

MEMORANDUM

To: Norm Eisen, Greg Craig and Susan Sher
From: Larry Ottinger and Stephen Rickard
Re: Proposed Actions re Executive Order on Ethics
Date: April 9, 2009

Dear Norm, Greg and Susan:

We are writing to follow up on our meeting to discuss the Administration's Executive Order on Ethics. As we said in our meeting, the wide range of organizations that make up our group come to this issue with three central positions: (1) we strongly support and appreciate what President Obama is seeking to achieve in issuing this historic Executive Order; (2) currently, the Order is causing serious, unintended harms to non-profit organizations who want and need to participate in our democracy; and (3) we believe that, properly interpreted and implemented, the Order can redress those harms and at the same time advance the essential purposes of the Executive Order.

After further discussions with a number of our groups, we believe that there are three key actions that the Administration should take to achieve the above objectives. These core principles for taking action to fix the unintended harms of the Executive Order are the product of a working group which included Center for Lobbying in the Public Interest, Citizens for Responsibility and Ethics in Washington, the Leadership Conference on Civil Rights, OMB Watch, the Open Society Policy Center and the Project on Government Oversight.

Proposed Actions

(1) Safe Harbor Category: The Administration should clarify that the "agency" and "specific issue" bans of Section 3 of the Order do not apply to *individuals who lobbied solely on behalf of an organization determined by the IRS to be a qualified organization under Section 501(c)(3) (public charities) or Section 501(c)(4) (social welfare organizations) of the Internal Revenue Code.*

(2) Presidential Statement: We also request that the Administration clearly articulate – ideally in a statement by President Obama – the reasons that individuals who have lobbied on behalf of organizations required by law to promote the general welfare and prohibited from advancing the private financial interests of a specific group do not raise the concerns which gave rise to the Executive Order. The statement should note that, to the contrary, encouraging increased participation by these nonprofits and their constituents is essential to providing increased accountability, information and trust in government. In the words of

your March 9 WH Blog entry, these are not individuals from the “the private sector... [seeking] personal gain at the expense of the public interest.”

(3) Prevent Conflicts of Interest and Ensure Transparency: The Administration should require full disclosure of lobbying activities including executive branch procurement lobbying and apply the requirement for recusals on particular matters to all individuals and should have a process for implementing these principles which is clear and transparent. To the extent waivers are used they should be disclosed along with all lobbying information.

Methods of Implementation

Our groups all agree on the “what” described above, but have different views on the “how” in terms of which vehicle or method the Administration could or should use. Thus, the Order can theoretically be implemented as an amendment to the Order, as a clarification of the meaning and application of the terms of the Order, or as a process for implementing the waiver provision of the Order.

Examples

Attached for purposes of illustration are examples of how the core principles listed above might be implemented, including a proposed draft presidential statement. As noted, these examples are only for purposes of illustration and are not intended to suggest that any particular group that participated in our discussions agrees with or would support any specific example.

Attachment: Examples of How the Core Principles on the Ethics EO Might Be Implemented

Note: We do not represent that the examples below are endorsed by any particular group that has participated in our ongoing discussion of these issues. Indeed, there are disagreements among groups who support the core principles about which is the best way to implement them.

This attachment first sets forth a draft example of an Administration statement clarifying its view that non-profit lobbying is different from for-profit lobbying.

It then offers examples of how all or some of the elements of the core principles could be implemented through: (1) amending the Executive Order; (2) clarifying the Executive Order based on its language and stated purpose; or (3) defining an expanded system of waivers with a rebuttable presumption that lobbyists for public purposes will be granted waivers.

The attachment further includes draft memoranda from the Office of Government Ethics to designated agency ethics officials that reflect the examples of methods to implement the core principles.

Statement Supporting Public Interest Advocacy:

Regardless of how the Administration proceeds, it is important that the President issue a statement clearly expressing an understanding of the difference between lobbying undertaken on broad public policy issues in the public interest and lobbying undertaken in order to pursue private pecuniary gain. This is necessary to help correct the confusion and unintended harm being done to nonprofits whose input and voices must be heard in the policy arena. It is necessary to reinforce the President's message that public service and civic participation are critical to restoring government of, by and for the people. Fixing this problem from a technical point of view without addressing the stigma that has attached to "lobbying" in the public interest will not adequately address the problem.

The statement below is an example of the kind of statement that might be issued using mostly language which President Obama or Administration officials have already used. Language from previous statements is underlined (some with slight modifications such as changes in personal pronouns) and the full text of the originals are below the draft statement:

"I began my career as a community organizer on the South Side of Chicago, where I saw firsthand what people can do when they come together for a common cause. Citizen participation is a priority for my Administration. As keepers of the public trust, my Administration has taken unprecedented steps to prevent persons from the private sector entering the government to achieve personal gain at the expense of the public interest. That is why I adopted an Executive Order on Ethics my first day in office. This was intended to elevate the public interest over special interests. However, it was never intended to prevent people from serving in my Administration who organized, and raised awareness, and kept on fighting for the public interest, whether it was seeking renewed

funding for stem cell research, keeping tobacco away from kids, seeking to end torture, promoting affordable health care, fighting for equality under the law, demanding action on climate change or otherwise working to advance the interests of Americans. Indeed, we owe a debt of gratitude to the tireless advocates who have worked at non-profit organizations to promote the public good.

According to the Center for Responsive Politics, the lobbying activities of non-profit organizations represent about one nickel out of every dollar spent on lobbying in Washington.* They are not the problem. They are part of the solution. Such advocates – some of whom are required by law to register and disclose their public interest advocacy under the law – must of course meet the strict disclosure and recusal requirements of my Executive Order on ethics. Specifically, they must recuse themselves from any particular matter in which they or their former organizations or members were substantially involved within the last two years.

Provided they meet these requirements, highly qualified individuals who have worked for the public good in non-profit organizations are both welcome and needed in government if we are to effectively meet the daunting challenges we face.”

Statements from which the bulk of this language was drawn:

“President Obama started his career as a community organizer on the South Side of Chicago, where he saw firsthand what people can do when they come together for a common cause. Citizen participation will be a priority for the Administration....” Macon Phillips, White House Director of New Media, White House Blog, January 20, 2009.

“The Order establishes some of the toughest ethics rules ever imposed on executive branch appointees. It has been widely praised by commentators and leading good government advocates for the hard line it takes on lobbyists and others riding the revolving door between government service and the private sector in order to achieve personal gain at the expense of the public interest.” Norm Eisen, Chief Ethics Officer, White House Blog, March 10, 2009.

“As we restore our commitment to science, and resume funding for promising stem cell research, we owe a debt of gratitude to so many tireless advocates, some of whom are with us today, many of whom are not. Today, we honor all those whose names we don’t know, who organized, and raised awareness, and kept on fighting – even when it was too late for them, or for the people they love.” President Obama, White House Blog, March 9, 2009.

* Center for Responsive Politics cited in Washington Post, March 22, 2009, p. A4 (\$180 million out of a total of \$3.2 billion).

Example One: Amend the Executive Order

Example 1A: Amend Section 3 of the Ethics Pledge required by Section One of the Executive Order in the following manner:

3. Revolving Door Ban Lobbyists Entering Government. If I was a registered lobbyist within the 2 years before the date of my appointment, in addition to abiding by the limitations of paragraph 2, I will not for a period of 2 years after the date of my appointment:

- (a) participate in any particular matter on which I lobbied within the 2 years before the date of my appointment;
- (b) participate in the specific issue area in which that particular matter falls; or
- (c) seek or accept employment with any executive agency that I lobbied within the 2 years before the date of my appointment.

(d) Subsections (b) and (c) herein shall not apply to individuals who lobbied solely on behalf of an organization determined by the Internal Revenue Service to be a qualified organization under Section 501(c)(3) (public charities) or Section 501(c)(4) (social welfare organizations) of the Internal Revenue Code.

Example 1B: Amend the Section Three Waiver Provision in the following manner:

Either, include a new provision that states:

- (c) Circumstances in which the literal application of the Pledge Sections 3(b) and (c) will generally be deemed to be inconsistent with the purposes of the restriction, shall include, but not be limited to, lobbying on behalf of an organization determined by the Internal Revenue Service to be a qualified organization under Section 501(c)(3) (public charities) or Section 501(c)(4) (social welfare organizations) of the Internal Revenue Code.

Or,

- (b) The public interest shall include, but not be limited to, (i) lobbying on behalf of an organization determined by the Internal Revenue Service to be a qualified organization under Section 501(c)(3) (public charities) or Section 501(c)(4) (social welfare organizations) of the Internal Revenue Code; or (ii) exigent circumstances relating to national security or to the economy.

Example Two: Clarify the Executive Order

Issue a statement providing a definitive clarification of the Executive Order that uses the following key operative language:

Based on its stated purpose and proper interpretation, the restrictions in Sections 3(b) and (c) of the Ethics Pledge do not apply to persons who lobbied solely on behalf of an organization determined by the Internal Revenue Service to be a qualified organization under Section 501(c)(3) (public charities) or Section 501(c)(4) (social welfare organizations) of the Internal Revenue Code.

Example Three: Bolster the Waiver Provision

The Executive Order waiver provision provides that:

“The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver.”

The Obama Administration should issue the following notice concerning granting waivers to registered advocates who lobbied on behalf of non-profit organizations:

Procedure and Standards for Granting Waivers to Non-Profit Advocates –

- The restrictions in Sections 3(b) and (c) of the Order were intended to apply to persons in the private sector who lobby in order to achieve personal gain at the expense of the public interest. It is therefore inconsistent with the purpose of the restrictions contained in Sections 3(b) and (c) of the Order to bar persons in the non-profit sector who sought no personal gain and worked to promote the public interest from public service. Further, it is in the public interest to promote citizen participation in government and collective, non-profit advocacy with the goal of promoting the public interest.
- Therefore, an applicant may apply for a waiver under the Executive Order on the grounds that she or he lobbied on behalf of an organization determined by the Internal Revenue Service to be a qualified organization under Section 501(c)(3) (public charities) or Section 501(c)(4) (social welfare organizations) of the Internal Revenue Code and that applying Sections 3(b) and (c) of the Pledge to them would be “inconsistent with the purposes of the restriction” and that granting the waiver would be “in the public interest.”

- Such applicant must fully disclose the employer and/or clients for whom they have lobbied in the last two years, the specific issues on which they lobbied and the agencies they lobbied. This information will be made available to the public for a minimum of 10 business days prior to any decision on granting a waiver. Such a waiver and the basis for it will be made available to the public via a searchable website at the time that it is issued.
- If it is determined upon review that the applicant lobbied solely on behalf of a non-profit organization created to promote the public interest and which has been determined by the Internal Revenue Service to solely devote its net earnings to charitable, educational or recreational purposes and which is prohibited by law to use any portion of its net earnings to benefit any private shareholder or individual, a waiver will be granted to the individual on the grounds that it would be "inconsistent with the purposes of the restriction" to bar the applicant and that granting the waiver is "in the public interest."

Examples of DAEOgrams that might be issued implementing the core principles:

Example A:

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Ethics Commitments by Executive Branch Personnel: Procedure and Standards for Granting Waivers to Non-Profit Advocates

Section 1 of Executive Order 13490 requires all full-time, non-career appointees, appointed on or after January 20, 2009, to sign an Ethics Pledge. 74 Federal Register 4673 (January 21, 2009). The purpose of the Pledge is to prevent private pecuniary interests from tainting public office and potentially compromising the independence of government officers. Paragraph 3 of the Pledge is titled "Revolving Door Ban Lobbyists Entering Government," and parts (b) and (c) of this paragraph preclude a registered lobbyist from participating in any "particular matter" in which their previous advocacy falls, and from seeking or accepting employment with "any executive agency" that was lobbied for a period of two years before the appointment date. Section 3(c) of the Executive Order permits waivers where such waivers advance the public interest.¹

¹ "The Director of the Office of Management and Budget, or his or her designee, in consultation with the Counsel to the President or his or her designee, may grant to any current or former appointee a written waiver of any restrictions contained in the pledge signed by such appointee

However, employees of nonprofit organizations who have pressed a particular agency for public policy reform on a broad range of matters, in pursuit of public purposes – examples include ending genocide in Darfur, securing equal rights under the law regardless of color, age, gender or disability, preventing the sale of toys that endanger children's health – benefit the broad public interest as opposed to narrow special interests and thus do not present the same challenge to governmental independence. Further, it is in the public interest to promote citizen participation in government and collective, non-profit advocacy with the goal of promoting the public interest. It is therefore inconsistent with the purpose of the restrictions contained in Paragraphs 3(b) and (c) of the Pledge to bar persons from public service who lobbied on behalf of an organization determined by the IRS to be a qualified organization under Section 501(c)(3) (public charities) or Section 501(c)(4) (social welfare organizations) of the Internal Revenue Code.

An applicant may apply for a waiver under Section 3 of Executive Order on the grounds that she or he lobbied on matters of broad public interest for a non-profit organization and that applying Paragraph 3(b) and (c) of the Ethics Pledge to the applicant would be "inconsistent with the purposes of the restriction" and that granting the waiver would be "in the public interest."

Such applicant must fully disclose the employer and/or clients for whom they have lobbied in the last two years, the specific issues on which they lobbied and the agencies they lobbied. This information will be made available to the public for a minimum of 10 business days prior to any decision on granting a waiver.

If it is determined upon review that the applicant lobbied solely on behalf of a non-profit organization created to promote the public interest and which has been determined by the Internal Revenue Service to solely devote its net earnings to charitable, educational or recreational purposes and which is prohibited by law to use any portion of its net earnings to benefit any private shareholder or individual, a waiver will be granted to the individual on the grounds that it would be "inconsistent with the purposes of the restriction" to bar the applicant and that granting the waiver is "in the public interest."

Such waiver and the basis for it will be made available to the public at the time that it is issued.

if, and to the extent that, the Director of the Office of Management and Budget, or his or her designee, certifies in writing (i) that the literal application of the restriction is inconsistent with the purposes of the restriction, or (ii) that it is in the public interest to grant the waiver."

Example B:

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Robert I. Cusick
Director

SUBJECT: Guidance Concerning Public Interest Advocates

Section 1 of Executive Order 13490 requires all full-time, non-career appointees, appointed on or after January 20, 2009, to sign an Ethics Pledge. 74 Federal Register 4673 (January 21, 2009). Paragraph 3 of the Ethics Pledge, titled "Revolving Door Ban Lobbyists Entering Government" sets out the agreement of an appointee who was a "registered lobbyist" not to: (a) "participate in a particular matter" on which they lobbied within two years of their appointment; (b) "participate in the specific issue area in which the particular matter falls" for two years after their date of appointment; or (c) "seek or accept employment with any executive agency" they lobbied within the previous two years. The purpose of this Memorandum is to provide ethics officials with initial guidance concerning the implementation and interpretation of this provision with regard to public interest advocates who were registered lobbyists.

The Order directs the Office of Government Ethics (OGE) to adopt rules or procedures "as are necessary or appropriate to carry out the foregoing responsibilities." Executive Order 13490, sec. 4(c)(3)(i). The guidance provided in this Memorandum is intended solely to help ethics officials understand the scope of these provisions as they apply immediately to persons registered as lobbyists for non-profit organizations.

Public Interest Advocates

The Executive Order is intended to provide protection against the revolving door that lets lobbyists come into government and use their time in public service to promote their own interests when they leave. The Executive Order was not intended to prohibit government service by certain public interest advocates, which does not implicate the purposes of the ban and actually promotes accountability and the public interest. Pending the issuance of final rules or procedures, the following guidance, which OGE developed in consultation with the White House Counsel's Office, authorizes immediate employment of registered lobbyists who have lobbied on behalf of an organization determined by the Internal Revenue Service to be a qualified organization under Section 501(c)(3) (public charities) or Section 501(c)(4) (social welfare organizations) of the Internal Revenue Code, and permits them to participate in general issue areas on which they engaged in public interest advocacy.

Charitable and other not-for-profit organizations that are exempt from taxation under 26 U.S.C. § 501(c)(3) are already restricted as to the amount of lobbying in which they may engage, and no part of their net earnings may benefit any private shareholder or individual. See

26 U.S.C. § 501(c)(3), (h). Social welfare organizations organized under 26 U.S.C. § 501(c)(4) are required to operate exclusively for public purposes and not to benefit private interests, and their net earnings must be devoted only to charitable, educational, or recreational purposes. Furthermore, any 501(c)(3) and 501(c)(4) organizations that receive Federal funds are subject to limitations on the use of those funds to lobby for Federal contracts, grants, loans or cooperative agreements. See 31 U.S.C. § 1352. Charities, social welfare organizations and their constituents contribute to a more open, accountable government consistent with the Order's intent. Because the Executive Order is targeted at lobbying for private, pecuniary gain and not lobbying for a charitable or public purpose as defined by law, the intent and purpose of the Order must be implemented to advance this fundamental distinction and the Order's purposes. Given these reasons and the kinds of purposes for which 501(c)(3) and 501(c)(4) organizations are granted tax-exempt status (e.g., educational, charitable, scientific), appointees from such organizations shall neither be prohibited from serving in agencies that they have lobbied within the last two years nor prohibited from participating in matters within the general issue area on which they lobbied.

Accordingly, based on its stated purpose and proper interpretation, the restrictions in Sections 3(b) and (c) of the Ethics Pledge do not apply to registered lobbyists who engaged in advocacy solely on behalf of a 501(c)(3) or 501(c)(4) organization.

Conclusion

OGE will continue to provide guidance on other aspects of the Executive Order in the future. Ethics officials should consult with OGE if they have any questions concerning these matters.