

HHS Updated Guidance Regarding Communications with Registered Lobbyists about Recovery Act Funds

On March 20, 2009, the President issued a Memorandum entitled, "Ensuring Responsible Spending of Recovery Act Funds." The purpose of the President's Memorandum was to facilitate Federal agencies' merit-based decision-making in awarding Recovery Act funds by, among other things, helping ensure that communications between federally registered lobbyists and Federal agency officials are transparent. This updated guidance outlines the actions you are required to take whenever you receive or participate in oral or written communications with any outside persons or entities regarding Recovery Act funding determinations. This supersedes all prior written guidance on this subject.

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, 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 when a large number of persons attend and persons with a diversity of views or interests are present. Thus, the President's Memorandum imposes no further restrictions on such public oral Federally registered lobbyist communications.

For purposes of implementing the President's Memorandum, in addition to the criteria mentioned above, widely attended gatherings must provide the opportunity for an exchange of ideas with a large and diverse group. Examples of events that may be considered widely attended gatherings include webinars, symposiums, conferences, large receptions, gala celebrations, similar social events, etc. Examples of events that are not likely to be considered widely attended gatherings are small dinner parties, events attended primarily by the personnel of a particular company, or sporting events.

Employees are reminded that this section of the guidance solely addresses communication with Federally registered lobbyists that occur at events that are widely attended gatherings, as defined above. This guidance does not change any ethics rules that restrict the acceptance of gifts by Federal employees, including free attendance at a widely attended gathering. Employees are reminded that they must continue to seek guidance from their respective ethics official before accepting any offer of free attendance at a widely attended gathering.

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

If a conference or meeting does not qualify as a widely attended gathering, you must inquire whether participants are Federally registered lobbyists. This requirement may be satisfied, for example, by requesting each individual to sign in at a registration table. The sign-in sheet could include a column for the name and blocks to check: general public, Federally registered lobbyist, press, or other.

The meeting should be opened with a review of the meeting ground rules as follows:

- (1) there can be no discussion of particular projects, applications, or applicants for funding under the Recovery Act during the period following submission of a formal application for a competitive grant up through award of such grants (discussed more fully below in section C),
- (2) discussion at the meeting may cover general Recovery Act policy issues, including Department or agency programs. Discussions relating to general Recovery Act policy issues will be documented (described more fully below in section D). Discussions of logistical issues (discussed more fully above in section A) do not need to be documented.

C. Oral Communications During Period Following Submission of a Formal Application for a Competitive Grant or Other Competitive Form of Federal Financial Assistance Under the Recovery Act, and Up Through Awards of Competitive Recovery Act Funds

During 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, you 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. This restriction applies unless:

- (i) the communication is purely logistical (Part A above);
- (ii) the communication is made at a widely attended gathering (Part B above);
- (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 and an elected chief executive of a state, local or tribal government, or to or from a Federal agency official and the Presiding Officer or Majority Leader in each chamber of a state legislature; or
- (v) the communication is initiated by the Federal agency official.

If an individual or entity, that does not fall within any of the excepted categories above, contacts you to discuss a Recovery Act program and wants to talk about a pending application for a competitive grant or other competitive form of Federal financial assistance under the Recovery Act, you should make it clear that you cannot talk about pending applications for Recovery Act funds and end the conversation or that part of the conversation. A sample response for such situations follows:

“Does this discussion relate to an application that is pending for a competitive grant opportunity under the Recovery Act? If so under the President’s Memorandum, we cannot engage in any oral communications with individuals or entities about the use of Recovery Act funds in support of or about any pending application for a competitive grant or other competitive form of Federal financial assistance.”

Before submission of a formal application for competitive grants or other competitive forms of Federal financial assistance under the Recovery Act, and after the award of such funds, any person or entity, whether or not a federally registered lobbyist, may (consistent with any other applicable law, regulation, or agency policy) communicate with you orally or in writing about any matter concerning Recovery Act policy or any particular project for funding that is not the subject of a pending application for competitive funding under the Recovery Act. If you have an allowable conversation with a Federally registered lobbyist, you are required to document that conversation (see Section D below).

Federal departments and agencies should seek to notify the public, through particular notices of funding opportunities under the Recovery Act, to which competitive funding opportunities these restrictions apply. HHS notices of competitive funding opportunities under the Recovery Act should include the following language in the “Agency Contacts” section of the funding opportunity:

This funding announcement is subject to restrictions on oral conversations during the period of time commencing with the submission of a formal application¹ by an individual or entity and ending with the award of the competitive funds. Federal officials 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. This restriction applies 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 and an elected chief executive of a state, local or tribal government, or to or from a Federal agency official and the Presiding Officer or Majority Leader in each chamber of a state legislature; or*
- (v) the communication is initiated by the Federal agency official.*

For additional information see
http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-24.pdf.

The President’s Memorandum applies to communications prior to the award of a grant or other Recovery Act funding; it does not apply to communications with officials regarding the administration of a grant that has already been awarded.

D. Oral and Written Communications With Federally Registered Lobbyists Concerning Recovery Act Policy or Projects For Funding, and Written Communications By Registered Lobbyists Concerning Pending Applications

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 policy or projects for funding, you should first ascertain that the contacting party is not restricted from communicating with you orally under Part C above. Even if Part C does not limit oral communications, you must ask if any person participating in the oral communication is a federally registered lobbyist speaking on behalf of a client (or, in the case of an in-house registered lobbyist, on behalf of an employer) for whom the lobbyist is registered. This requirement applies unless the communication is purely

¹ Formal Application includes the preliminary application and letter of intent phases of the program.

logistical (Part A above) or the communication occurs during a widely attended gathering (Part B above).

If any person is a federally registered lobbyist speaking on behalf of a client or employer for whom the lobbyist is registered, please take the following steps:

(1) **Inform the person(s) that you will document** the fact of the conversation in writing, including the name of the lobbyist and other participants, together with a brief description of the conversation, for public posting on the agency's recovery website within 3 days. A sample template of the discussion is as follows:

“Under the President’s Memorandum, we cannot engage in any oral communications on a particular project once a formal application has been submitted for a competitive grant under the Recovery Act until awards are made.”

“If the oral communication is about general policy issues concerning the Recovery Act we will document the conversation in writing, including your name, your employer, your client, the same information about other Federally registered lobbyist participants, and the names of the Federal participants, together with a brief description of the conversation, for public posting on HHS’ Recovery Website within three business days.”

(2) **Subject to the exceptions contained in Part A and Part B above, document each in-person or telephonic conversation concerning Recovery Act funding** with a registered lobbyist during or immediately after the conversation. If more than one Federal employee is present during the conversation, ensuring documentation is the responsibility of the most senior Federal official present during the conversation. The Federal employee has one business day to document the conversation to allow time for review by OGC and posting to the HHS Recovery Website within 3 days. Please be sure your writing includes:

- (i) the date of contact,
- (ii) the name(s) of the Federally registered lobbyists and the Federal employee(s) who were parties to the conversation,
- (iii) the name(s) of the lobbyist firm or organization, if any,
- (iv) the name(s) of the lobbyist’s client(s),
- (v) a general, one-sentence description of the substance of the conversation, and
- (vi) attachments that consist of any written materials prepared by outside participants of the meeting that were submitted in connection with the meeting.

(3) **Submit the information to OGC for review.** Within the first business day, send an email containing the above-required information to the OGC mailbox [OGC_LobbyReview@hhs.gov]. OGC will review the summation and discuss with the submitter as necessary. The purpose of the OGC review is to assure that the communication from the senior Federal official meets the standard of Sec. 3(d) of the Presidential Memorandum, namely that it appears to document the

oral conversation with a registered lobbyist and that the summation documents that the conversation was about general policy issues. Management retains the discretion to review the documentation before submission to OGC. However, management review does not extend the time for submission.

(4) Submitting the Form for Posting on the HHS Recovery Website. Once reviewed and cleared by OGC, the Federal official will enter the summation in the appropriate field of the on-line form, complete other fields, check that the summation has been reviewed by OGC, and submit the completed form. The form should be submitted for posting by 5 pm ET on the third business day after the communication. An on-line Lobbyist Comment form is available at <http://lobby.intranet.hhs.gov>. This form must be used to report both covered verbal and written communications.

E. Written Communications from Federally Registered Lobbyists

All written communications received from Federally registered lobbyists and Federal responses to registered lobbyists regarding specific projects, applications, or applicants for Recovery Act funding, are to be posted on the HHS Recovery Website within 3 business days of the communication. HHS is using the same on-line form used for verbal communications, located at <http://lobby.intranet.hhs.gov>. All materials posted on the Web must comply with Section 508 of the Rehabilitation Act of 1973, as amended (29 U.S.C.794d), when submitted to the HHS Recovery Website. Compliance may be achieved as follows:

- The Federal official should encourage the Federally registered lobbyist to submit written communication via email to Federal officials with supporting documents. Supporting documents may be linked within the email on a contacting party or client's Website or attached as an external file. The recipient Federal official will copy and paste the full contents of this email in the appropriate field of the on-line form, complete other fields, and submit the completed form. All communication must be submitted for posting by 5pm ET on the third business day after the communication for posting.
- Any response by Federal officials to the written contact should also be submitted via email and entered as above. This cycle should be repeated as long as the related substantive discussion continues.
- Any hard copy correspondence will need to be re-typed and that text, including letterhead content, copied and pasted into the appropriate field of the on-line form or attached in a 508 compliant file format. The other fields may be filled in directly. The hard copy correspondence can then be saved as a PDF and the file attached via the form. PDFs may not be attached unless the text version has been entered.
- Attached electronic files are not necessarily 508 compliant and may be difficult or impossible to make fully accessible. To consult on a particular case, contact lisa.kruppa@hhs.gov.

Please Note: Any Web site links entered into the lobbyist contact form must have the full Web address spelled out. Example, use <http://www.hhs.gov>, not Department of Health and Human Services.

Questions regarding posting on the HHS Recovery Website should be referred to Linda Adams at linda.adams@hhs.gov.

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 Robin Funston at robin.funston@hhs.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: How does the updated guidance differ from the earlier guidance on this same subject?

A: The prohibition on oral communications between Federal agency officials and federally registered lobbyists regarding specific Recovery Act projects that was contained in the earlier guidance has been clarified to apply to the stage and context where concerns about merit-based decision-making are greatest – during the period commencing after the submission of formal applications for, and up through awards of, competitive grants or other competitive forms of Federal financial assistance under the Recovery Act. At the same time, the restriction has been expanded to cover, generally, all persons outside the Federal Government (not just federally registered lobbyists) who initiate oral communications concerning pending competitive grant or loan applications under the Recovery Act.

Q: Does the new version of the guidance still require Internet posting of lobbying contacts?

A: Yes, the updated guidance continues to require prompt Internet disclosure of oral and written communications with federally registered lobbyists concerning Recovery Act policy or projects for funding. The guidance also requires Internet disclosure of written communications with lobbyists concerning pending applications for competitive funding under the Recovery Act.

Q: A local business group has contacted me to discuss how to apply for funding for health related 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. However, if the group includes federally registered lobbyists and the discussion veers to advocacy about Recovery Act policy or a particular project or application for funding under the Recovery Act, you should document your discussion and forward that documentation to your agency representative for posting on the Internet. You should decline to discuss any pending applications for competitive grants or other competitive forms of Federal financial assistance under the Recovery Act.

Q: I have received a request to meet with federally registered lobbyists who represent a city government. The city government officials have stated openly that they plan to apply for a competitive grant under the Recovery Act to fund a specific project in upstate New York. May I talk with the company's lobbyists about that project?

A: Yes. So long as the city government has not submitted its formal application for the competitive grant in question, you may meet with the city government's lobbyists to discuss the matter in any way that is appropriate under other applicable law, regulations, and agency guidance. You must document your meeting with the lobbyists, however, and forward your documentation to the appropriate agency representative for posting on the Internet.

Q: Do the restrictions on oral communications with persons or entities concerning pending competitive grant applications, contained in Part C of the sample guidance, apply to applicants or applications for formula grants?

A: No. Because formula grants are not competitive, the restrictions of Part C of the sample guidance are not applicable. The guidance focuses on competitive grants and other competitive forms of financial assistance because that is where concerns about merit-based decision-making and special access are the greatest. In the competitive grant context, there should be a level playing field among applicants, and decisions should be made on the merits with no special access to Federal officials by some applicants. By contrast, in formula-driven grant contexts, grantees (in many situations, state and local governmental entities) are designated by statute and do not have to compete with others to receive their awards from Federal agencies. Because they are not competing for grants, restricting their communications with Federal agency officials during the grant process would not enhance, and might impede, the quality or merits of agency decision-making.

Q: What sorts of Federal assistance is included by the phrase “and other competitive forms of Federal financial assistance”?

A: Competitive grants and loans are examples of a covered form of competitive Federal financial assistance.

Q: What is meant by, and how broad is, the exception for agency official-initiated conversations about pending applications for competitive grants or loans? Does the fact that an agency official is returning a phone call of an applicant make the conversation agency-initiated?

A: No. The purpose of this exception is to allow agency officials to obtain the information they need or seek about pending applications to evaluate the applications, among other things. An agency official should not receive, be willing to receive, or respond to communications concerning pending applications, unless the official affirmatively seeks or requires information about the application.

Q: I have received a request to meet with representatives of a non-profit entity that has filed an application for a competitive grant. The representatives want to discuss the merits of the non-profit entity’s proposal. The representatives are not federally registered lobbyists. May I speak with them?

A: No. Because the non-profit entity has filed an application for a competitive grant, its representatives may not initiate communications with you orally about the merits of the application or proposal until after an award is made.

Q: Shouldn’t I simply avoid all contact with federally registered lobbyists about Recovery Act matters, so I don’t have to document anything?

A: No. The purpose of the President’s Memorandum is to provide transparency to certain communications with federally registered lobbyists concerning the Recovery Act, not to bar such communications. You should proceed with all communications in accordance with the protocol.

Q: Do the reporting requirements that apply to lobbyists apply to all lobbyists – including lobbyists for governmental entities, lobbyists registered under state laws, and individuals who were federally registered lobbyists in recent years but are no longer so registered?

A: The reporting requirements of the Memorandum apply to communications with individuals who are currently federally registered lobbyists, including lobbyists for governmental or non-profit entities, and who are communicating on behalf of a client for whom they are registered. The reporting requirements do not apply to:

- individuals who have been previously registered but are no longer federally registered;
- individuals registered to lobby under state rather than Federal laws; or
- Federally registered lobbyists who are not communicating on behalf of a client (or, in the case of an in-house registered lobbyist, on behalf of an employer) for whom they are registered.

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. Regardless of whether the group includes federally registered lobbyists, you may speak with members of the group about funding allocation. You may not speak with any member of the group, however, about any pending Recovery Act competitive grant or competitive loan applications before the agency. If the group includes federally registered lobbyists, you should document the contact on the attached form and, once cleared by OGC, document the event on <http://lobby.intranet.hhs.gov>.

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 the speech is before a widely attending gathering, you do not need to determine whether federally registered lobbyists are present, and you may discuss the Recovery Act without documenting the discussion.

Q: How do I know if a caller or meeting participant is a federally registered lobbyist or if the caller or meeting participant has submitted a formal application for a competitive grant?

A: You should simply ask your caller or meeting participants the applicable questions.

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, the lobbyist's firm or organization, 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 revised protocol for communications with other government employees?

A: You may have oral communications at any time, even after the submission of a formal grant application, with (1) other Federal employees, and (2) elected chief executive of a state, local or tribal government, or the Presiding Officer or Majority Leader in each chamber of a state legislature.

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

A: You should contact your deputy ethics counselor initially, and if necessary, contact Robin Funston at Robin.Funston@hhs.gov in the Office of Recovery Act Coordination.

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 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 of contact:	Name of the Federal Employee(s) Contacted (Name)	Brief description of the contact:
Name of the Employee(s) who prepared this form:		Date:

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