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Executive Branch Ethics Commission
ADVISORY OPINION 13-04
September 9, 2013

RE: Does engaging in a new business relationship with an executive branch agency constitute “executive agency lobbying” under the Executive Branch Code of Ethics when the initial contact to express interest in such a relationship is initiated by the staff of the executive branch agency rather than by the staff of the private firm?

DECISION: Yes, under the circumstances described, if the private firm chooses to respond to the executive branch agency’s expressed interest in a new business relationship, executive agency lobbying activity is taking place.

This opinion is issued in response to your July 1, 2013, request for an advisory opinion from the Executive Branch Ethics Commission (the "Commission") concerning the application of KRS Chapter 11A, the Executive Branch Code of Ethics (the “Code of Ethics”), to a set of facts you provide. The request was reviewed at the September 9, 2013, meeting of the Commission and the following opinion is issued.

The facts you provide are as follows:

Your client, a firm that provides investment services (“Client”), has had a long-standing professional relationship with a public Kentucky pension entity (the “Kentucky entity”). The Kentucky Entity has indirectly invested in Client’s primary investment vehicle for several years through a fund of funds manager.

Recently, the Kentucky Entity staff approached Client, expressing the Kentucky Entity’s interest in a potential direct investment in the same investment vehicle provided by Client. The Kentucky Entity’s staff invited Client’s marketing representative and investment staff to travel to its headquarters in Kentucky to meet and discuss this potential new investment.

To be clear, no member of Client’s staff solicited the Kentucky Entity’s staff for this or any other new business. This contact was entirely the initiative of the Kentucky Entity’s staff, and based on the pre-existing investment relationship.

Client has asked you whether engaging in this new business relationship would constitute “executive agency lobbying” under the Code of Ethics, thereby requiring Client and/or its staff members to register as an “executive agency lobbyist” pursuant to the Code of Ethics.

You state that your opinion is that this activity does not constitute lobbying in that it does not involve “contacts made to promote, oppose, or otherwise influence the outcome of an executive agency decision,” since Client did not initiate contact or otherwise solicit the Kentucky Entity’s investment.

You ask whether, under these set of circumstances, Client and/or any of its staff should register as executive agency lobbyists should it pursue this new investment relationship.

The Code of Ethics contains the following relevant definitions at KRS 11A.201(7), (8), and (9):

(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;

(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. The term "executive agency lobbyist" shall also include placement agents and unregulated placement agents.

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

(9)(a) "Executive agency lobbying activity" means contacts made to promote, oppose, or otherwise influence the outcome of an executive agency decision by direct communication with an elected executive official, the secretary of any cabinet listed in KRS 12.250, any executive agency official, or a member of the staff of any one of the officials listed in this paragraph.

(b) "Executive agency lobbying activity" does not include any of the following:

1. The action of any person having a direct interest in executive agency decisions, if the person acting under Section 1 of the Kentucky Constitution, assembles together with other persons for their common good, petitions any person listed in paragraph (a) of this subsection for the redress of grievances or other proper purposes;
2. Contacts made for the sole purpose of gathering information contained in a public record; or
3. Appearances before public meetings of executive agencies;

To answer this question the Commission conducted a review of what may be considered somewhat historical Advisory Opinions. Nevertheless, the guidance contained therein remains

relevant to the question you posed. In Advisory Opinion 93-52, attached, the question of “who is an executive agency lobbyist” was addressed by the Commission in regard to whether persons or businesses who hold personal service contracts with the Kentucky Retirement Systems (“KRS”) are executive agency lobbyists and whether entities who contact KRS in order to be considered for providing investment or other services are considered executive agency lobbyists. These entities were attempting to influence KRS to contract or do business with them. In that advisory opinion, the Commission concluded that individuals and companies who hold personal service contracts with the state and are advising KRS under the terms of their contract are not engaged in executive agency lobbying activity and thus are not executive agency lobbyists. However, the advice given by the individual or company must be within the scope of the service they are to provide to KRS. If the individual or company is providing recommendations to KRS which are not within the scope of a contract, then the individual or company is considered an executive agency lobbyist. If a determination cannot easily be made as to whether the individual's or company's activities are lobbying, the Commission opined that the individual or company should register as an executive agency lobbyist.

In Advisory Opinion 93-73, also attached, the Commission addressed whether a securities firm or its brokers were executive agency lobbyists. The firm or its brokers were in frequent contact with several state agencies and responded to Requests for Proposals (“RFP”) for managing of competitive and negotiated bond issues. The firm asked if its employees who interacted with state agencies are considered executive agency lobbyists, and whether a broker for the firm who executes stock and bond transactions for an investment officer of a state agency must register as a lobbyist. In that opinion, the Commission reiterated from a previous opinion that responding to a RFP by itself is not executive agency lobbying. However, the Commission was of the opinion that the firm was likely to influence state decisions as to whether to issue bonds and as to what the fees paid to the firm and others would be therefor, and concluded that the firm and the firm's employees who contact the state on such matters were involved in lobbying and should register. The Commission did add, though, that a broker in the firm who only executed stock and bond transactions as ordered by a state investment officer was not required to register so long as the broker did not attempt to influence the state's investment decisions.

In Advisory Opinion 94-53, attached, the Commission concluded that an investment firm employee must register as an executive agency lobbyist. In this advisory opinion, a division of the firm was responsible for structuring, managing, and ultimately buying a negotiated tax-exempt or taxable municipal bond issue and in turn selling those bonds to both institutional and retail customers. The firm received a fee for this service which was usually paid out of the bond issue proceeds. As a representative of the firm, the employee met with employees of bond-issuing state agencies to attempt to secure business for the firm. The Commission's opinion therein was that the firm, in its contacts through its employee, was attempting to influence executive agency decisions involving state expenditures. Thus, the Commission believed the employee and other employees of the firm who similarly contacted state officials on such matters should register as executive agency lobbyists and that the firm should register as the employer of the lobbyists.

While recognizing the fact that the situation described in your request is one where the Client is being approached initially by the Kentucky Entity, it is the Commission's opinion, in light of the previously issued advisory opinions discussed above, that if the Client chooses to respond to the Kentucky Entity's expressed interest in a new business relationship, then the Client at that point would be attempting to secure business from the Kentucky Entity and should, therefore, register at that time as an employer of executive agency lobbyists while those of its employees who actively engage in the attempt to gain the additional investment business of the Kentucky Entity should register as executive agency lobbyists. It is not the initial approach by the Kentucky Entity staff that would constitute executive agency lobbying activity on the part of the Client, but rather any activity taken by the Client in response to the Kentucky Entity's initial approach, such as the Client's marketing representative and investment staff traveling to the Kentucky Entity's headquarters to meet and discuss the potential new investment. On the other hand, should the Client reject the Kentucky Entity's approach and make no attempt to pursue this new opportunity with the Kentucky Entity, then, due to the fact that the Client did not initiate the contact, there would be no requirement for the Client's staff to register as executive agency lobbyists or for the Client to register as an employer of executive agency lobbyists.

Sincerely,

EXECUTIVE BRANCH ETHICS COMMISSION

By Chair: W. David Denton

Attached: Advisory Opinion 93-52
 Advisory Opinion 93-73
 Advisory Opinion 94-53

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