

White House Modifies Restrictions on Federal Advisory Committee Service by Lobbyists

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On August 13, 2014, the Office of Management and Budget (OMB) of the Executive Office of the President issued guidance modifying the Obama Administration's previously imposed total ban on service by federally registered lobbyists on any federal advisory body. Under OMB's "Revised Guidance on Appointment of Lobbyists to Federal Advisory Committees, Boards, and Commissions," 79 FR 47482, lobbyists registered under the federal Lobbying Disclosure Act may now be appointed, or re-appointed, to such advisory entities in a "representative capacity," although the Administration's ban on service by lobbyists on federal advisory bodies in an "individual capacity" remains in place.

OMB's most recent guidance on lobbyist service on federal advisory entities revises that office's "final guidance" on this subject—issued October 5, 2011—which, in turn, implemented President Obama's June 18, 2010, Memorandum (Lobbyists on Agency Boards and Commissions) directing executive branch agencies and departments not to appoint or re-appoint federally registered lobbyists to any federal advisory body in any capacity, whether "individual" or "representative." As used in OMB's "Revised Guidance," "individual capacity" "refers to individuals who are appointed to committees to exercise their own individual best judgment on behalf of the government." An example of a person serving on a federal advisory body in an "individual capacity" would be someone designated as, and meeting the qualifications of, a Special Government Employee. A person serves on an advisory body in a "representative capacity" when, as OMB states in its "Revised Guidance," "they are appointed for the express purpose of providing a committee with the views of a nongovernmental entity, a recognizable group of persons or

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nongovernmental entities (an industry sector, labor unions, or environmental groups, etc.), or state or local government." Service on federal advisory bodies by lobbyists in this latter, "representative," capacity is now permitted.

In connection with OMB's most recent guidance regarding lobbyist service on federal advisory bodies, two general points should be noted about the scope of the remaining ban on lobbyist service in an "individual capacity." First, as stated by OMB in its "Revised Guidance," the policy established by the President's original June 18, 2010, Memorandum, and implemented by OMB's subsequent guidance, "applies only to individuals who are federally registered lobbyists and does not apply to individuals employed by organizations that lobby but are not [themselves] so registered." Second, as also stated in OMB's "Revised Guidance," as with the original ban, the modified restriction "applies to any committee, board, commission, council, delegation [including delegations to international bodies], conference, panel, task force, or other similar group (or subgroup) created by the President, the Congress, or an Executive Branch department or agency . . . regardless of whether it is subject to the Federal Advisory Committee Act"

The White House's modification of the total ban on lobbyist service on federal advisory boards comes after—and apparently accedes to the logic of—a January 2014 decision by the U.S. Court of Appeals for the D.C. Circuit ruling in favor of six lobbyists who had challenged the total ban on the grounds, in part, that it limited their exercise of their First Amendment rights to petition the government in order to qualify for a government benefit, that is, service on the Industry Trade Advisory Committee's (ITACs) established by the Department of Commerce and the Office of the U.S. Trade Representative. Tellingly, in remanding the lobbyists' lawsuit to the district court, the Court of Appeals had advised the lower court to "ask the parties to focus on the justification for distinguishing, as the lobbyist ban does, between corporate employees (who may represent their employers on ITACs) and the registered lobbyists those same corporations retain (who may not)."