

Lobbying Law and Government Ethics

Lobbying Considerations During the COVID-19 Pandemic



By: [Seth H. Agata](#) and [Laura P. MacDonald](#)

The COVID-19 pandemic—and the historic \$2 trillion Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) in particular—has focused a spotlight on lobbying. For countless individual businesses and certain sectors of the economy, interacting with federal, state and local government has never been so vital. As they more frequently interact with the various levels of government to ensure that their immediate and long-term needs are addressed, and that they are able to participate in grant and other stimulus-related programs to the greatest extent possible, the federal government and the states and localities continue to actively regulate lobbying. To avoid pitfalls and traps for the unwary, it is a critical time to examine the state of the complex and evolving web of lobbying laws and regulations across the United States.

Even before the CARES Act was enacted, there had been a dramatic uptick in federal lobbying. An *Associated Press* analysis of federal lobbying filings revealed that the number of clients retaining lobbyists in February, March and early April 2020 shot up “dramatically” and, of the more than 700 registrations filed since January, more than 10 percent specifically mentioned COVID-19 or a global health crisis.^[1] Indeed, one observer found that three-quarters of the new lobbying registrations filed in March cited COVID-19 and were filed by companies that were either new to lobbying altogether or had not lobbied in recent years.^[2]

Regulation and enforcement of federal lobbying laws and regulations is largely continuing as usual, and there are no carve-outs or exceptions for COVID-19 related lobbying.^[3] For instance, there has been no relaxation or suspension of the requirements or applicable thresholds for registering as a lobbyist under the federal Lobbying Disclosure Act, 2 U.S.C. section 1601, *et seq.* (LDA). Registration within 45 days of making a first-lobbying contact or being retained as a lobbyist (whichever is earlier) is still mandated, if a lobbyist spends 20 percent or more of her time on behalf of a client engaging in “lobbying activities,” has more than one “contact” with a “covered official” in support of such activities, and has a total income from the client that exceeds \$3,000 for a quarterly period (or \$13,000 for an in-house lobbyist).

And, although social distancing may cramp a lobbyist’s style, it does not prevent registerable lobbying—for example, by means of a well-placed phone call, email or other electronic communication. The LDA continues to define “lobbying activities,” in relevant part, as “lobbying contacts and efforts in support of such contacts.” In turn, a “lobbying contact” means *any oral or written communication (including an electronic communication)* to a covered executive or legislative branch official that is made on behalf of a client with regard to formulating, modifying or adopting a federal law, regulation, program or policy, as well as the administration or execution of a federal program or policy (including the negotiation, award, or administration of a federal contract, grant, loan, permit or license). Given the challenges presented by social distancing and disruption to normal communication opportunities and channels, lobbyists may perceive an increased need to rely on individuals who recently departed government to facilitate government contacts (*e.g.*, to get their call answered or email responded to) which requires great attention to the revolving-door limits imposed on former government officials under federal law and regulations (and also under certain state laws, which vary).

Of course, not all contacts or interactions with the government are registerable lobbying activities. Those exceptions are particularly noteworthy in the current context. For example, simple administrative-type or routine requests such as inquiring regarding the status of an application related to a grant or requesting routine, publicly-available information about government activity, provided it is not otherwise part of lobbying activity, do not constitute lobbying. In addition, responding to written information requests from the government, and providing such limited requested information (nothing more), does not necessarily constitute lobbying. Similarly, providing information required by statute or regulation or participating in inherently public processes (such as commenting on proposed regulations or participating in a public hearing) are exempted from LDA coverage. Whether such communications constitute lobbying depends on a factual analysis of the parties to, and content and context of, the contact.

At the state level, lobbying regulation has also continued during the pandemic. On the procedural front, some states have loosened some technical, registration and filing requirements and deadlines. In California, for example, when paper filings are required, the Fair Political Practices Commission (FPPC) has “encouraged [such filers] to make use of digital and electronic options for filing reports to ensure timely filing[.]” Moreover, if a person required to make a lobbying filing “makes best efforts to comply with the Political Reform Act’s lobbying registration and reporting rules but is unable to do so due to the COVID-19 pandemic, the FPPC will consider this a strong mitigating factor in determining whether an enforcement action against the person is appropriate.”^[4] Similarly, in New York, the Joint Commission on Public Ethics has extended filing deadlines and temporarily suspended random audits.^[5]

Substantively, the various states’ respective definitions of “lobbying” have not changed. Interestingly, in his March 18th Executive Order, New York Governor Andrew Cuomo temporarily suspended certain ethics-related laws that could ostensibly hinder voluntary responses to the state’s need for aid. For example, he lifted the ban on gifts to government agencies to facilitate donations in kind and relaxed some revolving-door restrictions for volunteers who assist in the state’s response to the pandemic. The City of Chicago Board of Ethics has similarly relaxed gifts bans to agencies and public officials to permit them to accept aid in responding to the crisis in the absence of a quid pro quo.^[6]

Even if most pandemic legislative activity is occurring at the federal level, state and local lobbying requirements cannot be overlooked. A number of stimulus and recovery programs may be administered at the state level. For example, the CARES Act authorizes funds to be distributed at the state level through the Byrne Memorial / Justice Assistance Grant program, the National Endowment for the Arts (40 percent of aid to be distributed at the state level), and the Community Development Block Grant Program. Depending on the applicable jurisdiction and the methods employed, obtaining such funds may involve registerable lobbying. In New York, for example, registerable lobbying may take place where an entity tries to influence the inclusion of money in a state appropriation—even an appropriation of federal funds.^[7] However, merely applying for money (and nothing more) that has been appropriated or made available—in other words, simply submitting a grant application—may not be lobbying depending on the circumstances.^[8]

Serious consequences can flow from engaging in unregistered lobbying, ranging from civil fines to criminal penalties. Equally important for many, severe reputational damage can result merely by the filing of public charges. The question of whether any entity is engaging in reportable lobbying is heavily dependent on the facts and law—and requires detailed analysis.

Lawyers in our [Lobbying Law and Government Ethics Practice](#) have in-depth experience in the field of lobbying compliance and public ethics at all levels of government and are available to assist and guide clients through this checkerboard of regulation.

Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.

For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.

[Click here to visit our COVID-19 / Coronavirus Resource Center](#)

[1] <https://www.usnews.com/news/business/articles/2020-04-07/coronavirus-pandemic-breeds-washington-lobbying-boom>; <https://www.nytimes.com/2020/03/28/us/politics/coronavirus-money-lobbyists.html>

[2] <https://www.npr.org/sections/coronavirus-live-updates/2020/04/13/833672904/lobbyists-descend-on-washington-seeking-coronavirus-relief-money>

[3] In fact, the Government Accountability Office released its regular review of federal lobbying on March 31, 2020. “2019 Lobbying Disclosure: Observations on Lobbyists’ Compliance with Disclosure Requirements.” <https://www.gao.gov/assets/710/705614.pdf>

[4] <http://www.fppc.ca.gov/media/press-releases/2020-news-releases/press-release-lobbying-reports.html>

[5] Executive Order 202.6 (Governor Andrew M. Cuomo, March 18, 2020); <https://jcope.ny.gov/>

[6] https://www.chicago.gov/content/dam/city/depts/ethics/general/AO_GiftsTravel/202012.Q.pdf

[7] See *Anderson v. Regan*, 53 N.Y.2d 356 (1981) (A divided New York Court of Appeals opined that once money—even federal money—hit the New York State Treasury, such funds could only be paid out through legislatively approved appropriation).

[8] New York State Temporary Commission on Lobbying, Advisory Op. No. 48 (02-3).

Contact Us



Seth H. Agata

sagata@jenner.com | [Download V-Card](#)



Laura P. MacDonald

lmacdonald@jenner.com | [Download V-Card](#)

Meet Our Team