Section 112 of HUD Reform Act of 1989

Legal Opinion: GMP-0071

Index: 6.666
Subject: Section 112 of HUD Reform Act of 1989

April 7, 1992

Ms. Rosemarie Sabatino
Mr. Larry Volk
National Council of State Housing Agencies
444 North Capitol Street, N.W.
Suite 412
Washington, D.C. 20001

RE: Section 112 of the HUD Reform Act of 1989

Dear Ms. Sabatino and Mr. Volk:

This letter is a follow-up to your January 10, 1992 meeting with Judy Keeler of my staff and Ed Murphy, Associate General Counsel for Legislation and Regulations, and your subsequent conversations with Ms. Keeler. At the meeting, and previously with the Office of Ethics, your organization and representatives from State Housing Finance Agencies raised several concerns concerning the impact of the Section 112 requirements on the operation of the HFAs. Since that meeting, you arranged to have informational material illustrating the organization and functions of an HFA forwarded to Ms. Keeler by one of the representatives at the meeting, J. Judson McKellar, Jr., General Counsel of the Virginia Housing Development Authority. Ms. Keeler also has had brief discussions with you and David Rawle of the Maryland Attorney General's Office and has reviewed prior correspondence from Rebecca Peace of the Pennsylvania Housing Finance Agency.

Recently, by letter of March 23, 1992, you raised similar concerns about the impact of Section 112, as well as three other HUD regulations, in response to the Department's request for comments published in the February 20, 1992 Federal Register. Your comments will be reviewed in the very near future by the Regulation Review Committee. The Committee may decide on the basis of your letter to make modifications to the regulations implementing Section 112. This letter does not affect any action which the Committee may take as a result of your comments.

You have raised the possibility of including HFAs within the exemptions of State and local government officials contained in 24 CFR 86.20 (f) and 24 CFR 86.25 (f). This is one of the issues that you raised that will be addressed by the Regulatory Review Committee. Based upon our review, it is our opinion that some HFA officials already are covered by the exemptions. Pursuant to subsections (f)(3) of both 86.20 and 86.25, the exemptions apply to: "Full-time, appointed officials of a State

and local government who serve in policy-level positions. These individuals include cabinet officials of a State and local government, Community Development and Housing Directors, and

Public Housing Authority Directors." Although HFAs are not specifically mentioned in the Rule, they may be covered by the exemption. For example, the Maryland program is operated through a State Department. The Virginia Housing Development Authority is a political subdivision of the State. It is our understanding that other HFAs are similarly established and organized.

If an official of a covered HFA otherwise meets the definition in the exemption, then that official would be exempt from the Rule. However, the "State and local government exemption" does not apply to all employees of the covered entity. The Rule states:

> To qualify for the exception, the individual must occupy a position that is responsible for setting policy for the organization, or for participating in the development of that policy with the organization head. The exception does not include positions in which the incumbent simply executes policy set by others.

It is our understanding that the HFAs are primarily concerned with the paperwork burden and impact on communications that you perceive the requirements of the Rule implementing Section 112 may have on HFA employees. Because the exemptions are limited to only official policy-making positions, they may not address this concern.

As we have discussed, it is difficult to draw any rigid distinctions between what communications by an HFA employee represent an intent to influence a funding decision or management action (and, therefore, are subject to the registration and recordkeeping requirements of the Rule), and what communications consist of efforts to comply with HUD conditions, requirements or procedures (and, therefore, are not subject to those requirements of the Rule). From the descriptions that you have provided to us, it appears doubtful that the vast majority of communications of HFA employees would constitute "lobbying." In general, if the communication is in response to a written HUD requirement, and is made within established channels for receiving the communication, then it is not a covered communication. The fact that the communication may be designed to persuade HUD to take some action is not dispositive.

For example, an employee's communication of problems in a program to the appropriate Department representative comes within the "compliance with HUD requirements" exception, if, as is most often the case, such notification is provided for in the written program guidance. Even if the communication is not required in written program guidance, it would not be covered if the HFA was

responding to a request from a Department employee. Assisting in

the preparation of an application for funds and advocating for approval of the application would not constitute covered lobbying as long as these activities were conducted within the framework of established Department procedures. Participation in audits or investigations would not be covered since they do not involve either a funding decision or "management action" as defined in the Rule. When a lender responds at HUD's request to a review of its servicing activities, this communication is made in compliance with HUD activities.

The HFA may wish to exercise control over which employees would be covered by the Section 112 recordkeeping or registration requirements by specifying which employees are authorized to make lobbying contacts with the Department. The Rule focuses on expenditures and agreements to make expenditures to influence a funding decision or management action. As the response to comment 64 in the Rule states: "... communications are important, for purposes of this Rule, only if they are made as a result of an expenditure or agreement to influence a departmental decision." If lobbying is not intended to be part of an employee's employment agreement or duties and responsibilities, then the HFA may want to make that clear in some written communication. We believe that the Pennsylvania Housing Finance Agency has taken that action. However, note that the failure to specifically direct an employee to engage in lobbying activity would not, in and of itself, exclude the HFA from coverage under the Rule. See the discussion in Section IV, number one of the Appendix to the Rule at page 22951 of the May 17, 1991 Federal Register.

We understand that, because of the relationship between the HFA and the project owners and sponsors, it is sometimes difficult to determine whether covered lobbying activity falls within 86.20 (requirements for persons making expenditures to obtain lobbying services) or 86.25 (requirements for persons engaged to provide lobbying services). Based upon the information available to us, it appears that most of the covered activity comes within 86.20 (a)(i) or (a)(ii). Those subsections include both lobbying on behalf of the HFA itself and lobbying on behalf of another "person," i.e., the project owner or sponsor, where the HFA has a financial or other interest in the project. Only in rare instances, none of which we are presently aware, would the project owner or sponsor make an expenditure to the HFA to conduct lobbying, thus subjecting the HFA to the requirements of 86.25.

Under 86.20, the HFA is required to keep records of all expenditures for lobbying activity. If the expenditures to persons other than regularly employed personnel of the HFA total more than $10,000 in one year, then the HFA must report all such expenditures. Compensation to regular employees of the HFA who may be engaged in lobbying does not have to be reported under

86.25. However, as we have discussed, the HFA employee who engages in lobbying must comply with the registration provisions of 86.25 within fourteen days of the date on which the expectation that the employee will conduct lobbying arises.

We have considered your suggestion that the HFA be permitted to submit one registration form for all employees, or one form listing all employees who will be conducting lobbying with respect to one project or Federal action number. This is also a comment that you previously made to the Regulation Review Committee. It will be reviewed and independently considered by the Committee. In our opinion, this accommodation may be precluded by the present language of the statute. Section 112 (c)(1) provides that any person who conducts lobbying of the Department must register in writing. The registration must include a statement whether the registrant has been employed by the federal government within the two years preceding the registration and, if so, in what capacity. Because of this latter certification requirement, we believe that it is necessary that each registrant fill out a separate registration form.

We hope that this information is helpful to you. We are happy to continue our dialogue with you to assure that the implementation of Section 112 does not have a deleterious effect on the important function that Housing Finance Agencies have in the Department's mission. If you, or your member organizations, have specific questions about covered communications or registration, reporting, or recordkeeping requirements, please feel free to continue to address them to either to me or Judith Keeler, Deputy Assistant General Counsel for Personnel and Ethics Law.

Very truly yours,

Carole W. Wilson
Associate General Counsel
for Equal Opportunity and
Administrative Law