

## E-ALERT | Election and Political Law

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### LOBBYISTS NOW PERMITTED TO SIT ON MANY FEDERAL ADVISORY COMMITTEES, BOARDS, AND COMMISSIONS

In a significant reversal by the Obama Administration, lobbyists will now be permitted to serve on federal advisory committees, boards, and commissions after more than four years of sitting on the advisory committee sidelines. In guidance published in the Federal Register today, the Office of Management and Budget (“OMB”) quietly revised, in large part, the Administration’s longstanding and controversial ban on lobbyists serving on federal advisory committees, boards, and commissions.

The ban started in 2010, when the White House published a memorandum from the President stating: “I hereby direct the heads of executive departments and agencies not to make any new appointments or reappointments of federally registered lobbyists to advisory committees and other boards and commissions.” Final guidance regarding the lobbyist bar was published in the Federal Register in October 2011 and has been the subject of ongoing litigation.

OMB’s new guidance now permits lobbyists to hold some seats on advisory committees while maintaining the bar with respect to others. The guidance distinguishes between lobbyists serving in an “individual capacity” (who are still prohibited from serving on advisory committees) and lobbyists serving in a “representative capacity” (who now may sit on these committees). “Individual capacity” lobbyists are those “appointed to committees to exercise their own individual best judgment on behalf of the government, such as when they designated as Special Government Employees.” These individuals are serving as individuals to assist the government and are not representatives of outside groups. On the other side of the coin, the ban no longer applies to lobbyists appointed “in a representative capacity.” “Representative capacity” lobbyists are those “appointed for the express purpose of providing a committee with the views of a nongovernmental entity, a recognizable group of persons or nongovernmental entities (an industry sector, labor unions, or environmental groups, etc.) or state or local government.”

The distinction between “individual capacity” committee members and “representative capacity” members is not a new one. Because government ethics rules, in large part, apply only to “individual capacity” advisory committee members, the Office of Government Ethics (“OGE”) previously issued guidance for agencies and advisory committees to help them understand the difference. That guidance sets forth a complex, multi-factored test. It states that an individual is more likely to be serving in an “individual capacity” if the individual is paid (other than travel or per diem) and is not mentioned as a representative in the committee’s authorizing legislation or charter. An individual is more likely to be serving in a “representative capacity” if the agency receives recommendations for potential members from outside groups and then allows those outside groups to select the person from the list to represent their interests and views. Similarly, individuals who serve on committees as a “spokesperson” for their industry or interest group are more likely to be serving in a representative capacity. Often, the committee’s implementing legislation or charter will be helpful in understanding whether a seat is for an “individual capacity” member or “representative capacity” member. Both the OGE guidance and the new OMB guidance, however, caution that the word

“represent” in the committee’s authorizing legislation may not be an adequate basis on which to assume that the individual acts in a representative capacity. For example, a person who serves as a “representative with expertise in natural sciences ... selected from a college or university” is not necessarily serving in a representative capacity.

Given these complexities, how can trade associations, corporations, and lobbyists determine whether a particular seat on an advisory committee is an “individual capacity” seat (from which lobbyists are still barred) or a “representative capacity” seat (to which lobbyists may now be appointed)? Thankfully, in most cases, the answer is easy. Although never mentioned in the guidance, the federal government already maintains a website with this information. The [FACA database](#), allows individuals to pull up a list of all members of a particular federal advisory committee. If the “Member Designation” is “Special Government Employee,” the person will likely be deemed to be serving in an individual capacity and may not be a lobbyist. If the “Member Designation” is “Representative,” the person will likely be deemed to be serving in a representative capacity and may now be a lobbyist.

The new guidance now gives lobbyists an opportunity to share their views, experience and expertise on many federal advisory committees from which they had previously been barred. But, because the bar still remains in effect with respect to many committee seats, lobbyists who are would-be advisory committee members will need to evaluate each committee, and each seat on the committee, on a case-by-case basis.

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