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Political Activity Law Bulletin

New Guidance on Lobbyist Reporting and Termination

The Clerk of the House and the Secretary of the Senate recently issued additional guidance regarding Lobbying Disclosure Act ("LDA") reporting requirements and the conditions under which a lobbyist's registration may be terminated. The notice issued June 5th is intended to address some of the most common questions that have come up as many registered federal lobbyists have filed terminations in the wake of the strict restrictions on lobbyists' activities and job prospects imposed by the Obama Administration. The June 9th revisions to the standard LDA guidance are in response to comments received by the Secretary and Clerk and issues that have arisen concerning LDA compliance over the preceding six months.

June 5th Notice

The notice issued June 5th clarifies that each LDA registrant and each individual who "is registered or required to register" under the LDA must file an LD-203 semiannual contributions report. Accordingly, individuals who were in fact listed on LD-2 quarterly reports must submit contributions reports under the "is registered" prong of the test, even if those individuals never actually satisfied the two lobbying contacts, 20% lobbying activities registration threshold.

Further, the notice explains that merely amending a previously filed LD-1 registration form or LD-2 reporting form does not relieve a lobbyist or registrant from the obligation to file a contributions report. The notice states, "Filers are expected to use reasonable care when filling out and submitting LD-1, LD-2, and LD-203 forms," the import being that being inadvertently listed as a lobbyist on an LD-2 should not excuse that individual from the obligation to file an LD-203.

The only means to free an individual from the obligation to file an LD-203 semiannual report is to terminate that individual's lobbying registration by listing his/her name on Line 23 of the registrant's LD-2 quarterly report. The guidance states that an individual may be listed on Line 23 (and therefore be terminated as a "registered lobbyist") only if: (1) the individual's lobbying activities on behalf of the client did not constitute 20% or more of the time that the individual engaged in total activities for the client during the current calendar quarter, and is not reasonably expected to constitute 20% or more in the upcoming quarter; or (2) the individual did not make more than one lobbying contact on behalf of the client in the current calendar quarter, and does not reasonably expect to make more than one lobbying contact on the client's behalf in the upcoming quarter.

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The second condition for termination listed above is particularly noteworthy because it appears inconsistent with the registration standard supplied in the statutory text of the LDA itself. The LDA, as well as prior House and Senate guidance, make clear that an individual qualifies as a lobbyist by spending 20% of his/her time engaged in lobbying activities for a client in a calendar quarter and making two or more lobbying contacts over the course of services provided for that client (even if the second contact occurs in a later quarter). Thus, an individual qualifies as a lobbyist if he/she made two or more lobbying contacts at any point during their work for a client, and not merely in the current or subsequent calendar quarter.

We believe the guidance contained in the notice could be read to mean (and likely was intended to mean) that an individual can deregister if he or she has never met the "two contacts" test, does not meet that test in the current quarter and does not expect to meet it in the upcoming quarter, but the language actually used in the notice does not quite match up with that result. To the extent this new guidance seems to create a discrepancy with the plain meaning of the statute, we believe the Clerk and the Secretary may revisit this part of their advice to lobbyists and registrants in the near future.

June 9th Revised LDA Guidance

The Clerk of the House and the Secretary of the Senate have indicated they plan to update the LDA Guidance on a semiannual basis. The most recent update, issued June 9th, incorporates the information described above in the June 5th notice. Additionally, the update includes the following revisions and clarifying statements:

- Persons trigger LDA registration on the earlier of the following two dates: (1) the date their employee/lobbyist is employed or retained to make more than one lobbying contact on behalf of a client and meets the 20% time threshold; or (2) the date their employee/lobbyist in fact makes a second lobbying contact and meets the 20% time threshold.

- Registrants reporting lobbying expenses using the tax reporting method may not subtract grassroots lobbying expenses from the amount reported.

- Contributions to state and local candidates and political committees are not reportable on the LD-203 semiannual contributions report unless the contribution recipient is registered with the Federal Election Commission.

- Contributions to a charitable organization established by an individual before he/she became a covered official are not reportable on the LD-203 semiannual contributions report if the individual no longer has a relationship with the organization.

- A covered official's de minimis contribution to a charitable organization (in proportion to the organization's overall receipts) is not determinative as to whether the official finances, maintains, or controls the organization for purposes of LD-203 reporting.

- A covered official who serves as a non-voting (*e.g.*, honorary or ex-officio) board member of an organization is not considered to control that organization for purposes of LD-203 reporting.

- Costs relating to sponsorship of a non-preferential, multi-candidate primary or general election debate for a particular office are not reportable on the LD-203 semiannual contributions report.

White House Revises Ban on Stimulus Contacts

As described in a previous Caplin & Drysdale Political Activity Alert, a March 20, 2009 Memorandum from President Obama imposed various restrictions on the interactions between lobbyists and the executive branch of the federal government, including: (1) barring registered lobbyists from having oral communications with government officials about specific American Recovery and Reinvestment Act ("ARRA") projects or applications and (2) requiring online disclosure of communications between registered lobbyists and government officials regarding any ARRA policy.

After a review resulting from numerous objections, the Obama Administration has decided to revise the Memorandum's restriction on oral communications, such that this restriction will now apply to all persons, and not just federally registered lobbyists. In addition, the oral-communications ban will now apply only to a narrower window of time—after competitive grant applications are submitted and before awards are made. Thus, comments made by *any* person during this specified period (unless initiated by an agency official) must be in writing and disclosed online.

The Administration will continue to require immediate internet disclosure of communications between government officials and registered lobbyists. The Office of Management and Budget will soon publish detailed guidance on these revisions to the March 20th Memorandum.

SEC to Propose Pay-to-Play Rule for Investment Advisors in July

In response to allegations of "pay-to-play" in the award of contracts to manage New York pension funds, the Securities and Exchange Commission ("SEC") plans to propose at the end of July new restrictions on firms subject to the Investment Advisors Act of 1940. The SEC intends to propose a rule modeled after MSRB Rule G-37 (a municipal bond rule) that would restrict investment advisors from managing state and local governments' money if the firm or its executives make certain state or local political contributions.

This is not the first time the SEC will take up a review of these concerns – in fact, the rule the SEC intends to re-propose was first considered in 1999. If enacted, the rule would parallel the restrictions currently imposed by G-37 and impose those limits on investment advisers. Specifically, the rule would prohibit investment advisers from providing advice for compensation to a government entity within two years following a political contribution to an official of the government entity from (i) the adviser, (ii) any of its partners, executive officers, or solicitors, or (iii) any PAC controlled by the adviser or its partners, executive officers, or solicitors. The rule would exempt contributions of $250 or less in the aggregate to candidates for whom the

donor is entitled to vote. The rule also would impose a record-keeping obligation on investment advisers.

As mentioned, the rule's prohibitions would be triggered by a contribution to an "official of a government entity." "Government entity" would include all state and local governments, their agencies and instrumentalities, and all government pension plans and other collective funds. An "official" would include incumbent candidates or successful candidates for office if the office (or the office's appointee) is directly or indirectly responsible for, or can influence the outcome of, the selection of an investment advisor.

This proposed rulemaking arises out of allegations that money managers and their placement agents have used ties to public officials and kickbacks to buy and sell access to the $2 trillion currently invested in and on behalf of U.S. public pension systems. New York state has already banned the use of placement agents outright, and other states may follow suit. In the most recent example, the California Public Employees' Retirement System ("CalPERS") adopted a new policy on May 11, 2009, which does not impose an outright ban but instead requires external managers to disclose fees and other information about the placement agents they hire to seek CalPERS business.

This area of law is rapidly developing and various state governments and other regulatory agencies can be expected to add different approaches to these concerns in the months ahead.

Hiring Former Federal Government Employees as Lobbyists

Public interest and reform groups have long called for closing the "revolving door" between government service and private employment. Although post-employment restrictions date back to 1962, groups consistently argued that the rules too easily allowed former Federal Government employees to lobby professionally for private industries they previously regulated. Congress responded to reformers' calls by passing the Honest Leadership and Open Government Act ("HLOGA") in 2007 to address revolving door issues. HLOGA extends the time period for most post-employment restrictions and broadens the restrictions' scope. President Obama one-upped Congressional efforts when, shortly after coming into office, he imposed even tighter post-employment restrictions for Executive Branch appointees.

In the current post-HLOGA/Obama era, organizations and companies seeking to hire former government employees should understand the post-employment restrictions so that they can modify their hiring practices accordingly. Post-employment restrictions limit a former employee's ability to represent others before Government officials and employees; however, the restrictions do not generally prevent a former public employee from participating in behind-the-scenes lobbying strategy.

Post-employment lobbying restrictions differ based on an individual's former Federal Government position.

- Former **Members and Officers of the House of Representatives** are: (1) prohibited for one year from representing a foreign government or political party before the Government or advising such a foreign entity about lobbying activity; and (2) prohibited for one year from lobbying Congress.

- Former **House Senior Staff** are: (1) prohibited for one year from representing a foreign government or political party before the Government or advising such a foreign entity about lobbying activity; and (2) prohibited for one year from lobbying their former House office or committee.

- Former **Senators** are: (1) prohibited for one year from representing a foreign government or political party before the Government or advising such a foreign entity about lobbying activity; and (2) prohibited for two years from lobbying Congress.

- Former **Senate Officers** and **Senate Senior Staff** are: (1) prohibited for one year from representing a foreign government or political party before the Government or advising such a foreign entity about lobbying activity; and (2) prohibited for one year from lobbying the Senate.

- Former **Senate Personal or Committee Staff** who register as federal lobbyists are prohibited for one year from lobbying their former Senate office or committee.

- **All** Former **Executive Branch Employees** are: (1) permanently prohibited from representing a private entity before the Government with the intent to influence, on particular matters involving specific parties that they handled "personally and substantially" during their Government employment; and (2) prohibited for two years from representing a private entity before the Government with the intent to influence, on particular matters involving specific parties that were pending under their official responsibility in their last year of Government service.

- Former **Senior Executive Branch Employees** are: (1) prohibited for one year from representing a foreign government or political party before the Government or advising such a foreign entity about lobbying activity; and (2) prohibited for one year from lobbying their former agency.

- Former **Very Senior Executive Branch Employees** are: (1) prohibited for one year from representing a foreign government or political party before the Government or advising such a foreign entity about lobbying activity; and (2) prohibited for two years from lobbying any Executive Level official in the Executive Branch or their former agency.

- Former **Obama Administration Appointees** are prohibited from lobbying any covered executive branch official (as defined in the Lobbying Disclosure Act) or any non-career Senior Executive Service appointee for the duration of the Obama Administration.

In addition to the restrictions summarized above, special limitations apply to post-employment activities by employees who participated in procurement matters or who engaged in trade or treaty negotiations while working for the Government.

Several exceptions apply to the federal post-employment restrictions. For example, self-representation,

providing testimony under oath, representing the Federal Government, or acting as an elected state or local representative are exempt. Likewise, notwithstanding the restrictions, former public employees may engage in certain communications with agencies on behalf of a state or local government, a college or university, or political candidates and committees.

For more information about federal post-employment restrictions, please contact one of the attorneys in Caplin & Drysdale's Political Activity Law Group.

Writing an Effective Corporate Political Activity Policy

Politics is more important to business than ever. Government entities are now reasserting themselves as active market regulators. Public-sector clients offer rare new growth opportunities as federal, state, and local governments open their coffers to offset the recent dip in private-sector spending. And as the New York Times observed just last year: "In the wake of the Jack Abramoff scandal, greater political activism by trade groups and demands by candidates and causes for corporate money, boards are now seeing that their corporate image could be tarnished if these contributions or political activities go awry." The consequences of inappropriate or illegal political activity can materially impact a corporation's bottom line.

At the same time, federal, state, and local laws that govern political activity and commercial interaction with public-sector clients are increasingly numerous and complex. For example, Colorado, Illinois, New Jersey, and Pennsylvania are just a few of the states that have recently enacted major "pay-to-play" regulations—rules that impose prohibitions and disclosure requirements on government vendors and lobbyists. More states are expected to follow suit in the wake of high-profile scandals surrounding New York's state pension fund and former Illinois Governor Rod Blagojevich.

To protect your businesses in this environment, it is important to have policies that clearly announce goals and procedures related to political contributions and lobbying. At least forty corporations in the S&P 100 have already done so. The best of these policies share some common goals and provisions:

1. Affirmatively State a Corporation's Motives for Political Involvement

A corporate political-activity policy should not simply restate the restrictions imposed on the corporation and its affiliated entities. Corporations have legitimate motives for engaging in political activities to the extent permitted by law. A policy should declare these motives so that shareholders and members of the public are properly informed. For instance, FedEx's policy states that the company "promote[s] legislative and regulatory actions that further the business objectives of FedEx and attempt[s] to protect FedEx from unreasonable, unnecessary or burdensome … actions at all levels of government." Merck & Co., Inc. says that it involves itself in politics because "[g]overnment proposals to regulate the health care system may directly affect the Company's business and the incentives for pharmaceutical innovation."

2. Highlight a Compliance Program and a Specific Decision-making Process

In addition to providing reasons for a corporation's political involvement, a policy should outline the decision-making process and compliance controls behind the corporation's lobbying activities and political contributions. Most corporate policies identify both the decision-maker and the criteria used to make choices. To reassure shareholders that corporate officers and directors are fulfilling their oversight duties, many policies also require that qualified counsel independently review and/or audit all lobbying and contributions.

3. Establish Boundaries for Individual Employees' Political Activities

Even beyond the activities conducted by the corporation as such, the political activities of individual employees can also subject a corporation to liability. For example, different federal and state rules can restrict employees' usage of corporate computers, email accounts, meeting facilities, telephones, logos, titles, support staff, and other resources while volunteering or otherwise working on behalf of a candidate or committee. Moreover, for businesses with public-sector clients, state and local pay-to-play laws may void a government contract and/or prohibit the pursuit of future contracts if certain officers, directors, employees, or family members of officers, directors, and employees make campaign contributions to political candidates. Because employees' political activities affect a corporation's business opportunities, a policy should carefully list permissible and impermissible activities.

4. Differentiate Between Types of Activities and Entities

Separate rules apply to different types of activities. Accordingly, a policy may need to distinguish between U.S. and non-U.S. dealings, between federal and state political activities in the U.S., and between actions that a corporation undertakes directly and those that the corporation performs through a corporate-sponsored political action committee.

5. Determine the Breadth and Frequency of Public Disclosure

Shareholder activist groups, most notably the Center for Political Accountability, have constantly pressured corporations to fully and frequently disclose their political activities. Some groups have chosen to disclose on their corporate websites on a quarterly, semiannual, or yearly basis. Others have committed to disclose all direct and indirect political spending that supports candidates, political parties, political action committees, non-profit organizations (e.g., "527 groups"), independent expenditures, electioneering communications, and trade associations. If a corporation chooses to disclose its activities, its political-activity policy should clearly describe the breadth and frequency of the corporation's public disclosure practices.

If you have any questions, please contact palnewsletter@capdale.com.

About Caplin & Drysdale
A leading law firm, Caplin & Drysdale provides political activity law counseling and a full range of tax and legal services to companies, organizations, and individuals throughout the United States and around the world. The firm also provides employee benefits counseling, corporate law counseling, exempt organization counseling, white collar defense, and complex civil litigation services.

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2009-2010 Contribution Limits for Individuals, PACs, and Parties

Donors	Recipients				Special Limits
	Candidate Committee	**PAC**	**State/Local Party Committee (Combined Limit)**	**National Party Committee**	
Individual	$2,400/election	$5,000/year	$10,000/year	$30,400/year	Biennial aggregate limit of $115,500 ($45,600 to all candidates and $69,900 to all PACs and parties—only $45,600 of the $69,900 amount may go to PACs and state parties) *See "Caplin & Drysdale Individuals' Contribution Limits for 2009-2010"*
State/Local Party Committee (Combined Limit)	$5,000/election	$5,000/year	Unlimited	Unlimited	
National Party Committee	$5,000/election	$5,000/year	Unlimited	Unlimited	$42,600 to each Senate candidate
PAC Multicandidate	$5,000/election	$5,000/year	$5,000/year	$15,000/year	
PAC Non-Multicandidate	$2,400/election	$5,000/year	$10,000/year	$30,400/year	

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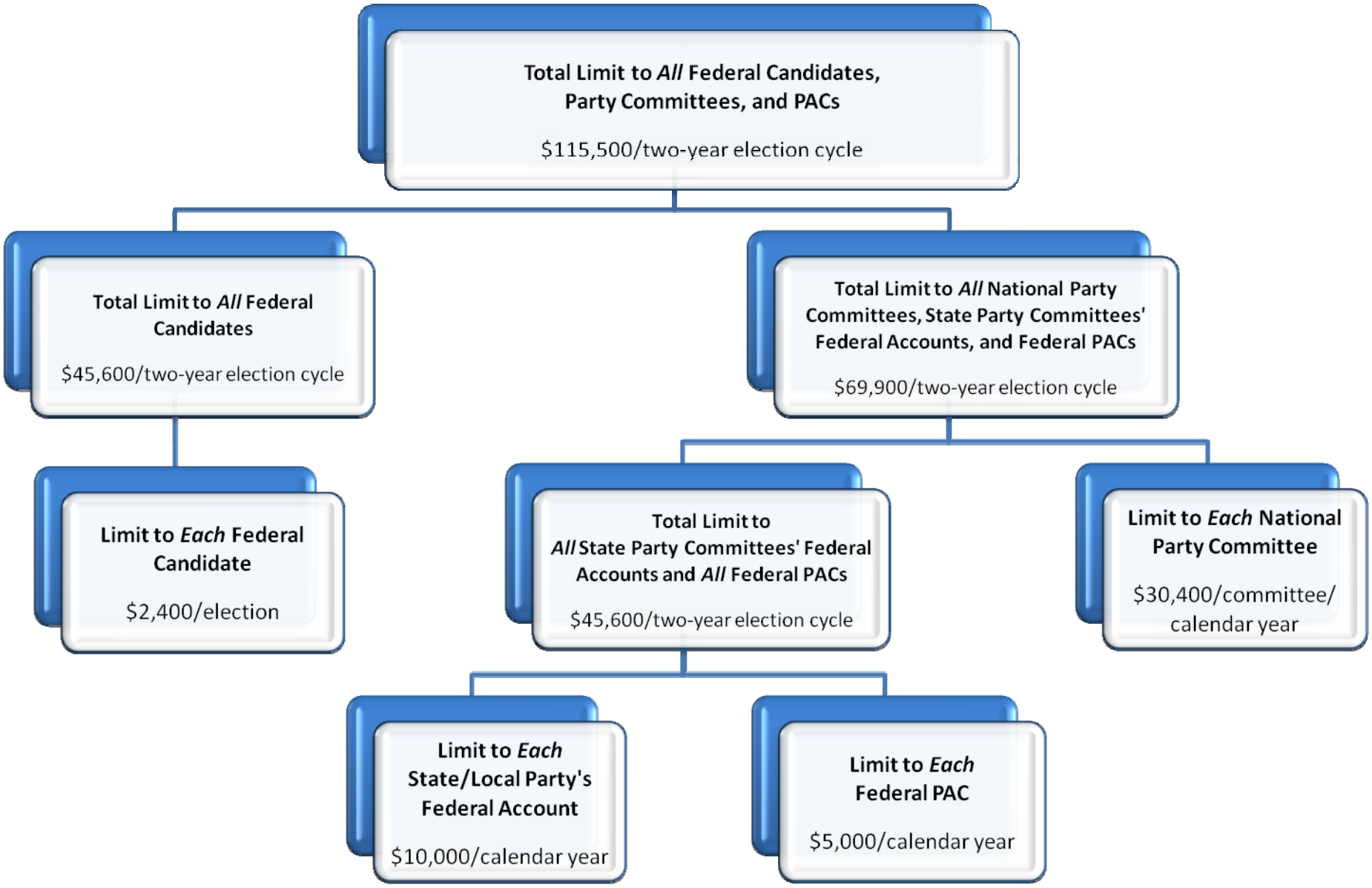
Individuals' Contribution Limits for 2009-2010



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2009 PAC and LDA Reporting Calendar

Federal PAC Reporting (Quarterly filers)

Report Due Date	Report Type	Reporting Period
January 31, 2009	2008 Year-End Report	November 25 – December 31, 2008
July 31, 2009	2009 Mid-Year Report	January 1 – June 30, 2009
January 31, 2010	2009 Year-End Report	July 1 – December 31, 2009

Federal PAC Reporting (Monthly filers)

Report Due Date	Report Type	Reporting Period
January 31, 2009	2008 Year-End Report	November 25 – December 31, 2008
February 20, 2009	February monthly report	January 1 – 31, 2009
March 20, 2009	March monthly report	February 1 – 28, 2009
April 20, 2009	April monthly report	March 1 – 31, 2009
May 20, 2009	May monthly report	April 1 – 30, 2009
June 20, 2009	June monthly report	May 1 – 31, 2009
July 20, 2009	July monthly report	June 1 – 30, 2009
August 20, 2009	August monthly report	July 1 – 31, 2009
September 20, 2009	September monthly report	August 1 – 31, 2009
October 20, 2009	October monthly report	September 1 – 30, 2009
November 20, 2009	November monthly report	October 1 – 31, 2009
December 20, 2009	December monthly report	November 1 – 30, 2009
January 31, 2010	2009 Year-End Report	December 1 – 31, 2009

LDA Reporting

Report Due Date	Report Type	Reporting Period
January 21, 2009	4Q 2008 LD-2 Quarterly lobbying report	October 1 – December 31, 2008
January 30, 2009	2008 Year-End LD-203 Semiannual contributions report and certification	July 1 – December 31, 2008
April 20, 2009	1Q 2009 LD-2 Quarterly lobbying report	January 1 – March 31, 2009
July 20, 2009	2Q 2009 LD-2 Quarterly lobbying report	April 1 – June 30, 2009
July 30, 2009	2009 Mid-Year LD-203 Semiannual contributions report and certification	January 1 – June 30, 2009
October 20, 2009	3Q 2009 LD-2 Quarterly lobbying report	July 1 – September 30, 2009
January 20, 2010	4Q 2009 LD-2 Quarterly lobbying report	October 1 – December 31, 2009
February 1, 2010	2009 Year-End LD-203 Semiannual contributions report and certification	July 1 – December 31, 2009

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