

EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 02-8

January 25, 2002

RE: Must pharmaceutical manufacturer employees register as lobbyists?

DECISION: Yes, if attempting to influence an executive agency decision.

This opinion is in response to your January 7, 2002, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the January 25, 2002 meeting of the Commission, and the following opinion is issued.

You state the relevant facts as follows. The Pharmacy and Therapeutics (P&T) advisory committee within the Cabinet for Health Services is comprised primarily of private practitioners who are not state employees. The P&T advisory committee makes policy recommendations concerning state-funded drug purchases within the Medical Assistance Program (Medicaid), including whether certain drugs should be listed in the state's Medicaid formulary. When drugs are listed on the formulary (the list of drugs not requiring prior approval for Medicaid reimbursement), there is a resulting financial benefit to the manufacturer of the drug.

Employees of pharmaceutical manufacturers may communicate with P&T advisory committee members in their private practices regarding issues before the P&T committee involving the manufacturers' products, including the issue of whether a drug is approved for listing on the state's Medicaid formulary. You ask whether employees of pharmaceutical manufacturers engaged in such communications must register as executive agency lobbyists.

KRS 11A.201(8) defines "executive agency lobbyist" as provided below:

(8)(a) "Executive agency lobbyist" means any person engaged to influence executive agency decisions or to conduct executive agency lobbying activity as one (1) of his main purposes on a substantial basis.

(b) "Executive agency lobbyist" does not include an elected or appointed officer or employee of a federal or state agency, state

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college, state university, or political subdivision who attempts to influence or affect executive agency decisions in his fiduciary capacity as a representative of his agency, college, university, or political subdivision;

An "executive agency decision" is defined in KRS 11A.201(7):

(7) "Executive agency decision" means a decision of an executive agency regarding the expenditure of funds of the state or of an executive agency with respect to the award of a contract, grant, lease, or other financial arrangement under which those funds are distributed or allocated;

It appears to the Commission that the P&T committee, although advisory in nature, is an entity appointed by the Governor that is part of the Cabinet for Health Services. The decisions by the P&T advisory committee as to which drugs should be recommended for the formulary appear to be executive agency decisions as they relate to financial arrangements under which Medicaid funds will be distributed. In Advisory Opinion 93-55 (a copy of which is enclosed), the Commission stated that reimbursement of funds made by an agency constituted an expenditure of funds with respect to an "other financial arrangement." Additionally, in Advisory Opinion 93-64 (a copy of which is enclosed), the Commission stated that decisions that would effect more funds to flow to the benefit of an organization would be executive agency decisions and would require registration as an executive agency lobbyist.

Consequently, if an employee of a pharmaceutical manufacturer is communicating with a member of the P&T advisory committee and attempting to influence the decisions the P&T committee will make concerning recommendations for drug approvals, then the Commission believes that the employee should be registered as an executive agency lobbyist with the Commission. The fact that the voting members are not state employees does not affect the Commission's interpretation of this matter.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

BY CHAIR: Cynthia C. Stone, Esq.

Enclosures: Advisory Opinion 93-55
Advisory Opinion 93-64