Client Advisory

KELLEY DRYE
COLLIER SHANNON

DECEMBER 18, 2007

Joint Guidance Issued for Compliance with the Lobbying Disclosure Act, As Amended by the Honest Leadership and Open Government Act of 2007

The Clerk of the House of Representatives ("Clerk") and Secretary of the Senate ("Secretary") recently issued detailed joint guidance for lobbyist compliance with the Lobbying Disclosure Act ("LDA"), as amended by the Honest Leadership and Open Government Act of 2007 ("HLOGA"). The joint House and Senate guidance replaces and suspends earlier individual guidance provided by each House of Congress. These materials are available at http://lobbyingdisclosure.house.gov/amended_lda_guide.html.

In summary, regarding lobbying disclosure, HLOGA requires the reporting of more information regarding lobbying (and lobbyists), more often. Semiannual Federal "LD-2" lobbying reports must now be filed quarterly, within twenty days (rather than forty-five), of reporting period close. Thresholds for initial registration on an "LD-1" form and periodic "LD-2" reporting have been halved, consistent with the halving of the LD-2 reporting periods from semiannually to quarterly. HLOGA also created a major new semiannual reporting and certification regime for both lobbying entities and individual lobbyists. This information must be reported on not-yet released "LD-203" forms.

We do not in this Client Advisory endeavor to discuss each element of HLOGA. We have explained these new requirements in detail in previous Client Advisories and other materials. For your convenience, these materials are available online at http://www.kelleydrye.com or by clicking here.

Rather, in the materials set forth below, we attempt to identify instances in which this new joint guidance either explains new HLOGA requirements or clarifies issues that arose under the LDA reporting regime pre-dating HLOGA. Accordingly, our catalogue of issues is necessarily somewhat subjective, as a full description of the guidance would span almost as long as the twenty-six page guidance document itself.

AMENDED/NEW FORMS

In the joint guidance, the Clerk and Secretary first identified changes to existing LD-1 and LD-2 forms, and set forth HLOGA's new filing time-tables and lowered reporting thresholds. The guidance also introduced the new LD-203.

INITIAL REGISTRATION FORM: LD-1

The initial registration form (LD-1) contains very few changes:

- The disclosure of previous governmental service has been changed from two to twenty years back from the date of first lobbying activity for a client on Line 10.
- The definition of an "affiliate" has been expanded on Line 13, consistent with HLOGA's new definition and reporting requirements. Affiliates that "in whole or major part" participate in the planning, control, or supervision of the lobbying activities of the client or affiliate must be listed first, as it is mandated that they be disclosed in the filing and not through other means. The remaining "active" participants in the planning, supervision and control

of the registrant's lobbying activities (HLOGA's new disclosure category) are to be listed following the ones described above. The guidance then proceeds to explain how active participants are recommended to be listed. This Client Advisory provides more detail regarding these new categories, within.

- More specifically, for disclosure of more than 60 organizations that are "active" participants, the guidance recommends either (1) completing the new Internet Address field instead and listing the additional affiliated organizations on the filing organization's website or (2) filing an amendment(s) to the filing disclosing the other additional affiliated organizations. While the joint guidance suggests using the Internet Address field in instances when reporting many active participants would be cumbersome, there is nothing in HLOGA that limits the use of a website address disclosure method to entities with more than sixty active participants.

PERIODIC LD-2 REPORT

The periodic LD-2 report contains the following changes, which are more extensive:

- Line 7 has a checkbox for disclosing whether the client is a state or local government or instrumentality (a new HLOGA requirement).
- The reporting thresholds on Lines 12 and 13 have been halved, consistent with the halving of the reporting period.
- The disclosure of previous governmental service has been changed from two to twenty years on Line 18.
- The definition of an "affiliate" has been expanded on Line 25. Affiliates that "in whole or major part" participate in the planning, control, or supervision of the lobbying activities of the client or affiliate must be listed first, as it is mandated that they be disclosed in the filing and not through other means. The remaining "active" participants must be listed following the ones described above. The joint guidance provides essentially the same counsel regarding the reporting of "active" coalition lobbying participants for the LD-2 form as it does for the LD-1 form, with the exception that the joint guidance recommends using the Internet Address field for groups of active participants larger than forty. (As explained above, nothing in HLOGA limits the use of the website disclosure method to entities with any specified number of active participants.)

NEW LD-203 REPORTING AND CERTIFICATIONS FOR LOBBYING ENTITIES AND THEIR INDIVIDUAL LOBBYISTS

Regarding new LD-203 reporting and certifications for lobbying entities and their individual lobbyists, the Clerk and Secretary jointly made clear that, under HLOGA, both lobbying entities (that is, lobbying firms and entities with in-house lobbyists) and their registered lobbyists must start reporting much of their political giving, not confined to federal campaign-related contributions.

The joint guidance explains that the beginning part of the new LD-203 will seek identifying information, including not only names and addresses of the filer, but any political committee (apparently, federal or non-federal) established or controlled by the filing entity.

In many cases, a political committee established or controlled by a registrant would be a separate segregated fund. In certain instances, a lobbyist may establish or control a "leadership PAC."

The middle part of the Form LD-203 requires the filer to disclose, for itself and for any political committee the filer establishes or controls, the following:

- Contributions aggregating over $200 in the semiannual period to any federal candidate, officeholder, or leadership PAC, or Federal political party committee, together with the date, recipient, and amount of funds.
- Donations to a range of events or entities named for or related to a public official, including funds paid for an event to honor a covered legislative or executive branch official; funds to an entity named for, or designated by, a covered legislative branch official; funds for a retreat or similar event held for, or in the honor of, a covered legislative or executive branch official; and funds in excess of $200 to each Presidential inaugural committee or library foundation. (Examples of such donations are reprinted, within.)

The new semiannual reports will also require periodic certification, *a là* Sarbanes-Oxley, that the lobbying entity and its registered lobbyists have not provided a gift, including travel, to a congressional member, staff, or officer "with knowledge" its receipt would violate House or Senate rules.

As the joint guidance reminds prospective filers, moreover, the certification requirement is significant, bringing potential criminal liability for "knowingly and willfully" making a false statement in a document the law requires be submitted to Congress.

JOINT GUIDANCE OF PARTICULAR NOTE

As explained above, this Client Advisory will also catalogue some of the more noteworthy elements of the joint guidance.

FILING REQUIREMENTS AND PROCESSES, IN GENERAL

- The guidance reminds filers that electronic filing is now mandatory.
- On November 10, 2007, the Clerk and Secretary issued guidance explaining how electronic filing will be simplified. The House and the Senate have combined their filing processes so that users may file forms electronically at a single location, without using the current often-balky electronic signature. These forms were made available online on December 10, 2007.
- However, one element of concern for registrants (and registered lobbyists) is that many more filers will be required to use the system, because individual registered lobbyists will be required

to file the new semiannual LD-203 reports and certifications, starting July 30, 2008, for the first half of 2008.

- Accordingly, registered lobbyists should prepare early for their initial LD-203 filings. To accomplish electronic reporting via the new LD-203 form, each registered lobbyist will need to obtain a new individual user identification number and password. The Clerk and Secretary report they will require two working days to issue identification numbers and passwords. However, given the fact that thousands of registered lobbyists will be required to file these new forms for the first time, individual lobbyists are well-advised to obtain their identification number and password well before the July 30, 2008, due date for the first LD-203 filing. A backlog can reasonably be expected and, as the guidance explains, the LDA does not provide for filing deadline extensions.

"ACTIVE PARTICIPATION" FOR HLOGA AFFILIATE DISCLOSURE

The joint guidance provides some explanation for what would (and would not) amount to an affiliate's "active" participation in the planning, supervision, and control of the registrant's lobbying activities, requiring HLOGA LD-1 and LD-2 affiliate disclosure. Examples of various levels of participation discussed in the joint guidance include:

- Example 1: *Association "A" has twenty organizational members who each pay $20,000 as a portion of their annual dues to fund "A's" lobbying activities. "E" is an employee of Organization "O", which is a member of "A." "E" serves as a member of "A's" board, as a representative of "O." While "A" carries out various functions, a substantial part of its mission is lobbying on issues of interest to its member organizations. "E's" board membership constitutes active participation by "O" in the lobbying activities of "A," and thus "O" would need to be listed as an affiliated organization of "A."*

- Example 2: *Another association "A" has 1000 organizational members who each pay $20,000 as a portion of their annual dues to fund A's lobbying activities. "E" is an employee of Organization "O," which is a member of "A." "E" serves as a member of "A's" board, as a representative of "O." "A" performs numerous functions, only a modest portion of which is lobbying. With regard to "A's" lobbying activities, "A's" board is only involved in approving an overall budget for such activities, but otherwise leaves supervision, direction, and control of such matters to a separate committee of member organizations. "E's" board membership in this case does not constitute active participation by "O" in the lobbying activities of "A."*

- Example 3: *Another association "A" has 1000 organizational members who each pay $1,000 a month in annual dues to "A." "E" is an employee of Organization "O," which is a member of "A." "E" serves as a member of "A's" lobbying oversight group as a representative of "O." The lobbying oversight group plans and supervises lobbying strategy for "A." While "E's"*

activities in "A" would constitute active participation, because "O" does not contribute $5,000 in the reporting quarter to the lobbying activities of "A," "O" would not need to be listed as an affiliate of "A."

- Example 4: *Another association "A" has 100 organizational members who each pay $30,000 a month as a portion of their annual dues to fund "A's" lobbying activities. "E" is an employee of Organization "O," and attends "A's" annual meeting/conference, informally provides "O's" list of legislative priorities to "A," and also facilitates responses from "O" to occasional requests for information by "A's" lobbyists. These activities would not make "O" an active participant in the lobbying activities of "A."*

- Example 5: *Organization "O" joins with a group of nine other organizations to form Coalition "C" to lobby on an issue of interest to it. Each contributes $50,000 to "C's" budget. "O's" vice president for government relations is part of the informal group that directs the lobbying strategy for "C". "O" would be considered an active participant in "C's" lobbying activities and would have to be disclosed.*

The joint guidance explains that merely paying dues or making donations for lobbying, receiving information and reports on legislative matters, occasionally responding to requests for technical information or expertise to support efforts, offering ad hoc informal comments on lobbying strategy (in the "absence of any formal or regular supervision or direction of lobbying activities"), attending general association or group meetings on lobbying, and participating on par with the general membership of the association in lobbying planning do not constitute "active" participation. These standards are generally consistent with what the guidance termed more "passive" participation, but may involve more activity than a "*de minimis*" role, which is the way the guidance characterizes "non-active" participation at the end of its discussion of the subject. We note the guidance may too broadly construe "active" participation, to the extent it contrasts it with *de minimis* participation.

CONSIDERATIONS INVOLVED IN INITIAL REGISTRATION

The joint guidance details considerations involved in determining whether an entity must file the initial LD-1 registration form:

- Under the LDA, as amended by HLOGA, such registration must occur if: (1) the same lobbyist makes two or more lobbying contacts over the course of the representation; (2) a lobbyist spends more than twenty percent of his or her time in a calendar quarter on lobbying activities; and (3) the registrant (lobbying firm or organization with in-house lobbyists) meets specified income or expense levels of $2,500 in income for a lobbying firm or $10,000 in expenses for an organization with in-house lobbyists in the same calendar quarter.

- According to the guidance, the two or more lobbying contacts prong of the initial registration threshold is met

when a lobbying firm is retained to make one lobbying contact on behalf of a client (with the assumption that the client will want the firm to make more than one lobbying contact) or on the date on which an in-house lobbyist makes his or her second lobbying contact.

- Under the LDA, initial lobbying registration is not triggered unless an individual at the prospective lobbying entity spends twenty percent or more of his or her time on "lobbying activities." The guidance explains, in general, how this twenty percent threshold should be assessed. For instance, "Generally, if work such as [legislative] reporting or monitoring occurs at a time when future lobbying contacts are contemplated, internal reporting and monitoring should be considered part of planning or coordinating of lobbying contacts, and therefore included as 'lobbying activity.'"

- The intersection of the requirements for initial lobbying disclosure have produced a range of potential fact patterns over the years, which the guidance addresses:

    - What if an individual spends twenty percent or more of his or her time in a quarter undertaking lobbying activities but these activities can only be expected to support one contact? *(Registration not triggered.)*

    - What if the individual does meet both the twenty percent and two contacts thresholds, but the entity does not hit the monetary registration thresholds? *(Registration not triggered.)*

    - What if one individual meets the twenty percent threshold, but another individual makes the two lobbying contacts, and the monetary threshold is not reached? *(Registration not triggered.)*

- When calculating whether an organization with in-house lobbyists exceeds the $10,000 threshold, the total must include all money paid for in-house lobbying activities (including to non-lobbyist employees who engage in lobbying activities) as well as to any outside firm retained to engage in lobbying activities on behalf of the organization.

- In general, it does not constitute a lobbying contact for an individual to call a covered official and inquire about the status of a matter. However, the guidance explains it may be appropriate to consider the identity of the person making the inquiry. For instance, having a former Chief of Staff of a congressional office call and make an inquiry about the "status of legislation" "presumably" would be considered by office staff as part of an effort to influence the Member.

- The joint guidance clarifies that communications compelled by an action of a federal agency would include communications that are required by a federal agency contract, grant, loan, permit or license, and therefore do not represent a

"lobbying contact." Accordingly, technical communications between a contractor's representative and covered executive branch officials at the contracting agency would not represent a "lobbying contact." By contrast, an attempt [by the contractor's representative] to influence a covered official regarding either matters of policy, or an award of a new contract would represent a "lobbying contact," because this latter category of communication is not "required by the existing contract."

FILING AND REPORTING RELATIONSHIPS

- Clarifies that if one firm or entity retains a second lobbying firm on behalf of the first firm's client, the lobbyist lists the first firm retaining it as the client on the LD-1 and the client of the firm retaining the lobbying firm as an "affiliated organization."
- Clarifies filing and reporting relationships between parent and affiliated companies and organizations, with guidance that each legally separate entity should, in general, be treated as a separate entity for LDA purposes that must make a separate assessment of LDA disclosure obligations. One exception is that the guidance noted a parent entity could report lobbying activities if the parent exercises discretion or control over a lobbyist who also devotes a fraction of his or her time to the activities of multiple subsidiaries, provided the subsidiaries are listed as affiliated organizations.
- Provides guidance regarding the LDA registration and disclosure impacts of lobbying firm, client, and lobbying organization mergers and acquisitions.
- Provides guidance relating to registration for an informal coalition, including by advising that the registration must adopt some sort of "identifier" for the coalition, even if it has no formal name or is not a legal entity. It is appropriate to indicate on the registration in such instance that the entity is an ("Informal Coalition") or other applicable description. The guidance also reminds filers regarding the circumstances under which coalition participants must be identified (*i.e.,* contribution of more than $5,000 in a calendar quarter and at least active participation in the planning, supervision, and control of the coalition's lobbying activities).

CONSIDERATIONS INVOLVED IN QUARTERLY FILINGS

- The guidance explains that an LD-2 report must be filed for periods in which, respectively, the initial obligation to register is triggered and the cessation of activity for termination occurs.
- Explains that a "good faith estimate," supported by a "reasonable system" to track expenses, suffices for an organization to estimate its lobbying expenses, but reminds registrants that fees a lobbying organization pays to outside lobbying firms should be included in the expense estimate.

- The guidance also provides additional information regarding the use of tax code-based lobbying expense estimates for LDA purposes, which survives HLOGA.

- The guidance thus explains how tax code-based assessments of lobbying expenses are generally broader than LDA-based parameters. For instance, the tax code requires inclusion of state and local lobbying and so-called "grassroots" lobbying excluded under the LDA definition of "lobbying activities," albeit the LDA includes a broader array of executive branch personnel in its reporting scope.

- Generally speaking, the pace of LD-2 disclosure under the HLOGA may counsel for consideration whether using a tax code-based estimate may have become more efficacious than undertaking a quarterly calculation of lobbying expenses.

- Provides somewhat confusing guidance regarding reporting of lobbying firm lobbying income, because it counsels that lobbying firms must report both "income earned and accrued from lobbying activities during a quarterly period, even though the client may not be billed or make payment until a later time." This approach could lead to double-counting in subsequent reporting periods as such accrued income is actually received. The guidance also explains that a lobbying firm's separately invoiced costs and disbursements must also be included in income.

- Confirms that it is not sufficient for a registrant to identify a lobbying activity solely by reference to a bill number, without some additional description of the subject matter of the effort.

- Clarifies that "covered executive branch personnel" for LDA purposes do not include senior executive service ("SES") personnel.

- Confirms that neither a registrant nor an individual lobbyist need to have lobbying contacts or activities to still be required to be included on a quarterly report. An individual lobbyist can be terminated as a lobbyist if the registrant does not expect the lobbyist to be active for the client/organization in the current or next quarterly period.

- A registration may be terminated in its entirety when a lobbying firm "anticipates no further lobbying activity for a client" or an organization's "in-house lobbying activities have ceased and are not expected to resume."

NEW SEMI-ANNUAL (LD-203) REPORTS

- The guidance identifies the certification requirement contained on each LD-203 (that the filer has read and understands the congressional gift and travel rules, and that the filer has not knowingly violated them), and separately notes the applicability of the federal false statement criminal liability provisions to LDA filings.

- The guidance offers the following examples of what should be reported in LD-203 filings as donations beyond contributions to federal candidate, party, and leadership political committees.

- Example 1: *In State "A," a group of constituents involved in widget manufacturing decide to honor Senator "Y" and Representative "T" with the "Widget Manufacturing Legislative Leaders of 2008" plaques. Registrant "B" is aware that "Y" has checked with the Senate Select Committee on Ethics regarding her ability to accept the award and attend the coffee and "T" has checked with the House Committee on Standards of Official Conduct. "B" pays $500 to partially fund the event. "B" would report that it paid $500 on November 20, 2008 for the purpose of honoring "Y" and "T" with the plaques.*

- Example 2: *After checking to discover if the activity is permissible, Lobbyist "C," contributes $300 on June 1, 2008 to Any State University towards the endowment of a chair named for "Y" in the example above. "C" would report the information above noting that the payment was for the endowment of "Y's" chair.*

- Example 3: *Senator "Y" has been asked to speak at a conference held in Washington, DC, sponsored by a professional association of which "B" is a member. Registrant "B" makes a donation of $100 to Charity "X" in lieu of honoraria. "B" would disclose a contribution of $100 on July 15, 2008, with the notation that "Y" was the speaker and the contribution was made in lieu of honoraria."*

- Example 4: *In State "A," there is a large regional conference on "Saving Our River," sponsored by three 501c(3) organizations. Senator "Y" and Representatives "T" and "R" are invited to appear as honored guests. Registrant "B" contributes $3,000 to the event, paying one of the sponsors. "B" would disclose a payment of $3,000 on August 1, 2008 payable to the sponsor with the notation that "Y," "T," and "R" are honored guests.*

FOR MORE INFORMATION

For more information about this development, please contact:

David E. Frulla
202-342-8648
dfrulla@kelleydrye.com

David H. Laufman
202-342-8803
dlaufman@kelleydrye.com

Robert R. Cohen
202-342-8890
rcohen@kelleydrye.com

Andrew E. Minkiewicz
202-342-8474
aminkiewicz@kelleydrye.com

Dustin J. Painter
202-342-8875
dpainter@kelleydrye.com