



TEXAS ETHICS COMMISSION



ETHICS ADVISORY OPINION NO. 98

December 10, 1992

Application of the lobby law to a broker's activities in connection with obtaining a loan guarantee through a state agency. (AOR-83)

The Texas Ethics Commission has been asked to consider the application of the lobby law to a broker's activities in connection with obtaining a loan guarantee through a state agency. The request raises questions about whether the broker's activities are the type of activities that require lobby registration and reporting. It also raises a question about the application of the prohibition on contingent fees for lobbying. Gov't Code § 305.022.

The request letter describes the following situation:

An agricultural business ("Client Business") desires to hire Broker, a licensed real estate broker. Client Business wishes to rearrange its affairs, increase working capital, and expand its operations. Broker will be responsible for obtaining a loan from a willing bank or other major lender. Government loan guarantees will be sought for the loan. In addition to these loan broker activities, Broker will represent Client Business in traditional real estate transactions.

It is contemplated that Broker would assist in the preparation of one or more applications to be submitted to the Texas Department of Commerce for various state and federal loan guarantee programs. Broker on behalf of Client Business would also coordinate with the local city and county in their efforts to obtain a Community Development Block Grant (Texas Capital Fund) administered by TDOC. It is likely that Broker would have direct contact with TDOC personnel regarding preparation, submission, and negotiation of applications for both the Community Development Block Grants and the various loan guarantee programs.

The first question raised is whether the activities described would require the broker to register as a lobbyist. A person is required to register as a lobbyist if the person receives compensation or reimbursement of more than \$200 in a calendar quarter from another person to communicate directly with a member of the legislative or executive branch to influence legislation or administrative action." Gov't Code § 305.003(a)(2).¹ The granting or denying a loan guarantee by the Department of Commerce would be administrative action. *See id.* § 305.002(1), (4) (defining, respectively, "administrative action" and "member of the executive branch," which would include an officer or employee of the Department of Commerce). Whether the broker's receipt of compensation for such activity would subject him to the registration and reporting requirements of the lobby statute depends on whether his activities are within one or more of the exceptions to required registration and reporting.

By rule, the Ethics Commission has set out certain activities that, for purposes of the compensation threshold, do not constitute activities to influence legislation or administrative action. Tex. Ethics Comm'n, 17 Tex. Reg. 6893-94 (1992) (to be codified at title 1, sections 40.5 and 40.7, of the Texas Administrative Code). In examining these exceptions, though, it is important to bear in mind that the broker is excepted from required registration and reporting under the lobby law only if *all* of his communications with officers and employees of the Department of Commerce in connection with his efforts to obtain a loan guarantee are covered by one or more of these exceptions.

The three exceptions that may be applicable in the situation described are subsections (a)(1), (a)(2), and (a)(8) of section 40.7 of the Ethics Commission rules. Section 40.7(a)(1) excepts

the mere preparation or submission of an application or other written document providing information required by law, including statute, rule[,] regulation, order, subpoena, or responses to documents prepared by a state agency.

Tex. Ethics Comm'n, 17 Tex. Reg. 6893 (1992). In other words, the mere submission of an application for a loan guarantee would not, for purposes of the compensation threshold, be an activity to influence administrative action. *See generally* Gov't Code § 305.002(2) (defining "communicates directly with" to mean "contact in person or by telephone, telegraph, or letter").

Section 40.7(a)(2) excepts

direct communication solely for the purpose of obtaining information if no attempt is made to influence the action of a member of the legislative or executive branch--examples include an inquiry as to when a particular matter has been set for hearing or the location of the hearing or as to what is an agency's official interpretation of a statutory provision.

Tex. Ethics Comm'n, 17 Tex. Reg. 6893 (1992). Presumably at least some of the broker's communications would be within this exception.

Section 40.7(a)(8) excepts

direct communication for the purpose of compliance with existing laws, administrative rules, policies, and procedures, including communication to show qualification for an exception of general applicability available under existing administrative rules, policies and procedures.

Id. *See generally* [Ethics Advisory Opinions Nos. 16, 15, 14](#) (1992) (interpreting an earlier version of this rule). Again, some of the broker's communications may be within this exception.

If the broker's communications to officers or employees of the Department of Commerce are intended to influence administrative action and if the communications are not within an exception, the broker is required to register as a lobbyist if he receives more than \$200 in a calendar quarter for lobbying activities.

The request also raises a question under the provision of the Government Code that prohibits contingent fees for lobbying:

(a) A person may not retain or employ another person to influence legislation or administrative action for compensation that is totally or partially contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.

(b) A person may not accept any employment or render any service to influence legislation or administrative action for compensation contingent on the passage or defeat of any legislation, the governor's approval or veto of any legislation, or the outcome of any administrative action.

Gov't Code § 305.022(a).² Under that section, a business that retains or employs a broker to communicate with officers or employees of the Department of Commerce to influence department action may not make the broker's payment contingent on the outcome of action by the department. We think this prohibition would also apply if the broker's payment was made contingent on the successful completion of a larger transaction if one piece of the transaction is action by the Department of Commerce.

SUMMARY

The granting or denying a loan guarantee by the Department of Commerce would be "administrative action" for purposes of chapter 305 of the Government Code. A business that retains or employs a broker to communicate with officers or employees of the Department of Commerce to influence department action may not make the broker's payment contingent on the outcome of action by the department. This prohibition would also apply in a case in which the broker's payment is made contingent on the successful completion of a larger transaction if a piece of the transaction is specific action by the Department of Commerce.

¹ A person is also required to register if the person makes a total expenditure of more than \$200 in a calendar quarter, "not including the person's own travel, food, or lodging expenses or the person's own membership dues, on activities described in Section 305.006(b) to communicate directly with one or more members of the legislative or executive branch to influence legislation or administrative action." Gov't Code § 305.003(a)(1). Because the request letter does not describe any expenditures, we do not consider the application of the expenditure threshold in this opinion.

² Note that the prohibition on contingency fees could apply to activities that would not require lobby registration. For example, a person who engaged in no other lobby activity would be prohibited from accepting a \$100 contingency fee for communications to influence administrative action even though the \$100 fee would not by itself require lobby registration.