

COMPLIANCE AND DISCLOSURE UNDER THE HONEST LEADERSHIP AND OPEN GOVERNMENT ACT OF 2007

July 14, 2008

Florida International University

C. Randall Nuckolls, Partner
McKenna Long & Aldridge, LLP
rnuckolls@mckennalong.com

What We Will Cover Today

- Basic Lobbying Disclosure Act (LDA) Rules
- Basic Gift, Meal & Travel Rules
- Changes under the Honest Leadership & Open Government Act (HLOGA)
- Key elements of a Compliance Plan

Gifts & Travel

The World Before Reform

Lobbying Disclosure Act



Lobbying Community

Federal Election Campaign Act/ FEC



Political Community

House and Senate Ethics Rules



Congress

Gifts & Travel

The World Before Reform

Lobbying Disclosure Act

Federal Election
Campaign Act/ FEC

House and Senate
Ethics Rules

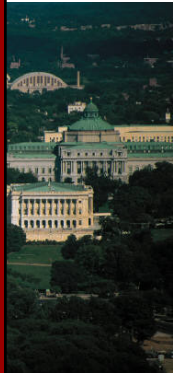
Congressional Ethics Rules Changes

**The Honest Leadership and
Open Government Act of 2007**

Public Law 110-81, signed 9/14/07



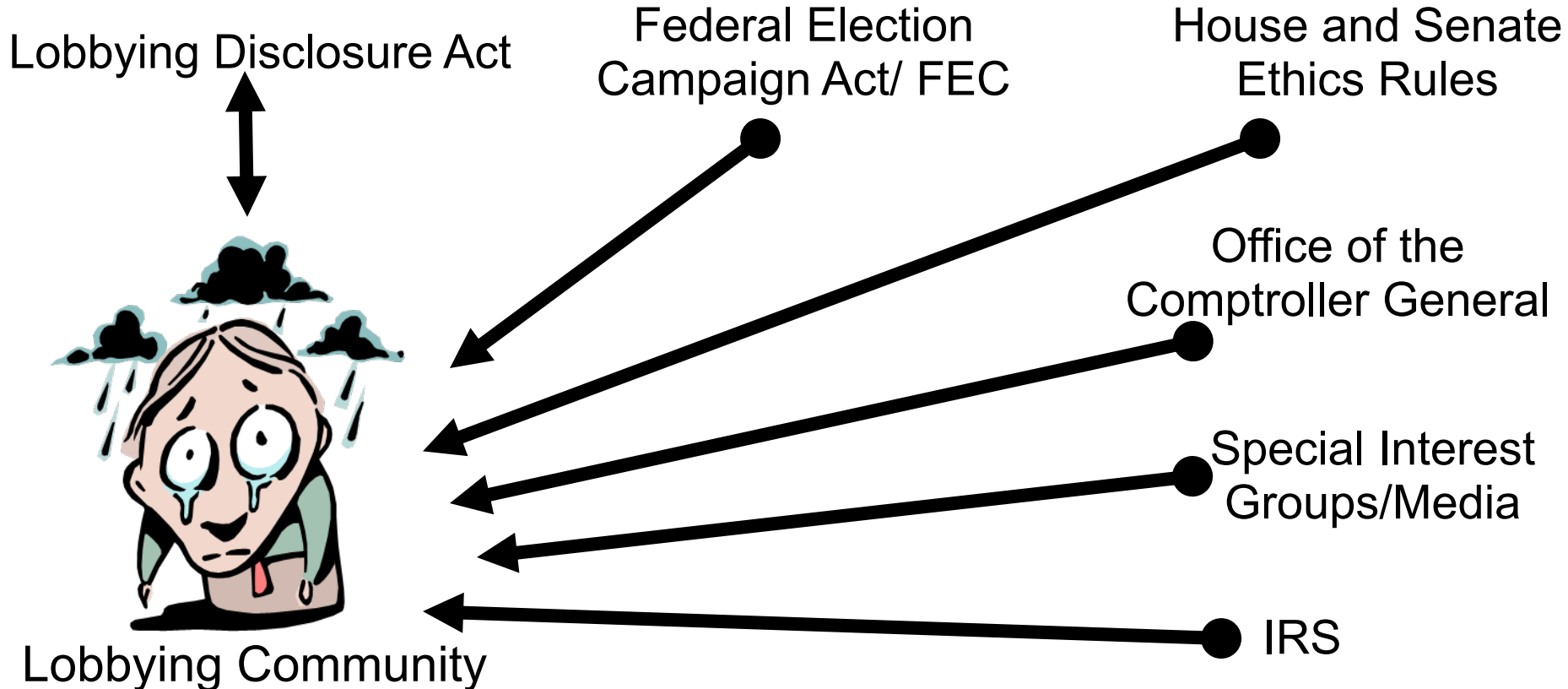
Lobbying



S

The New World

The Honest Leadership and Open Government Act



The Lobbying Disclosure Act (LDA)

- The LDA is intended to provide broad disclosure of both Legislative and Executive Branch lobbying activities
- Signed into law by President Clinton in 1995
- Subsequent minor technical amendments
- Major changes were made by the Honest Leadership and Open Government Act of 2007 (HLOGA)

Overall LDA Framework

- The LDA is built around the definitions of a
 - lobbyist
 - covered legislative & executive branch officials
 - lobbying activities
 - Exceptions
- LDA contains its own definitions of these terms

Who is a Lobbyist?

The LDA defines a “lobbyist” using a three-part test (measured quarterly as of January 1, 2008 under HLOGA):

1. More than one “lobbying contact” with covered officials
2. “Lobbying activities” constitute 20% or more of the services performed by that individual on behalf of his/her employer or client during any quarter
3. Total organization “Lobbying expenses” of \$10,000 per quarter in the case of an employed “lobbyist” (or \$2,500 per quarter if an outside lobbying firm)

Who Must Register?

- Organizations including universities are not themselves “lobbyists” but must register under the LDA and list any employees who meet the definition of a “lobbyist”;
- If a higher education institution hires an outside person or entity that meets the definition of a “lobbyist” - then that other person or entity must register under the LDA and list the hiring organization as its “client”
- Form LD-1 registration must be filed within 45 days
 - After lobbyist is employed or retained
 - After previous nonlobbyist employee makes second contact

Covered Contacts (LDA Definition)

Oral, written or electronic communications to a covered Legislative or Executive Branch Official regarding:

- formulation, modification, or adoption of Federal legislation
- the administration or execution of a Federal program or policy
- formulation, modification, or adoption of a Federal rule, regulation, Executive order, policy or position of the United States Government
- the nomination or confirmation of a person subject to confirmation by the Senate.

What is NOT a “Lobbying Contact” (LDA Definition)

- EXCEPTIONS - “lobbying contact” does NOT include:
 - a speech, article, publication or other material that is distributed and made available to the public through a medium of mass communication
 - a request for a meeting, a request for the status of an action, or other similar administrative request
 - testimony given before Congress or submitted for inclusion in the public record
 - information provided in writing in response to an oral or written request, or in response to a request for public comments in the Federal Register
 - required by subpoena or civil investigative demand
 - written comment filed in the course of a public proceeding
 - made by the media if the purpose is gathering and disseminating news and information to the public.

Covered Individuals (LDA Definition)

- A “Covered Legislative Branch Official” includes
 - Members of Congress
 - an elected officer of either House of Congress
 - employees of a Member, Committee, leadership staff, joint committee, working group or caucus

Covered Individuals (LDA Definition)

- A “Covered Executive Branch Official” includes
 - the President
 - the Vice President
 - any officer or employee in the Executive Office of the President
 - any Executive Schedule level I - V officer or employee
 - any member of the armed services at or above pay grade O-7 & above
 - “Schedule C” political appointees

“Lobbying Activities” (LDA Definition)

Lobbying activities means lobbying contacts **AND** efforts in support of such contacts including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others

New LDA Requirements

- Single Combined Electronic Filing for House & Senate
- Quarterly filing of Form LD-2 due 20 days after end of quarter - first filing due April 20, 2008
- Previous dollar thresholds halved to \$10,000/\$2500
- Lobbyists must disclose employment as Legislative or Executive branch officials within the last 20 years

New LDA Requirements

- Lobbyists must disclose if client is a state or local entity
- LDA reports must contain certification of compliance with gift, meal & travel rules
- Increased civil fines up to \$200,000 and criminal penalties up to 5 years for any knowing violation
- Mandatory GAO Audits & DOJ reports on referrals

New LDA Requirements

- New information required for coalition activities
- If organization is registered or employs outside lobbyists:
 - a. \$50 gift exception is eliminated for all employees
 - b. Funded travel is strictly limited and lobbyist involvement must be de minimus

New Semiannual Reports (LD-203)

- New Semi-Annual Reports on Form LD-203 of campaign contributions, donations to presidential libraries/Inaugurals, honorary events
 - Registrants employing or retaining lobbyists
 - Individual listed lobbyists (who must now also register & report)

New Semiannual Reports (LD-203)

- Must report contributions > \$200 by registrant (including any PAC “established or controlled” by registrant) and listed lobbyists to :
 - federal candidates, PACs, political party committees
 - presidential library or inaugural committee
- Required in addition to FEC reports

New Semiannual Reports (LD-203)

- Also contributions or expenses with respect to legislative & executive branch officials:
 - For events honoring covered official
 - to an entity named after or an entity in recognition of such official
 - to an entity “established, financed, maintained or controlled” or an entity designated by such official
 - to pay for a meeting, retreat or conference held by or in the name of one or more officials
- Never previously reported - Forms will be released around July 1, 2008

New Certification Requirement

- LDA reports filed by Registrant and each listed lobbyist must include certification that:
 - They have “read and [are] familiar with” the gift & travel rules
 - Have “not provided, requested, or directed” any gift or travel “with knowledge” of any violation of these rules
- Increased civil fines up to \$200,000 and criminal penalties up to 5 years in jail for a knowing violation

Reporting of Expenditures for Honoring or Recognizing on LD-203

- Covered Officials as defined in LDA
- Attendance or Speaking at Events vs. being Honored or Recognized
- Disclosing Costs for Honoring/Recognizing
- Confusing Examples in May 29th Guidance
- Possible Clarifications Forthcoming

Reporting of Expenditures for Honoring or Recognizing on LD-203

- Example 1: A group of constituents involved in widget manufacturing decide to honor Senator "Y" and Representative "T" with the "Widget Manufacturing Legislative Leaders of 2008" plaques. Registrant "B" is aware that "Y" has checked with the Senate Select Committee on Ethics regarding her ability to accept the award and attend the coffee, and "T" has checked with the House Committee on Standards of Official Conduct. "B" pays caterer "Z" \$500 and Hotel "H" \$200 to partially fund the event. "B" would report that it paid \$500 to "Z" and \$200 to "H" on November 20, 2008 for the purpose of an event to honor or recognize "Y" and "T" with the plaques.
- Example 2: Senator "Y" and Representative "T" are honorary co-hosts of an event sponsored by Registrant "R" to promote "Widget Awareness." "R" would disclose the date, amount, recipient(s) of funds and "Y" and "T" since "Y" and "T" are being honored and or recognized.

Reporting of Expenditures...Continued

- Example 5: Senator "Y" has been asked to speak at a conference in Washington, DC, sponsored by a professional association of which Registrant "B" is a member. "B" makes a donation of \$100 to Charity "X" in lieu of honoraria. "B" would disclose a contribution of \$100 on July 15, 2008, with the notation that "Y" was the speaker and the contribution was made in lieu of honoraria.
- Example 6: In State "A," there is a large regional conference on "Saving Our River," sponsored by three 501c(3) organizations. Senator "Y" and Representative "T" are invited to appear as honored guests. Registrant "B" contributes \$3,000 to the event, paying one of the sponsors. "B" would disclose a payment of \$3,000 on August 1, 2008 payable to the sponsor with the notation that "Y," "T," are honored guests.

Reporting of Expenditures....Continued

- Example 7: Registrant "B" is a large organization with 50 state offices in which its employees are assigned to handle state and local government affairs issues. A separate local organization hosts an event that honors primarily local officials, but also includes Representative "T," as an honoree. "B" pays for its employees' lunches at the honoring event. Accordingly, "B" would report that it paid the local organization \$200 for lunch to honor "T."
- Example 8: Lobbyists "C" and "D" serve on the board of an unaffiliated PAC as member and treasurer respectively. As board members, they are in positions that controls direction of the PAC's contributions. Since both are controlling to whom the PAC's contributions are given, they must disclose applicable contributions and payments on their semi-annual reports.

University Lobbying Disclosure and Ethics Compliance Checklist

- Does at least one employee of the University make “lobbying contacts” and spend 20% or more time on “lobbying activities”?
- If yes, is University registered under the Lobbying Disclosure Act?
- Public universities must use Method A for reporting

University Lobbying Disclosure and Ethics Compliance Checklist

- Does the University have a policy stating who is allowed to make “lobbying contacts” on behalf of the University?
- Does the University have a procedure for internal tracking and reporting of “lobbying contacts” made by employees?
- Is the University capturing and reporting all costs of “lobbying activities” (good faith estimate) to nearest \$10,000?
 - Salary/benefits/overhead
 - Travel and other expenses
 - Payment to outside lobbying firms
 - An appropriate percentage of dues payments to lobbying organizations

University Lobbying Disclosure and Ethics Compliance Checklist

- Are proper records of calculations maintained?
- How does University pay for lobbying expenses? How does University pay for gifts/meals to Members of Congress and staff?
- How does University track lobbying activities that must be disclosed on Byrd Amendment forms (LLL forms)?
- Has University educated key administrators about House and Senate gift and travel rules?
- Does the University obtain an acknowledgement from key employees that no gifts/travel has been offered to a Member of Congress or staff in violation of the rules?
- Are the Governmental Affairs officers/Public affairs officers/Legal Counsel knowledgeable and prepared to answer any media questions that might arise?

Section 15 Reporting Alternatives (cont.) Method A

- Method A - Any LDA Registrant
 - LDA definitions used to estimate \$\$\$ and to define covered officials and activities
 - Entire Legislative Branch re legislative & policy/regulatory matters
 - Executive Branch officials & military officers for legislative, regulatory/policy and contract/grant matters
 - State, local & grassroots legislative activities are not covered

Byrd Amendment

- 31 U.S.C. § 1352 (2000), FAR Subpart 3.8
- Prohibits use of “appropriated” federal funds to influence any type of federal award, including contracts, subcontracts, grants and cooperative agreements
- Requires disclosure of payments made to outside lobbyists to influence a federal award

Covered Activities

- Any communications to Congress or agency intended to influence an award, including its extension, renewal or modification, or the earmarking of funds for a particular program within a bill

Exempt Activities

- Payment of reasonable compensation for agency and legislative liaison activities by own employees not related to a particular federal award
- Providing information specifically requested by Congress or an agency
- Post-award communications to administer an award
- Payments of reasonable compensation to own employees or to consultants for professional or technical services in connection with preparation of a proposal or negotiation of an award

Disclosure/Certification Requirements

- Apply to federal awards greater than \$100,000
- Flow to sub-awardees
- Standard Form LLL requires identification of LDA registrants engaged in covered activities for that award (but not internal employees)
- Awardee must certify that appropriated funds not used for internal or external lobbying

Gifts and Travel - Ethical Issues

Members, Hill Staff and the Private Sector are Asking About



Lobbying Community

1. What is the scope of the new gift ban on lobbyists?
2. Are Members allowed to come to private functions? Are they allowed to eat?
 - a. nominal food other than a meal
 - b. widely attended events
3. Are Members allowed to travel for site visits outside DC?
 - a. trip length and permitted lodging?
 - b. scope of lobbyist involvement
4. What are we allowed to do at the conventions?

The Bottom Line

We advise our Congressional and other clients that a Member of Congress or staff person may NOT accept ANYTHING of value from ANYONE - whether personal or official - UNLESS acceptance is allowed under one of the exceptions.

We tell our Congressional clients they may NEVER:

- Solicit a gift from any person who has interests before the House;
- Accept a gift that is linked to any official action that the individual has taken, or is being asked to take;
- Accept any other gift, unless specifically allowed under one of the provisions of the House gift rule.

The biggest change for lobbying organizations & their employees:

Under the new rules, no lobbyist and no employee of an organization employing lobbyists (or hiring outside lobbyists) may rely on the “\$50” exception in giving gifts to any Member of Congress or staff.

However, other exceptions remain available

Permitted Gifts



- Personal Friendship Exemption - Based on long-standing personal friendship (any item over \$250 must receive pre-clearance)

Personal Friendship

- Not paid for personally
 - Corporate credit card
 - Charged to the Firm
 - Business Tax Deduction
- Reciprocal Gift giving
- History of the Relationship
- Similar Gifts to others

Widely Attended Event

- Widely Attended Event
 - At least 25 other than Members
 - Open to individuals from throughout a given industry or profession . . .
- Invitation came from the Sponsor of the Event (contributors are not sponsors)
- The attendance of the staff person is related to his or her official duties
 - Ceremonial role
 - Appropriate to duties

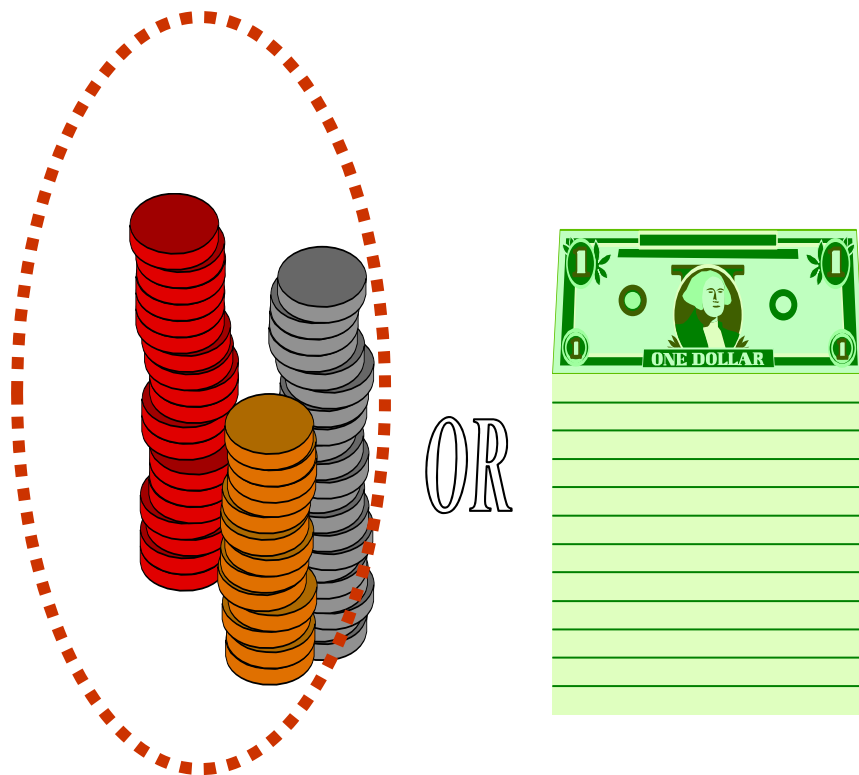
Charity Events

- Primary purpose to raise funds for 170(c) organization
- Invitation only from the sponsor of the event
- Unsolicited
- May include waiver of fee, food, entertainment and instructional materials

Educational Events

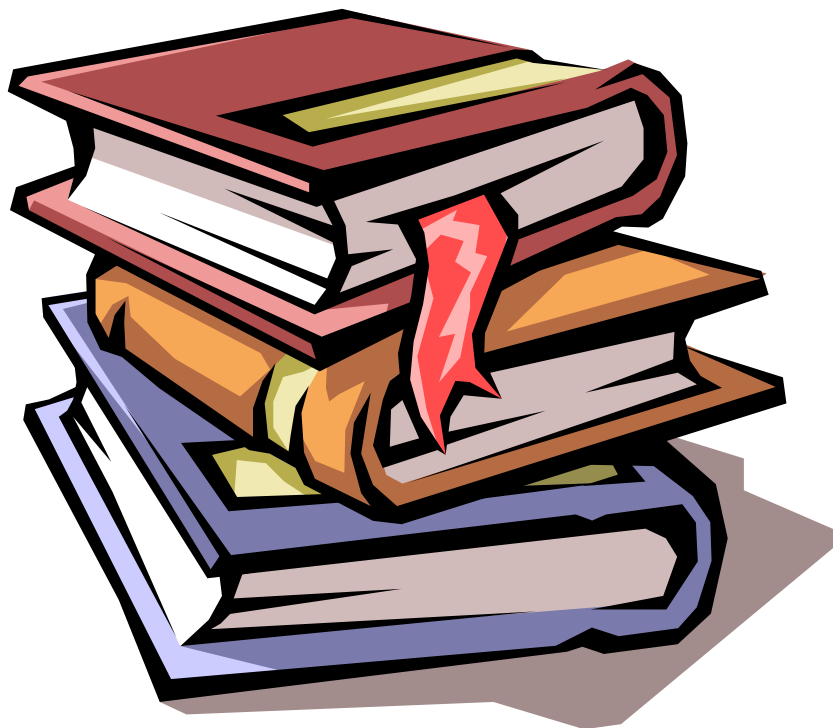
- lectures, seminars, discussion groups
- sponsored by universities, foundations, think tanks, or similar non-advocacy organizations
- does not extend to meals in connection with presentations by lobbyists
- does not extend to meals in connection with legislative briefings

Permitted Gifts



- Nominal food not part of a meal -- includes snacks at meetings such as bagels, fruit & cookies and "standing up foods" at receptions such as light hors d'oeuvres, (no one on one with lobbyists)
- An item of "nominal" value -- Greeting cards, baseball caps and T-shirts" ONLY

Permitted Gifts



- Books or other informational material
- Special plaques or awards
- Meals with small constituent groups (Civic groups, small DC fly-in visits)

Other Permitted Gifts



- State and Local Government Exemption;
- Anything paid for by the state/local governments, including public universities (but not outside lobbyists, or personal gifts of university employees, unless personal friendship exemption applies)

Travel



General Travel Rules

- Privately sponsored travel by entities not employing lobbyists is still allowed:
 - three days for a domestic trip
 - seven days for foreign travel
- Travel days don't count
- Travel must be for official purposes and no entertainment or recreation expenses

HLOGA Travel Restrictions

- Under HLOGA, privately sponsored travel may not be paid for by any lobbyist or organization employing or retaining an outside lobbyist (subject to limited exceptions)
- Special House rule for higher education institutions
- Special Senate rule for Section 501(c)(3) organizations

HLOGA Travel Restrictions (cont.)

- Exception: Privately sponsored travel still may be paid by a firm employing a lobbyist if...
 - The distant event occurs on a single day and only one (or possibly two) nights of lodging is provided
 - There is only de minimus involvement by a lobbyist in funding or planning the trip and there is no special access during travel or at the destination

HLOGA Travel Restrictions (cont.)

- Sponsors must certify in advance (subject to penalties for false statements & HLOGA)
 - Purpose of trip
 - Source of funding
 - De minimus involvement of lobbyists
- Both members & staff must obtain advance approval and submit reports after travel is completed

HLOGA Travel Restrictions (cont.)

- Travel must still be connected to meeting, speaking engagement, fact finding, or similar official event
- Entertainment & recreational expenses may not be paid

HLOGA Travel Restrictions (cont.)

- House rules treat private universities similar to entities that do not employ or retain a lobbyist (advance approval is still required)
- Senate rules are stricter and treat private universities the same as 501(c)(3) organizations -- three day trips allowed but only de minimis involvement by lobbyists
- Public universities are exempt from travel restrictions, lobbyists may be involved
- Private rules apply to trips jointly hosted by public and private universities

Executive Branch Ethics Rules

- Generally, a government employee may not accept gifts from prohibited sources (those seeking official action, doing business with the government or have interests that may be substantially affected by performance or non-performance of the employee's official duties) or given because of the employee's official position.

Executive Branch Exceptions

- a gift valued at \$20 or less, provided that the total value of gifts from the same person is not more than \$50 in a calendar year (employees of the same company are considered the same source).
- a gift based on family relationship or personal friendship
- gifts of free attendance at certain widely attended gatherings, provided the agency has determined the attendance is in the interest of the agency
- modest refreshments

Executive Branch Exception Gifts valued at \$20 or less

- If a gift is over the gift limit, an employee must pay the entire worth of the gift
 - If lunch costs \$22, the employee cannot offer to cover the \$2 difference - he or she must pay \$22
- If a government employee received two baseball tickets valued at \$15 each, he or she must pay \$30

Avoiding Pitfalls

- Ensure a high level of understanding of the law
- Create a culture of compliance - Make clear your organization places a premium on ethical conduct
- Institute “best practices” including advance approval, full reporting, knowledge of who to call;
- If there is any doubt about the appropriateness of an activity --- Simply Don't Do it
- Consider how any activity might “read” in the media to your members and to the DOJ/FBI in their search for new public corruption cases

Key Elements of a Compliance Plan

1. Review methodology and calculations for most recent LDA & IRS Form 990 filings and validate:
 - a. Whether or not to register
 - b. Understanding Reporting Method Used
 - c. Who is listed as a lobbyist (& additional employment disclosures required)
 - d. Which other employees & activities support lobbying

Key Elements of a Compliance Plan (cont.)

2. Establish appropriate accounting and record keeping systems:
 - a. Hours and activities with time sheets or other estimates
 - b. Direct & indirect expenses (with overhead)
 - c. Amounts paid to outside lobbying organizations (including trade associations, coalitions & 501(c)(3) organizations)

Key Elements of a Compliance Plan (cont.)

3. Establish employee education & training program:
 - a. For employees interacting with federal officials or supporting those activities
 - b. Overall framework & culture of compliance
 - c. Ethics rules re gifts, meal & travel
 - d. Reporting of time & expenses
 - e. Consider formal HR policy and signed certificates

Key Elements of a Compliance Plan (cont.)

4. Review in advance all activities that may involve gifts, meals & travel; restructure if necessary for legal compliance
5. Appoint individual to review & approve activities that may trigger ethics rules or other compliance issues

Key Elements of a Compliance Plan (cont.)

6. Establish procedures for timely, accurate and consistent filings of LD-1, LD-2, LD-203 (by entity & individual lobbyists)
7. Put someone in charge to review all reports for consistency & legal compliance before filing

What did you learn?

- A Congressman calls a public college President in the Congressman's district and asks to tour campus. Afterward the President invites the Congressman to go to lunch. The institution does not file under LDA and does not retain a lobbying firm. Can the President pay for lunch?
- A private university invites key friends and supporters to its football and basketball games. The university retains a lobbying firm in Washington D.C. to work on earmarks. Can the university offer free tickets to Members of Congress and staff? What about a public university?

What did you learn?

- A public university with an in house lobbyist wishes to invite a Member of Congress to give its graduation address. Can the institution provide travel costs for the Member? What are the rules? Does the invitation need preclearance? What role can the in house lobbyist play in the making arrangements for the Member? Does the university report the Congressman's appearance on its LD-203?
- A public university with an outside lobbying firm hosts a major conference and dinner attended by over 200 invitees. Can the university offer free attendance to a Senate staffer? Private university?

What did you learn?

- An in house lobbyist for a public university and an in house lobbyist for a private university invite Congressional staff to a small Capitol Hill briefing on extension of the Higher Education Act. Can the staff accept the invitation? Can food be served? What type?
- A public university and a private university both with lobbyists decide to invite House and Senate staff for a 2 day fact finding tour of the two campuses paid jointly by the two schools. What steps must be taken to ensure compliance under House and Senate travel rules?

What did you learn?

- The policy institute for a public university with a lobbyist sponsors a quarterly luncheon lecture series in Washington D.C. on foreign policy issues. The luncheon usually attracts 15-20 attendees from academia and the diplomatic corps. Can Congressional staff be invited?
- The foundation for a public or private university has a small fundraising dinner for a new chair professorship? Can a Senate staffer attend the dinner?
- A faculty researcher visits with his grant officer at NIH to discuss the existing program of work. Lobbying Contact? If the PI suggests extending the contract to the grant officer does that make it a Lobbying Contact?

What did you learn?

- The same faculty member goes to see a Political Appointee at HHS about extension of a grant. Lobbying Contact?
- Does HHS need to be listed as an agency contacted in FIU's quarterly LD-2 report if the PI contacts a covered official at HHS?
- What if a covered official at USDA is contacted by a FIU official about the regulations being written to implement the Higher Education Act? Lobbying Contact? Is DOE listed on the LD-2 as an agency contacted? What if Susan Moya makes the contact or goes along? Is there any difference?

Contact Information

C. Randall Nuckolls

McKenna, Long & Aldridge

1900 K Street, NW

Washington D.C. 20006

rnuckolls@mckennalong.com

(202)496-7176