The Lobbying Manual: A Complete Guide to Federal Law Governing Lawyers and Lobbyists (3d Edition)
(Revised as of March 23, 2008)

Interim Supplement to Chapters 3, 4 and 5

A completely updated, as well as revised and expanded, edition of The Lobbying Manual (LM) will be published in 2009. In the interim, this supplement indicates what changes have been made with regard to the registration, reporting, administrative, and enforcement provisions of the Lobbying Disclosure Act of 1995 (LDA) by Title II of the Honest Leadership and Open Government Act of 2007 (HLOGA), Public Law 110-81 (approved Sept. 14, 2007). The amendments themselves are posted (in a pdf file) on the Internet site for the LM, http://www.abanet.org/abapubs/lobbyingmanual/ , along with a version (prepared specifically for LM users) of the amended LDA showing the changes to the statute (specifying what was eliminated and added) and their respective effective dates. There is also a link to the web page of the Secretary of the Senate that contains an unofficial compilation of the statute as amended in 1998 and 2007.

This supplement integrates the changes made by the 2007 HLOGA with the amended Guide to the Lobbying Disclosure Act, first issued by the Secretary of the Senate and Clerk of the House of Representatives in December 2007 (hereinafter "Amended Guidance") and revised twice thereafter, most recently on January 25, 2008, which is separately contained on the webpage of the LM (linked also to the webpages of the Clerk of the House and the Secretary of the Senate where the Amended Guidance is also found). If and when further guidance is issued prior to the publication of the 4th

Edition of the LM, this interim supplement will be updated to reflect that additional guidance.

Readers should be aware, however, that there may be gaps between the time the Secretary and Clerk issue revisions to the Amended Guidance and the updating of this supplement. They should periodically check the webpage of the Lobbying Manual and the *webpages of the Secretary and Clerk to see if the Amended Guidance has been revised since the most recently posted interim supplement and, if it has been, consult the most recent version of the Amended Guidance to see what changes have been made.*

The following discussion is keyed to those chapter sections (and subsections where appropriate) in the 3rd Edition of the LM whose *primary focus* is the subject matter of the respective amendments. This supplement *does not*, however, cover all the sections of Chapters 3, 4 and 5 that may discuss in passing aspects of the LDA that are now outdated (e.g. many of the examples given are based on monetary thresholds and reporting periods that are no longer applicable).

Reports by registered lobbying firms and self-lobbying organizations previously required by Section 5(a) of the LDA must now be filed on a quarterly, rather than a semiannual, basis. Those reports focus on lobbying activities during the reporting period. However, HLOGA added additional reporting requirements that are not directly tied to lobbying activities (new Subsection 5(d)). Those reports are required on a semiannual basis. Because of the different timing and focus of the Section 5(d) reports, this

supplement and the revised LM, when published, will contain a separate chapter (herein referred to as Chapter 4A) describing the required contents of those new semiannual reports.

Chapter 3 The Lobbying Disclosure Act of 1995: Scope of Coverage

Section 3.3 Definition of "Lobbyist"

Because the HLOGA changes from a semiannual to a quarterly reporting cycle, the 20 percent-of-time threshold necessary to qualify as a "lobbyist" for a particular client is now calculated based on quarterly, not semiannual, periods. This may require the registration of persons who previously escaped application of the LDA.

> **Example:** *During 2007, Organization "A" employed two persons ("C" and "D") who made "lobbying contacts"(see Section 3-5) with various Senators and Representatives. Neither spent more than 15% of his or her time averaged over a semiannual period engaged in such contacts and supporting lobbying activities (see Section 3-6). The work varied in intensity so that during some months the time expended did exceed 20% of their time. Prior to HLOGA, Organization "A" did not have to register because it did not employ any "lobbyist" within the meaning of the LDA. During January, February, and March 2008, Organization "A" expects that "C" will spend more than 20% of his time in lobbying contacts and supporting activities, though during the April-June quarterly period, "C" will be on a leave of absence for a month and his time lobbying will clearly be less than 20% of his work effort. It is not expected that "D" will spend more than 15% of her time during either period in lobbying. Organization "A" must register if it meets the monetary threshold for registration (more than $10,000 in anticipated expenses over a quarterly period) since it employs a lobbyist within the meaning of the LDA.*

Section 3-3.1.1 Contingent Fee Lobbying

The Amended Guidance adds this new example:

> *Lobbying Firm "J" discusses an arrangement to accept stock options worth $4,500 from Client "M" in lieu of payment of a contingency fee. After determining that acceptance of a success fee is not a violation of another statute,*[1] *"J" signs a contract with "M," and registers. Late in the first quarter of the lobbying activities, it appeared "J" achieved the result. "J's" initial quarterly lobbying report disclosed lobbying income of less than $5,000. "M's" stock value increased shortly thereafter to be valued at $6,000, so "J" exercised its options. "J"*

[1] *See* Chapter 20 of the 3rd Edition of the LM for a detailed discussion of contingent fee lobbying.

amended the previously filed quarterly report to reflect income of "$5,000 or more," and rounding the amount to $10,000.

Section 3-4 Definition of "Client"

The Amended Guidance has added this additional discussion with regard to who is the "client" for disclosure purposes:

> *In some cases a registrant is retained as part of a larger lobbying effort that encompasses more than one lobbying firm on behalf of a third party. Generally, the entity that is paying the registrant is listed as the client. The third party, on whose behalf the client has expanded its activities and who is paying the intermediary, is listed on Line 13 [of the LD-1 form] as an affiliate.*
>
> > *Example: Client "P" retains lobbying firm "F" for general lobbying purposes, but has a new interest in obtaining an outcome in an area new to "P." "F" realizes that a boutique lobbying firm "L" has an excellent track record for obtaining the type of outcome "P" is seeking, and talks to "P" about subcontracting. "P" agrees with "F's" strategy. "F" contacts "L" to retain the latter to do the project. "F" is responsible for paying "L." Within 45 days, "L" registers disclosing "F" as the client, and "P" as the affiliate.*

Section 3-7 Monetary Thresholds for Registration

In moving to a quarterly reporting cycle, Congress reduced by one-half the monetary thresholds for registration (which apply regardless of whether or not the Section 15 option to use IRC definitions for certain purposes is invoked). Those thresholds had increased several times since 1995 based on the Consumer Price Index. HLOGA, however, has effectively reduced the applicable thresholds since Congress took the original thresholds of $5,000 in income (for lobbying firms) and $20,000 in expenses (for self-lobbying organizations)—*not the adjusted amounts in effect during 2007 and*

prior years--as the baselines for application of the 50% reduction. The revised thresholds are, therefore, now $2,500 in income over a three month period for lobbying firms and $10,000 in expenses over that same period for self-lobbying organizations.

Section 3-7.1 Estimation of Satisfaction of Monetary Thresholds for Registration

In estimating income and expenses for the purpose of determining satisfaction of monetary thresholds for registration, estimates of amounts in excess of $5,000 must be rounded to the nearest $10,000, *not* $20,000.

Section 3-8 Alternative Approach to Threshold Determination: Overview of the Section 15 Election

Consistent with the change to quarterly periods, the threshold calculation using IRC definitions now focuses on three month periods; the threshold is now $10,000, *not* $20,000, with amounts in excess of $5,000 rounded to the nearest $10,000, *not* $20,000.

Section 3-9 Summary: Checklist for Determining the Need to Register Under the LDA

See Sections 3.3 and 3.7, and 3-7.1 *supra*.

Effective Date

These changes apply to registrations with an "effective date" of January 1, 2008 or later. According to guidance issued prior to HLOGA (but confirmed in the new Amended Guidance), the Secretary of the Senate and Clerk of the House of

Representatives treat the "effective date" of a registration as the date on which the registrant is retained or first makes a lobbying contact, whichever is earlier.

Chapter 4 Registration, Reporting, and Related Requirements

4-2 Registration: Some Basic Issues

Section 4-2.1. The Triggering Event and the 45-Day Period

Consistent with prior practice by the Secretary and Clerk, the LDA now expressly provides that, if the 45-day period for registration does not fall on a business day, it extends to the next business day.

Section 4-2.2 Where to Register and the Option of Electronic Filing

In compliance with the HLOGA, the Secretary and Clerk have combined their filing processes and now prospective registrants have the option to file registration forms electronically at a single location that does not require an ACES digital signature, but does require a Senate password. Effective January 1, 2008, registrations must be filed electronically with both the Senate and House; until March 15, 2008, filing with each office separately is, however, permitted. *See* http://lobbyingdisclosure.house.gov/index.html. Interestingly, the language of Section 5(e) added by HLOGA only requires electronic filing of Section 5 "reports." But the Amended Guidance construes HLOGA to mandate electronic filing of registration forms also. According to the Secretary and Clerk, "[t]he 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."

Interested persons can be notified via email of future filing deadlines and pertinent information regarding lobbying disclosure filing procedures. This service is available at http://lobbyingdisclosure.house.gov/subscribe.html.

Section 4-3 Who is the Registrant?

See Section 3-4 *supra.*

Section 4-5 Registration: Form LD-1 (Line-by-Line Instructions)

Identification of Client/Identification of Registrant

See Section 3-4 *supra.*

Lobbyist(s) for the Client.

With regard to an employee of the registrant who has acted or is expected to act as a lobbyist on behalf of the client, the registration form must now disclose any position as a covered executive or legislative branch official held by that person within twenty (no longer two) years of the time he "first acted" as a lobbyist on behalf of the client.[2] The Amended Guidance notes that "this requirement applies to registrations having an **effective date of 01/01/2008 or later**: For any new registrant/client relationship requiring a registration which has an **effective date of January 1, 2008 or later**, government employment information going back 20 years **is required**. Registrants do **not** have to

[2] The original LDA relied on its enactment date as the cut-off for determining when an employee "first acted" as a lobbyist for the client; there is no such cut-off date in the LDA as amended in 2007.

amend their pre-2008 registration information to reflect this additional disclosure requirement in reference to lobbyists listed in those reports."

Affiliated Organizations.

For several years prior to the enactment of HLOGA, various legislative proposals were made to change the definition of "client" for purposes of the LDA to require the disclosure of members of associations and lobbying coalitions where the members made contributions in excess of certain thresholds to the lobbying activities of the association or coalition. These proposals were designed to deal with so-called "stealth coalitions," mellifluously named entities whose names might mislead the public or legislators with regard to their real interests and purposes. *See* William V. Luneburg & Thomas M. Susman, Lobbying Disclosure: A Recipe for Reform, 33 J. LEGIS. 32, 47-49 (2006). The HLOGA *does not* change the definition of "client" for LDA purposes, which, therefore, continues to treat the association or coalition as the client.

However, some of the effects of coalition membership disclosure will be achieved by HLOGA's change in the definition of "affiliated organization" (subparagraph (3)(B) of Section 4(b)) to cover any "organization"[3] that 1) contributes more than $5,000 *to the registrant or the client* in the quarterly period to fund the lobbying activities of the registrant; and 2) *actively participates* in the planning, supervision, or control of such lobbying activities. Unless the exception discussed below applies, as to each of these organizations (if any), the name, address, and principal place of business must be disclosed on the LDA registration and update forms.

[3] Under the LDA, "organization" does not include individual persons.

The $5,000 threshold reflects the change to a quarterly reporting period (the old threshold was $10,000 during a six month period), though it could effectively represent a change for some entities depending on whether the contribution is paid at one time or over a period of time. Unlike the LDA prior to the amendment, the statute now clarifies that it makes no difference whether the contribution triggering disclosure is made to the registrant directly or, rather, to the client which (or who) then pays the money to the registrant. (However, it is not self-evident from the 1995 version of Section 4(b)(3) that a different result would have been called for prior to enactment of the HLOGA.)

The most evident substantial change is the dilution of the required role in planning, supervising and control of lobbying activities from "in whole or in major part" to "active participation." This is likely to sweep into the disclosure net many more contributors. *There is no express statutory exception to disclosure based on whether or not the "client"(or for that matter, the contributor or registrant) falls within one of the categories of entities covered by Internal Revenue Code Section 501.*

The Amended Guidance defines "active participation" in the following way:

> An organization "actively participates" in the planning, supervision, or control of lobbying activities of a client or registrant when that organization (or an employee of the organization in his or her capacity as an employee) engages directly in planning, supervising, or controlling at least some of the lobbying activities of the client or registrant. Examples of activities constituting active participation would include participating in decisions about selecting or retaining lobbyists, formulating priorities among legislative issues, designing lobbying strategies, performing a leadership role in forming an ad hoc coalition, and other similarly substantive planning or managerial roles, such as serving on a committee with responsibility over lobbying decisions.

> Organizations that, though members of or affiliated with a client, have only a passive role in the lobbying activities of the 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. Examples of activities constituting only a passive role would include merely donating or paying dues to the client or registrant, receiving information or reports on legislative matters, occasionally responding to requests for technical expertise or other information in support of the lobbying activities, attending a general meeting of the association or coalition client, or expressing a position with regard to legislative goals in a manner open to, and on a par with that of, all members of a coalition or association – such as through an annual meeting, a questionnaire, or similar vehicle. Mere occasional participation, such as offering an *ad hoc* informal comment regarding lobbying strategy to the client or registrant, in the absence of any formal or regular supervision or direction of lobbying activities, does not constitute active participation if neither the organization nor its employee has the authority to direct the client or the registrant on lobbying matters and the participation does not otherwise exceed a *de minimis* role.

The Amended Guidance offers the following examples of how the revised disclosure obligation functions:

> *Example 1: Association "A" has 20 organizational members who each pay $20,000 as a portion of their annual dues to fund "A's" lobbying activities. "E" is an employee of Organization "O," which is a member of "A." "E" serves as a member of "A's" board, as a representative of "O." While "A" carries out various functions, a substantial part of its mission is lobbying on issues of interest to its member organization. "E's" board membership constitutes active participation by "O" in the lobbying activities of "A," and thus "O" would need to be listed as an affiliated organization of "A."*
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> *Example 2: Another association "A" has 1000 organizational member who each pay $20,000 as a portion of their annual dues to fund A's lobbying activities. "E" is an employee of Organization "O," which is a member of "A." "E" serves as a member of "A's" board, as a representative of "O." "A" performs numerous functions, only a modest portion of which is lobbying. With regard to "A's" lobbying activities, "A's" board is only involved in approving an overall budget for such activities, but otherwise leaves supervision, direction, and control of such matters to a separate committee of member organizations. "E's" board membership in this case does not constitute active participation by "O" in the lobbying activities of "A."*

Example 3: Another association "A" has 1000 organizational members who each pay $1,000 a month in annual dues to "A." "E" is an employee of Organization "O," which is a member of "A." "E" serves as a member of "A's" lobbying oversight group as a representative of "O." The lobbying oversight group plans and supervises lobbying strategy for "A." While "E's" activities in "A" would constitute active participation, because "O" does not contribute $5,000 in the reporting quarter to the lobbying activities of "A," "O" would not need to be listed as an affiliate of "A."

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

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

However, there is a statutory exception from these broadened disclosure provisions:

> No disclosure is required under paragraph 3(B) if the organization that would be identified as affiliated with the client is listed on the client's publicly accessible Internet website as being a member of or contributor to the client, *unless the organization in whole or in major part plans, supervises, or controls such lobbying activities.* If a registrant relies upon the preceding sentence, the registrant must disclose the specific Internet address of the web page containing the information relied upon. *Nothing in paragraph (3)(B) shall be construed to require the disclosure of any information about individuals who are members of, or donors to, an entity treated as a client by this Act or an organization identified under that paragraph.*

In other words, as under previous law, in all cases where the affiliated organization "in whole or major part plans, supervises, or controls" the lobbying

activities of the registrant, its name, address and principal place of business must be disclosed on the registration and quarterly update forms . Where, however, its involvement in those activities amounts only to "active participation," there is an option: disclosure on the registration and update forms of the address of the client's "publicly accessible Internet website" where the name of the organization appears as a member of or contributor to the client.

The last sentence of the exception is clearly designed to deal with perceived constitutional problems raised by mandatory disclosure of individuals[4] who are members of or donors to associations or coalitions. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). *See also* Chapter 3, Section 3-4 of the 3rd Edition of the LM and William V. Luneburg & Thomas M. Susman, Lobbying Disclosure: A Recipe for Reform, 33 J. LEGIS. 32, 47-49 (2006). *But see* William V. Luneburg, Anonymity and its Dubious Relevance to the Constitutionality of Lobbying Disclosure Legislation, 19 Stan. L. & Pol. Rev. (forthcoming May 2008). But, other than reflecting a concern that has been raised over the years in opposition to lobbying disclosure legislation, it is difficult to see exactly what the statutory caveat accomplishes. After all, Section 4(b)(3)(B) mandates only the disclosure of "organizations," not individuals, and the LDA's definition of "client" already makes it clear that disclosure of the "client" does not extend to its members (whether individuals or not).[5] Perhaps Congress was concerned that, in a

[4] The statutory reference is to "individuals," not "individual members." The LDA definition of "client" refers to "individual members" and the definition of "lobbyist" refers to "individuals." Congress thus clearly drew a distinction indicating that the term "individuals" refers to individual human beings, not, for example, to corporate entities who may be "members" of a coalition or association.

[5] Section 4(b)(3) does not require disclosure of members of an organization where that organization must be disclosed; rather the disclosure relates only to the name, address, and principal place of business of the organization.

fit of creative interpretation, the Secretary and Clerk would construe Section 4(b)(3) as allowing them to mandate additional disclosures with regard to "affiliated organizations" that themselves must be disclosed. The Amended Guidance does not, however, attempt to do that.[6]

Finally, in terms of satisfying disclosure obligations, the Amended Guidance notes as follows—

> *Please note that Line 13 [of LD-1 where affiliated organizations must be disclosed] may only accommodate sixty (60) total listings. Those affiliates that "in whole or major part" participate in the planning, control, or supervision of the lobbying activities of the client or affiliate must be listed first, as it is mandated that they be disclosed in the filing and not through other means. The remaining active participants must be listed following the ones described above. For disclosure of more than 60 organizations, it is strongly recommended that you also either (i) complete the Internet Address field [on the LD-1] instead and list the additional affiliated organizations on your web site (as the electronic form accommodates up to 60 listings) or (ii) file an amendment(s) to your filing disclosing the other additional affiliated organizations.*

Foreign Entities.

Apparently motivated by the shift to quarterly reporting periods, the threshold for disclosure of contributions by certain affiliated foreign entities has been reduced from $10,000 to $5,000.

Effective Date

These changes to the content of registration forms apply to registrations with "effective dates" on or after January 1, 2008.

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[6] Rather, the Amended Guidance notes that "[t]he revised section includes exceptions to narrow the scope of additional disclosure to make clear that an individual member or donor who only is a member or only contributes to the client or other affiliate does not have to be disclosed."

Section 4-6 Quarterly Reports and LD-1 Update: Form LD-2

4-6.1 Where, When and How to File and Scope of Coverage of Initial and Termination Reports

As amended by HLOGA, Section 5(a) of the LDA now requires reports by registrants to be filed four times a year to cover lobbying activities during three month periods beginning January 1, April 1, July 1 and October 1. Each report must be filed within 20 days of the end of the quarterly period, unless the due date does not fall on a business day, in which case the report must be filed on the next business day. (Under the LDA prior to HLOGA, registrants had 45 days to file their periodic reports.) The reports must be filed electronically with both the Secretary and the Clerk (in addition to any other form(s) required by the Secretary or Clerk). Unlike the uncoordinated and challenging situation that existed prior to HLOGA, both offices must use the same software for the receipt and recording of filings required under the LDA.

The first required quarterly report under the new reporting provisions will be for the period beginning January 1, 2008 and will be due April 21 (since April 20 falls on a Sunday). Current registrants must still file their semiannual reports in February 2008 covering the last six month period in 2007. *See* *http://lobbyingdisclosure.house.gov/index.html* (House) and http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm (Senate, paper filing permitted for this last report under the pre-HLOGA LDA).

4.6.2 Line-By-Line Instructions for Form LD-2

4-6.2.1 Content of Quarterly Report

The information regarding lobbying activities must now focus on a three, not a six, month period. In addition-

Client Name. It is now required that, immediately following the client name, the registrant must indicate “an identification of 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.” A checkbox has been added to revised LD-2 (line 7) for this disclosure.[7]

Income or Expenses. The estimations of income by lobbying firms and expenditures by self-lobbying organizations must be rounded to the nearest $10,000 (not $20,000), except that, if those amount to less than $5,000, all the registrant need indicate is that income and expenses were less than $5,000.

Name of each employee who acted as a lobbyist in the general issue area identified for the particular LD-2 page 2.

New lobbyists who served as covered executive or legislative branch officials within the last 20 (not 2) years must indicate the position in which they served.

[7] While lobbying communications by public officials themselves do not, by themselves, trigger registration, this exception is not available when the governmental entity hires a lobbying firm to work on its half.

4-6.2.2 Update to Form LD-1(Registration Form)

Section 5(b)(1) was amended expressly to require the update to include information on “affiliated organizations.”. However, even before HLOGA, the updating obligation extended to that element of the LD-1.

4-8 Optional Reporting Approach Based on Tax System Available to Certain Entities

The estimations of expenses for reporting purposes by those self-lobbying entities that have made the Section 15 election must be made on a quarterly, rather than a semi-annual, basis. The rounding convention is the same as that applicable to entities that do not elect or are not eligible for the Section 15 option (i.e., rounding to the nearest $5,000, not $10,000).

Effective Date:

The changes noted above take effect with the first quarterly report filed in 2008.

Chapter 4A Semiannual Reports: Contributions, Disbursements, and Certification of Compliance with the Senate and House Gift and Travel Rules

By amending Section 5 of the LDA to add a new subsection (d), HLOGA requires the disclosure of various types of contributions and disbursements made by registrants and lobbyists as well as certification of compliance with the House and Senate gift and travel rules. The required reports are semiannual and must be filed electronically with the Secretary of the Senate and Clerk of the House of Representatives within 30 days following the end of the periods beginning January 1 and July 1.[8] (This should be contrasted with the quarterly reports where a 20-day filing deadline applies.) The first such reports will be due on July 30, 2008. Congress indicated that, in the future, the reports may be required on a quarterly basis, though it requires an amendment to the LDA to effect that change.[9]

Who must file?

The mandated semiannual reports (designated LD-203 by the Secretary and Clerk) must be filed *separately* by—

1. each person or organization registered *or required to register* under the LDA; and

[8] If the 30th day does not fall on a business day, then the filing must be made no later than the next business day.

[9] Section 203(d) of the HLOGA merely expresses the "Sense of Congress" that reports be required on a quarterly basis "if it is practicably feasible to do so." But the LDA as amended does not vest in the Secretary and Clerk the express authority to change to that reporting cycle. The legislative history supports this reading. *See* Statement of Senate Managers, 153 CONG. REC. S10708, S10709 (Aug. 2, 2007)(" After the report is filed by the Clerk and the Secretary, an affirmative vote of Congress will be required to alter the frequency of the filing period.")

2. each employee who is listed or *required to be listed* --

    a. as a lobbyist *on the registration form*; or

    b. as an active lobbyist *on the quarterly reports*.

With regard to who must file, the Amended Guidance has this to say:

> *Active registrants and individuals who have been listed as active lobbyists on Forms LD-1 and LD-2, must file a semiannual report on Form LD-203 by July 30 and January 30 (or on the next business day should either day occur on a weekend or holiday) for each semiannual period in which a registrant or lobbyist remains active. . . . In the case of a registrant, "active" means not having filed a valid termination report <u>for all clients</u>. In the case of a lobbyist, "active" is a person listed on <u>any registrant's LD-1 or LD-2</u> and who has not been terminated on Line 23 of LD-2 or on Form LD-203 (Termination box)*(emphasis added).

What must the filing contain?

Each semiannual report must list:

1. the name of the person/organization/employee[10] filing the report;

2. the name of the employer of the lobbyist, if the lobbyist is the filer;

3. the names of all political committees (apparently as that term is defined in the Federal Election Campaign Act, 2 U.S.C. §431(4)[11]) established or controlled by the filer;

[10] Since the reports are required of both registrants and employees listed as "lobbyists," the references in new Section 5(d) to "person" in connection with the required disclosures presumably refers to both registrants and employees (though the statutory language might be construed otherwise). The Amended Guidance issued by the Secretary and Clerk confirm this reading of the HLOGA.

[11] "The term 'political committee' means—

> (A) any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year; or
>
> (B) any separate segregated fund established under the provisions of section 441b (b) of this title; or
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> (C) any local committee of a political party which receives contributions aggregating in excess of $5,000 during a calendar year, or makes payments exempted from the definition of contribution or expenditure as defined in paragraphs (8) and (9) aggregating in excess of $5,000 during a calendar year, or makes contributions aggregating in excess of $1,000 during a calendar year or makes expenditures aggregating in excess of $1,000 during a calendar year."

4. the name of each Federal candidate or officeholder, leadership PAC[12], or political party committee, to whom *aggregate contributions*[13] equal to or exceeding $200 were made by the person or organization (including the lobbyist active employee), or a political committee established or controlled by the person or organization (including the active lobbyist employee) within the semiannual period, and the date and amount of each such contribution made within the semiannual period;

5. *unless the funds are provided to a person required to report their receipt in accordance with the Federal Election Campaign Act (see 2 U.S.C. §434)*[14], the date, recipient, and amount of *funds contributed or disbursed*[15] during the semiannual period by the person or organization (including the active lobbyist employee) or a political committee established or controlled by the person or organization (or active lobbyist employee)--

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[12] The HLOGA amends Section 304 of the Federal Election Campaign Act of 1971 (2 U.S.C. 434) to provide the definition of this term:

> "LEADERSHIP PAC- The term `leadership PAC' means, with respect to a candidate for election to Federal office or an individual holding Federal office, a political committee that is directly or indirectly established, financed, maintained or controlled by the candidate or the individual but which is not an authorized committee of the candidate or individual and which is not affiliated with an authorized committee of the candidate or individual, except that such term does not include a political committee of a political party." 2 U.S.C. §434(i)(8)(B).

[13] There is no express reference in Section 5(d) to the definition of "contribution" in the Federal Election Campaign Act, *see* 2 U.S.C. §431(8)(A), though logically that definition could apply in this context. Indeed, there is no definition of this word anywhere in the LDA, which, however, refers to "contributes" (id. §1603(b)(3)(A)("affiliated organization" disclosure)) and "contribution" (id. §1603(b)(4)(affiliated "foreign entities")) in other places in the Act, suggesting perhaps that Congress did not intend to use the FEC meaning in Section 5(d) since, presumably, in enacting those other provisions it was not thinking of federal election law.

The Amended Guidance provides no help on this important interpretative issue. In the previous and now in the latest version of the Guidance, the Secretary and Clerk do note that "[a] contribution may take any form, and may be direct or indirect." However, that view is expressed in the context of disclosure under Section 4(b)(3)(A).

[14] If the funds are required to be reported to the FEC, but are not in fact reported, the exception to LDA disclosure would appear to be still applicable.

[15] The HLOGA does not define "disburse." The term possibly could include, among other things, those payments excluded from the FEC definition of "contribution." *See* 2 U.S.C. §431(8)(B). The Amended Guidance provides no help on this issue either.

(a) to pay the cost of an event to honor or recognize a covered legislative branch official or covered executive branch official[16];

(b) to an entity that is named for a covered legislative branch official, or to a person or entity in recognition of such official;

(c) to an entity established, financed, maintained, or controlled by a covered legislative branch official or covered executive branch official, or an entity designated by such official; or

(d) to pay the costs of a meeting, retreat, conference, or other similar event held by, or in the name of, 1 or more covered legislative branch officials or covered executive branch officials; and

6. the name of each Presidential library foundation, and each Presidential inaugural committee, to whom contributions[17] equal to or exceeding $200 were made by the person or organization (or active lobbyist employee), or a political committee established or controlled by the person or organization (or active lobbyist employee), within the semiannual period, and the date and amount of each such contribution within the semiannual period.

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[16] The statutory definitions of "covered officials" are discussed in Chapter 3 of the 3rd Edition of the LM, sections 3-5.3 and 3-5.4.

[17] *See supra* note 13.

It should be noted that the Amended Guidance reads the exception (the "unless" clause) of item 5 to apply <u>*only to item (d)*</u>. *The statutory exception, however, refers to "this subparagraph" which seems to refer to the entirety of (E), which contains items (a)-(d). The legislative history, in fact, confirms this reading.*[18]

Finally, the report must contain a certification by the person or organization filing the report that the person or organization (or active lobbyist employee)--

(a) has read and is familiar with those provisions of the Standing Rules of the Senate and the Rules of the House of Representatives relating to the provision of gifts and travel; and

(b) has not provided, requested, or directed a gift, including travel, to a Member of Congress or an officer or employee of either House of Congress with knowledge that receipt of the gift would violate rule XXXV of the Standing Rules of the Senate[19] or rule XXV of the Rules of the House of Representatives.[20]

The Amended Guidance offers the following advice and examples with regard to the new disclosure obligations imposed by Section 5(d):

> *This section of the LDA has been written broadly, and, in light of other provisions in P.L. 110-81, it would be prudent to consult with the appropriate Ethics Committee, as well as the Office of Government Ethics, in order to determine if any event listed above is otherwise prohibited under law, Senate or House Rules,*

[18] *See* Statement of Senate Managers, 153 CONG. REC. S10708, S10709 (Aug. 2, 2007)(" To avoid duplicative reporting, the bill provides an exception for payments made to committees regulated by the Federal Election Commission with respect to the provisions relating to disclosure of payments made to events honoring or recognizing federal officials, to entities named in honor or recognition of federal officials, to organizations controlled by such officials, and to pay the costs of meetings, etc. held by officials.")

[19] *See* http://ethics.senate.gov/.

[20] *See* http://www.house.gov/ethics/110th_rule_change_page.htm.

or Executive branch regulations. Please note that HLOGA and the Federal Election Campaign Act are not harmonized to contributions of exactly $200.

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

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

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

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

The final part of the form is a certification that the filer has read and is familiar with those provisions of the Standing Rules of the Senate and the Rules of the House of Representatives relating to the provisions of gifts and travel and has not knowingly provided gifts and or travel in violation of either Chamber's Rules. The form contains a check box for the certification, and the user ID and Password process has provided the signature on file with the Clerk and the Secretary for each filer. Please note that in the case of a registrant, a signatory is an individual who is responsible for the accuracy of the information contained in the filing. Under section 6 of the LDA, the Secretary and Clerk refer registrants and lobbyists who fail to provide an appropriate response within sixty (60) days to either officer's written communication rather than the signatory.

Each filer, regardless of any contribution activity or any lack thereof, must file Form LD-203 semiannually due to the certification provision.

A crucial question left unanswered both by the terms of the LDA as amended is whether the reporting and certification obligation extends to payments and disbursements by partners or employees of the lobbying firm or self-lobbying organization (other than "active lobbyists") when the payment or disbursement is not made expressly by and in the name of the registrant. The express language of Section 5(d) seems, however, to suggest a narrow reading that would exclude such gifts and other disbursements (if any have been made).

It should be noted that, like other disclosures mandated by the LDA, the False Statements Accountability Act of 1996[21] imposes criminal liability for, among other things, knowingly false statements contained in registration statements as well as in quarterly and semiannual reports.

Since lobbyists *as such* do not register and report with the Secretary and Clerk, electronic filing of LD-203 forms by them requires that they obtain their own Senate passwords. The Amended Guidance notes:

> *It will be necessary for each active lobbyist to obtain his/her individual user identification number and password in order to file semiannual reports electronically with the Secretary and Clerk. An active lobbyist may obtain both by going to www.disclosure.senate.gov and completing the ID and Password form on line. The Secretary will issue a user ID and password within 2 working days of receipt of the application. As soon as an email containing the user ID and password has been sent to the filer, the computer systems of the Clerk and the Secretary are simultaneously updated to include this information. Lobbyists*

[21] 18 U.S.C. §1001.

should plan to obtain them well in advance of a filing deadline; it will not be possible to activate a password the day before or the due date of a filing.

Chapter 5 Lobbying Disclosure Act: Administration, Enforcement, and Miscellaneous Matters

5-2 Administrative Duties: In General

The Secretary and Clerk must now make reports filed electronically available to the public over the Internet as soon as practicable after they are filed. Moreover, all registrations and reports must now be available over the Internet (the Clerk's Office has not done so previously) in a fashion that facilitates search for relevant information (e.g. full text searches which have not previously been available from the Secretary).[22] The Secretary and Clerk must also provide links to relevant information maintained in databases maintained by the Federal Election Commission (including that containing information on "bundled" lobbyist contributions). Such links will allow cross-checking to determine the accuracy and adequacy of LDA disclosures and to provide a more complete context for assessing the influence of lobbyists.

HLOGA also changes the six year limit on retention of registrations. Instead of the period running from the termination of the registration, it runs from the filing of the registration.

Finally, the Secretary and Clerk must now semiannually make available to the public the aggregate number of references they have made to the United States Attorney for the District of Columbia for possible prosecution under the LDA.

[22] Seachability must be available based, at a minimum, on the categories of information described by Sections 4(b)(the registration form) and 5(b)(the quarterly reports). Section 5(d), however, is not mentioned in this regard.

5-3 Enforcement

Prior to HLOGA, the Department of Justice had resisted disclosure of its enforcement activities under the LDA, though available information suggested that such activities were minimal. Now DOJ must semiannually report to the House Committee on the Judiciary and the Senate Committees on Homeland Security and Governmental Affairs and on the Judiciary with regard to the aggregate number of enforcement actions taken during the preceding semiannual period and the sentences imposed (though names and other personal information not otherwise a matter of public record must be withheld).

More important, however, is that the maximum civil fine for LDA violations has been increased from $50,000 to $200,000. Of even greater significance, it is now a felony punishable by 5 years in jail and/or a monetary fine to "knowingly and corruptly" fail to comply with the Act. The increased penalties apply to any violation that occurs on or after September 14, 2007.

The increased civil and new criminal penalties not only apply to the registration and reporting requirements of the LDA, but also to a new provision added to the statute that is meant to "reinforce" compliance with the House and Senate gift and travel rules. Specifically, it is a violation of the LDA where certain covered persons "make a gift or provide travel to a covered legislative branch official if the person has knowledge that the gift or travel may not be accepted by that covered legislative branch official under the Rules of the House of Representatives or the Standing Rules of the Senate." This

prohibition applies to persons and organizations that are registered *or are required to register* under the Act and also to lobbyists listed *or required to be listed* in registrations and quarterly reports. This new prohibition took effect on September 14, 2007.

5-3A Audit of Compliance by the Comptroller General

The Comptroller General is now required annually to audit compliance with the LDA by lobbyists, lobbying firms and registrants through a random sampling of filed registrations and reports. The CG must provide the results of that review to Congress along with recommendations on how to improve compliance with the Act (including providing additional resources and authorities for enforcement to the Department of Justice). Among other things, the annual report must specifically evaluate registrants' compliance with the LDA's requirement to disclose "affiliated organizations."

While the statute does not authorize the issuance of subpoenas, it does empower the CG to request from registrants and listed lobbyists information and access to documents that may be relevant to the CG's compliance review. Materials covered by attorney client privilege remain, however, protected.[23] In cases where there is a failure to comply with such a request, the CG may notify Congress.

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[23] *See* Statement of Senate Managers, 153 CONG. REC. S10708, S10710 (Aug. 2, 2007) ("Nothing in this section provides authority for the GAO to obtain information protected by the attorney-client privilege.")

The first audit will focus on registrations and reports filed during the first quarter of 2008 and the CG report must be submitted to Congress within 6 months following the end of that quarter.