COMMUNICATING WITH DECISION MAKERS

A Lobbying Primer for Scientists

ABSTRACT

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What is the definition of lobbying both at the federal and state level?

Michigan's definitions of "lobbying" and "lobbyist."

"Lobbying" means communicating directly with an official in the executive branch of state government or an official in the legislative branch of state government for the purpose of influencing legislative or administrative action.[i]

Lobbying does not include the providing of technical information when appearing before an officially convened legislative committee or executive department hearing panel. As used in this subsection, "technical information" means empirically verifiable data provided by a person recognized as an expert in the subject area to which the information provided is related.[ii]

"Lobbyist" means any of the following: (a) A person whose expenditures for lobbying are more than $1,000.00 in value in any 12-month period. (b) A person whose expenditures for lobbying are more than $250.00 in value in any 12-month period, if the amount is expended on lobbying a single public official. (c) For the purpose of subdivisions (a) and (b), groups of 25 or more people shall not have their personal expenditures for food, travel, and beverage included, providing those expenditures are not reimbursed by a lobbyist or lobbyist agent. (d) The state or a political subdivision which contracts for a lobbyist agent.[iii]

Lobbyist or lobbyist agent does not include: (a) A publisher, owner, or working member of the press, radio, or television while disseminating news or editorial comment to the general public in the ordinary course of business. (b) All elected or appointed public officials of state or local government who are acting in the course or scope of the office for no compensation, other than that provided by law for the office. (c) Employees of public or private colleges, community colleges, junior colleges or universities. (d) Employees of townships, villages, cities, counties or school boards. (e) Employees of state executive departments. (f) Employees of the judicial branch of government. (g) A member of a lobbyist, if the lobbyist is a membership

organization or association, and if the member of a lobbyist does not separately qualify as a lobbyist under subsection (4).[iv]

Federal definitions of "lobbying" and "lobbying contracts"

The federal definitions are different from the state's definition of lobbying because the federal statute distinguishes lobbying activities from lobbying contact. Lobbying activities under federal statute means "lobbying contacts and efforts in support of such contacts, including preparation and planning activities, research and other background work that is intended, at the time it is performed, for use in contacts, and coordination with the lobbying activities of others."[v] The statute then goes on to define lobbying contact as

> [A]ny oral or written communication (including an electronic communication) to a covered executive branch official or a covered legislative branch official that is made on behalf of a client with regard to—
>
> (i) the formulation, modification, or adoption of Federal legislation (including legislative proposals);
>
> (ii) the formulation, modification, or adoption of a Federal rule, regulation, Executive order, or any other program, policy, or position of the United States Government;
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> (iii) 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); or
>
> (iv) the nomination or confirmation of a person for a position subject to confirmation by the Senate.[vi]

There are also several exceptions to the definition that are important to note. Among others, lobby contact does not include communication that is:

i. made in a speech, article, publication or other material that is distributed and made available to the public, or through radio, television, cable television, or other medium of mass communication;

ii. a request for a meeting, a request for the status of an action, or any other similar administrative request, if the request does not include an attempt to influence a covered executive branch official or a covered legislative branch official;

iii. information provided in writing in response to an oral or written request by a covered executive branch official or a covered legislative branch official for specific information;

iv. made in response to a notice in the Federal Register, Commerce Business Daily, or other similar publication soliciting communications from the public and directed to the agency official specifically designated in the notice to receive such communications; or

v. a written comment filed in the course of a public proceeding or any other communication that is made on the record in a public proceeding; a petition for agency action made in writing and required to be a matter of public record pursuant to established agency procedures.[vii]

Are there specific rules for scientists who are funded (at least in part) by federal grants?[viii]

§200.113 Mandatory disclosures.

The non-Federal entity or applicant for a Federal award must disclose, in a timely manner, in writing to the Federal awarding agency or pass-through entity all violations of Federal criminal law involving fraud, bribery, or gratuity violations potentially affecting the Federal award. Non-Federal entities that have received a Federal award including the term and condition outlined in Appendix XII—Award Term and Condition for Recipient Integrity and Performance Matters are required to report certain civil, criminal, or administrative

proceedings to SAM. Failure to make required disclosures can result in any of the remedies described in §200.338 Remedies for noncompliance, including suspension or debarment.[ix]

§200.508 Auditee responsibilities.

The auditee must:

(a) Procure or otherwise arrange for the audit required by this part in accordance with §200.509 Auditor selection, and ensure it is properly performed and submitted when due in accordance with §200.512 Report submission.

(b) Prepare appropriate financial statements, including the schedule of expenditures of Federal awards in accordance with §200.510 Financial statements.

(c) Promptly follow up and take corrective action on audit findings, including preparation of a summary schedule of prior audit findings and a corrective action plan in accordance with §200.511 Audit findings follow-up, paragraph (b) and §200.511 Audit findings follow-up, paragraph (c), respectively.

(d) Provide the auditor with access to personnel, accounts, books, records, supporting documentation, and other information as needed for the auditor to perform the audit required by this part.[x]

§910.132 Research misconduct.

(a) A recipient is responsible for maintaining the integrity of research of any kind under an award including the prevention, detection, and remediation of research misconduct, and the conduct of inquiries, investigations, and adjudication of allegations of research misconduct in accordance with the requirements of this section.

(b) For purposes of this section, the following definitions are applicable:

“Adjudication” means a formal review of a record of investigation of alleged research misconduct to determine whether and what corrective actions and sanctions should be taken.

“Fabrication” means making up data or results and recording or reporting them.

“Falsification” means manipulating research materials, equipment, or processes, or changing or omitting data or results such that the research is not accurately represented in the research record.

“Finding of Research Misconduct” means a determination, based on a preponderance of the evidence, that research misconduct has occurred. Such a finding requires a conclusion that there has been a significant departure from accepted practices of the relevant research community and that it be knowingly, intentionally, or recklessly committed.

“Inquiry” means information gathering and initial fact-finding to determine whether an allegation or apparent instance of misconduct warrants an investigation.

“Investigation” means the formal examination and evaluation of the relevant facts.

“Plagiarism” means the appropriation of another person's ideas, processes, results, or words without giving appropriate credit.

“Research misconduct” means fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results, but does not include honest error or differences of opinion.

“Research record” means the record of all data or results that embody the facts resulting from scientists' inquiries, including, but not limited to, research proposals, laboratory records, both physical and electronic, progress reports, abstracts, theses, oral presentations, internal reports, and journal articles.

(c) Unless otherwise instructed by the Contracting Officer, the recipient must conduct an initial inquiry into any allegation of research misconduct. If the recipient determines that there is sufficient evidence to proceed to an investigation, it must notify the Contracting Officer and, unless otherwise instructed, the recipient must:

(1) Conduct an investigation to develop a complete factual record and an examination of such record leading to either a finding of research misconduct and an identification of appropriate remedies or a determination that no further action is warranted;

(2) Inform the Contracting Officer if an initial inquiry supports an investigation and, if requested by the Contracting Officer thereafter, keep the Contracting Officer informed of the results of the investigation and any subsequent adjudication. When an investigation is complete, the recipient will forward to the Contracting Officer a copy of the evidentiary record, the investigative report, any recommendations made to

the recipient's adjudicating official, and the adjudicating official's decision and notification of any corrective action taken or planned, and the subject's written response to the recommendations (if any).

(3) If the investigation leads to a finding of research misconduct, conduct an adjudication by a responsible official who was not involved in the inquiry or investigation and is separated organizationally from the element which conducted the investigation. The adjudication must include a review of the investigative record and, as warranted, a determination of appropriate corrective actions and sanctions.

(d) DOE may elect to act in lieu of the recipient in conducting an inquiry or investigation into an allegation of research misconduct if the Contracting Officer finds that:

(1) The research organization is not prepared to handle the allegation in a manner consistent with this section;

(2) The allegation involves an entity of sufficiently small size that it cannot reasonably conduct the inquiry;

(3) DOE involvement is necessary to ensure the public health, safety, and security, or to prevent harm to the public interest; or,

(4) The allegation involves possible criminal misconduct.

(e) DOE reserves the right to pursue such remedies and other actions as it deems appropriate, consistent with the terms and conditions of the award instrument and applicable laws and regulations. However, the recipient's good faith administration of this section and the effectiveness of its remedial actions and sanctions shall be positive considerations and shall be taken into account as mitigating factors in assessing the need for such actions. If DOE pursues any such action, it will inform the subject of the action of the outcome and any applicable appeal procedures.

(f) In conducting the activities in paragraph (c) of this section, the recipient and DOE, if it elects to conduct the inquiry or investigation, shall adhere to the following guidelines:

(1) Safeguards for information and subjects of allegations. The recipient shall provide safeguards to ensure that individuals may bring allegations of research misconduct made in good faith to the attention of the recipient without suffering retribution. Safeguards include: Protection against retaliation; fair and objective

procedures for examining and resolving allegations; and diligence in protecting positions and reputations. The recipient shall also provide the subjects of allegations confidence that their rights are protected and that the mere filing of an allegation of research misconduct will not result in an adverse action. Safeguards include timely written notice regarding substantive allegations against them, a description of the allegation and reasonable access to any evidence submitted to support the allegation or developed in response to an allegation and notice of any findings of research misconduct.

(2) Objectivity and expertise. The recipient shall select individual(s) to inquire, investigate, and adjudicate allegations of research misconduct who have appropriate expertise and have no unresolved conflict of interest. The individual(s) who conducts an adjudication must not be the same individual(s) who conducted the inquiry or investigation, and must be separate organizationally from the element that conducted the inquiry or investigation.

(3) Timeliness. The recipient shall coordinate, inquire, investigate and adjudicate allegations of research misconduct promptly, but thoroughly. Generally, an investigation should be completed within 120 days of initiation, and adjudication should be complete within 60 days of receipt of the record of investigation.

(4) Confidentiality. To the extent possible, consistent with fair and thorough processing of allegations of research misconduct and applicable law and regulation, knowledge about the identity of the subjects of allegations and informants should be limited to those with a need to know.

(5) Remediation and sanction. If the recipient finds that research misconduct has occurred, it shall assess the seriousness of the misconduct and its impact on the research completed or in process. The recipient must take all necessary corrective actions. Such action may include but are not limited to, correcting the research record and as appropriate imposing restrictions, controls, or other parameters on research in process or to be conducted in the future. The recipient must coordinate remedial actions with the Contracting Officer. The recipient must also consider whether personnel sanctions are appropriate. Any such sanction must be consistent with any applicable personnel laws, policies, and procedures, and must take into account the

seriousness of the misconduct and its impact, whether it was done knowingly or intentionally, and whether it was an isolated event or pattern of conduct.

(g) By executing this agreement, the recipient provides its assurance that it has established an administrative process for performing an inquiry, mediating if possible, investigating, and reporting allegations of research misconduct; and that it will comply with its own administrative process and the requirements and definitions of 10 CFR part 733 for performing an inquiry, possible mediation, investigation and reporting of allegations of research misconduct.

(h) The recipient must insert or have inserted the substance of this section, including paragraph (g), in subawards at all tiers that involve research.[xi]

Summary for research misconduct

An individual has a duty to maintain the integrity of the research conducted. If there is an allegation of misconduct, the recipient of the award must conduct an initial investigation to determine if there is enough evidence to warrant an investigation. If there is, the recipient must report this information to the Contract Officer and proceed with a formal investigation. If misconduct is discovered, an uninterested official must adjudicate the issue.

§605.19 Continuation funding and reporting requirements.

(a) A recipient shall periodically report on the project's progress in meeting the project objectives of the award. The following types of reports shall be used:

(1) *Progress reports.* After issuance of an initial award and if future support is recommended, recipients must submit a satisfactory progress report in order to receive continuation awards for the remainder of the project period. The original and two copies of the required report (generally not to exceed two pages per project or task) must be submitted to the SC program manager 90 days prior to the anticipated continuation funding date and contain the following information: on the first page, provide the project title, principal investigator/project director name, period of time report covers, name and address of recipient organization, DOE award number, the amount of unexpended funds, if any, that are anticipated to be left at the end of the

current budget period, and if the amount exceeds 10 percent of the funds available for the budget period, provide information as to why the excess funds are anticipated to be available and how they will be used in the next budget period. Report should state whether aims have changed from original application and if they have, provided revised aims. Include results of work to date. Emphasize findings and their significance to the field, and any real or anticipated problems. A completed budget page must be submitted with the continuation progress report when a change to anticipated future costs will exceed 25 percent of the original recommended future budget.

(2) *Notice of Energy R&D Project.* A Notice of Energy R&D Project, DOE Form 1430.22, which summarizes the purpose and scope of the project, must be submitted in accordance with the Distribution and Schedule of Documents set forth at the end of this section. Copies of the form may be obtained from a DOE Contracting Office.

(3) *Special reports.* The recipient shall report the following events to DOE as soon after they occur as possible:

(i) Problems, delays, or adverse conditions which will materially affect the ability to attain project objectives, or prevent the meeting of time schedules and goals. The report must describe the remedial action the recipient has taken or plans to take and any action DOE should take to alleviate the problems.

(ii) Favorable developments or events which enable meeting time schedules and goals sooner or at less cost than anticipated or producing more beneficial results than originally projected.

(4) *Final report.* A final report summarizing the entire investigation must be submitted by the recipient within 90 days after the final project period ends or the award is terminated. Satisfactory completion of an award will be contingent upon the receipt of this report. The final report shall follow the same outline as a progress report. Manuscripts prepared for publication should be appended.

(5) *Financial status report (FSR) (OMB No. 0348-0039).* The FSR is required within 90 days after completion of each budget period; for budget periods exceeding 12 months, an FSR is also required within 90 days after this first 12 months unless waived by the Contracting Officer.

Summary of continuation funding and reporting requirements.

Grant recipients are required to provide the grant-awarding entity progress reports on the research they are conducting. These progress reports determine whether the recipient will continue to receive funding, and this determination is based off of "satisfactory progress." The reports must include: any changes in the aim of the research, real results to date, and anticipated or real problems that might/have occurred, any findings that are significant to the field, and a budget page if the anticipated future costs will exceed 25 percent of the original recommended future budget.

There are also "special reports" that scientists must provide immediately to the grant-awarding entity. These include: notice of any major issues or findings that will materially affect anticipated timelines (for better or for worse), a final report of the entire investigation, and a financial status report.

§605.20 Dissemination of results.

(a) Recipients are encouraged to disseminate project results promptly. DOE reserves the right to utilize, and have others utilize, to the extent it deems appropriate, the reports resulting from awards.

(b) DOE may waive progress reporting requirements set forth in §605.19, if the recipient submits to DOE a copy of its own report which is published or accepted for publication in a recognized scientific or technical journal and which satisfies the information requirements of the program.

(c) Recipients are urged to publish results through normal publication channels in accordance with the applicable provisions of 2 CFR part 200 as amended by 2 CFR part 910.

(d) The article shall include an acknowledgment that the project was supported, in whole or in part, by a DOE award, and specify the award number, but state that such support does not constitute an endorsement by DOE of the views expressed in the article.[xii]

§ 182.300 What must I do to comply with this part if I am an individual recipient?

As a condition of receiving a Federal agency award, if you are an individual recipient, you must agree that—

(a) You will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in conducting any activity related to the award; and

(b) If you are convicted of a criminal drug offense resulting from a violation occurring during the conduct of any award activity, you will report the conviction:

(1) In writing.

(2) Within 10 calendar days of the conviction.

(3) To the Federal agency awarding official or other designee for each award that you currently have, unless the agency designates a central point for the receipt of the notices, either in the award document or its regulation implementing the guidance in this part. When notice is made to a central point, it must include the identification number(s) of each affected award.[xiii]

§ 8102. Drug-free workplace requirements for Federal contractors

Individuals.--A Federal agency shall not make a contract with an individual unless the individual agrees not to engage in the unlawful manufacture, distribution, dispensation, possession, or use of a controlled substance in the performance of the contract.[xiv]

Summary for individual rules for scientists.

There are many rules for scientists who are funded by federal grants, and most of them are concerned with how the scientists can spend the grant money. For example, in regards to lobbying costs, scientists are not allowed to spend grant money on influencing activities in an attempt to find more funding or gain additional helpful resources.[xv]

There are also reporting rules, but specifics depend on which agency has awarded the grant. However, each agency has some form of reporting requirement where the scientists must send progress and cost reports to ensure they are using the grant money appropriately and efficiently. These reports tie in to the audit requirements that scientists are also bound by.

The last category of rules applies to the scientists' conduct and final work product. For example, there are rules on research misconduct stating that "[a] recipient is responsible for maintaining the integrity

of research of any kind under an award from DOE including the prevention, detection, and remediation of research misconduct, and the conduct of inquiries, investigations, and adjudication of allegations of research misconduct in accordance with the requirements of this section."[xvi]

What types of non-lobbying activities can federally funded scientists participate in?

> The following activities are excepted from the coverage of paragraph (c)(1) of this section:
> (i) Technical and factual presentations on topics directly related to the performance of a grant, contract, or other agreement (through hearing testimony, statements, or letters to the Congress or a state legislature, or subdivision, member, or cognizant staff member thereof), in response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing) made by the non-Federal entity's member of congress, legislative body or a subdivision, or a cognizant staff member thereof, provided such information is readily obtainable and can be readily put in deliverable form, and further provided that costs under this section for travel, lodging or meals are unallowable unless incurred to offer testimony at a regularly scheduled Congressional hearing pursuant to a written request for such presentation made by the Chairman or Ranking Minority Member of the Committee or Subcommittee conducting such hearings;
> (ii) Any lobbying made unallowable by paragraph (c)(1)(iii) of this section to influence state legislation in order to directly reduce the cost, or to avoid material impairment of the non-Federal entity's authority to perform the grant, contract, or other agreement; or
> (iii) Any activity specifically authorized by statute to be undertaken with funds from the Federal award.

(iv) Any activity excepted from the definitions of ‘‘lobbying’’ or ‘‘influencing legislation’’ by the Internal Revenue Code provisions that require nonprofit organizations to limit their participation in direct and ‘‘grass roots’’ lobbying activities in order to retain their charitable deduction status and avoid punitive excise taxes, I.R.C. §§501(c)(3), 501(h), 4911(a), including:

(A) Nonpartisan analysis, study, or research reports;

(B) Examinations and discussions of broad social, economic, and similar problems; and

(C) Information provided upon request by a legislator for technical advice and assistance, as defined by I.R.C. §4911(d)(2) and 26 CFR 56.4911–2(c)(1)– (c)(3).

(v) When a non-Federal entity seeks reimbursement for indirect (F&A) costs, total lobbying costs must be separately identified in the indirect (F&A) cost rate proposal, and thereafter treated as other unallowable activity costs in accordance with the procedures of §200.413 Direct costs.

(vi) The non-Federal entity must submit as part of its annual indirect (F&A) cost rate proposal a certification that the requirements and standards of this section have been complied with. (See also §200.415 Required certifications.)

(vii)

(A) Time logs, calendars, or similar records are not required to be created for purposes of complying with the record keeping requirements in §200.302 Financial management with respect to lobbying costs during any particular calendar month when:

(1) The employee engages in lobbying (as defined in paragraphs (c)(1) and (c)(2) of this section) 25 percent or less of the employee’s compensated hours of employment during that calendar month; and

(2) Within the preceding five-year period, the non-Federal entity has not materially misstated allowable or unallowable costs of any nature, including legislative lobbying costs.

(B) When conditions in paragraph (c)(2)(vii)(A)(1) and (2) of this section are met, non-Federal entities are not required to establish records to support the allowability of claimed costs in addition to records already required or maintained. Also, when conditions in paragraphs (c)(2)(vii)(A)(1) and (2) of this section are met, the absence of time logs, calendars, or similar records will not serve as a basis for disallowing costs by contesting estimates of lobbying time spent by employees during a calendar month.

(viii) The Federal awarding agency must establish procedures for resolving in advance, in consultation with OMB, any significant questions or disagreements concerning the interpretation or application of this section. Any such advance resolutions must be binding in any subsequent settlements, audits, or investigations with respect to that grant or contract for purposes of interpretation of this part, provided, however, that this must not be construed to prevent a contractor or non-Federal entity from contesting the lawfulness of such a determination.[xvii]

Summary for permitted non-lobbying activities.

Scientists must be careful when communicating with public officials due to the fine line between lobbying and informing. However, there are a few activities that fall under the non-lobbying category as long as the activities follow the exceptions within the 2 USC § 1602 definition. "Technical and factual presentations on topics directly related to the performance of a grant, contract, or other agreement... in response to a documented request made by the non–Federal entity's member of congress, legislative body or a subdivision, or a cognizant staff member thereof..." are allowable and considered non-lobbying activities.[xviii] The caveat under this section is the information must be "readily obtainable and can be readily put in deliverable form."[xix] Another allowable activity is one that is "specifically authorized by statute to be undertaken with funds from the Federal award."[xx]

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[i] MCL § 4.415.
[ii] *Id.*
[iii] *Id.*
[iv] *Id.*
[v] 2 USC § 1602(7).

[vi] 2 USC § 1602(8).
[vii] *Id.*
[viii] Department of Energy, *Grants Policy and Guidance* (last visited December 4, 2017), https://science.energy.gov/grants/policy-and-guidance/
[ix] 2 CFR §200.113. *See also* 2 CFR part 180, 31 USC 3321, and 41 USC 2313.
[x] 2 CFR §200.508.
[xi] 2 CFR §910.132.
[xii] 10 CFR §605.20.
[xiii] 2 CFR § 182.300.
[xiv] 41 USC § 8102(2).
[xv] 2 CFR § 200.450(a).
[xvi] 2 CFR § 910.132.
[xvii] 2 CFR § 200.450(2)(i).
[xviii] *Id.*
[xix] *Id.*
[xx] *Id.*