A Lobbyist By Any Other Name

Author: ELIZABETH J. KINGSLEY

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Since 1995, exempt organizations have had to contend not only with IRS limitations and reporting obligations pertaining to lobbying, but also with the federal Lobbying Disclosure Act (LDA)\(^1\). For many years, however, the LDA required only registration and reporting of lobbying expenditures and issue areas. It did not impose any substantive limitations or additional requirements on the organization or individual lobbyists. While covered nonprofits had to track and report expenditures on a biannual basis, there was no great incentive to avoid registering where ambiguity existed. Absent unusual circumstances, the "safe" advice could be to err on the side of caution and register. LDA considerations usually were not a driving factor in how nonprofits structured their advocacy activities within a set of related corporations (which usually are exempt under Section 501(c)(3) and either Section 501(c)(4) or Section 501(c)(6)).

That all changed with the enactment of the Honest Leadership and Open Government Act of 2007 (HLOGA)\(^2\) and related changes to the House and Senate ethics rules\(^3\). Members of Congress and other congressional staff are now generally prohibited from accepting gifts from registered lobbyists, or from organizations that employ or retain them\(^4\), and lobbyists have an affirmative obligation not to provide any such gift knowing that it is prohibited under the House or Senate gift and travel rules\(^5\). Gifts can include paid travel or attendance at an event, so registering under the LDA can now have substantive implications for an organization's operations.

Understanding the requirements of the LDA, particularly the elements that trigger the initial obligation to register, has become more important than ever. Nonprofits need to think through the various LDA definitions, how they intersect with the Code definitions of lobbying, and what organizational structure will best allow them to achieve their advocacy goals while facilitating compliance.

The Lobbying Disclosure Act—Registration

The LDA requires individuals and organizations who direct lobbying efforts at the federal legislative or executive branches to disclose those efforts by registering with the Secretary of the Senate and the Clerk of the House and filing quarterly reports of their lobbying activities. The LDA creates different rules for "lobbying firms" (including self-employed lobbyists) who lobby on behalf of others (clients) and organizations that employ in-house "lobbyists" to lobby on their own behalf\(^6\). Each must register if they have retained one or more lobbyists and meet specified thresholds of income from or expenditures for lobbying during the calendar quarter ($3,000 and

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\(^1\) 2 U.S.C. section 1601 et seq.

\(^2\) P.L. 110-81, 9/14/07.

\(^3\) HLOGA amended the LDA and also enacted changes to the Senate ethics rules. The House amended its own ethics rules by resolution (H. Res. 6, 1/5/07) rather than statutory enactment.

\(^4\) HLOGA also imposes additional reporting requirements on lobbyists and their employers, discussed in more detail below.

\(^5\) 2 U.S.C. section 1613(a).

$11,500, respectively\(^7\). Lobbying firms must register separately for each client for which they meet the income or expenditure threshold.

A "lobbyist" is a person employed or retained by a client for financial or other compensation for services that include more than one lobbying contact and whose lobbying activities constitute at least 20\% of her or his total time working on behalf of that client during any reporting period. Only self-employed lobbyists register on their own behalf. Those who work in-house or for a lobbying firm are included on their employer's registration. Once registered, an individual or entity must remain registered unless they do not anticipate lobbying again in the foreseeable future—generally the current and succeeding reporting period\(^8\).

**The Lobbying Disclosure Act—Definitions**

The LDA's definitions of lobbying contacts and lobbying activities differ from every definition of lobbying and lobbying expenditures applicable under the Code, whether the "no substantial part" test of Section 501(c)(3), the detailed regulations of Sections 501(h) and 4911, or the business expense disallowance of Section 162(e). Perhaps this is not surprising, as each statute furthers a different goal. The stated intent of the LDA is to provide for "effective public disclosure of the identity and extent of the efforts of paid lobbyists to influence Federal officials in the conduct of Government actions" in order to increase public confidence in the integrity of the government and to promote responsible representative government\(^9\). By contrast, the Code's definitions are employed to ensure that legislative advocacy in general is not subsidized with tax-deductible funds.

As a result, the LDA's focus is both broader and narrower than the Code's. For LDA purposes, "lobbying" includes, not only legislative advocacy, but attempts to influence executive branch action as well. As a federal disclosure statute, however, the LDA excludes state and local lobbying entirely\(^10\), and also only reaches contacts with relatively senior government officials. The LDA also concerns itself with direct contacts with governmental decision-makers and, unlike the Code, does not generally encompass grass roots advocacy aimed at the public.

The LDA begins with defining a lobbying contact as any oral or written communication to a covered official made on behalf of a client with regard to:

- The formulation, modification, or adoption of federal legislation (including legislative proposals).
- The formulation, modification, or adoption of a federal rule, regulation, executive order, or any other program, policy, or position of the U.S. government.
- The administration or execution of a federal program or policy (including the negotiation, award, or administration of a federal contract, grant, loan, permit, or license).

Lobbying contacts do not include:

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\(^7\) These amounts are set by HLOGA at $2,500 and $10,000, but are announced every four years for inflation since the enactment of the original LDA in 1995. The adjusted figures effective for 2009 were adjusted on 2/3/09. Senate Office of Public Records and House Legislative Resource Center, *Lobbying Disclosure Act Guidance* (Revised 2/3/09, hereinafter "Guidance"), page 2, available at http://www.senate.gov/legislative/resources/pdf/S1guidance.pdf. 2 U.S.C. section 1601.

\(^8\) Guidance, page 25.


\(^10\) Many states require registration and disclosure of lobbying on state or local matters. The nature and scope of these regulations vary widely from state to state.
A speech, article, publication, or other material that is made available to the public.  
A request for a meeting to determine the status of an action or other similar administrative request, if the request does not include an attempt to influence a covered official.  
Testimony before a committee, subcommittee, or task force of Congress.  
Information provided in writing in response to an oral or written request by a covered official for information.  
Communications compelled by subpoena or other law or by Congress or by a federal agency.  
Communications in response to notices in the Federal Register or similar publication soliciting communications.  
Communications made in the course of a public proceeding.

Covered officials are:

- Members of Congress and their staffs, congressional committees or caucuses, and certain other congressional staff.  
- The President and Vice President and their staffs, officials serving in Executive Level I through V positions (generally political appointees serving in jobs at the assistant secretary or deputy director level or above), military officers with a rank of brigadier general or rear admiral or above, and other federal employees serving in a "confidential, policy-determining, policy-making, or policy-advocating character." This latter category includes all so-called "Schedule C" employees.

Lobbying activities, in turn, are defined as any lobbying contact and any efforts in support of such a contact, including:

- Planning and preparation activities.  
- Research and other background work that is intended, at the time of its performance, for use in contacts.  
- Coordination with the lobbying activities of others.

For an organization with in-house lobbyists, registration is triggered by having a staff person who makes more than one "lobbying contact" if that person (1) spends at least 20% of her or his time for the organization on lobbying activities, and (2) the organization spends at least the threshold amount on such activities during the quarter. This spending must measure costs of or incurred by the lobbyist, costs of lobbying by other staff who do not reach the 20% of time threshold, and costs of any other staff supporting lobbying activity, whether they make lobbying contacts or not.

**Coordination with the Code**

At this point, readers familiar with the challenges of training nonprofit staff to track and report lobbying time under one set of tax definitions may be moaning and holding their heads at the prospect of asking staff to simultaneously report their time using the different and only partially overlapping LDA definitions.

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11 Note that unlike the dollar threshold amounts, the number of contacts are counted cumulatively, not just in the covered period. This means that a person who makes only one lobbying contact per quarter or even per year may be required to register if the other elements are present.
Fortunately, Congress made some allowance for exempt organizations facing this dilemma. Charities that have elected to use the Section 501(h) expenditure test to report lobbying for federal tax purposes may choose to use the tax-law definitions for most purposes under the LDA. Similarly, taxpayers subject to Section 162(e), regarding nondeductibility of dues used for lobbying purposes, may use those definitions for most LDA purposes.

Specifically, these organizations may use the tax law's definition of lobbying for purposes of:

- Determining total lobbying expenditures for purposes of determining whether they meet the threshold for registration.
- Reporting the organization's quarterly lobbying expenditures, if required to register.
- Determining whether communications with executive branch officials are "lobbying contacts" (which influences both the threshold registration question and the determination of who must be reported as a "lobbyist").

The organization, however, still must use the LDA's definition of lobbying to determine whether communications with the legislative branch are "lobbying contacts." Fortunately, this is only relevant in counting contacts to decide whether registration is required, and reporting such contacts in the quarterly report according to which chamber of Congress was lobbied, not for tracking and reporting expenditures.

There is a strategic dimension to the choice of definitions to apply for organizations that have the option. By carefully selecting the right definition, an organization may be able to fall short of the dollar expenditure threshold, or may find that none of its staff meet the 20% of time test. For instance, a charity that engages in a substantial amount of grassroots or state-level lobbying may be able to avoid LDA registration by choosing to apply the LDA, rather than the Section 501(h) definition. In contrast, the LDA definition, unlike the 501(h) definition, includes efforts to influence agency rulemaking and other administrative decisions if such efforts involve relatively high-level executive branch officials. Thus, a charity that engages primarily in such administrative advocacy might wish to use the 501(h) definition. In addition, the exceptions and exemptions from the definition of lobbying also differ in ways that can be significant. For example, the LDA definition offers broader exemptions than the 501(h) definition for legislative testimony and information provided at the request of a legislator.

If an organization required to register under the LDA uses the Code definition, it must include all such expenditures when reporting its total lobbying expenditures on the quarterly LDA report and may not back out state and local or grassroots lobbying. However, when describing on that report the issues and government bodies lobbied, the charity should use the LDA definition, and thus exclude state, local, and grassroots efforts.

**Additional reporting**

Although only the organization that employs a lobbyist is responsible for registering under the LDA and filing quarterly reports of its lobbying activities, individual registered lobbyists as well as their employers must file additional semi-annual reports as of 1/1/08. Organizations registered under the LDA would do well to ensure that their listed lobbyists are up to date; in the initial filing period under this new requirement, many organizations discovered that they had failed to de-list employees who had long since left staff or were, in some cases, no longer alive. Also, as a practical consideration, these reports must be filed electronically, and it can take a few days to get set up within the system. Therefore, it is important to attend to the logistics of filing well in advance of the due date. User IDs and passwords can be obtained by completing a form online on the Public Disclosure page of the Senate's Web site: www.disclosure.senate.gov.
The semi-annual report, Form LD-203, is due no later than July 30th and January 30th each year for the six-month periods beginning January 1st and July 1st, respectively. In addition to identifying information about the filer and their employer if the filer is an individual, the LD-203 requires disclosure of all federal political committees established or controlled by the filer, and details of certain contributions made by the filer or any such political committee. These include amounts of $200 or more contributed to any federal candidate or officeholder, leadership PAC, or political party committee; funds paid for an event to honor or recognize a covered legislative or executive branch official; payments to an entity or person named for a covered legislative branch official, or to an entity established, maintained, or controlled by a covered official or designated by such official; payments for a meeting, retreat, conference, or other similar event held by, or in the name of one or more covered legislative branch or covered executive branch officials; and payments of $200 or more to a Presidential library foundation or Presidential inaugural committee.

In addition to the specific required disclosures, each filer must certify that the person (1) has read and is familiar with the gift and travel rules of the House and Senate, and (2) has not provided, requested, or directed a gift, including travel, to a Member of Congress or an officer or employee of either the House or Senate with knowledge that receipt of the gift would violate the gift and travel rules. Because of the need to make this certification, every registered organization and lobbyist must file Form LD-203 twice a year regardless of whether the person has made any disclosable contributions.

Affirmative prohibitions—Gifts

Prior to passage of HLOGA, members and employees of Congress were prohibited from accepting gifts, including gifts of travel, in violation of the rules of the House and Senate, but there were no penalties imposed on the individuals or organizations that paid for the prohibited gifts or travel. This has now changed.

The LDA currently prohibits registered lobbyists and the organizations that employ them from giving gifts to or paying the travel expenses of any covered legislative branch official if the lobbyist or organization has knowledge that the gift or travel may not be accepted by that official under the rules of the House or Senate, as the case may be. Because registered organizations and lobbyists are required to certify twice a year that they are familiar with these rules, pleading ignorance of them is not an option. Violations are subject to civil and criminal penalties.

Registered lobbyists and agents of a foreign principal have long been prohibited from giving gifts to any Member or employee of Congress. Now, however, organizations that employ or retain these people are also banned from making such gifts. Both House and Senate rules generally allow congressional employees to accept gifts valued at less than $50 per item and less than $100 in total from a single source in a calendar year, but members and staff may not accept a gift of any amount from a registered lobbyist or from an organization that retains or employs registered lobbyists. Thus, organizations that employ in-house lobbyists, as well as those that retain lobbying firms required to register under the LDA on behalf of the organizations, are covered by this ban.

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12 As with the quarterly disclosure reports, if the reporting deadline falls on a weekend or federal holiday, the report is due no later than the next business day.
14 The gift and travel bans apply equally to "registered lobbyists" (those persons identified as lobbyists on an organization’s LDA registration form or quarterly disclosure reports) and "agents of a foreign principal" (persons required to register and report under the Foreign Agents Registration Act).
Despite the extension of the gift ban to employers of registered lobbyists, all of the exceptions to the former lobbyist-only gift ban continue to apply, even if the gift is from an entity that retains or employs registered lobbyists. This means organizations that retain or employ registered lobbyists may continue many of the activities they conducted before the rules changed, such as holding Capitol Hill briefings at which light snacks and beverages are offered, inviting elected officials to attend a fundraising or campaign event sponsored by a political organization, or having members of Congress attend charity events sponsored by Section 501(c)(3) organizations.

In addition to having to comply with this general gift ban, registered lobbyists are subject to even more restrictions than their organizational employers. For instance, members and employees of Congress may not accept personal hospitality from a lobbyist unless the individual is a bona fide personal friend; a registered lobbyist may not make a charitable contribution on the basis of a designation of a congressional employee, other than a charitable contribution that is given in lieu of an honorarium to such person; and a registered lobbyist may not provide anything of value to an entity that is maintained or controlled by a congressional employee.

**Affirmative prohibitions—Travel**

Prior to the recent changes to the House and Senate gift and travel rules, organizations employing registered lobbyists were allowed to pay for multi-day domestic and foreign trips taken by members and employees of Congress as long as the travel was connected to the person's official duties. This is no longer the case for many such entities. In general, organizations that employ or retain registered lobbyists are now prohibited from paying the travel expenses of any member, officer, or employee of Congress.

Some limited exceptions to this general rule apply. They include travel for a one-day event, travel sponsored by a Section 501(c)(3) organization (Senate only), and travel sponsored by an institution of higher learning (House only).

An organization sponsoring a conference, forum, or other event hosted primarily for people other than congressional invitees may pay the reasonable and necessary travel expenses of a member or employee of Congress to attend a one-day event (or a single day of the event if it takes place over multiple days), as long as the member or employee's participation is sufficiently related to the performance of his or her official duties. Reasonable travel expenses may include the cost of a single night's lodging and meals, and may include a second night's lodging and meals when it is practically required in order to facilitate full participation in the event.

In addition to the general one-day event exception, organizations exempt under Section 501(c)(3) may continue to sponsor officially connected travel for members and employees of the Senate, regardless of whether they retain or employ registered lobbyists. These trips may last up to three days if they are within the United States and seven days if they consist of foreign destinations (all exclusive of travel time). The House of Representatives has a similar exception limited to accredited, degree-granting post-secondary institutions regardless of whether they retain or employ registered lobbyists.

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16 House Rule 25, clause 5(e)(1)-(4); House Ethics Manual pages 71-72.
17 Registered lobbyists were themselves prohibited from paying for congressional travel, and that has not changed.
Even under these exceptions, however, registered lobbyists are prohibited from involvement in planning the travel or accompanying the congressional employee while traveling. For the one-day event exception, lobbyists may not accompany the person on any segment of a trip. This has been interpreted to mean that a lobbyist may not travel with a member or employee (e.g., in a car or on a plane), but may be present at the event itself. No registered lobbyists may be present, however, during any part of a domestic or foreign trip (including at any event or site visit) that is sponsored by a Section 501(c)(3) organization under the Senate-only exception. Moreover, organizations are prohibited from sponsoring congressional travel if the trip is planned, organized, arranged, or requested by a registered lobbyist. This prohibition applies even if the trip is covered by one of the applicable exceptions for organizations that employ lobbyists, such as the one-day event rule.

A de minimis rule allows for lobbyist involvement that is negligible or inconsequential in terms of time and expense. This rule has been interpreted to allow an organization to ask its lobbyist which members might be interested in attending a fact-finding trip the organization was already planning to sponsor, but not to allow an organization's lobbyist to suggest that the organization sponsor a fact-finding trip and invite certain members of Congress to attend. Registered lobbyists and the organizations for which they work must, therefore, very carefully limit the involvement of lobbyists with such trips.

Finally, under the new rules, any congressional travel sponsored by a private organization requires advance approval from the Senate Ethics Committee or the House Committee on Standards of Official Conduct, as appropriate. The member or employee traveling must submit a written invitation from the organization and a completed Private Sponsor Travel Certification Form (the House and Senate each has its own version of this form) to the appropriate committee no later than 30 days before the proposed travel is to begin in order to give the committee enough time to evaluate the proposal. It is up to the sponsoring organization to complete the certification form, which must be signed by an officer of the organization and must state, among other things, that the trip will comply with the limitations and prohibitions of the House or Senate ethics rules.

**Structural considerations**

Because registering as the employer of lobbyists now carries substantive restrictions on other activities, organizations must consider how best to structure their advocacy activities in order to meet policy goals. For instance, take the example of a large Section 501(c)(3) organization that works to eliminate AIDS worldwide. It has actively advocated for legislation that would increase U.S. foreign aid to Africa, and promoted specific uses of U.S. funding as most effective in addressing the AIDS crisis. Accordingly, it has registered under the LDA, listing two of its government relations staff members as registered lobbyists. The organization believes that its mission would be served by taking several key members of the House of Representatives to visit several successful projects in several different African countries that have received funding under the program the organization supports. While it could arrange such travel for a Senator, the organization will not be able to sponsor this trip for Representatives because the organization is not an institution of higher learning and the trip cannot fit into the one-day event exception.

Does the organization have any options? What if it has a related 501(c)(4) and moves all LDA-defined lobbying activities to this sister organization, so the 501(c)(3) is no longer required to register? May a 501(c)(3) that is closely related to a 501(c)(4) that employs registered lobbyists sponsor travel that it could not sponsor if it employed the lobbyists itself? Does the answer change if the 501(c)(4) did not previously exist but was created to house this lobbying activity? What if the 501(c)(3) runs payroll for all employees of both organizations and is reimbursed by the 501(c)(4) for time attributable to work for it? Which organization then is considered the employer of the lobbyists?
Unfortunately, existing sources of authority give little guidance. Neither HLOGA, nor the House and Senate gift and travel rules, nor the LDA guidance provided by the Clerk of the House and Secretary of the Senate address any of questions about related nonprofits and the application of the ethics rules and associated certification (either the LD-203 or the travel pre-approval certification form that must be submitted to House or Senate ethics committees). The ethics committee staffers who are charged with approving travel will provide guidance upon request to members of Congress, but outside groups have no such access. They are thus left to sort out the conundrum for themselves.

Absent other guidance, organizations must look to the language of the statute (HLOGA) and ethics rules, which talk about an entity that "employs or retains" a lobbyist. It is probably fair to assert that merely serving to administer a common payroll does not make one organization the employer of a sister organization's staff. Rather, one should look at the traditional common law indicia of employment—the exercise of direction and control over the employee's work. Of course, for sister organizations with overlapping officers and other staff, this may not be clear-cut. To protect the 501(c)(3) in the example above, the staff structure should be set up to ensure that the lobbyists consistently report to 501(c)(4) personnel, or personnel who split their time and are acting in their 501(c)(4) capacity when supervising lobbyists. Reports on their work should be included in 501(c)(4) board reports; reports to the 501(c)(3) on lobbying on issues of common interest should come from the 501(c)(4) as an ally sharing information.

To the extent possible, the organizations should ensure that all their reporting, communications, and activities are consistent with the position that the 501(c)(4) is the employer of the lobbyists. Thus, one would want to structure the arrangement so that the 501(c)(4) reports payments for their personnel costs as salaries on its 990, and not as a payment to the 501(c)(3) for services of its staff. Staff working only for the 501(c)(4) would not be able to participate in a Section 403(b) plan maintained by the 501(c)(3), and the 501(c)(4) cannot take advantage of the 501(c)(3)'s exemption from the federal unemployment tax.

If the 501(c)(3) funds any of the 501(c)(4)'s lobbying, it will be critical to ensure that the 501(c)(4) retains the day-to-day supervision and direction of the employees who lobby. It is highly advisable—particularly if the 501(c)(4) is funded by its sister 501(c)(3)—to ensure and document that there is a valid business purpose to its creation other than mere avoidance of the House and Senate gift and travel rules.

Finally, when completing the travel pre-approval certification form, the charity should consider the extent to which it would be wise to disclose in full its relationship with the sister 501(c)(4) that employs lobbyists, and explain the basis for its conclusion that it does not retain or employ lobbyists. While it still must check a box averring this legal conclusion and have an employee sign the form—subject to applicable penalties for making false statements to the government—at least by making full disclosure the organization can ensure that the authorities reviewing it have all relevant facts in front of them and protect itself and the participating members against any later accusations that the relationship with its sister 501(c)(4) was hidden in some way. At the very least, this would help rebut any claim of a willful violation. And when planning congressional travel, the 501(c)(3) must be careful to ensure that the 501(c)(4)'s registered lobbyists are not involved in the planning other than as permitted under the de minimis exception. Otherwise, it will be unable to make the necessary certification.

Setting aside Congressional gift and travel concerns, there are a few other LDA-related considerations that may affect how sister organizations establish their relationship with regard to lobbying. For instance, the rule defining a lobbyist based on the time worked for a particular client (20%) means that a single employee, who would not have to register if all of his or her time were charged to one corporation, might cross the threshold if he or she bills only lobbying
to a Section 501(c)(4) or (c)(6) organization. That lobbying might be 10% of their total time, but it could represent nearly 100% of their time for the non-501(c)(3) if time is split. Also, a 501(c)(3) may use its allowable lobbying expenditures by making a grant to a related 501(c)(4) or 501(c)(6). This can simplify recordkeeping for staff, as they know to bill all lobbying to the non-501(c)(3). If, however, the relationship is set up as a contract whereby the 501(c)(3) hires its sister organization to engage in activities on the 501(c)(3)'s behalf, the non-501(c)(3) may become a lobbying firm, and would be subject to a lower dollar threshold for registration than applies to an organization that retains in-house lobbyists to lobby for itself.

Conclusion

Of course, even with the recent changes, it is important not to get so tied up in knots trying to avoid LDA registration that the organization's advocacy goals are undermined. Nonprofits need to be aware of the associated limitations and take them into account, but the primary concern should be the most effective way to carry out the mission. Legal compliance is a key component of that, as is administrative simplicity and programmatic flexibility. The intersection of the LDA, ethics rules, and the Code may require making difficult choices when maximum flexibility and simplicity are inconsistent with compliance.