

GSA Comments on a March 14, 2011 ACUS Proposal: Ongoing Web Forum Meetings of Federal Advisory Committees: A Proposed Use of “New Media” under the Federal Advisory Committee Act

GSA comments on the March 14, 2011 ACUS proposal are noted below. In addition, a copy of the ACUS proposal (with yellow highlighted text that relates to comment 4 below) is included as an attachment.

- (1) The proposal is an ACUS proposal that was provided to GSA for comment, not a joint project between ACUS and GSA. It is up to ACUS to decide what GSA comments to accept and incorporate, which then become part of the ACUS proposal. In addition, if the ACUS proposal is being sent to GSA for consideration, it would be inappropriate for GSA to be a partner in its creation. Other than noting that GSA provided comments on the ACUS proposal and some of those comments have been incorporated, references to GSA or CMS input should be removed from the proposal. This includes text throughout the proposal, Section F in its entirety, and the Appendix.
- (2) FACA is not a collaborative governance statute. FACA was adopted to allow Federal agencies to receive independent advice and recommendations from the public. This advice is advisory only and is not to be inappropriately influenced by the agency receiving the advice (41 C.F.R § 102–3.105 (g)). ACUS staff has concurred with GSA that FACA is not a collaborative governance statute, and informed us that the term was only being used because the collaborative governance subcommittee was the closest fit for their FACA in the 21st Century project. However, the term continues to be used, and is in fact included on page 1 of the proposal and is further embedded as an integral component of the ACUS proposal. We would suggest that this term not be used in this proposal since it has already been agreed that FACA is not, in fact, a collaborative governance statute.
- (3) The GSA 2001 FACA regulations already allow advisory committee meetings to be conducted in whole or in part by teleconference, videoconference, the Internet, or other electronic medium, as long as they meet the meeting requirements outlined in 41 C.F.R. §102–3.140. It is, therefore, unclear to GSA why ACUS is proposing a recommendation that asks GSA to announce that agencies can conduct online meetings when they are already allowed to do so under the current regulations.
- (4) References to how FACA committees operate should either cite the appropriate section of the law or FACA regulation (there are numerous factual errors in the proposal), or cite that the general statements regarding how FACA committees operate are the opinions of ACUS. See yellow highlighted text in the attachment for examples where the proposal's statements are not tied to the text of either the statute or FACA regulations. Further, many of the highlighted comments are clearly not supported by the law or the regulations.
- (5) Statements directly attributed to GSA (i.e., CMS has taken the position...) are incorrectly presented in the proposal or simply inaccurate and should be deleted.



ATTACHMENT

Ongoing Web Forum Meetings of Federal Advisory Committees: *A Proposed Use of “New Media” under the Federal Advisory Committee Act*

Recommendation: GSA should announce that, under current law, federal advisory committees can conduct meetings wherein committee members post comments on a web forum that would be available over the course of several weeks or months and would permit members of the public to view all postings.

I. Project Overview

The Administrative Conference of the United States (“ACUS”) has opened a study entitled “FACA in the 21st Century,” which is designed to explore agencies’ use of “new media” and innovative techniques of collaborative governance under the Federal Advisory Committee Act (“FACA”).¹ The study aims both to identify “best practices” amongst agencies in their current uses of advisory committees and to propose potential changes to the statute itself and to the 2001 General Services Administration (“GSA”) rules² implementing it in order to promote the optimal use of “new media” and collaborative governance amongst agencies.

ACUS has commissioned a study by Professor Jim O’Reilly of the University of Cincinnati College of Law wherein he generally addresses these issues. In addition to Professor O’Reilly’s work, ACUS staff Jon Siegel (Director of Research & Policy), David Pritzker (Deputy General Counsel and Staff Counsel for the FACA project), and Reeve Bull (Attorney Advisor and Project Advisor for the FACA project) have undertaken a study of whether agencies may conduct ongoing “virtual meetings” on the web, in which committee members can post their comments in a publicly available web forum. ACUS staff has worked closely with the Committee Management Secretariat (“CMS”) at GSA on this issue. This report addresses how an ongoing “virtual meeting” would comply with FACA and the GSA rules as well as various requirements identified by CMS in discussions between them and ACUS staff. The report ultimately concludes that agencies can conduct such ongoing web meetings in full compliance with current law.

¹ 5 U.S.C. App. §§ 1–16.

² 41 C.F.R. pts. 101-6, 102-3.



II. The Proposal- An Ongoing Web Forum

Exploiting “New Media” and Enhancing Public Transparency/Collaboration via a Web Forum Meeting

When FACA was enacted in 1972,³ many of the technological advances of the last two decades that have become integral to everyday life and to conducting the business of the federal government did not exist. At the time, interactions amongst advisory committee members occurred either in person-to-person exchanges or in telephone conversations. In preparing for the meetings, committee members would confer either in-person or over the telephone. Upon deciding upon the agenda for the meeting, the committee would then convene a physical gathering attended by committee members and interested members of the public.

The “Internet Revolution” introduced a number of communications tools that advisory committees have utilized to facilitate communications amongst committee members and promote expanded public participation in committee business. For instance, email greatly facilitates exchanges amongst committee members, allowing greatly expedited exchange of information. Webcasting has allowed the meetings of advisory committees to be broadcast to a much larger audience. When enacting the current rules implementing FACA in 2001, GSA included provisions clarifying the applicability of FACA to meetings conducted by electronic means.⁴ Nevertheless, some uncertainty remains regarding precisely how committees can exploit such new technologies in preparing for and conducting committee meetings.

For instance, the extent to which committees may use email to prepare for committee meetings is somewhat uncertain. FACA imposes a number of requirements on “meetings” of advisory committees, including requiring them to be noticed in the Federal Register and opened to public participation. Thus, the question arises of whether an email exchange amongst committee members prior to a physical meeting constitutes a “virtual meeting,” which would be unlawful as the email exchange was neither announced in the Federal Register nor made available for public participation. Committees often avoid this problem in one of two ways. First, exchanges designed solely to “gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting” constitute “preparatory work” that does not trigger the applicability of FACA.⁵ Second, exchanges amongst groups smaller than the entire advisory

³ Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 770 (1972).

⁴ Federal Advisory Committee Management, 66 Fed. Reg. 37,728, 37,730–31 (July 19, 2001).

⁵ 41 C.F.R. § 102-3.160(a).



committee fall under a “subcommittee exception” and also do not trigger FACA.⁶ Thus, advisory committees will often divide into a number of “subcommittees” that will prepare materials for consideration at meetings and will otherwise avoid attempting to reach consensus on any non-preparatory matter prior to an actual meeting.⁷

Though the “preparatory work” and “subcommittee exceptions” have enabled agencies to exchange emails without repeatedly triggering FACA, their use prevents the public from viewing certain work of the committee.⁸ Nevertheless, some such exceptions are likely necessary, lest every email exchanged between committee members constitute an improper “virtual meeting.” In order to resolve this tension and otherwise promote the optimal usage of “new media” developments, GSA should consider the possibility of agencies’ hosting “virtual meetings” via an ongoing web forum. The committee wishing to host the web forum would issue a Federal Register notice at least 15 days in advance of the opening of the forum announcing the date it will open, the website on which it will occur, the duration of the forum (which could be as long as several months), and the process for submitting comments to the committee for its consideration. The forum would be “moderated,” meaning that the Designated Federal Officer (“DFO”)⁹ for the committee would view every proposed comment prior to its posting on the forum. Committee members would have the ability to submit comments to the moderator and view all posted comments and uploaded documents on the forum. Members of the public could view all comments and uploaded documents but could not submit comments directly; rather, they would email, fax, or mail comments to the DFO, who could then screen the comments for inappropriate content and then post them on the forum for consideration by committee members. When the web forum concludes, the DFO will prepare detailed minutes summarizing the outcome of the forum based upon the comments submitted over the course of the meeting.

⁶ *Id.* § 102-1.35(a).

⁷ To the extent that committee members communicate via email in preparation for these meetings, the emails themselves arguably constitute “records” or “documents” that must be made available to the public upon request. 5 U.S.C. App. § 10(b). CMS has taken the position that every email exchanged between two or more committee members, including an email that is not made available to the entire committee, is a record that must be preserved and made available for public viewing. Such documents must be made available only on request, however, and need not be publicly posted.

⁸ In this light, Congress has recently considered the possibility of closing the “subcommittee exception.” A bill passed by the House (but not ultimately enacted into law) provides that essentially all major FACA requirements apply to smaller working groups within advisory committees. H.R. REP. NO. 111-135, at 3, 11–12 (2009).

⁹ The DFO is an officer or employee of the federal government designated to chair or attend each meeting of the advisory committee. 5 U.S.C. App. § 10(e).



Such a forum would enable committee members to freely use electronic communications without the concern of improperly triggering FACA (since the forum will have been announced in the Federal Register and made available to the public). The forum also would greatly enhance public access to the deliberations of committee members, allowing them to view exchanges that likely would have previously been private under the “preparatory work” or “subcommittee exceptions.” Of course, web forum meetings would not constitute the exclusive means of committee meetings, and committees would likely often continue to use more traditional in-person and teleconferenced meetings. Nevertheless, allowing for web forum meetings would open another avenue for committees to conduct business while promoting optimal public transparency and participation.

Legal Analysis of the Proposed Web Forum Meeting

Though FACA and the implementing rules focus primarily upon physical meetings, nothing in either the statute or the regulations would prohibit the proposed “virtual meeting.” Indeed, the GSA rules announce that “[a]ny advisory committee meeting conducted in whole or part by a teleconference, videoconference, the Internet, or other electronic medium meets the requirements of this subpart.”¹⁰ Of course, a number of the requirements contained in the statute and rules would apply somewhat differently to ongoing “virtual meetings” than to traditional in-person meetings. CMS pointed to a number of provisions contained in FACA, its implementing rules, and other statutes that would need to be considered in conducting an ongoing web forum meeting. These suggestions are presented in the Appendix to this document. This section analyzes each of the major requirements set forth in FACA and its implementing regulations as well as the specific concerns raised in CMS’s comments and explains how an ongoing web forum meeting would meet each of these requirements.

A. The Statute and Rules Set forth Certain Responsibilities for the DFO

Legal Requirements: The statute and rules require that the DFO perform the following functions: (1) “[a]pprove or call the meeting of the advisory committee”¹¹; (2) “[a]pprove the agenda” for the committee meeting¹²; (3) “[a]ttend the meetings” of the advisory committee¹³; (4) “[a]djourn any meeting when he or she determines it to be in the public interest”¹⁴; and (5)

¹⁰ 41 C.F.R. § 102-3.140(e).

¹¹ 5 U.S.C. App. § 10(f); 41 C.F.R. § 102-3.120(a).

¹² 5 U.S.C. App. § 10(f); 41 C.F.R. § 102-3.120(b).

¹³ 5 U.S.C. App. § 10(e); 41 C.F.R. § 102-3.120(c).

¹⁴ 5 U.S.C. App. § 10(e); 41 C.F.R. § 102-3.120(d).



“[c]hair the meeting when so directed by the agency head.”¹⁵ In light of the statutory and regulatory responsibilities of the DFO, CMS suggested that the DFO would need to “monitor[] the website 24/7” in order to attend the meeting and execute his or her responsibilities (such as adjourning the meeting if deemed to be in the public interest).¹⁶ CMS also inquired as to what the role of the Committee Chair would be and how the public would be informed of the respective roles of the DFO and Chair.¹⁷

How the Proposal Meets Those Requirements: A moderated web forum, in which the DFO serves as the moderator, would meet each of the statutory and regulatory requirements as those requirements are interpreted by CMS. The DFO, in consultation with the Committee Chair, would approve the web forum in advance and approve the agenda for the ongoing discussion. The DFO would also “[c]hair” the meeting (*i.e.*, moderate the discussion) at the direction of the Committee Chair. Though the DFO would not necessarily be logged onto the web forum “24/7,” as CMS suggests might be necessary to satisfy the attendance requirements, he or she would be privy to all postings as the moderator, insofar as he or she would view each submission prior to posting it to the website. As such, the DFO would effectively be “in attendance” at the meeting at all times active discussion is occurring by serving as a central clearinghouse for every posting. The DFO could also adjourn the meeting (*i.e.*, terminate the web forum) if the postings strayed too far from topic. Alternatively, if only some of the submissions strayed from topic, the DFO could simply decline to post the immaterial submissions (and remind the offending party of the need to stay on topic). The Committee Chair would advise the DFO on moderating the discussion and would post fairly regularly to ensure that the discussion remained on topic. The public would be advised of the respective roles of the DFO and Committee Chair in the Federal Register notice announcing the web forum as well as on the forum webpage.

B. Advisory Committee Meetings Must Ensure Reasonable Opportunities for Public Attendance and Participation

Legal Requirements: FACA requires that advisory committee meetings be “open to the public.”¹⁸ The implementing rules provide clarification of the precise steps committees must take in order to ensure adequate opportunities for public attendance and participation. With respect to public attendance, the meeting must be held “at a reasonable time and in a manner or

¹⁵ 41 C.F.R. § 102-3.120(e).

¹⁶ App. at 4.

¹⁷ *Id.*

¹⁸ 5 U.S.C. App. § 10(a)(1).



place reasonably accessible to the public.”¹⁹ The forum selected must accommodate all committee members and a reasonable number of public attendees.²⁰ With respect to public participation, members of the public must be permitted to “file a written statement” with the committee and, “if the agency’s guidelines permit,” must be able to “address the advisory committee.”²¹

CMS acknowledges that the proposed web forum would meet at least some of the statutory and regulatory requirements.²² Nevertheless, they raise several concerns regarding public access and participation. With respect to public access, they inquire as to how the website would be made available to persons having disabilities or lacking web access.²³ With respect to public participation, they ask how the committee members will know when a public comment has been posted and how such comments could be screened for “inappropriate” content prior to posting.²⁴ They also raise the concern that allowing comments only by email submission would foreclose the possibility for submitting comments by other means, such as via fax or traditional mail.²⁵

How the Proposal Meets Those Requirements: As an initial matter, it is worthwhile to note that a meeting by web forum holds the promise of *substantially* enhancing the possibility for public attendance at advisory committee meetings. Though the “digital divide” is undoubtedly a real and pressing issue,²⁶ the number of persons lacking web access is likely significantly smaller than the number of persons who do not live within the immediate vicinity of a physical meeting of an advisory committee and therefore cannot attend the meeting without great personal expense. Though some advisory committees allow *both* physical and virtual attendance by webcasting their physical meetings, neither the statute nor the implementing rules require them to do so. Furthermore, several means of mitigating the “digital divide” exist. For instance, many public libraries offer free online access to their patrons. As such, a web forum meeting is likely to *significantly enhance* opportunities for public attendance and participation rather than restrict

¹⁹ 41 C.F.R. §§ 102-3.105, 102-3.140(a).

²⁰ *Id.* § 102-3.140(b).

²¹ 5 U.S.C. App. § 10(a)(3); 41 C.F.R. §§ 102-3.140(c)–(d).

²² App. at 2–3.

²³ *Id.* at 2, 7.

²⁴ *Id.* at 4, 7.

²⁵ *Id.* at 4.

²⁶ See, e.g., Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 *Cardozo Arts & Ent. L.J.* 1, 2 (2002) (“The digital revolution has transformed the lives of many, but also has left untouched the lives of many others.”).



them. Nevertheless, access to the forum could be expanded to include persons completely lacking web access, as explained more fully below.

The proposal meets each of the requirements of the statute and regulations. The web forum would almost certainly be held at a reasonable time and in a place reasonably accessible to the public insofar as it would be constantly available for public viewing merely by going to the committee's webpage. The page could accommodate thousands of public attendees (limited only by bandwidth restrictions), which is orders of magnitude greater than the attendance limits for a physical meeting and undoubtedly a "reasonable" number as required by the rules. The ability to "file a written statement" with the committee or to "address the advisory committee" would essentially be equivalent in the case of an ongoing moderated web forum: interested members of the public could submit comments to the DFO, who would screen them for inappropriate content and then post them to the forum for the consideration of the committee members.

The web forum meeting could also accommodate each of CMS's concerns. The website could be designed in a manner to comply with all legal requirements for access by persons with disabilities (*e.g.*, it could be made compatible with software designed to convert text to audio for blind attendees).²⁷ With respect to the "digital divide" issue, interested participants lacking personal web access could relatively easily access the site at a local library or other source of free internet access.²⁸ To the extent accessing the internet is not an option (for instance, for elderly citizens who might be unfamiliar with operating a computer), the committee could offer the option of obtaining printouts of the committee proceedings through the mail. By the same token, members of the public who wish to comment could be given the opportunity to submit comments by traditional mail or fax: the Federal Register Notice announcing the meeting could provide the DFO's physical address and a fax number, and comments could be mailed or faxed to the DFO. The DFO would have the ability to screen all comments (whether submitted via email, traditional mail, or fax) for inappropriate content, and he or she could notify the committee members whenever such a public comment has been posted to the forum.

²⁷ 29 U.S.C. § 794; *see also* Section II.F.1., *infra*.

²⁸ Though accessing the internet may be inconvenient for some, particularly those who live in rural areas, the difficulty entailed in driving to a local library is likely to be considerably less severe than that involved in travelling to the forum of an advisory committee meeting (many such meetings are held in Washington, DC, which is extremely inconvenient for Americans living in the West and relatively inconvenient for anyone living outside of the Beltway). A local library is likely to be within reasonable driving distance whereas a meeting in Washington, DC probably is not for most United States citizens.



C. Committees Must Announce Meeting Information 15 Days in Advance in the Federal Register

Legal Requirements: Prior to any meeting of an advisory committee, **the committee must publish** a Federal Register notice 15 days in advance of the meeting announcing the meeting and providing certain meeting details.²⁹ The required details of the meeting notice include in relevant part: (1) the “time, date, place, and purpose of the meeting”³⁰; (2) a “summary of the agenda, and/or topics to be discussed”³¹; (3) a statement of whether the meeting is open or closed, providing a justification for any total or partial closure³²; and (4) the name and contact information for the DFO in order to allow interested members of the public to contact him or her for additional information.³³

CMS acknowledges that the proposal would meet many of the legal requirements but raises a number of concerns.³⁴ First, CMS inquires as to how the DFO or Committee Chair would handle discussions that deviate from the topic of the meeting.³⁵ Second, CMS asks several questions related to the handling of comments during the meeting, including whether the DFO or Committee Chair would provide introductory remarks, how the committee would handle comments from specially invited guests, how committee member technical questions would be addressed, and how the forum would handle discussion of multiple topics (including how the public would know which topic is being discussed).³⁶

How the Proposal Meets Those Requirements: The proposal meets all legal requirements. The Committee would publish a Federal Register notice announcing the web forum 15 days in advance of the forum’s availability online. The notice would provide the dates over which the forum will be available (“time”), the URL for the forum (“place”), and the details of the meeting (“purpose”). The notice would summarize the agenda for the meeting, providing a list of topics to be discussed and the timeline for discussing those topics. It would state whether all or part of the meeting was to be closed to public participation (*i.e.*, the website would only be available to committee members) and the reasons for closure. Finally, it would provide the name, email,

²⁹ 5 U.S.C. App. § 10(a)(2); 41 C.F.R. § 102-3.150(a).

³⁰ 41 C.F.R. § 102-3.150(a)(2).

³¹ *Id.* § 102-3.150(a)(3).

³² *Id.* § 102-3.150(a)(4).

³³ *Id.* § 102-3.150(a)(5).

³⁴ App. at 3–4.

³⁵ *Id.* at 3.

³⁶ *Id.*



telephone and fax numbers, and physical address of the DFO, thereby allowing members of the public without internet access to contact the DFO by alternative means.

The proposal also meets CMS's various concerns. First, because the forum would be moderated, the DFO could handle any deviations from the topic simply by refusing to post immaterial submissions (and reminding the submitting party to adhere to the subject matter of the meeting). The DFO and Committee Chair could provide initial postings describing the goals of the meeting ("introductory remarks"), receive comments from specially invited guests and post them if relevant, answer any technical questions of committee members, and announce which topics will be discussed at which times to ensure that the public is aware of the current topic of discussion.

D. The Public Must Have Access to Documents Considered by the Committee

Legal Requirements: FACA requires that every document "made available to or prepared for or by each advisory committee" must be made available on request for "public inspection and copying."³⁷ CMS acknowledges that the proposal complies with this requirement for online participants but again raises the concern regarding the availability of such materials to those lacking internet access.³⁸

How the Proposal Meets Those Requirements: The advantages of an online web forum vis-à-vis a traditional meeting are particularly apparent in the arena of ensuring compliance with FACA's provisions requiring public access to committee documents. CMS has taken the position that any written exchange (including email) between committee members qualifies as a "record" that must be made available for public viewing on request, even if the exchange does not go to the entire committee.³⁹ Maintaining a database containing all such exchanges could prove incredibly cumbersome for advisory committees. For instance, if one committee member emails another using personal email addresses, the exchange qualifies as a "record" that must be maintained by the agency and made available for public viewing on request per CMS's interpretation of the statute. For that reason, CMS advises committee members to copy the DFO on all email exchanges, though one can easily envision a scenario where a committee member

³⁷ 5 U.S.C. App. § 10(b); 41 C.F.R. § 102-3.170.

³⁸ App. at 5.

³⁹ For instance, an email from Committee Member A to Member B asking about the meaning of a term in a document considered by the Committee qualifies as a "record" under CMS's interpretation. This record must be made available to any interested member of the public upon his or her request.



simply forgets to copy the DFO on an email exchange. An online web forum efficiently resolves that issue: all exchanges would be available for public viewing on the committee's website.

With respect to the "digital divide" issue, as previously noted, a large percentage of citizens have personal web access, and a large percentage of those who lack personal access have ready access to free internet at local libraries. Of the remaining citizens who either lack easy web access or are unfamiliar with computers, such persons can request access to printouts of the meetings by calling or mailing the DFO listed in the Federal Register notice.

E. FACA Requires Detailed Minutes of All Advisory Committee Meetings

Legal Requirements: "[D]etailed minutes" of every advisory committee meeting must be kept.⁴⁰ The minutes must include: (1) the "time, date, and place of the advisory committee meeting"⁴¹; (2) a list of all persons present at the meeting (including committee members, agency staff, and members of the public)⁴²; (3) description of each matter discussed and the resolution thereof,⁴³ and (4) a copy of all reports and other documents received, issued, or approved by the committee.⁴⁴ The DFO **and Committee Chair** must ensure that the minutes are certified within 90 days of the conclusion of the meeting.⁴⁵

How the Proposal Meets Those Requirements: Following the conclusion of the web forum meeting, the DFO will review the postings. He or she will then prepare minutes providing: (1) a statement of when the meeting occurred and at what website it took place (the "time, date, and place" of the meeting); (2) a list of all participants, including committee members and agency staff as well as all members of the public who submitted comments; (3) a description of each major topic of discussion and the conclusion reached thereon; and (4) copies of all documents received or promulgated by the committee. The DFO will then submit those minutes to the Committee Chair for his or her certification within 90 days of the conclusion of the web forum.

F. Various Other Issues Raised by CMS

⁴⁰ 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165.

⁴¹ 41 C.F.R. § 102-3.165(b)(1).

⁴² 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165(b)(2).

⁴³ 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165(b)(3).

⁴⁴ 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165(b)(4).

⁴⁵ 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165(c).



In addition to the matters discussed above, CMS raised a number of additional concerns. The following section addresses how the proposal would meet each of these concerns.

(1) CMS asks “How does [the proposal] address Section 508 compliance?”⁴⁶ The site(s) used for web fora by each advisory committee would be created in full compliance with section 508 of the Rehabilitation Act (*e.g.*, it would be made compatible with screen readers for use by the blind and assistive listening devices for use by the deaf).

(2) CMS notes that Section 11(a) of FACA requires that committees “make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.”⁴⁷ The postings on the web forum would serve as the transcript of the meeting. Were a member of the public interested in obtaining a physical copy of this transcript, the committee would provide it to him or her at cost of duplication.

(3) CMS notes that Section 13 of FACA requires that at least eight copies of the advisory committee’s report and, where appropriate, background papers prepared by consultants be made available to the Library of Congress.⁴⁸ At the conclusion of the web forum, eight copies of the report and consultants’ background papers would be made available to the Library of Congress.

(4) CMS raises a number of issues regarding committee decisionmaking, including inquiries as to how the committee would handle voting and to what constitutes a quorum of the committee.⁴⁹ Neither the statute nor the rules imposes a formal quorum requirement for federal advisory committees, so the fact that only a small percentage of committee members may be simultaneously online is not problematic. With respect to voting, once the discussions of the committee members neared conclusion, the DFO and Committee Chair could announce a date at which all committee members are asked to log onto the forum and cast their votes on committee proposals.

(5) CMS asks whether web forum meetings would be supplemented with other types of meetings, such as those conducted over teleconference or in-person.⁵⁰ Though a committee could lawfully conduct all of its meetings by web forum, the committee certainly

⁴⁶ App. at 2.

⁴⁷ App. at 6–7; *see also* 5 U.S.C. App. § 11(a).

⁴⁸ App. at 7; *see also* 5 U.S.C. App. § 13.

⁴⁹ App. at 8.

⁵⁰ *Id.*



would want to consider whether holding additional in-person meetings or teleconferenced/webconferenced meetings would be useful. A committee could exploit a variety of meeting formats, using the meeting type that best suits its needs in any given context.

(6) CMS asks whether the meeting recordkeeping would comply with the National Archives and Record Administration's General Records Schedule 26.⁵¹ General Records Schedule 26 provides detailed guidance on retention periods for various documents associated with advisory committees. All postings and documents considered by the committee would be available on the web forum, and the committee would ensure that it retained copies of those documents as required by Schedule 26.

(7) CMS inquires as to how the committee would capture the time spent by committee members, which is relevant both for determining the pay for members receiving compensation and for committee members who are Special Government Employees (who are limited in the number of days per year that they can work on committee matters).⁵² As is the case with traditional advisory committee meetings, members will be asked to keep track of the time they spend on committee business. Keeping an accurate record of such time would presumably be somewhat easier in the case of a web forum meeting, for the website could keep track of the amount of time each member spends logged into the system.

III. Conclusion

For the reasons discussed, an advisory committee meeting conducted via a web forum would fully comply with the requirements of FACA and its implementing rules as well as satisfying the various concerns expressed by CMS regarding such a meeting. In this light, the Conference recommends that GSA, with the assistance of the Conference, issue an announcement recognizing the legality of such meetings. In so doing, GSA would both facilitate agencies' use of new technology and open a new mode of committee meetings that would greatly serve transparency and public participation in committee business, goals both of the Obama Administration and of FACA itself.⁵³

CMS appropriately points to issues arising from the lack of universal access to the internet. Nevertheless, as discussed above, the vast majority of citizens could access the online forum either on a personal internet connection or at a public terminal such as a local library, and

⁵¹ *Id.*

⁵² *Id.*

⁵³ 5 U.S.C. App. § 2(b)(5).



the remainder of the population would be able to obtain printouts of the postings and documents submitted in connection with the meeting. Similarly, members of the public could submit comments either electronically or via fax or traditional mail, making participation in the forum effectively available to the entire population. This opportunity for virtually universal attendance and participation contrasts starkly with participation in traditional in-person meetings, wherein attendance is cost effective only for citizens who live relatively close to the site of the meeting. Moreover, the web forum would provide access to information to which members of the public do not typically have ready access. For instance, committees often make use of the “sub-committee exception” to determine the agenda for committee meetings and decide upon the topics to be discussed thereat. Members of the public could potentially request copies of these communications if they were memorialized in emails,⁵⁴ but collecting and providing copies of the documents would require significant expenditure of effort on the part of the committee. By contrast, *all* communications exchanged amongst committee members, including those amongst groups smaller than the entire committee, would be collected and made readily available on the proposed web forum.

In short, a web forum meeting would in no way *detract* from the current regime’s opportunities for public attendance at and participation in committees’ work, and it would *enhance* the opportunities for such public interaction in many important respects. As times evolve and technology progresses, the government must ensure that its institutions evolve in concert. Advisory committee meetings conducted by web forum would constitute a small but significant step in that direction.

⁵⁴ *Id.* § 10(b).



Appendix⁵⁵

Virtual Meeting Question and Proposal From ACUS

Question: Can an agency conduct a multiple day “virtual meeting” in a publicly accessible website forum under the Federal Advisory Committee Act?

The Federal Advisory Committee Act (FACA) established a structure for creating, managing, and terminating Federal advisory committees, and required the opportunity for public input. The statute clearly states the only purpose of Federal advisory committees is to provide independent advice and recommendations to the Executive Branch of government. FACA is neither a public participation statute nor a collaborative process between the government, a Federal advisory committee, and the public.

ACUS PROPOSAL

(1) The agency announces 15 days in advance in the *Federal Register*:

- the date and time (i.e. beginning on a specific date and continuing in an online discussion for a number of days, weeks, or months) and place (i.e. the web address) of the meeting, noting that advisory committee members will discuss issues related to a specific topic of interest to the committee via online postings over an extended period of time (e.g. for three months following the initiation of the forum);
- an invitation to members of the public to submit written comments for consideration during the meeting; and
- other information required for a *Federal Register* notice.

(2) After the initiation of the forum, members of the public could view all postings and document submissions. Though members of the public would not be able to post statements directly on the forum, they would be free to submit comments at any time to the DFO, who would then post the comments on the forum for the committee’s consideration.

(3) All documents to be discussed in the forum would be posted to the web in advance, and the public would have real-time access to the process of revising the documents as it occurs on the

⁵⁵ This document was provided to ACUS Attorney Advisor Reeve Bull by Lorelei Kowalski of CMS on March 2, 2011. It contains CMS’s response to a document outlining the virtual meeting proposal that ACUS staff Jon Siegel and Reeve Bull submitted to CMS in December 2010.



forum. Members of the public could submit written statements for consideration during the ongoing discussion.

ANALYSIS

GSA evaluated the ACUS proposal against the requirements in the Federal Advisory Committee Act (5 U.S.C. App.) and the GSA Final Rule (41 C.F.R. Parts 101-6 and 102-3) for convening Federal advisory committee meetings. The analysis is organized by relevant sections of the Act, followed by the citation(s) for the corresponding section(s) in the Final Rule. The ACUS and GSA analyses that evaluate the ACUS proposal against these statutory and regulatory requirements follow. At the end of the analysis GSA raises additional considerations that are not direct FACA requirements, but could affect the use of online technology in a FACA forum.

A. Section 10 (a) (1): Each advisory committee meeting shall be open to the public.

ACUS Proposal:

Members of the public will be able to log onto the web forum and view all postings thereon. They also may submit written comments to the DFO for the committee's consideration (or even participate in the discussions if permitted by the agency's guidelines).

GSA Analysis:

The proposed meeting is only open to the public with access to a computer. How does ACUS propose to allow the interested public without computer access to obtain timely printouts of the ongoing discussions and documents uploaded to the website? How does ACUS propose to address Section 508 compliance?

B. 41 C.F.R. § 102–3.140 (a): The agency head...must ensure that: **Each advisory committee meeting is held at a reasonable time and in a manner or place reasonably accessible to the public**, to include facilities that are readily accessible to and usable by persons with disabilities, consistent with the goals of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794.

ACUS Proposal:

The web forum will be available at all hours of the day (“reasonable time”) and will be easily accessible on the web (“place reasonably accessible to the public”).

GSA Analysis:



How does ACUS propose to make the website accessible to and usable by persons with disabilities? What other means does the public have access to the deliberations and postings other than online access?

C. 41 C.F.R. § 102–3.140 (b): The meeting room or other forum selected is sufficient to accommodate advisory committee members, advisory committee or agency staff, and a reasonable number of interested members of the public.

ACUS Proposal:

The forum will be available for viewing by an essentially unlimited number of members of the public (“accommodate . . . a reasonable number of public attendees”).

GSA Analysis:

The ACUS proposal appears to be compliant with the regulatory requirement.

D. Section 10 (a) (2): timely notice of each such meeting shall be published in the *Federal Register*; 41 C.F.R. § 102–3.150 (a): A notice in the *Federal Register* must be published at least 15 calendar days prior to an advisory committee meeting.

ACUS Proposal:

The committee will publish a *Federal Register* notice at least 15 days in advance of the initiation of the web forum announcing it and inviting public participation.

GSA Analysis:

The ACUS proposal meets the statutory and regulatory requirements.

E. 41 C.F.R. § 102–3.150 (a): requires *Federal Register* notices to include, at a minimum, the following information:

(2) The time, date, place, and purpose of the meeting

ACUS Proposal:

The notice will state the date and time at which the web forum will commence and describe the purpose of the online discussion. It will also note the “place” of the meeting (i.e. the URL of the web forum).

GSA Analysis:

The *Federal Register* notice needs to indicate a beginning and end date and time. How does ACUS propose to ensure that the committee member discussions do not deviate over time from the purpose noticed in the *Federal Register*?



(3) A summary of the agenda, and/or topics to be discussed

ACUS Proposal:

The Federal Register notice will describe the goals of the online discussion and the topics that participants will be discussing.

GSA Analysis:

To comply with FACA, the website discussion could only involve the topic(s) identified in the *Federal Register* notice. How does ACUS propose to handle a situation in which committee members start discussing topic(s) that have not been previously noticed to the public via a *Federal Register* notice? Who are the “participants” that ACUS refers to in their proposal?

FACA meeting agendas typically include introductory remarks from the DFO and Chair. How will this be addressed in a website forum? FACA meeting agendas often include invited speakers to provide technical information to committee members – how would this be handled via a website forum? Committee members often have technical questions for the agency – how would this be handled via a website forum? If there is more than one topic to be discussed, how will the public know when to participate or view the discussions on each topic?

(4) A statement whether all or part of the meeting is open to the public or closed; if the meeting is closed state the reasons why, citing the specific exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), as the basis for closure.

GSA Analysis:

The ACUS proposal partially meets this requirement; the meeting is only open to the public with access to a computer, and ACUS does not identify alternative means of providing the website information to those who do not have access to a computer.

(5) The name and telephone number of the Designated Federal Officer (DFO) or other responsible agency official who may be contacted for additional information concerning the meeting.

GSA Analysis:

While not specifically mentioned in the ACUS proposal, GSA assumes this information would be included in the *Federal Register* notice.

F. Section 10 (a) (3) and 41 C.F.R. § 102–3.140 (c) and (d): Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee.



ACUS Proposal:

The DFO will provide his or her email address for submission of public comments. He or she will then post comments for consideration of the committee. The agency can write its guidelines such that the committee meets this requirement [41 C.F.R. §102–3.140 (d): address the advisory committee if the agency’s guidelines so permit] in any of the following ways: (a) only comments submitted by email to the DFO will be considered; (b) the committee can determine whether specific members of the public will be given posting privileges in the forum on a case-by-case basis; or (c) all members of the public can be given posting privileges.

GSA Analysis:

How will the committee members know when public comments have been posted? What does ACUS propose as the public comment policy for the website forum? We believe ACUS misunderstood the intent of 41 C.F.R. § 102–3.140 (d) – to allow the opportunity for oral comment. The ACUS proposal above states only comments submitted by email to the DFO will be considered, but that restricts the methods by which the public can submit comment – mail and faxed comments should also be permitted. It is unclear why ACUS would be giving deferential treatment to specific members of the public (i.e., giving some of them posting privileges); how would ACUS determine this? In addition, if any or all members of the public were given posting privileges, how would the DFO be able to monitor and screen out inappropriate comments?

G. Section 10 (b) and 41 C.F.R. § 102–3.170: Subject to section 552 of Title 5, United States Code, the **records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying** at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

ACUS Proposal:

Every draft of every document considered by the committee will be available for public viewing on the web forum.

GSA Analysis:

Timely access to advisory committee records is an important element of the public access requirements of the Act. Section 10(b) of the Act provides for the contemporaneous



availability of advisory committee records that, when taken in conjunction with the ability to attend committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. The ACUS proposal complies with these requirements for online participants, but does not include any options for those who cannot participate online. Again, how does the public that does not have access to a computer obtain copies of materials from the website?

H. Section 10 (c) and 41 C.F.R. § 102–3.165 (a) and (b): Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

ACUS Proposal:

The entire proceeding of the meeting will be memorialized online, which should itself meet the requirement for “detailed minutes.” Alternatively, if a summary of the online proceedings is needed or desired, the DFO can prepare minutes stating the duration of the meeting and the website on which it occurred, listing the persons who participated, describing major matters discussed, and including any other germane issue, and then certify those minutes within 90 days of the conclusion of the web forum.

GSA Analysis:

The FACA statute and regulation require that minutes be prepared for every FACA meeting. The “detailed minutes,” as proposed by ACUS, are deficient since they do not fully address the requirements for minutes as described by the FACA regulation. Minutes are a succinct summary of what happened at the meeting, and a verbatim transcript, webcast, or a web-based discussion cannot perform that function. The minutes are required to include: the time, date, and place of the advisory committee meeting; a list of the persons who were present at the meeting; an accurate description of each matter discussed and the resolution, if any, made by the advisory committee regarding such matter, and copies of each report or other document received, issued, or approved by the advisory committee at the meeting. The minutes are a standalone document certified by the chair within 90 calendar days of the meeting to which they relate.

I. Section 10(e) and 41 C.F.R. § 102-3.120 (c) (d) and (e): There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he



determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

ACUS Proposal:

The DFO will have continuing access to the web forum for its entire duration. The DFO will be given the capacity to terminate the web forum and will do so if he or she deems it to be in the public interest.

GSA Analysis:

The statute and regulations require that the DFO have control over the meeting, not just access to the meeting. If the DFO is not monitoring the website 24/7, how can the regulatory requirement that “no advisory committee shall conduct any meeting in the absence of the DFO” be met? How would it be possible for a DFO to be online during the entire meeting? How does ACUS propose to address the regulatory requirement that the DFO be present for the entire meeting, and not just when he/she decides to check on the status of the discussion? The DFO is given the authority to adjourn a meeting when determined to be in the public interest – unless the DFO controls the postings on the website, how does ACUS propose to ensure the DFO could adjourn a meeting in a timely manner in the public interest?

What is the role of the Chair during the website meeting? How is the public informed of the role of the DFO and Chair during the website meeting?

J. Sec. 10 (f) and 41 C.F.R. § 102-3.120 (a): The DFO must “approve or call the meeting of the advisory committee.” Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

ACUS proposal:

The DFO will consult with the Committee Chair to decide when the online forum will begin, approving any final decision that is made (or beginning the forum himself if appropriate).

The DFO, in consultation with the Committee Chair, will approve the topic of discussion for the web forum.

GSA Analysis:

The ACUS proposal appears to address the requirements of Section 10(f) and 41 C.F.R. § 102-3.120(a).



K. Section 11 (a): Except where prohibited by contractual agreements entered into prior to the effective date of this Act, **agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.**

ACUS Proposal:

Not addressed.

GSA Analysis:

This section requires an agency to make available copies of transcripts of advisory committee meetings. How would members of the public without access to a computer obtain copies of materials from the website? How does ACUS propose to address this?

L. Section 13: Subject to section 552 of Title 5, United States Code, the Administrator shall **provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee** and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

ACUS Proposal:

Not addressed.

GSA Analysis:

Although ACUS is proposing to develop committee reports online, the proposal should acknowledge that hard copies of each final committee report will be transmitted to the Library of Congress, in the format and quantity required by the Library of Congress.

M. 41 C.F.R. § 102–3.105: The head of each agency that establishes or utilizes one or more advisory committees must: (j) **Provide the opportunity for reasonable participation by the public in advisory committee activities**, subject to § 102–3.140 and the agency’s guidelines.

ACUS Proposal:

Not addressed.

GSA Analysis:

The ACUS proposal appears to comply with this requirement for online participants, but does not include any options for those who cannot participate online.

N. 41 C.F.R. § 102–3.120 (b): **The DFO is required to approve the [meeting] agenda.**



ACUS Proposal:

Not addressed.

GSA Analysis:

The ACUS proposal does not discuss an agenda, just topics and purpose of the website meeting. Does ACUS plan on developing an agenda for the website meeting? How will the Chair and DFO ensure that the agenda is followed during the meeting?

ADDITIONAL CONSIDERATIONS

- (1) Please describe the concept of online postings. Do you mean via a blog? Who has the authority to post to the website? Is the website on a Federal agency webpage? Website standard operating procedures for government agencies require screening of inappropriate/irrelevant material. What procedures are proposed to screen material prior to posting? Who decides what material is posted? The DFO, or the Committee Chair? If individuals choose to post graphic materials, how does ACUS ensure the postings are 508 compliant?
- (2) If multiple topics are discussed, how does ACUS propose to organize the discussions? Is more than one DFO required?
- (3) What does ACUS propose as the public comment policy for the website? For example, to whom does the public submit comments to and what happens to those comments?
- (4) How does the committee decide via a website forum on the advice/recommendations that will be transmitted to the agency? How does ACUS propose to handle committee member voting? If the entire committee membership does not participate in the website meeting, what constitutes a quorum for the meeting to proceed?
- (5) Would website meetings be supplemented with other types of committee meetings, such as teleconferences or face-to-face meetings?
- (6) What does ACUS propose as the electronic record policy for a website meeting? Does your proposal meet the requirements of General Records Schedule 26, as promulgated by NARA for recordkeeping of Federal advisory committees?
- (7) How does ACUS propose to capture the time spent by each committee member during the website meeting? SGEs are limited by statute in how many days they can work as SGEs in a rolling 365 day period. This is also relevant for those members who receive compensation.

