



# HLOGA & LDA Compliance: What Should You Be Doing?

**Prepared by ASAE Staff**  
**and**  
**Jeffrey P. Altman, Esq. & C. Randall Nuckolls, Esq.**  
**McKenna Long & Aldridge LLP**

Now that we are into the first quarter of 2008, the changes to the Lobbying Disclosure Act (“LDA”) enacted as part of the Honest Leadership and Open Government Act of 2007 (“HLOGA”) are in full force and effect. Accordingly, it is time for all organizations who engage in lobbying activities and have an active governmental affairs program to consider their compliance requirements and planning opportunities under the new law. These requirements and opportunities generally are associated with the following filings and legal requirements:

- Old Form LD-2 under the pre-HLOGA provisions of the LDA for the six-month period ended December 31, 2007, which must be filed by all existing registrants by February 14, 2008;
- New Form LD-1 that reflects HLOGA changes to the LDA, which must be filed by any new registrant within 45 days after the registration requirements are triggered;
- New Form LD-2 that reflects HLOGA changes to the LDA for the first quarter of 2008, which must be filed by all registrants by April 20, 2008;
- New Form LD-203 that incorporates new HLOGA reporting requirements under the LDA for the first six months of 2008, which must be filed by July 30, 2008.
- Reports of bundled contributions that candidates and campaign committees will be filing with the FEC as soon as regulations are finalized;
- IRS Form 990 for calendar year 2007, which must be filed by May 15, 2008 (or the 15<sup>th</sup> day of the fifth month following the end of your fiscal year); and
- Byrd Amendment certifications and government contract cost recoveries, which are ongoing for organizations with government contracts, cooperative agreements and grants.

The following memorandum is intended to provide helpful planning tips and to highlight some of the major compliance requirements and planning opportunities in each of these listed areas. For a more comprehensive review of the new LDA & HLOGA requirements, see ASAE’s Q&A on the Amended Guide to the Lobbying Disclosure Act, ASAE’s guidelines for Lobbyists and Non-Lobbyists of Associations that Employ or Hire Lobbyists, and other resource materials on Lobbying Reform that can be found at <http://www.asaecenter.org/GeneralDetail.cfm?ItemNumber=16409>. As always, if you have any questions about lobbying and ethics reform, please contact us at (202) 626-2703 or [publicpolicy@asaenet.org](mailto:publicpolicy@asaenet.org).

## **Form LD-2 Filing Under the Old Law for the Final Six Months of 2007**

The final Form LD-2 under the old law for the six month period ended December 31, 2007, is due no later than February 14, 2008. For organizations that have not yet filed, this is an opportunity to make sure you do not repeat mistakes from previous filings. For example, your organization may no longer meet the threshold requirements and should consider terminating your registration. Even if your registration continues, you may wish to narrow down the list of employees who are listed as lobbyists to include only those individuals who will meet the multiple contacts and 20% of time requirements (so that no employee will be unnecessarily identified and subjected to the new LD-203 reporting requirements discussed below). Alternatively, you should add any employees whose lobbying activities have increased or may have been inadvertently omitted. Make sure that you properly estimate your activities and expenses to be reported, including the time of all employees who may be helping to prepare for and are supporting your lobbying activities, reasonable overhead, the expenses of your unincorporated chapters and appropriate payments to any outside lobbying firms, trade association or other nonprofit organizations to support their lobbying activities. If you have made an election under Section 15 to use IRS calculations and certain IRS definitions, be sure that you have properly interpreted and applied the relevant rules. As discussed below, the interplay between the LDA and IRS definitions are more complicated than may initially appear. Finally, avoid inconsistencies between your final LD-2 filing for 2007 and your IRS Form 990 for 2007 that will raise unnecessary red flags.

## **Form LD-1 Registration for Newly Qualifying Organizations**

If you have not previously registered under the LDA, it is important to make sure your decision is correct. Given the expansive definition of lobbying contacts and activities under both LDA and IRS definitions, you should consider the time and expenses of not just your lobbyists, but also other employees who support their activities, background and preparatory work that is intended to support your lobbying activities, reasonable overhead, the expenses of your unincorporated chapters and appropriate payments to outside lobbying firms, trade associations and other nonprofit organizations to support their lobbying activities. Under HLOGA, failure to register can now result in civil penalties up to \$200,000 and up to five years in jail for a willful and knowing violation. No one should register that is not required to do so, but you should make sure your analysis is correct. The new Form LD-1, which was revised in December, incorporates minor HLOGA changes, including the expanded definition of "affiliates" that may require you to list members and donors if they "actively participate" in your lobbying activities (as further discussed below). Also, listed lobbyists on new registrations must now show whether they served as a covered official during the past 20 years.

## **Form LD-2 for the First Quarter of 2008**

The new Form LD-2 is not scheduled to be released until March 3<sup>rd</sup> and the filing deadline for the first quarter is April 20<sup>th</sup>. Although there are a few minor changes in what has to be reported (including the same changes as for the new Form LD-1 discussed above), the biggest change is that it must now be filed within 20 days after the end of the quarter. Also, all filings will be subject to random GAO audits and referrals to the Department of Justice for certain violations. This means that every organization should review carefully the manner in which it is collecting and reporting time and expenses, both to make sure it is being done right and to ensure that you will be able to file your Form LD-2 in a timely manner. This should start with a review of your timesheets and expense forms to make sure they track the

applicable definitions and reporting requirements, followed by specific guidance provided to your staff on how they should be completed.

Organizations should take this opportunity to decide whether to make a Section 15 election to use one of the two alternative IRS reporting methods for 2008 that are available for certain tax-exempt organizations:

- Method B -- Using the definitions under IRC Section 4911 for Section 501(c)(3) organizations that have made a Section 501(h) election. Note that Section 501(c)(3) organizations that have not made a Section 501(h) should consider doing so (although large charities may not wish to make the election because of the \$1 million "ceiling amount" on allowable lobbying expenses). Any Section 501(c)(3) that does not make a Section 501(h) election must use Method A, which utilizes LDA definitions.
- Method C -- Using the definitions under IRC Section 162(e) for Section 501(c)(4), 501(c)(5) and 501(c)(6) organizations.

An organization that makes a Section 15 election should use the applicable IRS definitions for both Legislative Branch and Executive Branch contacts and activities for purposes of recording time and expenses that must eventually be reported to the IRS on Form 990. That means that the appropriate definitions need to be communicated to staff so they know what time and expenses to record. This IRS number then gets plugged into the Form LD-2 even though it may include direct and grassroots lobbying on state and local activities that are irrelevant for LDA purposes beyond reporting the dollar amount. This process is challenging, because the LDA reports must be filed using IRS numbers as the year progresses even though your IRS Form is not filed until the following year. In the end, the same dollar amounts should be reported for LDA and IRS purposes in order to avoid raising any red flags.

At this point, it gets a bit more complicated. Section 15 says you use the IRS definitions to determine what Executive Branch contacts and activities get reported for other LDA purposes -- such as listing agencies contacted and issues on which you have lobbied (and also whether any individual meets the multiple contacts and 20% of time requirements to require registration and/or to be listed as a lobbyist). These definitions are the same that staff are using for tax purposes, so no extra work is required in terms of your LDA reporting requirements beyond keeping track of the agencies and issues.

Unfortunately, Section 15 says that even though you still plug in the IRS calculated amount into your Form LD-2, and you can use the IRS definitions for your Executive Branch contacts and activities, you must use LDA definitions to determine what Legislative Branch contacts and activities get reported for other LDA purposes. The problem is that these other contacts and activities may not be recorded by individuals who are keeping track of their time and expenses simply for IRS purposes. It doesn't change the dollar amount that must be reported on your Form LD-2, but it does mean that additional issues may need to be reported (and considered in determining whether any individual meets the multiple contacts and 20% of time requirements). For example, the IRS definitions generally only cover "specific legislation" (and "specific legislative proposals"). Accordingly, if an employee attends meetings and has communications with Members of Congress or their staff on general issues that do not relate to any "specific legislation," such activity would not need to be recorded for tax purposes and would not be included in the dollar amounts calculated under the IRS definitions and plugged into the Form LD-2. However, these general issues must still be reported on Form LD-2 and in the extreme case could cause an individual to trigger the multiple contacts and 20% of time requirements.

All of this suggests the critical importance of deciding what method and definitions your organization is going to use. You must then make sure that the appropriate definitions and procedures are explained to staff so that the numbers and activities are properly recorded on a relatively real time basis (either daily or weekly, but no less frequently than monthly). This will permit a quick turn around and timely filing of the new Form LD-2 within 20 days after the end of each quarter, and will make sure your reports are accurate.

Another compliance matter to address is the expanded definition of “affiliates” that may require your organization to identify members and donors that provide more than \$5,000 in support during the quarter and which “actively participate” in planning, supervising or controlling your lobbying activities. For organizations that don’t mind disclosing the names of their members or donors, putting this information on your website with merely a link provided on your Form LD-2 may be the solution. Otherwise, it may be important to reduce and make passive the role that your members or donors may play, so that their names will not need to be disclosed. Although the National Association of Manufacturers has filed a lawsuit challenging the constitutional basis for this provision, organizations can not count on such litigation being successful and need to think now about changing their website listings, changing the role their members and donors play to make it passive, or resolve to having to list their names in your Form LD-2 or on your website. Please note that the website alternative is not available for any outside entity that “in whole or major part” plans, supervises, controls, directs, finances or subsidizes your lobbying activities (which has been described as a 20% control test).

Remember that the dollar amounts you must report for both IRS and LDA purposes include amounts you pay to outside lobbying firms, trade associations and other nonprofit organizations to support their lobbying activities (and it is a good idea to check with them to make sure they are following the rules). Once again, the exact amount that must be included will depend upon which reporting method you are using as well as the tax status of your organization and the recipient organization. Also remember that your organization’s name may need to be disclosed by the recipient organization if you contribute more than \$5,000 in a calendar quarter and either “actively participate” or “in whole or in major part” plan, supervise, or control the lobbying activities of the recipient organization.

### **Form LD-203 for the First Six Months of 2008**

One thing that is completely new about HLOGA is the requirement that every registered organization and each of its listed lobbyists must file separate reports every six months in which they indicate the campaign contributions that have been made as well as contributions to Presidential libraries and inaugural parties, or for events honoring covered officials, or amounts contributed to other entities at their suggestion (such as directing how an honorarium should be paid). Each listed lobbyist must get his/her own password well in advance of the first filing deadline of July 30<sup>th</sup>. At this time, the new Form LD-203 and instructions are not scheduled to be released until March.

The immediate challenge is to understand this new requirement and begin recording the information that eventually will need to be reported, this is something that organizations and individuals have never done in the past and may include such diverse activities as a dinner by the organization honoring a covered official or attendance by a lobbyist at a school reunion honoring a classmate that is now a covered official. The list of activities and contributions should be carefully reviewed so that accurate records are maintained and timely reports are filed.

Remember that the new Form LD-203 reports will include a certification by the registered organization and each listed lobbyist that they understand the gifts, meals, travel and other ethics rules and have not violated same. Such certifications are subject to the civil fines and criminal penalties cited elsewhere. As noted above, many organizations that previously listed employees who did not meet the multiple contacts and 20% of time requirements may wish to terminate their listing in the final Form LD-2 report for 2007 in order to be able to avoid the burden and possible exposure from filing these reports.

Since these reports will be publicly available, care must be exercised by registered organizations, their PACs and their listed lobbyists to avoid making campaign contributions or these other types of contributions at the same time that they are engaging in lobbying activities that must be reported on Form LD-2. Government enforcement officials, public interest groups and the media will all be reviewing these reports to see if they can find connections between contributions and official actions, even when none may exist except for timing.

In order for your organization and listed lobbyists to be able to certify that you understand and have not violated the ethics rules that deal with gifts, meals and travel, you should conduct some kind of education and training program. In particular, all staff should be advised of the elimination of the \$50 gift exception for all employees and also the severe restrictions on sponsored travel and the prohibition against lobbyist involvement in travel planning except in a de minimis manner. Among other things, all sponsored travel must now be approved in advance and must also be certified as being compliant with the ethics rules. Please note that the involvement of a lobbyist in planning a trip beyond the de minimis activities specified in the ethics rules could require the official to cancel and refuse to attend, and also subject your employee that signs the authorization form and/or the organization to fines or penalties for making a false certification.

The nature of the education and training will vary by organization, but all staff should at least receive something in writing or be invited to a meeting where these new restrictions are explained. Your lobbyists and more senior staff will require more in-depth training to ensure compliance and avoid inadvertent violations. Some organizations are going so far as to modify their policy manual, have all employees sign a certification, and appoint a compliance officer to review in advance all situations that may potentially trigger the ethics rules. There continue to be numerous exceptions to the ethics rules for gifts, meals and travel that should allow your organization to conduct important activities. Such activities might just need to be restructured to meet the new HLOGA restrictions (such as by increasing the number of attendees to qualify a meeting or function as a widely attended event or by changing any food offering to snacks and light stand-up foods for smaller meetings and receptions). The rules are complex and not necessarily intuitive, so it is a good idea for a senior staff person to be appointed to review all activities and events that may trigger the ethics rules.

## **Reports of Bundled Contributions by Candidates & Campaign Committees**

Another new requirement under HLOGA is for candidates and campaign committees to include bundled contributions they receive from lobbyists in their own FEC reports. Although implementing regulations have not been adopted due to the current lack of a quorum at the FEC, the law is effective as of January 1<sup>st</sup>. Accordingly, registered organizations and their listed lobbyists need to make sure that any bundling activities are attributed to the PACs and individual lobbyists, and are not attributed to the registered organization. This is because in most cases the registered organization is not allowed to engage in bundling activities, so an improper attribution could be problematic. An important question that was raised in the proposed regulations (and remains unresolved) is how attribution will be divided when PACs for several organizations engage in a joint fund raising event. Apart from HLOGA, many organizations and their PACs have been lax in the past about completing their own bundling reports and they may wish to review these requirements more carefully to make sure that the organization's own PAC reports will be consistent with these new bundling reports that will be filed by candidates and campaign committees.

## **IRS Form 990 for 2007**

All trade associations and other nonprofit organizations must keep track of their time and expenses for lobbying activities. The IRS continues to focus on lobbying and political activities and has included a new schedule for reporting these activities in the new Form 990 that recently was adopted. Apart from HLOGA and the LDA, it is extremely important for every organization to review and validate the methodology that is being used to calculate these amounts, particularly the definitions and instructions that are being provided to staff for keeping track of their time and expenses. Among other things:

- Section 501(c)(3) organizations that have not made a Section 501(h) election must make sure their lobbying activities are not substantial (and should seriously consider making a Section 501(h) election if the applicable ceiling amount is not a problem);
- Section 501(c)(3) organizations that have made a Section 501(h) election must make sure they don't exceed their "ceiling amounts" under Section 4911; and
- Section 501(c)(4), Section 501(c)(5) and Section 501(c)(6) organizations must make sure they are properly calculating their lobbying activities and expenses and either pay the proxy tax or report accurately to their members the portion of their dues that is not tax deductible under Section 162(e) (unless they meet one of the reporting exceptions).

In order to do this right, employees must be told of what constitutes lobbying activities under the Section 501(c)(3), Section 4911 or Section 162(e) rules and definitions that are applicable, and then must keep reasonable track of their time and expenses in a manner that can be validated if audited.

As discussed above, an election under Section 15 to use LDA reporting Method B or Method C may be advantageous, but it also may require the organization to keep track of Legislative Branch lobbying contacts and activities that are not being currently captured under the IRS rules. That is, if an organization decides to keep track of its time and expenses using IRS definitions, it must still keep track of its Legislative Branch lobbying contacts and lobbying activities that may fall outside the IRS definitions for certain purposes. As noted above, organizations must carefully weigh the pros and cons and decide whether or not they wish to make a Section 15 election in their first Form LD-2 filing for the first quarter of 2008 that is due by April 20<sup>th</sup>. This is also the perfect time for any Section 501(c)(3) organization that has not previously made a Section 501(h) election to consider doing so.

### **Byrd Amendment and Government Cost Principles**

Those organizations that receive government contracts, cooperative agreements and grants must also be mindful of the additional definitions of lobbying activities that are provided under the so-called Byrd Amendment and general government contract cost principles. The Byrd Amendment generally prohibits the use of "appropriated" federal funds to lobby for or influence any type of federal award, including federal contracts and subcontracts, cooperative agreements, grants, and loans. The government cost principles generally bar the recovery of any costs associated with lobbying activities under any such contract, cooperative agreement and grant..

Without going into further detail at this time, the challenge is to educate employees on the differences and nuances of these additional definitions of lobbying activities that must be utilized to make Byrd Amendment certifications and also to recover costs on government contracts, cooperative agreements and grants. This presents additional challenges to an organization, since it must keep track of its lobbying activities under IRS definitions, plus its additional Legislative Branch activities under LDA definitions (if it makes a Section 15 election), and must also be in a position to make Byrd Act certifications and seek cost reimbursements using additional definitions of lobbying activities.

## General Conclusions

HLOGA is new and has many requirements with which registered organizations and their listed lobbyists must comply. The above summary is not intended to be exhaustive but merely highlights the key issues that should be considered now, while there is still time to prepare and plan.

As explained in great detail above, one of the biggest challenges faced by all organizations is the differences in definitions of lobbying contacts, activities and expenses under the LDA, Section 501(c)(3), Section 4911, Section 162(e), the Byrd Amendment and government contract cost principles. Although using the broadest possible definition is tempting and may provide a useful solution for the majority of organizations, this approach is problematic if it causes Section 501(c)(3) organizations to report to the IRS amounts that are substantial; Section 501(h) organizations could exceed their "ceiling amounts"; Section 501(c)(4), 501(c)(5) and 501(c)(6) organizations could end of paying excess proxy taxes or reporting to their members excess nondeductible amounts; and full cost recovery from the government on contracts, cooperative agreements and grants might not be achieved. In each case, an organization must weigh the benefits of simplicity against these potential adverse results.

Apart from HLOGA, the LDA and IRS have long-standing requirements for reporting lobbying activities and expenses that are not thoroughly understood by many organizations. Many organizations have their employees fill out time sheets without providing definitions or guidance about what time and expenses should be recorded. Some organizations are just preparing their LDA reports and IRS Form 990 based on a methodology established many years ago that no one remembers or understands. This is the time for every organization to review their procedures to make sure they are doing what is right and that employees know and comply with those internal procedures.

ASAE continues to encourage every organization to create a culture of compliance and to make clear that your organization places a premium on ethical conduct and compliance.

\* \* \* \* \*

For comments and questions, contact:

ASAE Public Policy Division, (202) 626-2703, [publicpolicy@asaenet.org](mailto:publicpolicy@asaenet.org)

Jeffrey P. Altman, (202) 496-7520, [jaltman@mckennalong.com](mailto:jaltman@mckennalong.com)

C. Randall Nuckolls, (202) 496- 7176, [rnickolls@mckennalong.com](mailto:rnickolls@mckennalong.com)