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OFFICE OF MANAGEMENT AND BUDGET

Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards, and Commissions

AGENCY: Office of Management and Budget.

ACTION: Notice of revised guidance.

SUMMARY: On June 18, 2010, President Obama issued “Lobbyists on Agency Boards and Commissions,” a memorandum directing agencies and departments in the Executive Branch not to appoint or re-appoint federally registered lobbyists to advisory committees and other boards and commissions. The Presidential Memorandum further directed the Director of the Office of Management and Budget (OMB) to “issue proposed guidance designed to implement this policy to the full extent permitted by law.” The Presidential Memorandum is available at <http://www.whitehouse.gov/the-press-office/presidential-memorandum-lobbyists-agency-boards-and-commissions>. OMB posted proposed guidance on November 2, 2010, and published final guidance on October 5, 2011. *See* 76 FR 61756. OMB is now issuing revised guidance regarding the prohibition against appointing or re-appointing federally registered lobbyists to clarify that the ban applies to persons serving on advisory committees, boards, and commissions in their individual capacity and does not apply if they are specifically appointed to represent the interests of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, environmental groups, etc.), or state or local governments.

DATES: EFFECTIVE DATE: The Revised Guidance is effective immediately.

REVISED GUIDANCE: OMB’s Revised Guidance follows in the form of questions and answers:

Q 1: Who is affected by the policy directed in the June 18, 2010 Presidential Memorandum (the “Memorandum”)?

A 1: Under the Memorandum and this Revised Guidance, federally registered lobbyists may not serve on an advisory committee, board, or commission (hereinafter, “committee”) in an “individual capacity.” In this Revised Guidance, the term “individual capacity” refers to individuals who are appointed to committees to exercise their own individual best judgment on behalf of the government, such as when they are designated as Special Government Employees as defined in 18 U.S.C. 202. The lobbyist ban does not apply to lobbyists who are appointed in a “representative capacity,” meaning that they are appointed for the express purpose of providing a committee with the views of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, or environmental groups, etc.), or state or local government. Appointing authorities already are required to clearly designate the role of committee members to assure their conformity with the applicable conflict of interest rules. *See* 41 CFR 102-3.105(h); *see also* 66 FR 37728, 37744 (July 19, 2001). Agencies should refer to guidance provided by the Office of Government Ethics regarding how to appropriately distinguish between “individual capacity” members (e.g., Special Government Employees) and “representative capacity” members when making committee appointments. *See* OGE, Federal Advisory Committee Appointments No. 05x4 (Aug. 18, 2005).

The lobbyist policy does not apply to individuals who are registered as lobbyists only at the state level. A lobbyist for purposes of the Memorandum is any individual who is subject to the

registration and reporting requirements of the Lobbying Disclosure Act of 1995 (LDA), as amended (2 U.S.C. 1605), at the time of appointment or reappointment to a committee.

Agencies may rely on appropriate searches of databases maintained by the House of Representatives and the Senate in identifying federally registered lobbyists.¹ Alternatively, agencies may consider including in their recruitment process for appointing members a way of obtaining written certification from the individual that he or she is not a federally registered lobbyist.

Any individual who previously served as a federally registered lobbyist may be appointed or re-appointed in an individual capacity only if he or she has either filed a bona fide de-registration or has been de-listed by his or her employer as an active lobbyist reflecting the actual cessation of lobbying activities or if they have not appeared on a quarterly lobbying report for three consecutive quarters as a result of their actual cessation of lobbying activities.

Q 2: Does the policy restrict the appointment of individuals who are themselves not federally registered lobbyists but are employed by organizations that engage in lobbying activities?

A 2: No, the policy established by the Memorandum applies only to individuals who are federally registered lobbyists and does not apply to individuals employed by organizations that lobby but are not so registered.

Q 3: What entities constitute “advisory committees and other boards and commissions” under the policy?

¹ Lobbying Disclosure, Office of the Clerk, U.S. House of Representatives: <http://lobbyingdisclosure.house.gov>; LDA Reports, U.S. Senate: http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm.

A 3: The policy directed in the Memorandum applies to any committee, board, commission, council, delegation, conference, panel, task force, or other similar group (or subgroup) created by the President, the Congress, or an Executive Branch department or agency to serve a specific function to which appointment is required, regardless of whether it is subject to the Federal Advisory Committee Act, as amended (5 U.S.C. App.). Appointment includes that which is required or permitted by law or regulation, including appointment at the discretion of the department or agency. Additionally, the ban applies to established committee workgroups and subcommittees, which may or may not require formal appointment.

Q 4: Does the policy apply to non-Federal members of delegations to international bodies?

A 4: Yes, delegations organized to present the United States' position to international bodies are considered to be committees for the purposes of this policy, regardless of whether they constitute advisory committees for purposes of the Federal Advisory Committee Act, as amended (5 U.S.C. App.). Therefore, agencies should not appoint federally registered lobbyists to these delegations if the lobbyists are to serve in an individual capacity.

Q 5: Which individuals are considered to be committee "members" and therefore covered by the policy?

A 5: The policy applies to all persons who are serving in an individual capacity as members of committees, including those who are full-time Federal employees and those who have been designated to serve as Special Government Employees. Committee members do not include individuals who are invited to attend meetings of committees on an ad hoc basis.

Q 6: How does the policy apply if a statute or presidential directive provides for appointments to be made by State Governors or by members of Congress?

A 6: While the discretion of appointing authorities outside of the Executive Branch will be respected, those appointing authorities should be encouraged to appoint individuals who are not federally registered lobbyists whenever possible, unless the individuals are appointed to serve in a representative capacity on behalf of an interest group or constituency.

Q 7: How does the policy apply when a statute or presidential directive requires the appointment of a specific representative from an organization and that representative is a federally registered lobbyist?

A 7: The policy does not supersede committee membership requirements established by statute or presidential directive. The Office of Government Ethics has cautioned that the term “represent” in a committee’s authorizing legislation or in its enabling documents does not necessarily mean that the members of that committee are to be appointed in a representative capacity rather than an individual capacity. *See* OGE, Federal Advisory Committee Appointments No. 05x4 (Aug. 18, 2005). The term “represent” frequently is used in a more generic sense with regard to members (e.g., to describe the kinds of expertise, knowledge, or employment background that should be included in a committee’s members) rather than for the express purpose of classifying a member’s role on the committee. Committee charters should, wherever possible and at the earliest possible time, be amended to conform to the policy, consistent with statutes and presidential directives.

Q 8: Does this policy also restrict the participation of lobbyists as members of a subcommittee or other work group that performs preparatory work for its parent committee?

A 8: Yes, the policy prohibits the appointment of federally registered lobbyists to a subcommittee or any other subgroup that performs preparatory work for a parent committee if the lobbyists are appointed in an individual capacity, whether or not the subcommittee members are appointed in the same manner as are members of the parent committee. The goal of the Memorandum is to restrict the undue influence of lobbyists on Federal government through their membership on committees, which would include subcommittees and other bodies regardless of whether those positions require formal appointment.

Q 9: Does this policy also restrict the participation of lobbyists as witnesses or experts who appear before or submit advice or materials to committees?

A 9: No, lobbyists may still appear before or otherwise communicate with a committee to provide testimony, information, or input in the same manner as non-lobbyists who are not members of or appointees to the advisory committee, board, commission, or any of its subgroups, to the extent permitted by law and regulation. The purpose of the policy is to prevent lobbyists from being in privileged positions in government. It is not designed to prevent lobbyists or others from petitioning their government. When lobbyists do testify, committees should make reasonable efforts to ensure that they hear a balance of perspectives and are not gathering information or advice exclusively from registered lobbyists.

Q 10: What should an agency do if it appoints to a committee an individual who is not a federally registered lobbyist at the time of appointment, but who, after appointment, becomes a federally registered lobbyist?

A 10: Agencies should make clear to all committee members that conducting activities that would require them to be federally registered lobbyists after appointment to serve on a committee in an individual capacity would necessitate their resignation or removal from committee membership. The appointing officers or their delegates shall ensure, at least annually, that committee members serving in an individual capacity are not federally registered lobbyists and, upon reappointment of the members, either shall require each member to certify that he or she is not a federally registered lobbyist or shall check the Federal lobbyist databases to confirm that each member has not registered as a lobbyist since appointment. If an agency finds that, following appointment to a committee in an individual capacity, a member subsequently has become a federally registered lobbyist or has engaged in activities which require registration, the agency shall request the resignation of the member.

Q 11: Will there be any waivers available for circumstances in which a federally registered lobbyist possesses unique or exceptional value to a committee?

A 11: The policy makes no provisions for waivers, and waivers will not be permitted under this policy.

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