

STIMULUS LOBBYING RULES, TAKE TWO

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The White House's Office of Management and Budget released the administration's new stimulus lobbying rules on Friday, as John mentioned [earlier](#). In summary, the new rules generally expand who is covered by the ban on agency staff having oral communications regarding Recovery Act grants, although it shrinks the circumstances as to when the ban applies and what it covers. It also closes a loophole pertaining to written communications by lobbyists on policy matters.

The 787 billion dollar question is how does the OMB's [July 24th guidance](#) on stimulus recovery lobbying differ from its [April 7th memo](#)? (For a short video explaining the old rules, see [this](#).) Here's how the rules have changed.

Who Is Covered?

The rule against agency officials engaging in oral communications with persons applying for federal financial assistance under the Recovery Act has been expanded to nearly everyone, instead of only encompassing lobbyists, as it did before.

However, the ban specifically exempts certain groups of people. It doesn't reach federal government employees. It doesn't cover the elected chief executive of a state, local, or tribal government (e.g., governors and mayors). And the ban doesn't apply to the Presiding Officer or Majority Leader in each chamber of a state legislature.

In addition, the ban does not apply if the subject of the communication to an agency official regards a purely logistical question, or was made at a widely attended gathering. Nor does it cover people responding to communications initiated by agency staff – that is, to answer agency staff questions.

Interestingly enough, it is not clear whether the new rules pertain to Congressional staff or Members of Congress. It seems reasonable to conclude that Congressional staff can communicate with agency officials under the “federal government employee” exemption. However, Members of Congress are not specifically exempted from these rules, although elected officials at the state and local level are specifically mentioned as exempted. (It would be a stretch to fit Members of Congress under the “federal government employee” exemption.)

The omission of Members of Congress probably is an oversight. If followed, banning communications by Members of Congress would likely be unconstitutional, as Congress has oversight responsibilities over agency activities.

When Does The Ban Take Effect?

The ban on oral communications set forth in the April 7th memo prohibits communications “regarding Recovery Act matters” that pertain to “particular projects, applications, or applicants for funding.” Under the old rule, oral communications are prohibited upon the first expression of interest by a party, or even earlier than that, if there's enough indication that the party is interested in a specific project or application.

The new memo changes this considerably. Now, persons interested in receiving Recovery Act money may communicate with agency officials up until the point they file a “formal application.” This is much later on in the process. Conceivably, persons interested in Recovery Act funds may hold off on filing an application for a grant while they lobby administration officials, and then submit the formal paperwork once they've laid the groundwork.

What Does The Ban Cover?

Under the new rule, the ban covers only oral communications concerning pending applications for a competitive grant or other competitive form of federal financial assistance under the Recovery Act. The previous rule covered oral communications regarding all grants, regardless of whether they were competitive or issued based upon a formula. The new OMB memo explains that only competitive grants are covered because “in formula-driven grant contexts, grantees . . . are designated by statute and do not have to compete with others to receive their awards from Federal agencies.”

Final Thoughts

The OMB memo says that the administration will soon release a “web tool” to “facilitate disclosure of lobbyist contacts concerning the Recovery Act.” This will go a long way towards making this a more transparent process. Hopefully, the form will look something like [this](#).

Last Friday's memo also partially closed a loophole identified in an [earlier post](#). Agencies are now required to publish online written communications from lobbyists concerning Recovery Act policies. This alleviates the concern about lobbyists can ask for the creation of specific grants that would benefit their clients without having to disclose their request. It leaves open, however, the ability of lobbyists to ask for the creation of formula-driven grants that would ultimately be distributed to their clients.