March 31, 2009

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The White House
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Washington, D.C. 20500

BY FAX: 202-456-2461

Dear Mr. Craig:

Citizens for Responsibility and Ethics in Washington ("CREW"), the American Civil Liberties Union ("ACLU") and the American League of Lobbyists ("ALL") respectfully request that President Barack Obama rescind Section 3 of the March 20, 2009, memorandum issued to the heads of executive departments and agencies with the subject line, "Ensuring Responsible Spending of Recovery Act Funds."

We applaud the president's efforts to ensure all American Recovery and Reinvestment Act of 2009 ("Recovery Act") funds are expended in a transparent and responsible manner. We also agree that only the merits of proposed projects, and not improper influence or pressure, should drive the distribution of such funds. Nevertheless, we firmly believe that Section 3, "Ensuring Transparency of Registered Lobbyist Communications," is an ill-advised restriction on speech and not narrowly tailored to achieve the intended purpose.

As you know, Section 3(b) prohibits registered lobbyists from participating in any oral communications, whether in-person or telephonic, with any official in the executive branch concerning any particular project, application or applicant for funding under the Recovery Act. This restriction is not imposed on others, who are permitted to communicate with administration officials without even any lesser form of restriction. Under the terms of this section, registered lobbyists are only permitted to "submit a communication in writing", and even then there are disclosure mandates that do not apply to others. And beyond these limitations, there are additional disclosure requirements that pertain only to registered lobbyists even when the communications do not relate to particular projects, applications or applicants.

First, banning lobbyists from in-person and telephonic communications will not advance the stated purpose of ensuring public transparency and accountability and avoiding improper influence or pressure in the decision-making process. For example, non-lobbyists employed by potential recipients of Recovery Act funds, who are permitted oral contact with executive branch officials, may well have contributed significant funds to the presidential campaign and/or to the

campaigns of members of Congress who sit on the committees with oversight jurisdiction over the Department of Treasury, the Federal Reserve and the expenditure of Recovery Act funds. They may hold positions of enormous power in the business world and have influence in Washington far beyond that of the average registered lobbyist. In addition, many of these non-lobbyists may have a substantial pecuniary interest in whether or not the government awards Recovery Act funds for a particular project, application or applicant. Also, nothing in this memorandum prevents a member of Congress from attempting to influence a funding decision, such as recently occurred with OneUnited Bank. Banning lobbyists from engaging in oral communications, but not bank vice presidents, corporate directors, and others who might seek to influence decision makers is unlikely to result in any real public benefit. Limiting the applicability of Section 3 to registered lobbyists wholly misses the risks inherent in communications with such individuals, while significantly restricting the free speech rights of others who may have no such pecuniary conflict.

Instead of increasing the transparency and accountability, this action will encourage participation by people who are not required to register and abide by the rules set forth in the stringent regulations that govern lobbyists. To be clear, this action will decrease transparency and accountability. Moreover, it will also discourage accurate reporting under the Lobbying Disclosure Act – especially for those who are on the cusp for meeting the definitional requirement of a 'registered lobbyist.'

Second, and more importantly, lobbying is a constitutionally protected activity. The right to petition the government equally 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 and discriminates against an entire group.

More significantly, the proposed classification system could easily be drawn more narrowly. As just one example, a better alternative would be to require disclosure of any and all communications with executive branch officials regarding a particular project, application or applicant for funding. The name and business affiliation of the individual who engages in an oral communication about such a matter, the name of the official contacted, the date of the contact, and the subject of the contact could all be publicly available, perhaps on the Treasury Department's website. Such a transparent process would diminish the possibility of improper contacts while not unnecessarily singling out and punishing registered lobbyists, who already comply with stringent disclosure rules and regulations. By allowing written communications from registered lobbyists under the mandated plan, the President implicitly acknowledges that it would be improper to bar all communications. If it is improper to ban all communications, it is just as improper to ban all oral communications if the purposes can be achieved by a narrower restriction. The intended purposes – transparency, accountability, avoidance of improper influence – are served just as well by the suggested alternative.

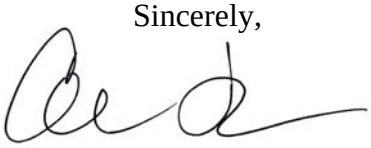
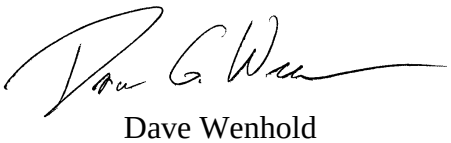
To reiterate, banning lobbyists from speaking with executive branch officials will not, in and of itself, preclude petitioning the government. Rather, such a ban simply will ensure that such contacts occur between government officials and non-lobbyists, who are not governed by any regulations or penalties for misconduct. In fact, banning lobbyists – often people with experience and subject matter expertise navigating the intricacies of federal regulations and agency

bureaucracy – may actually inhibit the speedy and responsible expenditure of funds on worthy projects and applicants.

In this sense, the directive is both over-inclusive and under-inclusive. It limits the free speech rights of certain registered lobbyists with absolutely no pecuniary or other improper interest in Recovery Act projects, applications or applicants. It fails to restrain non-registered lobbyists who have substantial pecuniary interests in the Recovery Act. The purposes of the directive can be achieved in a far more effective fashion, while at the same time preserving the speech rights of the maximum number of Americans.

We support your administration's efforts to change the culture of Washington and ensure our government acts in the best interest of all Americans. This admirable goal can best be achieved by creating transparent and inclusive processes and practices that do not violate any citizen's rights to equally petition the government. The alternative we propose would diminish the possibility of improper contacts while not unnecessarily singling out and punishing the one group that already reports its administration and congressional contacts quarterly. We welcome the opportunity to work with you to draft a constructive alternative to the ban enacted by the March 20 memorandum. We also request a meeting with you or your staff at the earliest possible opportunity to discuss the alternatives.

Sincerely,

Melanie Sloan
Executive Director
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cc: Peter S. Orszag, Director, Office of Management and Budget