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Lobbying the Executive Branch: Current Practices and Options for Change

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Summary

Under the Lobbying Disclosure Act (LDA) of 1995, as amended, individuals are required to register with the Clerk of the House of Representatives and the Secretary of the Senate if they lobby either legislative or executive branch officials. In January 2009, Secretary of the Treasury Timothy Geithner placed further restrictions on the ability of lobbyists to contact executive branch officials responsible for dispersing Emergency Economic Stabilization Act (EESA, P.L. 110-243) funds. Subsequently, President Barack Obama and Peter Orszag, Director of the Office of Management and Budget (OMB), issued a series of memoranda between March and July 2009 that govern communication between federally registered lobbyists and executive branch employees administering American Recovery and Reinvestment Act of 2009 (P.L. 111-5) funds. Most recently, in October 2009, the White House directed executive agencies to prohibit, when possible, the appointment of federally registered lobbyists to federal advisory bodies and committees.

The Recovery and Reinvestment Act lobbying restrictions focus on both written and oral communications between lobbyists and executive branch officials. Pursuant to the President's memoranda, restrictions have been placed on certain kinds of oral and written interactions between federally registered lobbyists and executive branch officials responsible for Recovery Act fund disbursement. The President's memoranda require each agency to post summaries of oral and written contacts with lobbyists on dedicated agency websites. EESA regulations are virtually identical.

This report outlines the development of registration requirements for lobbyists engaging executive branch officials since 1995. It also summarizes steps taken by the Obama Administration to limit and monitor lobbying of the executive branch; discusses the development and implementation of restrictions placed on lobbying for Recovery Act and EESA funds; examines the Obama Administration's decision to stop appointing lobbyists to federal advisory bodies and committees; considers third-party criticism of current executive branch lobbying policies; and provides options for possible modifications in current lobbying laws and practices.

For further analysis on lobbying registration and disclosure, see CRS Report RL34377, *Honest Leadership and Open Government Act of 2007: The Role of the Clerk of the House and the Secretary of the Senate*, by Jacob R. Straus; CRS Report RL34725, *"Political" Activities of Private Recipients of Federal Grants or Contracts*, by Jack Maskell; and CRS Report R40245, *Lobbying Registration and Disclosure: Before and After the Enactment of the Honest Leadership and Open Government Act of 2007*, by Jacob R. Straus.

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Introduction

Since 1995, Congress has on three occasions approved legislation to regulate lobbyists' contacts with executive branch officials. Prior to 1995, lobbying laws only required that lobbyists contacting Members of Congress register with the Clerk of the House of Representatives and the Secretary of the Senate.[1] Under current lobbying laws, individuals are required to register with the Clerk and the Secretary when lobbying either legislative or executive branch officials. Federally registered lobbyists who wish to lobby executive branch departments and agencies regarding funds provided by the Emergency Economic Stabilization Act[2] and the American Recovery and Reinvestment Act of 2009[3] are subject to additional restrictions pursuant to a series of memoranda and guidelines issued between January and July 2009.

This report outlines the development of registration requirements for lobbyists engaging executive branch officials since 1995. It also summarizes steps taken by the Obama Administration to limit and monitor lobbying of the executive branch; discusses the development and implementation of restrictions placed on lobbying for Recovery Act and EESA funds; examines the Obama Administration's decision to stop appointing lobbyists to federal advisory bodies and committees; considers third-party criticism of current executive branch lobbying policies; and evaluates options for possible modifications in current lobbying laws and practices.

Statutory Coverage for Executive Branch Officials

In 1995, the Lobbying Disclosure Act (LDA) repealed the Lobbying Act portion of the Legislative Reorganization Act of 1946[4] and created a system of detailed registration and reporting requirements for lobbyists. It included a provision requiring lobbyists to register with Congress and the disclosure of lobbying contacts with certain "covered" executive branch employees. [5] The LDA was amended in 1998 to make technical corrections, including altering the definition of executive branch officials covered by the act.[6] In 2007, the Honest Leadership and Open Government Act further amended LDA definitions on covered officials.[7]

[1] P.L. 601, 60 Stat. 839-842, August 2, 1946. Title III of the Legislative Reorganization Act of 1946 is the "Federal Regulation of Lobbying Act." These individuals are often referred to as "federally-registered" lobbyists to distinguish them from individuals who might have to register with state or local officials under non-federal laws.

[2] P.L. 110-343, 122 Stat. 3765, October 3, 2009.

[3] P.L. 111-5, 123 Stat. 115, February 17, 2009.

[4] Provisions contained in the Legislative Reorganization Act of 1946, for the first time, established requirements for individuals lobbying Congress to register with and report to the House of Representatives and the Senate. The Lobbying Act, however, did not impose restrictions on lobbying activities. Instead, it merely required individuals who lobby Congress to register with the House and Senate and disclose certain activities. For more information, see *Political Activity, Lobbying Laws and Gift Rules Guide*, ed. Trevor Potter and Kirk L. Jowers, 2nd ed., vol. 1 (Little Falls, NJ: Glasser Legal Works, 1999), p. 1-7.

[5] P.L. 104-65, 109 Stat. 691, December 19, 1995.

[6] P.L. 105-166, 112 Stat. 38, April 8, 1998.

[7] P.L. 110-81, 121 Stat. 735, September 14, 2007.

Lobbying Disclosure Act of 1995

The Lobbying Act of 1946 focused on lobbyists' interactions with Congress, and was silent on lobbying the executive branch. The LDA, for the first time, included executive branch officers and certain employees by defining them as "covered officials."[8] Section 3 of LDA defines a covered executive branch official as

> (A) the President;
>
> (B) the Vice-President;
>
> (C) any officer or employee, or any individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;
>
> (D) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;[9]
>
> (E) any member of the uniformed services whose pay grade is at or above O-7 under section 201 of title 37, *United States Code*;[10] and
>
> (F) any officer or employee serving in a position of a confidential policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2) of title 5, *United States Code*.[11]

Under the LDA, lobbyists who contact these executive branch officials are now required to register with the Clerk of the House and the Secretary of the Senate, and to disclose lobbying contacts and activities. The LDA made these requirements identical for covered legislative and executive branch officials and assigned to the Clerk of the House and the Secretary of the Senate the responsibility of collecting registration and disclosure statements.[12]

Lobbying Disclosure Technical Amendments Act of 1998

In April 1998, the LDA was amended to make technical corrections. Part of the technical corrections was a minor change in the *U.S. Code* section cited by the LDA defining covered

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[8] P.L. 104-65, 109 Stat. 692, December 19, 1995; 2 U.S.C. § 1602.

[9] For more information on the Executive Schedule and executive branch pay, see CRS Report RL34463, *Federal White-Collar Pay: FY2009 Salary Adjustments*, by Barbara L. Schwemle; CRS Report RL34380, *The Executive Schedule IV Pay Cap on General Schedule Compensation*, by Curtis W. Copeland; and CRS Report RL33245, *Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries*, by Barbara L. Schwemle.

[10] 37 U.S.C. § 201 establishes rates of compensation for commissioned officers of the uniformed services (other than commissioned warrant officers). For more information, see also CRS Report RL33446, *Military Pay and Benefits: Key Questions and Answers*, by Charles A. Henning.

[11] P.L. 104-65, 109 Stat. 692, December 19, 1995; 2 U.S.C. § 1602. 5 U.S.C. § 7511 defines terms related to federal employment, human resources, and pay.

[12] 2 U.S.C. § 1603 defines the registration requirements for all lobbyists. For more information on the role of the Clerk of the House and the Secretary of the Senate in collecting registration and disclosure statements, see CRS Report RL34377, *Honest Leadership and Open Government Act of 2007: The Role of the Clerk of the House and the Secretary of the Senate*, by Jacob R. Straus.

officials.[13] The amendment changed the reference in the LDA from 5 U.S.C. § 7511 (b)(2) to 5 U.S.C. § 7511 (b)(2)(B) to reflect the ability to the Office of Personnel Management to exempt a position from the competitive service.[14]

Honest Leadership and Open Government Act of 2007

The Honest Leadership and Open Government Act (HLOGA) of 2007 also amended the LDA. HLOGA did not further alter the definition of a covered executive branch official but did refine thresholds and definitions of lobbying activities, change the frequency of reporting for registered lobbyists and lobbying firms, require additional disclosures, create new semi-annual reports on campaign contributions, and add disclosure requirements for coalitions and associations.[15]

Obama Administration Lobbying Policies

Since its inception, the Obama Administration has focused on ethics and the potential influence of lobbyists on executive branch personnel. One of President Barack Obama's first actions was to issue ethics and lobbying guidelines for executive branch employees. These guidelines laid the foundation for formal lobbying restrictions issued in July 2009.

Executive Branch Ethics Pledge

On January 21, 2009, President Obama issued Executive Order 13490, "Ethics Commitments by Executive Branch Personnel."[16] The executive order created an ethics pledge for all executive branch appointments made on or after January 20, 2009;[17] defined terms included in the pledge; allowed the Director of the Office of Management and Budget (OMB), in consultation with the counsel to the President, to issue ethics pledge waivers; instructed the heads of executive agencies to consult with the Director of the Office of Government Ethics to establish rules of procedure for the administration of the ethics pledge; and authorized the Attorney General to enforce the executive order. In a press release summarizing the executive order, the White House explained the ethics pledge and the importance of following ethics and lobbying rules:

> The American people ... deserve more than simply an assurance that those coming to Washington will serve their interests. They deserve to know that there are rules on the books to keep it that way. In the *Executive Order on Ethics Commitments by Executive Branch*

[13] P.L. 105-166, 112 Stat. 38, April 6, 1998. The amendment to the definition of a covered executive branch employee is found in Section 2 of the act and at 2 U.S.C. § 1603 (3)(F).

[14] 5 U.S.C. § 7511 (b)(2)(B).

[15] P.L. 110-81, 121 Stat. 735, September 14, 2007. For further analysis of HLOGA's lobbying provision changes see CRS Report R40245, *Lobbying Registration and Disclosure: Before and After the Enactment of the Honest Leadership and Open Government Act of 2007*, by Jacob R. Straus.

[16] Executive Order 13490, "Ethics Commitments by Executive Branch Personnel," 74 *Federal Register* 4673, January 26, 2009. The executive order was issued on January 21, 2009, but was not published in the *Federal Register* until January 26, 2009.

[17] The ethics pledge required for all executive branch appointments made on or after January 20, 2009, includes a ban on gifts from registered lobbyists, a two-year ban on working on particular issues involving a former employer, and a ban on lobbying the administration after leaving government service. See also Executive Order 13490, "Ethics Commitments by Executive Branch Personnel," 74 *Federal Register* 4673, January 26, 2009.

> *Personnel*, the President, first, prohibits executive branch employees from accepting gifts from lobbyists. Second, he closes the revolving door[18] that allows government officials to move to and from private sector jobs in ways that give that sector undue influence over government. Third, he requires that government hiring be based upon qualifications, competence and experience, not political connections. He has ordered every one of his appointees to sign a pledge abiding by these tough new rules as a downpayment on the change he has promised to bring to Washington.[19]

Requirement of an ethics pledge above and beyond the general oath of office administered to all government employees reinstates a similar requirement instituted by President William Jefferson Clinton in 1993.[20] The effect of such a policy is undetermined for the recruitment and retention of governmental employees or for the barring of federally registered lobbyists from serving in executive branch positions.

Restrictions on Emergency Economic Stabilization Act (EESA) Funds Lobbying

On January 27, 2009, just a week after Barack Obama became President, Secretary of the Treasury Timothy Geithner announced restrictions on individuals lobbying to obtain Emergency Economic Stabilization Act (EESA) funds.[21] The guidance was designed to combat potential lobbyist influence on the disbursement of EESA funds, to remove politics from funding decisions, to offer certification to Congress that each investment decision was based "only on investment criteria and the facts of the case," and to provide transparency to the investment process.[22]

The guidance classified contacts between lobbyists and executive branch officials into two broad categories: (1) unrestricted oral communications on logistical questions and at widely attended gatherings and (2) oral communications during the period following submission of a formal application for federal assistance under EESA until preliminary approval of EESA funds.

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[18] "Revolving door" regulations refer to restrictions placed on the types of jobs current federal employees may take when they leave federal service. For more information on revolving doors see CRS Report 97-875, *Post-Employment, "Revolving Door," Laws for Federal Personnel*, by Jack Maskell

[19] The White House, "Statement from the Press Secretary on the President's signing of two Executive Orders and three Memoranda," press release, January 21, 2009, http://www.whitehouse.gov/the_press_office/StatementfromthePressSecretaryonthePresidentssigningoftwoExecutiveOrdersandthreeMe/.

[20] Executive Order 12834, "Ethics Commitments by Executive Branch Appointees," 58 *Federal Register* 5911, January 22, 1993. See also 5 U.S.C. § 2903.

[21] U.S. Department of the Treasury, *Communications with Registered Lobbyists and Other Persons About Emergency Economic Stabilization Act Funds*, Washington, DC, 2009, http://www.financialstability.gov/docs/Lobbying-Guidelines.pdf. [Hereafter, *EESA Lobbying Restrictions*.] The Emergency Economic Stabilization Act (EESA) was signed by President George W. Bush on October 3, 2008. P.L. 110-343, 122 Stat. 3765, October 3, 2008. For more information on the Emergency Economic Stabilization Act, see CRS Report RL34713, *Emergency Economic Stabilization Act: Preliminary Analysis of Oversight Provisions*, by Curtis W. Copeland; CRS Report RL34740, *Reporting Requirements in the Emergency Economic Stabilization Act of 2008*, by Curtis W. Copeland; CRS Report RS22969, *The Emergency Economic Stabilization Act's Insurance for Troubled Assets*, by Baird Webel; and CRS Report R40134, *"Fast Track" Procedures to Disapprove Additional Funds Under the Emergency Economic Stabilization Act*, by Christopher M. Davis. Prior to January 2009, no additional lobbying restrictions on EESA funds were in place.

[22] U.S. Department of the Treasury, "Treasury Secretary Opens Term Opens [sic] With New Rules To Bolster Transparency, Limit Lobbyist Influence in Federal Investment Decisions," press release, January 27, 2009, http://www.treas.gov/press/releases/tg02.htm.

The guidance also covers oral and written communication about EESA policy or applications for funding or pending applications.[23] Restrictions on lobbyist communication with executive branch officials are mirrored in the updated guidelines issued by OMB for the Recovery Act lobbying discussed below. As with the Recovery Act restrictions, federally registered lobbyists may ask logistical questions of executive branch officials responsible for disbursing EESA funds and speak with those officials at widely attended gatherings.[24] All other contacts between federally registered lobbyists and executive branch officials must be documented if they concern EESA policy, applications for funding, or pending applications.[25]

Restrictions on Recovery Act Funds Lobbying

Following the passage of the American Recovery and Reinvestment Act of 2009, the White House was concerned about the potential ability of lobbyists to influence stimulus funds that would be allocated by the executive branch. On March 20, 2009, the White House issued a memorandum outlining proposed restrictions on federally registered lobbyists' contacts with executive department and agency officials on stimulus funds. Following a 60-day review and comment period, updated guidance was issued by the Office of Management and Budget (OMB) for communication with federally registered lobbyists regarding stimulus funds in July 2009.[26]

Presidential Memorandum

To ensure the responsible and transparent distribution of funds pursuant to the American Recovery and Reinvestment Act of 2009 (Recovery Act),[27] President Obama, on March 20, 2009, issued a memorandum to the heads of the executive departments and agencies prescribing restrictions on oral communications with lobbyists on Recovery Act funds. In the memorandum's introductory remarks, President Obama stated that,

> In implementing the Recovery Act, we have undertaken unprecedented efforts to ensure the responsible distribution of funds for the Act's purposes and to provide public transparency and accountability of expenditures. We must not allow Recovery Act funds to be distributed on the basis of factors other than the merits of proposed projects or in response to improper influence or pressure. We must also empower executive department and agency officials to exercise their available discretion and judgment to help ensure that Recovery Act funds are expended for projects that further the job creation, economic recovery, and other purposes of the Recovery Act and are not used for imprudent projects.[28]

The President's memorandum outlined four policies for executive branch departments and agencies handing out Recovery Act funds: (1) ensuring that decision making is merit based for grants and other forms of federal financial assistance, (2) avoiding the funding of "imprudent"

[23] *EESA Lobbying Restrictions*, pp. 1-3.

[24] *EESA Lobbying Restrictions*, p. 1.

[25] *EESA Lobbying Restrictions*, p. 2.

[26] The White House, "Update on Recovery Act Lobbying Rules: New Limits on Special Interest Influence," Blog Post, May 29, 2009, http://www.whitehouse.gov/blog/Update-on-Recovery-Act-Lobbying-Rules-New-Limits-on-Special-Interest-Influence.

[27] P.L. 111-5, 123 Stat. 115, February 17, 2009.

[28] The President, "Memorandum of March 20, 2009: Ensuring Responsible Spending of Recovery Act Funds," 74 *Federal Register* 12531, March 25, 2009.

projects, (3) ensuring transparency for communications with registered lobbyists, and (4) providing OMB assistance to departments and agencies for implementation of the memorandum.[29]

To ensure transparency when executive department or agency officials are contacted by federally registered lobbyists for Recovery Act projects, section 3 of the memorandum provides five guidelines for interaction with lobbyists:

1. Executive departments and agencies cannot consider the views of lobbyists concerning projects, applications, or applicants for funding.
2. Agency officials cannot communicate orally (in-person or by telephone) with registered lobbyists about Recovery Act projects, applications, or funding applications and must inquire that the individuals or entities are not lobbyists under the Lobbying Disclosure Act of 1995.[30]
3. Written communication from a registered lobbyist must be publicly posted by the receiving agency or governmental entity on its recovery website within three business days of receipt.[31]
4. Executive departments and agencies can communicate orally with registered lobbyists if particular projects, applications, or applicants for funding are not discussed, and if that government official documents in writing and posts to the department or agency's Recovery Act website "(i) the date and time of the contact on policy issues; (ii) the names of the registered lobbyists and the official(s) between whom the contact took place; and (iii) a short description of the substance of the communication."
5. Agency officials must reconfirm, when scheduling and prior to communications, that any individuals or parties participating in the communication are not registered lobbyists.[32]

Interim Recovery Act Guidance for Lobbyist Communications

On April 7, 2009, pursuant to President Obama's earlier memorandum, OMB Director Peter Orszag issued "sample interim guidance" for departments and agencies which "outlines the actions employees are required to take ... whenever they receive or participate in oral communications with any outside persons or entities regarding Recovery Act funds."[33] The

[29] Ibid., pp. 12531-12534.

[30] Pursuant to the memorandum, lobbyists may submit written comments to executive branch departments and agencies.

[31] Each agency is required to have a Recovery Act website. For example, the Department of Energy website can be found at http://www.energy.gov/recovery/. The website contains a page that lists written information provided by registered lobbyists and can be found at http://www.energy.gov/recovery/reports.htm. For a list of all cabinet level departments' recovery websites see the **Appendix**.

[32] The President, "Memorandum of March 20, 2009: Ensuring Responsible Spending of Recovery Act Funds," 74 *Federal Register* 12533, March 25, 2009. Lobbying restrictions do not apply to tax issues in Division B of the Recovery Act.

[33] Office of Management and Budget, Peter R. Orszag, Director, *Interim Guidance Regarding Communications With Registered Lobbyists About Recovery Act Funds*, M-09-16, Washington, DC, April 7, 2009, p. 1, http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-16.pdf. [Hereafter, Orszag, *Interim Guidance.*]

interim guidance was not designed as a ban on communications with federally registered lobbyists. Instead, "communications with Federally registered lobbyists should proceed, but in compliance with the [outlined] ... protocol."[34]

The interim guidance divided communications between executive branch employees and registered lobbyists into three categories: unrestricted oral communications, restricted oral communications, and written communications.

Unrestricted Oral Communications

The Orszag memorandum does not place restrictions on employees' contact with federally registered lobbyists "concerning general questions about the logistics of the Recovery Act funding or implementation" including administrative requests.[35] Instead, the interim guidance document outlines four general topics of discussion which are not covered by the President's memorandum:

> (1) how to apply for funding under the Recovery Act;
>
> (2) how to conform to deadlines;
>
> (3) to which agencies or officials applications or questions should be directed, [and]
>
> (4) requests for information about program requirements and agency practices under the Recovery Act.[36]

In addition, the Orszag memorandum does not restrict communications or interactions with registered lobbyists at "widely attended" public gatherings.[37] Restrictions, however, "do apply to private (non-public) oral communications between Federal officials and federally registered lobbyists that may happen to occur at, or on the heals of, a widely attended gathering."[38]

Restricted Oral Communication

For oral communication between executive branch employees and federally registered lobbyists on policy matters or in support of specific Recovery Act projects or applications for funding, the contact must be documented. While executive branch employees "should ask if any person participating in the oral communication is a Federally registered lobbyist,"[39] if the contact is a federally registered lobbyist, the employee must initiate a four-step process to document the communication. If, at any point in the process, the communication ceases, the employee can suspend the collection of data. The four-step process is as follows:

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[34] Orszag, *Interim Guidance.*, p. 1.

[35] Ibid.

[36] Ibid.

[37] "Widely attended gatherings" are defined in ethics regulations found at 5 C.F.R. § 2635.204 (g)(2).

[38] Orszag, *Interim Guidance*, p. 2.

[39] Ibid.

1. Inform the person(s) of applicable restrictions through the use of two sample templates that can be read or provided to the federally registered lobbyist. These state:

   Under the President's Memorandum, we cannot engage in any oral communications with Federally registered lobbyists about the use of Recovery Act funds in support of particular projects, applications, or applicants. All such communications by Federal lobbyists must be submitted in writing, and will be posted publicly on our agency's recovery website within 3 days.

   If the oral communication is about general policy issues concerning the Recovery Act and does not touch upon particular projects, applications or applicants for funding, a Federally registered lobbyist may participate in the conversation. We will document the fact of the policy conversation in writing, including the name of the lobbyist and other participants, together with a brief description of the conversation, for public posting on our agency's recovery website within 3 days.[40]

2. If the oral communications proceeds, only logistical questions or general information about Recovery Act programs should be discussed. No discussion of particular projects, applications, or applicants for funding is permitted.[41]
3. Each in-person or telephone conversation on Recovery Act policy matters should be documented with the date of contact, the names of the parties to the conversation, the name of the lobbyist's client(s), and a one-sentence description of the substance of the conversation.[42]
4. Information about the contact should be submitted to the appropriate person in the employee's agency. "That official should review the form for completeness and forward it for posting on [the] agency's website within 3 business days of the communication."[43]

Restricted Written Communication

If executive branch employees receive written communication about Recovery Act projects, applications, or applicants from federally registered lobbyists, such communication must be forwarded to a designated agency official by e-mail. The designated agency official must then forward the communication for posting to the agency's Recovery Act website.[44]

Revised Recovery Act Guidance for Lobbyist Communications

On July 24, 2009, OMB Director Orszag released updated guidance on communications with registered lobbyists Recovery Act funds. Changes made to the interim guidance document include expansion of restrictions to "all persons outside the Federal Government (not just federally

[40] Ibid.

[41] Ibid.

[42] Orszag, *Interim Guidance*, p. 3.

[43] Ibid. See the **Appendix** for a list of Recovery Act websites for each cabinet level department.

[44] Orszag, *Interim Guidance*, p. 4.

registered lobbyists) who initiate oral communications concerning pending competitive applications under the Recovery Act."[45]

Restrictions for oral communication of logistical questions and oral communications at widely attended gatherings did not change from the policies established by the interim guidance document. The updated guidance document, however, differentiates between oral communications between the submission of a formal application and the award of a grant, and oral and written communication concerning policy and projects for funding.

Communication Between the Submission of an Application and Grant Award

Communication between interested parties and executive branch employees "[d]uring the period of time commencing with the submission of a formal application by an individual or entity for a competitive grant or other competitive form of Federal financial assistance under the Recovery Act, and ending with the award of the competitive funds" is restricted. Federal employees "may not participate in oral communications initiated by any person or entity concerning a pending application for a Recovery Act competitive grant or other competitive form of Federal financial assistance, whether or not the initiating party is a federally registered lobbyist."[46] These restrictions apply unless

> (i) the communication is purely logistical;
>
> (ii) the communication is made at a widely attended gathering;
>
> (iii) the communication is to or from a Federal agency official and another Federal Government Employee;
>
> (iv) the communication is to or from a Federal agency official or an elected chief executive of a state, local or tribal government, or to or from a Federal agency official and the Presiding Office or Majority Leader in each chamber of a state legislature; or
>
> (v) the communication is initiated by a Federal agency official.[47]

If communication concerns a pending application and is not exempted, the employee is directed to terminate the conversation.[48]

Other Oral and Written Communication

Restrictions on other oral and written communication with federally registered lobbyists about pending applications use the same thresholds for reporting as provided in the interim guidance document for "Restricted Oral Communication." This includes informing the contact that the conversation will be documented; documenting the contact by recording the contact date, names

[45] Office of Management and Budget, Peter R. Orszag, director, *Updated Guidance Regarding Communications With Registered Lobbyists About Recovery Act Funds*, M-09-14, Washington, DC, July 24, 2009, p. 1, http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-24.pdf. [Hereafter, Orszag, *Updated Guidance.*]

[46] Orszag, *Updated Guidance*, p. 2.

[47] Ibid.

[48] Ibid., p. 3.

of parties to the conversation, the name of the lobbyist's client, a one-sentence description of the conversation, and attachments of any written materials provided by outside participants during the meeting; and submitting of the forms to the agency for posting on the Recovery Act website.[49]

Restrictions on Lobbyists Serving on Federal Advisory Committees

Further broadening the restrictions on lobbyists, the White House, on September 23, 2009, announced a new policy to restrict the number of federally registered lobbyists serving on agency advisory boards and commissions in an effort to "reduce the influence of special interests in Washington."[50] In October 2009, Norm L. Eisen, special counsel to the President for ethics and government reform, issued two additional blog posts[51] to clarify the White House position on federally registered lobbyists serving on federal advisory committees and to respond to criticism leveled by the American League of Lobbyists[52] and by the chairs of the Industry Trade Advisory Committees (ITAC).[53] In his response, Mr. Eisen stated the following:

> While we recognize the contributions some of those who will be affected have made to these committees, it is an indisputable fact that in recent years, lobbyists for major special interests have wielded extraordinary power in Washington, DC, resulting in a national agenda too often skewed in favor of the interests that can afford their services. It is that problem that the President has promised to change, and this is a major step in implementing that change.[54]

Implementation of these recommendations are to be made by each agency during the recertification and reappointment process for each advisory committee. The White House has stated that they are not attempting to stifle lobbyists' ability to advocate on behalf of their clients, just that "industry representatives shouldn't be given government positions from which to make their case."[55]

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[49] Ibid., pp. 3-4.

[50] The White House, "Lobbyists on Agency Boards and Commissions," Blog Post, September 23, 2009, http://www.whitehouse.gov/blog/Lobbyists-on-Agency-Boards-and-Commissions. For more information on federal advisory committees see CRS Report R40520, *Federal Advisory Committees: An Overview*, by Wendy R. Ginsberg.

[51] The White House, "Why We Bar Lobbyists from Agency Advisory Boards and Commissions," Blog Post, October 21, 2009, http://www.whitehouse.gov/blog/Why-We-Bar-Lobbyists-from-Agency-Advisory-Boards-and-Commissions; and The White House, "Why We Closed the Revolving Door," Blog Post, October 28, 2009, http://www.whitehouse.gov/blog/2009/10/28/why-we-closed-revolving-door.

[52] Letter from David G. Wenhold, president, American League of Lobbyists, and Peter G. Mayberry, board of directors, American League of Lobbyists, to President Barack Obama, October 28, 2009, http://www.whitehouse.gov/files/documents/10-09-Letter-to-WH-Advisory-Committees.pdf.

[53] Letter from Gregory Dale, director, commercial trade policy, the Boeing Company, Timothy Hoelter, vice president, government affairs, Harley-Davidson Motor Company, and Brian Petty, senior vice president, government affairs, International Association of Drilling Contractors, et al. to President Barack Obama, Gary Locke, Secretary, U.S. Department of Commerce, and Ron Kirk, United State Trade Representative, October 19, 2009, http://www.whitehouse.gov/assets/documents/Chairs_ITAC_letter_to_Obama_(2).pdf.

[54] The White House, "Why We Bar Lobbyists from Agency Advisory Boards and Commissions," Blog Post, October 21, 2009, http://www.whitehouse.gov/blog/Why-We-Bar-Lobbyists-from-Agency-Advisory-Boards-and-Commissions.

[55] Letter from Norm L. Eisen, Special Counsel to the President, to Mr. Gregory Dole, director, commercial trade policy, the Boeing Company, et al, October 21, 2009, http://www.whitehouse.gov/assets/documents/Signed_Lobbyist_Response_Letter_(10-21-09).pdf.

Third-Party Critiques of Executive Branch Lobbying Policies

Critiques of the Obama Administration's policy toward federally registered lobbyists has focused on Recovery Act restrictions and lobbyists serving as members of federal advisory committees. In each instance, the American League of Lobbyists has written to the White House critiquing the programs and suggesting policy modifications.

Recovery Act Lobbying Policies

Criticism of executive branch policies on interactions between federally registered lobbyists and executive branch officials developed shortly after the President's March 20, 2009 memorandum outlining Recovery Act lobbying restrictions. On March 31, 2009, the American Civil Liberties Union (ACLU), Citizens for Responsibility and Ethics in Washington (CREW), and the American League of Lobbyists (ALL) sent a letter to White House Counsel Gregory Craig and, at the same time, issued a press release asking the White House to rescind the restrictions. In its letter, the groups stated their support for "efforts to ensure all American Recovery and Reinvestment Act of 2009 ('Recovery Act') funds are expended in a transparent and responsible manner," but felt that "[s]ection 3 [of the President's Memorandum], 'Ensuring Transparency of Registered Lobbyists Communications,' [was] an ill-advised restriction on speech and not narrowly tailored to achieve the intended purpose."[56]

The groups' press release emphasized that the directive was both too narrow and too broad, and it encroached on individuals' right to petition the government. The press release stated the following:

> In their letter, the groups said the directive was both too narrow—because it did not apply to non-registered lobbyists such as bank vice presidents or corporate directors—and also too broad, because it incorrectly assumed that all registered lobbyists may exert improper pressure for clients seeking funding for Recovery Act projects.
>
> Additionally, the right to petition the government is one of the main tenets of our country's founding principles. To state that one class of individuals may not participate in the same manner as all others is clearly a violation of this principle.[57]

The updated guidance document issued by the White House on July 24, 2009, included some of the changes that CREW, ACLU, and ALL had requested. The updated guidance included the expansion of restrictions to cover "all persons outside the Federal Government (not just federally

[56] Letter from Melanie Sloan, executive director, Citizens for Responsibility in Government; Carline Fredrickson, Director, Washington Legislative Office American Civil Liberties Union; and Dave Wenhold, president, American League of Lobbyists, to Gregory B. Craig, Esq., White House Counsel, March 31, 2009, http://alldc.org/pdfs/033109WhiteHouseLetter.pdf.

[57] Citizens for Responsibility and Ethics in Washington, the American Civil Liberties Union, and the American League of Lobbyists, "Diverse Coalition of Organizations Call for White House to Rescind Rule Restricting Lobbyist Communications on Bailout Funds: ACLU, CREW, and ALL Argue Rule Will Not Improve Transparency and Accountability," press release, March 31, 2009, http://www.alldc.org/press/pr033109.pdf.

registered lobbyists) who initiate oral communications concerning pending competitive applications under the Recovery Act."[58]

Federal Advisory Committee Membership

Following the September 23, 2009 White House blog post outlining the future appointment of federally registered lobbyists to executive branch agency boards and commissions, both the lobbying community and members of the Industry Trade Advisory Committees criticized the White House's position. On October 19, 2009, the 16 chairs of the Industry Trade Advisory Committees[59] wrote a letter to the Secretary of Commerce, Gary Locke, and the U.S. Trade Representative, Ron Kirk, outlining their concerns over the new policy of prohibiting federally registered lobbyists from serving on federal advisory committees. The three substantive and procedural concerns outlined in the letter are

- that banning federally registered lobbyists from serving on federal advisory committees will "undermine the utility of the advisory committee process, the level of advice that he advisory committee provide, and, consequently, the ability of the United States to achieve balanced and effective trade policies";[60]
- that the "new policy will undermine the broader goals of transparency with respect to lobbying which are the hallmarks of the Advisory Committee process." In addition, "because the policy focuses on registered lobbyists, it actually incentivizes individuals who desire to remain on the Committee to de-register as a registered lobbyist under the LDA";[61] and
- that the illegal action of a few individuals are being used to prejudge all federally registered lobbyists.[62]

The White House, in a letter from Norm L. Eisen, special counsel to the President, responded to the Industry Trade Advisory Committee's letter on October 21, 2009, and stated that

> Your arguments that only lobbyists can bring the requisite experience to provide wise counsel, or that reaching beyond the roster of industry lobbyists for appointees will result in a "lack of diversity," are unconvincing on their face. We believe the committees will benefit from an influx of businesspeople, consumers and other concerned Americans who can bring fresh perspectives and new insights to the work of government.[63]

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[58] *Updated Guidance*, p. 1.

[59] For a listing of the 16 Industry Trade Advisory Committees, see U.S. Department of Commerce, International Trade Administration, "Industry Trade Advisory Committees," http://www.trade.gov/itac/committees/index.asp.

[60] Letter from Gregory Dale, director, commercial trade policy, the Boeing Company; Timothy Hoelter, vice president, government affairs, Harley-Davidson Motor Company; and Brian Petty, senior vice president, government affairs, International Association of Drilling Contractors, et al. to President Barack Obama, Gary Lock, Secretary, U.S. Department of Commerce; and Ron Kirk, United State Trade Representative, October 19, 2009, p. 4, http://www.whitehouse.gov/assets/documents/Chairs_ITAC_letter_to_Obama_(2).pdf.

[61] Ibid., p. 5.

[62] Ibid.

[63] Letter from Norm L. Eisen, Special Counsel to the President, to Mr. Gregory Dole, director, commercial trade policy, the Boeing Company, et al, October 21, 2009, http://www.whitehouse.gov/assets/documents/Signed_Lobbyist_Response_Letter_(10-21-09).pdf.

Options for Change

Creation of restrictions on federally registered lobbyists' access to executive branch departments and agencies has already changed the relationship between lobbyists and covered executive branch officials. If desired, there are additional options which might further clarify lobbyists' relationships with executive branch officials. These options each have advantages and disadvantages for the future relationships between lobbyists and governmental decision-makers. CRS takes no position on any of the options identified in this report.

Amend the Lobbying Disclosure Act

If current disclosure requirements are not determined to be sufficient to capture program level lobbying activity, or if current executive branch restrictions were made permanent, the Lobbying Disclosure Act could be amended to institute provisions similar to current executive branch lobbying restrictions. Currently, lobbyists must file quarterly disclosure reports with information on their activities and covered officials contacted. In addition, the LDA, as amended by the Honest Leadership and Open Government Act of 2007, requires federally registered lobbyists to file semi-annual reports on certain campaign and presidential library contributions.[64] The disclosure requirements might be further amended to cover program specific disbursement information. Changes to the LDA would require the introduction and passage of a bill by Congress, as well as the President's signature.

Create a Central Executive Branch Disclosure Database

The White House or the Recovery Accountability and Transparency Board could create a central database to collect all Recovery Act projects and contacts by federally registered lobbyists in a single, searchable location.[65] Creating a central, searchable portal might allow for department and agencies to see which lobbyists, if any, are involved in a given project and allow individuals and groups to better understand which departments and agencies are responsible for projects of interest. A similar website has been established for stimulus fund recipients to register and disclose how funds are being spent.[66]

Take No Immediate Action

Congress or the President might determine that the current lobbying registration and disclosure provisions, executive orders, and executive branch memoranda on Recovery Act lobbying restrictions are effective. Instead of amending the LDA, issuing additional executive orders, or issuing additional memoranda, Congress or the President could continue to utilize existing law to provide lobbyists access to covered governmental officials. Changes to the LDA or executive

[64] 2 U.S.C. § 1604.

[65] While Recovery.gov contains information on the implementation of Recovery Act programs, a central database of registered-lobbyist contacts with executive branch officials does not currently exist. Each individual department and agency is responsible for listing contacts on its respective Recovery Act website. For a list of websites see the **Appendix**.

[66] For more information see https://www.federalreporting.gov.

branch policy could be made on an as-needed basis through changes to LDA guidance documents issued by the Clerk of the House and Secretary of the Senate,[67] through executive order, or through the issuance of new memoranda by the President.

[67] For more information on the role of the Clerk of the House and the Secretary of the Senate to administer the lobbying registration and disclosure system see CRS Report RL34377, *Honest Leadership and Open Government Act of 2007: The Role of the Clerk of the House and the Secretary of the Senate*, by Jacob R. Straus.

Appendix. Cabinet-Level Executive Departments Recovery Act Websites

Table A-1. Cabinet-Level Departments Recovery Act Websites

Department	Recovery Act Website
Department of Agriculture	http://www.usda.gov/recovery
Department of Commerce	http://recovery.commerce.gov/
Department of Defense	http://www.defenselink.mil/recovery/
Department of Education	http://www.ed.gov/recovery/
Department of Energy	http://www.energy.gov/recovery/
Department of Health and Human Services	http://www.hhs.gov/recovery/
Department of Homeland Security	http://www.dhs.gov/xopnbiz/recovery.shtm
Department of Housing and Urban Development	http://www.hud.gov/recovery/
Department of the Interior	http://recovery.doi.gov/
Department of Justice	http://www.usdoj.gov/recovery/
Department of Labor	http://www.dol.gov/Recovery/
Department of State	http://www.state.gov/recovery/
Department of Transportation	http://www.dot.gov/recovery/
Department of the Treasury	http://www.treas.gov/recovery/
Department of Veterans Affairs	http://www.va.gov/recovery/

Source: Recovery Accountability and Transparency Board, "Agency Sites and Information," *Recovery.gov*, http://www.recovery.gov/?q=content/agencies.

Notes: Additional agencies are also required to maintain recovery websites. These include the Agency for International Development, Corporation for National and Community Service, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, National Endowment for the Arts, National Science Foundation, Office of Personnel Management, Railroad Retirement Board, Small Business Administration, Smithsonian Institution, Social Security Administration, and U.S. Army Corps of Engineers.

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