

MEMORANDUM

On Friday, March 20, President Obama issued a Memorandum to the heads of Executive Departments and Agencies entitled "Ensuring Responsible Spending of Recovery Act Funds" that, in part, severely restricts the involvement of registered lobbyists in communications to agency officials about projects funded by the American Recovery and Reinvestment Act of 2009 ("the Recovery Act"). The new rules contained in the Memorandum are intended to ensure that applications for funding under the Recovery Act are decided on their merits. Generally, all oral communications between registered lobbyists and federal officials concerning specific stimulus projects are prohibited, and posting of all registered lobbyists communications is required.

The scope of the Directive is as follows:

- It only applies to programs funded by, or policy discussions regarding, the Recovery Act;
- it extends only to individual registered lobbyists of companies, associations, or firms, **not** employees of lobbyist registrant entities who are not individually registered i.e., it does not extend to all employees of EEI, just the registered lobbyists;
- it covers communications with all agency and department officials, not just "Covered Executive Branch Officials" as defined by the Lobby Disclosure Act (LDA); and,
- it does not apply to the tax-related provisions in Part B of the Recovery Act.

The following are highlights of the limitations of the Directive:

- Upon the scheduling of a conference call or meeting regarding a **specific** item or program in the Recovery Act, and again at the outset of any oral communication, an agency or department official must inquire as to whether any of the participants are registered lobbyists. If so, the registered lobbyist(s) are not permitted to participate or attend, but may submit comments in writing. The comments must be posted by the agency within 3 days of receipt on a publicly available website.
- If a call or meeting involves only **general** policy considerations, lobbyists may participate or attend, but the department or agency official must post the names of participating lobbyists and a short description of the meeting on the same website within 3 days of the call or meeting.

Please note a few items that merit additional consideration.

- 1) even where only general policy matters are the subject of a meeting, the requirement that the department or agency official post a written summary of his/her interpretation of the meeting raises potential problems.

Such disclosure may be misinterpreted by the public, mischaracterized by the agency (the description of the communication is in the discretion of the department or agency official), or could be used by competitors. In addition, the line between a “general policy” discussion and a discussion about a specific project may occasionally be difficult to determine. At a minimum, this requirement may have a chilling effect on dialogue with Federal agencies.

(2) there has been public speculation that this model could be extended to other programs (e.g., TARP) or even for any meeting on any subject when a lobbyist is included.

(3) OMB is required to report to the President in 60 days with any recommendations to revise or modify the Memorandum.

(4) This will continue to be a very controversial issue, and groups representing the lobbying community are evaluating what options are available to challenge the Memorandum. We will be closely monitoring these developments, and will keep you posted.

Please do not hesitate to call Ed Comer (5615) or Bruce Brown (5621) with any questions.