



October 18, 2011

**MEMORANDUM FOR**

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ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

**FROM: ROBERT FLAAK**   
**DIRECTOR  
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MANAGEMENT**

**SUBJECT: ACUS Committee on Collaborative Governance -- Draft  
FACA Recommendations**

GSA is providing our comments on the proposed Committee on Collaborative Governance Draft Recommendations on the Federal Advisory Committee Act – Issues and Proposed Reforms. During the process of developing these particular recommendations, GSA has provided numerous comments at various times which are reflected on the ACUS website. Now that these recommendations are being submitted to the Committee on Collaborative Governance, we provide our final comments on the particular provisions. In many cases, we have noted that the recommendation duplicates existing statute, regulation, or proposed Congressional language in H.R. 3124 (Federal Advisory Committee Act (FACA) Amendments of 2011).

**Recommendation**

**Alleviating Procedural Burdens that Inhibit the Effective Use of Advisory Committees**

**1. It is recommended that the agencies have a single office or official to serve as a clearinghouse for the formation of a new advisory committee.**

This recommendation is duplicative of existing regulatory language and proposed Congressional action. We note that it is the function of the Committee Management Officer, already defined in Section 8 of FACA, the GSA FACA Regulations at 41 CFR 102-3.25, and duties outlined in 41 CFR 102-3.115, to serve this purpose. Where the agency places this officer within the agency is up to the discretion of the Agency head. Further, the House of Representatives on

October 6, 2011 introduced H.R. 3124 to amend FACA. Included in this amendment is a new Section 5 which requires that the head of each agency appoint a senior official to be the Advisory Committee Management Officer.

**2. It is recommended that Congress provide more guidance as to the intended mission of the committee and its duration.**

This recommendation is duplicative of existing regulatory language and proposed Congressional action. GSA's FACA Regulations already require agencies to provide this information in the Committee Charter. (See 41 CFR 102-3.75) We also note that H.R. 3124 includes a provision that would require agency heads to provide this same information for discretionary FACA committees. (See, Amended Section 9(f) of H.R. 3124)

**3. It is recommended that the President and OMB remove the cap on the number of discretionary committees.**

GSA has no comment on this recommendation and defers to the White House and OMB.

**Clarifying the Scope of FACA**

**4. It is recommended that Congress not eliminate the exemption for subcommittees in 41 CFR 102-3.35 unless it codifies an exemption for the subcommittees to conduct "preparatory work" without the notice and open meeting requirements of the Act.**

GSA does not support this recommendation. "Preparatory work" often forms the basis of the Committee's advice and often leads to policy advice that is transmitted to the government. If that advice is generated in a closed meeting that the public has no access to, then the whole purpose of FACA, which is to allow the public to have access to the deliberative discussions that were the basis of advice and recommendations transmitted to the government will be lost. Transparency and openness will not be achieved.

**5. It is recommended that GSA amend 41 CFR 102-3.140(e) to clarify that agencies may host virtual meetings.**

GSA does not support this recommendation as it is duplicative of current GSA FACA Regulations, which state in 102-3.140(e) that "any advisory committee meeting conducted in whole or part by a teleconference, videoconference, the Internet, or other electronic medium meets the requirements of this subpart." [emphasis added] Agencies may already host "virtual" meetings, subject to normal procedural requirements regarding public access and recordkeeping, as for any meeting held using electronic means.

**6. It is recommended that Congress should amend the Negotiated Rulemaking Act (5 U.S.C. 561 et seq.) to exempt negotiated rulemaking committees from FACA.**

GSA supports this recommendation because Negotiated Rulemaking Committees involve a collaborative process which is not the purpose of FACA. FACA committees are advisory in nature and do not use the collaborative process.

### **Enhancing Transparency and Objectivity**

**7. It is recommended that Congress and agencies adopt procedures with respect to the ethics requirements applicable to advisory committee members.**

GSA defers to the Office of Government Ethics (OGE) since these types of ethics issues are the responsibility of OGE. We note, however, that this recommendation may be duplicative of existing agency requirements. The OGE has already issued instructional guidance to agencies regarding the appointment process for members of FACA committees which includes how and when to make the determination of whether a FACA Committee member is serving as a Special Government Employee or a Representative member. (See: DO-05-012, dated August 18, 2005, and 04X9, dated July 19, 2004). Also, this proposed recommendation may be duplicative of language in Section 2(b) of H.R. 3124 which specifically addresses these issues.

**8. It is recommended that Agencies post on a committee website all documents "*which were made available to or prepared for or by each advisory committee*".**

This recommendation is duplicative of existing requirements. The current GSA Regulations require that there be timely access to all advisory committee records. Further, Section 10(b) of FACA requires the contemporaneous availability of advisory committee records. In addition, Section 4 of H.R. 3124, would amend Section 11 of FACA to include a new subsection (b) which would require that all information required to be disclosed under the Act be available electronically on the official public website of the agency at least 15 days before each meeting. Subsection (d) requires that all meeting materials also be made available to the public.

We are concerned about the recommendation that Agencies "*not post documents that are not critical to understanding the work of the committee, such as intermediate drafts of reports*". This only invites abuse. In addition, the National Archives and Records Administration (NARA) has issued General Records Schedule 26 (Temporary Commissions, Boards, Councils and Committees) which deals with these preliminary reports and whether they are records that must be retained and transmitted to the National Archives at the end of the Committee's work. It should be clear that there is a distinction between

records/reports that must be published on the Committee's website and whether that report must be retained as part of the Committee's records and incorporated as part of the recordkeeping requirements of NARA.

**9. It is recommended that agencies provide live webcasts of open committee meetings.**

GSA notes that live webcasts of FACA meetings are already being conducted by a number of agencies, including the White House. In fact, GSA's FACA Regulations currently advise agencies that an advisory committee meeting may be conducted in whole or part by a teleconference, videoconference or other electronic medium. (41 CFR 102-3.145) In our informal guidance to agencies, GSA recommends that agencies use webcasts whenever practical to broaden their audience.

**10. It is recommended that agencies identify and prioritize achieving balance on factors directly relevant to the subject matter and purpose of the committee's work.**

This requirement is already in FACA and in GSA's FACA Regulations. Section 5(b) of FACA and section 102-3.60(b)(3) of GSA's FACA Regulations currently address balance requirements. Furthermore, Key Point III of Appendix A to Subpart B of GSA FACA Regulations provides guidance on how to obtain "*fairly balanced membership*" on an agency's FACA committee. GSA has also issued formal guidance requiring agencies to develop a Balance Plan to attain fairly balanced membership which will "*consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee.*"

**11. It is recommended that agencies adopt "best practices" related to selecting members of a FACA committee.**

This recommendation is duplicative of language already introduced in H.R. 3124. A newly revised Section 9(c) and (d) of H.R. 3124 will require agencies to obtain public input, including nominations, when appointing potential committee members for newly created FACA committees.

**With regard to the Proposed recommendation of Philip Harter, dated October 17, 2011.**

One of the primary reasons FACA was enacted was the failure of agencies to properly administer advisory committees – Congress concluded that, in the period prior to the enactment of FACA, a complete lack of oversight and basic management controls contributed to inactive and meaningless advisory committees. Oversight is essential for accountable and transparent advisory committees. As Mr. Reeve's report documents, agencies have stated that their own excessive agency administrative procedures are causing administrative delays in implementing FACA, not FACA program oversight.

Mr. Harter is recommending the removal of two basic tenets of FACA: oversight and basic management controls and clear scope of mission, as achieved through the committee charter. In essence, Mr. Harter is returning to the practices that Congress and others determined resulted in duplication of effort, waste of federal resources, and a public that did not know how public funds were being spent. Therefore, GSA cannot support Mr. Harter's proposal.