COVINGTON

COVINGTON & BURLING LLP

E-ALERT | Election and Political Law

January 11, 2010

NEW LOBBYING DISCLOSURE ACT GUIDANCE ISSUED BY CONGRESSIONAL OFFICIALS

On December 23, 2009, the Clerk of the House and Secretary of the Senate issued revised guidance for complying with the Lobbying Disclosure Act, including several key changes:

- An organization must report "dues" paid to trade associations or other membership organizations for lobbying activities during the quarter in which the dues are paid, even though the payment covers the entire calendar year.

- An organization may be required to amend its LDA registration to disclose additional foreign entities. The new guidance requires an LDA registrant to list any parent entity with an ownership interest of 20% or more, regardless of how high in the organization's hierarchy that parent entity is located. In addition, a registrant must identify on its registration form all foreign organizations that involve themselves with the registrant's lobbying activities indirectly through one of the registrant's foreign entity affiliates.

- The new guidance includes clarifications about which contributions or payments must be included on LD-203 reports. Although not explained in the guidance, we have been informally advised by officials with the Secretary of the Senate and the Clerk of the House that contributions to the state campaign committee of a federal officeholder (*i.e.*, a contribution to the gubernatorial campaign of a sitting U.S. Senator) need not be disclosed on an LD-203 report.

These and the other changes in the LDA guidance are discussed below.

Quarterly Lobbying Activity Reports

The new guidance provides additional information about how a registrant should report the portion of dues payments to trade associations or other organizations used for lobbying activity. The full dues payment should be reported in the quarter in which it is paid.

The new guidance includes two new examples of expenses to include in the lobbying activity report. In the first new example, the guidance notes that time spent by a registrant's state lobbyists to prepare a strategic lobbying plan that includes *both* federal and state lobbying must be included in the registrant's good faith estimate of its lobbying expenses because, at the time the materials were prepared, they were intended to be used for federal lobbying. In the second example, the guidance notes that the cost of hiring a firm to place advertisements in the media encouraging citizens to contact their representative about an issue need not be included in the good faith estimate of lobbying expenses.[1]

[1] The result may be different if the registrant uses the "Tax Method" to calculate its lobbying expenses. Under the tax method, lobbying activities include "grassroots lobbying" -- that is, attempts to influence the general public with respect to a legislative matter.

Line 19 of the quarterly activity report requires a registrant to disclose any foreign entity listed in the registration with an interest in the issues lobbied during that period. The new guidance clarifies that this disclosure is required whether or not that foreign entity makes a contribution of $5,000 or more to the registrant's lobbying activities during the reporting period.

Finally, the Clerk and the Secretary have added a new lobbying issue code to the lobbying disclosure reporting forms: the TAR code, to be used to report lobbying activity relating to tariff issues. For any other trade-related issues, the TRD code (Trade) should be used.

Disclosure of Foreign Entities

The new guidance seeks to clarify the requirement that a registrant disclose the identity of each foreign entity that meets any one of three statutory criteria, which may require LDA registrants to amend their registrations to list additional foreign entities.

First, the LDA guidance and information provided by congressional officials conclude that the registration must list any foreign entity, at any level of the corporate hierarchy, that holds 20% or more equitable ownership of the registrant or an affiliate of the registrant (as listed on Line 13 of the LDA registration). It is not sufficient to list only first-level parent companies. We have included several examples to illustrate this approach, based on our conversations with congressional officials:

- Foreign Entity A holds a 20% ownership interest in the registrant, and Foreign Entity B owns 100% of Foreign Entity A, both Foreign Entity A and B must be disclosed as foreign entities on Line 14 of the registration form.

- Foreign Entity C owns 50% of the registrant, and Foreign Entity D owns 50% of Foreign Entity C, both Foreign Entity C and D must be disclosed because Foreign Entity D owns 25% of the registrant (50% of 50%=25%).

- Foreign Entity E owns 20% of the registrant, and Foreign Entity F owns 50% of Foreign Entity E, Foreign Entity F will not need to be disclosed as a foreign entity on the registration, because its ownership share of the registrant is only 10% (50% of 20%=10%).

This approach will require LDA registrants with complicated corporate hierarchies to calculate ascending percentages of ownership until a point is reached where a parent entity no longer holds 20% ownership of the registrant.

Second, the new guidance appears to expand the third criterion for determining whether a foreign entity must be listed on the LDA registration to require that an LDA registrant disclose the identify of any foreign entity that (a) contributes more than $5,000 to the registrant, a registrant's affiliated organization[2] (listed on Line 13 of the registration), *or to a registrant's foreign entity (listed on Line 14 of the registration)* for the registrant's lobbying activity; (b) actively participates in the planning, supervision, or control of those lobbying activities; and (c) has a direct interest in the outcome of the lobbying activities.

Semiannual Contribution Reports

Each LDA registrant and each individual lobbyist is required to disclose on its semiannual LD-203 contribution report any contributions to federal candidates, political party committees, and

[2] An affiliated organization is an entity that (1) contributes more than $5,000 toward the registrant's lobbying activities in a quarterly period, and (2) actively participates in the planning, supervision, or control of such lobbying activities.

leadership PACs, if those contributions aggregate to $200 or more per recipient during the six-month reporting period. The revised guidance clarifies that in-kind contributions (not just monetary contributions) must be reported on the LD-203 report.

The guidance also includes two new examples to illustrate the requirement that the full cost of an event that honors or recognizes a covered official must be included in the LD-203 report. In one example, the guidance notes that the full cost of an annual fundraising event must be disclosed, even if only 4 out of the 50 honorees are covered officials. While the registrant may not simply report 4/50ths of the cost of the event, it may note in the comments section of the report that only 4 out of 50 honorees at the event were covered officials. Similarly, in a second example, the guidance provides that the full cost of a university's commencement ceremony must be reported if an honorary degree is conferred upon a covered official. Again, the registrant may note in the comments section that only one official was honored as part of the larger university event.

Finally, with several federal officeholders choosing to run for state office this year, the question has arisen whether a contribution to the state campaign of a sitting federal officeholder should be disclosed on an LD-203 report. While the answer to that question is not entirely clear from the language of the LDA itself, congressional officials have informally advised that they do not interpret the statute to require disclosure of such state contributions.

Termination of an Individual Lobbyist

The new guidance incorporates notices issued by the Clerk and Secretary in June 2009 regarding the circumstances in which an individual lobbyist may be de-listed from an LDA registration. Pursuant to that guidance, an individual may be de-listed as a lobbyist only when (1) that individual's lobbying activities did not constitute in the current quarter, and are not reasonably expected to constitute in the next quarter, 20% of the employee's work time (or time spent on behalf of that client); or (2) that person does not reasonably expect to make further lobbying contacts. The de-listing of an individual lobbyist is accomplished by listing that person's name on Line 23 of the next scheduled LD-2 report.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our election and political law practice group:

Robert K. Kelner	202.662.5503	rkelner@cov.com
Bob Lenhard	202.662.5940	rlenhard@cov.com
Scott Gast	202.662-5533	sgast@cov.com