FINAL REPORT

CONFLICT-OF-INTEREST REQUIREMENTS
FOR MEMBERS OF
FEDERAL ADVISORY COMMITTEES

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This is a report for the consideration of the Administrative Conference of the United States. The views expressed are those of the author, and do not necessarily reflect those of the Conference, its committees, or staff.

Conflict-of-Interest Requirements for Members of Federal Advisory Committees

The purpose of this study is to examine the conflict-of-interest requirements applicable to members of Federal advisory committees. Its scope includes not only an analysis of the legal requirements applicable to the various categories of members, but an examination of the practices of agencies in administering and applying these requirements, with a view to evaluating the efficiency and rationality of the present system, and formulating recommendations for improvements.

As the subsequent discussion will demonstrate, there are significant semantic problems involved in any discussion of the applicability of conflict-of-interest requirements to members of "advisory committees." This paper adopts a functional approach and includes within its scope all individuals and groups, other than full-time Federal employees, which perform advisory rather than operational functions for the Executive Branch or for any Federal agency. Even this definition has problems around the edges, but we should be able to refine our distinctions as we proceed.

This paper proceeds from two hypotheses: The first is that the law and practices regarding conflict-of-interest requirements have developed from the interaction of three statutory schemes, the Federal Advisory Committee Act, the conflict-of-interest laws, and the Federal personnel laws, none of which was drafted to deal specifically with conflict-of-interest standards for advisors to the Government, and that as a consequence this body of law contains anomalies and irrationalities which arise from applying classifications and distinctions which, however rational in their original context, have little or nothing to do with the question of what standards ought to be applied to such advisors. The second is that advisory committees perform a variety of roles in their relation to the federal decisionmaking process and that the conflict-of-interest standard to be applied to any committee member or members should take into account the nature of the committee's role and the ability of the decisionmaker to discount or offset possible bias deriving from conflict of interest.

Statutory Framework

Federal Advisory Committee Act

The Federal Advisory Committee Act (FACA), 5 U.S.C. App. §§1-15, was enacted in 1972. It seeks to regulate the establishment, operation and use of advisory committees to the Federal Government. The Act's definition of "advisory committee" is very broad. It has four key elements. The Act covers (1) any committee or similar group, (2) whose members include one or more individuals who are not full-time Federal employees, (3) established or utilized by the President or a Federal agency, (4) in the interest of obtaining advice or recommendations.

The regulatory scheme of the Act covers various aspects of advisory committee operations. The Act is aimed at a variety of real and perceived problems with Government advisory committees, that some did too much and others too little, that there was too little Federal control of their activities, review of their effectiveness, or follow-up on their recommendations, that advisory committees were not fairly balanced in their membership (particularly, in that many were perceived to have an industry bias), and that there was too little public access to their deliberations or to the results of their work.[1/] To deal with these problems, the Act provided a range of corrective measures. The Act requires chartering and periodic review of committees, it attempts to ensure greater responsibility in each agency for the operation of the committees which the agency establishes, it requires greater openness for advisory committees, through provision for publicly noticed and open meetings and publicly available minutes. Conflict-of-interest problems were not a principal focus of the Act. However, there was very definitely a suspicion that advisory committees, particularly in areas involving Federal regulatory programs, had an undue industry bias, and, consequently, one of the key provisions of the Act was to require that authorities establishing advisory committees should "require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed," and "assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority <u>or by any special interest</u>, but will instead be the result of the advisory committee's independent judgment." [emphasis added]. 5 U.S.C. App. §5(b),(c).

The coverage of the Federal Advisory Committee Act is very broad. While the term "advisory committee" was familiar in a general way, the classification did not previously carry particular legal consequences, and there was no body of law to which one could advert to determine what was or was not an advisory committee. The Act was designed to regulate agency practices and eliminate agency abuses in the establishment and use of advisory committees, and, therefore, Congress was unwilling to leave it to the agencies themselves to say what they would treat as a covered committee. Consequently, the statutory definitions were designed to prevent evasion, and from the start they created confusion and controversy.

The principal areas of confusion over coverage were (1) the so-called *ad hoc* committees or groups, without formal organization, structure, or continuing existence, brought together to discuss problems with or present views to agency officials; and (2) privately established groups whose views were "utilized" by agency officials in the course of their decisionmaking.

Initial confusion over the status of *ad hoc* groups and "utilized" committees was increased by early judicial rulings giving a broad inter-

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1/ See, *e.g.*, S. Rept. No. 92-1098, 92d Cong., 2d Sess. 3-4, Federal Advisory Committee Act Sourcebook, 155-56.

pretation to the statutory definition and by the failure of the agencies charged with providing guidance under the Act to do so.[2]

Finally, in response to a 1980 recommendation of the Administrative Conference of the U.S.,[3] the General Services Administration in its 1983 interim guidelines and its 1987 final rule on Federal Advisory Committee Management[4] attempted to narrow the coverage of the definition. To deal with the problem of the ad hoc groups, the GSA regulation excludes meetings with Government officials "for the purpose of exchanging facts or information," meetings initiated by the group for the purpose of presenting its views to an official or agency where the official does not use the group "recurrently as a preferred source of advice," and meetings initiated by a Federal official with more than one individual, where the official is seeking individual and not consensus advice or recommendations.[5] To deal with the problem of "utilized" committees, GSA adopted the view of the ACUS recommendation that a privately established committee is not "utilized" within the meaning of the Act unless the agency through institutional arrangements "adopts [the committee] as a preferred source of advice." 41 CFR §§101-6.1003, 6.1004.

The definitions in the GSA guidelines have provoked little controversy and have been useful in excluding from the scope of the Act the ordinary informal give-and-take between Government decisionmakers and the private sector. Yet they assuredly do not eliminate all problems of coverage. Indeed, they introduce new bases of distinction which in operation are likely to prove somewhat nebulous. What exactly is a "preferred source of advice?" Is there a real distinction between "obtaining the advice of individual attendees" and seeking "to obtain consensus advice or recommendations?"[6]

Underlying these largely semantic questions is a basic policy question. Is FACA to be viewed as limited to those advisory committees which might be termed "official" or "quasi-official" in that they are organized by or receive financial and/or logistical support from the Government? Or is FACA to be viewed as a more ambitious undertaking, as basically a requirement governing

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2/ See National Nutritional Foods Assn. v. Califano, 603 F.2d 327, 334-36 (2d Cir. 1979), reviewing the legislative, administrative and judicial authorities.

3/ Recommendation 80-3, 1 CFR §305.80-3.

4/ 41 CFR Part 101-6, 52 F.R. 45926.

5/ 41 CFR §101-6.1004(i), (j), (l).

6/ See NRDC v. Herrington, 637 F.Supp. 116 (D.D.C. 1986) holding that members of a scientific panel brought together to advise the Department of Energy in an examination of the safety of DOE's Hanford, Wash. plutonium reactor were not an advisory committee because they were being asked to provide individual views and not to act as a committee. The Court indicated that it was not disposed to interpret FACA broadly in situations which do not raise the problems that Congress was concerned about when it enacted FACA.

substantially all situations in which the Government actively seeks advice from the private sector? Some aspects of FACA point in each direction. The provisions on committee charters, periodic review, etc., make sense only as applied to those committees which are, realistically, a part of Government. The requirements with respect to openness and membership balance seem to speak more broadly to the entire process by which Government receives outside advice. So long as this dualism remains, questions of coverage are likely to persist.

One noteworthy fact about FACA and its administration is that the Act purports to apply equally to all covered advisory committees regardless of their function.[7/] Obviously, advisory committees are established and employed for many different purposes: to tap a source of expertise not available within the Government, to secure the views of interest groups affected by Government policy, to provide an objective critique of a Government program or activity, to develop a broad consensus on a delicate or controversial issue, and even to provide an excuse for inaction.

Various attempts have been made to break the committees down into rough functional categories. Prof. Cardozo listed five functional categories: policy advice, technical advice, fact-finding, evaluation of proposals and applications, and advice in personnel selection.[8/] Wegman cites four categories: peer or grant review committees, technical or program review committees, special fact-finding or investigative committees, and general policy advisory committees.[9/] The Annual Report of the President on Federal Advisory Committees for Fiscal Year 1987, prepared by GSA's Committee Management Secretariat, lists six functional groups for committees: scientific/technical program, non-scientific program, grant review, major national policy/issue, regulatory negotiation, and "other".[10/]

While these categorizations are helpful in describing what it is advisory committees do, they cannot weigh precisely the relative significance of committees' recommendations to the decisionmaking process. It seems likely, however, that the most influential committees, i.e. those whose recommendations correlate most closely with the final governmental action, would be the grant

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7/ However, judicial decisions suggest that only parts of the Act may be applicable to "utilized" committees, see, Center for Auto Safety v. Cox, 580 F.2d 689, 694 (D.C. Cir. 1978); Washington Legal Foundation v. American Bar Association, 648 F.Supp. 1353, 1360-61 (D.D.C. 1986).

8/ Cardozo, The Federal Advisory Committee Act in Operation, 33 Ad.L.Rev. ____ (1981), 1980 ACUS 313, 343.

9/ Wegman, The Utilization and Management of Federal Advisory Committees (1983) pp. 29-31. If we lump Prof. Cardozo's last two categories, which are in some respects similar, his classifications and Wegman's are essentially the same.

10/ Sixteenth Annual Report of the President on Federal Advisory Committees, p. 2. The breakdown is based on the sponsoring agency's categorization. The regulatory negotiation category accounted for less than 1% of the total.

review committees and those committees which provide a technical expertise which the Government does not have in-house. Conversely, on matters of broad policy the governmental decisionmaking authority, whether an agency, the President or Congress, is less likely to defer to the committee judgment, and the committee's influence is likely to depend on the persuasiveness of its report, the political acceptability of its proposals, and a variety of other considerations. Obviously, the greater the committee's influence on the decisionmaking process, the more important it becomes to prevent conflicts of interest.

For purposes of this paper, the point to be emphasized is that FACA, and particularly FACA in its broader reading, embraces committees and similar groups with a great variety of functions, organizational structures and ties, relationships and obligations to the Federal Government. Indeed, perhaps the only element common to all covered advisory committees is that in some way and for some reason they are looked to by the Federal decisionmaker as "a preferred source of advice."

Conflict-of-Interest Requirements

FACA, as we have seen, prescribes no conflict-of-interest requirements for advisory committee members. Indeed, it might be argued that it adopts an alternative approach for obtaining objective advice. FACA's requirement that committees be "fairly balanced in terms of the points of view represented," is tacit recognition that members are not expected to approach their agenda with Olympian detachment, although the very next statutory injunction, "that the advice and recommendations * * * will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment," certainly asks the members to walk a very thin line.

At any rate, FACA was not enacted in a vacuum, and it may be assumed that the drafters were aware of the general framework of legal requirements governing conflicts of interest of advisory committee members. The most significant of those requirements are those imposed by 18 U.S. Code Chapter 11, entitled "Bribery, Graft, and Conflicts of Interest."

18 U.S.C. Ch. 11 is applicable to Federal employees generally, and many of its provisions go back to the nineteenth century. However, the statutes were thoroughly revised in 1962 by Public Law 87-849. One of the principal contributions of P.L. 87-849 was to distinguish for purposes of conflict-of-interest requirements between full-time Federal employees and "those who serve the Government intermittently or for a short period of time," and to except persons in the latter category from certain of the prohibitions imposed on ordinary full-time employees.

To this end P.L. 87-849 created the category of "special Government employee" (hereinafter SGE), defined as "an officer or employee * * * who is retained, designated, appointed or employed to perform, with or without compensation, * * * temporary duties either on a full-time or intermittent basis" for not to exceed 130 days in any 365-day period, 18 U.S.C. §202(a).

The various prohibitions of 18 U.S.C. Ch. 11 are complicated, but may be described generally as follows:[11]

18 U.S.C. §201 prohibits bribery of public officials and witnesses in Federal proceedings. It punishes both the giving and the receiving of bribes. The term "public official" includes any person "acting for or on behalf of the United States * * * in any official function." The term has been interpreted broadly, see Dixson v. United States, 465 U.S. 482 (1984),[12] and probably would include members of Federal advisory committees who are SGE's and arguably even those who are independent contractors. It is unlikely that this provision would cover one who is advising as a representative of an outside group.

18 U.S.C. §§203 and 205 deal with representation of a private party by a Government employee in a judicial or administrative matter in which the United States is a party or has a direct or substantial interest. A regular Government employee may not represent another person before an agency or a court in such a proceeding, with or without compensation. An SGE is subject to much more limited prohibitions. (1) He may not represent anyone else before a court or agency in a matter in which the United States is a party or has a direct and substantial interest where the matter involves a specific party or parties and where he has at any time participated personally and substantially in the same matter in the course of his Government employment. (2) If the SGE has served in his agency more than 60 days in the past 365 days he may not represent anyone in a matter before that agency involving a specific party or parties. (It should be noted that in conflict-of-interest parlance, particular matter involving a specific party or parties is a relatively narrow concept and does not include a rulemaking of general applicability.)[13]

18 U.S.C. §207 deals primarily with post-employment restrictions. With respect to both regular and special Government employees, section 207(a) imposes a permanent ban on representation in connection with a particular matter involving a specific party or parties, where the employee participated personally and substantially in the decisional process in the course of his Government service. Section 207(b) imposes a two-year ban on representation with respect to a particular matter involving a specific party or parties when the matter was actually pending under the former employee's official responsibility within one year prior to his leaving Government. It also imposes a two-year ban on certain kinds of assistance in representation by so-

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11/ Chapter 11 consists of sections 201-219 and 224. However, only sections 201-03, 205, 207-09, 218 and 219 have relevance to the subject of this paper.

12/ In Dixson the Court held, 5-4, that officers of a private non-profit corporation administering community development grants as the designee of a local governmental grantee were "public officials" under section 201.

13/ There is considerable overlap between sections 203 and 205. According to the explanatory memorandum of the Department of Justice, "for all practical purposes Section 205 completely overshadows Section 203 in respect of officers and employees of the Government." Section 203, however, also covers Members of Congress.

called Senior Employees[14/] with respect to particular matters involving specific parties in which they participated personally and substantially while in Government employment. Section 207(b) does not exclude SGE's from its operation, but it is unlikely to impact very frequently on SGE's because they are rarely Senior Employees and do not usually have such particular matters pending under their official responsibility. ("Official responsibility" is defined, §202(b), as "direct administrative or operating authority" and presumably would not include the responsibilities of an employee serving in an advisory capacity.)

Section 207(c) applies exclusively to Senior Employees, including SGE's who serve for more than 60 days in a calendar year, and forbids for one year after employment with the agency has ceased any representational activity before that agency irrespective of the subject matter.

Section 207(g) is the only provision in section 207 not addressed to post-employment activities. It prohibits a partner of a Government employee from acting as agent or attorney before any agency or court with respect to any particular matter (not qualified by "involving a specific party or parties") in which the employee has participated personally and substantially. This provision is specifically applicable to SGE's. Because the "particular matters" to which it applies need not involve specific parties, section 207(g) has the anomalous effect of prohibiting representation by a partner of an SGE in circumstances in which the SGE himself would not be barred by section 203(b) or section 205(b).

18 U.S.C. §208 is the most important conflict-of-interest provision for purposes of our inquiry. Section 208 prohibits a Government employee, including an SGE, from participating "personally and substantially" as a Government employee "through decision, * * * recommendation, the rendering of advice, investigation, or otherwise, in * * * [any] particular matter in which to his knowledge, he, his spouse, minor child, partner, organization * * * has a financial interest." This is an especially broad prohibition in several respects. "Particular matter" is not qualified by the words "involving a specific party or parties" and has been interpreted very broadly by the Department of Justice.[15/] It does include adoption of rules of general applicability. Second, the participation which is forbidden includes the rendering of advice. Third, the range of financial interests it reaches is broad, and there is within the statute itself no de minimis exception. However, because of its very breadth the statute itself recognizes a need for

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14/ "Senior Employee" is a term defined in OPM regulations, 5 CFR §737.25, to refer to those employees specified in or designated pursuant to 18 U.S.C. §207(d)(1).

15/ In a 1978 opinion the Office of Legal Counsel, Department of Justice stated, "[W]e have consistently interpreted §208(a) to apply to rule-making proceedings or advisory committee deliberations of general applicability where the outcome may have a 'direct and predictable effect' on a firm with which the Government employee is affiliated, even though all other firms similarly situated will be affected in a like manner," 2 Ops. OLC 151, 155 (1978).

exceptions. Accordingly, section 208(b) provides for waivers by the employing agency (1) in particular cases where the employee discloses to the appointing official the conflicting financial interest and the appointing official makes a written determination that "the interest is not so substantial as to be deemed likely to affect the integrity of the services" of the employee, and (2) where the agency by general rule exempts certain financial interests as "too remote or too inconsequential to affect the integrity" of employees' services.[16/]

18 U.S.C. §209, which forbids a Government employee to receive any salary or supplement as compensation for his services to the Government, is specifically made inapplicable to SGE's.

If we consider the potential impact of 18 U.S.C. §§201-09 on SGE's who are advisory committee members, it is evident that the principal trouble spot is section 208. Section 201 is broad in coverage, but hardly a trap for the unwary. The prohibitions in sections 203 and 205 are narrow, and, at least, as applied to lawyers, no more than common sense and the Canons of Ethics would require.[17/] The revolving door provision of section 207(a) is likewise narrow and reasonable, and the broader prohibitions of sections 207(b) and (c) are not

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16/ Where agencies have used their authority to exempt by general rule under section 208(b)(2) the exemption has almost invariably been for described types of financial holdings, such as bank deposits, insurance policies, Government and municipal bonds, and interests in diversified mutual funds. See, e.g., 15 CFR §0.735-13 (Dept. of Commerce); 40 CFR §3.301(b) (EPA); 24 CFR §0.735-204(d) (HUD); 16 CFR §5.8(d) (FTC). The Administrative Conference of the United States, however, has adopted a section 208(b)(2) rule defining certain agency actions as too remote from a member's financial interests to affect the integrity of his services. 1 CFR §302.5(b)(2). This was done after the Department of Justice had ruled that public members of the Conference were special Government employees and that section 208 might reach a member's action in voting on a recommendation for procedural changes in an agency before which he practiced.

17/ Sections 203 and 205 do apply to any kind of representation, not merely representation as an attorney. For example, one who negotiates a contract with the Government on behalf of a corporation acts as an agent within the meaning of section 205. However, section 205 states that neither that section nor section 203 prevents an SGE from acting as agent or attorney for another in the performance of work under a Government grant or contract where the head of the department or agency certifies that the national interest so requires. But this exemptive authority may have been significantly limited by the 1988 amendment to the Office of Federal Procurement Policy Act, P.L. 100-679, §6, 41 U.S.C. 423(e), which prohibits any Government employee who participated personally and substantially in the conduct of an agency procurement from participating personally and substantially in the performance of the contract arising out of such procurement.

likely to apply to many advisory committee members.[18] Section 207(g), the prohibition on representational activity by a partner of an employee, is worth special attention because it may come into play in unforeseen and rather innocent circumstances, particularly where an advisory committee member is a member of a large law firm. However, section 207(g) applies primarily to lawyers in private practice, and a relatively small number of committee members are lawyers.[19]

Section 208, on the other hand, is very broad, as I have pointed out. Since it covers rulemaking of general applicability, as well as substantially any other kind of agency action, an SGE who serves on an advisory committee which is making a recommendation respecting a rule that would affect the industry to which he has financial or employment ties would be bound to recuse himself unless he received a waiver from the agency under section 208(b).

The Federal Personnel Manual recognizes this problem and encourages the use of waivers where "the special Government employee renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization." FPM, p. 735-C-4. The Office of Legal Counsel has observed that this provision of the Manual constitutes a "gloss" on the statutory language of section 208(b)(1) that "the interest 'is

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18/ Another post-employment restriction with potential application to <u>some</u> advisory committee members is contained in the new procurement integrity section of the Office of Federal Procurement Policy Act, 41 U.S.C. §423, added by P.L. 100-679, §6. Section 423(e) provides that "no Government official * * * who has participated personally and substantially in the conduct of any Federal agency procurement" shall for two years thereafter either participate in any manner on behalf of a contractor in negotiations leading to the award, modification or extension of the contract which is the subject of the procurement or participate personally or substantially in the performance of such contract. This prohibition applies to special Government employees and thus could, in theory at least, reach SGE's who serve on advisory committees. Whether an advisory committee would ever be sufficiently involved in the procurement process to meet the personal and substantial participation test of section 423(e) is a more difficult question. An OFPP guidance memorandum of April 7, 1989 on section 423 states, "We expect that special Government employees would rarely participate personally and substantially in the conduct of a procurement." However, it seems clear from the statute that participation includes acting in an advisory capacity, see §423(n)(3)(B), so that the possibility of the prohibitions applying to members of an advisory committee cannot be ruled out. There is no provision in section 423 for waiver of its substantive prohibitions. (Section 423 was scheduled to take effect May 16, 1989, but legislation has just been enacted extending the effective date 60 days to enable the Administration to explain its terms to covered employees and contractors.)

19/ According to the Seventeenth Annual Report of the President on Federal Advisory Committees, only 763 (3.8%) of the approximately 20,000 members of advisory committees are lawyers. Presumably this figure includes Government lawyers.

not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect' from the special Government employee" and seems particularly geared to "members of advisory committees, who are often specifically chosen because of an expertise that results from this affiliation with particular organizations, firms, or groups having a general interest in the very matters before the advisory committee." However, OLC emphasized that the exemption process "compels the responsible Agency official to focus on the questions of the special Government employee's outside affiliations and to make a specific written finding with respect to the expected integrity of the individual's services."[20/]

Two other provisions of 18 U.S.C. Ch. 11 are worth brief mention. Section 219 makes it a criminal offense for a public official to act as an agent of a foreign principal required to register under the Foreign Agents Registration Act of 1938, 22 U.S.C. §§611-621. The prohibition applies to special Government employees, but section 219(b) authorizes a waiver for an SGE where "the head of the employing agency certifies that such employment is required in the national interest." Although the Foreign Agents Registration Act does not apply to ordinary legal representation before courts and agencies, it does apply where the representation includes "attempts to influence or persuade agency personnel or officials other than in the course of established agency proceedings," 22 U.S.C. §613(g); see 28 CFR §5.306. Approximately 100 law firms are registered under the Act. The Act also reaches legislative lobbying and public relations activities on behalf of foreign principals.

Finally, 18 U.S.C. §218 authorizes the President and the heads of Federal departments and agencies to "declare void and rescind any contract, loan, grant, subsidy, license, right, permit, * * * ruling, decision, opinion or rate schedule * * * in relation to which there has been a final conviction for any violation of this chapter * * *." However, the possibility for voiding a Government decision tainted by a violation of the conflict-of-interest laws is not limited to the situation in which there has been a criminal conviction. Prior to the enactment of P.L. 87-849, the 1962 legislation, the Supreme Court had held in the well-known Dixon-Yates case, United States v. Mississippi Valley Generating Co., 364 U.S.520 (1961), that the United States was entitled to cancel a contract in the negotiation of which there had been a violation of the predecessor statute to section 208, notwithstanding that no criminal prosecution had ever been brought. In its explanatory memorandum on P.L. 87-849, the Department of Justice stated with respect to section 218 that since the powers it grants are "in addition to any other remedies provided by law" it would not seem to override the Dixon-Yates case. At least one case has held that the Government may disavow a contract where there was a violation of section 208 notwithstanding the absence of a criminal conviction, K. & R. Engineering Co. v. United States, 616 F.2d 469, 472-75 (Ct. Claims 1980); see,

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20/ 2 Ops. OLC 151, 156-57 (1978). If the Manual provision in question is read as exclusively applicable to section 208(b)(1), it would follow that waivers in such circumstances could be granted ad hoc but not by general rule. The Nuclear Regulatory Commission has stated that it is its policy to grant waivers to SGE's in the circumstances described, but such waivers must nevertheless be granted individually. 10 CFR §0.735-21(d).

also, United States v. Medico Industries, 784 F.2d 840, 844-46 (7th Cir. 1986).

While the potential for the Government's voiding its prior action or decision on the basis of a violation of the conflict-of-interest laws should not be overlooked, the likelihood that a violation by a member of an advisory committee would lead to such a result is rather slim, particularly so, where the advice rendered is on a broad policy issue, rather than on the disposition of a particular matter involving specific parties, such as a contract, grant or license.

Disclosure Requirements. In addition to the criminal prohibitions of 18 U.S.C. Ch. 11, SGE's are subject to certain financial disclosure provisions. Under Executive Order 11222 of May 8, 1965 and OPM regulations, 5 CFR §735.412, SGE's are required to file with the employing agency a confidential statement of other employment, including corporate directorships, trusteeships and similar affiliations, and such financial information as the appointing agency determines is relevant to the SGE's duties.[21/] SGE's who are paid at the rate of a GS-16 or higher also must file the more elaborate public financial disclosure form (SF-278) required of high level Government officials by Title II of the Ethics in Government Act. Since the disclosure requirements are in addition to and not in lieu of the prohibitions in 18 U.S.C. Ch. 11, disclosure of a disqualifying financial interest does not of itself work an exemption from section 208. The burden is on the employee to obtain the appropriate waiver.

The Office of Government Ethics is at present revising the regulations governing the system of confidential financial reporting by Federal employees, including SGE's. The proposed regulations published December 2, 1986, would have expanded the reporting requirements for SGE's well beyond what has been generally required under Executive Order 11222, but because of provisions permitting agencies with OGE approval to "tailor" reporting requirements to their needs by asking for either more or less information and to exempt some individuals entirely, it is hard to gauge the impact precisely. The proposed

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21/ Section 306 of E.O. 11222, which prescribed financial disclosure requirements for SGE's, was stricken from the Order by E.O. 12565 of September 25, 1986 in order to permit development of a comprehensive system of financial reporting for employees in the Executive Branch under the Ethics in Government Act. See text at note 22, infra. However, the OPM regulation implementing section 306, 5 CFR §735.412, has remained in effect, as have the practices of nearly all agencies in requiring SGE's to file confidential statements.

regulation has met with considerable criticism, and one may anticipate significant changes in the final version.[22]

The applicability of the provisions of 18 U.S.C. Ch. 11, as well as the financial disclosure requirements cited above, to SGE's depends exclusively on the SGE's employment status and not (except for the "responsibility" provision in section 207(b)) on the nature of their functions. In other words, these conflict-of-interest statutes do not distinguish between operational and advisory responsibilities. Nevertheless, Congress was well aware that SGE's frequently serve in advisory roles, and indeed the principal purpose of creating the category of SGE's was to ease the recruitment of experts and consultants whose main work was performed outside of Government.

Status of Advisory Committee Members

As we have seen, the category of special Government employee was established to deal with the conflict-of-interest problems arising from the situation of part-time or intermittent Government employees, serving with or without compensation, frequently in advisory roles. But because some part-time advisors are to be treated as SGE's, it does not follow that all must be. The variety of advisory relationships between persons in the private sector and decisionmakers in the Federal Government has been the source of some confusion.

The principal guidance to the agencies on the subject of the status of members of Federal advisory committees for purposes of the conflict-of-interest laws is a memorandum dated July 9, 1982 from the then Director of the Office of Government Ethics, J. Jackson Walter, to the heads of all Executive departments and agencies.[23] This memorandum reviewed at length the administrative practice in dealing with part-time Government advisors since shortly before the enactment of P.L. 87-849. The principal distinction which the Walter Memorandum pointed to was that between those advisory personnel who are selected because of their individual qualifications and those who are expected to act in a representative capacity for an industry, for labor or agriculture or some other group. This distinction, first enunciated in a memorandum from President Kennedy dated February 9, 1962 and entitled "Preventing Conflicts of Interest on the Part of Advisers and Consultants to the Government," has been

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22/ The proposed regulation, 51 F.R. 43359-65, would require covered employees, including SGE's, to report the source and nature (but, apparently, not the amount) of any investment income, and a description (but, apparently, not the value) of other assets held for production of income, the source of any earned income, and information respecting employment or affiliations with profit or non-profit organizations. Agencies would, however, have authority to exclude individuals from "all or a portion of the reporting requirements" on the basis of appropriate findings by the agency head. The regulations would exclude from coverage individuals "performing services for the United States as an independent contractor under a personal service contract."

23/ As the memorandum points out, "There is no substantive difference between an appointee providing advisory service individually and one doing so as a member of a committee." Walter Memorandum, p.2.

maintained with revisions to take into account the provisions of P.L. 87-849, in the regulations of the Office of Personnel Management, Federal Personnel Manual, Part 735, Appendix C. The pertinent portion of Appendix C is worth quoting at length because, together with the Walter Memorandum, it remains the principal operative guidance to the agencies.

> "It is necessary occasionally to distinguish between consultants and advisers who are special Government employees and persons who are invited to appear at an agency in a representative capacity to speak for firms or an industry, or for labor or agriculture, or for any other recognizable group of persons, including, on occasion, the public at large. A consultant or adviser whose advice is obtained by an agency from time to time because of his individual qualifications and who serves in an independent capacity is an officer or employee of the Government. On the other hand, one who is requested to appear before a Government agency to present the views of a nongovernmental organization or group which he represents, or for which he is in a position to speak, does not act as a servant of the Government and is not its officer or employee. He is therefore not subject to the conflict of interest laws and is not within the scope of this chapter.
>
> The following principles are useful in arriving at a determination whether a person is acting before an agency in a representative capacity:
>
> (1) A person who receives pay from the Government for his services as an adviser or consultant is its employee and not a representative of an outside group. The Government's payment of travel expenses and a per diem allowance, however, does not by itself make the recipient an employee.
>
> (2) It is rare that a consultant or adviser who serves alone is acting in a representative capacity. Those who have representative roles are for the most part persons serving as members of an advisory committee or similar body utilized by a Government agency. It does not follow, however, that the members of every such body are acting as representatives and are therefore outside the range of the conflict of interest laws. This result is limited to the members of committees utilized to obtain the views of non-governmental groups or organizations.
>
> (3) The fact that a person is appointed by an agency to an advisory committee upon the recommendation of an outside group or organization tends to support the conclusion that he has a representative function.
>
> (4) Although members of a governmental advisory body who are expected to bind outside organizations are no doubt serving in a representative capacity, the absence of authority to bind outside groups does not require the conclusion that the members are Government employees. What is important is whether they function as spokesmen for non-

> governmental groups or organizations and not whether they can formally commit them.
>
> (5) When an adviser or consultant is in a position to act as a spokesman for the United States or a Government agency--as, for example, in an international conference--he is obviously acting as an officer or employee of the Government."

The Walter Memorandum recognizes, however, that the distinction set out in Appendix C between SGE's and private sector representatives does not exhaust the possibilities for classifying those who furnish advice to the Government. Advisory services may also be furnished through a contract, and in that case the advisor or advisors may be independent contractors.

One of the key indicia of the employment relation in the Government, as elsewhere, is that an employee must carry out his duties under the supervision of another employee. An independent contractor, the Walter Memorandum points out, "is not hired under the civil service laws and is not subject to the supervision that inheres in an employee-supervisor relationship in the civil service. More to the point, he is not an employee for the purposes of 18 U.S.C. §§202-09."

The Memorandum observes that the employee/independent contractor distinction is not often a problem because "committees are rarely brought into the service of an agency by means of a contract." But if the problem were to come up, the issue would be resolved under the ordinary legal principles which govern the distinction between employees and independent contractors.

> "However, it is worthwhile to mention an issue that could arise in connection with the conflict-of-interest statutes if an agency were to create an advisory committee and then enter into a contract with it or each of its members individually. The issue is whether the agency would in practice exercise supervision over the operations of the committee and the formulation of judgments by its members that was great enough to taint the contract as a device for concealing their true status as SGE's under §§202-209. If an agency, for example, were to convene a committee and award the members a contract pursuant to which they (1) produced, after independent study, an advisory paper dealing with a problem that the agency's staff was too busy to resolve on its own and (2) delivered the paper without antecedent clearance from the staff or agency head, the committee members would properly have been deemed contractors. However, if the committee worked routinely subject to the scrutiny of the staff and with a significant amount of guidance from it, the members would be open to the charge that they actually served as SGE's and were subject to §§202-209. As appears from these examples, the question is one of degree."

Still another distinction discussed in the Memorandum is the circumstance in which a Federal official receives "unsolicited, informal advice from an outside individual or group of individuals regarding a particular matter or issue of policy that is within his official responsibility. Or he may himself bring up an agency matter of policy issue informally with one or more outsiders in order to obtain their views. An incident of this sort sometimes prompts the inquiry whether the outsiders have become SGE's of the agency. In general, the answer is that they have not, for they are not possessed of appointments as employees nor do they perform a federal function." However, Mr. Walter felt compelled to subject this conclusion to a caveat:

> "An official should not hold informal meetings more or less regularly with a non-federal individual or group of individuals for the purpose of obtaining information or advice for the conduct of his office. If he does so, he may invite the argument that willy-nilly he has brought them within the range of 18 U.S.C. §§202-09." [emphasis added].

This portion of the Memorandum seems a departure from what is otherwise a very tightly reasoned discussion. It seems very doubtful that the mere frequency of meetings of one or more Federal officials with a group of individuals can "willy-nilly"[24] and contrary to the intentions of all concerned bring those individuals into an employment relation with the Government so as to subject them to the criminal sanctions of 18 U.S.C.§§202-09.

What we have here is basically the problem of the ad hoc advisory committee. But if we assume that at some point the informal ad hoc committee shades over into a committee covered by the FACA, does it necessarily follow that at the same point on the spectrum the committee members become SGE's? And if at that point the Federal official should comply with FACA and formalize these informal arrangements, are these committee members SGE's if he fails to do so? We must bear in mind that FACA and the conflict-of-interest laws have

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24/ The term is well chosen for it comes from the Latin volens/nolens, willing or not willing. The notion of an advisor becoming a Federal employee "willy-nilly" has given the Department of Justice pause. "In the usual case [the employment] relationship is based on an identifiable act of appointment. However, an identifiable act of appointment may not be absolutely essential * * * in a particular case where the parties omitted it for the purpose of avoiding the application of the conflict-of-interest laws or perhaps where there was a firm mutual understanding that a relatively formal relationship existed." 1 Ops. OLC 20, 21 (1977).

In this opinion the Office of Legal Counsel concluded that a personal friend of the President who advised him almost daily on an informal basis on "a wide range of policy issues" did not thereby become a special Government employee. However, when the adviser called and chaired meetings attended by employees of various agencies and assumed responsibilities for coordinating Administration activities on a particular issue, OLC ruled that the adviser was engaged in a Governmental function and should receive a formal appointment.

somewhat different purposes, that they impose different obligations and burdens, and that violations of their provisions entail very different consequences.

The Walter Memorandum does not address still another problem raised by FACA, the members of "utilized" committees. The reason is doubtless that these committee members are assumed not to be subject to the conflict-of-interest laws because, by hypothesis, they have not been selected and, therefore, not appointed by a Federal official.

To sum up, in theory there appear to be at least five categories of members of Federal advisory committees in terms of conflict-of-interest law analysis (excluding regular Government employees serving in their official capacities):

1. Members selected by a Federal official to serve on a formally established advisory committee in their individual capacities with or without compensation.

2. Members selected to serve in a representative capacity, as described in Part 735, Appendix C of the Federal Personnel Manual.

3. Independent contractors who have been engaged by the Government to supply advice or recommendations pursuant to a contract and whose work is not supervised or controlled by a Federal employee.[25/]

4. Members of an informal ad hoc group whose advisory activities have crossed the FACA threshold but who have not been "appointed in the civil service" within the meaning of 5 U.S.C. §2104 and §2105.

25/ There is some question whether a committee which performs consultant services for the Government under a contract is an advisory committee under FACA. See Lombardo v. Handler, 397 F.Supp. 792, 797-800 (D.D.C. 1975) aff'd without op., 546 F.2d 1043 (D.C. Cir. 1976), cert. denied, 431 U.S. 932 (1977), citing legislative history to the effect that FACA "does not apply to persons or organizations which have contractual relationships with the Federal agencies nor to advisory committees not directly established by or for such agencies." 397 F.Supp. at 799, citing 118 Cong. Rec. 31421. On the other hand, Paul Weiss, GSA's Associate Administrator for Administration, recently stated in responding to a Congressional question regarding the applicability of FACA to advisory committees created in connection with the performance of Federal contracts: "[T]he test for inclusion under the Act is that the agency's contract requires that the advice of a group or other than contractor personnel be provided to the agency, and that the contractor has not merely solicited advice as part of the activities incidental to the performance of the contract." Hearing before the Senate Committee on Governmental Affairs, Department of Defense/Strategic Defense Initiative Organization Compliance with Federal Advisory Committee Act (4-19-88).

Agency responses to Senator Glenn's questionnaire, see text at note 31, infra, classified a few committee members as independent contractors.

5. Members of committees which are privately established but which are "utilized" by the Government as "a preferred source of advice."

The first category of advisory committee members are SGE's and are subject to the conflict-of-interest laws. All the other categories of members are not SGE's and are not subject to the conflict-of-interest laws.

This multiplicity of categories is in itself neither good nor bad. Most subjects in Government are complicated. The Federal Advisory Committee Act covers a very broad range of situations and relationships, and it is not surprising that in dealing with conflict-of-interest questions, distinctions must be made.

There are, however, two points which must strike an observer:

(1) The operative distinctions seem primarily conclusory and almost invariably questions of degree. Take, for example, the distinction -- crucial for purposes of conflict-of-interest coverage -- between a member selected as an individual and one selected as a representative. There are undoubtedly situations in which an agency is primarily interested in ascertaining the views of the industry or other interest group from which the member is selected. Some statutes establishing advisory committees even specify the representative character of the membership.[26/] But agencies can generally obtain industry views on an issue without establishing an advisory committee. One would assume that in many situations what the agency is looking for is just the kind of borderline or hybrid situation the conflict-of-interest laws appear to rule out, that is to say, the honest judgment of someone who is forced to weigh his perception of the common good against the narrower interests or biases of the constituency from which he is selected.[27/] Of course, the agency can resolve the problem on the legal level simply by classifying the members as representatives while hoping that in practice they can rise above mere representation. But it does seem to me, at least, that the either/or classification called for by Appendix C and the Walter Memorandum oversimplifies what is likely to be a spectrum of situations and a mix of motives on the part of all the participants.

One result of the difficulty in classifying advisory committee members is that the question of compensation -- the only "hard" indicium -- tends to become determinative. An uncompensated adviser <u>may</u> be an SGE, but a compensated adviser <u>must</u> be an SGE. Appendix C states flatly that "[a] person who receives pay from the Government for his services as an adviser or

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26/ See, note 29, *infra*.

27/ One might well ask, if what is desired from the member is a mere expression of the industry view, why have him work on a committee? The committee device implies an interest in developing a consensus through exchange of views, which in turn implies that the individual's own views are of interest to the agency. Of course, it may well be that the function of the committee is not so much to communicate the constituencies' views to the agency as to make the agency's actions more palatable to the constituencies.

consultant is its employee and not a representative of an outside group." Therefore, if an agency desires to compensate a committee member, he must be treated as an SGE, even if his role on the committee is to "balance" the views of members serving as representatives of special interests.

While the question of compensation should doubtless be relevant in determining whether an adviser should be considered an SGE, I doubt that the flat rule stated in Appendix C is desirable or realistic. Presumably the agency benefits from advice received from persons acting in a representative role or capacity. Why should the agency be forbidden to pay them to do so? In other contexts such payments are allowed, as when an agency provides financial support for public interest representation in its proceedings.[28/] Indeed, when Congress has turned its attention to the problem in the course of establishing statutory advisory committees, it has on occasion provided for compensation for committee members who serve as representatives of outside interests.[29/] After all, it is not the fact of payment which creates the conflict of interest, but rather the existence of a conflict which is assumed to make payment inappropriate. In the case of representatives deliberately chosen as such, this assumption seems of doubtful validity.

Even more nebulous in this context is the distinction between the SGE and the independent contractor. If the key issue is supervision and control, the requirement of FACA that recommendations of the advisory committees "not be inappropriately influenced by the appointing authority * * * but will instead

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28/ Opinion of the Comptroller General B-139703 (July 24, 1972); see, generally, Boyer, Expense-Reimbursing Public Participants in Administrative Rulemaking: The Federal Trade Commission Experience, 1979 ACUS 437, 438-46.

29/ The legislation establishing the Technical Pipeline Safety Standards Committee, 49 U.S.C. App. §1673, and the Technical Hazardous-Liquid Pipeline Safety Standards Committee, 49 U.S.C. App. §2003, specifically provides compensation for the non-Federal members of the committees, and that such payments "shall not render members of the Committee employees or officials of the United States for any purpose." Similar provisions are in the legislation establishing the National Boating Safety Advisory Council, 46 U.S.C. §13110, and the National Highway Safety Advisory Committee, 23 U.S.C. §404. The Department of Transportation treats these members as representatives. The statute establishing the Advisory Council on Employee Welfare and Pension Benefit Plans, 29 U.S.C. §1142, provides that three members "shall be representatives of employee organizations" and three "shall be representatives of employees." It also provides that members shall be entitled to daily pay at the rate of a GS-18. The Department of Labor has felt compelled to classify these members as SGE's notwithstanding their representative role on the committee, and has provided appropriate waivers under section 208. On the other hand, where section 7 of the Occupational Safety and Health Act, 29 U.S.C. §656, authorized, but, in Labor's view, did not compel compensation for advisory committee members serving as representatives, Labor decided not to provide compensation in order to treat the members as representatives and not as SGE's.

be the result of the advisory committee's independent judgment" seems inconsistent with the conclusion that committee members are SGE's.

(2) But aside from the difficulties of applying these distinctions, there is the troubling question whether they make any sense in terms of the problem of conflicts of interest. The distinction between advisory committee members who are selected to exercise independent judgment and those who are selected to represent distinct interests is sound enough in theory whatever its difficulties of application. The problem is that it is not realistic in terms of the purposes of the agency in establishing the committee. Distinctions between SGE's and independent contractors in terms of conflict-of-interest requirements make little sense, even in theory. With respect to members of ad hoc or of utilized committees, the distinction can probably be justified by the practical impossibility of bringing the conflict-of-interest laws into play where the relationships to the Government are so tenuous. But that does not eliminate the danger of self-serving advice or obviate the need for some alternative mechanisms.

One of the issues I have researched is how agencies have administered the fine distinctions set forth in the Walter Memorandum. Given the number of agencies and committees involved,[30] it has simply not been feasible to examine on any systematic basis the correctness of the legal conclusions the agencies have reached. However, the information available suggests a tendency of agencies to adopt a policy of administrative convenience and to consider members as interest group representatives, at least in all doubtful cases.

In March, 1988, Chairman Glenn of the Senate Committee on Governmental Affairs sent a letter to the agencies asking twenty questions respecting their management of advisory committees. One question was: "Do you consider members of advisory committees to be regular government employees, special government employees, or independent contractors? What criteria has the agency established to make this determination?" I have examined the responses to this question from 25 agencies and obtained additional information through interviews at a half-dozen agencies. My conclusions are as follows:

1. Agencies tend to place (or at least, to report) all or nearly all non-Government members in the same category. Thus, the Department of Health and Human Services, the agency with the most committees and over 20% of the total committee members, reported, "Members of committees which are established to advise the Department are routinely appointed as special government employees." Other agencies which reported that all or nearly all members were SGE's included the Department of Education, NASA, the United States Information

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30/ There were 992 advisory committees and 57 sponsoring agencies in fiscal 1987. Total membership was 19,837 individuals, of whom approximately 8% were full-time Federal employees. There is no breakdown on the status of the remaining membership. Sixteenth Annual Report of the President on Federal Advisory Committees, pp. 1-2, 7, 9. In fiscal 1988, 58 departments and agencies sponsored 1,020 committees, and a total of 21,236 individuals served as committee members. Seventeenth Annual Report of the President on Federal Advisory Committees, p. 1.

Agency, and the Nuclear Regulatory Commission. On the other hand, the Department of Transportation, with over 20 committees and over 500 members, reported that all its advisory committee members served as representatives, and the Department of the Interior, with approximately 150 committees and over 1,500 members, reported that the members of only one committee were considered SGE's; all other committees were made up of members serving in a representative capacity. Other agencies reporting that their members were all or mostly representatives included the Department of Energy, the Department of the Treasury, the Office of the United States Trade Representative, the Eximbank, the Federal Home Loan Bank Board, the Federal Mediation and Conciliation Service, and the Small Business Administration.[31] Although many agencies cited the 1982 Walter Memorandum as their principal source of guidance, my impression (possibly unfair) is that of the agencies whose responses I reviewed, only the Department of Labor and EPA have attempted to apply the criteria on a case-by-case basis. Four agencies reported that some committee members were serving as independent contractors.

2. In at least two instances, committee members who were clearly SGE's under the Walter Memorandum and FPM guidelines were classified as representatives for reasons of administrative convenience. (Neither instance involved significant potential for conflict of interest.) Several agencies reported as a basis for not treating members as SGE's that they received no compensation for their services, a consideration which should not be controlling under the Walter Memorandum.

3. Agencies, by and large, do not demand financial disclosure from committee members who are not SGE's. The National Endowment for the Humanities classifies its advisory committee members as independent contractors. However, since the committees make recommendations with respect to award of grants, the Endowment reported that it took precautions to avoid appointing panelists to review applications from institutions with which they were affiliated. (The replies are too sketchy to get an adequate idea of agency efforts to brief non-SGE members on conflict problems.)

Availability of Waivers

While the distinctions in classifications of advisory committee members seem confusing and arbitrary, the waiver authority in 18 U.S.C. §208 does offer an avenue of relief from the threat of criminal liability, and it _is_ used, at least in some agencies. However, there appear to be a number of drawbacks:

(a) Some agencies, notably the Department of Defense, are extremely reluctant to issue section 208 waivers. This policy may increase the pressure

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[31] These agency replies expressly or impliedly exclude from consideration committee members who are full-time Federal employees. However, the membership figures cited, which I have drawn from the Sixteenth Annual Report, are total committee membership.

on those officials responsible for establishing advisory committees to find ways to avoid classifying their members as SGE's.[32]

(b) Doubts have been expressed whether a section 208(b) waiver may be granted where the financial interest in question is not insubstantial in an absolute sense, even though the agency concludes that any bias arising from that interest may be offset through committee balance or, perhaps, discounted as a result of disclosure. Because of these doubts the President's Commission on Federal Ethics Law Reform is recommending an amendment to section 208 to authorize waivers for advisory committee members where the appointing authority determines, after review of the financial disclosure forms, that the need for the member's expertise outweighs the potential for conflict of interest. The Commission concluded that under the present statute, "officials with the authority to grant waivers are required to look in large measure at the magnitude of the financial interest in question."[33]

I do not believe the administrative interpretation of section 208 is as narrow as the Commission assumes. In the 1978 Office of Legal Counsel opinion previously discussed,[34] OLC addressed the issue of substantiality of interest and concluded on the basis of the contemporaneous understanding of the 1962 legislation and the subsequent administrative construction in the Federal Personnel Manual that a waiver may be granted to an advisory committee member even though his financial interest is not insubstantial in an absolute sense provided that he "renders advice of a general nature from which no preference or advantage over others might be gained by any particular person or organization."[35] Nevertheless, agencies may not be sufficiently aware of their authority in these circumstances, or they may feel unwilling to subscribe to a determination that the conflicting interest is not "likely to affect the integrity" of the advice to be obtained. (In this respect the Commission's formulation -- "the need for a member's expertise outweighs the potential for conflict of interest" -- seems a more accurate statement of the basis for the determination.)

(c) The waiver process is not always smooth. In a case brought to the attention of the Glenn Committee the President's AIDS Commission had been assembled and had conducted several public meetings before it was realized that the members' affiliations with health care providers, medical research

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32/ The President's Commission on Federal Ethics Law Reform points out that "an undesirable stigma already attends the seeking of waivers," and it stated its belief that "waivers should be granted more frequently instead of discouraged." These comments were directed at the administration of section 208(b) generally, but they are also relevant to advisory committees. To Serve with Honor, Report of the President's Commission on Federal Ethics Law Reform (1989), p. 24.

33/ *Ibid*., p. 30.

34/ See text at note 20, *supra*.

35/ 2 Ops. OLC 151, 156 (1978), quoting from the FPM Ch. 735, App. C.

institutions and other private entities might constitute conflicting financial interests. Waivers were hastily granted, but only after the members had, all unknowingly, been exposed to criminal liability.36/

(d) Waivers tend to be limited in scope and to place the burden on the member to anticipate potential conflicts outside that scope. Let me quote from a sample waiver letter to a committee member from the Secretary of Labor:

> "I have determined pursuant to 18 U.S.C. 208(b)(1) that the personal financial interests you have disclosed are not so substantial as to be deemed likely to affect the services you will provide * * * when those services are on matters of broad policy or general applicability. On these matters the provisions of 18 U.S.C. 208(a) are waived. This waiver would not extend to matters which may have a direct, predictable and unique effect on your financial interests or the interests of other related and associated persons covered by 18 U.S.C. * * *."

Should a member's lawyer advise him to take the job under such a limited waiver? It is true that the waiver tracks the line of distinction set forth in the FPM and the OLC opinion. But it is the agency and not the advisory committee members which is supposed to set the committee's agenda, and it seems reasonable to expect the agency to be in a better position than the individual member -- once financial disclosure has been made -- to anticipate and guard against conflicts of interest. Accordingly, where waivers are used, it would be far better for the agency to set out in the waiver what the committee is expected to do, what conflicting interests have been disclosed, and its conclusion that so long as the committee stays within the former, the interests disclosed shall not be deemed disqualifying.

(e) Finally, waivers address only the section 208 problem. This is admittedly the most serious one, but there are others, including a minor irritant, the requirements of the Hatch Act, which would apply on any day when the member is performing committee service.37/

Another such problem is the potential impact of the new procurement integrity provision of the Office of Federal Procurement Policy Act.38/ This legislation contains restrictions on employment discussions between "procurement officials" and competing contractors during the conduct of a procurement, on the unauthorized disclosure of certain information regarding a

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36/ U.S. General Accounting Office, Report to the Chairman, Committee on Governmental Affairs, U.S. Senate, GAO/GGD-89-17 AIDS Commission Compliance with FACA.

37/ The Hatch Act, 5 U.S.C. §§7324-27, restricts partisan political activity by Federal employees. It applies to SGE's only on the days they perform Government services, 5 CFR §733.123(b).

38/ 41 U.S.C. §423. See note 18, supra.

procurement, and on the post-employment activities of Federal officials involved in a procurement. Whether this legislation will affect any advisory committees will depend on how broadly the procurement process is defined, and thus far this definition has proved elusive.[39] To the extent the statute applies to advisory committees, the applicability of the revolving door provision, §423(e), and possibly the restriction on employment discussions, §423(a), (b), will depend on whether the committee member is regarded as an SGE. Significantly, section 423, unlike 18 U.S.C. §208, contains no agency authority to exempt insignificant conflicts of interest.

Conclusions and Recommendations

1. The principal conclusion of this study is that the present distinctions among advisory committee members between special Government employees, on the one hand, and representatives and independent contractors, on the other, are extremely fine, difficult to administer consistently, and, in any event, cannot be justified in terms of protecting the Government from self-interested advice. In practice they result in agencies requiring too little disclosure from the members who are not SGE's, while imposing significant burdens, principally potential criminal liability, on those members who are SGE's.

2. The burdens associated with classification as an SGE, in terms of financial disclosure, potential criminal liability, Hatch Act coverage, contrast sharply with the minimal burdens on committee members who serve in any other capacity. Consequently, at least where committee service is not compensated, agencies are likely to avoid classifying members as SGE's.

One must recognize, of course, that the likelihood of actual criminal prosecution for an inadvertent violation of 18 U.S.C. Ch. 11 is remote. It is Department of Justice policy to bring criminal charges under these provisions only in situations involving aggravating circumstances. Nevertheless the possible embarrassment associated with a criminal investigation is something most committee members would seek to avoid. Furthermore, the Government has an obligation to its advisory committee members, many of whom serve for no or merely nominal compensation, not to expose them to even theoretical risks. Finally, overbroad and unrealistic prohibitions tend to debase the currency of ethics rules and may make the public indifferent to even serious violations.

3. Advisory committees vary greatly in their functions and in the degree to which conflicts of interest must be guarded against. Generally speaking, the need to avoid conflicts is greatest with respect to those committees

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39/ The drafters of the interim regulations to implement the procurement integrity provision confessed that "the vastly different types and nature of procurements conducted throughout the Federal Government make it impossible to identify one event that is common to all agencies, that constitutes the beginning of a procurement," 54 F.R. 20488. Nevertheless, the interim rule states that a procurement begins when an authorized agency official "determines that a specific agency need or requirement shall be satisfied by procurement," 48 CFR §3.104-7, 54 F.R. 20494. See, also, section 3.104-4(h)(2).

involved in reviewing grants or similar applications and those furnishing scientific or technical advice, whereas for those committees providing policy advice the avoidance of conflicting personal interests is less important than assurance that the agency is aware of those interests and able to discount possible bias where appropriate or to offset it through committee balance.

The thrust of the proposed recommendations is to:

(a) Require from each member of an advisory committee (excluding full-time Government employees) the same level of disclosure of employment, affiliations and financial interests, irrespective of the member's status as an SGE, contractor, or representative. The agencies should have authority to exclude from the disclosure requirement information, other than the individual's employment, not deemed relevant to the purposes and functions of the committee, much as they do now with respect to SGE's under former section 306 of E.O. 11222. Thus, where the committee is dealing with social rather than economic issues, or where the impact of its recommendations on identifiable financial interests is likely to be remote, it would be appropriate to require no financial information. Any willful misstatement in the disclosure document would be punishable under 18 U.S.C. §1001.

(b) Replace the present unsatisfactory bases of distinction among advisory committee members with specific authority in the agency to classify members of advisory committees as SGE's or non-SGE's on the basis of the function of the committee and the agency's expectations of the degree of objectivity to be expected of the member. In general, members of those advisory committees which advise on the disposition of particular matters involving specific parties, e.g., grant review committees, scientific advisory groups,[40/] would continue to be classified as special Government employees, whereas members of those committees which advise on matters of general policy would not. But the choice in each instance would be an explicit one by the agency, after consultation with the Office of Government Ethics.

The recommendation is limited to those committees formally established and whose members are selected by the Federal Government. It is, therefore, not coextensive with the coverage of the Federal Advisory Committee Act, nor would it apply to those ad hoc or informal committees which fall outside the coverage of FACA.

(c) The final paragraph is intended to deal with the anomaly in 18 U.S.C. Ch. 11 described on page 7 of the report. Because section 207(g) applies to "particular matters," while sections 203(c) and 205 apply more narrowly to representation with respect to particular matters "involving a specific party or parties," a partner of a special Government employee is at present under a broader disability with respect to representation than is the employee himself.

Finally, we can all agree, at a minimum, that if no changes are made in the coverage of the conflict-of-interest laws, as proposed herein or by the

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40/ E.g., the Nuclear Regulatory Commission's Advisory Committee on Reactor Safeguards, which is an integral part of the NRC's licensing process, 42 U.S.C. §2039.

President's Commission, the agencies must do a better job of advising committee members and proposed committee members of their potential exposure. However remote the prospect of prosecution, the potential is there, it could lead to embarrassment, if nothing worse, and the Government owes it to these members, many of whom volunteer their services without compensation, to warn them of the risks and how they may be avoided. Agencies should make clear to each advisory committee appointee what his legal status is to be, and if he is classified as an SGE, he should be briefed on his conflict-of-interest exposure, not merely in general terms, as is frequently done, but also with particular reference to the anticipated agenda of the committee. One of the purposes of the Federal Advisory Committee Act was to increase agency control over the activities of its advisory committees, and with that control should go the responsibility for guiding the committee members through the pitfalls which their status entails.