



PROJECT ON GOVERNMENT OVERSIGHT

December 2, 2011

Administrative Conference of the United States  
1120 20th Street NW  
Suite 706 South  
Washington, DC 20036

To Whom It May Concern:

The Project On Government Oversight (POGO) would like to provide the following public comment to the Assembly of the Administrative Conference of the United States (ACUS) regarding the proposed recommendation dealing with the Federal Advisory Committee Act (FACA).

POGO is a nonpartisan independent watchdog that champions good government reforms. As such, we have a keen interest in ensuring that federal advisory panels are operating with sufficient transparency and independence as required by FACA.

We greatly appreciate that ACUS's Committee on Collaborative Governance has engaged with the public interest community on its proposals for reducing FACA's procedural burdens while promoting the goals of transparency and independence. Indeed, we believe the Committee's proposed recommendations would go a long way toward achieving these goals. At the same time, we believe ACUS could strengthen its proposal by calling for the elimination of loopholes that have allowed much of the work of advisory panels to be conducted in secret.

In particular, we would like to offer our support for the following proposed recommendations: clarify that agencies have the authority to host asynchronous virtual meetings (Recommendation 6); ensure that agencies correctly designate committee members as representatives or special government employees and disclose conflict-of-interest waivers (Recommendation 8); encourage agencies to post key committee documents online (Recommendation 9) and to provide live webcasts of committee meetings (Recommendation 10); and provide agencies with guidance on best practices for selecting committee members (Recommendation 11). These recommendations, if adopted, would help to reduce conflicts of interest and facilitate the public's oversight of federal advisory panels. It's worth noting that the House Oversight and Government Reform Committee recently approved legislation that would advance these same goals.<sup>1</sup>

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<sup>1</sup> Project On Government Oversight, "House Committee Passes Legislation to Improve Oversight of Federal Advisory Committees," October 13, 2011. <http://pogoblog.typepad.com/pogo/2011/10/house-committee-passes-legislation-to-improve-oversight-of-federal-advisory-committees.html>

We are concerned, however, that the Committee has scaled back or eliminated other sensible recommendations that were included in an earlier draft report.

A draft report prepared by ACUS Attorney Advisor Reeve Bull on September 12, 2011, included a recommendation for Congress to eliminate the contractor, non-voting member, and subcommittee exceptions to FACA.<sup>2</sup> The Committee's research documented a strong need for these reforms:

- In *Food Chemicals News v. Young* and *Byrd v. United States EPA*, the D.C. Circuit held that FACA does not apply in cases where the agency does not exert sufficient control over a private entity to “utilize” the group. ACUS's data-gathering efforts suggested that this “contractor exception creates too grave a danger that committees will circumvent the statute by the simple expedient of instructing a contractor to form a committee rather than doing so directly.”<sup>3</sup>
- In a case related to Vice President Cheney's energy task force, the D.C. Circuit held that private sector committee members do not “provide advice or recommendations” to an agency unless they have the right to vote on committee proposals. ACUS's draft report pointed out that a committee could easily exploit this loophole in order to evade FACA. And ACUS's research found almost no evidence to suggest that committees or agencies actually need this loophole in order to efficiently obtain advice from outside experts.<sup>4</sup>
- Although some agency representatives told ACUS that the subcommittee exception is necessary in order to prepare for committee meetings, other participants in ACUS's FACA workshop pointed out that the loophole creates a “potential for abuse.”<sup>5</sup>

Other experts have also highlighted the problems associated with these FACA loopholes. In 2008 testimony before the House Oversight and Government Reform Committee, Professor Sidney Shapiro explained that the D.C. Circuit's decisions have enabled agencies to circumvent FACA, and recommended that Congress close the loopholes.<sup>6</sup> Indeed, the legislation recently approved the House Oversight and Government Reform Committee would eliminate the contractor, non-voting member, and subcommittee exceptions.

In its final proposal, however, ACUS's Committee states that Congress should not get rid of the subcommittee exception unless it also codifies a “preparatory work” exemption. And there is no longer a recommendation calling on Congress to eliminate the contractor and non-voting member loopholes.

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<sup>2</sup> Reeve Bull, Administrative Conference of the United States, *The Federal Advisory Committee: Issues and Proposed Reforms*, September 12, 2011, p. 66. <http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=315> (Downloaded December 2, 2011) (Hereinafter “ACUS Draft Report”)

<sup>3</sup> ACUS Draft Report, p. 41

<sup>4</sup> ACUS Draft Report, pp. 41-42

<sup>5</sup> ACUS Draft Report, p. 43

<sup>6</sup> Testimony of Sidney A. Shapiro, University Distinguished Chair in Law, Associate Dean for Research and Development, Wake Forest School of Law, and Member Scholar, Center for Progressive Reform, before the Subcommittee on Information Policy, Census, and National Archives of the House Committee on Oversight and Government Reform, Hearing on the Federal Advisory Committee Act of 2008, April 2, 2008. <http://www.pogoarchives.org/m/go/shapiro-testimony-20080402.pdf>

We understand that the Committee may not have found enough recent examples of agencies abusing the FACA loopholes in order to justify keeping this recommendation. Nonetheless, we believe the Committee's research documented a strong potential for future abuses. We urge ACUS to recommend closing these loopholes once again in order to send a clear message that it is possible to reduce the procedural burden on advisory committees while still ensuring that they operate with transparency and independence.

Thank you for consideration of these comments.

Sincerely,

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