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Restricting Membership: Assessing Agency Compliance and the Effects of Banning Federal Lobbyists from Executive Branch Advisory Committee Service

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Abstract

In October 2011, the Office of Management and Budget (OMB) issued guidelines prohibiting lobbyists from federal advisory committee service. Issued as a corollary to Executive Order 13490—which placed limits on lobbyist’s government service—OMB’s guidelines suggest that lobbyists have had undue influence over policy making. This paper explores limited advisory committee literature and examines lobbyists’ potential advisory process influence. Using data on lobbyists who served on advisory committees between 2009 and 2012, the paper finds that while lobbyists’ service has declined, some continue to serve. To conclude, the paper explores first-hand accounts from former advisory committee members to offer some perceived consequences of restricting lobbyist committee service.

Introduction

On his first full day in office, President Barack Obama issued Executive Order 13490. The executive order defined new executive branch ethics requirements, established an executive branch ethics pledge, and placed restrictions on former federally-registered lobbyists serving in various administration positions. The limitations on lobbyist activity were rooted in campaign promises to limit influence on administrative decisionmaking (Kirkpatrick 2008; Brown 2008).¹

In September 2009, the White House—through the Office of Management and Budget (OMB)—announced a new policy to prohibit the appointment of federally-registered lobbyists to executive branch agency advisory committees. In a blog post that accompanied the policy announcement, Norm L. Eisen, then-special counsel to the President for ethics and government reform, characterized the Administration’s position on lobbyists serving on advisory committees as an effort to “reduce the influence of special interests in Washington” (White House 2009a).

In October 2009, Mr. Eisen posted two blog entries on the White House website to clarify the Administration’s position on federally-registered lobbyists serving on advisory committees (White House 2009b; White House 2009c) and respond to both private sector and agency concerns about the new policy (Wenhold and Mayberry 2009; Dale, Hoelter, and Petty 2009). In his response, Mr. Eisen stated the following:

While we recognize the contributions some of those who will be affected have made to these committees, it is an indisputable fact that in recent years, lobbyists for major special interests have wielded extraordinary power in Washington, DC, resulting in a national agenda too often skewed in favor of the interests that can

afford their services. It is that problem that the President has promised to change, and this is a major step in implementing that change. (White House 2009b)

Implementation of OMB's guidance was to be made by each agency during the recertification and reappointment process for each advisory committee, and does not retroactively affect appointments.² The White House has stated that it is not attempting to stifle lobbyists' abilities to advocate on behalf of their clients, just that "industry representatives shouldn't be given government positions from which to make their case" (Eisen 2009).

This action and exchange was followed by the issuance of preliminary guidance in June 2010, and final guidance in October 2011 (Office of Management and Budget 2010; Office of Management and Budget 2011). The guidance provides executive agencies with "instructions" on the appointment of advisory committee members. At the time of the White House's 2009 announcement, the overall number of registered lobbyists serving on federal advisory committees was not publicly available, and the possible effects of banning lobbyists from advisory committees was, therefore, difficult to discern.

This paper examines the potential consequences of removing lobbyists from federal advisory committees. To conduct this analysis, we begin by defining federal advisory committees and lobbyists. We then survey the literature on influence to understand how public interest groups and lobbyists might affect public policy through membership on federal advisory committees. From this literature, we then develop five hypotheses to analyze the potential effects of removing federally-registered lobbyists from advisory committees. They are: change in public perception of advisory committees, change in information sharing within an advisory committee, change in representative membership of an advisory committee, change in committee advice, and change in the presidential control of bureaucracy.

Using this knowledge, we then examine data from the Federal Advisory Committee Act (FACA) Database and the Lobbying Disclosure Act (LDA) database to understand whether agencies followed the OMB guidance and removed federally-registered lobbyists from advisory committees. Next, we place the data in context by recounting interviews with former federal advisory committee members to assess their impressions of the ban and the committees' role in the agency decision making process. Finally, we revisit the literature on influence to evaluate and assess the potential consequences of removing lobbyist and interest group influence from the advisory process.

Federal Advisory Committees

Presidents and executive branch agencies create federal advisory committees to gain expertise and policy advice from individuals outside the federal government. Federal advisory committees have historically been created on an ad hoc, provisional basis to bring together various experts—often with divergent opinions and political backgrounds—to examine an issue and recommend statutory, regulatory, or other policy actions. Federal advisory committees are one of only a few formalized mechanisms for private-sector citizens to participate in the federal policymaking process.

Defining Advisory Committees

In 1972, the Federal Advisory Committee Act (FACA) formalized the creation and governance of advisory committees established or utilized by the President or executive branch agency heads (5 U.S.C. Appendix).³ Enactment of FACA addressed many congressional and citizen concerns about federal advisory committees.⁴ The law established the first statutory requirements for management of, access to, and oversight of federal committees. The act, in

section 2(b)(6), required advisory committees “be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.”

Federal Advisory Committees and the Policy Making Process

Scholarship on the creation, operations, and effects of federal advisory committees is limited. Existing work largely examines the ways Congress can design more effective committees (Balla and Wright 2001) or explores whether committees serve presidential interests (Wolanin 1975). Other studies found that advisory committees—both congressional and executive branch—have traditionally allowed political actors to “deflect blame, buy time, and give the appearance of action on issues that are too politically charged, too difficult, to solve” (Zegart 2004, 372; Campbell 1998).⁵

Zegart (2004) attempts to group commissions into three categories: agenda commissions, which aim to attract support and attention to presidential policy initiatives; information commissions, which are designed to give “new ideas, new facts, and new analysis to policymakers;” and political constellation commissions, which seek to “foster consensus, compromise, and cooperation in a policy domain” (374-376).

Campbell (1998) also argued that using a FACA committee to acquire outside ideas may offer a formal and transparent process that puts meetings and ideas on the public record in a way that holding individual meetings with outside experts might not accomplish. Moreover, Campbell stated that Members of Congress may create committees to “pare down Congress’s workload to more manageable dimensions or to handle and manage a problem in a timely manner” (170). In general, congressionally-created advisory committees that solely advise

Congress would not be subject to FACA. Subsequently, whether Congress's oversight or legislative workload would be reduced by a FACA committee is questionable.

Since FACA's enactment, scholars and practitioners of government have debated whether advisory bodies increase public interaction with the federal government (Murphy 1982; Mitchell 1997). Other debates continue over whether advisory committees have a positive effect on the federal government (Miller 1976; Schmitt 1989) or if they are a symptom of a federal government that is not performing properly (Rourke 1989).

Only Brown (2008) has focused on how the structure and composition of a federal advisory committee may affect its deliberative process, and, therefore, its contribution to public policy. He examines the representative balance requirement in FACA and argues that the distinction between experts and laypeople in advisory committee membership is arbitrary, naïve, and artificial. Brown writes that "... most current advisory committee guidelines rest on an untenable double-standard that directs agencies to evaluate potential expert members of advisory committees solely in terms of their professional qualifications and non-expert members in terms of their 'political interests'" (548).⁶

Lobbyist Influence on Government

Since 1946, the federal government has attempted to regulate lobbyist contact with government decisionmakers by requiring registration and disclosure of activities.⁷ Pursuant to the Lobbying Disclosure Act (LDA), federally-registered lobbyists are individuals who represent a client for financial compensation, make more than one lobbying contact, and spend at least 20 percent of their time engaged in lobbying activities over a three-month period (2 U.S.C. 1602). Individuals who meet this basic definition are required under the LDA to register with Congress and to file quarterly disclosure statements.⁸ Lobbyists register and disclose their activities in an

effort to make lobbying more transparent. A lobbyist's ability to contact government decisionmakers is not restricted by LDA.

In contrast to the intent of statutory lobbying laws, the Obama Administration has created a system to restrict lobbyist access to executive branch decisionmakers. Since it would likely be unconstitutional to legally limit the speech of lobbyists, the Administration has instead worked to create guidelines that restrict federal employees from interacting with lobbyists.

The Obama Administration has attempted to limit federal employee and lobbyist interaction through the issuance of Executive Order 13490 that, among other items, revives a Clinton Administration-era requirement that bans gifts from lobbyists to federal employees and restricts former lobbyists from being appointed to administrative positions.⁹ Additionally, the Administration has issued guidance to restrict federal employee interactions with federally-registered lobbyists for large spending programs, "to reduce the influence of special interests in Washington (White House 2009a).¹⁰

Interest Groups, Pressure, and Representation in Washington

In 1883, the Pendleton Act was enacted to provide federal jobs on the basis of merit and competitive exams instead of patronage (Hoogenboom 1959; Skowronek 1982, 67). In the years that followed, "scholars and presidents believed that career civil servants could be trusted to neutrally implement the president's policies" (Wilson 1887; Golden 2000, 4). While not specifically mentioned by Wilson or Golden, the idea that civil servants were trustworthy implies that their decision-making ability was unimpeded by lobbyists or the groups they represented.

This may or may not be true. Some scholars have found that pressure—either directly from the public or through interest groups—can force government to change, even when it does not want to (Theirault 2003). Others have found that lawmakers (and by extension the

President), in structuring administrative agencies, have the greatest ability to decide what type of access groups will have (Macey 1992). Still others have found that restricting lobbyist—and therefore group—access to agencies benefits wealthy and larger groups over the less-organized and smaller private entities (Balla and Wright 2001; Reenock and Gerber 2008).

Interaction between organized interests and the government are an essential element of American democracy (Epstein and Nitzan 2006; Hamilton, Madison, and Jay 1787). Evidence on the effectiveness of influence, however, is mixed (Baumgartner and Leech 1998, 75; Lowery 2007, 34). Regardless of whether interest groups can actually influence governmental decisionmaking, public officials have expressed a belief that it is not only possible, but likely (White House 2009a; White House 2009b).

Lobbyist Influence on Advisory Committees

Few previous studies have been conducted on lobbyists' service on advisory committees and its potential influence.¹¹ Existing studies generally conclude that lobbyists could play an essential informational role and provide agencies with context on the impact of policy decisions. For example, Balla and Wright (2001) examined the roll of lobbyists on the National Drinking Water Advisory Council—an Environmental Protection Agency (EPA) advisory committee—and found that lobbyists provided invaluable service and information to the EPA in making decisions on policy issues (810-811).

Other studies have found that lobbyists and groups may tailor the information they provide to meet a lawmaker's or bureaucrat's preferred policy position (Patty 2009). Most lobbyists who serve on advisory committees are appointed to represent a specific policy position. Subsequently, their advice is anticipated to be tailored. If lobbyists are prohibited from being

appointed to advisory committees, the information provided by committee members might not reflect the opinions of the industry or organization that the lobbyist represented.

Similarly, Susan Webb Yackee (2006) finds that formal participation by interest groups during the rulemaking process can influence the policy content. As agencies utilize statutory rulemaking authority to implement laws, access to those policy makers becomes imperative. Since interest groups attempt to ensure that agency decisionmakers are in possession of the groups' opinions and recommendations, lobbyists may utilize any available (and, hopefully, legal) means to convey that information (Nownes 2006).

Literature on lobbyist influence on federal government policymaking generally discusses three types of influence: indirect, direct written, and direct advisory. First, lobbyists can attempt to influence public policy using *indirect influence*. Under this strategy, the lobbyist uses his or her organization's grassroots networks and media savvy to influence decisionmakers (Wright 1996, 95-97; Berry 1997, 124-125; and Brown and Waltzer 2002).

Second, under *direct written influence*, the organization utilizes its registered lobbyists to contact individual decisionmakers (Kersh 2007), either directly or through public comments to *Federal Register* publications (Nownes 2006, 69).¹² Under *direct written influence*, lobbyists are potentially one of many voices responding to a proposed guideline, rule, or regulation. As such, the lobbyist's voice has the potential to be diminished because it is only a single voice among other public comments. It can, however, be an important part of a lobbyist's strategy to influence agency decisionmaking (Furlong and Kerwin 2004; Weimer 2006).

Finally, in addition to direct written influence, lobbyists—in the past—have been appointed to federal advisory committees as representatives of a specific corporation or industry. Serving on advisory committees and using *direct advisory influence* gives individual lobbyists

direct and formalized access to decisionmakers. This direct access, and the idea that lobbyists have too much influence within the federal government, likely contributed to the Obama Administration's prohibition on federally-registered lobbyists serving on executive branch advisory committees.

Potential Effects of the Lobbyist Ban

The decision by the Obama Administration to prohibit federally-registered lobbyists from advisory committee service has several potential consequences and implications. These consequences include altering public's perception of the committee system, changing how industry shares information or participates with the government, standardizing the process for replacement of individual committee members, attempting to direct committee advice, and altering presidential control of the bureaucracy and policymaking.

Public Perception

The public may perceive federally-registered lobbyists' participation on federal advisory committees as evidence that the government favors special interests. A perception that special interests enjoy unique access to the government could weaken the public's confidence in advisory committee recommendations and, in turn, the federal government itself. Lessig (2011), for example, conducted a study of three areas—politics, medicine, and consumer products—to analyze the relationship between financial incentives and participants' trust of the respective institutions. He found that in all three cases, the mere potential for bias was enough to make the participants of the study view the actors involved as untrustworthy (28-29).

If the public believes that federal officials are influenced by special interests, it may weaken legitimacy. Advice obtained from federal advisory committees that have federally-

registered lobbyists serving as members, therefore, may be perceived by the public as less trustworthy than advisory committees that do not have federally-registered lobbyist members. The Obama Administration’s guidance to prohibit federally-registered lobbyists from serving on federal advisory committees may not have a tangible effect on the advice provided, but it may nevertheless have a positive influence on the public’s perception of the committees and the advice they provide.

Information Sharing

The federal advisory committee system is primarily an information conduit to aid policy makers. Since lobbyists generally are only as effective as the information they provide, the advantages and disadvantages of banning the appointment of lobbyists depend on whether one believes that lobbyists have valuable information that can aid decisionmakers or that lobbyists succeed in slanting the process in an unfair manner.

Interest groups, and their representatives, have been considered an essential, but potentially dangerous, component of the government since before the Constitution’s ratification. James Madison was careful in *Federalist* #10 to discuss the importance of “factions” for providing information to policy makers, while at the same time thinking about ways to limit their influence (Hamilton, Madison, and Jay 1787). Subsequently, studies of historic lobbying practices have emphasized individual lobbyist’s roles as conveyers of information and brokers of contacts (Baumgartner and Leech 1998, 137-139). Other studies focused on some of the potentially corrupt or illegal actions lobbyists would take to reach and influence decisionmakers (Jacobs 2010; Kaiser 2010).

The role of lobbyists—or other industry representatives—on advisory committees is often informational. Since advisory committees are tasked with providing only *advice* to

governmental decisionmakers, any influence that a lobbyist has would likely be informational. Lobbyists can provide valuable insight into issue areas as result of their knowledge of policy areas and the groups they represent (Potters and Van Winden 1992). They can provide policy makers with a unique ability to summarize the landscape on an issue, making it easier for the decisionmaker to understand the potential impacts of policy.

Conversely, lobbyists could attempt to do more than just provide advice through their formal roles as committee members. Well-documented cases exist of lobbyists providing illegal benefits to government officials (e.g., Jack Abramoff), but these types of activities are more the exception than the rule. The government has ethics rules in place to guide agency officials' and lobbyists' interactions and define what is and is not acceptable. These ethics rules apply to advisory committees as well. The Administration's guidance, therefore, could reduce the value of information provided to the federal government or could eliminate undeserved or unacceptable industry influence.

Designing Representative Membership

Advisory committees are created primarily to provide specialized policy advice to government decisionmakers. To ensure that advisory panels have the expertise necessary to provide that advice, the official charged with appointing members has a choice about the types of individuals appointed to the committee. On one hand, they can choose to appoint an individual solely for his or her expertise or because he or she represents a particular interest, group, or company. Alternatively, the appointing official could choose to appoint only individuals who are likely to provide policy advice and recommendations that are in line with the political leanings of the administration (Patty 2009; Tama 2011).

Attempting to direct the advice provided by a commission or committee can be a complicated exercise. If the administration can successfully appoint members sympathetic to its policy preferences, the advice provided will likely assist the agency or administration in pushing for a given agenda (Lewis 2005; Aberbach and Rockman 2009). If, however, the policy examined is high profile, not appointing the leading experts could prompt committee legitimacy concerns. In this scenario, the committee could potentially become an extension of the White House or an agency and would likely be expected to provide advice that reinforces or supports the Administration's policy preferences (Kumar 2007; Canes-Wrone 2009).

As a result, many FACA committees are populated with individuals who are appointed for the express purpose of providing opinions and recommendations of a particular entity, industry, or group. It is assumed that advice provided by a FACA committee will mirror the opinions of its membership (Tama 2011). Advisory committees with members who represent private interests are likely to provide advice that reflects industry concerns. The guidance, therefore, may make it difficult or impossible for industries to articulate their concerns through the formalized FACA process. Additionally, the guidance may eliminate agencies' formal, organized process by which they have accessed industry lobbyists, who, arguably, provide important information.

Committee Advice

If an agency removes lobbyists from its advisory committees, there are several possible outcomes for committee advice to agencies. First, a registered lobbyist who represents a private company or industry could be replaced by non-lobbyist from the same industry or company. In this scenario, the advice or report produced by the committee could be largely unchanged because the non-lobbyist and the lobbyist would share opinions on what is best for the company

or industry. Alternatively, the replacement of a lobbyist with a non-lobbyist could make an important difference. Lobbyists are advocates of particular points of view. Non-lobbyists may not articulate particular view points as effectively as a lobbyist.

Second, an agency could remove a lobbyist and not replace him or her, thus reducing the number of committee members. Reducing the number of committee members may result in a change to the tenor or depth of committee advice. By removing potential information sources, the committee may not provide the agency with as robust information and the agency's decisionmaking process would be bounded and missing potentially important information. This could then create information asymmetry and leave the agency with incomplete policy analysis (Jones 1995; Jones 2001). Conversely, leaving a vacancy could also allow committee members whose opinions were previously ignored or overshadowed to have a stronger voice in the deliberative process.

Third, the agency could remove a lobbyist member and replace him or her with a new appointee who represents an entirely different viewpoint.¹³ In this instance, if a new voice were introduced to the committee, the advice or report may or may not be affected. The new member may have identical, similar, or completely different opinions and information. It is uncertain whether this information would be of better quality or more helpful to the committee than that provided by a lobbyist.

Presidential Control of Bureaucracy

Modern presidents succeed or fail based on the Administration's ability to reflect the president's personal preferences and enact public policy (Light 1993). While the president has the ability to command media attention and speak directly to the American people (Kernell 2006) and Congress (Copeland 1983; Deen and Arnold 2002), it is ultimately the power of the

bureaucracy that allows the president to move forward his agenda (Rourke 1984; Lewis 2006). The president can guide the bureaucracy in several ways. The available tools include: informal conversations or media-based communications (Barrett 2007); formal written documents, including White House agency (e.g., the Office of Management and Budget) guidance, executive agreements (Caruson and Farrar-Myers 2007), executive proclamations (Rottinghaus and Maier 2007), and executive orders (Mayer 1999); political appointments—including the power to remove appointments (Moe 1982; Moe 1985); and agency resources, including the budget recommendation (Wood and Waterman 1994, 30-31).

Formal written tools such as guidance, executive agreements, and executive proclamations allow the president to make non-binding policy decisions and test the potential for future actions. Executive orders allow the president to “establish policy, reorganize executive branch agencies, alter administrative and regulatory processes, affect how legislation is interpreted and implemented, and take whatever action is permitted within the boundaries of their constitutional or statutory authority” (Mayer 1999, 445).

The power of appointments and control of agency resources—through the OMB—also give the president enormous power to direct activity and control policy making. The president, through his appointment and resource control functions, can attempt to direct agencies and their policymaking to fit his agenda. But he can sometimes find that directing policy through appointment is difficult. Because the majority of agency employees are not subject to the president’s appointment power, the agency can be “captured” and thus thwart presidential action (Cronin 1989, 187). Moe (1994), however, suggests that congressional intent in creating some independent regulatory commissions (e.g., the National Labor Relations Board) might be to

ensure that capture occurs as a way to balance the president's power to appoint like-minded officials as agency heads (18-19).

The congressional intent concerning independent regulatory commissions is not fully relevant to federal advisory committees. It is, however, relevant to understanding whether the president can have greater control over advisory committees by limiting appointment authority. Balla and Wright (2001) argue that Congress can control the bureaucracy by crafting advisory body membership to reflect the shape of the legislative debate. While Congress does have a role in the establishment of about half of FACA advisory committees, the president and agency officials also have broad discretion to create advisory committees, within the limits of the law. For committees created by the president or executive agency officials, the control of appointments rests solely within the executive branch. As a result, the president or the agency official can appoint virtually anyone to fill vacancies on advisory bodies, within the confines of FACA's fair and balanced advice provisions.¹⁴ This authority, following Balla and Wright's assertion, could give the president broad authority to control the bureaucracy. Additionally, as noted above, the President would likely populate a committee with those who have similar political and policy positions to his own. The guidance, therefore, may attempt to assert publicly that the President believes that his policy and political positions are constantly at odds with those of all lobbyists—an untenable assertion given that lobbyists are not like-minded and occupy all realms of politics and policy.

In the specific case of banning federally-registered lobbyists from FACA committees, the president chose to issue non-binding guidance on how appointments should be made. Because the guidance is technically non-binding, agency officials could ignore the White House and continue to appoint lobbyists to advisory committees. If an agency ignores the guidance,

however, it is possible that the White House could impose political penalties on the agency or an agency official. Additionally, if guidance is ignored by the bureaucracy, it could signal an internal loss of power by the White House. In that case, the White House may choose to forgo the issuance of future guidance in favor of more formalized instructions (i.e., and executive order).

Data and Methodology

To evaluate the outcome of the Administration's exclusion of federally-registered lobbyists from advisory committee membership, we devised a two-step methodology. First, to evaluate compliance, we collected data on advisory committee membership both before and after the issuance of the OMB guidance. Second, we conducted interviews with former advisory committee members to understand the advisory process and to illicit their opinions on how the guidance changed that process.

Examining the membership of federal advisory committees raised some methodological challenges. With approximately 1,000 advisory committees operating in a given year, attempting to examine the universe is not feasible. It is also not feasible to take a small, random sample of these committees as the number necessary to create a representative sample would still be too large for a manageable project (Henry 1990, 118-121). Our solution to the problem of sample size was to conduct a case study on one group of advisory committees: committees that advise the United States Trade Representative (USTR).

USTR advisory committees were chosen because of media attention the committees received in light of the Obama Administration's guidance. Following the initial announcement of the guidance, the USTR committees jointly wrote to the White House protesting the policy and its possible effects on the committees' operations, including the loss of "considerable

institutional expertise and essential substantive knowledge in all areas of trade negotiation, policy development, and enforcement” (USTR Industry Trade Committee Chairs 2009).

Given the public nature of their disagreement with the White House guidance, the USTR committees provide a unique opportunity to examine the initial impact of the lobbyist ban. These committees have a large percentage of industry representatives, some of whom were lobbyists when they were members. They could, therefore, be among the committees that would be most affected by the Obama Administration guidelines. Additionally, noting their public opposition to the Administration’s policy, they would potentially be among the committees least likely to heed the guidelines. Because the USTR committees are focused on a single aspect of policy, however, they might not be representative of the overall advisory committee universe.

Further, the 28 USTR advisory committees provide information on a wide range of trade related issues. Pursuant to FACA, each committee reports annually on its performance measures. These reports are self-generated and generally state that the committee had an impact in major agency policy initiatives. The self-reported nature of committee accomplishments, however, does not diminish their contribution. For example, the Government Accountability Office (GAO) reported that the USTR advisory committee “...system strengthens the U.S. bargaining position by bringing to bear on-the-ground perspective and information from the private sector that the U.S. government lacks; establishing a clear set of U.S. priorities and fuller appreciation of various American interests; and enabling the United States to present a unified front when it faces foreign nations at the negotiating table.” Further, GAO reported that “[w]ithout the system, some participants commented, U.S. negotiators would be operating in a vacuum and businesses would be unable to effectively resolve with foreign governments issues that only the U.S. government can pursue” (Government Accountability Office 2002, 11).

Advisory Committee Membership

To understand how membership of the USTR committee changed from before to after the OMB guidance was issued, we examined membership data between 2009 and 2012 for the 28 USTR advisory committees. Table 1 lists the committees examined.

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The data were collected in two stages. First, the FACA Database was consulted to identify the members of the 28 trade advisory committees for each year of the study. Second, committee member names were used to search the LDA database to determine if committee members were federally-registered lobbyists between 2009 and 2012.¹⁵

In review of the two databases, an issue arose that could affect the consistency of the data. For fiscal year (FY) 2009, FY2010, and FY2011, we were able to gather membership information from the FACA Database, which is maintained, verified, and updated by the General Services Administration (GSA). At the time of data collection, however, FY2012 data had yet to be updated. As a proxy for FY2012 data, we gathered calendar year (CY) 2012 membership lists for each USTR committee from the committees' websites.¹⁶

Once the committee membership lists were collected for FY2009, FY2010, FY2011, and CY2012 we used the LDA database to identify whether an individual serving on one of the USTR advisory committee had been a federally-registered lobbyist in any of the four years analyzed. Matching names between the FACA and LDA databases, however, proved problematic in some cases—especially when committee members or lobbyists had common first and last names (e.g., John Smith). For example, the FACA Database and the committee websites sometimes provide only a committee member's first and last name. As a result, it can be impossible to differentiate two individuals with the same name. To resolve this issue, we relied

on the members' affiliate organizations listed in the FACA Database or USTR committee websites as a way to ensure individuals in the FACA Database were properly matched with individuals in the LDA database.

Additionally, as member names were cross checked, we found that some individuals serving on the trade advisory committees had terminated their lobbying registration during a study year. For consistency, any individual who terminated his or her status as a lobbyist during a given year was counted as a lobbyist for that year. For subsequent years, they were included as a non-lobbyist.

Impact of Lobbyist Exclusion from Advisory Committees

To better understand the impact of the Administration's policy not to appoint or reappoint federally-registered lobbyists to federal advisory committees, we conducted interviews with several former members of USTR advisory committees. Potential interviewees were identified on the basis of their relationships to any of the 28 USTR federal advisory committees examined in this study.

The list of potential interviewees was compiled using publicly available information and included OMB employees, advisory committee Designated Federal Officials (DFOs) or Committee Management Officers (CMOs) in the Office of the USTR or the Department of Agriculture (USDA), and current or former Trade Advisory Committee chairs or members. These individuals were contacted via e-mail and asked to participate in voluntary, confidential phone interviews. Unfortunately, given current litigation concerning the ban of federally-registered lobbyists serving on Industry Trade Advisory Committees (ITACs),¹⁷ many of the potential interviewees declined. Some former members, however, agreed to discuss the issue. Ultimately, three individuals agreed to participate in the study and interviews were conducted

over a three week period. Interview questions were designed to address our five hypotheses on the potential effects of the lobbyist ban: public perception, information sharing, designing representative membership, committee advice, and presidential control of bureaucracy.

Findings

Overall, we found that USTR advisory committees complied with the OMB guidance prohibiting the appointment or reappointment of lobbyists to advisory committees. Additionally, our interviews revealed three themes on the impact of prohibiting lobbyist service: disruption of industry lobbying, declining quality of advice, and reduction of committee output.

Advisory Committee Membership

Overall, the total number of federally-registered lobbyists serving on trade advisory committees declined from FY2009 to CY2012. In FY2009, USTR committees had 691 total members, of which 174 (24.86%) were registered lobbyists. In FY2010, the 28 USTR committees had a total of 741 members, of which 141 (19.03%) were registered lobbyists. In FY2011, the USTR committees' total membership declined to 652 members, with 58 (8.90%) registered lobbyists. In CY2012, the USTR committees' total membership declined again to 600 members, with 9 (1.50%) registered lobbyists. While the actual number of trade advisory committee members slightly increased in FY2010, membership declined in FY2011 and CY2012. The percentage of lobbyists on these committees has declined each year. Figure 1 shows the total number of USTR advisory committee members and the number who were federally-registered lobbyists. Figure 2 shows the percentage of federally-registered lobbyists on advisory committees.

<Figure 1 About Here>

<Figure 2 About Here>

In addition to the declining number of lobbyists, the number of committees with lobbyist members was also reduced. Of the 28 USTR advisory committees, 26 had federally-registered lobbyists among their memberships in FY2009. In FY2010, that number declined to 24. In FY2011, 16 committees had registered lobbyists as members. For CY2012, that number of committees with registered lobbyists as members declined to seven. Figure 3 shows the total number of advisory committees (out of 28) that had federally-registered lobbyists as members for each year.

<Figure 3 About Here>

Overall, most USTR committees experienced a decline in the number of federally-registered lobbyists serving as advisory committee members between FY2009 and CY2012. For some committees, however, the data show a slight increase in the percentage of members who were federally-registered lobbyists. For example, the Agricultural Policy Advisory Committee saw a slight percentage increase from FY2011 to CY2012 of 15.15% to 15.79%. This slight change may be the result of using calendar year instead of fiscal year data. In other words, a federally-registered lobbyist may not have been reappointed for FY2013, but they are still showing up as a committee member for CY2012.

Overall, between FY2010 and FY2011, 23 of the 28 policy advisory committees, experienced a decrease in the percentage of members who were also federally-registered lobbyists. Another four committees had no federally-registered lobbyists as members in either FY2010 or CY2011. Between FY2011 and CY2012, eight of the 28 policy advisory committees, experienced a decrease in the percentage of members who were also federally-registered lobbyists and 14 saw no change. Based on our analysis of the committees' membership, it would

generally appear that the USTR advisory committees have followed the OMB guidance on appointing federally-registered lobbyists to federal advisory committees. For CY2012, 21 of the 28 committees had no lobbyists serving as members. This is a decrease from the beginning of the Obama Administration, when only two committees—the Small and Minority Business Committee and the Intergovernmental Policy Advisory Committee—counted no lobbyists among its members.

While some of the decrease in the percentage of lobbyists serving on USTR committees can be attributed restricting the reappointment of federally-registered lobbyists, part of the decrease also comes from committee members terminating their lobbying registration (de-registering), but remaining on the committee. In fact, 41 individuals who served on trade advisory committees during FY2009, FY2010, FY2011 and CY2012 terminated their registrations in 2009, 2010 or 2011, but continued to serve on the committee. Whether de-registration took place because of the OMB guidance could not be determined.

Impact of Lobbyist Exclusion from Advisory Committees

Interview responses converged on three common trends. First, the ability of an industry to lobby between the executive and legislative branches has been disrupted since the ban was instituted. Prior to the ban, lobbyists who were members of USTR advisory committees were granted security clearances and thereby access to documents concerning policy negotiations. In the committee setting, these lobbyists were able to offer feedback to the executive branch on the basic principles as well as the specific wording of those negotiations. Outside of the committee setting, the same lobbyists were also able to approach decisionmakers to discuss and inform the key issues addressed in the developing documents. With the ban in place, a lobbyist cannot legally sit on an advisory committee while still retaining their ability to lobby the federal

government. Lobbyists expressed some concern that, as a result, certain industries may have neglected to register committee members who would be considered lobbyists under current law in order to maintain their advisory statuses.

Industries whose lobbyists were removed from advisory committees to comply with the ban have been forced to adopt alternate strategies to maintain influence. Some industries chose to have two distinct representatives—one who is a registered lobbyist and one who is not and can sit on the advisory committee. There are two disadvantages to this method. First, for smaller industries or firms, the ability to have two representatives in Washington, DC is not feasible. Second, because only the representative on the advisory committee has the security clearance necessary to access ongoing negotiations, translating the membership into other lobbying efforts is not as effective as it has been in the past.

Another course of action taken by industries has been to withdraw representation from advisory committees and lobby the executive branch directly. For these industries, the advisory committee process has become a mere formality. Lobbying the executive branch directly, however, does not come without its own disadvantages. Not only do these lobbyists not have access to negotiation documents, but they also often have to sort through the bureaucracy to contact an appropriate decisionmaker. Furthermore, in order to comply with the ban it is possible that meetings between lobbyists and agency decisionmakers will be held outside a formal setting, making those meetings less transparent.

The second theme that emerged during the interviews was the perceived decline in quality of advice offered by industry representatives who have filled the advisory committee positions vacated by lobbyists. While often experienced in their respective fields, the interviewees reported that industry representatives tend to lack expertise in unfamiliar areas that

fall under the umbrellas of the industries they represent. In addition to limits on their knowledge of industry practices, many representatives have not developed the political and international trade expertise required. A final issue that arises when relying on industry representatives is that they are often not as dedicated to their advisory body positions as lobbyists. As a result, these representatives typically step down from their positions after shorter tenures, posing a problem of inconsistent representation during negotiations.

The third theme follows directly from the second. Our interviews suggested that when the quality of advice declines, committee outputs have reportedly been less developed and ultimately less useful than before the ban. As one interviewee explained, prior to the ban there was a balance of opinions on the committee between government officials, industry representatives, and lobbyists. Within that balance, lobbyists served an important role because they had experience with both politics and industry issues and could bridge misunderstandings between other committee members. Without the mediating role of lobbyists, advisory committees have become less effective at vetting negotiations so they satisfy the needs of the government, the market, and the industries.

Conclusions

To best understand the scope and effect of the Obama Administration's guidance to discourage the appointment of federally-registered lobbyists to federal advisory committees, we collected data from the Federal Advisory Committee Act (FACA) Database on the membership of the United States Trade Representative's (USTR) advisory committees and interviewed former advisory committee members. Furthermore, we developed five hypotheses to analyze the potential effects of removing federally-registered lobbyists from advisory committees. They are:

change in public perception, change in information sharing, change in representative membership, change in committee advice, and change in the presidential control of bureaucracy.

A Reduction in Lobbyists Serving on Committees

Overall, our study found that the percentage of registered lobbyists serving on USTR committees has declined. The ban, therefore, has been measurably successful in reducing the total number of lobbyists on advisory committees, but not successful in removing all lobbyists.¹⁸ Our analysis of committee members found some evidence to support the claim that lobbyists were de-registering.

The data on committee membership, however, suggest that the total percentage of individuals who de-registered and retained their committee membership is small. For most USTR committees, the reduction in the percentage of lobbyists serving as members means that new individuals have been appointed or that committees are operating with one fewer member. This could lead to an infusion of new ideas and advice for the USTR, which was presumably the goal of the Obama Administration guidance. Conversely, it may also lead to a reduction in information or new ideas provided by advisory bodies. This could result in groups engaging in negative blocking of agenda items, instead of positive promotion (Kindgon 1995, 49).

In many cases, federally-registered lobbyists did leave their respective advisory committee positions. While this paper does not discuss the status or affiliations of members who replaced lobbyists, or whether slots previously filled by the registered lobbyists were simply eliminated, such questions are potential avenues for future research. As we discussed, in some instances the lobbyist may have been replaced by someone with an identical affiliation but who is not a registered lobbyist. If these types of replacements are being made it may have little effect on the substantive constitution of the advisory committee, but would satisfy the

Administration's requirements. In other cases, agencies may fill a former lobbyist's seat with an individual who represents a previously unrepresented industry or company. Such action could benefit or hinder the deliberative process or it could also have no effect on the substance or tenor of committee deliberation.

Reactions to the Effects of the Guidance

As discussed, we conducted interviews with three former lobbyists to examine the effects of the Administration's guidance on advisory committee operations and advisory committee structure. Our interviews were designed to test five potential areas of change effected by the Administration's guidance.

Change in Public Perception. Our interviewees provided no information that demonstrated an improvement in the public perception of the advisory committee system or the advice advisory committees provide. In fact, the interviewers asserted that those familiar with the advisory committee system believed that the quality of advice provided by the committees was declining because of the guidance.

Change in Information Sharing. The interviewees stated that the guidance made information sharing more complicated in two ways. First, the guidance prevented lobbyists, who are often required to be knowledgeable in both policy and technical issues, from serving on the committees. In some cases, they said, technical experts were appointed as advisory board members in lieu of the lobbyists. Technical experts may not be as adept at conveying the political implications of a policy choice. It is possible, however, that the technical experts can learn to articulate the political context in time. It is also possible that lobbyists were not as nimble as the technical experts at conveying the industry's more technical concerns.

Second, the interviewees noted that the guidance could limit a smaller industry's ability to communicate with both the federal government. Pursuant to the guidance, a lobbyist cannot legally sit on an advisory committee while still exercising his or her ability to lobby. A lobbyist, therefore, cannot directly provide the government with information about burgeoning policy ideas or forthcoming policy implementation. Subsequently, the guidance can be seen as limiting the flow of communication between industry, Congress, and agencies.

Representative Membership. According to the interviews, the guidance would make it costly and potentially impossible for smaller industries to participate in the advisory committee process. Our initial hypotheses about the potential effects of the guidance posited that the guidance could make it more likely that newer, previously un- or under-represented voices might replace those who have historically sat on advisory committees. The interviewees, however, expressed concerns that only industries that could afford to have two representatives—one a registered lobbyist and one not—would be able to participate on federal advisory committees. Membership on advisory committees, therefore, might represent only those who can afford the staff to ensure contact with both the legislative and executive branches. Arguably, such a requirement could skew membership toward those with a greater amount of resources. Also noted in the interviews is that industry representatives tend to have shorter advisory committee tenures than lobbyists. This turnover could lead to questions of consistency and quality of membership of an advisory committee.

Change in Committee Advice. The interviewees expressed concerns that the guidance would prompt information asymmetry because lobbyists could no longer serve to balance the divide that emerges between industry and government. As expressed in the interviews, lobbyists can serve to merge the often conflicting aims of government, the market, and industry. Without the

appropriate combination of expertise, the interviewees claimed that the advice provided by the committees has been less developed and less useful. We have not been able to test this claim, nor have agencies noted publicly that they are relying less on advisory committees since the guidance was released.

Change in Presidential Control of the Bureaucracy. The number of lobbyists serving on advisory bodies dropped considerably since the release of the Administration's guidance, which demonstrates the President has considerable control over the bureaucracy. It is unclear, however, whether this control led to an increased number of committees or committee members that reflect the political or policy preferences of the President.

Future Research

Overall, it may be difficult to measure whether the substance of advisory committee deliberations is affected by the Administration guidance. Future research would likely need to determine the best way to capture such data. Such measures, however, could be moot if we discover that the membership of advisory bodies remained relatively stable because a lobbyist was replaced by another non-lobbyist individual from the same company or industry.

Whether we find that membership shifts incrementally or significantly, future research could also focus on the utility of Administration guidance. Perhaps the goal of this particular guidance is to avoid capture by interest groups (Truman 1951; Posner 1974; Laffont and Tirole 1991). It could, however, also be a signal of the Administration's preferences. Such findings would fit Lessig's (2011, 39-41) theory that lobbyist access creates the appearance of impropriety and undue influence. The Obama Administration's guidelines, therefore, would be a public cue that such influence is unacceptable and unwanted. In this case, implementation of the guidance might be secondary to public perception.

Additionally, the removal of lobbyists from advisory committees could reduce congressional influence on the policy process. Since lobbyists generally work across both the legislative and executive branches, removing them from advisory committees may remove those with understanding of the Congress's policy positions and interests. Future research could explore the link lobbyists provide between legislative and executive branch decision-making and what role the removal of lobbyists from the advice process has on inter-branch relations.

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Table 1. United States Trade Representative Advisory Committees

Committee Name
Overall Policy Committees
Advisory Committee for Trade, Policy, and Negotiations (ACTPN)
General Policy Committees
Trade Advisory Committee on Africa
Intergovernmental Policy Advisory Committee
Agricultural Policy Advisory Committee
Labor Advisory Committee
Trade and Environmental Policy Advisory Committee
Specific Policy Committees
<i>Agricultural Technical Advisory Committees</i>
Animal and Animal Products
Sweeteners and Sweetener Products
Fruits and Vegetables
Grains, Feeds, and Oilseeds
Tobacco, Cotton, Peanuts, and Planting Seeds
Processed Foods
<i>Industry Trade Advisory Committees (ITAC)</i>
ITAC-1: Aerospace Equipment
ITAC-2: Automotive Equipment and Capital Goods
ITAC-3: Chemicals, Pharmaceuticals, Health/Science Products and Services
ITAC-4: Consumer Goods
ITAC-5: Distribution Services
ITAC-6: Energy and Energy Services
ITAC-7: Forest Products
ITAC-8: Technologies, Services, and Electronic Commerce
ITAC-9: Nonferrous Metals and Building Materials
ITAC-10: Services and Finance Industries
ITAC-11: Small and Minority Business
ITAC-12: Steel
ITAC-13: Textiles and Clothing
ITAC-14: Customs Matters and Trade Facilitation
ITAC-15: Intellectual Property
ITAC-16: Standards and Technical Trade Barriers

Source: U.S. Government Accountability Office 2009.

Figure 1. Federally-Registered Lobbyists Serving on USTR Advisory Committees

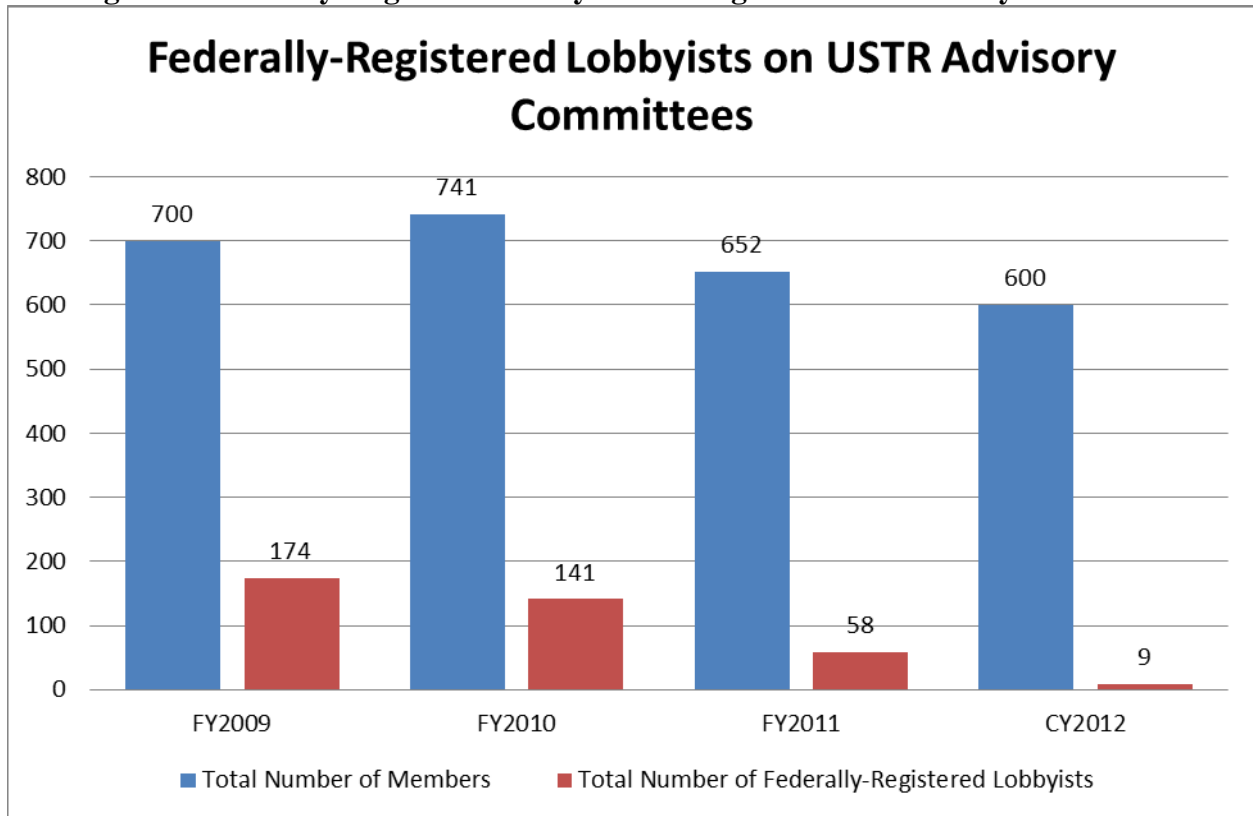


Figure 2. Percentage of Federally-Registered Lobbyists Serving on USTR Advisory Committees

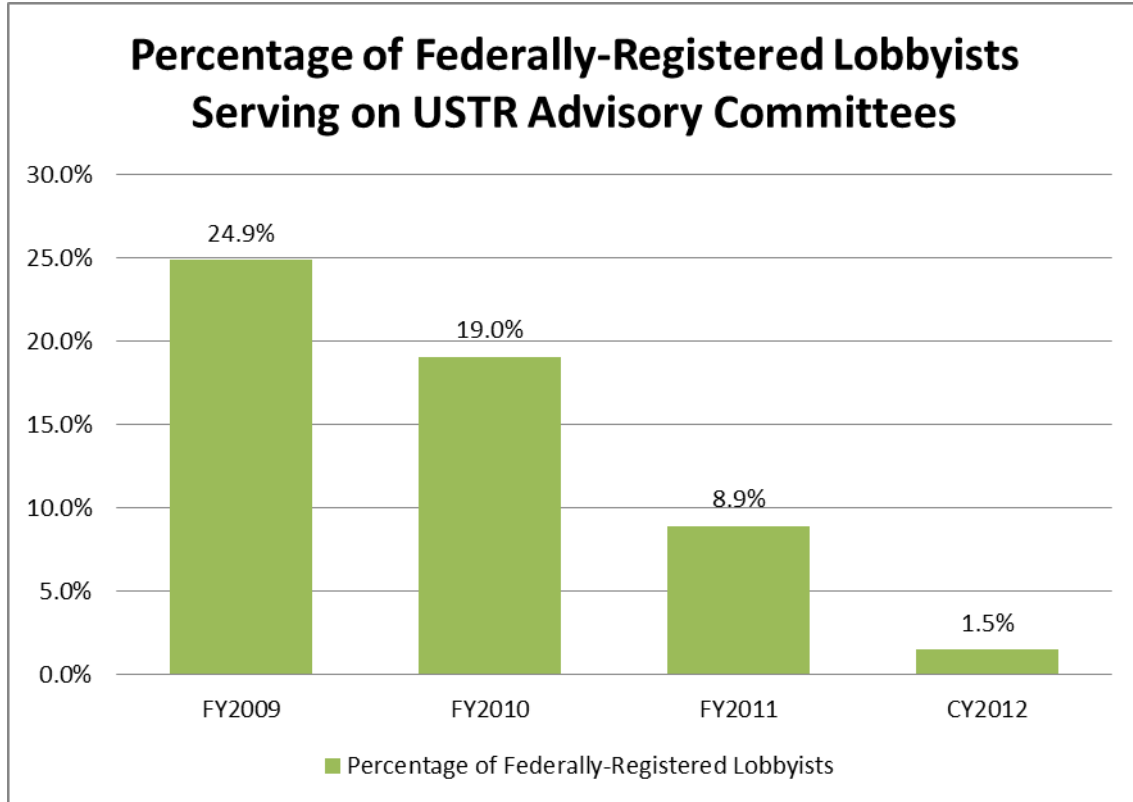
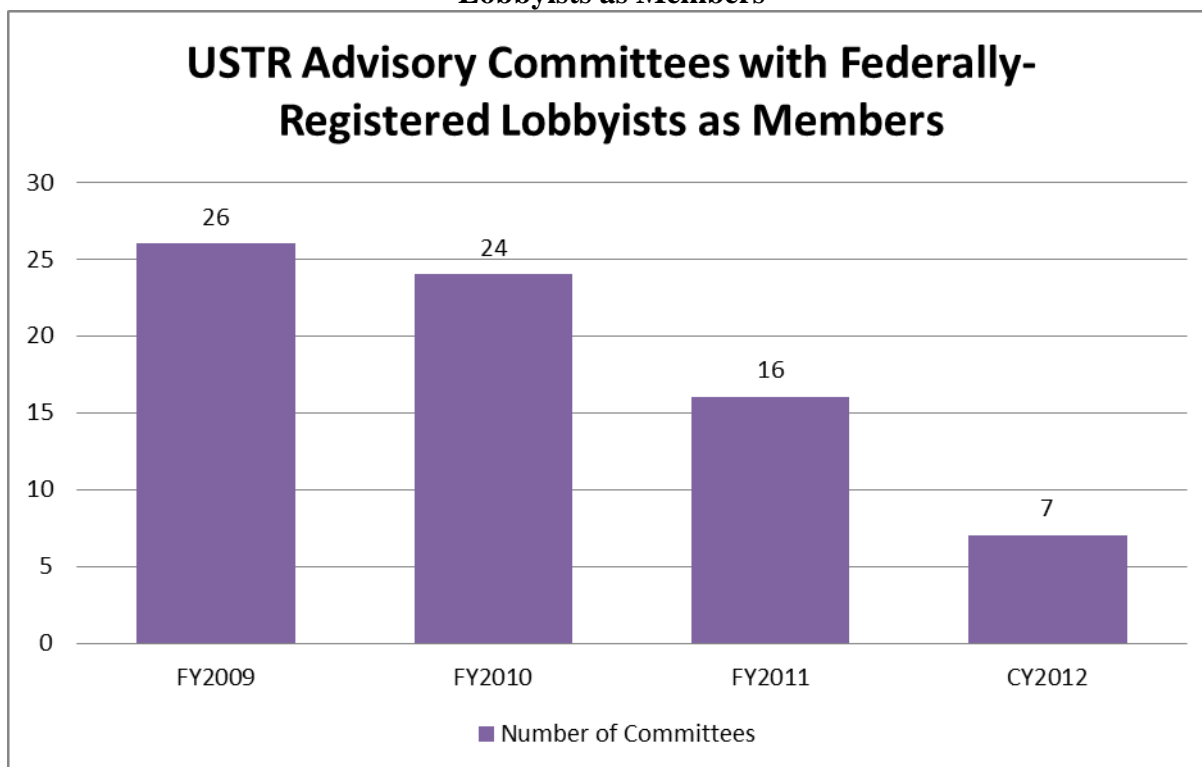


Figure 3. Total Number of USTR Advisory Committees with Federally-Registered Lobbyists as Members



Notes

¹ For policy statements from the Obama Administration transition team, see the Office of the President-Elect, “The Obama-Biden Plan” *Agenda: Ethics*, http://change.gov/agenda/ethics_agenda; and U.S. Office of Government Ethics. *Report on Executive Order 13490, Ethics Branch Commitments by Executive Personnel*, March 31, 2010, [http://www.oge.gov/Open-Government/Annual-Report-on-Executive-Order-13490-\(2009\)](http://www.oge.gov/Open-Government/Annual-Report-on-Executive-Order-13490-(2009)).

² Pursuant to FACA, advisory committees are required to re-charter every two years, unless statutorily exempted (5 U.S.C. Appendix § 14).

³ Advisory bodies statutorily mandated may or may not be obligated to follow FACA requirements—often depending on whether Congress explicitly states in legislation whether FACA should apply. Unless otherwise specified in statute, the authority that creates the advisory body determines its membership pursuant to 5 U.S.C. Appendix § 5(b)(2), which requires “...the membership of the advisory committee to be *fairly balanced* in terms of the points of view represented and the functions to be performed...” [emphasis added]. FACA’s application can be determined by examining who appoints committee members and to whom the committee reports its findings. Pursuant to FACA, advisory bodies are subject to the act’s guidelines if they have at least one member who is not a federal employee, and if their membership is determined predominantly by the executive branch, among other qualifications (5 U.S.C. Appendix § 3).

⁴ Some Members believed that the public harbored concerns that a proliferation of federal advisory committees had created inefficient duplication of federal efforts. Moreover, some citizens argued that the advisory entities did not reflect the public will, a point that was punctuated by many committees’ policies of closed-door meetings. Congress was called on to increase committee oversight and gain some control over the proliferating advisory boards. See,

for example, U.S. Congress, Senate Committee on Government Operations, *The Federal Advisory Committee Act*, report to accompany S 3529, 92nd Cong., 2nd sess., September 7, 1972, S.Rept. 92-1098 (Washington: GPO, 1972), pp. 5-6.

⁵ Zegart (2004) also establishes seven reasons why the President might create an advisory committee. They are “...to garner greater public support for a policy to which the president is already committed; show symbolic concern over a situation at the highest level of government; establish a fact base for others to use; respond to crises; deflect political heat from the president and allow passions to cool when issues become explosive; overcome the “stovepipes” and parochial thinking of the permanent bureaucracy; gather more information about a problem and its policy alternatives; forge consensus among the interests represented on the commission itself; and change the hearts and minds of men” (372).

⁶ It is not true that “expert” members of advisory bodies are always treated as not having personal biases.

⁷ Since 1946, two major lobbying laws have been enacted. First, Title III of the Legislative Reorganization Act of 1946, the “Federal Regulation of Lobbying Act,” required lobbyists to register with Congress, but no specific penalties were attached to non-compliance (P.L. 79-601, 60 Stat. 839-843, August 2, 1946). In 1995, the 1946 Act was repealed by the Lobbying Disclosure Act of 1995 (P.L. 104-65, 109 Stat. 691, December 19, 2005), which was subsequently amended with technical corrections in 1998 (P.L. 105-166, 112 Stat. 38, April 8, 1998), and by the Honest Leadership and Open Government Act of 2007 (P.L. 110-81, 121 Stat. 735, September 14, 2007). The most current lobbying laws can be found in Title 2, chapter 26, *United States Code*.

⁸ 2 U.S.C. § 1605. Lobbying activities are defined as “[l]obbying 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.” Since the passage of the first lobbying laws in 1946, Congress has not attempted to impose restrictions on lobbying. Instead, lobbyists have been required to register and report their activities. The initial 1946 law required each individual who lobbied Congress to register with the House and Senate and disclose certain activities under oath (Potter and Jowers 1999, 1-7). Congress chose to require registration and not to impose restrictions because of concerns over restricting the First Amendment rights “to petition the government for redress of grievances” (Potter and Jowers 1999, 1-1). In many ways, the 1946 law was largely ineffective because it lacked a mechanism to evaluate whether a lobbyist was in compliance with the law and it did not provided definitions of or restrictions on lobbying contacts or activity (*Columbia Law Review* 1947, 103-106).

⁹ President Clinton issued Executive Order 12834 on January 20, 1993 (58 *Federal Register* 5911). It was repealed by Executive Order 13184 on December 28, 2000 (66 *Federal Register* 697). The ethics pledge required for all executive branch appointments made on or after January 20, 2009, includes a ban on gifts from registered lobbyists, a two-year ban on working on particular issues involving a former employer, and a ban on lobbying the administration after leaving government service.

¹⁰ Specifically, the Administration issued guidance covering the Emergency Economic Stabilization Act (P.L. 110-343) and the American Recovery and Reinvestment Act (P.L. 111-5). U.S. Department of the Treasury, “Treasury Secretary Opens Term Opens [sic] With New Rules To Bolster Transparency, Limit Lobbyist Influence in Federal Investment Decisions,” press

release, January 27, 2009, <http://www.treas.gov/press/releases/tg02.htm>. For additional information on the EESA guidance, see U.S. Department of the Treasury, *Communications with Registered Lobbyists and Other Persons About Emergency Economic Stabilization Act Funds*, Washington, DC, 2009, <http://www.financialstability.gov/docs/Lobbying-Guidelines.pdf>. Prior to January 2009, no additional lobbying restrictions on EESA funds were in place. For Recovery Act guidance, see The President, “Memorandum of March 20, 2009: Ensuring Responsible Spending of Recovery Act Funds,” 74 *Federal Register* 12531, March 25, 2009; The White House, “Update on Recovery Act Lobbying Rules: New Limits on Special Interest Influence,” Blog Post, May 29, 2009, <http://www.whitehouse.gov/blog/Update-on-Recovery-Act-Lobbying-Rules-New-Limits-on-Special-Interest-Influence>; and Office of Management and Budget, Peter R. Orszag, Director, *Interim Guidance Regarding Communications With Registered Lobbyists About Recovery Act Funds*, M-09-16, Washington, DC, April 7, 2009, p. 1, http://www.whitehouse.gov/omb/assets/memoranda_fy2009/m-09-16.pdf.

¹¹ The effects of advisory committees are difficult to measure. For example, the FACA Database includes a section that permits agencies to self-report on the effects each of its advisory bodies has had on federal policymaking. It is unclear whether the advisory bodies affected all of the changes that the agencies claim they have made. An agency may have been inclined to implement a particular policy regardless of an advisory committee’s recommendations. The advisory committee, however, may convince the agency employee who enters information into the FACA Database that the committee itself was solely responsible for any policy change that matched its recommendations. Pursuant to 5 U.S.C. Appendix, advisory committees cannot implement policy. They may only provide recommendations to an agency. A federal officer may then use or ignore recommendations as he or she sees fit.

¹² The National Archives and Records Administration publishes the *Federal Register*, which “is the official daily publication for rules, proposed rules, and notices of Federal agencies and organizations, as well as executive orders and other presidential documents.” See Office of the Federal Register, <https://www.federalregister.gov/>.

¹³ It may be impossible to determine whether a particular new member of a FACA committee was appointed specifically to replace a removed lobbyist. The FACA Database does not include information on which membership balance requirements each member meets, and most of the committees we studied do not have a finite membership cap. Even if a new member were appointed to the committee on the exact same day as a lobbyist was removed, it would not be certain that the new member replaced the outgoing member.

¹⁴ P.L. 92-462, 86 Stat. 771, October 6, 1972.

¹⁵ The Federal Advisory Committee Act (FACA) Database can be found at <http://www.fido.gov/facadatabase>. The Lobbying Disclosure Act (LDA) database can be found at <http://disclosures.house.gov/ld/ldsearch.aspx> or http://www.senate.gov/legislative/Public_Disclosure/LDA_reports.htm.

¹⁶P For the 16 industry trade advisory committees we used the committee membership lists from the International Trade Administration website(<http://www.trade.gov/itac>); and for the Advisory Committee for Trade Policy and Negotiations (ACTPN), the Agricultural Policy Advisory Committee (APAC), the Agricultural Technical Advisory Committee for Trade (ATAC), the Industry Trade Advisory Committee (ITAC), the Intergovernmental Policy Advisory Committee (IGPAC), the Labor Advisory Committee (LAC), the Trade Advisory Committee on Africa (TACA) and the Trade and Environmental Policy Advisory Committee (TEPAC) we used the Office of the United States Trade Representative website

(<http://www.ustr.gov/about-us/intergovernmental-affairs/advisory-committees/advisory-committee-trade-policy-and-negotiations>).

¹⁷ *Autor v. Blank*, No. 11-1593 (ABJ), 2012 D. D.C. (September 26, 2012).

¹⁸ Three possible reasons exist that may explain why lobbyists still serve on USTR advisory committees. First, some appointment authorities may have chosen to ignore the OMB guidance. Because it is guidance and not binding policy or regulation, an agency or department head may choose to ignore it and appoint whomever he or she believes is most appropriate to the mission of the committee. Second, many advisory committees are chartered for two years and have corresponding membership terms. The Obama Administration guidance only affects future appointments and does not require agencies to retroactively remove federal-registered lobbyists from current posts on advisory committees. If any of the USTR committees are not scheduled to be rechartered in FY2012 (or beyond), they would not be required to reappoint members until after the rechartering, and the guidance would not have any effect on its membership. Additionally, FACA committees explicitly authorized by statute may have membership terms longer than two years or have authority for members to serve in perpetuity. Third, it is possible that a lobbyist has promised his or her appointing authority that he or she would de-register to be in compliance with the Administration guidelines to remain on the advisory committee. The lobbyist may then fail to terminate his or her lobbyist registration, or he or she may make a filing error that causes the termination not to occur.