

Election and Political Law

E-ALERT

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NEW GUIDANCE REGARDING RECOVERY ACT LOBBYING

On July 24, 2009, the White House Office of Management and Budget (“OMB”) issued [new guidance](#) interpreting President Obama’s March 20, 2009, Memorandum, “Ensuring Responsible Spending of Recovery Act Funds” (available [here](#)). The guidance replaces [prior OMB guidance](#) issued on April 7, 2009.

The White House’s original policy outlined in the President’s Memorandum strictly limited the ability of lobbyists to orally communicate with agency officials regarding particular projects, applications, and applicants for Recovery Act funding, although it still allowed written communications from lobbyists. Following input from OMB, the White House expanded its policy to bar oral communications not just from lobbyists but from *all* individuals seeking to influence the spending of Recovery Act funds (update available [here](#)). The White House also explained that the bar would apply only to communications while an application for federal assistance is pending.

Our guidance on the President’s original and updated policies is available [here](#) and [here](#).

OMB’s new guidance clarifies the White House’s updated policy, particularly with regard to the individuals covered, the time period covered, the types of grants covered, and other exceptions to the policy.

TIME PERIOD COVERED

In its guidance, OMB explains that the bar on oral communications by lobbyists only applies during the time that an application for federal assistance is pending, that is, from the time the formal application is filed until funds are awarded. Up until the application is actually filed, in-person meetings and phone calls are acceptable.

However, even if the communication does not occur when an application is pending, any oral communication with a lobbyist regarding Recovery Act funding must be documented and posted on the agency’s website.

INDIVIDUALS COVERED

OMB clarifies that the bar on oral communications applies to *any* person outside the federal government who initiates an oral communication regarding a pending application for a Recovery Act competitive grant or other competitive federal financial assistance. As we have explained in prior guidance, this would include attorneys and employees representing an applicant for federal assistance, as well as federally registered lobbyists.

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TYPES OF GRANTS COVERED

OMB makes clear that the bar on oral communications only applies with respect to pending applications for *competitive* grants and loans. The bar does not apply to “formula grants,” that is, noncompetitive awards based on a predetermined statutory formula (sometimes referred to as state-administered programs).

OTHER EXCEPTIONS

OMB also gives details on the following exceptions to the bar on oral communications:

- *Widely Attended Gatherings.* The White House’s policy places no restrictions on public, oral communications by persons attending widely attended gatherings. However, the policy would bar *private* discussions in connection with a widely attended gathering, such as a discussion immediately before or after the event, if the policy otherwise would have barred an oral communication with the official in question.
- *Purely Logistical Communications.* Oral communications regarding purely logistical matters are allowed, so long as the communication does not include advocating a particular Recovery Act policy or a particular project or application. Requesting a meeting or information about program requirements could be a purely logistical communication, as could inquiring about the status of an action, how to apply for funding, how to conform with deadlines, or to which agencies or officials questions or applications should be directed.
- *Communications with Certain Government Officials.* Oral communications between federal agency officials and other federal government employees are not barred under the White House policy. In addition, federal agency officials may orally communicate with the chief executive of a state, local, or tribal government or with the presiding officer or majority leader of each chamber of a state legislature without running afoul of the policy.
- *Agency-initiated Communications.* Finally, federal agency officials are allowed to initiate oral communications regarding pending applications for competitive grants and loans. This exception is very narrow, however, and only applies to instances where an official affirmatively seeks or requires information about an application, not instances where an official simply responds to a phone call from an outside individual.

PUBLICATION OF CONTACTS

Under OMB’s guidance, when an agency official is contacted by any person outside the federal government with regard to Recovery Act policy or projects for funding, the official first must find out if the contacting party is allowed to make the communication and if any person participating in the communication is a federally registered lobbyist. These requirements do not apply if the communication is purely logistical or is made during a widely attended gathering.¹

All communications, including written communications, involving a lobbyist must be documented and posted on the agency’s recovery website within 3 business days. OMB is in the process of creating a technology tool to facilitate this disclosure. This tool would enable the agency official to request outside participants in a meeting to provide information regarding themselves and the communication, subject to review by the agency prior to posting on the agency’s website.

¹ At least one agency has documented the fact that a lobbyist was present at what appears to have been a widely attended gathering (see the Department of Agriculture’s April 18, 2009, report of a meeting with the National Forest Homeowners Association [here](#)).

We will continue to track and communicate with clients regarding the interpretation and implementation of this new guidance 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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