Political Activity, Lobbying Laws and Gift Rules Guide, 3d
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Part I. The Lobbying Disclosure Act
B. Applicability of the Act
Chapter 6. Government Contractors
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6:1. Introduction

Special Study for Corporate Counsel on Corporate Lobbying Activity § 1:13 (2007 ed.)
Overview of Corporate Political Activity, BNACPS No. 16-5 § I

The Lobbying Disclosure Act of 1995 ("the Lobbying Disclosure Act" or "LDA.")[FN1] and the amendments made by the Lobbying Disclosure Technical Amendments Act of 1998 ("LDTAA" or "the Technical Amendments")[FN2] and the Honest Leadership and Open Government Act of 2007 ("HLOGA")[FN3] represent a fundamental change in the way federal lobbying laws affect companies that contract with the Federal government. For example, under the old Federal Regulation of Lobbying Act, attempts to influence the executive branch were not considered lobbying. Under the LDA, such activities—including marketing efforts typically engaged in by government contractors—frequently fall within the definition of lobbying and therefore may trigger the law's registration and reporting requirements.

Not only does the LDA radically change the definition of "lobbying" from the old law, it also takes a fundamentally different approach to defining the term than that reflected in the cost principles established by the Federal Acquisition Regulations ("FAR"). The end result may be that government contractors will have to implement yet another mechanism to track the costs of "lobbying" as defined by the Act.

6:2. Threshold considerations

Lobbying Disclosure Act Guidance Memorandum Issued Jointly by the Clerk of the House of Representatives and the Secretary of the Senate (July 1998), BNACPS No. 25-2 W4

The Lobbying Disclosure Act of 1995 ("LDA")[FN1] establishes a series of tests and thresholds to determine whether a company is required to register under the law. First, the company must have at least one employee who meets the definition of a lobbyist under the law. A lobbyist is defined as an individual who is compensated for services that include more than one lobbying contact with a covered executive or legislative branch official, and who spends at least 20% of his or her time for the company during a three month period on lobbying activities. Lobbying activities are defined to include both lobbying contacts and work done to prepare for or support those contacts.

If a company has one or more employees who meet these tests and therefore qualify as lobbyists, the company is required to register and list those employees as lobbyists on its registration if the

company itself meets a dollar threshold test. If the company has in-house personnel lobby on its own behalf, the threshold is $10,000 in expenditures for lobbying activities during a calendar quarter. This threshold is easy to meet, because the expenditures include a pro rata share of the salaries paid to employees for their lobbying work. If the firm is a lobbying firm retained to lobby on behalf of others, the threshold is $2,500 in income from lobbying activities for that particular client during a calendar quarter.

Two examples will illustrate how these tests operate in the government contracts context. If a contractor has an employee whose job it is to sell the company's products to government agencies, and that employee spends most or all of his or her time making numerous lobbying contacts with covered officials and doing the work to prepare for those contacts, the company will be required to register, list that employee as a lobbyist, and report its expenditures for lobbying activities (assuming that the company's total lobbying expenses, including the employee's compensation for lobbying activities, exceed $10,000 in a calendar quarter).

If, on the other hand, a law firm that assists its clients in obtaining contracts with the government has a partner who makes numerous contacts with covered officials for a given client in an attempt to influence the award of a contract, but who spends 90% of his or her time for that client on litigation matters, the firm will not have to register, regardless of the income that the firm receives for its lobbying activities (assuming no other employee qualifies as a lobbyist).

If a contractor is required to register at least one employee as a lobbyist, the law imposes on the company quarterly lobbying and semiannual contribution reporting requirements. On the quarterly lobbying reports, the company must report all amounts spent on lobbying activities—including the costs associated with lobbying activities by employees who themselves do not trigger the individual lobbying requirement; and describe the issues on which it lobbied, the employees who engaged in lobbying contacts on those issues, and the Houses of Congress or Executive Branch agencies or departments contacted by employees. On the semiannual contribution reports, the company must disclose contributions and payments made to honor or benefit covered legislative and executive branch officials.

6:3. Key issues for government contractors

There are three key areas of the lobbying law that require special analysis for government contractors: the definition of covered executive branch officials;[FN1] the definition of what type of communication constitutes a lobbying contact;[FN2] and the exceptions to the definition of lobbying contacts that are likely to apply in the context of government contracts.[FN3]

6:4. Key issues for government contractors—Covered legislative and executive branch officials

Determining whether a particular individual is a covered legislative branch official is fairly straightforward. The definition of such officials, while broad in scope, is relatively easy to apply. Covered legislative branch officials are defined as: Members of Congress; elected officers of either House of Congress; any employee or anyone functioning as an employee of a Member of Congress, a committee of either House of Congress, the leadership staff of either House of Congress, a joint committee, or a working group or caucus; and any other legislative branch employees serving in positions “described under section 109(13) of the Ethics in Government

Act of 1978 (5 U.S.C. 611(b)).” This last category includes relatively high-level employees of the General Accounting Office, the Congressional Research Service, and the Congressional Budget Office.

However, it is more difficult to state in general terms whether executive branch officials with whom contractors communicate with regard to government contracts are covered by the Act. Covered executive branch officials are defined under the law as: the President; the Vice President; all officers and employees of the Executive Office of the President; any officers and employees with Executive Schedule positions; any member of the uniformed services with a pay grade of 0-7 or above (which includes the ranks of brigadier general, admiral, and above in the armed forces); and “any officer or employee serving in a position of a confidential, policy-determining, policy-making, or policy-advocating character as described in section 7511(b)(2)(B) of Title 5,” United States Code.

The Lobbying Disclosure Technical Amendments Act (“LDTAA” or “Technical Amendments”)[FN1] clarifies the application of Lobbying Disclosure Act (“LDA” or “Act”) § 3(3)(F), the provision regarding “any officer or employee serving in a position of a confidential, policy-determining, policy-making or policy advocating character as described in 7511(b)(2)(B) of title 5. The Technical Amendments make clear that § 3(3)(F) generally applies only to “Schedule C” employees and does not apply to Senior Executive Service employees unless they fall within one of the specific categories of employees listed in the definition of covered executive branch official. The categories are: the President; the Vice President; officers and employees of the Executive Office of the President; any official serving in an Executive Level I-V position; any member of the uniformed services at grade 0-7 or above; or any Schedule C employee.

The scope of the definition of covered officials is critical because, if a communication is not with a covered official, it does not count as a lobbying contact under the Act, regardless of the purpose or content of the communication. Government contractors may find that many of their contacts with the government do not involve covered executive or legislative branch officials. However, to illustrate the application of the definition of “lobbying contacts” and the exceptions to that definition, the following discussion will presume that communications are with covered officials.[FN2] Again, it is important to keep in mind that, in reality, many such communications will not be with covered officials and, therefore, do not implicate the Act.

6:5. Key issues for government contractors—Definition of lobbying contact
Special Study for Corporate Counsel on Corporate Lobbying Activity § 1:13 (2007 ed.)

The definition of a lobbying contact is a critical issue under the Lobbying Disclosure Act (“LDA” or “Act”) for at least two reasons. First, individual employees must make “lobbying contacts” with covered officials for the Act to apply at all. Second, lobbying activities are defined as lobbying contacts and the activities in support of such contacts. Therefore, for purposes of determining (1) whether an individual meets the 20% test; (2) whether a company meets the dollar registration thresholds; and (3) if so, what amount must be reported on a semiannual basis, it is essential to understand what constitutes a lobbying contact.

Generally, the law defines lobbying contacts as contacts with regard to one of four types of subjects. The first subject involves communications with regard to the adoption, modification, or formulation of legislation or legislative proposals—what traditionally has been conceived of as lobbying. The last of the four subjects involves communications that relate to the nomination or confirmation of a person for a position subject to Senate confirmation. Again, the scope of this prong is relatively self-explanatory.

However, the other two prongs of the definition—which are the prongs most directly relevant to government contractors—raise serious questions. They state that communications with covered officials are lobbying contacts if they concern

(ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive Order, or any other program, policy, or position of the United States Government;
(iii) the administration or execution of a Federal program or policy (including the negotiation, award, or administration of a Federal contract, grant, loan, permit, or license).[FN1]

The critical question is whether communications relating to government contracting are covered only by subparagraph (iii)—which specifically references government contracts—or whether they also are covered by subparagraph (ii), which contains no such reference. This question is important, because if subparagraph (iii) alone applies in the government contracts context, only communications with regard to the execution or administration of a program or policy would be lobbying contacts. In other words, communications regarding the development or creation of a new or revised policy or program would not be lobbying contacts within the context of government contracts. However, if subparagraph (ii) applies in the context of government contracts as well, virtually any communication by government contractors relating to a program or policy, whether it is with regard to the formulation, adoption, modification, administration, or execution of that program or policy, would fall within the definition of a lobbying contact.

It is reasonable to conclude that the Act intended communications regarding government contracts to be analyzed under both subparagraphs (ii) and (iii). There is more to government contracting than simply the negotiation, award, and administration of contracts—the phases identified in subparagraph (iii). The adoption, formulation, or modification of policies and programs under which contracts are awarded—the types of activities covered by subparagraph (ii)—also are important components of the government contracting process. It is unlikely that Congress intended to exempt communications relating to these important stages of the contracting process. Determining whether a communication relating to government contracting falls within the definition of lobbying contacts requires an analysis of each such communication. If the substance and purpose of a communication indicate that it is with regard to the formulation, modification, adoption, administration, or execution of a Federal program or policy, the communication would fall within the definition of a lobbying contact.

However, there may be instances in which a communication by a government contractor or a potential government contractor is not within the definition of a lobbying contact. While the definition of lobbying contacts does not say so on its face, the findings section of the Act suggests that there must be an intent to influence the recipient of a communication for that communication to be a lobbying contact. Therefore, a purely informational communication about

a new product or service, which is not intended to influence a covered official with regard to an agency program or policy, would be outside the definition.

6:6. Key issues for government contractors—Exceptions to the definition of lobbying contact

Lobbying, PACs and Campaign Finance, 50 State Handbook § 10:14 (2008 ed.)

Excerpts from the Report of the House Committee on the Judiciary Concerning the Lobbying Disclosure Act of 1995 (H.R. Rep. No. 104-339, Pt. 1,1995), BNACPS No. 25-2 W2

Any analysis of the application of the new lobbying law to government contractors' activities also must evaluate the application of the nineteen exceptions to the definition of lobbying contacts. Relevant exceptions to the definition of "lobbying contacts" within the context of government contracts include communications that:

• provide information in writing in response to oral or written requests by covered executive or legislative branch officials for specific information;
• are required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by Federal contract, grant, loan, permit or license; (note the italicized section was added by the Lobbying Disclosure Technical Amendments Act ("LDTAA")[FN1]);
• are made to an official in an agency with regard to a judicial proceeding or a criminal or civil law enforcement inquiry, investigation, or proceeding;
• are made in compliance with written agency procedures for adjudications under the Administrative Procedures Act;
• are written comments filed in the course of a public proceeding, or any other communication that is made on the record in a public proceeding; and
• are made in response to a notice in the Federal Register, Commerce Business Daily or similar publication soliciting communications from the public and directed to the agency official designated in the notice to receive information.

6:7. Application of the law to government contractors: Stages of the procurement process

Lobbying Disclosure Act Guidance Memorandum Issued Jointly by the Clerk of the House of Representatives and the Secretary of the Senate (July 1998), BNACPS No. 25-2 W4

In the government contracts context, the application of the definition of lobbying contacts, as well as the exceptions to that definition, may depend to a large extent on the stage of the procurement process at which the communication takes place. For purposes of this analysis, communications related to the procurement process have been divided into five stages: pre-procurement sales and marketing communications; responses to requests for statements of interest; responses to requests for comments on draft Requests for Proposals ("RFPs"); responses to RFPs; and communications associated with contract performance, administration, and closeout. This chapter will address each of these stages in turn.

6:8. Application of the law to government contractors: Stages of the procurement process—Promotional communications

Lobbying Disclosure Act Guidance Memorandum Issued Jointly by the Clerk of the House of Representatives and the Secretary of the Senate (July 1998), BNACPS No. 25-2 W4

Before the formal procurement process begins, it is common for contractors to communicate with agencies of the federal government about their products or services. These communications cover a range of levels of detail and degrees of connection to specific government programs. However, they generally aim to promote the company in some way with the agency being contacted, either with the hope of obtaining a contract immediately, or with the goal of laying the groundwork for a contract in the future.

As we have seen, the specific nature of the communication is important because certain pre-procurement process marketing contacts might not fall within the definition of lobbying contacts. This is particularly important in this context because, as discussed below, no exceptions to the definition readily apply to such communications. As noted above, there is an argument that purely informational communications—which do not relate to the formulation, modification, adoption, administration, or execution of a federal program or policy—are outside of the definition of a lobbying contact. However, within the context of promotional activities, only a narrow band of communications likely will fall within this loophole in the definition.

For example, a government contractor may urge the Federal Aviation Administration ("FAA") to undertake a program to develop a new generation of radar systems, along the lines of the company's new, highly advanced radar equipment, to better manage air traffic control at airports around the country. This communication likely would relate to the adoption, modification, execution, or administration of FAA programs or policies, regarding air traffic safety. The communication therefore would be deemed a lobbying contact.

If, on the other hand, the same contractor makes a presentation on the same technology to the Defense Department, not because the company is urging the military to procure the equipment, but because it wants the Department to be aware of the technological advances the company is making, such a communication arguably does not relate to a program or policy and, therefore, might not fall within the definition of a lobbying contact.

Admittedly, there likely will be few communications that do not relate to a federal program or policy in this context or do not seek to influence the government official contacted. In other words, most communications regarding the sale or marketing of a product or service to an agency before the procurement process formally begins will be lobbying contacts. Even so, it is important to keep in mind that a company employee does not trigger registration requirements if he or she fails to spend at least 20% of his or her time during a three month period on lobbying activities.

6:9. Application of the law to government contractors: Stages of the procurement process—Responses to requests for statements of interest

Lobbying Disclosure Act Guidance Memorandum Issued Jointly by the Clerk of the House of Representatives and the Secretary of the Senate (July 1998), BNACPS No. 25-2 W4

The second stage of the procurement process for purposes of the Act is when an agency requests statements of interest. A number of different types of communications may occur at this stage. Generally speaking, however, the agency has identified a particular need and is seeking comments and suggestions from likely contractors to help it formalize its requirements and move on to the procurement process.

Communications in response to such requests are almost certain to fall within the definition of lobbying contacts. This is the case, even though there may be no specific contract about which the communications are made, because the communication relates to an established agency program or policy. Therefore, any attempt to influence that policy or program likely would fall within the definition of a lobbying contact. Clearly, most communications by potential contractors at this stage would be attempts to influence the policy or program.

Although such communications are within the definition of lobbying contacts, they may fall under one of the exceptions to that definition. Two exceptions are particularly important for communications at this stage of the procurement process: the exception covering written responses to requests for specific information by covered officials, and the exception covering responses to notices published in the Federal Register, Commerce Business Daily or other similar publications.

The first exception raises a number of issues. It is common for government officials to call experts in their fields for their views on policy or program issues. This practice certainly occurs within the government contracts context, particularly when an agency is attempting to define its requirements. The difficulty that this practice raises, however, is that under the terms of the Act an oral response to such a question would be a lobbying contact, while a written response would fall within the exception. This anomaly may lead to the absurd result that responses to questions in a meeting would have to be written down to avoid turning the meeting into a lobbying contact, even if the meeting involves the presentation of written materials.

Similarly, this exception creates a situation in which unsolicited communications—such as an unsolicited proposal—would be lobbying contacts, whereas written responses to questions would not be. This may lead to difficult “who started it” questions about each submission to a covered official.

The second relevant exception for communications intended to provide an agency with information for a possible future procurement is for responses to notices published in the Federal Register, Commerce Business Daily, or other similar publications requesting public comment. This exception is limited to responses directed at the official designated in the notice as the recipient of such comments, but such responses may be written or oral. In practice, however, this exception may lead to difficult questions. For example, if a contractor contacts the designated official in response to a Commerce Business Daily notice, and the designated official states that he or she would like the contractor to speak to his or her supervisor, is the contractor's communication with the supervisor within the exception? Or is the communication no longer to the designated official?

While it is true that discussing the matter with someone other than the designated official takes the communication out of the literal meaning of the exception, the most reasonable approach appears to be to treat anyone the agency indicates it would like to receive such comments as the designated official.

§ 6:10. Application of the law to government contractors: Stages of the procurement process—Responses to requests for comments on draft RFPs

Lobbying Disclosure Act Guidance Memorandum Issued Jointly by the Clerk of the House of Representatives and the Secretary of the Senate (July 1998), BNACPS No. 25-2 W4

The third stage of the procurement process involves an agency's requests for comments on a draft Request for Proposal ("RFP"). At this stage, the agency is seeking comments, not only on a policy or program, but on a specific contract that will be entered into after the procurement process. Frequently, the agency circulates a draft RFP for comment among companies that it knows may be interested in the contract, or it may publish a notice in the Commerce Business Daily that the draft is available for general comment.

In either case, the same analysis as was discussed above in the context of responses to requests for statements of interest would apply. The communication would fall within the definition of a lobbying contact, but might be subject to the exception for written responses to information requested by covered officials, or to the exception for responses to notices in the Federal Register or Commerce Business Daily.

6:11. Application of the law to government contractors: Stages of the procurement process—The formal procurement process

Lobbying Disclosure Act Guidance Memorandum Issued Jointly by the Clerk of the House of Representatives and the Secretary of the Senate (July 1998), BNACPS No. 25-2 W4

The fourth stage of the procurement process is when the formal procurement process truly gets under way, typically with the issuance of a Request for Proposal ("RFP").

There is little question that responses to RFPs or other communications during the formal procurement process would fall within the definition of a lobbying contact. However, the formal procurement process is highly regulated by statute and regulation. Thus, there also is little question that such communications would fall within at least one of several exceptions that may apply.

As we have already discussed, the exception governing written responses to specific requests for information, as well as the exception for notices in the Federal Register, Commerce Business Daily, or other similar publications, would cover many of the communications that take place during the formal procurement process. In addition, another exception—communications compelled by agency action, statute, or regulation—might apply at this more formal stage. This exception would apply to communications relating to disclosures the company is required by law to make in order to participate in the procurement process or to communicate during the formal negotiation process.

6:12. Application of the law to government contractors: Stages of the procurement process—Contract performance, administration, and closeout

Lobbying Disclosure Act Guidance Memorandum Issued Jointly by the Clerk of the House of Representatives and the Secretary of the Senate (July 1998), BNACPS No. 25-2 W4

The final stage of the procurement process may be described as contract performance, administration, and closeout. Once the procurement process is complete, a contractor typically is awarded a contract to provide the goods or services the agency intends to obtain. Pursuant to the performance of a contract, there are innumerable communications with the contracting agency. For example, there may be status reports or briefings required under the contract and/or routine minor modifications made to a contract as unexpected difficulties or changes in circumstances arise.

It might appear self-evident that Congress did not intend to include all communications of this nature within the definition of lobbying contacts. However, the plain language of the definition does not exempt such communications. In fact, the third prong of the definition explicitly includes communications with regard to the "administration of a Federal Contract." Regardless of whether day-to-day communications relating to contract performance and administration are covered by the definition of lobbying contacts in the first instance, there is an exception that removes such communications from the scope of the definition. That exception provides: lobbying contacts do not include communications that are "required by subpoena, civil investigative demand, or otherwise compelled by statute, regulation, or other action of the Congress or an agency, including any communication compelled by a Federal contract, loan, grant, permit, or license." (Emphasis added.)

The legislative history of the Lobbying Disclosure Technical Amendments Act ("LDTAA")[FN1] states that Congress intended "to except communications required under the terms of a Federal contract, grant, loan, permit or license."[FN2] Therefore, a communication that is required by the terms of a contract is not a lobbying contact. For example, in an on-going technical assistance contract, technical communications between the contractor and a covered official that are required by the contract would not constitute a "lobbying contact." Note however, that this exception would not apply in situations in which a contractor tries to influence a covered official regarding a matter of policy or an award of a new contract.

In addition, communications that are compelled by regulations or statutes that require certain actions of government contractors also would fall within this exception. For example, during or after contract performance, contract provisions or the Federal Acquisition Regulations ("FAR") may require that the contractor respond to a request for an audit. As a result, communications with covered officials pursuant to that audit would be excepted from the definition of a lobbying contact.

Similarly, a government contractor may receive an inquiry from an agency Office of Inspector General ("OIG") or other investigative agency. Communications in response to such inquiries could come within the exception as being required by an "investigative demand" or compelled by statute. As a result of these exceptions, most communications relating to government contract performance, administration, or closeout would not be lobbying contacts.

However, it is important to keep in mind that, if the communication strays beyond that required by the terms of the statute, the investigative demand, or the contract, the communication may become a lobbying contact. For example, if, during a mandatory design review, the contractor attempts to convince a covered official to extend, renew, or expand the existing contract, the communication would no longer fall within the exception to the definition of a lobbying contact, and it would become a lobbying contact unless another exception applies. Similarly, a routine request for equitable adjustment under the changes clause would not be a lobbying contact, because the contract requires such action. However, communications with higher level agency officials regarding the request may be lobbying contacts, because such communications are not called for by the contract.

In addition, another exception likely would apply to communications with investigative agencies such as the OIG. Under that exception, communications with regard to a criminal or civil law enforcement inquiry, investigation, or proceeding are not lobbying contacts. The Act's legislative history provides that this exception applies to communications that take place before formal communications are instituted.[FN3] Thus, the exception will apply to many government contractors' communications with the OIG and similar agencies.

6:13. Relationship between the Act and the Federal Acquisition Regulations ("FAR") cost principles

Special Study for Corporate Counsel on Corporate Lobbying Activity § 1:13 (2007 ed.)
Other Federal Statutes, Rules, and Regulations Affecting Those Who Lobby, BNACPS No. 25-2 § V

It is noteworthy that the definition of lobbying under the Act does not by its terms alter the very different terms of the Legislative Lobbying Costs and Executive Lobbying Costs cost principles. The latter renders unallowable only costs incurred "in attempting to improperly influence" executive branch employees or officials.[FN1] However, many activities deemed executive branch "lobbying" under the Act could be viewed as "direct selling efforts" under the Selling Cost principle.[FN2] Such efforts are described as those acts or actions to induce particular customers to purchase particular products or services … [including] such activities as familiarizing a potential customer with the customer's products or services, … technical and consulting efforts, [and] individual demonstrations ….

Under FAR, the costs of these direct sales efforts are allowable if reasonable in amount.[FN3] As for legislative lobbying costs, the cost principle treats costs associated with activities not considered lobbying under the new lobbying law as unallowable costs. Such activities include grassroots attempts to influence federal legislation[FN4] and attempts to influence federal, state, or local elections.[FN5]

Two consequences flow from these differences between the Act and the cost principles. First, it will be important for contractors to recognize these differences in scope, both in determining whether any of their employees must register as a lobbyist, and in segregating their unallowable legislative lobbying costs. Second, it is not clear whether the definition of lobbying embodied in the Lobbying Disclosure Act may encourage the FAR Council to amend the definition of lobbying in the cost principles.

6:14. Conclusion
Special Study for Corporate Counsel on Corporate Lobbying Activity § 1:13 (2007 ed.)
Other Federal Statutes, Rules, and Regulations Affecting Those Who Lobby, BNACPS No. 25-2

The Lobbying Disclosure Act[FN1] presents significant challenges to government contractors. Since the enactment of the Act in 1995, Congress has monitored compliance with the new law, that monitoring is expected to increase with time. Government contractors should take care to understand what requirements apply to them and take action to ensure full compliance.

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[FN1] Lobbying Disclosure Act of 1995, Pub. L. No. 104-65, 109 Stat. 691 (1995) (codified as amended at 2 U.S.C.A. §§ 1601 to 1612 and 22 U.S.C.A. §§ 611, 621).

[FN2] Lobbying Disclosure Technical Amendments Act of 1998, Pub. L. No. 105-166, 112 Stat. 38 (1998).

[FN3] Honest Leadership and Open Government Act of 2007, Pub. L. No. 110-81, 121 Stat. 735 (2007).