



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

THE DIRECTOR

April 7, 2009

M-09-16

MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES

FROM: Peter R. Orszag
Director

SUBJECT: Interim Guidance Regarding Communications With Registered Lobbyists About Recovery Act Funds

On March 20, 2009, the President issued an Executive Branch-wide Memorandum entitled, "Ensuring Responsible Spending of Recovery Act Funds" (attached). Section 3 of the Memorandum mandates, on an initial basis, specific protocols for oral communications between agency officials and Federally registered lobbyists. The purpose of the President's Memorandum is to promote transparency in communications with Federally registered lobbyists and facilitate Federal agencies' merit-based decision-making in awarding Recovery Act funds.

To help employees understand and comply with their responsibilities under the President's Memorandum, Executive Branch departments and agencies, with the assistance of OMB, are required to distribute guidance to their employees. The attached sample interim guidance memorandum for departments and agencies may be used as a template for the guidance you distribute to your employees. This internal guidance should be adapted to include your internal agency points of contact and should be distributed to your staff as expeditiously as possible, with a copy to OMB's General Counsel, Preeta Bansal, at recoverycommunications@omb.eop.gov. The sample interim guidance outlines the actions employees are required to take, pursuant to the President's Memorandum, whenever they receive or participate in oral communications with any outside persons or entities regarding Recovery Act funds.

The President's Memorandum provides for the Director of OMB to assist and issue additional guidance, as needed, to facilitate Executive Branch-wide implementation of these initial requirements. To that end, please contact OMB's General Counsel's office, at recoverycommunications@omb.eop.gov, with questions regarding the President's Memorandum or this guidance.

Finally, please note that the President's Memorandum directs OMB within 60 days to recommend adjustments or modifications to the Memorandum, in recognition that the interim requirements outlined in the Memorandum should be evaluated in light of actual experience and

input in order to advance the President's policy goals most effectively. I am committed to working with you to help fashion a final protocol that represents good policy and advances the effectiveness and quality of government decision-making. Accordingly, my office looks forward to receiving your questions, experiences, and other feedback concerning the scope, impact, and practical implementation aspects of the President's Memorandum. We already are receiving feedback; please continue to forward it to recoverycommunications@omb.eop.gov on a rolling basis.

Attachment: **Sample Interim Guidance Memorandum for Executive Branch Departments and Agencies**

Sample Interim Guidance Memorandum for Executive Branch Departments and Agencies

SUBJECT: Interim Instructions Regarding Communications With Registered Lobbyists About Recovery Act Funds

On March 20, 2009, President Obama issued an Executive Branch- wide Memorandum entitled, "Ensuring Responsible Spending of Recovery Act Funds" (enclosed). Section 3 of the President's Memorandum mandates interim specific protocols for oral communications with registered lobbyists. The Director of OMB is directed to evaluate agencies' experience with the Memorandum's requirements within 60 days and to recommend potential adjustments or modifications to the Memorandum.

This interim guidance outlines the actions you are required to take, effective immediately, whenever you receive or participate in oral or written communications with any outside persons or entities regarding Recovery Act funds. The purpose of the President's Memorandum and this initial guidance is to promote transparency in communications with Federally registered lobbyists and facilitate Federal agencies' merit-based decision-making in awarding Recovery Act funds. Accordingly, your communications with Federally registered lobbyists should proceed, but in compliance with the following protocol:

A. Unrestricted Oral Communications with Registered Lobbyists on Logistical Questions Related to the Recovery Act

The President's Memorandum does not place any restrictions on communications with registered lobbyists concerning general questions about the logistics of Recovery Act funding or implementation. Such matters include a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to communicate about Recovery Act policy or a particular project or application for funding under the Recovery Act.

The following general topics of discussion, for example, all may fall within the category of general questions about logistics or implementation, 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,
or
- (4) requests for information about program requirements and agency practices under the Recovery Act.

B. Unrestricted Public Oral Communications with Registered Lobbyists at Widely

Attended Gatherings

The President's Memorandum is aimed at furthering the transparency of oral communications between Federal officials and registered lobbyists concerning the Recovery Act. Such transparency aims are achieved with respect to public communications made at widely attended gatherings that are attended by either a large number of people from throughout an industry or profession, or by those representing a wide range of interests (the term "widely attended gathering" is defined and implemented in ethics regulations at 5 C.F.R. § 2635.204(g)(2) and related interpretive guidance, and is regularly construed and applied by your designated agency ethics official). Thus the President's Memorandum imposes no further restrictions on such public oral lobbyist communications.

The restrictions below, however, apply to private (non-public) oral communications between Federal officials and Federally registered lobbyists that may happen to occur at, or on the heels of, a widely attended gathering.

C. Oral Communications with Federally Registered Lobbyists on Recovery Act Policy Matters or in Support of Specific Projects or Applicants for Funding

Other than the above situations, if you communicate with or are contacted, via telephone or in-person, by any persons outside the Federal government (including persons associated with for-profit companies, non-profit organizations and State and local governmental entities) regarding Recovery Act matters, you should ask if any person participating in the oral communication is a Federally registered lobbyist. If any person is a Federally registered lobbyist, please take the following steps:

(1) **Inform the person(s) of applicable restrictions**, a sample template of which follows:

"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."

(2) **If the oral communication proceeds** with the participation of a Federally registered lobbyist, you should discuss only logistical questions or provide information regarding Recovery Act programs (as outlined in part A above) or general policy issues concerning Recovery Act funding, not particular projects, applications, or applicants for funding. Examples of general policy issues concerning the Recovery Act include discussions

supporting funding of certain general populations, categories of projects, or broad geographical areas.

You may not, however, orally discuss particular projects, applications, or applicants for funding with a Federally registered lobbyist. A particular project is:

- (i) a discrete and identifiable transaction, or set of transactions
- (ii) in which specific parties have expressed an interest.

Ordinarily, the first expression of an interest by a specific party will be when an initial proposal or application (such as a response to requests for proposals) is received by the Government. In other circumstances, however, there may be sufficient indications that a party is interested in a specific project or application earlier in the process, and in those instances, the matter should be considered a particular project or application. The President's Memorandum applies to communications prior to the award of a grant or other Recovery Act funding; it does not restrict grant recipients' representatives' ability to communicate with officials regarding the administration of a grant that has already been awarded.

If a conversation in which a Federally registered lobbyist is participating moves to particular projects, applications, or applicants for funding, you should end the conversation and request a written statement be submitted.

- (3) **Document each in-person or telephonic conversation concerning Recovery Act policy matters** with a registered lobbyist immediately after the conversation using the attached electronic form (remember that this form must be posted on the website within 3 days of the conversation). Please be sure your writing includes:

- (i) the date of contact,
- (ii) the names of the parties to the conversation,
- (iii) the name of the lobbyist's client(s), and
- (iv) a general, one-sentence description of the substance of the conversation.

- (4) **Submit the form to the appropriate person within your agency.** Send your form containing the above-required information, via e-mail, to [the appropriate official designated by your agency]. That official should review the form for completeness and forward it for posting on your agency's website within 3 business days of the communication.

D. Written Communications from Federally Registered Lobbyists

In addition, with regard to all written communications you receive from Federally registered lobbyists regarding specific projects, applications, or applicants for Recovery Act funding, please forward such communications to [the appropriate designated agency official], via e-mail. This must be done immediately upon receipt. That official will then forward the written communications for posting on your agency's website within 3 business days of the communication.

In addition, if you have any questions about the President's Memorandum, or this guidance, please refer to the attached "Frequently Asked Questions" which provides specific examples or contact [designated agency point of contact] at [agency phone number].

The President's Memorandum provides for the Director of OMB to assist and issue additional guidance, as needed, to facilitate Executive Branch-wide implementation of these requirements. The President's Memorandum also directs OMB to evaluate agencies' experience with the Memorandum's initial requirements within 60 days and to recommend adjustments or modifications to the protocol outlined in the Memorandum. To that end, you should feel free to forward your questions, experiences, and feedback regarding the President's Memorandum to OMB's General Counsel's office, at recoverycommunications@omb.eop.gov.

Attachments:

- (1) Frequently Asked Questions
- (2) Registered Lobbyist Contact Disclosure Form
- (3) President Obama's Memorandum "Ensuring Responsible Spending of Recovery Act Funds" (March 20, 2009)

FREQUENTLY ASKED QUESTIONS

Q: A local business group has contacted me to discuss how to apply for funding for transportation projects. May I talk with members of the group?

A: Yes. This area of discussion falls within the category of general logistical and implementation issues concerning the Recovery Act, and thus you may talk with the group without restriction to answer its questions, regardless of whether the group includes Federally registered lobbyists. However, if the discussion includes Federally registered lobbyists and veers into discussion of particular policy views or particular projects or applications for funding under the Recovery Act, you should comply with the terms of the President's Memorandum and document oral communications by Federally registered lobbyists about Recovery Act policy matters, and request that all communications about particular projects or applications be submitted in writing.

Q: Shouldn't I simply avoid all contact with Federally registered lobbyists about Recovery Act matters?

A: No. The purpose of the President's Memorandum is to provide transparency of certain communications with Federally registered lobbyists concerning the Recovery Act to further accountability and merit-based decision-making by agencies, and not to bar such communications. In many cases, Federally registered lobbyists bring to bear helpful information that facilitates agencies' evaluation of policies and projects on the merits. Accordingly, you should proceed with all communications with Federally registered lobbyists in accordance with the prescribed protocol.

Q: Do the restrictions apply to lobbyists for governmental entities, or lobbyists registered under State laws, or individuals who were Federally registered lobbyists in recent years but are no longer so registered?

A: The Memorandum applies to communications with individuals who are currently Federally registered lobbyists, including lobbyists for governmental or non-profit entities. It does not apply to individuals who have been registered in prior years, but are no longer, or to individuals registered to lobby under State rather than Federal laws.

Q: A group has called me to discuss concerns about how funding is being allocated to certain geographic areas. May I speak with members of the group?

A: Yes. This topic falls within the category of general policy issues concerning the Recovery Act, and thus you may talk with the group, regardless of whether the group includes Federally registered lobbyists. However, because this goes beyond mere logistical questions and into discussion of concerns and views about Recovery Act policy, please keep in mind that if the group does include Federally registered lobbyists, you will have to document the contact on the attached form.

Q: I have received a request to meet with representatives of a city government who have filed an application to discuss the possibility of obtaining Recovery Act funding for a light rail

project that would link their city to another. May I speak with them?

A: Because the subject for discussion involves a particular project, you may not speak with the representatives if a Federally registered lobbyist participates in the communication. You may, however, meet with any of the city's representatives who are not Federally registered lobbyists. In addition, any of the city's registered lobbyists can send something to you in writing with regard to the particular project, which you should thereafter forward to your designated agency official via email for posting on the Internet.

Q: I am scheduled to deliver a speech to a group of business leaders about how to apply for Recovery Act funds. Must I pre-screen the group for Federally registered lobbyists? If Federally registered lobbyists are present, do I need to document each of their questions as a lobbying contact?

A: If your discussion will focus on logistical issues only, you may speak to the group without restriction regardless of its size or composition. Moreover, even if the discussion touches on Recovery Act policy issues, if the speech is before a widely attended gathering, you do not need to determine whether Federally registered lobbyists are present, and you may discuss general Recovery Act issues without documenting the discussion.

Q: How much information do I need to include on the Lobbyist Contact Disclosure form?

A: The form is meant to document the fact and date of your contact, along with the identity of the lobbyist, his or her client, and a one-sentence description of the general topic or topics of discussion. Additional detailed information is not required.

Q: Are there any exemptions in the interim protocol for communications with Federally registered lobbyists representing State, local, tribal or other governmental entities?

A: No.

Q: Do the requirements of the President's Memorandum concerning lobbyist communications apply only to individuals who are Federally registered lobbyists, or to lobbying organizations and their employees more generally?

A: The requirements apply only to communications with individuals who are Federally registered lobbyists, and not with lobbying organizations or their non-registered employees more generally.

Q: When does this new policy go into effect?

A: The policy is in effect, and you should adhere to this interim protocol immediately.

Q: To whom should I turn for further questions about how to deal with specific situations?

A: You should contact your designated agency ethics official, in the first instance, or another designated agency point of contact.

Q: I want to provide feedback on this protocol. What should I do?

A: The President's Memorandum directs the Office of Management and Budget to evaluate agencies' experience with the Memorandum's requirements within 60 days. If you would like to provide comments or recommend adjustments, please contact the OMB General Counsel's office, at recoverycommunications@omb.eop.gov.

REGISTERED LOBBYIST CONTACT DISCLOSURE FORM

This form is to be completed by Executive Branch employees who are contacted by registered lobbyists regarding **policy issues concerning the Recovery Act**. This report includes a written description of each contact, the date and time of the contact, and the names of the registered lobbyist(s) and the employee(s) with whom the contact took place. The information on this form will be available to the public on the Executive Branch agency's recovery website.

To be completed by the employee contacted.			
Date and time of contact:	Name of the Employee(s) Contacted (Name and Title)	Brief description of the contact: (attach separate sheet if necessary)	
Name of the Employee(s) who prepared this form:			Date:

Registered Lobbyist(s) Name:	Title:	Firm or Organization, if applicable:	Client:

Presidential Documents

Title 3—

Memorandum of March 20, 2009

The President

Ensuring Responsible Spending of Recovery Act Funds

Memorandum for the Heads of Executive Departments and Agencies

My Administration is committed to ensuring that public funds are expended responsibly and in a transparent manner. Last month, I signed into law the “American Recovery and Reinvestment Act of 2009,” Public Law 111–5 (the “Recovery Act” or “Act”), an investment package designed to provide a necessary boost to our economy in these difficult times and to create jobs, restore economic growth, and strengthen America’s middle class. The Recovery Act is designed to stimulate the economy through measures that, among other things, modernize the Nation’s infrastructure, jump start American energy independence, expand high-quality educational opportunities, preserve and improve access to affordable health care, provide middle-class tax relief, and protect those in greatest need. It is not intended to fund projects for special interests.

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.

To these ends, I hereby direct that for any further commitments, obligations, or expenditures of funds under the Recovery Act, the head of each executive department or agency shall immediately take all necessary steps, to the extent consistent with the Act and other applicable law, to comply with this memorandum.

Section 1. *Ensuring Merit-Based Decisionmaking for Grants and Other Forms of Federal Financial Assistance Under the Recovery Act.* (a) Executive departments and agencies shall develop transparent, merit-based selection criteria that will guide their available discretion in committing, obligating, or expending funds under the Recovery Act for grants and other forms of Federal financial assistance. Such criteria shall be consistent with legal requirements, may be tailored to the particular funding activity, and shall be formulated to ensure that the funding furthers the job creation, economic recovery, and other purposes of the Recovery Act. To this end, merit-based selection criteria shall be designed to support particular projects, applications, or applicants for funding that have, to the greatest extent, a demonstrated or potential ability to: (i) deliver programmatic results; (ii) achieve economic stimulus by optimizing economic activity and the number of jobs created or saved in relation to the Federal dollars obligated; (iii) achieve long-term public benefits by, for example, investing in technological advances in science and health to increase economic efficiency and improve quality of life; investing in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; fostering energy independence; or improving educational quality; and (iv) satisfy the Recovery Act’s transparency and accountability objectives.

(b) No considerations contained in oral or written communications from any person or entity concerning particular projects, applications, or applicants for funding shall supersede or supplant consideration by executive departments and agencies of such projects, applications, or applicants for funding pursuant to applicable merit-based criteria.

Sec. 2. *Avoiding Funding of Imprudent Projects.* (a) Funds under the Recovery Act shall not be committed, obligated, or expended by any executive department or agency, and shall not be used by any State or local governmental or private grantee or awardee, to support projects of the type described in section 1604 of Division A of the Recovery Act, which states that “[n]one of the funds appropriated or otherwise made available in this Act may be used by any State or local government, or any private entity, for any casino or other gambling establishment, aquarium, zoo, golf course, or swimming pool.”

(b) In exercising their available discretion to commit, obligate, or expend funds under the Recovery Act for grants and other forms of Federal financial assistance, executive departments and agencies, to the extent permitted by law, shall not approve or otherwise support funding for projects that are similar to those described in section 1604 of Division A of the Recovery Act.

(c) In exercising their available discretion to commit, obligate, or expend funds under the Recovery Act for grants and other forms of Federal financial assistance, executive departments and agencies, to the extent permitted by law, shall not approve or otherwise support any project, application, or applicant for funding that is imprudent or that does not further the job creation, economic recovery, and other purposes of the Act. To this end, executive departments and agencies shall exercise their available discretion to decline approving or otherwise supporting particular projects, applications, or applicants for funding unless the department or agency has affirmatively determined, in advance, that the project, application, or applicant has a demonstrated or potential ability to: (i) deliver programmatic results; (ii) achieve economic stimulus by optimizing economic activity and the number of jobs created or saved in relation to the Federal dollars obligated; (iii) achieve long-term public benefits by, for example, investing in technological advances in science and health to increase economic efficiency and improve quality of life; investing in transportation, environmental protection, and other infrastructure that will provide long-term economic benefits; fostering energy independence; or improving educational quality; or (iv) satisfy the Recovery Act’s transparency and accountability objectives.

(d) Where executive departments or agencies lack discretion under the Recovery Act to refuse funding for projects similar to those described in section 1604 of Division A of the Act, or other projects that the executive department or agency deems imprudent or as not furthering the job creation, economic recovery, or other purposes of the Act, the department or agency shall consult immediately with the Office of Management and Budget (OMB) about the project and its funding requirements. Where legally permissible, the department or agency shall:

- (i) delay funding of the project for 30 days, or the longest period permitted by law if less than 30 days, in order to ensure adequate opportunity for public scrutiny of the project prior to commitment of funds; and
- (ii) publish a description of the proposed project (or project plan) and its funding requirements on the agency’s recovery website as soon as practicable before or after commitment, obligation, or expenditure of funds for the project.

(e) Executive departments and agencies, including their respective Offices of Inspector General, shall monitor compliance with the prohibition in section 1604 of Division A of the Recovery Act, referenced in paragraph (a) above, by contractors, grantees, and other recipients of Federal financial assistance (recipients). If a department or agency believes that a recipient has not complied with section 1604, then the department or agency shall (i) promptly

notify the Recovery Accountability and Transparency Board; and (ii) take appropriate corrective action that may include, but not be limited to, disallowing or otherwise recovering improperly spent amounts, imposing additional requirements on the recipient to ensure compliance with section 1604 (and other applicable prohibitions and obligations), initiating a proceeding for administrative civil penalties, and initiating a proceeding for suspension and debarment.

Sec. 3. Ensuring Transparency of Registered Lobbyist Communications. (a) An executive department or agency official shall not consider the view of a lobbyist registered under the Lobbying Disclosure Act of 1995, 2 U.S.C. 1601 *et seq.*, concerning particular projects, applications, or applicants for funding under the Recovery Act unless such views are in writing.

(b) Upon the scheduling of, and again at the outset of, any oral communication (in-person or telephonic) with any person or entity concerning particular projects, applications, or applicants for funding under the Recovery Act, an executive department or agency official shall inquire whether any of the individuals or parties appearing or communicating concerning such particular project, application, or applicant is a lobbyist registered under the Lobbying Disclosure Act of 1995. If so, the lobbyist may not attend or participate in the telephonic or in-person contact, but may submit a communication in writing.

(c) All written communications from a registered lobbyist concerning the commitment, obligation, or expenditure of funds under the Recovery Act for particular projects, applications, or applicants shall be posted publicly by the receiving agency or governmental entity on its recovery website within 3 business days after receipt of such communication.

(d) An executive department or agency official may communicate orally with registered lobbyists concerning general Recovery Act policy issues; provided, however, that such oral communications shall not extend to or touch upon particular projects, applications, or applicants for funding, and further that the official must contemporaneously or immediately thereafter document in writing: (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. This writing must be posted publicly by the executive department or agency on its recovery website within 3 business days of the communication.

(e) Upon the scheduling of, and again at the outset of, any oral communications with any person or entity concerning general Recovery Act policy issues, an executive department or agency official shall inquire whether any of the individuals or parties appearing or communicating concerning such issues is a lobbyist registered under the Lobbying Disclosure Act. If so, the official shall comply with paragraph (d) above.

Sec. 4. General Provisions. (a) The Director of OMB shall assist and, as appropriate, issue guidance to the heads of executive departments and agencies to carry out their responsibilities under this memorandum. Within 60 days of the date of this memorandum, the Director of OMB shall review the implementation of this memorandum by executive departments and agencies and shall forward to me any recommendations for modifications or revisions to this memorandum.

(b) This memorandum does not apply to tax-related provisions in Division B of the Recovery Act.

(c) Nothing in this memorandum shall be construed to impair or otherwise affect: (i) authority granted by law or Executive Order to an executive department, agency, or the head thereof; or (ii) functions of the Director of OMB relating to budgetary, administrative, or legislative proposals.

(d) This memorandum shall be implemented consistent with applicable law and all OMB implementing guidance, and shall be subject to the availability of appropriations.

(e) This memorandum is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

Sec. 5. *Publication.* The Director of OMB is hereby authorized and directed to publish this memorandum in the *Federal Register*.

A handwritten signature in black ink, appearing to read "Paul Ryan", with a stylized flourish extending to the right.

THE WHITE HOUSE,
Washington, March 20, 2009

[FR Doc. E9-6754

Filed 3-24-09; 8:45 am]

Billing code 3110-01-P