



# Lobbying the Executive Branch: Current Practices and Options for Change

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## Summary

Under the Lobbying Disclosure Act (LDA) of 1995, as amended, individuals are required to register with the Clerk of the House of Representatives and the Secretary of the Senate if they lobby either legislative or executive branch officials. In January 2009, Secretary of the Treasury Timothy Geithner placed further restrictions on the ability of lobbyists to contact executive branch officials responsible for dispersing Emergency Economic Stabilization Act (EESA, P.L. 110-343) funds. Subsequently, President Barack Obama and Peter Orszag, Director of the Office of Management and Budget (OMB), issued a series of memoranda between March and July 2009 that govern communication between federally registered lobbyists and executive branch employees administering American Recovery and Reinvestment Act of 2009 (P.L. 111-5) funds. Most recently, in October 2011, OMB published final guidance on the appointment of federally registered lobbyists to federal advisory bodies and committees. The guidance stipulates that federally registered lobbyists be prohibited from serving on advisory committees governed by the Federal Advisory Committee Act (FACA).

The Recovery and Reinvestment Act lobbying restrictions focus on both written and oral communications between lobbyists and executive branch officials. Pursuant to the President's memoranda, restrictions have been placed on certain kinds of oral and written interactions between "outside persons and entities" and executive branch officials responsible for Recovery Act fund disbursement. The President's memoranda require each agency to post summaries of oral and written contacts with lobbyists on dedicated agency websites. EESA regulations are virtually identical, but only apply to federally registered lobbyists.

This report outlines the development of registration requirements for lobbyists engaging executive branch officials since 1995. It also summarizes steps taken by the Obama Administration to limit and monitor lobbying of the executive branch; discusses the development and implementation of restrictions placed on lobbying for Recovery Act and EESA funds; examines the Obama Administration's decision to stop appointing lobbyists to federal advisory bodies and committees; considers third-party criticism of current executive branch lobbying policies; and provides options for possible modifications in current lobbying laws and practices.

For further analysis on lobbying registration and disclosure, see CRS Report RL34377, *Honest Leadership and Open Government Act of 2007: The Role of the Clerk of the House and the Secretary of the Senate*, by Jacob R. Straus; CRS Report RL34725, *"Political" Activities of Private Recipients of Federal Grants or Contracts*, by Jack Maskell; and CRS Report R40245, *Lobbying Registration and Disclosure: Before and After the Enactment of the Honest Leadership and Open Government Act of 2007*, by Jacob R. Straus.

## **Contents**

Introduction.....	1
Statutory Coverage for Executive Branch Officials .....	1
Lobbying Disclosure Act of 1995.....	2
Lobbying Disclosure Technical Amendments Act of 1998 .....	2
Honest Leadership and Open Government Act of 2007 .....	3
Obama Administration Lobbying Policies.....	3
Executive Branch Ethics Pledge.....	3
Restrictions on Emergency Economic Stabilization Act (EESA) Funds Lobbying .....	4
Restrictions on Recovery Act Funds Lobbying.....	5
Presidential Memorandum .....	5
Interim Recovery Act Guidance for Lobbyist Communications .....	7
Revised Recovery Act Guidance for Lobbyist Communications.....	9
Restrictions on Lobbyists Serving on Federal Advisory Committees.....	10
Initial White House Memorandum.....	11
Draft Guidance .....	11
Final Guidance .....	12
Third-Party Critiques of Executive Branch Lobbying Policies .....	12
Recovery Act Lobbying Policies .....	12
Federal Advisory Committee Membership.....	13
Options for Change.....	14
Amend the Lobbying Disclosure Act .....	15
Create a Central Executive Branch Disclosure Database .....	15
Take No Immediate Action.....	15

## **Tables**

Table A-1. Cabinet-Level Departments Recovery Act Websites .....	16
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## **Appendixes**

Appendix. Cabinet-Level Executive Departments Recovery Act Websites .....	16
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## **Contacts**

Author Contact Information.....	16
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## Introduction

Since 1995, Congress has on three occasions approved legislation to regulate lobbyists' contacts with executive branch officials. Prior to 1995, lobbying laws only required that lobbyists contacting Members of Congress register with the Clerk of the House of Representatives and the Secretary of the Senate.<sup>1</sup> Under current lobbying laws, individuals are required to register with the Clerk and the Secretary when lobbying either legislative or executive branch officials. Federally registered lobbyists who wish to lobby executive branch departments and agencies regarding funds provided by the Emergency Economic Stabilization Act<sup>2</sup> and the American Recovery and Reinvestment Act of 2009<sup>3</sup> are subject to additional restrictions pursuant to a series of memoranda and guidelines issued between January and July 2009.

This report outlines the development of registration requirements for lobbyists engaging executive branch officials since 1995. It also summarizes steps taken by the Obama Administration to limit and monitor lobbying of the executive branch; discusses the development and implementation of restrictions placed on lobbying for Recovery Act and EESA funds; examines the Obama Administration's decision to stop appointing lobbyists to federal advisory bodies and committees; considers third-party criticism of current executive branch lobbying policies; and evaluates options for possible modifications in current lobbying laws and practices.

## Statutory Coverage for Executive Branch Officials

In 1995, the Lobbying Disclosure Act (LDA) repealed the Lobbying Act portion of the Legislative Reorganization Act of 1946<sup>4</sup> and created a system of detailed registration and reporting requirements for lobbyists. It included a provision requiring lobbyists to register with Congress and the disclosure of lobbying contacts with certain "covered" executive branch employees.<sup>5</sup> The LDA was amended in 1998 to make technical corrections, including altering the definition of executive branch officials covered by the act.<sup>6</sup> In 2007, the Honest Leadership and Open Government Act further amended LDA definitions on covered officials.<sup>7</sup>

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<sup>1</sup> P.L. 601, 60 Stat. 839-842, August 2, 1946. Title III of the Legislative Reorganization Act of 1946 is the "Federal Regulation of Lobbying Act." These individuals are often referred to as "federally-registered" lobbyists to distinguish them from individuals who might have to register with state or local officials under non-federal laws.

<sup>2</sup> P.L. 110-343, 122 Stat. 3765, October 3, 2009.

<sup>3</sup> P.L. 111-5, 123 Stat. 115, February 17, 2009.

<sup>4</sup> Provisions contained in the Legislative Reorganization Act of 1946, for the first time, established requirements for individuals lobbying Congress to register with and report to the House of Representatives and the Senate. The Lobbying Act, however, did not impose restrictions on lobbying activities. Instead, it merely required individuals who lobby Congress to register with the House and Senate and disclose certain activities. For more information, see *Political Activity, Lobbying Laws and Gift Rules Guide*, ed. Trevor Potter and Kirk L. Jowers, 2<sup>nd</sup> ed., vol. 1 (Little Falls, NJ: Glasser Legal Works, 1999), p. 1-7.

<sup>5</sup> P.L. 104-65, 109 Stat. 691, December 19, 1995.

<sup>6</sup> P.L. 105-166, 112 Stat. 38, April 8, 1998.

<sup>7</sup> P.L. 110-81, 121 Stat. 735, September 14, 2007.

## **Lobbying Disclosure Act of 1995**

The Lobbying Act of 1946 focused on lobbyists' interactions with Congress, and was silent on lobbying the executive branch. The LDA, for the first time, included executive branch officers and certain employees by defining them as "covered officials."<sup>8</sup> Section 3 of LDA defines a covered executive branch official as

(A) the President;

(B) the Vice-President;

(C) any officer or employee, or any individual functioning in the capacity of such an officer or employee, in the Executive Office of the President;

(D) any officer or employee serving in a position in level I, II, III, IV, or V of the Executive Schedule, as designated by statute or Executive order;<sup>9</sup>

(E) any member of the uniformed services whose pay grade is at or above O-7 under section 201 of title 37, *United States Code*,<sup>10</sup> and

(F) any officer or employee serving in a position of a confidential policy-determining, policy-making, or policy-advocating character described in section 7511(b)(2) of title 5, *United States Code*.<sup>11</sup>

Under the LDA, lobbyists who contact these executive branch officials are now required to register with the Clerk of the House and the Secretary of the Senate, and to disclose lobbying contacts and activities. The LDA made these requirements identical for covered legislative and executive branch officials and assigned to the Clerk of the House and the Secretary of the Senate the responsibility of collecting registration and disclosure statements.<sup>12</sup>

## **Lobbying Disclosure Technical Amendments Act of 1998**

In April 1998, the LDA was amended to make technical corrections. Part of the technical corrections was a minor change in the *U.S. Code* section cited by the LDA defining covered

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<sup>8</sup> P.L. 104-65, 109 Stat. 692, December 19, 1995; 2 U.S.C. §1602.

<sup>9</sup> For more information on the Executive Schedule and executive branch pay, see CRS Report RL34463, *Federal White-Collar Pay: FY2009 and FY2010 Salary Adjustments*, by Barbara L. Schwemle; CRS Report RL34380, *The Executive Schedule IV Pay Cap on General Schedule Compensation*, by Curtis W. Copeland; and CRS Report RL33245, *Legislative, Executive, and Judicial Officials: Process for Adjusting Pay and Current Salaries*, by Barbara L. Schwemle.

<sup>10</sup> 37 U.S.C. §201 establishes rates of compensation for commissioned officers of the uniformed services (other than commissioned warrant officers). For more information, see also CRS Report RL33446, *Military Pay and Benefits: Key Questions and Answers*, by Charles A. Henning.

<sup>11</sup> P.L. 104-65, 109 Stat. 692, December 19, 1995; 2 U.S.C. §1602. 5 U.S.C. §7511 defines terms related to federal employment, human resources, and pay.

<sup>12</sup> 2 U.S.C. §1603 defines the registration requirements for all lobbyists. For more information on the role of the Clerk of the House and the Secretary of the Senate in collecting registration and disclosure statements, see CRS Report RL34377, *Honest Leadership and Open Government Act of 2007: The Role of the Clerk of the House and the Secretary of the Senate*, by Jacob R. Straus.

officials.<sup>13</sup> The amendment changed the reference in the LDA from 5 U.S.C. Section 7511 (b)(2) to 5 U.S.C. Section 7511 (b)(2)(B) to reflect the ability to the Office of Personnel Management to exempt a position from the competitive service.<sup>14</sup>

## **Honest Leadership and Open Government Act of 2007**

The Honest Leadership and Open Government Act (HLOGA) of 2007 also amended the LDA. HLOGA did not further alter the definition of a covered executive branch official but did refine thresholds and definitions of lobbying activities, change the frequency of reporting for registered lobbyists and lobbying firms, require additional disclosures, create new semi-annual reports on campaign contributions, and add disclosure requirements for coalitions and associations.<sup>15</sup>

## **Obama Administration Lobbying Policies**

Since its inception, the Obama Administration has focused on ethics and the potential influence of lobbyists on executive branch personnel. One of President Barack Obama's first actions was to issue ethics and lobbying guidelines for executive branch employees. These guidelines laid the foundation for formal lobbying restrictions issued in July 2009.

### **Executive Branch Ethics Pledge**

On January 21, 2009, President Obama issued Executive Order 13490, "Ethics Commitments by Executive Branch Personnel."<sup>16</sup> The executive order created an ethics pledge for all executive branch appointments made on or after January 20, 2009;<sup>17</sup> defined terms included in the pledge; allowed the Director of the Office of Management and Budget (OMB), in consultation with the counsel to the President, to issue ethics pledge waivers; instructed the heads of executive agencies to consult with the Director of the Office of Government Ethics to establish rules of procedure for the administration of the ethics pledge; and authorized the Attorney General to enforce the executive order. In a press release summarizing the executive order, the White House explained the ethics pledge and the importance of following ethics and lobbying rules:

The American people ... deserve more than simply an assurance that those coming to Washington will serve their interests. They deserve to know that there are rules on the books to keep it that way. In the *Executive Order on Ethics Commitments by Executive Branch*

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<sup>13</sup> P.L. 105-166, 112 Stat. 38, April 6, 1998. The amendment to the definition of a covered executive branch employee is found in Section 2 of the act and at 2 U.S.C. §1603 (3)(F).

<sup>14</sup> 5 U.S.C. §7511 (b)(2)(B).

<sup>15</sup> P.L. 110-81, 121 Stat. 735, September 14, 2007. For further analysis of HLOGA's lobbying provision changes see CRS Report R40245, *Lobbying Registration and Disclosure: Before and After the Enactment of the Honest Leadership and Open Government Act of 2007*, by Jacob R. Straus.

<sup>16</sup> Executive Order 13490, "Ethics Commitments by Executive Branch Personnel," 74 *Federal Register* 4673, January 26, 2009. The executive order was issued on January 21, 2009, but was not published in the *Federal Register* until January 26, 2009.

<sup>17</sup> The ethics pledge required for all executive branch appointments made on or after January 20, 2009, includes a ban on gifts from registered lobbyists, a two-year ban on working on particular issues involving a former employer, and a ban on lobbying the administration after leaving government service. See also Executive Order 13490, "Ethics Commitments by Executive Branch Personnel," 74 *Federal Register* 4673, January 26, 2009.

*Personnel*, the President, first, prohibits executive branch employees from accepting gifts from lobbyists. Second, he closes the revolving door<sup>18</sup> that allows government officials to move to and from private sector jobs in ways that give that sector undue influence over government. Third, he requires that government hiring be based upon qualifications, competence and experience, not political connections. He has ordered every one of his appointees to sign a pledge abiding by these tough new rules as a downpayment on the change he has promised to bring to Washington.<sup>19</sup>

Requirement of an ethics pledge above and beyond the general oath of office administered to all government employees reinstates a similar requirement instituted by President William Jefferson Clinton in 1993.<sup>20</sup> The effect of such a policy is undetermined for the recruitment and retention of governmental employees or for the barring of federally registered lobbyists from serving in executive branch positions.

## **Restrictions on Emergency Economic Stabilization Act (EESA) Funds Lobbying**

On January 27, 2009, just a week after Barack Obama became President, Secretary of the Treasury Timothy Geithner announced restrictions on lobbying, by individuals registered as lobbyists, to obtain Emergency Economic Stabilization Act (EESA) funds.<sup>21</sup> The guidance was designed to combat potential lobbyist influence on the disbursement of EESA funds, to remove politics from funding decisions, to offer certification to Congress that each investment decision was based “only on investment criteria and the facts of the case,” and to provide transparency to the investment process.<sup>22</sup>

The guidance classified contacts between federally registered lobbyists and executive branch officials into two broad categories: (1) unrestricted oral communications on logistical questions and at widely attended gatherings and (2) oral communications during the period following

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<sup>18</sup> “Revolving door” regulations refer to restrictions placed on the types of jobs current federal employees may take when they leave federal service. For more information on revolving doors see CRS Report 97-875, *Post-Employment, “Revolving Door,” Laws for Federal Personnel*, by Jack Maskell.

<sup>19</sup> The White House, “Statement from the Press Secretary on the President’s signing of two Executive Orders and three Memoranda,” press release, January 21, 2009, [http://www.whitehouse.gov/the\\_press\\_office/StatementfromthePressSecretaryonthePresidentssigningoftwoExecutiveOrdersandthreeMe/](http://www.whitehouse.gov/the_press_office/StatementfromthePressSecretaryonthePresidentssigningoftwoExecutiveOrdersandthreeMe/).

<sup>20</sup> Executive Order 12834, “Ethics Commitments by Executive Branch Appointees,” 58 *Federal Register* 5911, January 22, 1993. See also 5 U.S.C. §2903.

<sup>21</sup> U.S. Department of the Treasury, *Communications with Registered Lobbyists and Other Persons About Emergency Economic Stabilization Act Funds*, Washington, DC, 2009, <http://www.financialstability.gov/docs/Lobbying-Guidelines.pdf>. [Hereafter, *EESA Lobbying Restrictions*.] The Emergency Economic Stabilization Act (EESA) was signed by President George W. Bush on October 3, 2008. P.L. 110-343, 122 Stat. 3765, October 3, 2008. For more information on the Emergency Economic Stabilization Act, see CRS Report RL34713, *Emergency Economic Stabilization Act: Preliminary Analysis of Oversight Provisions*, by Curtis W. Copeland; CRS Report RL34740, *Reporting Requirements in the Emergency Economic Stabilization Act of 2008*, by Curtis W. Copeland; CRS Report RS22969, *The Emergency Economic Stabilization Act’s Insurance for Troubled Assets*, by Baird Webel; and CRS Report R40134, *“Fast Track” Procedures to Disapprove Additional Funds Under the Emergency Economic Stabilization Act*, by Christopher M. Davis. Prior to January 2009, no additional lobbying restrictions on EESA funds were in place.

<sup>22</sup> U.S. Department of the Treasury, “Treasury Secretary Opens Term Opens [sic] With New Rules To Bolster Transparency, Limit Lobbyist Influence in Federal Investment Decisions,” press release, January 27, 2009, <http://www.treas.gov/press/releases/tg02.htm>.

submission of a formal application for federal assistance under EESA until preliminary approval of EESA funds.

The guidance also covers oral and written communication about EESA policy or applications for funding or pending applications.<sup>23</sup> Restrictions on lobbyist communication with executive branch officials are mirrored in the updated guidelines issued by OMB for the Recovery Act lobbying discussed below. As with the Recovery Act restrictions, federally registered lobbyists may ask logistical questions of executive branch officials responsible for disbursing EESA funds and speak with those officials at widely attended gatherings.<sup>24</sup> All other contacts between federally registered lobbyists and executive branch officials must be documented if they concern EESA policy, applications for funding, or pending applications.<sup>25</sup> In contrast to the Recovery Act guidelines, which restrict contact by all non-governmental persons, the EESA guidelines continue to apply only to federally registered lobbyists.

## **Restrictions on Recovery Act Funds Lobbying**

Following the passage of the American Recovery and Reinvestment Act of 2009, the White House was concerned about the potential ability of lobbyists to influence stimulus funds that would be allocated by the executive branch. On March 20, 2009, the White House issued a memorandum outlining proposed restrictions on federally registered lobbyists' contacts with executive department and agency officials on stimulus funds. Following a 60-day review and comment period, updated guidance was issued by the Office of Management and Budget (OMB) for communication with federally registered lobbyists regarding stimulus funds in July 2009.<sup>26</sup>

### **Presidential Memorandum**

To ensure the responsible and transparent distribution of funds pursuant to the American Recovery and Reinvestment Act of 2009 (Recovery Act),<sup>27</sup> President Obama, on March 20, 2009, issued a memorandum to the heads of the executive departments and agencies prescribing restrictions on oral communications with lobbyists on Recovery Act funds. In the memorandum's introductory remarks, President Obama stated that,

In implementing the Recovery Act, we have undertaken unprecedented efforts to ensure the responsible distribution of funds for the Act's purposes and to provide public transparency and accountability of expenditures. We must not allow Recovery Act funds to be distributed on the basis of factors other than the merits of proposed projects or in response to improper influence or pressure. We must also empower executive department and agency officials to exercise their available discretion and judgment to help ensure that Recovery Act funds are

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<sup>23</sup> *EESA Lobbying Restrictions*, pp. 1-3.

<sup>24</sup> *EESA Lobbying Restrictions*, p. 1.

<sup>25</sup> *EESA Lobbying Restrictions*, p. 2.

<sup>26</sup> The White House, "Update on Recovery Act Lobbying Rules: New Limits on Special Interest Influence," Blog Post, May 29, 2009, <http://www.whitehouse.gov/blog/Update-on-Recovery-Act-Lobbying-Rules-New-Limits-on-Special-Interest-Influence>.

<sup>27</sup> P.L. 111-5, 123 Stat. 115, February 17, 2009.



expended for projects that further the job creation, economic recovery, and other purposes of the Recovery Act and are not used for imprudent projects.<sup>28</sup>

The President's memorandum outlined four policies for executive branch departments and agencies handing out Recovery Act funds: (1) ensuring that decision making is merit based for grants and other forms of federal financial assistance, (2) avoiding the funding of "imprudent" projects, (3) ensuring transparency for communications with registered lobbyists, and (4) providing OMB assistance to departments and agencies for implementation of the memorandum.<sup>29</sup>

To ensure transparency when executive department or agency officials are contacted by federally registered lobbyists for Recovery Act projects, Section 3 of the memorandum provides five guidelines for interaction with lobbyists:

1. Executive departments and agencies cannot consider the views of lobbyists concerning projects, applications, or applicants for funding.
2. Agency officials cannot communicate orally (in-person or by telephone) with registered lobbyists about Recovery Act projects, applications, or funding applications and must inquire that the individuals or entities are not lobbyists under the Lobbying Disclosure Act of 1995.<sup>30</sup>
3. Written communication from a registered lobbyist must be publicly posted by the receiving agency or governmental entity on its recovery website within three business days of receipt.<sup>31</sup>
4. Executive departments and agencies can communicate orally with registered lobbyists if particular projects, applications, or applicants for funding are not discussed, and if that government official documents in writing and posts to the department or agency's Recovery Act website "(i) the date and time of the contact on policy issues; (ii) the names of the registered lobbyists and the official(s) between whom the contact took place; and (iii) a short description of the substance of the communication."
5. Agency officials must reconfirm, when scheduling and prior to communications, that any individuals or parties participating in the communication are not registered lobbyists.<sup>32</sup>

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<sup>28</sup> The President, "Memorandum of March 20, 2009: Ensuring Responsible Spending of Recovery Act Funds," 74 *Federal Register* 12531, March 25, 2009.

<sup>29</sup> *Ibid.*, pp. 12531-12534.

<sup>30</sup> Pursuant to the memorandum, lobbyists may submit written comments to executive branch departments and agencies.

<sup>31</sup> Each agency is required to have a Recovery Act website. For example, the Department of Energy website can be found at <http://www.energy.gov/recovery/>. The website contains a page that lists written information provided by registered lobbyists and can be found at <http://www.energy.gov/recovery/reports.htm>. For a list of all cabinet level departments' recovery websites see the **Appendix**.

<sup>32</sup> The President, "Memorandum of March 20, 2009: Ensuring Responsible Spending of Recovery Act Funds," 74 *Federal Register* 12533, March 25, 2009. Lobbying restrictions do not apply to tax issues in Division B of the Recovery Act.

## **Interim Recovery Act Guidance for Lobbyist Communications**

On April 7, 2009, pursuant to President Obama's earlier memorandum, OMB Director Peter Orszag issued "sample interim guidance" for departments and agencies which "outlines the actions employees are required to take ... whenever they receive or participate in oral communications with any outside persons or entities regarding Recovery Act funds."<sup>33</sup> The interim guidance was not designed as a ban on communications with federally registered lobbyists. Instead, "communications with Federally registered lobbyists should proceed, but in compliance with the [outlined] ... protocol."<sup>34</sup>

The interim guidance divided communications between executive branch employees and registered lobbyists into three categories: unrestricted oral communications, restricted oral communications, and written communications.

### ***Unrestricted Oral Communications***

The Orszag memorandum does not place restrictions on employees' contact with federally registered lobbyists "concerning general questions about the logistics of the Recovery Act funding or implementation" including administrative requests.<sup>35</sup> Instead, the interim guidance document outlines four general topics of discussion 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, [and]
- (4) requests for information about program requirements and agency practices under the Recovery Act.<sup>36</sup>

In addition, the Orszag memorandum does not restrict communications or interactions with registered lobbyists at "widely attended" public gatherings.<sup>37</sup> Restrictions, however, "do apply to private (non-public) oral communications between Federal officials and federally registered lobbyists that may happen to occur at, or on the heels of, a widely attended gathering."<sup>38</sup>

### ***Restricted Oral Communication***

For oral communication between executive branch employees and federally registered lobbyists on policy matters or in support of specific Recovery Act projects or applications for funding, the

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<sup>33</sup> Office of Management and Budget, Peter R. Orszag, Director, *Interim Guidance Regarding Communications With Registered Lobbyists About Recovery Act Funds*, M-09-16, Washington, DC, April 7, 2009, p. 1, [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m-09-16.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-16.pdf). [Hereafter, Orszag, *Interim Guidance*.]

<sup>34</sup> Orszag, *Interim Guidance*, p. 1.

<sup>35</sup> *Ibid.*

<sup>36</sup> *Ibid.*

<sup>37</sup> "Widely attended gatherings" are defined in ethics regulations found at 5 C.F.R. §2635.204 (g)(2).

<sup>38</sup> Orszag, *Interim Guidance*, p. 2.

contact must be documented. While executive branch employees “should ask if any person participating in the oral communication is a Federally registered lobbyist,”<sup>39</sup> if the contact is a federally registered lobbyist, the employee must initiate a four-step process to document the communication. If, at any point in the process, the communication ceases, the employee can suspend the collection of data. The four-step process is as follows:

1. Inform the person(s) of applicable restrictions through the use of two sample templates that can be read or provided to the federally registered lobbyist. These state:

Under the President’s Memorandum, we cannot engage in any oral communications with Federally registered lobbyists about the use of Recovery Act funds in support of particular projects, applications, or applicants. All such communications by Federal lobbyists must be submitted in writing, and will be posted publicly on our agency’s recovery website within 3 days.

If the oral communication is about general policy issues concerning the Recovery Act and does not touch upon particular projects, applications or applicants for funding, a Federally registered lobbyist may participate in the conversation. We will document the fact of the policy conversation in writing, including the name of the lobbyist and other participants, together with a brief description of the conversation, for public posting on our agency’s recovery website within 3 days.<sup>40</sup>

2. If the oral communications proceeds, only logistical questions or general information about Recovery Act programs should be discussed. No discussion of particular projects, applications, or applicants for funding is permitted.<sup>41</sup>

3. Each in-person or telephone conversation on Recovery Act policy matters should be documented with the date of contact, the names of the parties to the conversation, the name of the lobbyist’s client(s), and a one-sentence description of the substance of the conversation.<sup>42</sup>

4. Information about the contact should be submitted to the appropriate person in the employee’s agency. “That official should review the form for completeness and forward it for posting on [the] agency’s website within 3 business days of the communication.”<sup>43</sup>

### ***Restricted Written Communication***

If executive branch employees receive written communication about Recovery Act projects, applications, or applicants from federally registered lobbyists, such communication must be forwarded to a designated agency official by e-mail. The designated agency official must then forward the communication for posting to the agency’s Recovery Act website.<sup>44</sup>

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<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Orszag, *Interim Guidance*, p. 3.

<sup>43</sup> Ibid. See the **Appendix** for a list of Recovery Act websites for each cabinet level department.

<sup>44</sup> Orszag, *Interim Guidance*, p. 4.

## **Revised Recovery Act Guidance for Lobbyist Communications**

On July 24, 2009, OMB Director Orszag released updated guidance on communications with registered lobbyists Recovery Act funds. Changes made to the interim guidance document include expansion of restrictions to “all persons outside the Federal Government (not just federally registered lobbyists) who initiate oral communications concerning pending competitive applications under the Recovery Act.”<sup>45</sup>

Restrictions for oral communication of logistical questions and oral communications at widely attended gatherings did not change from the policies established by the interim guidance document. The updated guidance document, however, differentiates between oral communications between the submission of a formal application and the award of a grant, and oral and written communication concerning policy and projects for funding.

### ***Communication Between the Submission of an Application and Grant Award***

Communication between interested parties and executive branch employees “[d]uring 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” is restricted. Federal employees “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.”<sup>46</sup> These restrictions apply 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 or 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 a Federal agency official.<sup>47</sup>

If communication concerns a pending application and is not exempted, the employee is directed to terminate the conversation.<sup>48</sup>

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<sup>45</sup> Office of Management and Budget, Peter R. Orszag, director, *Updated Guidance Regarding Communications With Registered Lobbyists About Recovery Act Funds*, M-09-14, Washington, DC, July 24, 2009, p. 1, [http://www.whitehouse.gov/omb/assets/memoranda\\_fy2009/m09-24.pdf](http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m09-24.pdf). [Hereafter, Orszag, *Updated Guidance*.]

<sup>46</sup> Orszag, *Updated Guidance*, p. 2.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*, p. 3.

## ***Other Oral and Written Communication***

Restrictions on other oral and written communication with federally registered lobbyists about pending applications use the same thresholds for reporting as provided in the interim guidance document for “Restricted Oral Communication.” This includes informing the contact that the conversation will be documented; documenting the contact by recording the contact date, names of parties to the conversation, the name of the lobbyist’s client, a one-sentence description of the conversation, and attachments of any written materials provided by outside participants during the meeting; and submitting of the forms to the agency for posting on the Recovery Act website.<sup>49</sup>

## **Restrictions on Lobbyists Serving on Federal Advisory Committees**

Further broadening the restrictions on lobbyists, the White House, on September 23, 2009, announced a new policy to restrict the number of federally registered lobbyists serving on agency advisory boards and commissions in an effort to “reduce the influence of special interests in Washington.”<sup>50</sup> In October 2009, Norm L. Eisen, special counsel to the President for ethics and government reform, issued two blog posts<sup>51</sup> to clarify the White House position on federally registered lobbyists serving on federal advisory committees and to respond to criticism leveled by the American League of Lobbyists<sup>52</sup> and the chairs of the Industry Trade Advisory Committees (ITAC).<sup>53</sup> In his response, Mr. Eisen stated the following:

While we recognize the contributions some of those who will be affected have made to these committees, it is an indisputable fact that in recent years, lobbyists for major special interests have wielded extraordinary power in Washington, DC, resulting in a national agenda too often skewed in favor of the interests that can afford their services. It is that problem that the President has promised to change, and this is a major step in implementing that change.<sup>54</sup>

Implementation of these recommendations was initially made by individual agencies and departments during the recertification and reappointment process for each advisory committee. Additionally, the White House stated that they were not attempting to stifle lobbyists’ ability to

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<sup>49</sup> Ibid., pp. 3-4.

<sup>50</sup> The White House, “Lobbyists on Agency Boards and Commissions,” Blog Post, September 23, 2009, <http://www.whitehouse.gov/blog/Lobbyists-on-Agency-Boards-and-Commissions>. For more information on federal advisory committees see CRS Report R40520, *Federal Advisory Committees: An Overview*, by Wendy Ginsberg.

<sup>51</sup> The White House, “Why We Bar Lobbyists from Agency Advisory Boards and Commissions,” Blog Post, October 21, 2009, <http://www.whitehouse.gov/blog/Why-We-Bar-Lobbyists-from-Agency-Advisory-Boards-and-Commissions>; and The White House, “Why We Closed the Revolving Door,” Blog Post, October 28, 2009, <http://www.whitehouse.gov/blog/2009/10/28/why-we-closed-revolving-door>.

<sup>52</sup> Letter from David G. Wenhold, president, American League of Lobbyists, and Peter G. Mayberry, board of directors, American League of Lobbyists, to President Barack Obama, October 28, 2009, <http://www.whitehouse.gov/files/documents/10-09-Letter-to-WH-Advisory-Committees.pdf>.

<sup>53</sup> Letter from Gregory Dale, director, commercial trade policy, the Boeing Company, Timothy Hoelter, vice president, government affairs, Harley-Davidson Motor Company, and Brian Petty, senior vice president, government affairs, International Association of Drilling Contractors, et al. to President Barack Obama, Gary Locke, Secretary, U.S. Department of Commerce, and Ron Kirk, United State Trade Representative, October 19, 2009, [http://www.whitehouse.gov/assets/documents/Chairs\\_ITAC\\_letter\\_to\\_Obama\\_\(2\).pdf](http://www.whitehouse.gov/assets/documents/Chairs_ITAC_letter_to_Obama_(2).pdf).

<sup>54</sup> The White House, “Why We Bar Lobbyists from Agency Advisory Boards and Commissions,” Blog Post, October 21, 2009, <http://www.whitehouse.gov/blog/Why-We-Bar-Lobbyists-from-Agency-Advisory-Boards-and-Commissions>.

advocate on behalf of their clients, just that “industry representatives shouldn’t be given government positions from which to make their case.”<sup>55</sup>

## **Initial White House Memorandum**

On June 18, 2010, the White House issued a memorandum announcing a formal policy of not making “any new appointments or reappointments of federally registered lobbyists to advisory committees and other boards and commissions.”<sup>56</sup> In a blog post accompanying the presidential memorandum, the White House reiterated why the President believes that prohibiting lobbyists from serving on federal advisory committees is a prudent course of action:

For too long, lobbyists have wielded disproportionate influence in Washington. It’s one thing for lobbyists to represent their clients’ interests in petitions to the government, but it’s quite another, and not appropriate, for lobbyists to hold privileged positions [that] could enable them to advocate for their clients from within the government. It was for this reason that the President took steps on his first day in office to close the revolving door through which lobbyists rotated between private industry and full-time executive branch positions. Today’s step goes further by barring lobbyist appointments to part-time agency advisory positions.<sup>57</sup>

The memorandum further directed the Office of Management and Budget (OMB) to “issue proposed guidance designed to implement this policy to the full extent permitted by law” within 90 days, and to issue final guidance following a public comment period.<sup>58</sup>

## **Draft Guidance**

On November 2, 2010, OMB issued proposed guidance and invited comments from interested parties.<sup>59</sup> Included in the guidance were proposed rules to apply the federally registered lobbying ban to all boards and commissions regardless of Federal Advisory Committee Act (FACA) status<sup>60</sup> or whether the committee was created by statute, executive order, or agency authority.<sup>61</sup>

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<sup>55</sup> Letter from Norm L. Eisen, Special Counsel to the President, to Mr. Gregory Dole, director, commercial trade policy, the Boeing Company, et al, October 21, 2009, [http://www.whitehouse.gov/assets/documents/Signed\\_Lobbyist\\_Response\\_Letter\\_\(10-21-09\).pdf](http://www.whitehouse.gov/assets/documents/Signed_Lobbyist_Response_Letter_(10-21-09).pdf).

<sup>56</sup> The White House, “Lobbyists on Agency Boards and Commissions,” 75 *Federal Register* 35955, June 18, 2010. See also <http://www.whitehouse.gov/the-press-office/presidential-memorandum-lobbysits-agency-boards-and-commissions>.

<sup>57</sup> The White House, “Ending Lobbyist Appointments to Agency Boards and Commissions,” Blog Post, June 18, 2010, <http://www.whitehouse.gov/blog/2010/06/18/ending-lobbyist-appointments-agency-boards-and-commissions>.

<sup>58</sup> The White House, “Lobbyists on Agency Boards and Commissions,” 75 *Federal Register* 35955, June 18, 2010.

<sup>59</sup> Office of Management and Budget, “Proposed Guidance on Appointments of Lobbyists to Federal Boards and Commissions,” 75 *Federal Register* 67397, November 2, 2010.

<sup>60</sup> The Federal Advisory Committee Act (FACA) governs the actions and operations of executive branch advisory entities. For more information on FACA, see CRS Report R40520, *Federal Advisory Committees: An Overview*, by Wendy Ginsberg.

<sup>61</sup> Office of Management and Budget, “Proposed Guidance on Appointments of Lobbyists to Federal Boards and Commissions,” 75 *Federal Register* 67398, November 2, 2010.

## **Final Guidance**

On October 5, 2011, OMB issued final guidance for the appointment of federally registered lobbyists. As initially provided for in the presidential memorandum and the proposed guidance, the final guidance provides that after June 18, 2010, federally registered lobbyists (as defined by 2 U.S.C. Section 1605) are not to be appointed to advisory committees, boards, commissions, councils, delegations, conferences, panels, task forces, or other similar groups (or sub-groups) regardless of whether the entity was created by the President, Congress, or an executive branch agency or official, and regardless of whether FACA applies to the entity. Additionally, only former federally registered lobbyists who have “filed a bona fide de-registration or has been delisted 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” are eligible for appointment.<sup>62</sup>

## **Third-Party Critiques of Executive Branch Lobbying Policies**

Critiques of the Obama Administration’s policy toward federally registered lobbyists have focused on Recovery Act restrictions and lobbyists serving as members of federal advisory committees. In each instance, the American League of Lobbyists has written to the White House critiquing the programs and suggesting policy modifications.

### **Recovery Act Lobbying Policies**

Criticism of executive branch policies on interactions between federally registered lobbyists and executive branch officials developed shortly after the President’s March 20, 2009, memorandum outlining Recovery Act lobbying restrictions. On March 31, 2009, the American Civil Liberties Union (ACLU), Citizens for Responsibility and Ethics in Washington (CREW), and the American League of Lobbyists (ALL) sent a letter to White House Counsel Gregory Craig and, at the same time, issued a press release asking the White House to rescind the restrictions. In its letter, the groups stated their support for “efforts to ensure all American Recovery and Reinvestment Act of 2009 (‘Recovery Act’) funds are expended in a transparent and responsible manner,” but felt that “[s]ection 3 [of the President’s Memorandum], ‘Ensuring Transparency of Registered Lobbyists Communications,’ [was] an ill-advised restriction on speech and not narrowly tailored to achieve the intended purpose.”<sup>63</sup>

The groups’ press release emphasized that the directive was both too narrow and too broad, and it encroached on individuals’ right to petition the government. The press release stated the following:

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<sup>62</sup> Office of Management and Budget, “Final Guidance of Appointment of Lobbyists to Federal Boards and Commissions,” 76 *Federal Register* 61756, October 5, 2011.

<sup>63</sup> Letter from Melanie Sloan, executive director, Citizens for Responsibility in Government; Carline Fredrickson, Director, Washington Legislative Office American Civil Liberties Union; and Dave Wenhold, president, American League of Lobbyists, to Gregory B. Craig, Esq., White House Counsel, March 31, 2009, <http://alldc.org/pdfs/033109WhiteHouseLetter.pdf>.

In their letter, the groups said the directive was both too narrow—because it did not apply to non-registered lobbyists such as bank vice presidents or corporate directors—and also too broad, because it incorrectly assumed that all registered lobbyists may exert improper pressure for clients seeking funding for Recovery Act projects.

Additionally, the right to petition the government is one of the main tenets of our country's founding principles. To state that one class of individuals may not participate in the same manner as all others is clearly a violation of this principle.<sup>64</sup>

The updated guidance document issued by the White House on July 24, 2009, included some of the changes that CREW, ACLU, and ALL had requested. The updated guidance included the expansion of restrictions to cover “all persons outside the Federal Government (not just federally registered lobbyists) who initiate oral communications concerning pending competitive applications under the Recovery Act.”<sup>65</sup>

## **Federal Advisory Committee Membership**

Following the September 23, 2009, White House blog post outlining future restrictions on the appointment of federally registered lobbyists to executive branch agency boards and commissions, both the lobbying community and members of the Industry Trade Advisory Committees criticized the White House's position. On October 19, 2009, the 16 chairs of the Industry Trade Advisory Committees<sup>66</sup> wrote a letter to the Secretary of Commerce, Gary Locke, and the U.S. Trade Representative, Ron Kirk, outlining their concerns over the new policy of prohibiting federally registered lobbyists from serving on federal advisory committees. The three substantive and procedural concerns outlined in the letter are:

- that banning federally registered lobbyists from serving on federal advisory committees will “undermine the utility of the advisory committee process, the level of advice that the advisory committees provide, and, consequently, the ability of the United States to achieve balanced and effective trade policies”;<sup>67</sup>
- that the “new policy will undermine the broader goals of transparency with respect to lobbying which are the hallmarks of the Advisory Committee process.” In addition, “because the policy focuses on registered lobbyists, it actually incentivizes individuals who desire to remain on the Committee to de-register as a registered lobbyist under the LDA”;<sup>68</sup> and

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<sup>64</sup> Citizens for Responsibility and Ethics in Washington, the American Civil Liberties Union, and the American League of Lobbyists, “Diverse Coalition of Organizations Call for White House to Rescind Rule Restricting Lobbyist Communications on Bailout Funds: ACLU, CREW, and ALL Argue Rule Will Not Improve Transparency and Accountability,” press release, March 31, 2009, <http://www.alldc.org/press/pr033109.pdf>.

<sup>65</sup> *Updated Guidance*, p. 1.

<sup>66</sup> For a listing of the 16 Industry Trade Advisory Committees, see U.S. Department of Commerce, International Trade Administration, “Industry Trade Advisory Committees,” <http://www.trade.gov/itac/committees/index.asp>.

<sup>67</sup> Letter from Gregory Dale, director, commercial trade policy, the Boeing Company; Timothy Hoelter, vice president, government affairs, Harley-Davidson Motor Company; and Brian Petty, senior vice president, government affairs, International Association of Drilling Contractors, et al. to President Barack Obama, Gary Lock, Secretary, U.S. Department of Commerce; and Ron Kirk, United State Trade Representative, October 19, 2009, p. 4, [http://www.whitehouse.gov/assets/documents/Chairs\\_ITAC\\_letter\\_to\\_Obama\\_\(2\).pdf](http://www.whitehouse.gov/assets/documents/Chairs_ITAC_letter_to_Obama_(2).pdf).

<sup>68</sup> *Ibid.*, p. 5.



- that the illegal actions of a few individuals are being used to prejudge all federally registered lobbyists.<sup>69</sup>

The White House, in a letter from Norm L. Eisen, special counsel to the President, responded to the Industry Trade Advisory Committee's letter on October 21, 2009, and stated that

Your arguments that only lobbyists can bring the requisite experience to provide wise counsel, or that reaching beyond the roster of industry lobbyists for appointees will result in a "lack of diversity," are unconvincing on their face. We believe the committees will benefit from an influx of businesspeople, consumers and other concerned Americans who can bring fresh perspectives and new insights to the work of government.<sup>70</sup>

Following the issuance of draft guidance in November 2010, OMB solicited public opinions on banning federally registered lobbyists from serving on advisory committees. Among the opinions submitted to OMB were critiques provided by 10 individuals and organizations and generally restated themes present in earlier American League of Lobbyists correspondence.<sup>71</sup> In some instances, however, organizations highlighted new reasons for opposing the ban. For example, the AFL-CIO stated that the Administration was drawing arbitrary lines between federally registered lobbyists and other employees who work for the same company or organization. In their letter to White House General Counsel Preeta D. Bansal, the AFL-CIO stated the following:

The Administration's policy also embraces a flawed and arbitrary distinction between lobbyists another who serve the same organizations—including, of course, those who, unlike lobbyists, actually lead and set policy for them. Self-evidently, it is not the commercial interest or public policy preferences of "lobbyists" themselves that the Administration is concerned may be implicated by their service on advisory committees. Rather, it is the interests and preferences of their employers or clients, which direct them and for which they serve as advocates and experts.... If the Administration seeks to constrain and expose private influence in the advisory committees program, then its policies should be directed at the actual private decision-makers and beneficiaries of government spending, not their subordinate advisers and representatives.<sup>72</sup>

## Options for Change

Creation of restrictions on federally registered lobbyists' access to executive branch departments and agencies has already changed the relationship between lobbyists and covered executive branch officials. If desired, there are additional options which might further clarify lobbyists' relationships with executive branch officials. These options each have advantages and disadvantages for the future relationships between lobbyists and governmental decision-makers. CRS takes no position on any of the options identified in this report.

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<sup>69</sup> Ibid.

<sup>70</sup> Letter from Norm L. Eisen, Special Counsel to the President, to Mr. Gregory Dole, director, commercial trade policy, the Boeing Company, et al, October 21, 2009, [http://www.whitehouse.gov/assets/documents/Signed\\_Lobbyist\\_Response\\_Letter\\_\(10-21-09\).pdf](http://www.whitehouse.gov/assets/documents/Signed_Lobbyist_Response_Letter_(10-21-09).pdf).

<sup>71</sup> The White House. "Comments on Federal Guidance on Appointment of Lobbyists to Federal Boards and Commissions," <http://www.whitehouse.gov/sites/default/files/omb/fedreg/2011/comments-on-final-guidance-on-appointment-of-lobbyists-to-federal-boards-and-commissions.pdf>.

<sup>72</sup> Ibid., p. 4.

## **Amend the Lobbying Disclosure Act**

If current disclosure requirements are not determined to be sufficient to capture program level lobbying activity, or if current executive branch restrictions were made permanent, the Lobbying Disclosure Act could be amended to institute provisions similar to current executive branch lobbying restrictions. Currently, lobbyists must file quarterly disclosure reports with information on their activities and covered officials contacted. In addition, the LDA, as amended by the Honest Leadership and Open Government Act of 2007, requires federally registered lobbyists to file semi-annual reports on certain campaign and presidential library contributions.<sup>73</sup> The disclosure requirements might be further amended to cover program specific disbursement information. Changes to the LDA would require the introduction and passage of a bill by Congress, as well as the President's signature.

## **Create a Central Executive Branch Disclosure Database**

The White House or the Recovery Accountability and Transparency Board could create a central database to collect all Recovery Act projects and contacts by federally registered lobbyists in a single, searchable location.<sup>74</sup> Creating a central, searchable portal might allow for department and agencies to see which lobbyists, if any, are involved in a given project and allow individuals and groups to better understand which departments and agencies are responsible for projects of interest. A similar website has been established for stimulus fund recipients to register and disclose how funds are being spent.<sup>75</sup>

## **Take No Immediate Action**

Congress or the President might determine that the current lobbying registration and disclosure provisions, executive orders, and executive branch memoranda on Recovery Act lobbying restrictions are effective. Instead of amending the LDA, issuing additional executive orders, or issuing additional memoranda, Congress or the President could continue to utilize existing law to provide lobbyists access to covered governmental officials. Changes to the LDA or executive branch policy could be made on an as-needed basis through changes to LDA guidance documents issued by the Clerk of the House and Secretary of the Senate,<sup>76</sup> through executive order, or through the issuance of new memoranda by the President.

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<sup>73</sup> 2 U.S.C. §1604.

<sup>74</sup> While Recovery.gov contains information on the implementation of Recovery Act programs, a central database of registered-lobbyist contacts with executive branch officials does not currently exist. Each individual department and agency is responsible for listing contacts on its respective Recovery Act website. For a list of websites see the **Appendix**.

<sup>75</sup> For more information see <https://www.federalreporting.gov>.

<sup>76</sup> For more information on the role of the Clerk of the House and the Secretary of the Senate to administer the lobbying registration and disclosure system see CRS Report RL34377, *Honest Leadership and Open Government Act of 2007: The Role of the Clerk of the House and the Secretary of the Senate*, by Jacob R. Straus.

## Appendix. Cabinet-Level Executive Departments Recovery Act Websites

**Table A-1. Cabinet-Level Departments Recovery Act Websites**

Department	Recovery Act Website
Department of Agriculture	<a href="http://www.usda.gov/recovery">http://www.usda.gov/recovery</a>
Department of Commerce	<a href="http://recovery.commerce.gov/">http://recovery.commerce.gov/</a>
Department of Defense	<a href="http://www.defenselink.mil/recovery/">http://www.defenselink.mil/recovery/</a>
Department of Education	<a href="http://www.ed.gov/recovery/">http://www.ed.gov/recovery/</a>
Department of Energy	<a href="http://www.energy.gov/recovery/">http://www.energy.gov/recovery/</a>
Department of Health and Human Services	<a href="http://www.hhs.gov/recovery/">http://www.hhs.gov/recovery/</a>
Department of Homeland Security	<a href="http://www.dhs.gov/xopnbiz/recovery.shtm">http://www.dhs.gov/xopnbiz/recovery.shtm</a>
Department of Housing and Urban Development	<a href="http://www.hud.gov/recovery/">http://www.hud.gov/recovery/</a>
Department of the Interior	<a href="http://recovery.doi.gov/">http://recovery.doi.gov/</a>
Department of Justice	<a href="http://www.usdoj.gov/recovery/">http://www.usdoj.gov/recovery/</a>
Department of Labor	<a href="http://www.dol.gov/Recovery/">http://www.dol.gov/Recovery/</a>
Department of State	<a href="http://www.state.gov/recovery/">http://www.state.gov/recovery/</a>
Department of Transportation	<a href="http://www.dot.gov/recovery/">http://www.dot.gov/recovery/</a>
Department of the Treasury	<a href="http://www.treas.gov/recovery/">http://www.treas.gov/recovery/</a>
Department of Veterans Affairs	<a href="http://www.va.gov/recovery/">http://www.va.gov/recovery/</a>

**Source:** Recovery Accountability and Transparency Board, “Agency Sites and Information,” *Recovery.gov*, <http://www.recovery.gov/?q=content/agencies>.

**Notes:** Additional agencies are also required to maintain recovery websites. These include the Agency for International Development, Corporation for National and Community Service, Environmental Protection Agency, General Services Administration, National Aeronautics and Space Administration, National Endowment for the Arts, National Science Foundation, Office of Personnel Management, Railroad Retirement Board, Small Business Administration, Smithsonian Institution, Social Security Administration, and U.S. Army Corps of Engineers.

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