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LOBBYING DISCLOSURE ACT/EDITION II

By Agnes P. Dover, C. Michael Gilliland, and Michael J. Bell

The Lobbying Disclosure Act, originally passed by Congress in 1995[1] and amended most recently in 2007,[2] fundamentally expanded the definition of what constitutes "lobbying" of Federal Government officials and created a new system for keeping track of lobbying activity.[3] Although the Act was not primarily targeted at federal contractors, its scope is broad enough to cover high-level contractor marketing and business development efforts as well as many contacts with senior federal customer representatives under existing contracts.

Although the impact of the Act on companies has varied widely, many organizations, including many federal contractors, have found that they must register. In fact, in the 10 years following the enactment of the 1995 Act (1996–2006), registrations were filed on behalf of more than 21,000 clients (persons or entities that employ and compensate another person to conduct lobbying activities on their behalf[4])—an increase of more than 164% from the 1996 filing totals.[5]

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In 2007, Congress further refined the Lobbying Disclosure Act with the passage of the Honest Leadership and Open Government Act of 2007 (HLOGA).[6] Then, in January of this year, the Secretary of the Senate and the Clerk of the House issued guidance (subsequently revised in May and July) that answered questions lingering since the 1995 Act and clarified key provisions of the 2007 Act.[7]

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HLOGA is a far-reaching package of new ethics and lobbying reform rules that have significantly changed the system governing lobbyists and organizations that employ or retain lobbyists. Among other things, HLOGA expanded the information that must be provided by those who qualify as lobbyists under the *existing* provisions of the 1995 Act (either as an outside lobbyist who must register and list his or her clients or as an "in-house" lobbyist who is an employee engaging in a certain amount of lobbying on behalf of his or her employer). The 2007 amendments did not, however, expand the definition of "lobbyist." [8]

Additionally, HLOGA did not change the original 1995 Act's definition of "lobbying contact," which expressly includes communications with regard to the negotiation, award, or administration of a federal contract or grant.[9] Therefore, federal contractors must continue to register when engaged in lobbying of "covered officials"[10] for award or renewal of federal contracts (including much of what is normally thought of as marketing or business development).

The purpose of this Edition II BRIEFING PAPER is to refocus attention on those questions about the Lobbying Disclosure Act that are most pertinent to the circumstances of federal contractors and the coalitions and associations in which they participate in light of the significant amendments to the Act since publication of the prior PAPER on this topic.[11] After providing a brief overview of the Act and the substantial changes made in 2007 by HLOGA, the PAPER discusses the amended Act's (1) key definitions, (2) registration and reporting requirements applicable to federal contractors, (3) treatment of lobbying by coalitions and associations in which contractors may participate, (4) other disclosure requirements, and (5) penalties and enforcement.

Overview

The Lobbying Disclosure Act, as amended, covers all activities associated with communications made to any one of thousands of covered legislative or executive branch officials on virtually any federal subject—not only legislation but also the formulation, adoption, or administration of Executive Orders and agency rules, regulations, programs, or policies.[12] Under the Act, any organization that employs at least one "lobbyist" (as defined in the Act[13] and explained in more detail later in this PAPER) and is not otherwise exempt must register with the Secretary of the Senate and the Clerk of the House of Representatives.[14] The deadline for registration is 45 days after a lobbyist first makes a "lobbying contact" or is retained to do so.[15] In the initial registration and in subsequent quarterly reports (both filed separately for each client[16]), the registrant must, among other things, identify the client (if other than itself), the general issues and specific actions on which it lobbies, any organizations that support and control its lobbying activities, and the lobbyist or lobbyists.[17] Under a provision added by HLOGA, the registrant must also indicate whether the client is a state or local government, department, agency, or other instrumentality.[18] In addition, the registrant must report the income received from each client for lobbying activities or, in the case of a company lobbying on its own behalf, such as a Government contractor, provide a good faith estimate of total lobbying expenses, which include amounts paid for "lobbying contacts" and "efforts in support of such contacts."[19]

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The Act's definition of "lobbying contact" does not extend to "grass-roots" lobbying—that is, to efforts designed to influence federal law or policy *indirectly* by developing support for positions at the grass-roots level.[20] However, it covers virtually all forms of *direct* lobbying on federal matters, including not only direct lobbying of members of Congress but also lobbying of congressional staff and certain executive branch officials.[21]

The Act's focus on lobbying *activities* rather than on lobbying *communications* is intentional and significant. The Act was designed to provide the public with a more comprehensive picture of the scope of federal lobbying by requiring registrants to reveal the income or expense associated with lobbying contacts and all activities *supporting* lobbying contacts—not just the relatively minor income or expense generated by the contacts themselves. To this end, in 2007, Congress in HLOGA increased the reporting frequency to quarterly (from the previous semiannual reporting requirement)[22] and required the disclosure of additional information, as discussed further below.

As noted above, the Act requires not only prospective *registration* by companies that expect to engage in lobbying activities[23] but also retrospective *quarterly reporting* on the lobbying activities actually carried out by the company's employees.[24] Included in the quarterly reports is the requirement to disclose lobbying income or expenses at the *organizational* level.[25] As a result, organizations that employ "lobbyists" as defined under the Act must develop comprehensive estimates of all expenses associated with those lobbying efforts—i.e., those associated not only with the in-house lobbyist but also with any other in-house employees who help support lobbying activities and any amounts paid to others to conduct lobbying activities.

Finally, in addition to the required quarterly reports, HLOGA imposed an additional semiannual reporting requirement on lobbyists individually, as well as on registrants (the companies employing lobbyists). Each lobbyist and registrant is now required to report to Congress any political contributions made by them or by a political committee under their control, equal to or exceeding $200, to any federal candidate or officeholder, leadership PAC, political party committee, presidential library foundation, or inaugural committee and to certify that the filer has read, understands, and has abided by the House and Senate gift rules prohibiting lobbyists and organizations employing or retaining lobbyists from giving most gifts to members of Congress or their staff (as discussed further below).[26]

Key Definitions

■ "Lobbyist"

HLOGA did not change the definition of a "lobbyist" but did change the reporting period for lobbying activity from semiannually to quarterly. Thus, for an employee of a Government contractor to be considered a "lobbyist" under the Lobbying Disclosure Act during any *quarterly period*, the employee must meet two tests. *First,* the employee must have been employed to provide services to his or her employer that include more than one "lobbying contact" (as defined in the Act and discussed below).[27] *Second,* the amount of time that the employee spends in "lobbying activities" (as defined in the Act and explained later) during the *quarterly period* must constitute at least 20% of the total time spent by the employee on behalf of the employer during the period.[28]

For purposes of the first test of the "lobbyist" definition, in determining what constitutes "more than one" lobbying contact, each communication to a covered legislative or executive branch official on a covered subject is a separate "contact" for purposes of the Act. In certain circumstances, a sequence of discussions with a single covered official might be considered a single contact (such as where a telephone call is interrupted and later resumed),[29] but these circumstances are likely to be quite rare.

In addition, to meet the first test, it is not necessary that the employee make more than one lobbying contact *in the quarterly period* in question. The Act requires only that the services provided by the employee "include more than one lobbying contact,"[30] and guidance issued by the Secretary of the Senate and the Clerk of the House has confirmed that this test will be satisfied even if the second contact occurs in a subsequent quarterly reporting period.[31]

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The guidance does not address the question whether the "more than one lobbying contact" test would also be satisfied if the employee made multiple lobbying contacts in *prior* quarterly periods but was expected to make none in the period in question. Applying the language of the Act, it would appear that any individual employed to make multiple lobbying contacts would be deemed to satisfy the "more than one lobbying contact" test for the remainder of his employment, at least as long as his assigned duties contemplated the possibility of further lobbying contacts.

The second element of the definition of "lobbyist"—the "20% test"—must be determined prospectively, since registrations (unlike quarterly reports) are made at the beginning of a project or engagement rather than the end of the reporting period. Employers must *estimate,* based on experience and their best judgment, whether a particular employee is expected to spend 20% of his time in lobbying activities during the current quarterly reporting period. If it later becomes apparent that an employee designated as a lobbyist in a registration statement will not meet or has not met one or both of the tests of the "lobbyist" definition, the employer may, if it chooses, correct the designation in an amended registration or in its next quarterly report.[32]

The two tests of the "lobbyist" definition are to be applied individually to each employee, regardless of the employee's relationship to the lobbying contacts or activities of others. For example, if a marketing vice president of a contractor makes many lobbying contacts but spends only 10% of her time in lobbying activities, and her assistant spends 100% of his time preparing for and supporting her lobbying contacts but makes no lobbying contacts himself, neither employee would be considered a "lobbyist." This is because the vice president does not meet the "20% test" and her assistant, although he meets the "20% test," makes no lobbying contacts personally. As noted later in this Paper, however, the time that each of these employees spends on lobbying activities must be included in their employer's good faith estimate of total lobbying expenses if the company must file a report.

■ "Lobbying Contact"

The Act defines the term "lobbying contact" so broadly that virtually any substantive communication to a covered federal official—on behalf of one's employer/client—relating to that official's duties would come within the definition. Under the definition, a "lobbying contact" is any oral or written communication, including an electronic communication, to a "covered executive branch official" or "covered legislative branch official" (discussed later) that is made on behalf of a client with regard to (a) the formulation, modification, or adoption of federal legislation, rules, regulations, Executive Orders, or any other program or policy of the U.S. Government,[33] (b) 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),[34] or (c) the nomination or confirmation of a person for a position subject to confirmation by the Senate.[35]

The fact that communications relating to the "negotiation, award, or administration of a Federal contract" are expressly covered by the Act's definition of "lobbying contact"[36] does not necessarily mean that contractor communications at an earlier stage of the procurement cycle—for example, at the requirements development stage—are exempt. On the contrary, under the broad language of the Act, such early business development communications arguably are covered as communications "with regard to. . . the administration or execution of a Federal program"[37] if they are made to a covered official. For practical purposes, therefore, contractors should assume that *all* substantive contacts with covered federal officials are "lobbying contacts" unless one of the exceptions to the Act's definition of "lobbying contact" applies.

The Act contains 19 express *exceptions* to the definition of "lobbying contact,"[38] but only the following seven are likely to be of much practical significance to Government contractors:

(1) *A communication made in a speech, article, publication, or other material that is distributed and made available to the public or any communication made through a medium of mass communication.*[39] This exception would apply, for example, to an open letter to Congress or to a Cabinet Secretary

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published in a newspaper of general circulation. It is unclear from the Act whether speeches, articles, and publications must be "distributed and made available to the public" to fall within this exception, or whether the public distribution proviso applies only to "other material." The question is potentially important because many "speeches" are delivered to small private audiences that include one or more covered federal officials. The House Report accompanying the 1995 Act states that this exception applies to communications "made in speeches, articles, or *other* medium of mass communication,"[40] suggesting that only speeches to a broad public audience would be covered by the exception.

(2) *A request for a meeting or for information on the status of a federal action that does not include an attempt to influence a covered official.*[41] This exception clearly applies to requests for administrative information on the status of an action (such as a question about when a request for proposals will be issued). It is not clear, however, whether it would apply to a request for substantive information on an agency's intentions with respect to a particular matter (such as a question whether the RFP will include certain specifications). The most reasonable interpretation of the exception appears to be that it does exempt such substantive status inquiries, provided that they are not made with the intention of influencing a covered official. Under this interpretation, for example, a simple request for substantive information on the likely content of a final rule would not in itself constitute a lobbying contact, but a status inquiry that developed into advocacy about what the final rule *should* contain would be a lobbying contact.

(3) *Testimony before a committee, subcommittee, or task force of Congress.*[42] This exception applies only to congressional testimony. It does not apply to testimony given to an agency in similar circumstances (in an agency rulemaking proceeding, for example). There is a separate exception for responses to agency requests for information or public comment (see paragraph (5) below) that would cover most such testimony.[43]

(4) *Information provided in writing in response to a written or oral request by a covered official for specific information.*[44] It is important to emphasize that this exception applies only if the information in question is provided *in writing*. Also, the use of the words "specific information" seems designed to require that the covered official's request be for substantive data of some kind, not simply for arguments for or against a proposed federal action.

(5) *A communication made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public.*[45] This exception would apply, for example, to communications made in response to requests for information and RFPs. It would also cover testimony to agency personnel at a public hearing on a proposed agency rule.

(6) *Communications "required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, grant, loan, permit or license."*[46] This exception was clarified by a technical corrections act in 1998.[47] In that legislation, Congress added the reference to an agency contract, which is potentially significant to contractors. The Act's implementing guidance clarifies that communications that are compelled by the action of a federal agency would include communications that are required by a federal agency contract, grant, loan, permit, or license.[48] For example, where a contractor has a contract to provide technical assistance to an executive branch agency on an ongoing basis, technical communications between the contractor's personnel and covered officials at the agency would be required by the contract and therefore would not constitute "lobbying contacts."[49] Note, however, that this exception would not encompass an attempt by the contractor to influence covered officials regarding either matters of policy or an award of a new contract since such communications would not be required by the existing contract.[50]

(7) *A written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding.*[51] The House Report accompanying the 1995 Act explains that these communications were excepted from the definition of "lobbying contact" because "[p]rocedural protections available in such cases ensure that all parties have an equal opportunity to comment,

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and such protections ensure that there is a public record of all comments."[52]

■ "Covered Legislative Branch Official"

To be considered a "lobbying contact," a communication must not only relate to a covered subject but must also be made to a covered legislative or executive branch official. The definition of "covered legislative branch official" is fairly straightforward—it includes any member of Congress, any elected officer or any employee of either House of Congress or its leadership staff, and any employee of a member, committee, joint committee, working group, or caucus.[53] It also includes any other legislative branch employee covered by § 109(13) of the Ethics in Government Act of 1978.[54] This definition is so all-encompassing that for practical purposes it should be considered to include virtually anyone working for the U.S. Congress with whom a contractor might wish to communicate.

■ "Covered Executive Branch Official"

The definition of "covered executive branch official" is not so all-inclusive, and it is certainly more difficult to apply in practice. "Covered executive branch officials" include the following:

(a) *The President and the Vice President.*[55]

(b) *Any officer or employee of the Executive Office of the President.*[56] The Executive Office of the President includes not only those offices closely associated with the White House but also dozens of other subordinate offices and agencies, including the Office of Management and Budget, the Office of Federal Procurement Policy, and the Office of the U.S. Trade Representative. It should be emphasized that *any* officer or employee of any of these offices and agencies—technically even a receptionist or contracting specialist—is a covered official under this definition. Thus, contractors that have or are seeking contracts with these offices and agencies may well have employees who are spending significant amounts of time on "lobbying activities" with respect to such contracts.

(c) *Any officer or employee serving in Levels I through V of the Executive Schedule.*[57] The Executive Schedule, consisting of five levels, is the basic pay schedule for high-level federal officials other than members of the Senior Executive Service.[58] The positions included in the Executive Schedule are set forth by title in the U.S. Code.[59] They extend from Cabinet members at Level I to such positions as the Deputy Under Secretary of Defense (Acquisition and Technology), the General Counsel of the Department of Health and Human Services, the Chief Acquisition Officer of the National Aeronautics and Space Administration, and many others at the lower Executive Schedule Levels.

(d) *Any member of the uniformed services whose pay grade is O-7 or above.*[60] This category includes all "flag-rank" officers (brigadier general or above in the case of the Army, Air Force, or Marine Corps; rear admiral (lower half) or above in the case of the Navy).

(e) "[*A*] *ny officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2(B)) of* [*5 U.S.C.A.*]."[61] The opaque wording of this category of "covered executive branch officials" originally resulted in some confusion.The 1998 technical corrections act, however, clarified that this definition applies only to "Schedule C" employees and not those serving as part of the Senior Executive Service.[62] Guidance on this issue further clarified that the "application of coverage of Section 3(3)(F) of the [Lobbying Disclosure Act] (who is a covered Executive Branch official) was intended for Schedule C employees only. Senior Executive Service employees are not covered Executive Branch officials as defined in the Act"[63] unless they fall within one of the other categories listed above.

■ "Lobbying Activities"

Time spent in "lobbying activities" includes time spent in (1) "lobbying contacts" (as defined earlier in this Paper), (2) preparation and planning activities relating to lobbying contacts, (3) research and other background work that is intended at the time it is performed for use in lobbying contacts, and (4) coordination with the lobbying activities of others.[64] This deliberately broad definition is intended to ensure that calculations of lobbying income and expense include not only the relatively small dollar amounts associated with actual lobbying contacts but also

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the more significant amounts associated with supporting activities.

The fact that a certain activity or communication falls within one of the exceptions to the definition of "lobbying contact" does not necessarily mean that the activity does not constitute lobbying *activity*. For example, although providing testimony to Congress is expressly excluded from the definition of "lobbying contact,"[65] the time spent preparing and delivering such testimony might well be considered "lobbying activity" if it were part of a general campaign designed to influence the passage of legislation. Similarly, a request for a meeting at which a lobbying contact will be made, although not itself a lobbying contact,[66] is an effort in support of a lobbying contact and therefore covered by the definition of "lobbying activities."[67] This distinction is important because all measures of lobbying-related time, income, and expense under the Act are based on lobbying activities not lobbying contacts.

Importantly, whether a particular activity will be considered "lobbying activity" depends in significant part on the *contemporaneous intent* of the person performing or requesting the activity. If the activity is intended at the time it is performed to support lobbying contacts, and if it is in fact used for that purpose, it will be considered lobbying activity. If it is not intended to support lobbying contacts at the time it is performed, it will not be considered lobbying activity even if it is later used for that purpose.

The last element of the definition of "lobbying activities"—"coordination with the lobbying activities of others"—should not be construed to include "grass-roots" coordination even though the language of the definition could support such an interpretation. The legislative history of the Act establishes that Congress intended to exclude grass-roots lobbying efforts from the Act's coverage[68] (unless the registrant chooses the option to use the tax code definition of lobbying contacts, as discussed below).

Contractor Registration & Required Reports

As the foregoing discussion demonstrates, the Act includes within the concept of "lobbying" most communications made by federal contractors to covered legislative or executive branch officials relating to the negotiation, award, or administration of a federal contract. There is no exemption for sales, marketing, or business development activity, and the language of the Act suggests that such activity is covered whether it is part of the "negotiation, award, or administration" of a federal contract or not.[69] On the positive side, contract administration activities required by the terms of a federal contract are not "lobbying contacts" because they are "compelled by a Federal contract."[70] However, attempts by a contractor to influence covered officials on matters of policy, the award of a new contract, or the renewal of an existing contract would not be covered by this exception.[71]

■ Who Must Register

An organization must register under the Act if it employs one or more lobbyists and is not otherwise exempt.[72] For this purpose, each corporation or legal entity in an affiliated group of companies is considered a separate organization.[73] No registration is required if an organization's total expenses in connection with lobbying activities are $10,000 or less during the applicable three-month period.[74] (This amount will be adjusted on January 1, 2009, and every fourth year thereafter, according to the Act's adjustment schedule, to reflect changes in the Consumer Price Index.[75]) For purposes of estimating lobbying expenses, an organization must include the costs of both in-house lobbying activities and payments to outside lobbyists.[76] It should be noted, however, that in calculating lobbying expenses for quarterly reports, amounts over $5,000 are to be rounded to the "nearest $10,000."[77]

■ Registration Form

The 2007 amendments to the 1995 Act require the mandatory electronic filing of all documents required by the Act.[78] The only exception to mandatory electronic filing is for the purpose of amending reports in the format previously filed or for compliance with the Americans With Disabilities Act.[79] The form for registration under the Act (Form LD-1 (11/07)) and instructions for filing electronically are available on the website

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for the Office of the Clerk of the U.S. House of Representatives.[80] Although the form is relatively straightforward, a few points of explanation are in order.

(a) *Lobbyists (Line 10).* Line 10 of the form requires the registrant to provide the name and title of each *individual* who has acted or is expected to act as a lobbyist for the "client." (In the case of a company lobbying on its own behalf, the client is the company itself.[81]) In addition, as required by HLOGA, Line 10 directs the registrant to indicate any employee who served as a covered legislative or executive branch official in the *20 years* before the date on which the individual first acted as a lobbyist on behalf of the registrant.[82] If such an employee is identified, the form requires the registrant to identify the legislative or executive branch position or positions in which the employee served. It is important to note that this requirement applies to all registrations having an effective date of January 1, 2008 or later. Registrants do not have to amend their pre-2008 registration information to reflect this additional disclosure requirement in reference to lobbyists listed in those reports.[83]

(b) *Lobbying Issues (Lines 11 and 12).* Line 11 of the registration form directs the registrant, as required by the Act, to identify the *general issue areas* in which the registrant expects to engage in lobbying activities on behalf of the client.[84] The form provides 78 predefined categories of general issue areas to choose from for this purpose. Registrants should bear in mind that the quarterly reporting form requires certain information to be reported for each general issue area in which lobbying activity is conducted. To minimize the burden of completing the quarterly report, therefore, registrants should try to avoid identifying multiple general issue areas if one general issue area can fairly be said to cover all of the registrant's lobbying activities.

A reasonable approach for contractors to identify the general issue areas for lobbying activities is to identify general issue areas in terms of the business of the contractor—i.e., a computer hardware vendor might identify the computer industry (using the code "CPI") as its general issue area, or a defense contractor might identify defense (using the code "DEF"). Alternatively, a contractor might identify one or more general issue areas in terms of the subject matter addressed by its federal customers—for example, taxation ("TAX") for contractors serving the Internal Revenue Service, postal ("POS") for contractors serving the Postal Service, or defense ("DEF") for Department of Defense contractors. For a contractor marketing to many different federal agencies, however, this approach would result in the identification of a large number of general issue areas and a correspondingly more complicated quarterly report.

Line 12 calls for the identification of *specific issues* (current and anticipated) that have already been addressed or are likely to be addressed in lobbying activities by the registrant, including, for example, specific bills before Congress or specific executive branch actions. Although the form does not say so, the Act states that these specific issue areas need be identified on the registration form only "to the extent practicable."[85]

(c) *Affiliated Organizations (Line 13).* One of the concerns of Congress was that companies would attempt to evade the Act's disclosure requirements by conducting their lobbying efforts through ad hoc lobbying coalitions.[86] For example, if each of four companies were to contribute $25,000 to such an ad hoc coalition, which in turn hired one lobbyist whose activities were supervised by the four coalition members, the coalition would be the registrant and the significant interests and control of the four coalition members would be hidden from public view.

To avoid this result, HLOGA requires registrants to identify any organization, other than the client, that contributes more than $5,000 to the registrant's lobbying activities in the applicable quarterly period *and* actively participates in the planning, supervision, or control of such lobbying activities.[87] Organizations meeting this definition must be listed in Line 13 of the registration form, which refers to them as "affiliated organizations." The implementing guidance indicates that an organization "actively participates" in the planning, supervision, or control of lobbying activities of a

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client or registrant when that organization (or an employee 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.[88] Examples of activities constituting active participation would include participating in decisions about selecting or retaining lobbyists, formulating priorities among legislative issues, developing 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.[89] Organizations, however, that play only a passive role in the lobbying activities of a client (or of the registrant on behalf of the client), are not considered active participants in the planning, supervision, or control of such lobbying activities. [90]

(d) *Foreign Entities (Line 14)*. There are additional disclosure requirements for registrants in which a foreign entity has a defined interest.[91] For purposes of the Act, the term "foreign entity" includes a foreign government or a foreign political party, a person outside the United States other than a U.S. citizen or U.S. corporation, and a foreign partnership, association, corporation, or organization.[92] Under this definition, a contractor incorporated in the United States, even if wholly owned by a foreign corporation, is not a foreign entity.

An organization registering under the Act as an organization lobbying on its own behalf must identify any "foreign entity" that (1) holds at least a 20% equitable ownership in the registrant or an "affiliated organization," (2) directly or indirectly, in whole or in major part, supervises, controls, directs, finances, or subsidizes the activities of the registrant or an affiliated organization, or (3) is an affiliate of the registrant or an affiliated organization and has a direct interest in the outcome of the registrant's lobbying activity.[93] The identification required by the Act with respect to a foreign entity consists of the name, address, and principal place of business of the foreign entity; its percentage of ownership (if any) of the registrant; and any contribution in excess of $5,000 that it is expected to make to the registrant's lobbying activities.[94]

The implementing guidance defines "in major part" for this purpose to mean "in 'substantial' part" and says that "20 percent control or supervision should be considered 'substantial'."[95] This 20% guideline appears to contemplate a situation in which the organization in question is one of a number of entities that together control or supervise the contractor's lobbying activities. If there were only four such entities in the group, each might be said to exercise 25% control or supervision, and the 20% guideline thus would be met. If, however, there were 10 entities, each might be said to exercise only 10% control or supervision, and the 20% guideline would not be met.

■ Quarterly Reports

Each registrant under the Act must file quarterly electronic reports with the Secretary of the Senate and the Clerk of the House of Representatives describing its lobbying activities during the three-month filing period and estimating the total expenses incurred in lobbying activities during the period in the case of a registrant lobbying on its own behalf or total income from the client related to lobbying activities during the period in the case of a lobbying firm.[96] The quarterly reports are due 20 days following the end of each quarter—April 20th, July 20th, October 20th, and January 20th—or the next business day should the filing date occur on a weekend or holiday.[97] The coverage periods are January 1 through March 31, April 1 through June 30, July 1 through September 30, and October 1 through December 31 for the April Quarterly (Q1), July Quarterly (Q2), October Quarterly (Q3), and January Quarterly (Q4) reports respectively.[98] The quarterly reporting form (Form LD-2 (11/07)) is available on the website of the Office of the Clerk of the U.S. House of Representatives.[99]

The required content for quarterly reports is more detailed than for registration forms. Quarterly reports must include basic information identifying the registrant and any updates to the information provided in the initial registration.[100] In addition, for each *general* issue area in which the registrant engaged in lobbying activities, the report must contain (a) a list of

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the specific issues addressed, including where practicable a list of bill numbers or references to executive branch actions, (b) a statement of the Houses of Congress and federal agencies contacted, (c) a list of the employees of the registrant who acted as lobbyists with respect to the general issue, and (d) a description of the interest, if any, of any foreign entity identified in the registrant's registration statement.[101] Furthermore, the report must contain a good faith estimate of the total expenses incurred by the registrant in lobbying activities during the filing period.[102]

In addition to the required information noted above, HLOGA imposed an additional reporting requirement. For each client, the report must indicate whether the client is a state or local government or a department, agency, special purpose district, or other instrumentality controlled by one or more state or local governments.[103] This is accomplished by simply checking the box on Line 7 of the report form indicating such.

■ Estimating Lobbying Expenses

For purposes of reporting a good faith estimate of a registrant's total lobbying expenditures where the registrant, such as a Government contractor, is lobbying on its own behalf, all time spent in lobbying activities must be counted—even the time of employees who are not lobbyists.[104]

In some cases, whether the costs of a particular activity must be included in the good faith estimate depends on the *intent* with which the activity is carried out. If the intent of the activity is to support ongoing and future lobbying, it would fall within the definition of "lobbying activities."[105] For example, assume that a contractor spends time preparing for and giving testimony to a Senate committee and later distributes copies of the testimony to various members of Congress to influence their positions on pending legislation. Although the Act provides that presenting testimony to a committee of Congress is not considered a "lobbying contact,"[106] the time that the contractor spends preparing for and giving such testimony could be considered lobbying *activity* if it was intended to be part of an overall lobbying campaign. Conversely, if no lobbying campaign were contemplated at the time the testimony was given, and the contractor decided only later to distribute copies of the testimony, then the activity of distribution would be lobbying activity but preparing and giving the testimony would not be.

Similarly, the House Report accompanying the original Act states that the definition of "lobbying activities" excludes "the preparation of non-partisan analysis, study, or research and examinations of broad social, economic, and other similar communications that are not specifically directed to covered legislative or executive branch officials."[107] For example, a nonprofit environmental organization's preparation of a technical report on an environmental hazard, the primary purpose of which is to educate the general public, would not be considered lobbying activity even if the report was prepared with the expectation that it would be sent to members of Congress as well.

In addition, the Act's implementing guidance provides some explanation of the circumstances in which internal monitoring of legislation, regulations, or other federal actions may constitute lobbying activities.[108] As in the case of other activities, the timing of the work performed, as well as the status of the issue, is also pivotal. Generally, if work such as reporting or monitoring occurs at a time when future lobbying contacts are contemplated, such reporting and monitoring should be considered as a part of planning or coordinating of lobbying contacts and therefore included as "lobbying activity." If on the other hand, a person reports back to the relevant committee or officer regarding the status of a completed effort, that activity would probably not be included as lobbying activity if reports are not being used to prepare a lobbying strategy the next time the issue is considered.[109]

There is no single prescribed *method* for estimating the expenses associated with lobbying activities. The Act's legislative history indicates that an organization will be deemed to have made a "good faith estimate" of its lobbying expenses if it (a) requires its professional employees to make regular periodic estimates of the percentage of

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time they spend on lobbying activities, (b) uses that percentage to estimate salary costs of lobbying, (c) applies appropriate overhead rates to cover costs such as rent, utilities, and support staff, and (d) adds other direct costs of lobbying to arrive at a grand total.[110]

The Act also provides an alternative method of estimating lobbying expenses for certain entities. It allows entities that are required to report and do report lobbying expenditures under § 6033(b)(8) of the Internal Revenue Code to use IRC definitions for purposes of determining whether registration is required and estimating total expenditures for inclusion in lobbying reports.[111] Charitable organizations, as described in IRC § 501(c)(3),[112] must report to the Internal Revenue Service their lobbying expenditures in conformity with IRC § 6033(b)(8). They may treat as lobbying expenses under the Act the amounts they treat for "influencing legislation" under the IRC.[113]

The Act also allows entities that are subject to IRC § 162(e) to use IRC definitions for purposes of determining whether registration is required and estimating total expenditures for inclusion in lobbying reports.[114] The eligible entities include for-profit organizations (other than lobbying firms) and tax-exempt organizations such as trade associations that calculate their lobbying expenses for IRC purposes with reference to IRC § 162(e) rules. The guidance implementing this provision indicates that this reporting option is also available to a small number of trade association registrants not required by the IRC to report nondeductible lobbying expenses to their members (i.e., those whose members are tax-exempt).[115]

If an eligible organization elects to report under these provisions, it must do so consistently for all reports covering a calendar year.[116] The electing organization also must report all expenses that fall within the applicable IRC definition. The total that is ultimately reportable to the IRS is the figure that would be used for Line 13 of the quarterly reporting form (LD-2), which would require any organization to report if the amount of lobbying expenses were less than $5,000, or $5,000 or more.[117] If the expense amount is $5,000 or more, it should be rounded to the nearest $10,000.[118] Line 14 of the reporting form (LD-2) requires the electing organization to mark as applicable, either the "Method B" box (IRC § 6033(b)(8)) or the "Method C" box (IRC § 162(e)).[119] The guidance states that the Secretary of the Senate and the Clerk of the House are aware that the IRC and the Act "are not harmonized in terms of expense reporting" and thus advises registrants that eliminating grass-roots and state and local lobbying expenses from the expenses under the Act, thereby altering the IRS reportable total, is not permitted.[120]

Semiannual Reports

HLOGA imposed an additional reporting requirement for all active registrants and individuals who have been listed as active lobbyists by their employer-registrant.[121] The Act now requires all such individuals to file a semiannual report with the Secretary of the Senate and the Clerk of the House disclosing certain contributions and certifying that the filer has read and understands the gift and travel provisions in the rules of both the House and the Senate, and that the filer has not knowingly violated the aforementioned rules.[122] These reports are due for each semiannual period by July 30 and January 30 (or on the next business day should either day occur on a weekend or holiday).[123]

Specifically, with respect to the contributions that must be disclosed, the report must include the name of the person or organization filing the report;[124] in the case of an employee, his or her employer;[125] the names of all political committees established or controlled by the person or organization filing the report;[126] and the name of each federal candidate or officeholder, leadership PAC, political party committee, presidential library foundation, and presidential inaugural committee to whom contributions equal to or exceeding $200 were made by the person or organization filing the report or any political committee established or controlled by such person or organization.[127] In addition, the report must include the date, recipient, and amount of funds contributed or distributed during the semiannual period by the person or organization or by a political committee established or controlled by the person

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or organization (1) to pay the cost of an event to honor or recognize a covered official, (2) to an entity that is named for a covered official, (3) to an entity "established, financed, maintained, or controlled" by a covered official, or (4) to pay the costs of a meeting, retreat, conference, or other similar event held by, or in the name of, a covered official.[128]

Coalitions & Associations

As with other entities, a coalition or association is not required to register or report unless it *employs* one or more "lobbyists."[129] If a coalition or association conducts its lobbying activities through an outside lobbyist, the coalition or association is the *client* of the lobbyist, not a lobbyist itself.[130] Outside lobbyists must register and report their activity on behalf of a coalition or association client, but the coalition or association need not do so. If a coalition conducts lobbying activities through individuals who are employees of the coalition's members, once again the coalition is not required to register or report because those individuals are not *its* employees.[131] A coalition member contributing the time of an employee to the coalition's lobbying activities would be required to consider that time as time spent lobbying on the member's behalf, however. As such, it would count toward the "20% test" that is used to determine whether the employee is a "lobbyist,"[132] and the cost of the activity would be included as a cost of the member's lobbying activities for quarterly reporting purposes.[133]

In response to criticism that entities were conducting anonymous lobbying activities through coalitions and trade associations,[134] HLOGA added new reporting requirements for coalitions and associations. Specifically, if a coalition or association employs an outside lobbyist, that lobbyist must disclose in its registration not only the identity of its "client" (the coalition or association),[135] but also the identity of any affiliated organization (such as a member of the coalition or association) that (a) contributed more than $5,000 toward the lobbyist's activities in the relevant quarterly period and (b) actively participated in the planning, supervision, or control of such activities (as defined above).[136] This disclosure may be made either by listing the name of each such affiliated entity individually or by listing all such entities on the publicly accessible Internet website of the coalition or association and disclosing the specific website address on the report form.[137]

This provision, however, has not been without controversy. In particular, the National Association of Manufacturers raised a First Amendment challenge to the new disclosure requirement added by HLOGA § 207 in the U.S. District Court for the District of Columbia.[138] After the parties agreed to have the court treat NAM's motion for a preliminary injunction as a request for a decision on the merits, the district court upheld the challenged disclosure provisions under strict scrutiny review.[139] NAM appealed, seeking a stay and an injunction pending the appeal, but the district court rejected its argument,[140] concluding again that the law "is narrowly tailored to serve compelling government interests, and is neither vague on its face nor as applied to the NAM."[141] A panel of the U.S. Court of Appeals for the District of Columbia Circuit rejected NAM's subsequent emergency motion for an injunction and stay pending an appeal,[142] and Chief Justice John Roberts declined to intervene,[143] leaving NAM with no additional remedies before the disclosure deadline.

Other Disclosure Requirements

■ Byrd Amendment

Although the Byrd Amendment is not the focus of this Briefing Paper, it also mandates reporting of lobbying activities that are relevant to this discussion of the Lobbying Disclosure Act as recently amended by HLOGA. Notably, the Byrd Amendment prohibits the recipient of a federal contract, grant, loan, or cooperative agreement from using "appropriated funds" to influence or attempt to influence any officer or employee of any federal agency or Congress in connection with the award, continuation, renewal, amendment, or modification of a federal contract, grant, loan, or cooperative

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agreement.[144] In a 2007 case involving allegations that a grantee used federal funds for lobbying activities, the U.S. District Court for the Northern District of Illinois held that the Byrd Amendment's requirements are not unconstitutionally broad or vague.[145]

Under the Byrd Amendment, as amended by the 1995 Act, contractors and other awardees must file a declaration in connection with an individual award containing (1) the name of any registrant under the Act who has made lobbying contacts on behalf of the contractor or other awardee with respect to the relevant federal contract, grant, loan, or cooperative agreement, and (2) a certification that the person making the declaration has not made, and will not make, any prohibited payment[146] The disclosure requirements under the Byrd Amendment were implemented in guidance issued by the OMB.[147] Specifically, OMB's guidance amended Standard Form (SF) LLL, "Disclosure of Lobbying Activities," to incorporate the term "registrant" and to remove requests for detailed information regarding lobbying payments made by the contractor or other awardee as was required before passage of the Act.[148]

The disclosure requirements for individual awards apply regardless of whether the contractor must register under the Lobbying Disclosure Act. If the only lobbying contacts made on behalf of a contractor in connection with the award have been made by its own employees and the contractor is a registrant under the Act, it would appear that the contractor need disclose only its own name in the declaration filed at the time of award. Where the contacts have been made by an outside lobbying firm that must register under the Act, the name of that firm would have to be disclosed.[149]

In September 2006, the FAR Council issued a proposed rule entitled "Changes to Lobbying Restrictions" that proposed to revise sections of the Federal Acquisition Regulation implementing the Byrd Amendment to make them consistent with the Lobbying Disclosure Act.[150] The Council issued its final rule on August 17, 2007, clarifying the FAR language and formally incorporating existing OMB guidance into the regulations.[151] Significantly, the final rule made clear that the term "lobbying contact" was to have the same meaning as that contained in the Lobbying Disclosure Act,[152] thus providing further guidance to federal contractors and other awardees on what behavior is covered under the Act. Moreover, the rule formalized in the regulations the new simplified disclosure requirements (discussed above), which had already been incorporated into OMB Standard Form (SF) LLL, "Disclosure of Lobbying Activities."[153] Also, for purposes of the Byrd Amendment's prohibition on the use of appropriated funds for lobbying activities, the rule made clear that the term "appropriated funds" does not include profit or fee from a federal contract, grant, or cooperative agreement.[154] Finally, the rule removed the Byrd Amendment from the list of laws inapplicable to subcontracts for the procurement of commercial items, making clear that the term "recipient" includes "the contractor *and all subcontractors.*"[155]

■ Identification Of Interests

Any person or entity who makes an oral lobbying contact on behalf of a contractor must—*if asked* by the covered official with whom the contact is made—(a) state whether the person or entity is registered, (b) identify the client on whose behalf the contact is being made, and (c) state whether the client is a foreign entity.[156] Where the lobbying contact is made in writing, the written submission must—if the client on whose behalf the contact was made is a *foreign entity*—(1) identify the client, (2) state that the client is a foreign entity, and (3) state whether the person making the submission is registered on behalf of that client.[157] In addition, the written submission must identify any other foreign entity identified in the applicable registration statement that has a direct interest in the outcome of the lobbying activity.[158]

Penalties & Enforcement

The Lobby Disclosure Act, as amended by HLOGA, provides for a civil fine of up to $200,000 (as opposed to the $50,000 fine under the original Act) for (a) knowing failure to

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correct a defective filing within 60 days after notice of such defect by the Secretary of the Senate or the Clerk of the House of Representatives or (b) knowing failure to comply with any other provision of the Act.[159] The amount of the civil fine will depend on "the extent and gravity of the violation."[160] In addition, anyone who knowingly and corruptly fails to comply with any provision of the Act may be imprisoned for up to five years or fined under title 18 of the U.S. Code, or both.[161]

The Secretary of the Senate or the Clerk of the House must notify the U.S. Attorney for the District of Columbia if an organization does not comply with the Act after receiving the prescribed written notice and 60-day opportunity to respond.[162] Although the notice and cure provisions appear to apply only to defective filings as opposed to failures to register or report, in practice it is expected that organizations subject to the Act that fail to register will be given an opportunity to do so before the initiation of enforcement proceedings.

GUIDELINES

These *Guidelines* are intended to assist Government contractors in complying with the Lobbying Disclosure Act. They are not, however, a substitute for professional representation in any specific situation.

1. Determine which, if any, of your *employees* would be considered "*lobbyists*" under the Act. For smaller organizations, this determination can often be made centrally, based on existing knowledge of the scope and extent of individual employees' lobbying activities. If your organization is large, you may need to conduct some form of limited survey to determine which employees are engaged in *lobbying contacts* and which of them spend *20% or more* of their time in *lobbying activities.* These determinations must be made and renewed on a *quarterly basis.*

2. If your organization has at least one employee who is a "lobbyist" under the Act and has total lobbying expenses in any quarterly period exceeding $10,000 ($2,500 income in the case of a lobbying firm), then your organization must file a lobbying registration (Form LD-1).

3. Remember that for each employee identified as a lobbyist, you must also determine whether the employee served as a *covered legislative* or *executive branch employee* during the 20 years before the date on which the individual first acted as a lobbyist on behalf of the company. Such information must be disclosed. (Lobbyists already reported on registrations effective before January 1, 2008 need only report any covered official position held during the previous two years.)

4. If you are required to register under the Act, you must establish procedures for making a "*good faith estimate*" of your *total lobbying expenses* for each quarterly period. For-profit contractors should first determine whether it would be to their advantage to report the lobbying expense figure that is calculated for *tax purposes* under IRC § 162 (e).

5. If you elect not to use the IRC § 162 (e) lobbying expense figure, you must make an *independent estimate* of lobbying expenses. This estimate must include expenditures associated with activities of the lobbyist and also anyone providing support to the lobbyist ("efforts in support of lobbying activities"). Where practicable, this estimate should be based on estimates by professional staff of the *percentage of time* they spend on lobbying activities, combined with information on *overhead* and *direct expenditures* on *outside* and *in-house lobbying.* If it is known that lobbying activity is concentrated in a *particular office* or *group of employees,* the estimate of total lobbying expenses may be based on the expenses associated with that office or group.

6. Direct your employees to include in their estimate of lobbying activities any time spent on your behalf in the lobbying efforts of *associations or coalitions.*

7. When filling out a registration form, select the *minimum* number of *general issue areas* that, taken together, fairly and fully describe your organization's lobbying activities. General issue areas may be identified in terms of your *areas of interest* (e.g., aerospace, defense, computer industry, or telecommunications), the subjects

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covered by your *Government customers* (e.g., taxation, postal, labor, transportation, immigration, or defense), or the *Government process* involved (e.g., budget/appropriations).

8. If your organization is *owned by* or *affiliated with foreign entities,* you should closely study the special rules applicable to disclosure of foreign interests. In making *written* lobbying contacts, you must identify any such foreign entity that has a *direct interest* in your lobbying activities. Also note the specific rules with respect to membership in an association or coalition as they apply to your organization.

9. Twice a year, your organization must file a Form LD-203, disclosing certain contributions to covered officials and political committees and certifying understanding and compliance with congressional gift and travel rules. You should also ensure that all employees who are "lobbyists" file this form.

10. Be prepared to disclose *at the time of contract award* the name of *any registrant* under the Act who has made lobbying contacts *on your behalf* in connection with the contract. This requirement applies even to contractors that are *not* required to register under the Act.

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141/ 549 F. Supp. 2d 33, 38.

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143/ Nat'l Ass'n of Mfrs. v. Taylor, No. 08-5085 (D.C. Cir. Apr. 21, 2008), application for stay pending appeal denied (U.S. Apr. 21, 2008) (App. No. 07A848).

144/ 31 U.S.C.A. § 1352(a). See generally Goddard, "Business Ethics in Government Contracting—Part I," Briefing Papers No. 03-6 (May 2003).

145/ United States v. National Training & Info. Ctr., Inc., 532 F. Supp. 2d 946 (N.D. Ill. 2007).

146/ 31 U.S.C.A. § 1352(b)(2) (as amended by Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, § 10, 109 Stat. 691, 700 (Dec. 19, 1995)).

147/ 61 Fed. Reg. 1412 (Jan. 19, 1996).

148/ 61 Fed. Reg. at 1413.

149/ 31 U.S.C.A. § 1352(b)(2)(A).

150/ 71 Fed. Reg. 54255 (Sept. 14, 2006).

151/ 72 Fed. Reg. 46327 (Aug. 17, 2007) (amending FAR pts. 3, 12, 52).

152/ FAR 52.203-11(a).

153/ FAR 3.802(b), 52.203-11, 52.203-12.

154/ FAR 3.802(a)(1), 52.203-12(b)(1).

155/ FAR 3.801, 12.504, 52.203-12(a) (emphasis added).

156/ 2 U.S.C.A. § 1609(a).

157/ 2 U.S.C.A. § 1609(b)(1).

158/ 2 U.S.C.A. § 1609(b)(2); see 2 U.S.C.A. § 1603(b)(4).

159/ 2 U.S.C.A. § 1606(a).

160/ 2 U.S.C.A. § 1606(a).

161/ 2 U.S.C.A. § 1606(b).

162/ 2 U.S.C.A. § 1605(a)(7)–(8).

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