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March 9, 2010

Norman Eisen
Special Counsel for Ethics and Government Reform
The White House
1600 Pennsylvania Avenue
Washington, DC 20502

Re: Administration Policy on Lobbyists Serving on Advisory Committees

Dear Mr. Eisen:

On May 7, 2009, the ABA Section of Administrative Law and Regulatory Practice wrote you regarding two Administration directives: E.O. 13490 (Ethics Commitments by Executive Branch Personnel) and a memorandum entitled Ensuring Responsible Spending of Recovery Act Funds.[1] That letter identified a number of ambiguities in those issuances that might have been avoided if the Administration had sought public comments on drafts of the documents prior to their final adoption. The letter also urged the Administration to seek public input in the future with regard to such documents. We write you now regarding the topic that you addressed at our Fall Conference on October 21st: your September 22nd blog post on Lobbyists on Agency Boards and Commissions.[2] As in the case of our earlier letter, the views expressed in this letter are presented only on behalf of the ABA Section of Administrative Law and Regulatory Practice.[3] They have not been submitted to or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the Association.

[1] The Section's May 7, 2009 letter is attached.
[2] http://www.whitehouse.gov/blog/Lobbyists-on-Agency-Boards-and-Commissions
[3] The Section has established a Task Force on Lobbying Reform to study and develop recommendations regarding a variety of existing and proposed restrictions, regulations, and reporting requirements for lobbyists. The Task Force continues to examine the issues discussed in this letter and may recommend that the Section address these issues in more detail in the future.

While the policy we address here is contained only in a blog post, it represents, as it forthrightly acknowledges, "a dramatic change" in how advisory committees are constituted. And while the policy does not legally bind federal agency heads, it would be unrealistic to expect that those officials would lightly disregard the "hope" and "aspiration" of the President who appointed them. As a result, we fear that the policy could have substantial adverse impacts on advisory committees and, more important, on the quality of advice that such committees can offer federal agencies. We believe it could have benefitted from prior consultation with the public.

The creation and operation of the "advisory boards and commissions" that are the subject of your blog post is comprehensively governed by the Federal Advisory Committee Act (FACA). FACA's implementing rules permit an agency to create an advisory committee only when the agency concludes that doing so "is essential to the conduct of agency business and when the information to be obtained is not already available through another . . . source . . . ."[4] Thus, the principal criterion for appointing someone to a FACA committee is the expertise or perspective that he or she offers. As the Administrative Conference of the United States (ACUS) has noted, "advisory committee members [o]ften . . . have been selected precisely because are especially well qualified to provide advice concerning problems in a particular field in which they themselves may be active both professionally and personally."[5] In many cases, those people will also be registered lobbyists. It frustrates the fundamental purpose of FACA to exclude such people *a priori*. While it is certainly true that persons in the academic community as well as those that routinely advise and represent private interests but who are not registered under the Lobbying Disclosure Act may have expertise on many topics, those individuals may lack the practical knowledge of how government operates that is so essential to fashioning workable public policies.

Unlike the situations addressed in your earlier directives regarding lobbyists, the fact that a person is being paid to represent an interest before Congress or senior Administration officials creates no tension with the goals that advisory committees are intended to serve. To the contrary, the point of advisory committees is precisely to bring those interests into a setting where the government can benefit by seeking their views and subjecting them to challenges by others with different views. FACA explicitly contemplates that members of these committees will represent particular interests or perspectives – that is why the statute requires appointing agencies to ensure that the committees will be "fairly balanced."[6]

The statute also requires agencies to operate committees in such a way that their "advice and recommendations . . . will not be inappropriately influenced by the appointing agency or by any special interest, but will instead be the result of the advisory committee's independent judgment."[7] Accordingly, the goal should not be to exclude special interests from the committees any more than it should be to exclude the appointing agency from having any role in the committee's operation. Rather, what is crucial is that the committee be constituted in such a way as to operate in an open and democratic way that ensures the integrity of its deliberations.

Finally, mechanisms exist currently to guard against the prospect that an advisory committee member's personal interests may skew that person's advice. Federal conflict of interest restrictions and disclosure

[4] 41 C.F.R. § 102-3.30(a).
[5] Recommendation 89-3, *Conflict-of-Interest Requirements for Federal Advisory Committees*.
[6] 5 U.S.C. App. 2, § 5(b)(2).
[7] *Id*. § 5 (b)(3).

requirements apply whenever a committee member is appointed as a "special government employee" (SGE). ACUS has recommended that individuals be appointed as SGEs whenever a committee will render advice with respect to the agency's disposition of particular matters involving a specific party or parties.[8] The Government Accountability Office has recommended more broadly that advisory committee members be SGEs whenever they are appointed for their expertise (as opposed to speaking as stakeholders for the entities or groups they represent).[9] This is an area where further guidance from the Administration could improve the implementation of FACA – unlike the policy barring registered lobbyists from serving on boards and commissions.

We urge the Administration to reconsider this policy. As before, we stand ready to provide constructive advice on these and related matters. You can reach me at 412-648-1380 and wvl@pitt.edu.

Sincerely,

William V. Luneburg
Chair
Section of Administrative Law and Regulatory Practice

[8] Recommendation 89-3, *supra* note 4.
[9] Government Accountability Office, GAO-04-328, *Federal Advisory Committees – Additional Guidance Could Help Agencies Better Ensure Independence and Balance* 52 (April 2004).