



## **Guidance on Reporting Executive Branch Lobbying**

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Lobbyists are now required to report lobbying of executive branch officials and constitutional officers. (Chapter 373 of the Public Laws of 2007, effective September 20, 2007.) This memo offers advice on the new requirement.

### **CHANGES TO THE DEFINITION OF LOBBYING**

How has Chapter 373 changed the definition of lobbying?

Lobbying is defined in the lobbyist disclosure law at 3 M.R.S.A. § 312-A(9), which is attached. To count as lobbying, a communication by a lobbyist must have three elements. It must:

<b>1</b>	<b>2</b>	<b>3</b>
be made for the purpose of influencing	a covered governmental official	regarding legislative action

The primary change made by Chapter 373 was to add new categories of governmental officials covered by the lobbyist disclosure law: the staff and cabinet of the Governor, certain agency officials, and the state’s constitutional officers. Some agencies covered by the law are independent but in this memo the Commission will use the term “executive branch agencies” to refer to all agencies covered by the law, regardless of whether they are technically a part of the executive branch. The term “official in the executive branch” is defined in 3 M.R.S.A. § 312-A(10-C) and refers to specific employees in major policy-influencing positions within these agencies, now covered under this law.

**In addition to communicating with covered officials, are there other activities that constitute lobbying?**

In addition to communicating, lobbying includes “the time spent to prepare and submit to the Governor, an official in the legislative branch, an official in the executive branch, a constitutional officer, or a legislative committee oral and written proposals for, or testimony or analyses concerning, a legislative action.” (Please see the attached definition of lobbying.)

**What kinds of legislative action are covered by the law?**

“Legislative action” is defined in 3 M.R.S.A. § 312-A(8) as “the drafting, introduction, consideration, modification, enactment or defeat of any bill, resolution, amendment, report, nomination or other matter by the Legislature, by either the House of Representatives or the Senate, any committee or an official in the Legislative Branch acting in his official capacity, or action of the Governor in approving or vetoing any legislative document presented to the Governor for his approval.”

**What if a lobbyist communicates with a Legislator or an executive branch official for the purpose of influencing the official regarding a policy issue, but there is no proposed legislation related to that issue at that time? Is that lobbying?**

The definition of legislative action includes the drafting of legislation and the introduction of legislation. So, communications made for the purpose of influencing how legislation will be drafted, what to include in the proposed legislation, or whether legislation will be introduced is lobbying.

If a lobbyist does not intend to influence the drafting or introduction of legislation, the communication is not lobbying. Lobbyists who are uncertain whether their communications qualify as lobbying are welcome to turn to the Commission staff for advice.

**What about meetings with agency officials made for the purpose of obtaining information or documents or to conduct other research?**

If the lobbyist is not communicating with the official for the purpose of influencing legislative action, the meeting is not lobbying. Meeting with agency officials to discuss policy matters in a general way, to explore an agency’s policy positions on issues, or to inquire how proposed legislation would affect an agency’s programs or operations is not lobbying. Merely gathering information or documents is not lobbying, even if the information or documents relate to a subsequent legislative proposal. There may be other types of communications or interactions with agency officials that would not be considered lobbying. The most important factor to determine whether some activity is lobbying is whether its purpose is to influence the agency official concerning a legislative action. If the lobbyist is uncertain, the Commission staff is available to provide specific guidance to the lobbyist.

**What about other research or preparatory activities that are conducted before the lobbyist knows whether legislation will be introduced, such as:**

- drafting a written history of current law in Maine for a client,
- conducting quantitative analysis on a policy issue of interest to a client, or
- engaging experts in the field to conduct research or to offer advice?

Research or analysis concerning legislative action only counts as lobbying if it is submitted to a covered official in the form of oral or written proposals, testimony, or analysis. If the analysis is conducted only to educate the lobbyist or client and is not submitted to a covered official, it is not lobbying.

If research or analysis is conducted and the lobbyist does not intend to use it to influence legislative action, the research or analysis is not lobbying. Even if the research or analysis is later submitted to a covered official, it does not count as lobbying if at the time it was prepared the lobbyist did not intend to submit it to a covered official.

### **What about drafting legislation if the lobbyist does not intend to submit it to a covered official?**

Lobbying includes “the time spent to prepare and submit to [covered officials] oral and written proposals for...legislative action.” (3 M.R.S.A. § 312-A(9)) If, at the time a legislative proposal is drafted, the lobbyist does not intend that it will be submitted to a covered official, the drafting is not lobbying. If the legislation is later submitted to a covered official, the drafting does count as lobbying. The Commission advises that the lobbyist should report any compensation and expenditures connected with the drafting as though they occurred during the month when the legislation is submitted.

### **What about monitoring the activities of agency officials regarding legislative action?**

Monitoring the legislative plans or other activities of executive branch agencies is not lobbying, as long as there is no communication made to influence legislative action.

### **What about influencing other kinds of actions by executive branch agencies?**

Communications with executive branch officials covered by this law only count as lobbying if they are made to influence legislative action (see definition above). Communicating with agency officials in an effort to influence other kinds of administrative action, such as licensing, permitting, rate setting, or government procurement is not lobbying. Contacts with an agency to influence a rulemaking prior to the agency’s adoption of rule changes do not count as lobbying because they are not intended to influence legislative action. If the rule changes are major substantive, communicating with a covered official to influence the Legislature’s review of the adopted rule changes is lobbying.

## GOVERNMENTAL OFFICIALS COVERED BY THE LAW

Which governmental officials are covered by the law?

The law covers:

- officials in the legislative branch (“a member, member-elect, candidate for or officer of the Legislature or an employee of the Legislature”),
- the Governor’s cabinet and staff,
- officials in the executive branch, and
- constitutional officers.

Which officials in the executive branch are covered?

The term “[o]fficial in the executive branch” was introduced by Chapter 373. It refers to:

- an official in a major policy-influencing position listed in Title 5, Chapter 71,
- the Governor’s cabinet and staff, and
- any individual in a major policy-influencing position in any other agency or independent agency as defined in 3 M.R.S.A. § 953, who is not specifically named in Title 5, Chapter 71.

Title 5, Chapter 71 [Sections 932-958] lists about 24 agencies and offices within Maine state government and designates 109 high-ranking positions within those agencies as being “major policy-influencing positions.” These specified positions will be listed on the Commission’s website as guidance for lobbyists.

The Governor’s cabinet and staff are listed at [www.maine.gov/governor](http://www.maine.gov/governor). In the opinion of the Commission, the reference to “staff” in the phrase “the Governor’s cabinet and staff” was intended to mean employees who work in the Office of the Governor and not the entire staffs of those agencies whose Commissioners or directors are in the Governor’s cabinet.

In addition, “[o]fficial in the executive branch” includes “any individual in a major policy-influencing position in any other agency or independent agency, as defined in [Title 3,] section 953, who is not specifically named in Title 5, Chapter 71.” Section 953(1) of Title 3 defines “agency” to mean “a governmental entity subject to review pursuant to this chapter, but not subject to automatic termination.” Title 3, Chapter 35 provides that a wide range of executive branch agencies and other state governmental offices be reviewed every eight years by their respective oversight committees in the Maine Legislature. The scope of offices subject to review under Chapter 35 is determined by Section 952:

This chapter provides for a system of periodic review of agencies and independent agencies of State Government in order to evaluate their efficacy and performance. Only those agencies, independent agencies or parts of those agencies and independent agencies that receive support from the General Fund or that are established, created or incorporated by reference in the Maine Revised Statutes are subject to the provisions of this chapter.  
(underlining added)

The Commission advises that executive branch agencies covered under the new definition of lobbying include any agency that receives support from the General Fund or that is established, created, or incorporated by reference in the Maine Revised Statutes. Section 959 lists a review schedule for 93 agencies, organized by legislative oversight committee. That list does not appear to include all agencies that receive support from the General Fund or that are established or incorporated by reference in the Maine Revised Statutes. Thus, while this list provides a useful guide, it cannot be relied upon as all encompassing.

The state's constitutional officers are the Attorney General, the Secretary of State, and the State Treasurer. Although some personnel in the offices of the Attorney General and the Secretary of State are listed in Title 5, Chapter 71, for reporting purposes lobbyists should count those officials as constitutional officers rather than as officials in the executive branch. Management-level employees in the Department of Audit, including the State Auditor, should be considered to be officials of the executive branch, because the State Auditor was established by the Maine Revised Statutes and is thus subject to review under Title 3, Chapter 35.

The term "official in the executive branch" only includes officials in a "major policy-influencing" position. Since that term is not defined in Maine Statutes, the Commission recommends that it would apply to those officials or employees of the agency who have policy development as a major function of their position.

#### **EXCEPTION FOR LOBBYING A STAKEHOLDER GROUP**

Chapter 373 created an exception to the definition of lobbying in 3 M.R.S.A. § 312-A(9) for persons "providing information to or participating in a subcommittee, stakeholder group, task force or other work group regarding legislative action" provided that the person's "regular employment does not otherwise include lobbying." Please see the attached definition of lobbying for the full exception.

The language "subcommittee, stakeholder group, task force or other work group" appears to be quite broad, but it is limited by the phrases "regarding legislative action" and "by the appointment or at the request of the Governor, a Legislator or legislative committee ...." The Commission interprets this to cover any group of individuals established by the Governor, a Legislator or legislative committee,

constitutional officer, state agency commissioner, or a chair of a board or commission for purposes which include proposing, drafting, or influencing legislative action.

If the regular employment of the participant or the person providing information does include lobbying, the exception does not apply and all communications made to covered governmental officials in the stakeholder group to influence legislative action count as lobbying. It does not mean that the person's other actions in the stakeholder group (*e.g.*, discussing policy ideas unrelated to legislation, or proposing rules or administrative policies) would count as lobbying.

The Commission has been asked to interpret the clause "as long as the person's regular employment does not otherwise include lobbying." The Commission interprets this to mean that the exception does not apply to registered lobbyists and lobbyist associates. It also does not apply to other individuals whose employment, outside of the stakeholder group, includes paid lobbying activities even if they have not yet reached the registration threshold of 8-hours of lobbying in a calendar month.

If the lobbyist is not compensated by an employer for participating in or providing information to the stakeholder group, then those activities are not lobbying.

## HOW TO REPORT EXECUTIVE BRANCH LOBBYING

**How does a lobbyist report compensation received and expenditures made to lobby the Governor's staff, executive branch officials, and constitutional officers?**

The law now requires you to report separately the amounts of compensation received and expenditures made to lobby legislative branch officials, executive branch officials, and constitutional officers. The Commission has updated Questions 5 and 6 on the monthly reporting form on its electronic filing website so that the compensation and expenditures can be reported separately in three fields. If the communication is made to influence, simultaneously, officials in two or more categories, the activity should be divided proportionally among the categories based upon whom the lobbyist sought to influence.

**When a lobbyist is required to list a legislative action and a legislative document number has not been assigned, how much specificity is required?**

Lobbyists are required to provide in their monthly reports "[a] list of each legislative action by Legislative Document or, if unknown, by Senate Paper or House Paper number or, if unknown, by topic or nomination in connection with which the lobbyist is engaged in lobbying ...." (3 M.R.S.A. § 317(1)(H))

Please use a brief description that provides some specificity about the particular program, regulation, or issue which is the subject of the communication. Avoid

descriptions that are so broad as to convey little about what issue has been lobbied on.

<i>Unacceptable</i>	<i>Preferred</i>
Public Assistance	Eligibility criteria
Air Quality	Greenhouse gas emissions
Taxation	Business Equipment Tax Reimbursement
Animal welfare	Mass breeding facilities

In addition, please use a legislative request number if known.

If you have additional questions regarding reporting on executive branch lobbying, please telephone the Commission's PAC/Party/Lobbyist Registrar at (207) 287-4179.

### Definition of Lobbying in 3 M.R.S.A. § 312-A(9)

“Lobbying” means to communicate directly with any official in the legislative branch or any official in the executive branch or with a constitutional officer for the purpose of influencing any legislative action or with the Governor or the Governor’s cabinet and staff for the purpose of influencing the approval or veto of a legislative action when reimbursement for expenditures or compensation is made for those activities. “Lobbying” includes the time spent to prepare and submit to the Governor, an official in the legislative branch, an official in the executive branch, a constitutional officer or a legislative committee oral and written proposals for, or testimony or analyses concerning, a legislative action. “Lobbying” does not include time spent by any person providing information to or participating in a subcommittee, stakeholder group, task force or other work group regarding a legislative action by the appointment or at the request of the Governor, a Legislator or legislative committee, a constitutional officer, a state agency commissioner or the chair of a state board or commission as long as the person’s regular employment does not otherwise include lobbying.