



COMMONWEALTH OF KENTUCKY  
**EXECUTIVE BRANCH ETHICS COMMISSION**

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Executive Branch Ethics Commission  
**ADVISORY OPINION 19-10**  
September 23, 2019

**RE:**

- (1) Does participation of members or representatives of interest groups and their legal counsel in regulation development stakeholder meetings initiated by Kentucky executive branch agencies amount to “executive agency lobbying activity” as defined in KRS 11A.201, as amended by the Kentucky General Assembly on June 27, 2019?
- (2) Are entities that send representatives to attend meetings initiated by executive branch agencies required to register as employers of executive agency lobbyists and are their representatives required to file as executive agency lobbyists pursuant to KRS 11A.211?

**DECISION:**

- (1) No, as long as the meetings are initiated by the executive branch agency and are open to any interested stakeholders in the resultant executive agency decision.
- (2) No, as long as the contact is limited to attending the open meetings of the executive branch agency.

This opinion is issued in response to your September 17, 2019 request for an advisory opinion pursuant to KRS 11A.110(1) from the Executive Branch Ethics Commission (the Commission). The Commission reviewed your request at the September 23, 2019 meeting and issued the following advisory opinion.

You have requested that the Commission review the question of whether the participation of members/representatives of interest groups and their legal counsel in regulation development stakeholder meetings initiated by Kentucky executive branch agencies would be considered “executive agency lobbying activity” as defined in KRS 11A.201, which was amended by the Kentucky General Assembly on June 27, 2019. If so, would those entities be

required to register their representatives attending those meetings as executive agency lobbyists pursuant to KRS 11A.211.

You state the relevant facts as follows: recently, the Kentucky Department for Environmental Protection (KDEP) invited the Kentucky Resource Council (KRC) and the Utility Information Exchange of Kentucky (UIEK) and its electric utility company members to participate in a series of joint meetings to provide comments and input on draft regulations being developed by KDEP with respect to management and disposal of coal combustion wastes at Kentucky electric generating facilities. You indicate that these meetings initiated by the state agency are in the nature of open meetings to assist in regulatory development to help avoid future controversies by providing interested parties the opportunity to engage in informal discussions and information sharing. As part of this process, the participating stakeholder groups will be submitting written comments as solicited by KDEP concerning the draft regulations. These comments will be discussed during the open meetings. The written comments will be shared with the other participating stakeholders and would become part of the open record.

During a recent training held on August 21, 2019, concerning the implications of recent legislation amending the lobbyist registration process, the Commission staff indicated that participation by individuals in the open meetings of executive branch agencies initiating stakeholder participation in the process of drafting or revising regulations would not amount to executive agency lobbying activity because the contacts are initiated by the executive branch agency. Inversely, Commission staff stated that any contact with the executive branch agency that was initiated by the stakeholder in an attempt to influence the executive branch agency to introduce or amend regulations to benefit the financial situation of a client could be considered executive agency lobbying activity and would require registration pursuant to KRS 11A.211. You are requesting that the Commission determine through a formal advisory opinion that this reasoning is supported by the Commission.

KRS 11A.201 provides certain definitions related to executive agency lobbying, which were amended by Senate Bill 6 of the 2019 General Assembly Session that went into effect on June 27, 2019; amendments are indicated in italicized font below. KRS 11A.201 states in pertinent part as follows:

- (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. *This shall also include decisions made concerning:*
- (a) The parameters of requests for information and requests for proposals;*
  - (b) Drafting, adopting, or implementing a budget provision;*
  - (c) Administrative regulations or rules;*

- (d) *An executive order;*
- (e) *Legislation or amendments thereto; or*
- (f) *Other public policy decisions;*

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- (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 or her main purposes *regarding a substantial issue, including associations, coalitions, or public interest entities formed for the purpose of promoting or otherwise influencing executive agency decisions.* The term "executive agency lobbyist" shall also include placement agents and unregulated placement agents.

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- (9) (a) "Executive agency lobbying activity" means contacts made to promote, advocate, or oppose *the passage, modification, defeat, or executive approval or veto of any legislation* 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 whether in the classified service or not, 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;
  3. Appearances before public meetings of executive agencies;
  4. *News, editorial, and advertising statements published in newspapers, journals, or magazines, or broadcast over radio or television;*
  5. *The gathering and furnishing of information and news by bona fide reporters, correspondents, or news bureaus to news media described in subparagraph 4. of this paragraph;*
  6. *Publications primarily designed for, and distributed to, members of bona fide associations or charitable or fraternal nonprofit corporations;*
  7. *Professional services in preparing executive agency decisions, preparing arguments regarding executive agency decisions, or in advising clients and rendering opinions regarding proposed or*

*pending executive agency decisions, if the services are not otherwise connected to lobbying; or*

8. *Public comments submitted to an executive agency during the public comment period on administrative regulations or rules;*

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- (16) "Substantial issue" means contacts which are intended to influence a decision that involves one or more disbursements of state funds in an amount of at least five thousand dollars (\$5,000) per year, *or any budget provision, administrative regulation or rule, legislative matter, or other public policy matter that financially impacts the executive agency lobbyist or his or her employer;*

KRS 11A.211 requires the registration of executive agency lobbyists, their employers, and real parties in interest:

- (1) Each executive agency lobbyist, employer, and real party in interest shall file with the commission within ten (10) days following the engagement of an executive agency lobbyist, an initial registration statement showing all of the following:
- (a) The name, business address, and occupation of the executive agency lobbyist;
  - (b) The name and business address of the employer and of any real party in interest on whose behalf the executive agency lobbyist is acting, if it is different from the employer. However, if a trade association or other charitable or fraternal organization that is exempt from federal income taxation under Section 501(c) of the Internal Revenue Code is the employer, the statement need not list the names and addresses of every member of the association or organization, so long as the association or organization itself is listed;
  - (c) A brief description of the executive agency decision to which the engagement relates;
  - (d) The name of the executive agency or agencies to which the engagement relates;
  - (e) Certification by the employer and executive agency lobbyist that the information contained in the registration statement is complete and accurate;
  - (f) Compensation paid to each executive agency lobbyist by each employer; and
  - (g) Certification that the employer and agent have complied with KRS 11A.236.

- (2) In addition to the initial registration statement required by subsection (1) of this section, each executive agency lobbyist, employer, and real party in interest shall file with the commission, not later than the last day of July of each year, an updated registration statement that confirms the continuing existence of each engagement described in an initial registration statement, that lists the specific executive agency decisions the executive agency lobbyist sought to influence under the engagement during the period covered by the updated statement, and the compensation paid to each executive agency lobbyist by each employer, and with it any statement of expenditures required to be filed by KRS 11A.216 and any details of financial transaction required to be filed by KRS 11A.221.
- (3) If an executive agency lobbyist is engaged by more than one (1) employer, the executive agency lobbyist shall file a separate initial and updated registration statement for each engagement and list compensation paid to the executive agency lobbyist by each employer. If an employer engages more than one (1) executive agency lobbyist, the employer shall file only one (1) updated registration statement under subsection (2) of this section, which shall contain the information required by subsection (2) of this section regarding all executive agency lobbyists engaged by the employer.
- (4) (a) A change in any information required by subsection (1)(a), (b), (c), (d), or (2) of this section shall be reflected in the next updated registration statement filed under subsection (2) of this section.
- (b) Within thirty (30) days following the termination of an engagement, the executive agency lobbyist who was employed under the engagement shall file written notice of the termination with the commission.
- (5) Each employer of one (1) or more executive agency lobbyists, and each real party in interest, shall pay a registration fee of five hundred dollars (\$500) upon the filing of an updated registration statement. All fees collected by the commission under the provisions of this subsection shall be deposited in the State Treasury in a trust and agency fund account to the credit of the commission. These agency funds shall be used to supplement general fund appropriations for the operations of the commission and shall not lapse. No part of the trust and agency fund account shall revert to the general funds of this state.

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The interests of executive branch agencies in having the stakeholders participate in the preliminary process of drafting or revising administrative regulations is to ensure that regulations are developed that can reasonably be complied with by the stakeholders and that the regulations do not create an unforeseen burden on the stakeholders. Furthermore, stakeholder participation early on in the process may serve to mitigate controversy prior to the executive branch agency's issuance of the regulations so that the public comment period



operates smoothly and increases the likelihood of ultimate success in passage of the regulations before the Administrative Regulation Review Committee and subject matter committees of the legislature. The Commission itself has engaged in this process prior to issuing administrative regulations that may affect other state agencies and executive agency lobbyists. If the Commission were to determine that stakeholders who are invited to agency-initiated meetings have to register as executive agency lobbyists, then this would put a chilling effect on the cooperation of executive branch agencies and their stakeholders. This would be antithetical to the ultimate goal of government and public cooperation in implementing good government that benefits the Commonwealth.

As such, to answer your initial question of whether participation of members or representatives of interest groups and their legal counsel in regulation development stakeholder meetings initiated by Kentucky executive branch agencies amounts to “executive agency lobbying activity” as defined in KRS 11A.201, as amended by the Kentucky General Assembly on June 27, 2019, it would appear that KRS 11A.201(9)(b)(3) would not require registration of individuals who are merely participating in public meetings of an executive branch agency. Moreover, to further support this point, the initiating of the contacts and the written comments is from the executive branch agency and not the stakeholder or its representative. If however, the stakeholders were to pursue further meetings or inquiries with the executive branch agency in efforts to “promote, advocate, or oppose the passage, modification, defeat, or executive approval or veto of any legislation or otherwise influence the outcome of an executive agency decision by direct communication” with the executive branch agency as contemplated by KRS 11A.201(9)(a), and the other factors are present as indicated by KRS 11A.201(8), (9), and (16), then registration would be required.

As such, as long as the meetings are initiated by the executive branch agency and are open to any interested stakeholders in the resultant executive agency decision and as long as the contacts and written comments are limited to attending the open meetings of the executive branch agency, then registration is not required.

**EXECUTIVE BRANCH ETHICS COMMISSION**



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By Chair: Christopher L. Thacker