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Criminal Referral Of Alleged 'Unlobbyist' Is A Wake-Up Call

Law360, New York (July 31, 2014, 11:08 AM ET) -- An unexpected announcement last week from the Office of Congressional Ethics ("OCE") ought to serve as a wake-up call for many consultants, strategic advisers, corporations and others who lobby the federal government. At the tail end of its quarterly report to Congress, the OCE — an independent, nonpartisan entity in the legislative branch that reviews alleged misconduct by House members and staff — noted that, in the second quarter of 2014, it voted to refer an unnamed entity "to the U.S. Attorney's Office of the District of Columbia for failure to register under the Lobbying Disclosure Act." This referral, which appears to be the first of its kind, is a major development in the regulation of lobbying and may signal a turning point in enforcement of lobbying disclosure laws.

The LDA was enacted in 1995 and substantially amended, following the Jack Abramoff lobbying and gift scandals, by the Honest Leadership and Open Government Act of 2007. The transparency-focused law requires entities employing "lobbyists" to register and file reports with the Secretary of the U.S. Senate and Clerk of the U.S. House. These electronically filed reports are available to the public on Congress' website.

Becoming a registered lobbyist is no picnic. Registrants must implement compliance systems aimed at capturing the information they need to report about their lobbying activities, which can be expensive and time-consuming. Adequate compliance systems might require employees to complete dreaded timesheets, for example. In a large corporation, changes to the coding system used by the accounting department and to expense reimbursement forms might be required. In addition, the company becomes subject to stricter limits on gifts or meals provided to members and employees of Congress. Employees or outside lawyers must be hired to compile and review the required reports. And the firm employing the lobbyist must publicly disclose the issues on which it is lobbing and how much it is spending on lobbying activity.

For these reasons, many so-called "unlobbyists" try to avoid triggering lobbying registration requirements. An entity need not register unless it employs a "lobbyist." A "lobbyist," in turn, is an individual, compensated above certain thresholds, who (1) over any period of time makes two or more lobbying contacts with a member or employee of Congress or certain senior executive branch officials and (2) spends at least 20 percent of his or her work time in a three-month period making, preparing for, or supporting lobbying contacts.

Many strategic advisers, consultants and companies that engage with the federal government carefully ensure that employees stay below these thresholds and therefore avoid meeting the lobbyist triggers. But there are certainly others who have crossed the thresholds without registering. Perhaps many. In some cases, this is inadvertent. For instance, a corporate executive who rarely interfaces with Washington may have a period of intense activity fighting a piece of legislation and not even realize he has crossed the registration threshold.

More nefariously, some may not register simply because they doubt they will ever be caught. In the statute's nearly two decades of life, it has only rarely been enforced and, in those rare cases, enforcement has focused exclusively on registered lobbyists who are alleged serial violators. After almost a decade of essentially no enforcement, a prelitigation civil settlement was announced in 2005 involving three registered lobbyists who failed to file regular reports.

More recently, there has been a slight uptick in enforcement, with the U.S. Department of Justice filing two civil cases against alleged repeat offenders in the past 18 months. The alleged facts in both of these recent cases were extreme. In the first, a registrant failed to file 28 reports even though it received repeated delinquency notices. In the second, registrants allegedly failed to file dozens of reports notwithstanding at least 22 notices from the House and Senate of their obligation to file.

But these cases all involved civil complaints against existing registrants. The OCE referral is significant because, if the DOJ acts on it, it will be the first case against an alleged unregistered lobbyist. It may also be the first involving criminal charges. In referring the matter to Justice, OCE relied on a provision in its rules that allows staff to "refer information to state and federal authorities in the event that information indicates a crime has occurred." Under the LDA, criminal charges can only succeed if the Justice Department shows that the failure to comply was "knowing and corrupt."

The problem of unregistered lobbyists can present issues for major corporations even when the corporations and their in-house lobbyists are all registered. Outside consulting firms, as well as lobbying firms, retained by corporations to make contact with federal officials may themselves be required to register. But there is no question that there are many such firms, particularly smaller ones, that strategically choose to operate without registered lobbyists.

In many cases, those firms pay close attention to the registration thresholds. But if an outside firm that is required to register fails to do so, there could be reputational risks, and potentially legal risks, for their corporate clients. Even corporations with elaborate lobbying compliance policies and practices sometimes forget to check whether their outside consultants have registered.

Although many corporations devoted significant time and attention to LDA compliance when the statute was first enacted, and again in 2007 when it was strengthened, the very low level of enforcement activity by the Department of Justice has led to a good deal of complacency. For most chief compliance officers and general counsel, lobbying compliance has been at the bottom of a very long list. That may be about to change.

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