



August 28, 2014

Ms. Emily O'Reilly  
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**Re: Own-initiative inquiry 01/6/2014/BEH concerning the composition of Commission expert groups**

Dear Ms. O'Reilly:

On behalf of the Office of the Chairman of the Administrative Conference of the United States, pursuant to 5 U.S.C. § 595(c)(2), and in furtherance of Recommendation 2011-6, *International Regulatory Cooperation*,<sup>1</sup> we submit these comments in response to your call for contributions from the public in connection with your own-initiative inquiry into the composition of Commission expert groups.

In the United States, the Federal Advisory Committee Act (FACA) governs the establishment, composition, and operation of expert committees and similar groups that advise federal government agencies. FACA was enacted in 1972, in response to concerns similar to those you have raised in your current inquiry. In the intervening decades, agencies in the United States have learned much through efforts to comply with the law. We hope that sharing this history and experience, in the context of the rulemaking process used by U.S. federal agencies, may be instructive as you consider ways that the expert group process in the EU might be improved.

**Background on the Administrative Conference**

The Administrative Conference is a non-regulatory agency of the U.S. government that studies administrative procedure and makes recommendations for improvement to other branches and agencies of the federal government.<sup>2</sup> As President Barack Obama has explained, the Administrative Conference “is a public-private partnership designed to make the government

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<sup>1</sup> See 77 Fed. Reg. 2257, 2259 (Jan. 17, 2012); see also Executive Order 13,609, 77 Fed. Reg. 26,413 (May 1, 2012).

<sup>2</sup> See 5 U.S.C. § 594(1); see also *id.* § 591(1) (stating that one purpose of the Administrative Conference is “to provide suitable arrangements through which Federal agencies, assisted by outside experts, may cooperatively study mutual problems, exchange information, and develop recommendations for action by proper authorities to the end that private rights may be fully protected and regulatory activities and other Federal responsibilities may be carried out expeditiously in the public interest”). “Administrative procedure” is “broadly construed to include any aspect of agency organization, procedure, or management which may affect the equitable consideration of public and private interests, the fairness of agency decisions, the speed of agency action, and the relationship of operating methods to later judicial review, but does not include the scope of agency responsibility as established by law or matters of substantive policy committed by law to agency discretion.” *Id.* § 592(3).



work better.” The Chairman of the Conference is appointed by the President and confirmed by the Senate for a five-year term and is the only member of the Conference who also serves as a paid member of the agency’s staff.<sup>3</sup> The Chairman is joined by up to 100 other voting members, roughly 60 percent of whom are high-level officials from other government agencies.<sup>4</sup> The remaining members are administrative experts drawn from the private sector, including from law school faculties, law firms, and public interest organizations.<sup>5</sup> The Administrative Conference is non-partisan, and its membership is politically balanced. When the full membership meets in plenary session (this occurs semi-annually, typically in June and December), it is referred to as the “Assembly of the Conference,”<sup>6</sup> and it operates as an expert group or “federal advisory committee” subject to the requirements of FACA.<sup>7</sup>

Administrative Conference recommendations are based on independent research and crafted through a transparent, consensus-based committee process.<sup>8</sup> Recommendations begin with an independent research report prepared by an outside consultant (typically a law professor or other academic) or a member of the staff acting as an in-house researcher.<sup>9</sup> Each report is presented to one of the committees, which works to come to a consensus on a draft recommendation. Drafts of reports and recommendations are made available online, and committee meetings are open to the public and streamed live online, with the videos archived for subsequent public viewing.<sup>10</sup> At its semi-annual plenary sessions, which are similarly open to the public, the Assembly of the Conference debates and votes on the adoption of the resulting recommendations.<sup>11</sup>

The Administrative Conference has recently examined the expert group or “advisory committee” process in the U.S. and adopted Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*.<sup>12</sup> The recommendation is based on a report written by Administrative Conference Attorney Advisor Reeve T. Bull.<sup>13</sup> Our comments are informed by this recommendation and Mr. Bull’s report. We also offer these comments in the

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<sup>3</sup> See *id.* §§ 593(b)(1), (c). A directory of the small staff that currently assists the membership in carrying out the duties of the Administrative Conference is available at <http://www.acus.gov/directory/staff>.

<sup>4</sup> See *id.* § 593(b)(2)-(5). The current roster of these “Government Members” is available at <http://www.acus.gov/directory/government-member>.

<sup>5</sup> See *id.* § 593(b)(6). Members from the private sector are referred to as “Public Members.” The current roster of these members is available at <http://www.acus.gov/directory/public-member>.

<sup>6</sup> See *id.* § 595(a).

<sup>7</sup> See Assembly of the Administrative Conference, Filing of Advisory Committee Charter, 75 Fed. Reg. 47,523 (Aug. 6, 2010); see also 5 U.S.C. App. § 3(2) (defining “advisory committee”).

<sup>8</sup> See <http://www.acus.gov/projects-by-stage>. Each Conference member is assigned to serve on one of six committees: Adjudication, Administration & Management, Collaborative Governance, Judicial Review, Regulation, and Rulemaking. See <http://www.acus.gov/committees/>.

<sup>9</sup> See 5 U.S.C. § 595(c)(10).

<sup>10</sup> See [http://acus.granicus.com/ViewPublisher.php?view\\_id=2](http://acus.granicus.com/ViewPublisher.php?view_id=2).

<sup>11</sup> See 5 U.S.C. § 595(a)(1).

<sup>12</sup> See 77 Fed. Reg. 2257, 2261 (Jan. 17, 2012).

<sup>13</sup> Reeve T. Bull, *The Federal Advisory Committee Act: Issues & Proposed Reforms* 6–7 (Sept. 12, 2011), available at <http://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf>.



spirit of another recently adopted recommendation: Recommendation 2011-6, *International Regulatory Cooperation*.<sup>14</sup>

Administrative Conference recommendations are the consensus positions of the Assembly of the Administrative Conference.<sup>15</sup> To the extent that these comments go beyond the text of the Conference recommendations cited herein, they should be understood to reflect the considered views of the Administrative Conference's Office of the Chairman, informed by research conducted by two of the Administrative Conference's staff attorneys, Emily S. Bremer and Reeve T. Bull.<sup>16</sup> It bears noting that, in this one respect, these Office of the Chairman views have not been approved by and may not necessarily reflect the views of the Conference or its members.

### **Public Participation in U.S. Administrative Decisionmaking**

U.S. administrative procedure places a high value on public participation in administrative policymaking. This is evident in the Administrative Procedure Act (APA), which sets forth the minimum procedural requirements that agencies must follow when developing rules or regulations (these two terms are used interchangeably).<sup>17</sup> Today, most U.S. federal agencies develop regulations through a process set out in the APA known as "informal" or "notice-and-comment" rulemaking.<sup>18</sup> The APA imposes three core procedural requirements in this kind of proceeding.<sup>19</sup>

First, an agency must initiate a rulemaking by publishing a notice of proposed rulemaking (NPRM) in the *Federal Register*,<sup>20</sup> a centralized and readily available government publication.<sup>21</sup> Agencies usually include a proposed text for the rule in the NPRM, along with extensive explanatory material.<sup>22</sup> After the NPRM is published, the agency must then "give interested persons an opportunity to participate in the rule making through submission of written data,

<sup>14</sup> See 77 Fed. Reg. 2257, 2259 (Jan. 17, 2012).

<sup>15</sup> See 5 U.S.C. § 595(a).

<sup>16</sup> Ms. Bremer is Staff Counsel to the Committee on Rulemaking, and Mr. Bull is Staff Counsel to the Committee on Regulation.

<sup>17</sup> The APA's requirements are considered "minimums" because "[a]gencies are free to grant additional procedural rights in rulemaking in the exercise of their discretion." *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1974). The President and Congress may also impose additional procedural requirements on agencies. See, e.g., Executive Order 13,653, 76 Fed. Reg. 3821 (Jan. 21, 2011); Executive Order 12,866, 3 C.F.R. 644 (1993), reprinted in 5 U.S.C. § 601.

<sup>18</sup> See generally JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING (5th ed., A.B.A. 2012). The APA defines "rulemaking" as any "agency process for formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). A "rule" is "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." *Id.* § 551(4).

<sup>19</sup> See 5 U.S.C. § 553.

<sup>20</sup> See *id.* § 553(b). The APA also requires agencies to provide "interested person[s] the right to petition for the issuance, amendment, or repeal of a rule." See *id.* § 553(e). The Conference is currently examining the processes by which agencies accept and respond to such petitions for rulemaking. See <http://www.acus.gov/research-projects/petitions-rulemaking>.

<sup>21</sup> See <https://www.federalregister.gov/>.

<sup>22</sup> JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 254 (5th ed., A.B.A. 2012).



views, or arguments.”<sup>23</sup> Finally, after considering all public comments, agencies must publish the final rule in the *Federal Register*, along with a concise statement explaining the rule’s basis and purpose.<sup>24</sup>

U.S. agencies often go beyond the APA’s requirements in order to encourage and facilitate public participation in the rulemaking process. These efforts take many different forms. In some cases, for example, agencies elect to use notice-and-comment procedures to develop rules that are formally exempt from the APA’s requirements.<sup>25</sup> Another approach is to offer, on a voluntary basis, additional or “reply” comment periods to ensure adequate opportunity for public engagement.<sup>26</sup> Agencies are required to the extent practicable to use electronic communication tools, such as the internet, in their rulemakings to make it easier for members of the public to submit comments on proposed rules.<sup>27</sup> Most agencies use a government-wide website known as Regulations.gov for this purpose. Agencies may also use their own websites to highlight rulemaking activities and direct potential commenters to the appropriate page on Regulations.gov, and to expand outreach regarding rulemakings and other agency actions.<sup>28</sup> Some agencies have even used social media to enable dialogue with the public in connection with a rulemaking. The Administrative Conference has recently encouraged further experimentation with this innovative new approach.<sup>29</sup>

In addition to the input received through the notice-and-comment process, agencies sometimes wish to hear the views of specific public stakeholders or subject matter experts. This kind of interaction may occur in the context of written or (more often) oral communications between agency personnel and members of the public.<sup>30</sup> Under the APA, these informal

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<sup>23</sup> 5 U.S.C. § 553(c).

<sup>24</sup> *Id.*; see also 1 C.F.R. § 18.2(a) (providing that proposed and final rules must include a “preamble which will inform the reader, who is not an expert in the subject area, of the basis and purpose for the rule or proposal”); *Kooritzky v. Reich*, 17 F.3d 1509, 1513 (D.C. Cir. 1994).

<sup>25</sup> The Administrative Conference has adopted a number of recommendations urging agencies to interpret the APA’s exemptions narrowly and voluntarily follow notice-and-comment procedures in exempted proceedings. See [Recommendation 95-4](#), *Procedures for Noncontroversial and Expedited Rulemaking*, 60 Fed. Reg. 43,110 (Aug. 18, 1995); [Recommendation 92-1](#), *The Procedural and Practice Rule Exemption for the APA Notice-and-Comment Rulemaking Requirements*, 57 Fed. Reg. 30,102 (July 8, 1992); [Recommendation 83-2](#), *The “Good Cause” Exemption from APA Rulemaking Requirements*, 48 Fed. Reg. 31,180 (July 7, 1983); [Recommendation 76-5](#), *Interpretive Rules of General Applicability and Statements of General Policy*, 41 Fed. Reg. 56,769 (Dec. 30, 1976); [Recommendation 73-5](#), *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, 39 Fed. Reg. 4,847 (Feb. 7, 1974); [Recommendation 69-8](#), *Elimination of Certain Exemptions from the APA Rulemaking Requirements*, 38 Fed. Reg. 19,784 (July 23, 1973); see also [Recommendation 93-4](#), *Improving the Environment for Agency Rulemaking*, 59 Fed. Reg. 4,670 (Feb. 1, 1994) (correction at 59 Fed. Reg. 8,507 (Feb. 22, 1994)); [Recommendation 92-2](#), *Agency Policy Statements*, 57 Fed. Reg. 30,103 (July 8, 1992); [Recommendation 72-5](#), *Procedures for the Adoption of Rules of General Applicability*, 38 Fed. Reg. 19,792 (July 23, 1973).

<sup>26</sup> See [Recommendation 2011-2](#), *Rulemaking Comments*, 76 Fed. Reg. 48,791 (Aug. 9, 2011).

<sup>27</sup> See E-Government Act 2002, Pub. L. 107-347, § 206. Today, most rulemaking is conducted electronically and is often referred to as “e-Rulemaking.” See [Recommendation 2011-1](#), *Legal Considerations in e-Rulemaking*, 76 Fed. Reg. 48,789 (Aug. 9, 2011).

<sup>28</sup> See [Recommendation 2011-8](#), *Agency Innovations in e-Rulemaking*, 77 Fed. Reg. 2,264 (Jan. 17, 2012).

<sup>29</sup> See [Recommendation 2013-5](#), *Social Media in Rulemaking*, 78 Fed. Reg. 76,269 (Dec. 17, 2013).

<sup>30</sup> See [Recommendation 2014-4](#), *“Ex Parte” Communications in Informal Rulemaking*, 79 Fed. Reg. 35,988, 35,993 (June 25, 2014). Borrowing a term from the judicial context, these informal communications are often referred to as



communications “are completely appropriate so long as they do not frustrate judicial review or raise serious questions of fairness.”<sup>31</sup> Although the law imposes few formal requirements on such communications, agencies often observe procedures designed to “ensure that access to agency personnel is provided in a balanced, viewpoint-neutral manner.”<sup>32</sup> Transparency is similarly valued. Agencies generally disclose to the public the occurrence and a summary of the content of such communications.<sup>33</sup>

A more formal way in which agencies seek input from stakeholders and experts is by consulting with expert groups or, as they are called in the United States, “advisory committees.” U.S. agencies have long valued this kind of consultation as an important tool for improving administrative decisionmaking, which supplements the basic requirement to publish proposals for public comment. At the same time, as your inquiry recognizes, the use of advisory committees comes with its own challenges. One such challenge is the necessity of ensuring the committees have a balanced composition of members. In the United States, this and related issues are addressed by FACA and the Negotiated Rulemaking Act.

### **Overview and History of the U.S. Federal Advisory Committee Act**

Federal agencies have long consulted with “advisory committees” as a way of gathering outside input on factual and policy issues.<sup>34</sup> Shortly after the Administrative Procedure Act was enacted in 1946, the President and the Department of Justice provided guidelines to agencies regarding the use of these committees. The goal of the guidelines was to prevent undue influence and ensure transparency.<sup>35</sup> In 1972, Congress passed (and President Nixon signed) FACA, which codified and built on many of the earlier guidelines.<sup>36</sup>

FACA was designed to address two widespread concerns with the use of advisory committees. One concern was that advisory committees were too numerous and often subsisted long past the point of usefulness, thereby squandering governmental resources.<sup>37</sup> The second concern was that the use of advisory committees made agencies more vulnerable to undue

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“ex parte” communications. This term, however, “does not entirely fit in this non-adversarial context, and some agencies do not use it.” *Id.* at 35,993

<sup>31</sup> *Home Box Office, Inc. v. Fed. Comm’n Comm’n*, 567 F.2d 9, 57 (D.C. Cir. 1977); *see also* *Sierra Club v. Costle*, 657 F.2d 298, 400-01 (D.C. Cir. 1981).

<sup>32</sup> [Recommendation 2014-4](#), “*Ex Parte*” Communications in Informal Rulemaking ¶ 3(b), 79 Fed. Reg. 35,988, 35,994 (June 25, 2014); *see generally* Esa L. Sferra-Bonistalli, *Ex Parte Communications in Informal Rulemaking*, Final Report to the Administrative Conference (May 1, 2014), available at <http://www.acus.gov/report/final-ex-parte-communications-report> (providing a comprehensive analysis of agency procedures governing informal communications between agency personnel and members of the public).

<sup>33</sup> *See id.*

<sup>34</sup> Bull, *supra* note 13, at 6–7.

<sup>35</sup> *Pub. Citizen v. United States*, 491 U.S. 440, 456 (1989); Exec. Order No. 11,007, 27 Fed. Reg. 1875 (Feb. 28, 1962).

<sup>36</sup> Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. App.).

<sup>37</sup> HOUSE COMM. ON GOV’T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. Rep. No. 91-1731, at 4, 12, 15–16 (1970).



influence by special interests by providing a non-public forum in which the agencies might consult with certain favored groups to the exclusion of other groups or the general public.<sup>38</sup>

FACA addresses these concerns by imposing certain conditions and requirements on the establishment, composition, and operation of advisory committees. To ensure a balanced composition and provide some protection against regulatory capture by special interests, FACA and related regulations require that:

- The membership of an advisory committee includes experts in all relevant subject matters,<sup>39</sup> as well as a balance of viewpoints.<sup>40</sup>
- Committee members who are selected to provide impartial advice to the government should be appointed as “special government employees.” These members are subject to various ethics requirements (relating to personal conflicts of interest, acceptance of gifts, etc.) designed to preserve impartiality.<sup>41</sup>
- Committee members selected to represent a defined interest or perspective (e.g., automobile manufacturers in a rulemaking related to carbon emissions) should be appointed as “representatives.” These members are not subject to ethics requirements because they are not expected to act impartially.<sup>42</sup>

To improve transparency and public accountability, and thereby provide further protection against regulatory capture, FACA also requires that:

- Committee meetings are normally announced in the *Federal Register* at least 15 days in advance.<sup>43</sup>
- Members of the public are permitted to attend committee meetings and submit written and/or oral comments for the committee’s consideration.<sup>44</sup>

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<sup>38</sup> *Id.* at 18–20.

<sup>39</sup> 5 U.S.C. App. §§ 5(b)(2), 5(c); 41 C.F.R. § 102-3.30(c). For instance, a panel addressing the human health effects of a particular chemical used in pesticides might include chemists, microbiologists, toxicologists, botanists, medical doctors, agricultural experts, and other specialists possessing information bearing on the question before the committee.

<sup>40</sup> *Id.* For example, a panel addressing whether to set aside a tract of land as an environmental preserve (a politically charged issue) would include both environmentalists and advocates of unrestricted development.

<sup>41</sup> 18 U.S.C. § 202(a); 41 C.F.R. § 102-3.105(h); U.S. Office of Government Ethics, Conflict of Interest and the Special Government Employee: A Summary of Ethical Requirements Applicable to SGEs 1, *available at* <http://ethics.od.nih.gov/topics/OGE-SGE.pdf>.

<sup>42</sup> U.S. Office of Government Ethics, Conflict of Interest and the Special Government Employee: A Summary of Ethical Requirements Applicable to SGEs 3, *available at* <http://ethics.od.nih.gov/topics/OGE-SGE.pdf>.

<sup>43</sup> 5 U.S.C. App. § 10(a)(2); 41 C.F.R. § 102-3.150(a).

<sup>44</sup> 5 U.S.C. App. §§ 10(a)(1), (3); 41 C.F.R. §§ 102-3.140(c)–(d).



- Documents made available to, or prepared for or by, committee members are available to the public on request (subject to certain exceptions established by the Freedom of Information Act).<sup>45</sup>

### **The Role of Advisory Committees in the United States**

In 2012 (the most recent year for which data is available), 52 federal agencies consulted with a total of 1077 advisory committees.<sup>46</sup> Despite their prevalence, advisory committees are only one source of public input and a relatively minor component of the overall rulemaking process. Advisory committees may *supplement*, but they do not *replace*, the APA's notice-and-comment process.<sup>47</sup> Although committees are often used to offer advice relevant to drafting a proposed rule, they can be used in connection with other, non-rulemaking aspects of an agency's mission.

Agencies ordinarily use advisory committees to gather expert advice on discrete issues. For instance, an agency grappling with a technical question at the frontier of scientific knowledge might convene a committee of scientists to conduct a peer review of a study or report.<sup>48</sup> Or an agency looking to award a research grant might appoint a panel of academics to review proposals and recommend a grant recipient.<sup>49</sup> Another example, previously noted, is the Assembly of the Administrative Conference, which is itself an advisory committee that brings together private sector administrative law experts and agency representatives to develop recommendations for improving administrative procedure.<sup>50</sup> All meetings of such groups would be required to follow the requirements laid out above concerning public meeting notice, openness to the public, opportunities for members of the public to contribute, and public availability of documents distributed.

Agencies also occasionally use advisory committees for the broader purpose of negotiating the text of a rule, which the agency will then issue as a notice of proposed rulemaking.<sup>51</sup> These "negotiated rulemaking" committees are subject to FACA.<sup>52</sup> They are also

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<sup>45</sup> 5 U.S.C. App. § 10(b).

<sup>46</sup> U.S. General Services Administration, Types of Federal Advisory Committees, <http://www.gsa.gov/portal/content/248961> (enumerating federal advisory committees by type and by associated agency).

<sup>47</sup> 5 U.S.C. § 553(c).

<sup>48</sup> U.S. General Services Administration, Types of Federal Advisory Committees, <http://www.gsa.gov/portal/content/248961>.

<sup>49</sup> *Id.*

<sup>50</sup> 5 U.S.C. §§ 591, 593.

<sup>51</sup> In the 1980s, the Administrative Conference urged agencies to use negotiated rulemaking in appropriate circumstances. See [Recommendation 82-4](#), *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,701 (July 15, 1982); [Recommendation 85-5](#), *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52,893 (Dec. 27, 1985). In 1990, Congress enacted a statute that confirmed the lawfulness of the procedure and established parameters for its use. See Negotiated Rulemaking Act, Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified at 5 U.S.C. § 561 et seq.).

<sup>52</sup> See 5 U.S.C. § 562(7).



relatively rare: in 2012, just 4 of 1077 advisory committees performed this function.<sup>53</sup> Negotiated rulemaking committees are rare because their use is appropriate only in limited circumstances, when an agency can identify a relatively narrow group of interests that will be affected by a rulemaking and that group is able to reach consensus on a socially beneficial proposed rule.<sup>54</sup> In this context, it is particularly important for the committee membership to have a balanced composition. For these reasons, and in order to prevent the possibility that special interests might abuse the procedure, negotiated rulemaking committees are subject to requirements beyond those contained in FACA. With respect to the issue of committee composition, the Negotiated Rulemaking Act requires agencies to ensure that the “limited number of identifiable interests that will be significantly affected by the rule” are “adequately represent[ed]” by members who “are willing to negotiate in good faith to reach a consensus on the proposal rule.”<sup>55</sup>

When an advisory committee concludes its work, it conveys to the agency its conclusions or recommendations, which do not bind the agency, but may be integrated into the agency’s decision-making, as appropriate.<sup>56</sup> For example, if a grant review panel determines that a particular application meets the technical qualifications required to receive federal funding, the agency might decide not to award a grant for other reasons (e.g., limited resources).

In all cases, an agency that uses an advisory committee, including one devoted to negotiated rulemaking, remains subject to the APA’s notice-and-comment requirements for rulemaking.<sup>57</sup> Any member of the public has the opportunity to submit comments on what is usually the text of a proposed rule, and the agency is legally bound to consider any “relevant matter presented” in those comments.<sup>58</sup> These requirements are enforced by the federal courts on judicial review of the final rule.<sup>59</sup>

## **Lessons Learned from the U.S. Advisory Committee Experience**

Over the over forty-year history of FACA (and the much longer history of federal agencies’ use of advisory committees), several important lessons have emerged. Some of these may be helpful as you consider the European Commission’s use of expert groups.

*First*, as your current inquiry recognizes, advisory committees must have a balanced composition. To that end, as explained above, both FACA and the Negotiated Rulemaking Act contain provisions designed to ensure that advisory committees include an appropriate diversity of specializations and viewpoints. It is particularly important to include on a committee

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<sup>53</sup> U.S. General Services Administration, Types of Federal Advisory Committees, <http://www.gsa.gov/portal/content/248961>.

<sup>54</sup> Philip J. Harter, *Negotiating Regulations: A Cure for Malaise*, 71 GEO. L.J. 1, 28–31 (1982).

<sup>55</sup> 5 U.S.C. §§ 563(a)(2)–(3).

<sup>56</sup> 5 U.S.C. App. § 2(b)(6); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 446 (1989); *Colo. Env’t. Coal. v. Wenker*, 353 F.3d 1221, 1225 (10th Cir. 2004).

<sup>57</sup> 5 U.S.C. § 553(c). For this reason, negotiated rulemaking is only conducted with respect to the development of a proposed rule, not a final one.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* § 706.





representatives of all interests most likely to be affected by the agency’s ultimate decision. For instance, a balanced committee convened to provide input on a proposed rule curtailing carbon emissions from power plants would include representatives of both affected industries and civil society organizations dedicated to environmental protection. But it would also include representatives of manufacturers (whose livelihood may depend on cheap power), farmers (the productivity of whose land may be affected by climate change), impoverished citizens (for whom fluctuations in the cost of power may be particularly problematic), and small businesses (which may face disproportionately large economic impacts relative to larger businesses). Although committees must be kept to a manageable size, agencies must carefully identify and include any interest likely to be significantly affected by the agency’s decision-making.<sup>60</sup> This increases the likelihood that the agency will receive complete information and enhances the legitimacy of its final decision.

*Second*, regardless of a committee’s composition, all interested persons and entities must have an opportunity to express their views to the agency. Observing this principle ensures that any imbalance in a committee’s membership can be neutralized or counteracted before the agency reaches a final decision. Promoting widespread input is also critical for two additional reasons. First, agencies are more likely to reach a well-informed conclusion if they cast a wide net and consider input from any entity that wishes to give it.<sup>61</sup> Second, inviting widespread public participation fosters a sense of investedness on the part of the general public and increases the likelihood that they will perceive the process as legitimate.<sup>62</sup>

*Third*, agencies should be mindful of the possibility that committee members may have unique perspectives, biases, and even conflicts of interest. As explained above, the United States addresses these issues by dividing non-governmental members of advisory committees into two distinct groups: individuals expected to offer impartial advice are appointed as “special government employees” and subjected to ethics requirements, while “representatives” are not expected to be impartial and are not subject to those requirements. The Administrative Conference has also recommended that agencies be as transparent as possible in revealing the backgrounds and affiliations of committee members.<sup>63</sup> This approach allows agency officials and the public to consider potential biases when evaluating a committee’s recommendations.

*Fourth*, the advisory committee process should be transparent. An advisory committee may be well-balanced and offer impartial advice that furthers the public interest, and yet if its activities are not open to scrutiny, the public may nonetheless impute improper motives or activities to it. At a minimum, agencies should announce committee meetings in advance, make committee documents publicly available, allow members of the public to submit comments for

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<sup>60</sup> There is also no general bar on foreign nationals’ and representatives’ of foreign firms (including both foreign and US citizens) service on advisory committees, though a committee member must disclose his or her affiliation with any entity that he or she represents.

<sup>61</sup> Reeve T. Bull, *Making the Administrative State “Safe for Democracy”*: A Theoretical & Practical Analysis of Citizen Participation in Agency Decisionmaking, 65 ADMIN. L. REV. 611, 628 (2013).

<sup>62</sup> *Id.*

<sup>63</sup> [Recommendation 2011-7](#), *The Federal Advisory Committee Act—Issues and Proposed Reforms*, 77 Fed. Reg. 2257, 2263–64 (Jan. 17, 2012).



the committee's consideration, and provide a public description of the nature of each committee's work and a list of its members. Many U.S. agencies go beyond these minimum requirements and voluntarily open advisory committees further to public participation. In 2011, the Administrative Conference recognized several of these agency "best practices" and urged other agencies to adopt them.<sup>64</sup> These best practices include:

- Posting all documents associated with advisory committee meetings online, instead of providing them only upon request.<sup>65</sup>
- Webcasting committee meetings or holding the meetings via web discussion forum, to facilitate the participation of individuals unable to physically attend.<sup>66</sup>
- Soliciting nominations for committee members from relevant communities (e.g., asking chemistry professors to nominate chemists to sit on a peer review panel), or (when appropriate) the general public.<sup>67</sup>

Measures like these make the advisory committee more transparent and facilitate public-private interaction that, over time, may improve agencies' ability to identify affected interests and compose more complete and balanced committees.

*Fifth*, although procedures to ensure a balanced composition and protect other administrative values are important, those procedures may impose burdens that require a more limited use of advisory committees. In its study of FACA, the Administrative Conference found that U.S. agencies often faced substantial delays in creating new advisory committees.<sup>68</sup> To some extent, this is an artifact of FACA's rather extensive procedural hurdles to forming a committee.<sup>69</sup> Additional barriers are often erected by agencies' unique, internal procedures for authorizing new committees.<sup>70</sup> Nevertheless, even if one were to sweep away the various external and internal impediments to expeditious formation of advisory committees, the process of selecting a balanced slate of committee members, briefing the individuals selected on the relevant background information, scheduling committee meetings, and affording the members an ample opportunity to debate the key issues is inherently time-consuming. Agencies should consider these issues when deciding whether to use an advisory committee or whether some other mechanism of obtaining public input may be more efficient or effective under the circumstances.

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<sup>64</sup> *Id.* at 2261.

<sup>65</sup> *Id.* at 2264.

<sup>66</sup> *Id.* at 2263–64.

<sup>67</sup> *Id.* at 2264.

<sup>68</sup> Bull, *supra* note 13, at 47–50.

<sup>69</sup> *Id.* at 47–48.

<sup>70</sup> *Id.*



## Conclusion

The Administrative Conference commends the EU Ombudsman for undertaking this investigation of the use of expert groups by the European Commission. In the spirit of the Conference's recommendation on international regulatory cooperation, regulators in both the EU and United States can gain tremendous insights from sharing experiences concerning the successes and failures of their respective administrative procedures. We hope that our brief description of the use of advisory committees in the United States and the various lessons that agencies have learned over the past decades has proven informative, and we welcome inquiries on any aspects of the U.S. experience. To that end, you can reach Ms. Bremer at [ebremer@acus.gov](mailto:ebremer@acus.gov) or 202.480.2086 and Mr. Bull at [rbull@acus.gov](mailto:rbull@acus.gov) or 202.480.2083.

Sincerely,

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