Q&A on the LD-203 -- Revised January 21, 2009

Based on Revised Congressional Guidance Issued January 16, 2009

Prepared by ASAE Staff and McKenna Long & Aldridge LLP -- Political Law Practice Group

Revision Note: The purpose of this Q&A is to explain and provide answers to questions that are frequently asked about the obligations of lobbying organizations and individual lobbyists to file semiannual LD-203 reports. This Q&A has been updated to reflect the latest version of the official Lobbying Disclosure Act Guidance issued by the Secretary of the Senate and Clerk of the House on January 16, 2009, which can be found at http://www.senate.gov/legislative/resources/pdf/S1guidance.pdf.

It is important to note that the LD-203 reporting requirement is still relatively new and the official interpretation of reporting obligations remains subject to change. We will keep the community apprised in the event additional clarification or guidance is issued for the LD-203. Please also note that this Q&A is for informational purposes only and does not constitute specific legal advice or opinions by McKenna Long & Aldridge LLP. Such advice and opinions are provided only upon engagement with respect to specific factual situations.

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On June 30, 2008, the offices of the Secretary of the Senate and Clerk of the House of Representatives announced the release of their new web-based "LD-203 Reporting System" that applies to all registered lobbying organizations and each of the individuals listed as lobbyists in their LD-1 and LD-2 filings. The purpose of the LD-203 is for registered organizations and their listed lobbyists to report certain contributions and payments linked to officials as well as to certify their understanding and compliance with Congressional gift and travel rules. This new form is named after Section 203 of the Honest Leadership and Open Government Act of 2007 ("HLOGA"), which added a new Section 5(d) to the Lobbying Disclosure Act ("LDA"). The LD-203 is required to be filed within 30 days after the end of each semiannual reporting period.

The Secretary of the Senate and the Clerk of the House spent a great deal of time developing technical instructions and substantive guidance documents that can be found at http://www.senate.gov/pagelayout/legislative/g_three_sections_with_teasers/lobbyingdisc.htm and http://lobbyingdisclosure.house.gov/. These include a detailed User Manual and step-by-step audio-visual tutorials for the new web-based electronic filing system (also available on DVD). The Lobbying Disclose Act Guidance document at http://www.senate.gov/legislative/resources/pdf/S1guidance.pdf (which has been periodically revised), provides a substantive explanation of the law and a number of specific examples.

It is recommended that every registrant and lobbyist carefully review these materials. This Q&A document is designed to provide an overview and also to highlight certain technical and substantive issues regarding the new LD-203. Additional Q&A and other resource documents on the LDA 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 ASAE at (202) 626-2703 or publicpolicy@asaenet.org. You can also contact individual members of the Political Law Practice Group of McKenna Long & Aldridge LLP as follows: Jeff Altman at (202) 496-7520 or

jaltman@mckennalong.com; Jackie Henson at (202) 496-7549 or jhenson@mcKennalong.com; Randy Nuckolls at (202) 496-7176 or rnuckolls@mckennalong.com; Stefan Passantino at (202) 496-7138 or spassantino@mckennalong.com; and Ted Van Der Meid at (202) 496-7713 or tvandermeid@mckennalong.com.

Section 1: Overview of the New LD-203 Form

What is the new LD-203 and how is it different from the LD-1 and LD-2?

The LD-1 is the form that must be filed within 45 days after an organization determines that it must register under the LDA. Among other things, the LD-1 identifies the individuals who must be listed as lobbyists.

The LD-2 is the quarterly reporting form that registered organizations must file to disclose lobbying activities and the expenses incurred to conduct those activities (including salaries, direct expenses, and overhead for listed lobbyists and others in the organization who support their efforts as well as payments to outside lobbyists and the share of dues payments to organizations that conduct lobbying activities). Among other things, the LD-2 is used to list new lobbyists and to terminate the listing of individuals who no longer are lobbyists. The LD-2 must be filed within 20 days after the end of each calendar quarter.

The new LD-203 serves two new purposes:

To disclose certain additional contributions and payments linked to officials that are not included in the LD-2 filings of registered organizations, or by any political committees established or controlled by such organizations or their listed lobbyists; and

For the registered organization and each of its listed lobbyists to separately certify that they have read, are familiar with, and have not violated Congressional ethics rules relating to gifts and travel.

Who must file the LD-203?

A separate LD-203 must be filed by every registered organization and by each of its active listed lobbyists "who were active for all or part of the semiannual reporting period." This is different than the LD-1 and LD-2, which must only be filed by the registered organization. According to the Secretary and Clerk, a registered organization remains active until it has filed a termination report for itself and any other organization that it may have listed as a client. Likewise, any individual who was listed by a registrant as a lobbyist for any part of the semi-annual period remains active until they are listed as terminated on Line 23 in a LD-2 filing. A LD-203 must be filed even if there are no contributions or payments to be reported, because the certificate of compliance with Congressional ethics rules must be completed.

When is the LD-203 due?

The LD-203 must be filed semiannually within thirty days after the end of each six month period.

Section 2: Technical Filing Instructions

How do we get started?

Electronic notices regarding the new LD-203 electronic reporting system were sent to each active registered organization on June 30, 2008, with links to the Senate and House website provided above. Registrants can access the new electronic reporting system by using their existing identification numbers and passwords. The first thing to do is take a few minutes to watch and listen to the audio-visual tutorials and review the User Manual and other instructional materials available on the House and Senate websites, which are excellent.

The new electronic filing system is built around the premise that registered organizations are responsible for providing basic information and keeping current the names of individuals that they list as their lobbyists. When you initially log in, you will be provided with a "pre-populated form" for your organization with contact information that you should verify. Among other things, each registered organization must review the list of its active lobbyists and verify their telephone numbers and current email addresses. Each registered organization must then initiate a process whereby an activation email will be sent to each of its listed lobbyists so they can obtain their own user identification numbers and passwords. Each listed lobbyist is responsible for completing the lobbyist's own LD-203 in addition to the LD-203 filed by the registered organization.

What are the other features of the LD-203 contribution reporting system?

In addition to pre-populated forms, the new electronic reporting system allows for automated retrieval of ID numbers and passwords (once assigned); filings that can be saved on the system and amended; a "streamlined" process to allow filing with both the House and Senate "with a single button"; the ability to import data maintained on spreadsheets (this feature is only for registered organizations at this time); an online help manual; and step-by-step tutorials and demonstrations accessible for each screen.

What about new lobbyists not named in a previous LD-1 or LD-2 filing?

A registrant can not change who is listed as a lobbyist for overall LDA purposes using the LD-203 Reporting System. Rather, such changes must be made by adding a new lobbyist on the LD-2 for the quarter in which they first meet the qualifications of a lobbyist. Although you can indicate new lobbyists by adding their names to the LD-203, they will not be able to obtain their own passwords and access the LD-203 Reporting System until after they are named in a LD-2 filing.

What should be the role of the registrant after each of its listed lobbyists are activated for LD-203 purposes and what authorization is required to assist with filings?

Each registered organization will be able to monitor the progress of its listed lobbyists as they are notified and take steps to obtain their own identification numbers and passwords. After that process is completed, the registered organization has no legal responsibility for helping its listed lobbyists to complete their own LD-203 filings. Prudence, however, suggests that the listing organization has an interest in making sure its employees who are listed as lobbyists understand and comply with the law. Many organizations may therefore wish to provide assistance if not assume responsibility for helping their listed lobbyists make accurate and timely filings. If filing assistance is provided, it will be important to have the listed lobbyist review and verify a printed copy of the LD-203 before it is filed and also to confirm in writing that the filing was authorized.

What other responsibilities do registrants and listed lobbyists have to safeguard their User IDs, Passwords, and keep appropriate documentation?

Registrants and listed lobbyists are responsible for maintaining the confidentiality and controlling the use of their user ID and/or passwords. If a registrant or third-party preparer is authorized to help make the filings, all parties are responsible for retaining appropriate documentation to verify report contents. The obligation to file accurate reports and to certify compliance remain the responsibility of each registrant and listed lobbyist even if another party is authorized to assist with the filing.

Section 3. Substantive Reporting Requirements for Contributions and Expenses

Although most of the reporting requirements are simple and straightforward, some of the statutory language was initially interpreted by the Secretary of the Senate and Clerk of the House in a manner that seemed much broader than and at times inconsistent with the statutory language. Among other things, the examples that were

provided in the original Guidance raised serious questions about whether contributions or payments had to be reported for a meeting or event at which a covered official is merely listed as a speaker or attendee, and is not specifically honored or recognized. Other questions also were raised.

On July 16, 2008, the Secretary and Clerk issued a revision to the official Lobbying Disclose Act Guidance in which they provided a number of revised examples to clarify and narrow what needed to be reported. The January 16, 2009 revision continues this trend by revising several examples to clarify further the expenses that still need to be reported. See discussion below regarding these revisions to Examples 4, 6, 9, and 10.

What information does HLOGA require to be reported?

Section 203 of HLOGA requires registrants and lobbyists (and any political committees they establish or control) to report contributions and payments in six broad categories. As paraphrased in the May 29, 2008 revision to the Lobbying Disclosure Act Guidance, registered organizations, individual lobbyists, and any political committee they establish or control, must report:

1. The date, recipient, and amount of funds contributed to any Federal candidate or officeholder, leadership PAC, or political party committee equal to or exceeding $200 for the semiannual period

2. The date, the name of honoree(s), the payee(s) and amount of funds paid for an event to "honor or recognize" a covered Legislative or Executive Branch official (if not otherwise required to be disclosed to the FEC)

3. The date, the name of honoree(s), the payee(s) and amount of funds paid to an entity or person that is named for a covered Legislative Branch official, or to an entity or person in recognition of such official (if not otherwise required to be disclosed to the FEC)

4. The date, recipient, the name of the covered official, the payee(s) and amount of funds paid to an entity established, financed, maintained, or controlled by a covered Legislative or Executive branch official, or to an entity designated by such official (if not otherwise required to be disclosed to the FEC)

5. The date, the name of honoree(s), the payee(s) and amount of funds paid for a meeting, retreat, conference, or other similar event held by, or in the name of, one or more covered Legislative or Executive branch officials (if not otherwise required to be disclosed to the FEC)

6. The date, the name of honoree, the payee(s) and amounts of funds paid to any Presidential library foundation or Presidential inaugural committee equal to or exceeding $200 for the semiannual period

The July 16, 2008 revised Guidance cautioned registered organizations and lobbyists to make sure that all such contributions and expenses are in compliance with Congressional gift and travel rules as well as any Federal Election Commission (FEC) requirements. Also, certain campaign contributions must be reported to Congress even if they already are being reported to the FEC by the recipients.

What does the LD-203 say I need to report?

The LD-203 form itself, the tutorials and User Manual do not exactly track the language of Section 203 or these descriptions in the Lobbying Disclosure Act Guidance. Instead, registered organizations and individual lobbyists are directed to report their contributions and payments under four broad categories: FECA (presumably meaning campaign contributions); Honorary Expenses; Meeting Expenses; and Presidential Library Expenses. Although these broad categories do not exactly match the descriptions in the statute, all of the statutory items should be included under one category or another, to ensure that no relevant expenditures

are omitted. Further guidance on the relationship between the four listed categories and the statutory items still would be useful.

Is there any more guidance?

The January 16, 2009 revision to the official Lobbying Disclosure Act Guidance contains changes to the ten examples contained in previous revisions that should be carefully reviewed. Specifically, Examples 4, 6, 9 and 10 were changed as indicated below. Although questions remain, these changes continue to help the lobbying community understand and reasonably comply with the new reporting requirements .

Example 1 says that a registrant must report the amounts paid to partially fund an event to "honor" Members of Congress with "plaques" as the "Widget Manufacturing Legislative Leaders of 2008" (after confirming that the award is in compliance with Congressional ethics rules).

Example 2 provides that a contribution made by a lobbyist to help endow a university chair named after a Member of Congress needs to be reported.

Example 3 describes a situation where a Member of Congress is asked to "speak at a conference" sponsored by a "professional association" and states that a member of the association who is a registrant must report a charitable contribution it makes "in lieu of the association paying a speaking fee."

Example 4 describes a "large regional conference" sponsored by several Section 501 (c)(3) organizations where Members of Congress are given awards at a dinner event that is part of the conference. A registrant that "contributes $3,000" to one of the sponsors "specifically for the costs of the dinner event" and who was aware that the Members of Congress would be honored "at the time of the specific or restricted contribution" was made, must report the payment. The January 16, 2009 Revised Guidance emphasizes that LD-203 reporting is required under these facts and circumstances even though the registrant is not considered a sponsor under House or Senate gift rules; listed on the invitation as a sponsor; or publicly held out as a sponsor ("or the like"). Although not expressly stated, this example would seem to illustrate that only the costs of a dinner event are reportable when the event is part of a larger conference. Some reasonable allocation made in good faith for similar "honoring" functions embedded in day long or multi-day conferences would also seem appropriate.

Example 5 describes an industry organization that gives a "Legislator of the Year" award to a member of Congress at its annual gala dinner. According to the example, the industry organization must report the "cost of the event" even if the event generates revenues to help fund the registrant's activities throughout the year. The example states that this additional fact "could be noted in the filing."

Example 6 in the July 16, 2008 revision replaced one of the most controversial examples in the May 29, 2008 revision of the official Lobbying Disclosure Act Guidance. The revised example stated that the mere listing of a Member of Congress on the invitation as a speaker during an industry organization's annual two-day Washington fly-in "would not, in and of itself, form the basis for concluding that the official is to be honored or recognized." However, the event would still need to be reported by the industry organization if there is a "special award, honor, or recognition by the organization at the event" -- "even if the invitation did not indicate that such [an award, honor, or recognition] would be given." The January 16, 2009 revised Guidance notes that no physical object needs to be presented in order for the event to be reportable. Also, "simply designating" a covered official as a "speaker" will not allow the filer to avoid or evade reporting its expenses for the event if otherwise required by the facts and circumstances.

Example 7 replaces another controversial example in the prior revision. It describes a situation where Members of Congress serve as "honorary co-hosts" of an event sponsored by a registrant to raise funds for a charity, "which is not established, financed, maintained, or controlled by either legislator." The example states that the "passive allowance of their names to be used as co-hosts, in and of itself, is not sufficient to be considered honored or recognized." The example notes that the "purpose of the event is to raise funds for the charity, not to

honor or recognize" the legislators. These facts, in an of themselves, are not sufficient to treat the event as being held "by or in the name" in the officials. Once again, supplemental facts might require the event to be reported by the sponsor of the event.

Example 8 describes a situation where "The Honorable Cabinet Secretary Z" is listed on the invitation for an event "to promote Widget Awareness" as an "attendee" or "special invitee" -- but "Z" will not receive any honor or award at the event. The mere listing of "Z's" anticipated attendance at an event, in and of itself, is not sufficient to be considered "honored or recognized." Also, the use of the phrase "The Honorable" in this context is consistent with widely accepted notions of protocol applicable to referencing certain very senior government officials." Once again, if "Z" were to actually receive a special award, honor, or recognition, the "costs of the event" would need to be reported by the sponsor of the event.

Example 9 in the July 16, 2008 revision replaced yet another controversial example from the prior guidance that dealt with whether attendees at an event being put on by a third party must report their costs to attend if a covered official is honored. This new example stated that the "purchase of a table or ticket to another entity's event, in and of itself, is not sufficient to be considered paying the cost of an event." According to the example, the cost would only need to be reported by an individual lobbyist or a registrant if: (1) they undertake activities such that they become "a sponsor of the event for House and/or Senate gift rule purposes"; or (2) they "purchase enough tickets/tables so that it would appear that they are paying the costs of the event and/or would not appear to be just ticket or table-buyers." The January 16, 2009 revised Guidance emphasizes once again that the sponsorship provisions in the House and Senate gift rules are not determinative in deciding what must be reported in the LD-203. It is also emphasizes that a case-by-case analysis will be needed to determine if the quantity of tickets and/or tables purchased means that the filer is "paying the costs of the event" that must be reported. Even with the most recent changes, this example eliminates the vast majority of expenses that otherwise would have been required to be reported under the initial Guidance.

Example 10 is different than the others in that it deals with political campaign contributions. The January 16, 2009 revised Guidance makes a change that is critical to the association community. Although the wording of this example still remains somewhat confusing, Congressional staff indicated that the purpose of this change is to provide a new interpretation about who must report contributions made by political committees that are connected to or sponsored by a trade association or other organization under Federal Election Commission Act definitions and rules. If a connected or sponsoring organization (a) is registered under the LDA and (b) reports the actual political contributions on its LD-203 -- then individual lobbyists need only report that they are officers or board members of the political committee on their individual LD-203 reports. Previously, Congressional staff indicated that such relief was only available for employees of a connected or sponsoring organization; but that lobbyists employed by member companies who serve as officers or board members of a trade association political committee were required to report all of the political committee's contributions as if they were their own. This new interpretation should result in greater clarity in reporting. It should also provide welcome relief for individual lobbyists and help reverse the decision of some to resign their positions on association political committees, because of misimpressions caused by reporting under the previous interpretation.

Additional Guidance. Although not part of the ten examples discussed above, two additional points were made in the July 16 revision to the official Lobbying Disclosure Act Guidance.

> If a lobbyist makes a reportable payment but is reimbursed by the registered organization, the registrant should report the payment as its own, rather than the lobbyists reporting the payment.
>
> When covered officials help assist with fundraising activities, "a mere statement of support or solicitation [by a covered official] does not necessarily constitute a reportable event under Section 203 without some further role by a covered official." One such role that would require reporting is if the covered official is "also on the board of the entity." Another would be if an official directs that a contribution be made in lieu of receiving a

speaking fee or honorarium.

The January 16, 2009 revised Guidance also provides additional instructions in two key areas.

It notes that the requirement to report contributions to report contributions to Presidential inaugural committees includes the official "Presidential Transition Organization" of the President-elect and Vice President-elect under the Presidential Transition Act. Although not mentioned in the most recent revised guidance, registrants and lobbyists should be mindful that expenditures honoring covered officials at the party conventions and in connection with the Presidential inauguration and the new Congress may also trigger LD-203 reporting requirements depending upon the facts and circumstances.

It confirms previous verbal advice that a registrant must report the portion of membership dues paid to another organization that engages in lobbying activities, whether or not that other organization is reporting those expenditures itself for LDA purposes. The registrant has the obligation to obtain this information if it is not otherwise provided by the other organization.

IMPORTANT NOTE: For registrants who use Method B or Method C and tax definitions for purposes of determining their lobbying expenses and activities for their LD-2 reports, a literal reading of the LDA requires the use of the broader LDA definition of covered executive branch officials for LD-203 reporting purposes. This interpretation has been confirmed in discussions with Congressional representatives but was not addressed in any revision to the official Lobbying Disclosure Act Guidance. This is an area that may be extremely problematic for some registered organizations to achieve compliance and seems contrary to the overall intent of the LDA to simplify record keeping requirements and allow for consistency between LDA and IRS reporting requirements.

Section 4. HLOGA Certification

What is the new HLOGA Certification Requirement?

One of the key changes made by HLOGA was to make registered organizations and individual lobbyists responsible for compliance with Congressional ethics rules. Accordingly, the LD-203 includes a certification that the filer has "read and is familiar" with the House and Senate ethics rules "relating to the provision of gifts and travel" and "has not provided, requested, or directed a gift, including travel . . . with knowledge that receipt of the gift would violate" these rules.

Which employees are covered by Congressional ethics rules?

The ethics rules apply to every employee of an organization that is registered or that has an outside lobbyist who registers and lists the organization as its client. Nothing of value can be given by any employee to Members of Congress or their staff unless one of the exceptions apply (e.g., a widely attended event, nominal food not part of a meal, one-day travel planned without lobbyist involvement, personal friendship, etc.).

What are the penalties for noncompliance and who can be held liable?

HLOGA authorizes civil fines up to $200,000 and possible criminal jail terms up to five years for any willful or knowing violation. This includes the LD-203 certification and other LDA reporting requirements such as the LD-2. According to the May 29 revision to the Lobbying Disclosure Act Guidance, the Secretary and Clerk may refer the names of registrants and lobbyists to the Department of Justice who fail to provide an appropriate response within 60 days to a notice of noncompliance from either the Senate or House, rather than the name of the signatory who signs on behalf of the organization. Of course, individual lobbyists who falsely sign their own LD-203 certification may be held liable. False statement penalties under other statutes may also apply.

What actions or compliance program should I have in place in order to be able to make this certification in good faith and avoid any fines or penalties?

HLOGA requires a registrant to certify that the organization has reviewed the new House and Senate rules relating to gifts and travel, and that the employees of the organization have not offered anything in violation of these gift and travel restrictions. Any knowing or willful violation of this certification is subject to potential civil fines and criminal penalties. Each registered organization should ensure that it understands the new rules and has provided information about the new rules to its key employees that might interact in any way with Members of Congress and their staff. The information can be posted on an intranet page, sent via email or in written form to all employees. It is also a best practice to conduct some type of training program for staff, particularly those in Washington D.C. and those who come in contact with Congressional employees. Many organizations are conducting workshops or training sessions on HLOGA and then asking all employees to certify via email or by signing a form twice yearly stating that the employee understands and is in compliance with HLOGA.

Each registered organization and its lobbyists must also make sure that they have appropriate record keeping procedures in place to keep track of their lobbying time and expenses that must be reported on LD-2, and the contributions that must be reported on LD-203. This is one of the areas that the GAO is examining in its random audits and it continues to be one of the major areas of difficulty that many organizations still face in complying with the new law.

What happens if we discover someone made an improper gift while compiling information for the LD-203?

This is a difficult question to answer. An inadvertent mistake should always be addressed as soon as it is discovered and corrected to the extent possible by obtaining repayment or reimbursement for any improper gifts or travel. Depending upon the severity of the rule violation, the filer should also discuss this situation with their legal counsel.

Will there be further changes?

The January 16, 2009 revised Guidance notes that Senate and House officials will continue to welcome questions, comments and suggestions for purposes of drafting additional updates. Congressional staff also are available to answer questions and provide help if needed.