

Election and Political Law

E-ALERT

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New Presidential Guidance Restricts Lobbyist Communications Regarding Stimulus Funds

On March 20, 2009, President Barack Obama issued new guidance to the heads of all executive branch departments and agencies directed at ensuring that public funds available through the American Recovery and Reinvestment Act of 2009 (the "Recovery Act") are not "distributed on the basis of factors other than the merits of the proposed projects or in response to improper influence or pressure." Under this new guidance, lobbyists who are "registered under the federal Lobbying Disclosure Act" are banned from participating in any oral communications regarding the commitment or expenditure of Recovery Act funds.

The memorandum, entitled "Ensuring Responsible Spending of Recovery Act Funds," prohibits federal executive department or agency officials from considering the views of a "lobbyist" regarding particular projects, applications, or applicants for funding under the Recovery Act, unless such views are submitted in writing. Executive officials are directed to inquire at the time of scheduling an oral communication (whether in-person or over the telephone), and again at the outset of the oral communication, whether any participant is "a lobbyist registered under the Lobbying Disclosure Act." A lobbyist may not participate in the oral communication, but may submit comments in writing.

Furthermore, all written communications from lobbyists concerning the commitment, obligation or expenditure of Recovery Act funds for particular projects, applications, or applicants must be publicly posted on the agency's recovery website within three days of the communication.

Lobbyists may communicate orally with executive branch officials concerning *general* Recovery Act policy issues, but those communications may not touch on *specific* funding requests or projects. These oral conversations must be documented in writing, contemporaneously or immediately following the conversation, by the executive branch official involved. The date and time of the oral communication, the names of the participants, and a short description of the substance of the contact must be recorded and publicly posted on the agency's recovery website within three business days of the communication.

While most of the memorandum is directed at individual lobbyists, it nonetheless instructs executive branch officials to inquire whether any of the "individuals *or parties*" to an oral communication "is a lobbyist registered under the Lobbying Disclosure Act." If so, "the lobbyist" may not participate in the oral communication. Under the Lobbying Disclosure Act, however, only an individual can be a "lobbyist;" organizations that employ lobbyists are "registrants," not "lobbyists." It is possible that the reference to "parties" registered under the Lobbying Disclosure Act was a drafting error. It is also possible, though far less likely, that this policy is intended to bar any employee of a company that is registered under the Lobbying Disclosure Act from orally communicating with executive officials. If that were true, this policy's

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implications could sweep far beyond the lobbying community and make entire industries off limits to executive branch officials - except when communicating in writing.

Assuming the President's memorandum uses the term "lobbyist" as it is defined in the Lobbying Disclosure Act, employees who are not themselves lobbyists, even if employed by a company registered under the LDA, could still make oral communications regarding Recovery Act projects. In addition, those non-lobbyist employees could consult with lobbyists prior to making oral communications. Organizations involved in lobbying for stimulus funds should consider consulting counsel regarding their particular activities and how the memorandum may apply to them. We will continue to apprise clients regarding the interpretation and implementation of this new policy by the White House and the various executive branch departments and agencies.

If you have any questions concerning the material discussed in this client alert, please contact the following members of our election and political law practice group:

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