OFFICE OF MANAGEMENT AND BUDGET

Governmentwide Guidance for New Restrictions on Lobbying

AGENCY: Office of Management and Budget.

ACTION: Notice.

SUMMARY: This Notice provides further information about OMB's interim final guidance, published December 20, 1989, as called for by Section 319 of Public Law 101-121.

DATE: The effective date of the interim final guidance was December 23, 1989.

FOR FURTHER INFORMATION CONTACT: For grants and loans, contact Barbara F. Kahlow, Financial Management Division, OMB (telephone: 202-395-3053). For contracts, contact Richard C. Loeb, Office of Federal Procurement Policy, OMB (telephone: 202-395-3300).

SUPPLEMENTARY INFORMATION: On October 23, 1989, the President signed into law the Department of the Interior and Related Agencies Appropriations Act for Fiscal Year 1990 ("the Act"). Section 319 of the Act amended title 31, United States Code, by adding a new Section 1352, entitled "Limitation on use of appropriated funds to influence certain Federal contracting and financial transactions." Section 1352 took effect with respect to Federal contracts, grants, loans, cooperative agreements, loan insurance commitments, and loan guarantee commitments that were entered into or made more than 60 days after the date of the enactment of the Act, i.e., December 23, 1989.

Section 1352 required the Director of the Office of Management and Budget (OMB) to issue governmentwide guidance for agency implementation of, and compliance with, the requirements of this section. Interim final guidance was issued on December 18, 1989 and published on December 20, 1989 (54 FR 52306).

This Notice is to inform the public about certain clarifications which OMB has made since the December 20, 1989 publication. These include replies to two letters addressed to OMB from Members of Congress. Both letters are reproduced herein as well as OMB's replies. In addition, OMB has issued an internal government memorandum which is reproduced herein.

Allan V. Burman,

Administrator for Federal Procurement Policy.

Susan Gaffney,

Acting Assistant Director for Financial Management.

Herein follows the text of the first letter and OMB's reply:

United States House of Representatives

Employment and Housing Subcommittee of the Committee on Government Operations

May 9, 1990.

Richard Darman,

Director, Office of Management and Budget, 10300 New Executive Office Building, Washington, D.C. 20503.

Dear Mr. Darman: As the House sponsor of the The Clean Consultants Act of 1989, for which you are now writing regulations, I would like to encourage you to consider and include clarification in the implementation of this law to state that it does not preclude legitimate functions of local governments which includes contact with Federal agencies.

A priority in the case of cities and counties is the ability to contact Federal agencies for information concerning grants. At present, Federal agencies are not responding because there is either confusion on the part of Federal employees concerning how to deal with direct contact from local governments and their representatives, or there is a policy of no response to requests for information or clarification from local govenrment representatives because of an extremely strict definition of what the new law does and does not allow. OMB should direct all Federal agencies to continue past practices of providing information to local governments and their representatives until final regulations make clear and uniform the appropiate parameters for contacts among local officials, their representatives and Federal employees. I cannot stress enough how important it is for local government to receive timely and accurate information on Federal programs. Providing information is clearly not within the realm of 'influence peddling' or lobbying to which the new law addresses itself.

In relation to drafting of regulations, I urge you to consider comments to clarify potential problems which surfaced in the NPRM. Among my concerns and the concerns of local government are:

1. The unnecessary inclusion of entitlement programs in reporting requirements. Entitlement programs do not fall under the catagory of programs which could be 'brokered' in the manner of discretionary grant programs. The Clean Consultants Act as its focus, the *process* of obtaining discretionary grants by the use of undue influence. Entitlements do not go through the same kind of process and therefore I do not understand why recipients would need to follow disclosure regulations as applicants and recipients of discretionary monies would need to follow.

2. Grants management is, for all practical purposes, a general duty job with most cities and counties. Whether that individual is a direct employee, or holds a long-term bona fide consultant contract, the duties involved in grants management often include the need to monitor the grants program from which the city or county benefits. Seeking information in this role, a grants manager would not appear to be using undue influence to obtain funding—rather, it seems an informed manager serves a function for the best use of funds from the perspective of the Federal government as well as the local government entity. Therefore, contacts with the Federal government by grants managers would seem to be an appropriate action and one not prohibited under the lobbying portions of the new law.

The intent of the law is to either disallow those receiving Federal funds from using employees on that grants to solicit other Federal monies, and to make public those individuals hired with non-Federal funds to obtain a Federal grant. The law makes a clear distinction which singles out the special arrangement or contract individual hired to secure specific program funding. Abuses in this area are the focus and the background of the law. A local government employee or a long-term Washington agent for a local government clearly does not fit into the same abusive pattern.

During the period regulations to make this distinction are being written, and safeguards are put in place to cut abuse, local governments should not be shackled by a loss of opportunity to use informed employees and other legitimate representatives in grants application and management when they seek information on grant opportunities. The current unresponsiveness of many Federal agencies, which appears to be a reaction in advance of final regulations, acts as a veil behind which grant-making agencies decline to provide any information to local officials or their representatives. This seems a needless impediment for appropriate actions by local governments competing for existing programs of Federal assistance.

3. In your writing of regulations, I trust you will define terms to clarify problems which present themselves in the NPRM in the context of current practice. Special project lobbyists and 'influence peddling' as exemplified in the HUD hearings conducted by the Employment and Housing Subcommittee of the House Government Operations Committee, which I chair, define themselves. Specifically, the $300,000 phone calls to HUD and the contracting of well-connected Washington operatives for specific projects are the target of the new law. Day-to-day grants managers and long-term bona fide general interest consultants perform a service different from those abusive actions which have been uncovered during our HUD hearings. This distinction between individuals and actions should be made clear—which does not appear to be the case in the NPRM.

I appreciate your attention to my comments and hope that you will contact me or have your staff contact Lisa Phillips on my

Subcommittee staff (225–6751) if you have any questions. I am particularly interested in the issue of information availability and ask that your office contact me in the next ten days to advise on how Federal agencies are provided guidance on the new law while regulations are being finalized.

Sincerely,

Tom Lantos,

Chairman.

Executive Office of the President

Office of Management and Budget

May 21, 1990.

Honorable Tom Lantos,
Chairman, Employment and Housing Subcommittee, Committee on Government Operations, U.S. House of Representatives, Washington, DC 20515.

Dear Chairman Lantos: This responds to your letter of May 9, 1990, concerning Section 319 of Public Law 101–121 and the Office of Management and Budget's (OMB's) interim final guidance entitled "Governmentwide Guidance for New Restrictions on Lobbying." Your letter raises concerns about "legitimate functions of local governments which include contact with Federal agencies."

First, your letter raises concerns about Federal agencies' responsiveness to requests from cities and counties for information or clarification about grants. Nothing in the statute or OMB's guidance limits Federal agencies from continuing to respond to such informational requests. However, as your letter indicates, there appears to be a need to better inform the agencies with respect to this aspect of OMB's guidance. Therefore, we will be raising this issue with the agencies during the interagency common rulemaking process which is proceeding with work on the final version of the OMB guidance. We want to insure that the guidance does not inappropriately impose a chilling effect on communications between Federal agencies and their grantees. As agencies become more familiar with this new law and OMB's guidance, questions about responding to these types of requests should be eliminated.

Several commenters included in the docket of public comments on OMB's interim final guidance, as well as your letter, raise concerns about the appropriateness of requiring disclosure of routine and ongoing post-award administration of grants. After consideration of these concerns, we intend to indicate in OMB's final guidance that such activities fall within the exemption for "Professional and Technical Services."

Also, your letter raises concerns about the applicability of the law, as well as OMB's guidance, to entitlement programs. Neither the statute nor OMB's guidance exempts any particular grant programs. We believe that coverage of mandatory awards, including the entitlement programs (e.g., grants for State administration of Medicaid) and formula grants, is appropriate, since subawards under these grant programs are discretionary. For example, contractors are competitively selected by State grantees for electronic data processing of Medicaid claims.

Lastly, your letter raises concerns about ways to clarify or more specifically target OMB's guidance to better capture the types of activities which this new law was intended to curb. We are carefully considering ways to improve this aspect of OMB's guidance along the lines that you raised, as well as in response to the public comments that we have received.

We have every intention of achieving reasonable implementation of this law, within the context of the statutory framework provided by Congress. I hope this letter fully meets the concerns raised in your letter. If you have additional questions, please do not hesitate to call me.

Sincerely,

Frank Hodsoll,

Executive Associate Director.

Herein follows the text of the second letter and OMB's reply:

United States House of Representatives

May 10, 1990.

Mr. Richard Darman,
Director, Office of Management and Budget, Old Executive Office Bldg., Washington, D.C. 20503.

Dear Mr. Darman: When Congress passed the appropriations bill for the Department of the Interior, the intent of Section 319 was to prohibit the use of federally appropriated funds to lobby Congress or federal agencies in connection with federal grants, contracts, loans, or cooperative agreements.

However, I fear that the interim final rule unnecessarily affects state agency communications with Congress and federal agencies in the course of administering ongoing programs. These communications are appropriate, they foster more efficient and effective program implementation and benefit all levels of government.

I ask that you consider re-examining section 319 in light of these concerns. Thank you for your attention.

Sincerely,

Timothy J. Penny,

Member of Congress.

Executive Office of the President

Office of Management and Budget

June 8, 1990.

Honorable Timothy J. Penny,
U.S. House of Representatives, Washington, DC 20515.

Dear Congressman Penny: This responds to your letter of May 10, 1990, concerning Section 319 of Public Law 101–121 and the Office of Management and Budget's (OMB's) "Governmentwide Guidance for New Restrictions on Lobbying." Your letter raises concerns about "State agency communications with Congress and Federal agencies in the course of administering ongoing programs."

We are sensitive to the concerns you raised and those raised by State and local officials and their interest groups. We are attempting to address all of these concerns in finalizing OMB's guidance.

Several commenters on OMB's interim final guidance pointed out the inequity of requiring disclosure by a grantee or a contractor's newly-hired employees who are expected to become employed over 130 days, including newly-elected State officials. After consideration of these concerns, we expect that OMB's final guidance will expand the regulatory definition of "regularly employed" so as to no longer require disclosure by such persons.

In addition, several commenters, as well as your letter raised concerns about the appropriateness of requiring disclosure of routine and ongoing post-award activities to administer grants and contracts. These activities are not influencing activities. After consideration of these concerns, we intend to indicate in OMB's final guidance that such activities fall within the exemption for "Professional and Technical Services."

We have every intention of achieving reasonable implementation of this law, within the context of the statutory framework provided by Congress. I hope this letter fully meets the concerns raised in your letter. If you have any questions, please do not hesitate to call me.

Sincerely,

Frank Hodsoll,

Executive Associate Director.

Herein follows the text of OMB's clarification memorandum to the agencies: June 12, 1990.

Memorandum for Assistant Secretaries for Management and Agency Senior Procurement Executives

From:
Allan V. Burman, Administrator for Federal Procurement Policy
Susan Gaffney, Acting Assistant Director for Financial Management

Subject: Clarification Regarding "Governmentwide Guidance for New Restrictions on Lobbying"

On December 20, 1989, the Office of Management and Budget's (OMB's) interim final "Governmentwide Guidance for New Restrictions on Lobbying" was published in the **Federal Register**. The effective date of the guidance was December 23, 1989. Included in the guidance at Appendix A are the "Certification Regarding Lobbying" and the "Statement for Loan Guarantees and Loan Insurance." This memorandum provides clarifications concerning the guidance and the "Certification" and "Statement." Please alert your headquarters and field staffs to them.

First, the Certification and the Statement are intended to apply only to the instant Federal transaction for which a Certification or Statement is being obtained: the awarding of a Federal contract, the making of a Federal grant, the making of a Federal loan, the entering into of a cooperative agreement, or the making of a Federal commitment for a loan guarantee or loan insurance.

Second, the final version of the Certification and Statement will reference OMB's guidance, including Subparts B and C, which specify certain "Agency and Legislative Liaison" and "Professional and Technical Services" activities which are allowable with appropriated funds and for which no disclosure is necessary.

Third, only bids, offers, applications and awards, submitted or made on or after the

December 23, 1989 effective date of the restrictions need to contain certifications or statements and disclosures, if required, i.e., awards and commitments made before December 23, 1989, but modified, amended, extended, continued or renewed after that date do *not* need certifications or statements *unless* they are modified or amended beyond the scope of the award. An existing Federal grant, loan, or cooperative agreement with such a modification or amendment needs to contain a certification and disclosure form, if required. A bilateral modification to an existing Federal contract which requires justification and approval pursuant to Federal Acquisition Regulation (FAR) section 6.303, citing the authorities in FAR section 6.302, and which exceeds the $100,000 threshold needs a certification and disclosure form, if required.

Fourth, only Federal transactions over the $100,000 (contracts, grants, cooperative agreements) or $150,000 (loans, loan guarantees, loan insurance) thresholds need certifications or statements and disclosures, if required.

Fifth, contracts subject to the FAR are covered by the January 30, 1990 FAR interim final rule (Federal Acquisition Circular 84–55), not the February 26, 1990 common rule. The February 26, 1990 rule applies only to contracts not subject to the FAR (generally nonprocurement contracts) as well as to grants, loans, cooperative agreements, loan guarantee commitments, and loan insurance commitments.

Sixth, nothing contained in Subpart C of the guidance, Activities by Other Than Own Employees, applies to selling activities by independent sales representatives before an agency provided that the selling activities are prior to formal solicitation by an agency. Such selling activities are:

(1) Discussing with an agency (including individual demonstrations) the qualities and characteristics of the person's products or services, conditions or terms of sale, and service capabilities; and,

(2) Technical discussions and other activities regarding the application or adaptation of the person's products or services for an agency's use.

Note that the activities in (1) and (2) above are specifically limited to the merits of the matter. An independent sales representative who engages in selling activities described above, prior to the issuance of a formal solicitation by an agency, is not deemed to be engaged in influencing with regard to a particular contract and will not need to disclose such activities.

Seventh, under subsections ____.205(b) and ____.300(c), the examples cited are not intended, in any way, to be all inclusive, to limit the application of the "Professional and technical services" exemption provided in the law, or to limit the exemption to licensed professionals. "Professional and technical services" shall be advise and analysis directly applying any professional or technical expertise. Note that the "Professional and technical services" exemption is specifically limited to the merits of the matter.

Lastly, the following clarify OMB's interim final guidance:

(1) To the extent a person can demonstrate that the person has sufficient monies, other than Federal appropriated funds, the Federal Government shall assume that these other monies were spent for any influencing activities unallowable with Federal appropriated funds. This assumption applies equally to persons who do and do not submit to the Federal Government cost or pricing data. Where no cost or pricing data are submitted, the Federal Government shall assume that monies spent are a reduction from profits otherwise available.

(2) Profits and fees earned under Federal contracts (see FAR subpart 15.9) are not considered appropriated funds. Profits, and fees that constitute profits, earned under Federal grants, loans, and cooperative agreements are not considered appropriated funds.

(3) Nothing in OMB's interim final guidance requires a person to make any changes to that person's existing accounting systems.

(4) The prohibition on use of Federal appropriated funds does not apply to influencing activities not in connection with a specific covered Federal action. These activities include those related to legislation and regulations for a program versus a specific covered Federal action.

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