

In practice, it can sometimes be difficult to determine whether an executive branch official is “covered.” One rule of thumb is that if the official has a significant role in the formulation of policy, then it’s likely he or she is covered. Where there is uncertainty, lobbyists should always ask. All government officials are required to disclose their status if asked by a lobbying contact.

There are 19 exempt categories for covered executive branch officials. These categories include the following activities:

- Congressional testimony
- Petitions for agency action
- Compelled statements
- Public comments solicited through the Federal Register
- Public statements or media-broadcast statements
- Written responses to government information requests (FOIA)
- Communication directed solely to the intended agency regarding judicial, criminal or civil law proceedings
- “Grassroots” lobbying activities, which encourage private citizens to contact officials on a particular issue, for example.

Registration

A lobbyist or lobbying firm must register within 45 days of making a lobbying contact or being employed for such activities, whichever occurs first.⁴

In order to register, lobbyists must file with the Secretary of the Senate and the Clerk of the House and disclose the following information:

⁴ 2 USC Sec. 1603, Chapter 26 “Disclosure of Lobbying Activities: Sec. 1603. Registration of Lobbyists.” Jan. 6, 2003.

- The name, address, business telephone number, and principal place of business of the registrant, and a general description of its business or activities.
- The name, address, and principal place of business of the registrant's client, and a general description of its business or activities (if different from registrant).
- The general issues on which the organization intends to engage in lobbying activities and, to the extent practicable, the specific issues that are likely to be addressed.
- Each employee whom the organization expects to act as a lobbyist
- The identity of any organization that provides more than \$5,000 in support in a three month period and plays a major part in the supervision of the registrant's lobbying activities.
- The identity of a foreign entity that influences the registrant's lobbying activities, directly or indirectly, or is an affiliate of the client and has a direct interest in the outcome of the lobbying activity.⁵
- Under the 2007 amendments to LDA, lobbyists must also file with the Clerk of the House and Secretary of the Senate a semi-annual LD-203 report listing any campaign contributions to federal candidates and expenses related to events that honor a member of Congress.

Filing

Once an organization registers itself under the LDA, it is required to file quarterly reports so long as it remains registered. If it ceases lobbying, it must file a registration termination form.

Quarterly reports of lobbying activity must be filed by registrants the first day of January, April, July and October each year. Registrants must also file semi-annual reports of campaign contributions to federal candidates and events that honor federal officeholders, known as LD-203 reports. The lobbyist activity reports must include the following information:

- For each general issue in which the organization is engaged in lobbying, a list of the specific issues on which the lobbyists are working. This should include a list of bill numbers and references to specific executive branch actions "to the maximum extent practicable."
- A list of the houses of Congress (Senate and House) and federal agencies contacted by any employee acting as a lobbyist
- The names of the employees who acted as lobbyists during the semi-annual period;
- A disclosure of the interests of any foreign entity listed in the registration statement; and
- A "good faith" estimate of the organization's total expenses relating to lobbying activities during the semi-annual period. Importantly, the Act provides that expenses above \$10,000 should be rounded to the nearest \$20,000.⁶

⁵ 2 USC Sec. 1603, Chapter 26, (a)(3)(B)(ii)

⁶ 2 USC Sec. 1610, Chapter 26, "Disclosure of Lobbying Activities: Sec. 1610. Estimates based on tax reporting system." Office of the Law Revision Counsel, U.S. House of Representatives.

Penalties

The Secretary of the Senate and the Clerk of the House are responsible for monitoring compliance to the LDA. The LDA directs these offices to ensure “accuracy, completeness, and timeliness of registration and reports.”⁷

If either of the Secretary or the Clerk is made aware that “any lobbyist or lobbying firm...may be in noncompliance” with the LDA, the aforementioned offices must notify the lobbyist or lobbying firm in writing. The lobbyist or lobbying firm then has 60 days to respond and provide appropriate information. Failure to do this triggers the Secretary or the Clerk to notify the United States Attorney for the District of Columbia to initiate an investigation.

If a lobbyist or lobbying firm is found by the U.S. Attorney to be in violation of the LDA, they may levy substantial civil fines of up to \$100,000 for knowingly failing to comply with the LDA or for failing to resubmit an incomplete filing within 60 days of notification. As in all civil cases, violations must be proven with a preponderance of evidence.

Under congressional ethics rules approved in the Honest leadership and Open Government Act of 2007, lobbyists may also be held liable for encouraging members of Congress or their staff to violate the ethics rules.

⁷ Section 6(2) of the “Lobbying Disclosure Act.”