



4/18/2011 -- Working Draft Recommendation

The Federal Advisory Committee Act and New Technologies

Background

The Federal Advisory Committee Act (FACA)¹ governs the 900 committees which advise federal agencies in approximately 7,000 meetings each year. An advisory committee is any committee or similar group, which does not consist solely of federal officers or employees, and which is established by statute, by the President, or by a federal agency to advise the President or a federal agency or officer. The Act restricts the creation and use of advisory committees by federal agencies. Among other things, the FACA imposes procedural requirements on the creation of advisory committees, requires advisory committees to be fairly balanced, requires the meetings of advisory committees to be public and to be preceded by public notice in the Federal Register, and requires the documents of advisory committees to be available to the public.

General oversight of advisory committee management has been delegated to the General Services Administration (GSA) since 1977.² GSA issued a set of regulations, last updated in 2001, which govern the creation and management of advisory committees.³

The FACA was enacted in 1972, predating all of the major media advances of the Internet Revolution, including e-mail and a variety of social media. The Act contains certain provisions that, if interpreted expansively, may tend to inhibit the use of such media for committee interactions and agency outreach to the public to acquire useful information. For instance, some have argued that the FACA may limit committee members' ability to exchange substantive e-mail messages prior to a meeting, since the exchange might arguably constitute a "virtual meeting" that was neither announced in the Federal Register nor opened for public participation. Some agencies have expressed interest in obtaining a clearer picture of how they might utilize the rapidly developing means of communication in connection with their use of advisory committees. The scope of this recommendation is limited to the implications of new and social media for the use of advisory committees by federal agencies under the FACA.

A survey conducted for the Administrative Conference, with the assistance of GSA's Committee Management Secretariat, sought the views of agency Committee Management Officers with respect to the use of new and social media by, and in connection with, agency advisory committees. The inquiry addressed the extent to which these media are being used, the procedures being followed, any "best practices" to be gleaned from agency experience, and

¹ 5 U.S.C. App. 2, §§ 1-16.

² Executive Order 12024, 42 Fed. Reg. 61445 (1977).

³ 66 Fed. Reg. 37727 (July 19, 2001); 41 CFR Part 102-3.



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whether the requirements of the FACA present any issues that inhibit the use of new or social media.

The Administrative Conference has also considered the possibility of an agency's hosting "virtual meetings" via an ongoing web forum, moderated by the committee's Designated Federal Officer (DFO). The agency would announce the meeting in advance in the Federal Register and provide the website at which it would occur and the time period over which it would be available for posting of comments (which could be as long as several months). During the meeting period, committee members could log in to the forum at whatever time is convenient for them, read the comments posted so far, and submit comments that the DFO would review and then post to the web forum. The public could view all postings and documents associated with the meeting simply by logging onto the committee page and could submit comments to the DFO for posting. The DFO and Committee Chair would regularly post to the forum to ensure that the discussion remained on topic. Such a forum would improve efficiency while preserving the transparency goals of the FACA.

Findings from the Report

The Conference's consultant interviewed government officials who regularly work with the FACA, most of whom were Committee Management Officers for advisory committees. Agency managers who are technologically savvy know how to use group electronic communications to obtain useful responsive information. They are also aware that the evolution in dynamics of electronic interaction is continuing with further expansion of hardware and software devices to facilitate the exchange of views.

Of the government officials interviewed, some adhere rigidly to the 1972 statute and the 2001 rule that require certain steps to be followed. This group of interviewees may be unhappy with the system, but they accept it. The caution exercised by this group appears to be a barrier to FACA committees making better use of new and social media. Moreover, this group appears to be a minority among agency persons interviewed.

The majority of those agency persons contacted appear to ignore the 1972 and 2001 constraints until agency lawyers require them to do so. The survey found numerous instances in which agency personnel chose to avoid potential problems with the Act's requirements by devising creative alternatives. For example, agency personnel might communicate sequentially with informed or interested persons, so that no "committee meeting" in the sense of the Act would occur. Other approaches simply avoid any attempts to obtain "consensus" or "collective" advice or other input, which are perceived to be the triggers for the FACA to apply.⁴

Even among those who perceive the FACA to be an inhibiting factor in agency access to external advice using new media and current public practices with electronic communications, there was

⁴ See, e.g., *Ass'n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993) ("The point, it seems to us, is that a group is a FACA advisory committee when it is asked to render advice or recommendations, *as a group*, and not as a collection of individuals." (emphasis in original)).



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some reluctance to press for change of the FACA or the GSA implementing regulations. Instead, it appears that agencies have been creative in finding means of avoiding the FACA burdens to accommodate their needs for expert advice.

In sum, it appears that a variety of circumstances tend to inhibit agency experimentation and use of evolving communications media and practices to enhance access to outside expert advice. The apparent practices of agency managers in creating workaround techniques to avoid the FACA suggest strongly that some modification of either the Act or the regulations would be beneficial. The circumstances presently limiting agencies' use of new media developments include:

- Some agency managers simply do not have adequate information about ways to utilize new media to reduce costs and increase their access to advice.
- Some agency managers know about these techniques, but fear they will run afoul of the FACA or the FACA regulations.
- Some agency managers see no need to depart from established ways of doing business with advisory committees.
- Resources and currently available training have not been adequate for equipping agency managers to make optimal use of new media.

RECOMMENDATION

1. Agencies should experiment with creative techniques of using "new media" (or "social media") as a means of reducing the costs of advisory committee activities, as well as obtaining broader sources of useful information by advisory committees.
2. The General Services Administration (GSA) should amend the Federal Advisory Committee Act (FACA) committee management rules to permit expanded electronic meeting opportunities by clarifying the extent to which new media (or social media) can be used by agencies. The rules should also provide options for using these media to obtain public input to agency decision-making, including development of consensus positions on specific issues, which do not trigger the applicability of FACA.
3. GSA should announce that, under current law, federal advisory committees can conduct online meetings wherein committee members post comments on a web forum that would be available over the course of several weeks or months and would permit members of the public to view all postings. Such meetings would have to comply with FACA requirements for advance public notice and public access to the meetings.
4. GSA should incorporate into its training sessions for committee management officers and its informational materials about FACA a discussion of ways in which new or social



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media can be used by advisory committees without violating FACA. The emphasis should be upon finding ways to obtain the potential benefits within the requirements of existing law.