May 11, 2009

Mr. Norman Eisen
Special Counsel to the President
For Ethics & Government Reform
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

BY FAX: (202) 456-2461

Dear Mr. Eisen:

I am writing to comment on the March 20, 2009, presidential memorandum restricting federally registered lobbyists who seek to meet with executive branch officials about specific projects funded by the American Recovery and Reinvestment Act of 2009.

The Public Affairs Council is a non-partisan, non-political organization that provides public affairs training and best-practice information to its member companies and non-profit organizations. Our membership includes Fortune 500 companies, smaller firms, trade associations, charitable organizations, consultancies, law firms and other groups that maintain a public affairs function. You can review a complete list of our members at www.pac.org.

I am aware that you have already received a great deal of feedback on the presidential memorandum. Some political reform groups have praised the directive for making the lobbying function more transparent. Others have said it unnecessarily restricts give-and-take conversations between people with expertise on important programs. I'm also aware that groups such as the American Civil Liberties Union and the American League of Lobbyists have questioned the constitutionality of the directive.

At the recent George Washington University forum on lobbying, it struck me that there hadn't been enough discussion about whether the directive would actually help achieve the administration's goals. That's the subject I would like to address in this letter.

Accountability Objectives of the Recovery Act
The Office of Management and Budget deserves credit for issuing a ground-breaking (and remarkably coherent) set of implementation guidelines for the Recovery Act. In guidance issued by OMB on Feb. 18 and April 3, the administration makes it abundantly clear that public funds must be expended responsibly and in a transparent manner to further economic recovery.

Among those guidelines is a section entitled "Governance, Risk Management, and Program Integrity," which states that the Recovery Act Accountability and Transparency Board will monitor the accountability objectives of the law to ensure the following:

- Funds are awarded and distributed in a prompt, fair and reasonable manner;

- The recipients and uses of all funds are transparent to the public, and the public benefits of these funds are reported clearly, accurately and in a timely manner;

- Funds are used for authorized purposes and instances of fraud, waste, error and abuse are mitigated;

- Projects funded under this Act avoid unnecessary delays and cost overruns; and

- Program goals are achieved, including specific program outcomes and improved results on broader economic indicators.

The Impact of Protocols for Communication with Registered Lobbyists
While I believe the restrictions on lobbyist communication will have a negative impact on the administration's ability to achieve the above objectives, I also want to be careful not to overstate my case. Certainly, it is possible for some federal officials to make sound, merit-based funding decisions on specific Recovery Act projects without having face-to-face conversations with registered lobbyists.

However, it's important that the administration understand why its efforts to set protocols for communication with lobbyists will – in many cases – create unintended and harmful consequences.

1. <u>These rules will slow down the flow of information between organizations that would like to propose projects and those that are in charge of dispensing funds.</u> The implementation guidelines instruct agencies to "determine what award method(s) will allow recipients to commence expenditures and activities as quickly as possible consistent with prudent management and statutory requirements." Requiring that federally registered lobbyists communicate in writing is not a strategy for ensuring efficient dialogue with federal agencies.

   As OMB noted in its April 7 memorandum to executive departments and agencies, "In many cases federally registered lobbyists bring to bear helpful information that facilitates agencies' evaluation of policies and projects on the merits." If this is true, then why has an inefficient protocol been created that makes it more cumbersome for lobbyists to communicate this information?

   If an organization or governmental body has relied on a federally registered lobbyist to be its technical expert (as well as process expert) in dealing with the federal government, many are going to have to either hire a non-lobbyist, or train other individuals to take that individual's place. This problem could be particularly acute for small businesses that don't have the flexibility to find an alternative representative to meet with officials. And yet, OMB's implementation guidelines instruct agencies to support "projects that provide maximum practicable opportunities for small businesses."

2. <u>These rules miss the mark when it comes to achieving transparency objectives</u>. As you know, the Lobbying Disclosure Act (LDA) does not apply to people whose lobbying activities constitute less than 20 percent of the time engaged in services. By choosing the LDA definition of lobbyist and only tracking this narrow band of project advocates, the administration has no record of the many meetings and phone calls that are likely to take place with individuals excluded from LDA requirements. These individuals include many Washington lawyers, corporate and non-profit executives, state lobbyists, business development consultants and members of Congress.

   It is my personal belief that the last category – members of Congress – is perhaps the most important group to track. As I said at the George Washington University forum, it's not difficult for a federal agency official to say "no" to a lobbyist, a business executive or a consultant. But when a member of Congress calls to inquire about a funding decision, that official can be put in an extremely awkward position because Congress holds the purse strings for that agency's funding.

   Ideally, the administration should be tracking <u>all</u> conversations about specific Recovery Act projects that occur between federal officials and groups or individuals seeking funding, either directly or indirectly.

Alternative Protocol for Increasing Transparency and Accountability
The challenge with providing detailed reports on all conversations, of course, is that doing so could create a tremendous administrative burden for agency officials. Even the current guidelines that require the posting of written communication and the recording of non-specific meetings with lobbyists have caused confusion and – in a few cases – a reluctance in some agencies to meet with lobbyists about any subject. Fortunately, OMB addressed these concerns in its April 7 executive memorandum to executive departments and agencies.

A better strategy for supporting merit-based funding and improving transparency would be modify section 3 of the March 20 directive in the following ways:

- Remove the requirement prohibiting registered lobbyists from participating in any oral communications with an executive branch official concerning a particular Recovery Act project;

- In place of the reporting requirements, create a searchable database that tracks <u>all</u> conversations about specific Recovery Act projects. Unlike the current "Registered Lobbyist Contact Disclosure Form," however, this information-gathering tool would only collect essential information: date, name and agency of official contacted, name and employer/client of person who contacted the official, and project name.

  The current form requires a federal employee to record detailed information – by hand – about a meeting with a lobbyist, and then someone else undoubtedly must enter the information into an agency website. This two-step process has likely resulted in uneven compliance with the guidelines. In addition, the information from the disclosure forms appears on agency websites, not on the centralized (and user-friendlier) www.recovery.gov website.

Because the alternative would be a computerized system, certain data fields – date and agency – would automatically appear. That means the federal official would only need to complete three additional fields. To make the data more searchable, the official would simply type in a project name and not be forced to write a description of the contact. The results would stream onto www.recovery.gov, where they would appear alongside useful information about federal agency investments in the economy.

Benefits of Alternative Protocol

There are several important benefits to this new approach:

1. The impediments to the free-flow of information between federal fund applicants and federal agencies would be removed. This would help to ensure that Recovery Act dollars are distributed quickly and prudently. In particular, it would help local governments, small businesses and others who depend the most on paid lobbyists to serve as their technical and funding process experts.

2. It would greatly enhance the ability of the Recovery Act Accountability and Transparency Board and others to monitor whether funds have been distributed in a way that is merit-based and devoid of conflicts of interest.

   The president's overall efforts to improve governmental ethics and transparency should be applauded. Even though some of the administration's decisions in this area have been controversial, it's refreshing to see a president who is actually trying to follow through on his campaign promises to improve the way Washington works.

   Yet, that's exactly why many organizations have been frustrated with the current rules for lobbyist communication about Recovery Act funding. They not only appear punitive -- which upsets both registered lobbyists and those that hire them -- they won't be useful as a tool to increase transparency, which upsets political reform groups and others who would like to restore trust in government and advocacy.

   While increased transparency can be a deterrent to fraud and abuse, it will only be effective if the right people are being forced to be transparent. And the fact is, there is no proof whatsoever that federally registered lobbyists deserve a higher level of scrutiny than any other group.

The best way I can explain the value of the alternative protocol is to outline a scenario in which it would be useful to have comprehensive information about the processes used to award Recovery Act funding.

Let's say that come Jan. 1, 2010, Americans are sizing up the impact that the president's stimulus package has had on local, state and national economic conditions. A news reporter hears about a Recovery Act-funded project on the East Coast that cost the government $800 million but hasn't yielded any meaningful results. Because the website www.recovery.gov provides complete information on government investments under the Act, that reporter would be able to trace the source of funding.

However, under the current system, if he or she wanted to find out more about how and why this failed project had been funded, only limited information would be available. The reporter could certainly access the project proposal and perhaps view records of several meetings or written correspondence, as long as federally registered lobbyists were involved in the project application process. But it's unlikely that there would be a "smoking gun" in these records to suggest that the funding decision was not merit-based.

Now, let's imagine how useful it would be if that reporter – or an Inspector General – had access to a database that tracked all meetings with federal officials involved in funding decisions. If the group responsible for the failed project had multiple meetings with a federal official while competitor organizations were denied such opportunities, that situation would be worth investigating. If several members of Congress placed calls that appeared to result in a non-merit-based funding decision, that situation would also be worth investigating.

The point, once again, is that transparency in government funding is only meaningful if it applies to everyone. If there are exceptions to the rule, the value proposition collapses.

At the same time, the administration must resist the temptation to gather more information than it really needs. That's why only key data should be collected to document in-person meetings and telephone calls. That's also why this comprehensive transparency initiative should only apply to major funding decisions, not to the day-to-day activities of the executive branch.

I do believe that modifying section 3 of the March 20 presidential directive in the ways I have explained would serve multiple purposes. It would facilitate the dispersal of Recovery Act funds, it would greatly improve the transparency of the process and it would acknowledge that any system designed to improve government must address the potential burden on federal officials, as well as the impact on private citizens.

I would welcome the opportunity to discuss these ideas further with you or others involved in the White House ethics and government reform programs. In the spirit of transparency, I would also hope and expect that you would post this letter on your website so that others might comment on the proposal.

Sincerely,

Douglas G. Pinkham
President
Public Affairs Council