EXECUTIVE BRANCH ETHICS COMMISSION

ADVISORY OPINION 93 – 41

August 23, 1993

RE: Issues on Executive Agency Lobbying

This letter is in response to your July 8, 1993, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission"). This matter was reviewed at the August 23, 1993, meeting of the Commission, and the following opinion is issued.

You are the general counsel for a nonprofit professional organization which conducts lobbying as one of its services for members. Your organization has met with approximately 15 attorneys representing various industries throughout the state to study the new executive branch lobbying requirements. You have numerous questions concerning the new laws that you need answered in order to advise your membership. These questions involve a variety of issues which will be summarized and responded to by the Commission.

You raise the question as to whether an "executive agency decision" is limited to situations in which an executive agency is considering whether to make an outlay of funds to procure goods or services from an outside party. In addition, you provide scenarios and wish to know if they are considered "executive agency decisions". Senate Bill 7, Section 45(7) (to be codified as KRS 11A.201(7)) defines an "executive agency decision" as:

> ...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.

The Commission believes that "the expenditure of funds...with respect to the award of a contract, grant, lease, or other financial arrangement" limits an executive agency decision to only those decisions that involve an expenditure of state funds for goods or services, or other financial arrangements. For purposes of executive agency lobbying, "other financial arrangement" is interpreted to mean any arrangement whereby funds of the state or of an elected executive official or agency are distributed or allocated to the benefit of the person, company, or organization seeking the distribution or allocation of such funds. Examples of such funds include, but are not limited to, the deposit of state funds into a particular commercial banking system, costs associated with the maintenance of any service agreement, and any type of retainer fees associated with management consulting services, condemnation cases, and unemployment insurance claims. Therefore, the scenarios listed in your request which involve decisions concerning licenses and permits, tax decisions, material specifications, bank charters, administrative regulations, enforcement actions, and other non-expenditure decisions, are not executive agency decisions as defined in the above provision.

You also ask for some clarification on who is considered an " executive agency lobbyist". Senate Bill 7, Section 45(8)(a) (to be codified as KRS 11A.201(8)(a)) defines an

"executive agency lobbyist" as

> ...any person engaged to influence executive agency decisions or to conduct executive agency lobbying activity as one of his main purposes on a regular and substantial basis.

The Commission believes someone who is marketing goods and services to the state as a vendor would normally be making "contacts . . . to promote, oppose, or otherwise influence the outcome of an executive agency decision" and thus would be considered an executive agency lobbyist. However, only those who act to influence executive agency decisions or conduct lobbying activity "on a regular and substantial basis" are subject to Senate Bill 7. As a guideline in determining whether such actions are "regular and substantial," the Commission states that, barring other, unusual circumstances, only those who lobby concerning executive agency decisions involving state expenditures of more than $5,000 per decision will be considered as acting on a "regular and substantial basis" and thus subject to regulation as executive agency lobbyists. Advisory Opinion 93-34 (a copy of which is enclosed) also addresses the issues of whether sales employees are lobbyists.

Regarding your question as to whether an employer of an executive agency lobbyist, who makes an expenditure on behalf of an official of a cabinet of which the lobbyist is not engaged to influence, must report that expenditure or not, the Commission takes note of Senate Bill 7, Section 45(2)(a) (to be codified as KRS 11A.201(2)(a)) which defines expenditure as:

> ...any of the following that is made to, or for the benefit of an elected executive official, the secretary of a cabinet listed in KRS 12.250, an executive agency official, or a member of the staff of any of the officials listed in this paragraph:
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> 1. A payment, distribution, loan, advance, deposit, reimbursement, or gift of money, real estate, or anything of value, including, but not limited to, food and beverages, entertainment, lodging, transportation, or honoraria;
> 2. A contract, promise or agreement to make an expenditure; or
> 3. The purchase, sale, or gift of services or any other thing of value.

In addition, Senate Bill 7, Section 48(2)(b)1. (to be codified as KRS 11A.216(2)(b)1.) states:

> If, during a calendar year, the employer or any executive agency lobbyist he engaged made expenditures to, or on behalf of a particular elected executive official, the secretary of a cabinet listed in KRS 12.250, a particular executive agency official, or a particular member of the staff of any of those officials, the employer or executive agency lobbyist also shall state the name of the official or employee on whose behalf the expenditures were made, the total

> amount of the expenditures made, a brief description of the expenditures made, and the approximate date the expenditures were made.

The provisions above make no exclusion for expenditures made on behalf of an official of a cabinet which the lobbyist or employer may not be trying to influence. If the employer or lobbyist is registered as an executive agency lobbyist, all expenditures made to or for the benefit of any state employee must be reported on the statement of expenditures required to be filed with the updated registration statement.

In response to whether the office of the Property Valuation Administrator (PVA) of a county is an "executive agency", the Commission refers to Advisory Opinion 92-10 (a copy of which is enclosed). This opinion concludes that PVAs and their deputies are considered executive branch employees. Senate Bill 7, Section 45(6) (to be codified as KRS 11A.201(6)) defines "executive agency" as:

> ...the office of an elected executive official, a cabinet listed in KRS 12.050, or any other state agency, department, board, or commission controlled or directed by an elected executive official or otherwise subject to his authority. "Executive agency" does not include any court or the General Assembly;

From the above, the Commission concludes that the office of Property Valuation Administrator is an executive agency.