

The Federal Advisory Committee Act: Issues and Proposed Reforms

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**INTRODUCTION ..... 2**

**PART A: BACKGROUND OF FACA ..... 6**

1. A BRIEF HISTORY OF FACA ..... 6

    a. *FACA and its Predecessors* ..... 6

    b. *Post-FACA Advisory Committee Legislation* ..... 8

    c. *Implementing Regulations* ..... 9

    d. *Other Relevant Developments* ..... 11

    e. *Historical Usage of Advisory Committees* ..... 12

2. DEFINING THE SCOPE OF FACA’S COVERAGE ..... 12

    a. *“Group” Requirement* ..... 13

    b. *“Established” or “Utilized” Requirement* ..... 15

    c. *“Advice or Recommendations” Requirement* ..... 19

    d. *Statutory Exemptions* ..... 21

3. FACA’S PROCEDURAL REQUIREMENTS ..... 22

    a. *Authority for Committee Establishment* ..... 22

    b. *Chartering and Other Committee Formation Requirements* ..... 22

    c. *Committee Membership Balance* ..... 23

    d. *Ensuring Unbiased Advice* ..... 24

    e. *Meeting Notice Requirements* ..... 26

    f. *Public Participation Requirements* ..... 27

    g. *Closing Committee Meetings* ..... 28

    h. *Committee Document Requirements* ..... 29

    i. *Management of Advisory Committees* ..... 31

    j. *Review and Termination of Existing Committees* ..... 31

**PART B: RESEARCH METHODOLOGY AND FINDINGS ..... 32**

**PART C: RECOMMENDATIONS ..... 39**

1. CLARIFYING THE SCOPE OF FACA ..... 40

    a. *FACA Exceptions* ..... 40

    b. *Asynchronous Virtual Meetings of Advisory Committees* ..... 45

2. STREAMLINING FACA’S PROCEDURAL REQUIREMENTS ..... 47

    a. *Committee Formation Process* ..... 47

    b. *The Advisory Committee Cap* ..... 50

    c. *Special Considerations for Negotiated Rulemaking Committees* ..... 51

3. ENHANCING TRANSPARENCY AND OBJECTIVITY IN FEDERAL ADVISORY COMMITTEES ..... 55

    a. *Promoting Committee Transparency* ..... 55

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*b. Committee Member Conflict of Interest Standards* ..... 61

**CONCLUSION**..... 65

**PROPOSED RECOMMENDATIONS** ..... 66

**APPENDIX A- Historical Numbers of Advisory Committees Covered By FACA**..... 68

**APPENDIX B- FACA Membership Survey** ..... 69

**APPENDIX C-Literature Review/Initial Interviews and Conference Member Survey**..... 72

**APPENDIX D- Summary of FACA Workshop** ..... 80

**Introduction**

Over the past several years, governmental entities have increasingly sought to interact with members of the private sector and obtain outside advice for the government’s consideration.<sup>2</sup> Indeed, merely one day after taking office, President Obama promised to create “an unprecedented level of openness in government” and urged federal agencies to “solicit public feedback to assess and improve their level of collaboration and to identify new opportunities for cooperation.”<sup>3</sup> Of course, public-private interaction has long been a fixture of government, and government officials have sought private sector expertise from the very early days of the Republic.<sup>4</sup> Nonetheless, the emphasis on public participation has expanded in recent years, and many federal agencies have sought opportunities to obtain outside advice and involve members of the private sector in their work.

In their efforts to promote public-private interaction, a major consideration for governmental entities is compliance with the Federal Advisory Committee Act (“FACA”).<sup>5</sup>

<sup>2</sup> See, e.g., Twenty Seventh Annual Report of the President on Federal Advisory Committees 1 (1998), available at <http://www.fido.gov/facadatabase/printedannualreports/1998-Twenty-Seventh%20Annual%20Report%20Of%20The%20President%20On%20Federal%20Advisory%20Committees.pdf>

(“Advisory committees continue to represent an essential part of federal efforts to increase public participation”); Lisa Blomgren Bingham, *The Next Generation of Administrative Law: Building the Legal Infrastructure for Collaborative Governance*, 2010 WIS. L. REV. 297, 298 (“On his first full day in office, President Barack Obama committed to create ‘an unprecedented level of openness in Government’ and ‘a system of transparency, public participation, and collaboration’ to strengthen democracy, ensure the public trust, and ‘promote efficiency and effectiveness in Government.’ . . . The president's memorandum represents a commitment to collaborative governance.”).

<sup>3</sup> *Transparency & Open Government*, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) (memorandum dated January 21, 2009).

<sup>4</sup> Michael H. Cardozo, *The Federal Advisory Committee Act in Operation*, 33 ADMIN. L. REV. 1, 1 (1981) (“The use of advisory committees in the United States government started when the government started.”); Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act & Good Government*, 14 YALE J. ON REG. 451, 458 & n.34 (1997).

<sup>5</sup> 5 U.S.C. App. 2.

Enacted in 1972, FACA regulates the government's ability to interact with outsiders, formalizing the process of seeking advice from groups containing at least one non-federal employee and imposing various procedural requirements on groups from which such advice is sought.<sup>6</sup> Though Congress recognized the value of public-private interaction when enacting the Act, acknowledging that federal advisory committees "provide[] a means by which the best brains and experience available in all fields of business, society, government and the professions can be made available to the Federal Government at little cost,"<sup>7</sup> FACA also clearly reflects a desire to cabin the power of advisory committees and place certain constraints on the government's ability to seek private sector advice. Indeed, in its Findings and Purposes, the Act expressly declares that "new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary."<sup>8</sup>

As will be explored in greater detail, FACA's various limits on the use of advisory committees reflect two primary policy concerns. First, FACA's framers felt that advisory committees tended to proliferate unnecessarily and thereby squander federal resources.<sup>9</sup> Accordingly, FACA imposes a number of requirements designed to ensure that the government does not create committees without providing an adequate justification for doing so.<sup>10</sup> Second, FACA's framers sought to ensure that committees operated objectively and were not improperly captured by special interests.<sup>11</sup> The Act achieves this policy in two ways. First, it directs all authorities convening advisory committees to ensure that "the advisory committee will not be inappropriately influenced by the appointing authority or any special interest" and requires that the membership of committees reflect an appropriate balance "of the points of view represented and the functions to be performed."<sup>12</sup> Second, reflecting Justice Brandeis's insight that "[p]ublicity is justly commended as a remedy for social and industrial diseases,"<sup>13</sup> the Act

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<sup>6</sup> See generally *id.*

<sup>7</sup> HOUSE COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. REP. NO. 91-1731, at 4 (1970).

<sup>8</sup> 5 U.S.C. App. 2 § 2(b)(2).

<sup>9</sup> HOUSE COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. REP. NO. 91-1731, at 15-17 (1970) ("One of the more significant problems is the danger of committees being permitted to remain in existence beyond their usefulness.").

<sup>10</sup> See, e.g., 5 U.S.C. App. 2 §§ 7(b) (directing the Administrator of the General Services Administration to conduct a periodic "comprehensive review" of existing committees to ensure that they are fulfilling their missions), 9(c) (requiring that new and renewed advisory committees file a charter that sets forth the committee's mission and the "time necessary for the committee to carry out its purpose").

<sup>11</sup> HOUSE COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. REP. NO. 91-1731, at 18-20 (1970).

<sup>12</sup> 5 U.S.C. App. 2 §§ 5(b)(2)-(3), (c).

<sup>13</sup> LOUIS DEMBITZ BRANDEIS, OTHER PEOPLE'S MONEY 92 (1914).

imposes various transparency requirements to ensure that committees operate publicly and that everyday citizens have the opportunity to express their views to committee members.<sup>14</sup>

FACA has undoubtedly furthered its goals of efficiency and transparency. As will be examined in more detail, the total number of advisory committees has remained fairly stable over time, and committee meetings are relatively open and transparent. At the same time, the Act has fallen under increasing criticism, with some asserting that its various procedural requirements stifle the government's ability to seek outside advice and others contending that its provisions are insufficient to promote openness and transparency. On one hand, many federal agencies that work extensively with advisory committees have argued that it limits their ability to collaborate with private parties or otherwise seek outside information. The necessity of formally chartering a committee, announcing its meetings, receiving public input, and then holding a public meeting has led many agencies to avoid the formal advisory committee process whenever possible by exploiting one of the Act's many "exceptions."<sup>15</sup> On the other hand, representatives from open government organizations and other members of the public interested in the work of advisory committees have contended that committees are insufficiently transparent, with committees' deliberations and membership information (such as potential sources of bias and conflicts of interest) remaining overly obscure. Congress has taken up this clarion call for increased transparency and has proposed multiple bills in the past several sessions that would, as a general matter, fill many of the interstices in FACA's coverage and impose greater public disclosure requirements on committees.<sup>16</sup>

Both in light of its general mandate to improve administrative process<sup>17</sup> and its historical interest in matters of public-private interaction and collaborative governance,<sup>18</sup> the Administrative Conference of the United States undertook this study of FACA to obtain greater insight into the competing interests at play and to devise recommendations that would both eliminate procedural hurdles to the use of advisory committees and promote greater openness and transparency. The study has involved a close review of the relevant FACA literature as well as extensive data gathering from federal agencies that use advisory committees and members of the public interested in the work of such committees. The Administrative Conference undertook

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<sup>14</sup> See, e.g., 5 U.S.C. App. 2 § 10 (requiring that advisory committee meetings be open to the public and that citizens have the opportunity to file written statements, and, in appropriate circumstances, address advisory committees).

<sup>15</sup> James T. O'Reilly, *Federal Advisory Committee Act: Inhibiting Effects upon the Utilization of New Media in Collaborative Governance & Agency Policy Formation* 23–24 (Apr. 15, 2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/04/OReilly-FACA-Report-4-15-2011-Redline2.pdf>.

<sup>16</sup> See, e.g., H.R. 1144, 112th Cong. (2011).

<sup>17</sup> 5 U.S.C. § 595.

<sup>18</sup> See, e.g., Administrative Conference of the United States, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,701 (July 15, 1982); Administrative Conference of the United States, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52,893 (Dec. 27, 1985).

a very extensive empirical study that involved multiple rounds of data gathering, as explained in greater detail in Part B. First, a Conference consultant interviewed Committee Management Officers at twelve agencies that make extensive use of advisory committees. Second, the Conference circulated a set of inquiries focusing on a number of salient issues under FACA to its government members and asked its public members generally about potential issues under FACA. The Conference's government members include individuals from the vast majority of agencies that make major usage of advisory committees, and its public members include several attorneys who have written on FACA and litigated some of the most significant FACA cases. Third, the Conference conducted a workshop that included both government and private sector experts on FACA to obtain further input on the most pressing issues as identified in the Conference membership survey. Finally, Conference staff conducted a series of additional interviews with survey respondents, workshop participants, and contacts recommended by Conference members to obtain additional information on various issues discussed during the workshop. Throughout its data gathering efforts, the Conference sought to obtain a diversity of perspectives, receiving input both from within and outside the government.

As will be explained in detail, the data gathered suggest that, despite their competing concerns, an unbridgeable gulf does not exist between those who seek to streamline the advisory committee process and those who advocate increased transparency. Whatever historical bias may have existed against the use of advisory committees, both sides are in fundamental agreement that such committees provide invaluable information to the federal government at relatively minimal cost and open an important avenue for public participation in government.<sup>19</sup> In this light, both parties have a vested interest in ensuring that committees can operate effectively, free of crippling procedural burdens, and both parties recognize the need to ensure that the process is open and transparent. Accordingly, this report focuses on eliminating ambiguities in the statutory regime and removing procedural hurdles that unnecessarily constrain the use of advisory committees while identifying relatively straightforward activities that committees might undertake to greatly increase transparency. FACA has always sought to preserve a delicate balance between maintaining an efficient source of outside advice, on one hand, and checking the influence of special interests on the advice received by government, on the other. This report proposes various readjustments to that balance designed to update FACA for the 21<sup>st</sup> century, seeking to ensure that the statute facilitates rather than hinders public-private

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<sup>19</sup> Twenty Seventh Annual Report of the President on Federal Advisory Committees 1 (1998), available at <http://www.fido.gov/facadatabase/printedannualreports/1998-Twenty-Seventh%20Annual%20Report%20Of%20The%20President%20On%20Federal%20Advisory%20Committees.pdf> (“Advisory committees continue to represent an essential part of federal efforts to increase public participation”); Cary Coglianese et al., *Transparency & Public Participation in the Federal Rulemaking Process: Recommendations for the New Administration*, 77 GEO. WASH. L. REV. 924, 953 (2009) (“Procedural barriers to advisory committee formation may tend to discourage their use, despite the fact that, when operating as intended, such committees provide an excellent means of fostering diverse public participation.”).

interaction while striving to maintain and even enhance the Act’s traditional commitment to openness and transparency.

The report is divided into three parts. Part A focuses exclusively on positive law, including three sections that examine the background of the Act. Section 1 provides a brief history of the enactment of FACA and its implementing regulations, focusing particularly on the policies that Congress intended the Act to serve. Section 2 examines which government-public interactions are subject to FACA and which are not, reviewing the cases that have interpreted the Act and considering how they have delimited the scope of its coverage. Section 3 then analyzes the various procedural requirements imposed by FACA in detail. Sections 1–3 identify potential ambiguities in the Act and other areas of uncertainty and inefficiency, but they do not recommend any revisions to the Act, reserving such discussion for later sections.

Part B describes the data gathering effort undertaken by the Conference in connection with the FACA project. It describes the literature review, surveys, and workshop that the author and other Conference staff, members, and a consultant conducted to gather information on the salient issues under FACA. Part B also provides a brief overview of the primary FACA issues identified during the data gathering effort. The report also includes 3 appendices that summarize the results of this data gathering effort in detail.

Part C of the report analyzes the information that the Conference gathered and proposes a number of recommendations for improving upon the existing FACA regime and spreading various “best practices” amongst agencies. Section 1 offers various proposals for clarifying the scope of the Act. If agencies are unsure of whether FACA applies to any given interaction, they may be chilled from meeting with private parties or may structure such meetings to take advantage of certain “safe harbors” created by exceptions in the existing FACA regime. The report offers various recommendations to clarify the Act’s applicability and minimize the risk of chilling interaction or encouraging circumvention of the Act. Section 2 identifies certain procedural burdens associated with FACA that create unnecessary hurdles for agencies without greatly furthering the policies of the Act and recommends potential solutions to those issues. Section 3 then considers possible reforms to the current FACA regime and best practices within the existing regime that would promote increased transparency without imposing a large procedural burden on agencies.

## **Part A: Background of FACA**

### **1. A Brief History of FACA**

#### ***a. FACA and its Predecessors***

In the last 60 years, a time characterized by the rise of the administrative state and increased demand for private sector advice, the federal government has made increasingly

significant use of advisory committees.<sup>20</sup> Over that same period, the government has undertaken various efforts to control the use of advisory committees so as to ensure that such committees do not exercise undue influence or proliferate excessively. The first formal attempt to regulate advisory committees arose from concerns that they would facilitate anticompetitive behavior by providing a forum for private industry groups to confer with the federal government.<sup>21</sup> As a prophylactic measure against such violations, in 1950, the Department of Justice issued a set of guidelines intended to thwart any effort to use advisory committee meetings as a platform for market participants to secretly meet with regulators.<sup>22</sup> As a general matter, the guidelines sought to ensure that the federal government exercised the initiative in establishing any advisory committee, thereby minimizing the risk that private groups would exploit committee meetings as a means of colluding with competitors and influencing government policy.<sup>23</sup> Specifically, the guidelines imposed five requirements on the activities of advisory committees: (1) either Congress or the convening agency had to decide that any given committee was necessary to achieve statutory duties; (2) the government had to set the committee's agenda; (3) a full-time government official had to call and chair all committee meetings; (4) minutes had to be kept for each meeting; and (5) the committee's findings had to be purely advisory in the sense that the government had to make the ultimate decision, if any, that would result from the committee's work.<sup>24</sup>

Unfortunately, agencies largely ignored the Justice Department's guidelines, which were essentially hortatory, leading Congressman Dante Fascell to sponsor a bill in 1957 that would legally require agencies to report to Congress on their use of advisory committees and impose various procedural controls on such agencies.<sup>25</sup> Congress ultimately failed to enact the bill,<sup>26</sup> and it thereafter essentially abdicated any efforts to regulate advisory committees, leaving the task to the executive branch, until the enactment of FACA. Taking up the effort that Congress had abandoned, the Bureau of Budget issued a directive in 1962 that essentially incorporated the substance of the original Justice Department Guidelines.<sup>27</sup> Also in 1962, President Kennedy issued Executive Order 11,007, which similarly echoed the 1950 Justice Department guidelines and applied them to all advisory committees.<sup>28</sup>

Executive Order 11,007 governed the activities of advisory committees for approximately a decade, from its enactment in 1962 until the promulgation of FACA in 1972. Congress resumed its consideration of the advisory committee process in 1970.<sup>29</sup> A major motivation for doing so was the perception that advisory committees needlessly consumed federal resources and

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<sup>20</sup> H.R. REP. NO. 576, 85th Cong., at 2 (1957); *The Federal Advisory Committee Act*, 10 HARV. J. ON LEGIS. 217, 219–20 (1972).

<sup>21</sup> *Public Citizen v. United States*, 491 U.S. 440, 456 (1989).

<sup>22</sup> *Id.*

<sup>23</sup> *The Federal Advisory Committee Act*, *supra* note 20, at 220.

<sup>24</sup> *Id.* at 220 n.18.

<sup>25</sup> *Public Citizen*, 491 U.S. at 456; H.R. 7390, 85th Cong. (1957).

<sup>26</sup> *Public Citizen*, 491 U.S. at 456.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 456–57; *The Federal Advisory Committee Act*, *supra* note 20, at 221.

<sup>29</sup> *The Federal Advisory Committee Act*, *supra* note 20, at 221–22.

ultimately had little impact on agencies' regulatory activities, leading to provisions requiring agencies to continuously review the propriety of existing committees.<sup>30</sup> Another significant concern was the need to preserve a role for the public in committee business and to ensure that committees' work remained transparent, and the legislation accordingly contained provisions designed to ensure public access to committee meetings and records.<sup>31</sup> As a related matter, Congress sought to limit the ability of industry to exercise undue influence through advisory committees, a focus that harkened back to the original concern over antitrust violations reflected in the Justice Department guidelines.<sup>32</sup> Ultimately, the House and Senate passed the bill that became FACA in September 1972, and the President signed the legislation on October 6 of that year.<sup>33</sup>

The twenty-two years of Executive Branch and Congressional activity culminating in FACA reveal two major concerns that the Act and its predecessors sought to combat: (1) ensuring that federal resources are not misallocated towards committees that serve little purpose and (2) promoting the objectivity of advisory committees by preventing their being overrun by special interests, at least partly through ensuring that the committee process is transparent and preserves at least a limited role for public participation.<sup>34</sup> Both policies remain important considerations and have continued to animate later efforts to regulate advisory committees.<sup>35</sup>

#### ***b. Post-FACA Advisory Committee Legislation***

As a general matter, FACA has proven to be a fairly durable statutory regime and has survived more or less intact over the course of the past 40 years. Of course, as will be explored in more detail in Section 2, federal courts have considerably narrowed the potential sweep of the legislation by interpreting it to contain a number of exceptions. Congress, too, has narrowed FACA's coverage by passing special legislation to exempt certain groups from complying with the Act. For instance, in 1995, Congress passed the Unfunded Mandates Reform Act,<sup>36</sup> which contained a provision dealing with federal advisory committees. The Act exempted from FACA meetings between federal officials and officials from state, local, and/or tribal governments for the purpose of exchanging information or advice about federal programs designed to share government responsibilities.<sup>37</sup> In 1997, Congress passed a set of amendments to FACA that

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<sup>30</sup> *Id.* at 222; *see also* 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).

<sup>31</sup> HOUSE COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. REP. NO. 91-1731, at 18-20 (1970).

<sup>32</sup> Croley & Funk, *supra* note 4, at 460.

<sup>33</sup> Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. App. 2); *The Federal Advisory Committee Act*, *supra* note 20, at 224-25.

<sup>34</sup> *Public Citizen*, 491 U.S. at 459; *Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 932-33 (D.C. Cir. 1995)

<sup>35</sup> *See, e.g.*, H.R. 1144, 112th Cong. (2011) (imposing various obligations on agencies beyond the existing FACA requirements designed to promote transparency); Exec. Order No. 12,838, 58 Fed. Reg. 8,207 (Feb. 10, 1993) (Executive Order issued by President Clinton that instructed agencies to justify existing advisory committees and proposed advisory committees and directed agencies to reduce the total number of committees by one-third).

<sup>36</sup> Pub. L. No. 104-4, 109 Stat. 48 (1995).

<sup>37</sup> *Id.* § 204(b), 109 Stat. at 66.



exempted meetings of committees formed by the National Academy of Sciences and National Academy of Public Administration, though the legislation also created a separate set of obligations that applied to committee meetings of those two agencies.<sup>38</sup>

More recently, Congress has shown an increased willingness to make more fundamental changes to FACA, and, in contrast to previous amendments that have exempted certain types of meetings from the Act, current legislative efforts have sought to expand FACA's coverage. On March 5, 2009, Congressman William Lacy Clay introduced a bill that would have enacted a number of revisions to FACA.<sup>39</sup> Most notably, the bill would have created a conflict of interest regime for all members of advisory committees<sup>40</sup>; eliminated the FACA exceptions that apply to subcommittees, committees convened by contractors, and committees in which the non-governmental participants formally lack a vote; and required committees to undertake additional efforts to promote transparency, such as posting information about committee members online and either transcribing or webcasting all committee meetings.<sup>41</sup> Though the House passed Congressman Clay's bill by 250-124 on July 26, 2010, the Senate took no further action on the legislation.<sup>42</sup> On March 17, 2011, Congressman Elijah Cummings introduced a bill that essentially replicated many of the provisions of the earlier Clay bill.<sup>43</sup> Like the Clay bill, Cummings' proposed legislation would eliminate several of the exceptions to the Act's coverage and require committees to disclose additional information such as background data on committee members.<sup>44</sup> Cummings' bill would not impose a common conflict of interest regime on all committee members, but it would clarify the group of committee members who must comply with federal ethics standards.<sup>45</sup> This bill is currently pending in the House of Representatives.

### *c. Implementing Regulations*

In the original legislation passed in 1972, FACA delegated to the Office of Management and Budget ("OMB") the tasks of promulgating regulations to assist agencies in complying with FACA and annually reviewing advisory committees to ensure that committees do not outlive

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<sup>38</sup> Pub. L. No. 105-153, 111 Stat. 2689 (1997).

<sup>39</sup> H.R. 1320, 111th Cong. (2009).

<sup>40</sup> As will be explained at length in Section A.3.d, members of advisory committees are generally divided into two groups: (a) special government employees and (b) representatives. Special government employees are subject to a somewhat less stringent version of the ethics regime that applies to traditional federal employees, whereas representatives are not subject to any ethics standards. Clay's bill would have ensured that a minimal conflict of interest regime applied to *all* committee members, though special government employees would still have been subject to additional ethics standards.

<sup>41</sup> *Id.*

<sup>42</sup> Wendy R. Ginsberg, Federal Advisory Committees: An Overview 2 (Jan. 24, 2011), *available at* [http://assets.opencrs.com/rpts/R40520\\_20110124.pdf](http://assets.opencrs.com/rpts/R40520_20110124.pdf).

<sup>43</sup> H.R. 1144, 112th Cong. (2011).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* § 101.

their useful lifespan.<sup>46</sup> In 1977, by Executive Order, President Carter transferred the functions assigned to OMB to the General Services Administration (“GSA”).<sup>47</sup>

GSA issued its initial set of FACA regulations in 1987.<sup>48</sup> The regulations comprehensively addressed the processes for establishing advisory committees, the responsibilities of agencies for maintaining existing committees, and the steps required to comply with the open meeting requirements of the Act.<sup>49</sup> On July 19, 2001, GSA published a final rule establishing updated regulations.<sup>50</sup> Amongst other things, the revised regulations clarified the exemption for subcommittees, contained additional guidance on FACA’s applicability to meetings conducted via electronic means, and elucidated the requirements for ensuring balanced committee membership.<sup>51</sup> The 2001 regulations currently remain in effect.

Though the GSA regulations provide significant clarification of the steps agencies must undertake to comply with FACA, the federal courts have declined to accord *Chevron* deference<sup>52</sup> to the regulations.<sup>53</sup> This lack of deference arises as a result both of the significant delay between FACA’s enactment in 1972 and the promulgation of the first set of regulations in 1987<sup>54</sup> and of the fact that FACA is subject to interpretation by all agencies that utilize advisory committees, eliminating the need to defer to any one agency’s interpretation.<sup>55</sup> Thus, though the regulations provide significant clarification of the Act for agencies, a committee cannot be

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<sup>46</sup> Pub. L. No. 92-463, § 7, 86 Stat. 770, 772–73 (1972).

<sup>47</sup> Exec. Order No. 12,024, 42 Fed. Reg. 61,445 (Dec. 1, 1977). The Executive Order also transferred the President’s duties for filing an annual report on the activities of advisory committees, 5 U.S.C. App. 2 § 6, which had also previously been undertaken by OMB pursuant to Executive Order 11,769, 39 Fed. Reg. 7,125 (Feb. 21, 1974), to GSA. The annual reporting requirement, however, has since been terminated. Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 1044-66, § 3003, 109 Stat. 707, 734–36 (1995).

<sup>48</sup> Federal Advisory Committee Management, 52 Fed. Reg. 45,926 (December 2, 1987).

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

<sup>50</sup> Federal Advisory Committee Management, 66 Fed. Reg. 37,728 (July 19, 2001) (codified at 41 C.F.R. § 102-3).

<sup>51</sup> *Id.* at 37,728–31.

<sup>52</sup> *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 844 (1984) (“We have long recognized that considerable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . .”).

<sup>53</sup> See, e.g., *Public Citizen*, 491 U.S. at 463 n.12; *Ass’n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993).

<sup>54</sup> *Public Citizen*, 491 U.S. at 463 n.12.

<sup>55</sup> *Am. Physicians & Surgeons*, 997 F.2d at 913.

assured that its compliance with the regulations will necessarily shield it from a claim that it has violated FACA.<sup>56</sup>

*d. Other Relevant Developments*

In addition to FACA, a number of other statutes impact the activities of federal advisory committees. For instance, as will be explored in greater detail in Section 3, the federal ethics laws govern the activities of certain members of advisory committees,<sup>57</sup> and portions of the Freedom of Information Act<sup>58</sup> and Government in the Sunshine Act<sup>59</sup> are incorporated by reference into FACA.<sup>60</sup>

The Executive Branch has also issued executive orders and other directives designed to regulate advisory committees so as to achieve certain policy preferences of the sitting Administration. For instance, shortly after he was sworn into office, President Clinton issued Executive Order 12,838, which required agencies to terminate one-third of all advisory committees not required by statute, submit a justification for existing committees to the Office of Management and Budget, and refrain from creating any new committees unless “compelling considerations” necessitate it.<sup>61</sup> The Office of Management and Budget thereafter issued a guidance document that essentially capped the total number of advisory committees that all agencies could host at a level at or below the reduced number of committees permitted by the Executive Order.<sup>62</sup>

More recently, in line with his overall goals of promoting transparency and openness in government, President Obama has banned the appointment of registered lobbyists to serve on advisory committees.<sup>63</sup> Interestingly, these Presidential initiatives echo the policies that initially

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<sup>56</sup> As a general matter, the regulations hew closely to the language of FACA itself, but, in a few cases, the regulations considerably elaborate on the statutory language or even ostensibly contradict certain portions of the Act. For instance, FACA provides that any group providing advice “or any subcommittee or sub-group thereof” is subject to the requirements of the Act, 5 U.S.C. App. 2 § 3(2), whereas the regulations provide that subcommittees are exempt from FACA, 41 C.F.R. § 102-3.35. Though the regulations do not necessarily contradict the Act, since the regulations acknowledge that the Act applies to subcommittees that report directly to the agency, *id.* § 102-3.145, such facial discrepancies between the Act and the regulations can understandably create some level of consternation on the part of agencies attempting to comply scrupulously with FACA.

<sup>57</sup> 18 U.S.C. § 202(a) (defining “special government employee,” a classification that applies to many members of advisory committees).

<sup>58</sup> 5 U.S.C. § 552.

<sup>59</sup> *Id.* § 552b.

<sup>60</sup> *Id.* App. 2 §§ 10(b), (d).

<sup>61</sup> Exec. Order No. 12,838, 58 Fed. Reg. 8,207 (Feb. 10, 1993).

<sup>62</sup> Office of Management & Budget, Circular A-135: Management of Federal Advisory Committees, 59 Fed. Reg. 53,856, 53,857 (Oct. 26, 1994).

<sup>63</sup> Presidential Memorandum: Lobbyists on Agency Boards and Commissions, 75 Fed. Reg. 35,955 (June 18, 2010) (“I hereby direct the heads of executive departments and agencies not to make any new appointments or reappointments of federally registered lobbyists to advisory committees and other boards and commissions.”).

motivated the enactment of FACA, to wit, ensuring that committees do not improperly proliferate and that they act objectively and transparently.

*e. Historical Usage of Advisory Committees*

Following the issuance of Executive Order 12,838 in 1993, the total number of advisory committees declined from 1,304 in 1993 to 970 in 1995.<sup>64</sup> The committees eliminated as a result of the Executive Order were primarily those authorized but not required by statute and those formed at the behest of individual agencies (i.e., so-called “discretionary committees”), which decreased by 256 between 1993 and 1995. Though the Executive Order did not apply to committees required by statute, the number of statutory committees also decreased by 85 between 1993 and 1995.

From 1995 to 2009, the total number of committees remained relatively constant, oscillating between 920 and 1000. In the last two years, the total number of committees has increased, from 953 to 1069. The increase in committees in the last two years has been almost entirely a result of increasing numbers of statutory committees: Congress has created 124 new committees in that period, whereas the total number of discretionary committees has actually decreased. Other than the substantial uptick in the number of statutory committees in the last two years, however, the total number of committees has remained relatively constant since the Executive Order was issued. The numbers of statutory and discretionary committees have both fluctuated between 400 and 500 committees of each type. A year-by-year breakdown of committees by type over the past 18 years appears in Appendix A of this report.

## 2. Defining the Scope of FACA’s Coverage

Since its enactment, FACA has generated consternation on the part of federal agencies as a consequence of its potential applicability to a wide range of interactions between the government and private citizens. As written, the Act could be read so broadly as to apply to basically any exchange between a federal government employee and two or more persons not employed by the federal government. Per its terms, the Act applies to every “advisory committee,” with “advisory committee” being defined as “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof” that is “established or utilized” by statute, the President, or a federal agency “in the interest of obtaining advice and recommendations.”<sup>65</sup> Acknowledging the vagueness of the statute, the Supreme Court has noted that the Act could be interpreted to “extend FACA’s requirements to any group of two or more persons, or at least any formal organization, from which the President or an Executive agency seeks advice.”<sup>66</sup> The Supreme Court ultimately found such a broad reading untenable and limited the scope of the Act’s coverage by narrowly

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<sup>64</sup> All statistics on the total number of advisory committees were obtained from the Federal Advisory Committee Database maintained on the Federal Interagency Databases Online (“FIDO”), available at <http://www.fido.gov/facadatabase/public.asp>.

<sup>65</sup> 5 U.S.C. App. 2 §§ 3(2), 4(a).

<sup>66</sup> *Public Citizen*, 491 U.S. at 452.

defining the types of committees that are “utilized” by agencies,<sup>67</sup> but some uncertainty still surrounds the precise scope of FACA’s coverage.

Though FACA apparently does not extend so broadly as a literal reading of the statute would suggest, much ink has been spilled, both in the case law and in scholarly research, to define precisely when the statute applies. As a general matter, an interaction between the federal government and two or more persons outside of the government must meet the following qualifications to trigger FACA: (1) the entity that interacts with the government must qualify as a “group”; (2) the group must be “established” or “utilized” by the federal government; and (3) the group must provide “advice” or “recommendations” to the government.<sup>68</sup> Many of the “exceptions” to FACA, such as those for subcommittee meetings or for committees convened by private contractors, are more properly characterized as interactions that simply do not meet one or more of these three *sine qua non* conditions for triggering FACA.<sup>69</sup>

This section analyzes the relevant case law and FACA’s implementing regulations to provide an overview of the scope of FACA’s coverage. As the section will demonstrate, some degree of uncertainty regarding the precise ambit of FACA exists. The section will focus solely on stating positive law, eschewing any normative analysis. Section 5, by contrast, includes specific recommendations for clarifying the determination of when the statute applies.

**a. “Group” Requirement**

FACA defines “advisory committee” to include “any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof.”<sup>70</sup> Clearly, “group” implies an assemblage of two or more persons, and FACA therefore does not apply to meetings between agencies and individual providers of advice. FACA also does not apply to a group that consists solely of officers or employees of the federal government.<sup>71</sup>

In addition to these fairly mechanical aspects of the “group” requirement, the case law has also created an amorphous exception to FACA that arises when an agency seeks advice from an assemblage of persons acting not as a formal group but as a collection of individuals. Shortly after the enactment of FACA, the United States District Court for the District of Columbia was called upon to determine whether FACA applied to meetings organized by a Public Liaison Assistant to the President in which the assistant met with different groups of government and

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<sup>67</sup> *Id.* at 462 (“The phrase ‘or utilized’ therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences ‘for’ public agencies as well as ‘by’ such agencies themselves.”).

<sup>68</sup> Steven P. Croley, *Practical Guidance on the Applicability of the Federal Advisory Committee Act*, 10 ADMIN. L. REV. AM. U. 111, 134 (1996).

<sup>69</sup> Nevertheless, for the sake of conciseness and consistency with colloquial usage, this report will generally refer to such areas of non-coverage as “exceptions.”

<sup>70</sup> 5 U.S.C. App. 2 § 3(2).

<sup>71</sup> *Id.* § 3(2)(i); *Am. Physicians & Surgeons*, 997 F.2d at 911.

industry leaders on a biweekly basis.<sup>72</sup> The court criticized the sweeping wording of the Act, opining that it “is not a model of draftsmanship,” and stated that it could be read so broadly as to apply to “ad hoc groups . . . as well as any other less formal conference of two or more non-government persons who advise the President.”<sup>73</sup> Finding that broad reading untenable, it determined that FACA did not apply to the meetings at issue, since the meetings did not arise from a formal Presidential request for recommendations and because “[t]he committees were not formally organized and there is little or no continuity.”<sup>74</sup> Thus, to meet the “group” requirement, a federal advisory committee must be more than a mere assemblage of two or more persons that provides information to the government: the group must include some formal organization and be charged with a specific task.

In *Association of American Physicians & Surgeons, Inc. v. Clinton*,<sup>75</sup> the D.C. Circuit elaborated at greater length on the “group” requirement of FACA. After having concluded that a Task Force convened to provide advice on healthcare policy was exempt from FACA because it consisted entirely of federal employees (concluding that the First Lady, the only arguably non-federal member of the Task Force, qualified as a federal employee),<sup>76</sup> the court turned to the question of whether working groups under the Task Force, which included non-federal representatives, were subject to the requirements of the Act. Though the court ultimately remanded the issue of FACA’s applicability to the working groups, it discussed at length the characteristics of a group subject to FACA:

It is not so much that a group is not a FACA advisory committee unless it gives “consensus” advice. . . . 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. The group’s activities are expected to, and appear to, benefit from the interaction among the members both internally and externally.<sup>77</sup>

Thus, though the group need not necessarily reach a consensus conclusion, the *sine qua non* of the “group” requirement is the existence of interaction amongst group members in developing advice for the government.<sup>78</sup>

Though the interpretation of the “group” requirement adopted by the courts seems appropriate, given the procedural burden that would be created by requiring agencies to comply with the strictures of FACA even when seeking individual advice from persons outside of the government, the exception for seeking individual advice has proven somewhat difficult to apply in practice. First, the boundary between “group” and “individual” advice is not terribly clear, and agencies may have difficulty determining when a relatively informal assemblage wherein

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<sup>72</sup> *Nader v. Baroody*, 396 F. Supp. 1231 (D.D.C. 1975).

<sup>73</sup> *Id.* at 1232.

<sup>74</sup> *Id.* at 1234.

<sup>75</sup> 997 F.2d 898 (D.C. Cir. 1993).

<sup>76</sup> *Id.* at 911.

<sup>77</sup> *Id.* at 913.

<sup>78</sup> *Id.*

thoughts are solicited from participants more or less individually evolves into a more formal “group” subject to FACA.<sup>79</sup> Moreover, even if an agency scrupulously structures a meeting to avoid extensive group interaction, such as by assembling a group of experts and asking that each attendee provide advice individually and refrain from commenting on statements made by other participants,<sup>80</sup> it can be difficult to ensure that participants structure their statements purely as individual responses and do not attempt to interact with fellow attendees or tailor their responses in accordance with statements by other participants.<sup>81</sup>

**b. “Established” or “Utilized” Requirement**

By its terms, FACA applies to all committees that are “established” by statute or “established or utilized” by the President or Congress for purposes of obtaining advice or recommendations.<sup>82</sup> The meaning of “established” is relatively straightforward: any group “formed by, at the prompting of, or solely for the federal government” is “established” by the government or purposes of FACA.<sup>83</sup> The term “utilized,” by contrast, poses much more significant interpretive difficulties. Theoretically, any private group whose work the government even remotely considers has been “utilized” by the government for purposes of obtaining advice, yet such a broad reading would undoubtedly sweep up conduct that Congress did not intend to subject to the formal strictures of FACA. Thus, courts have struggled with defining the precise contours of the term “utilized” under the Act.

In *Public Citizen v. United States*,<sup>84</sup> one of the few Supreme Court cases to analyze FACA, the Court considered the meaning of the word “utilized” under the Act. The case concerned the President’s ability to receive advice from the American Bar Association (“ABA”) with respect to judicial nominees.<sup>85</sup> When the President selected (but had not yet announced) a potential nominee for one of the federal courts of appeals, he would submit the name to an ABA committee, which would consider the nominee’s response to a questionnaire, review the nominee’s writings, and potentially interview the nominee to develop a recommendation

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<sup>79</sup> See Administrative Conference of the United States, Recommendation 80-3, *Interpretation & Implementation of the Federal Advisory Committee Act*, 45 Fed. Reg. 46,771 (July 11, 1980) (characterizing FACA’s applicability “to groups convened by agencies, on an ad hoc basis, without formal organization or structure or continuing existence, to obtain views on particular matters of immediate concern to the agency” as one of “[t]he most serious problems regarding the coverage of FACA”).

<sup>80</sup> FACA’s implementing regulations specifically acknowledge the ability of agencies to obtain advice from private parties individually, even if they are gathered in a single forum, without triggering FACA. 41 C.F.R. § 102-3.40(e) (“Any group that meets with a Federal official(s), including a public meeting, where advice is sought from the attendees on an individual basis and not from the group as a whole” is “not covered by the Act.”).

<sup>81</sup> See, e.g., *Ala.-Tombigbee Rivers Coal. v. Dep’t of the Interior*, 26 F.3d 1102, 1105 (11th Cir. 2004) (finding that a committee violated FACA where it was initially structured to involve individual advice by members but was later restructured such that members met and prepared a common report).

<sup>82</sup> 5 U.S.C. App. 2 § 3(2).

<sup>83</sup> *Aluminum Co. of Am. v. Nat’l Marine Fisheries Serv.*, 92 F.3d 902, 905 (D.C. Cir. 1996).

<sup>84</sup> 491 U.S. 440 (1989).

<sup>85</sup> *Id.* at 444.

regarding the nominee's qualifications for the federal judiciary.<sup>86</sup> The President could then consider the ABA's findings in determining whether or not to nominate the particular candidate.<sup>87</sup> The Washington Legal Foundation ("WLF"), a non-profit legal organization, unsuccessfully attempted to obtain the names of the nominees under consideration by the ABA and the reports and minutes from the meetings considering those nominees.<sup>88</sup> Following their failure to obtain such materials, the WLF brought suit against the Department of Justice, arguing that FACA applied to the meetings of the ABA committee and that the committee therefore must make all documents it considered available for public inspection and copying.<sup>89</sup>

The case ultimately produced two opinions, a majority opinion by Justice Brennan and a concurrence in the judgment by Justice Kennedy, and both opinions reflected obvious discomfiture with the potential of FACA to limit the President's ability to obtain advice from private parties. In his concurrence in the judgment, Justice Kennedy concluded that the statute effected an unconstitutional interference with the President's ability to obtain advice on potential judicial appointees in contravention of the Appointments Clause.<sup>90</sup> In the majority opinion, Justice Brennan avoided these concerns by examining the legislative history to conclude that Congress intended a relatively narrow reading of the term "utilized."<sup>91</sup> Describing the word "utilize" as a "woolly verb" with "contours left undefined by the statute itself," the Court concluded:

The phrase "or utilized" therefore appears to have been added simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations such as the National Academy of Sciences "for" public agencies as well as "by" such agencies themselves.<sup>92</sup>

Thus, since the ABA committee was formed entirely by private entities, it did not trigger FACA.<sup>93</sup>

The result in *Public Citizen* clearly seems correct, given the constitutional issues that would be raised by applying FACA to the President's attempts to obtain private sector advice on judicial nominees.<sup>94</sup> Unfortunately, the case fails to elucidate whether the Court intended the narrow reading of "utilized" it adopted to apply to all advisory committees, only to Presidential advisory committees, or only to those committees wherein significant constitutional concerns

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<sup>86</sup> *Id.* at 444–45.

<sup>87</sup> *Id.* at 445.

<sup>88</sup> *Id.* at 447.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 482 (Kennedy, J., concurring in the judgment).

<sup>91</sup> *Id.* at 463–64 ("A literalistic reading . . . would catch far more groups and consulting arrangements than Congress could conceivably have intended.").

<sup>92</sup> *Id.* at 452, 462.

<sup>93</sup> *Id.* at 463.

<sup>94</sup> *Id.* at 466 ("That construing FACA to apply to the Justice Department's consultations with the ABA committee would present formidable constitutional difficulties is undeniable.").



exist. Thus, *Public Citizen* did not necessarily establish a clear line of demarcation between groups that are “established or utilized” by the government and those that are not, and, in the years following the decision, lower courts have continued to struggle with defining the precise contours of the requirement.<sup>95</sup>

As a general matter, post-*Public Citizen* cases have focused on the degree of control an agency wields over an advisory committee in determining whether or not the committee is “utilized” within the meaning of FACA. In *Washington Legal Foundation v. United States Sentencing Commission*,<sup>96</sup> the D.C. Circuit applied a functional test for determining whether the Department of Justice (“DOJ”) “utilized” a working group established by the United States Sentencing Commission so as to implicate FACA.<sup>97</sup> Specifically, the court asserted that the agency must exert “something along the lines of actual management or control of the advisory committee.”<sup>98</sup> In that case, even though DOJ supplied two representatives to the working group and “played an important role in the Group’s decisionmaking” and would likely “exercise significant influence on [the] deliberations and on the ensuing recommendations,” the agency did not control the proceedings and therefore did not “utilize” the committee so as to implicate FACA.<sup>99</sup>

The degree of control that an agency must exert to “utilize” a committee is perhaps even more extensive when the entity is formed by a private organization.<sup>100</sup> In *Food Chemical News v. Young*,<sup>101</sup> the D.C. Circuit considered whether FACA applied to a group of experts convened by a private scientific organization pursuant to a contract with the Food and Drug Administration (“FDA”).<sup>102</sup> Though the court did not foreclose the possibility that a privately formed entity could be subject to FACA, it suggested that the circumstances under which such an entity could

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<sup>95</sup> Of course, if a committee is directly formed by a quasi-public entity, it fairly easily qualifies as being “utilized” by the government. For instance, *Animal Legal Defense Fund, Inc. v. Shalala*, 104 F.3d 424 (1997) considered whether FACA applied to the activities of a committee of the National Academy of Sciences convened to prepare a guide on the care and use of laboratory animals. *Id.* at 426. Applying *Public Citizen* directly, the D.C. Circuit held that committees of the National Academy of Sciences, a quasi-public entity, “were precisely the sort of advisory committees that would be covered by the Act.” *Id.* at 427. Nevertheless, the universe of committees directly or even indirectly established by quasi-public entities is likely to be relatively small, and the more salient question is whether an entity technically established by a private group but subject to extensive governmental influence is “utilized” by the government within the meaning of FACA.

<sup>96</sup> 17 F.3d 1446 (D.C. Cir. 1994).

<sup>97</sup> *Id.* at 1450. Though the United States Sentencing Commission “established” the working group, the court found that fact alone insufficient to trigger FACA because the Sentencing Commission was formed by the judicial branch and therefore did not qualify as an “agency” within the meaning of FACA. *Id.* at 1449–50. Thus, the court considered whether or not the Department of Justice, which undoubtedly qualified as an “agency,” utilized the working group’s output. *Id.* at 1450.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 1450–51.

<sup>100</sup> See *Public Citizen*, 491 U.S. at 462 (suggesting that “utilized” committees might include only those formed by public or quasi-public entities).

<sup>101</sup> 900 F.2d 328 (D.C. Cir. 1990).

<sup>102</sup> *Id.* at 329.

implicate the Act were extremely rare, requiring that the group be “so closely tied to an agency as to be amenable to strict management by agency officials.”<sup>103</sup> In *Byrd v. Environmental Protection Agency*,<sup>104</sup> the D.C. Circuit reasserted the standard articulated in *Food Chemical News*:

[T]he utilized test is a stringent standard, denoting something along the lines of *actual management or control of the advisory committee*. Indeed, this Court has held that participation by an agency or even an agency’s “significant influence” over a committee’s deliberations does not qualify as management and control such that the committee is utilized by the agency under FACA.<sup>105</sup>

The court so held even though the agency provided the contractor convening the committee at issue in *Byrd* with a “task order” defining the objective, method, and scope of studies to be performed; gave the contractor a list of recommended committee members; and reserved the power to approve the contractor’s selection of committee members.<sup>106</sup>

Though the *Byrd* court also did not foreclose the possibility that an agency could exert sufficient control over a privately organized committee to meet the “utilized” requirement of the Act, explicitly stating that the result may have been different had the agency vetoed the contractor’s selection of committee members,<sup>107</sup> many have interpreted this line of cases to create a per se exemption for all committees convened at the behest of a private entity, such as a government contractor, rather than a public or quasi-public entity.<sup>108</sup> In any event, regardless of whether the cases create a per se exception, an agency can relatively easily avoid the strictures of FACA by outsourcing its committee work to private contractors and ensuring that the contractors retain at least a limited degree of discretion in operating the committees so created. A bill that would eliminate this so-called “contractor exception” is currently pending in Congress.<sup>109</sup>

In short, the “utilized” requirement under FACA has been interpreted relatively narrowly by the federal courts. At the very least, an agency must exert a high degree of control over an advisory committee to “utilize” it within the meaning of FACA, and committees formed by private entities, such as government contractors, may be per se exempt from coverage under the statute.

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<sup>103</sup> *Id.* at 333 (internal citations omitted).

<sup>104</sup> 174 F.3d 239 (D.C. Cir. 1999).

<sup>105</sup> *Id.* at 246 (internal citations omitted).

<sup>106</sup> *Id.* at 246–47.

<sup>107</sup> *Id.* at 247.

<sup>108</sup> See *Hearing on the Federal Advisory Committee Act (FACA) of 2008*, 110th Cong. 56–57 (2008) (testimony of Professor Sidney A. Shapiro) (describing the “contractor loophole” to FACA that has arisen from *Food Chemical News* and *Byrd*); Bipartisan Policy Center, *Improving the Use of Science in Regulatory Policy* 25 (Aug. 5, 2009) (“Federal agencies should not be able to circumvent [FACA] by contracting out the appointment or operation of advisory committees.”).

<sup>109</sup> H.R. 1144, 112th Cong. § 102(c) (2011)

### c. “Advice or Recommendations” Requirement

In its definition section, FACA provides that “advisory committee” includes any group “established or utilized” by the government “*in the interest of obtaining advice or recommendations.*”<sup>110</sup> This requirement contains two components: (a) the group must provide “advice” or “recommendations” and (b) the advice or recommendations must be intended for the use of the federal government. The second component has been subject to less scrutiny than the first, though it can create some uncertainty for committees. In *Sofamor Danek Group, Inc. v. Gaus*,<sup>111</sup> the D.C. Circuit determined that FACA did not apply to a committee’s work where its work product was intended primarily for the benefit of private parties and was only incidentally used by the government after the fact.<sup>112</sup> Of course, when a committee’s work product is intended for multiple end users, it can be difficult to ascertain whether an agency’s intended usage of the product is sufficient to trigger FACA.<sup>113</sup>

The “advice or recommendations” requirement is considerably more nebulous in its application, and it has been read to create a number of exceptions to the statute’s coverage. Essentially, to meet the requirement, the group of interest must be “primarily advisory in nature.”<sup>114</sup> The D.C. Circuit has defined “advisory” to mean that “the advice called for is . . . directed to governmental policy.”<sup>115</sup> Thus, a committee that is convened solely to provide factual or other non-policy-oriented information, even if it is established by a federal agency or the President and deliberates as a group, is not subject to FACA.<sup>116</sup> The requirement that the advice sought must concern matters of policy is the source of a number of exceptions contained in FACA’s implementing regulations. For instance, the Act does not apply to “[g]roups assembled to exchange facts or information,”<sup>117</sup> because such committees are merely providing background information and therefore do not address matters of policy. The regulations similarly exempt “[o]perational committees,” i.e., those performing “functions . . . specifically authorized by statute or Presidential directive,”<sup>118</sup> because such committees have no discretion in choosing amongst and advising on potential courses of action. “Preparatory work” and “[a]dministrative work” undertaken by a committee do not fall within the purview of the Act because they are not specifically directed towards providing policy advice.<sup>119</sup>

<sup>110</sup> 5 U.S.C. App. 2 § 3(2) (emphasis added).

<sup>111</sup> 61 F.3d 929 (D.C. Cir. 1995).

<sup>112</sup> *Id.* at 914.

<sup>113</sup> *See, e.g., Cal. Forestry Ass’n v. United States Forest Serv.*, 102 F.3d 609, 612–13 (D.C. Cir. 1996) (concluding that, even though Congress made use of a committee’s advice, the work product was at least partly intended for use by a federal agency, the Forest Service, and that FACA therefore applied, distinguishing *Sofamor Danek* on the grounds that, in that case, a statute specifically stated that private parties were the intended beneficiaries of the committee’s advice).

<sup>114</sup> *Judicial Watch, Inc. v. Clinton*, 76 F.3d 1232, 1233 (D.C. Cir. 1996).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1234 (“The term ‘policy’ implies choice; advice on an identified government *policy* is necessarily advice which favors one of alternative positions or courses of action.”).

<sup>117</sup> 41 C.F.R. § 102-3.40(f).

<sup>118</sup> *Id.* § 102-3.40(k).

<sup>119</sup> *Id.* § 102-3.160.

Similar logic leads to two of the more controversial exceptions under FACA: those for subcommittees and for groups whose private participants are non-voting members. Though the statute explicitly states that the term “advisory committee” includes any formal group of persons “or any subcommittee or sub-group thereof,”<sup>120</sup> the implementing regulations provide that subcommittees are exempt insofar as they report to a parent committee.<sup>121</sup> As explained in the Supplementary Information to the rule enacting the FACA regulations, “[m]ost subcommittees . . . report only to a parent advisory committee and it is the parent committee that is normally responsible for providing advice or recommendations to the Government. In this conventional scenario, the subcommittee is not subject to the Act *because it is not providing advice to the Government.*”<sup>122</sup>

By similar reasoning, the D.C. Circuit has held that FACA is not triggered if federal officials meet with private parties in a setting where the private parties do not actually vote as members of a full committee, even if the private parties participate in discussions and provide useful information to the federal officials.<sup>123</sup> The court explained:

The outsider might make an important presentation, he might be persuasive, the information he provides might affect the committee’s judgment. *But having neither a vote nor a veto over the advice the committee renders to the President, he is no more a member of the committee than the aides who accompany Congressmen or cabinet officers to committee meetings.*<sup>124</sup>

Thus, so long as private parties do not have a final vote on the advice provided to the government, even if they provide input critical to the development of that advice, FACA is not implicated.

Though the subcommittee and non-voting member exceptions seem to follow naturally from the “advice or recommendations” requirement of the statute, they have proven enormously controversial.<sup>125</sup> As a matter of logic, one can easily see how the exceptions could permit agencies to circumvent the statute. For instance, an agency could structure its advisory committees such that all of the important work takes place at the subcommittee level, with the parent committee merely reviewing its subcommittees’ work and issuing final decisions. Though a parent committee cannot rubber stamp a subcommittee’s work,<sup>126</sup> the statute and implementing regulations are less than clear on how much authority a committee can delegate to

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<sup>120</sup> 5 U.S.C. App. 2 § 3(2).

<sup>121</sup> 41 C.F.R. § 102-3.35(a).

<sup>122</sup> Federal Advisory Committee Management, 66 Fed. Reg. 37,728, 37,729 (July 19, 2001) (emphasis added).

<sup>123</sup> *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005).

<sup>124</sup> *Id.* (emphasis added).

<sup>125</sup> See, e.g., *Hearing on the Federal Advisory Committee Act (FACA) of 2008*, 110th Cong. 56–59 (2008) (testimony of Professor Sidney A. Shapiro) (criticizing the “Contractor” and “Nonvoting Participant Loophole[s]” and urging Congress to close the same).

<sup>126</sup> Charles Howton et al., FACA for Facilitators 30, available at <http://www.fs.fed.us/emc/nepa/ecr2008/sessions/materials/25/FACA%20for%20Facilitators%20Presentation.pdf>.

a subcommittee without running afoul of FACA. Similarly, under the “non-voting participant” exception, an agency could structure its committees to extend voting rights only to federal employees but to include private parties who will participate in all discussions and influence the ultimate decision made by the committee.

In light of the controversy surrounding the “subcommittee” and “non-voting participant” exceptions, Congress is currently considering legislation that would eliminate those two exceptions.<sup>127</sup> Nevertheless, regardless of the ultimate fate of those specific exceptions, the “advice or recommendations” requirement is likely to remain an important lever for determining the applicability of FACA, ensuring that the Act only applies when the government is formally seeking advice from private entities.

#### *d. Statutory Exemptions*

In addition to the FACA exceptions that arise from federal courts’ and agencies’ interpretation of the statute’s various requirements, the Act itself contains a number of specific exceptions for certain entities. The original Act exempted committees established by the Central Intelligence Agency and the Federal Reserve System.<sup>128</sup> The Unfunded Mandates Reform Act of 1995 provided that FACA does not apply to meetings between federal officials and representatives from state, local, or tribal governments for purposes of exchanging information or advice about federal programs designed to share governmental responsibilities.<sup>129</sup> Pursuant to the Federal Advisory Committee Act Amendments of 1997, FACA does not apply to committees created by the National Academy of Sciences or the National Academy of Public Administration,<sup>130</sup> though various other procedural requirements apply to committees created by those two agencies.<sup>131</sup>

As a general matter, the statutory exceptions to FACA are much more straightforward than the exceptions that arise from interpretation of the statutory language: if one of the exempted entities forms an advisory committee, the Act does not apply to that committee’s activities. Of course, some difficulties can arise, such as determining how directly an exempted entity must control a committee’s work for it to qualify for the FACA exemption,<sup>132</sup> but the statutory exceptions tend to be relatively *sui generis* and are not available to the majority of advisory committees.

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<sup>127</sup> H.R. 1144, 112th Cong. § 102 (2011).

<sup>128</sup> Federal Advisory Committee Act, Pub. L. No. 92-463, § 4(b), 86 Stat. 770, 771 (1972).

<sup>129</sup> Pub. L. No. 104-4, § 204(b), 109 Stat. 48, 66 (1995).

<sup>130</sup> Pub. L. No. 105-153, 111 Stat. 2689 (1997).

<sup>131</sup> 5 U.S.C. App. 2 §§ 3(2)(ii), 15.

<sup>132</sup> See, e.g., *Ctr. for Arms Control & Non-Proliferation v. Pray*, 531 F.3d 836, 841 (D.C. Cir. 2008) (concluding that the Central Intelligence Agency “utilized” an advisory committee, thereby rendering it exempt from the purview of FACA).

### 3. FACA's Procedural Requirements

FACA imposes a panoply of procedural requirements on federal advisory committees designed to ensure that committees do not outlive their useful lifespan and that the committees' activities are transparent and not excessively beholden to special interests. This section examines the requirements chronologically, beginning with the steps a committee must take to convene a new advisory committee, continuing with the various procedural requirements that apply to a committee's work, and concluding with the process for eliminating a committee that has completed its mission.

#### *a. Authority for Committee Establishment*

Advisory committees can be established by Congress, the President, or by individual agencies. Committees are classed as either "discretionary" or "non-discretionary."<sup>133</sup> "Non-discretionary" advisory committees can arise in either of two ways: (a) Congress establishes an advisory committee or directs the President to do so or (b) the President establishes an advisory committee by executive order or some other directive.<sup>134</sup> "Discretionary" advisory committees also may be established in either of two ways: (a) Congress specifically authorizes an advisory committee, and the President or an agency establishes the committee so authorized or (b) an agency establishes a committee of its own initiative.<sup>135</sup>

#### *b. Chartering and Other Committee Formation Requirements*

Under FACA, "[n]o advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator [of GSA], in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committee of the Senate and House of Representatives having legislative jurisdiction over such agency."<sup>136</sup> The implementing regulations additionally require that the charter be filed with the Library of Congress and GSA's Committee Management Secretariat.<sup>137</sup>

The charter must contain certain information designed to define the scope of the committee's mission and ensure that the agency allocates its resources efficiently in establishing the committee. Specifically, FACA requires that the charter state, inter alia, the "objectives and scope" of the committee's work, the amount of time required for the committee to complete its mission, an estimated operating cost for the committee, and the estimated number and frequency of committee meetings.<sup>138</sup> As a default matter, advisory committees expire two years after

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<sup>133</sup> 41 C.F.R. § 102-3.50.

<sup>134</sup> 5 U.S.C. App. 2 § 3(2); 41 C.F.R. §§ 102-3.50(a)–(b).

<sup>135</sup> 5 U.S.C. App. 2 § 3(2); 41 C.F.R. §§ 102-3.50(c)–(d).

<sup>136</sup> 5 U.S.C. App. 2 § 9(c).

<sup>137</sup> 41 C.F.R. §§ 102-3.70(a)(3)–(4).

<sup>138</sup> 5 U.S.C. App. 2 § 9(c); 41 C.F.R. § 102-3.75.

initiation,<sup>139</sup> and the agency must renew the charter of committees whose duration exceeds that two-year period, as explained in more detail in Section A.3.j.

In chartering and re-chartering their committees, agencies are required to consult with GSA.<sup>140</sup> During that consultation, the agency must explain its need for the proposed committee, show that the committee's work cannot be performed by other existing committees or groups within the agency, and describe the agency's plan for ensuring that the committee's membership is fairly balanced.<sup>141</sup> GSA informs agencies of any deficiencies in their charter and provides advice on committee formation but does not formally approve proposed committee charters.

*c. Committee Membership Balance*

FACA provides that standing committees of the House of Representatives and Senate considering legislation creating an advisory committee must ensure that "the membership of the advisory committee [is] fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."<sup>142</sup> Though the statutory sub-section setting forth the balance requirement applies only to legislation establishing advisory committees, the statute later provides that the balance requirement "shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee."<sup>143</sup>

The statute contains no further guidance on the precise dimensions on which agencies must ensure that their advisory committees are "balanced." The implementing regulations provide some additional clarification, stating that, in connection with chartering a new committee, agencies should submit a plan to GSA for attaining balanced membership, which must "ensure that, in the selection of members for the advisory committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee."<sup>144</sup> The regulations also enumerate a series of factors that an agency might consider in determining how to balance its advisory committees, including: (a) the mission of the advisory committee; (b) the geographic, ethnic, social, economic, or scientific impact of the committee's recommendations; (c) the need for specific types of perspectives, "such as those of consumers, technical experts, the public at large, academia, business, or other sectors"; (d) the value of considering divergent viewpoints; and (e) the relevance of the perspective of State, local, and tribal governments.<sup>145</sup>

Though the regulations provide much more detail than the Act itself, agencies still enjoy a great deal of discretion in determining how to ensure balance on their advisory committees. Though this likely affords agencies a necessary degree of flexibility, it also potentially creates some uncertainty in determining whether or not the balance requirements have been satisfied.

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<sup>139</sup> 41 C.F.R. § 102-3.55(a).

<sup>140</sup> *Id.* § 102-3.60.

<sup>141</sup> *Id.* § 102-3.60(b).

<sup>142</sup> 5 U.S.C. App. 2 § 5(b)(2).

<sup>143</sup> *Id.* § 5(c).

<sup>144</sup> 41 C.F.R. § 102-3.60(b)(3).

<sup>145</sup> *Id.* § 102-3, sub-pt. B, App. A.

For instance, must a scientific advisory committee invite “skeptics” of a generally accepted scientific theory to serve as members in the name of achieving “balance,” even if the “skeptics” represent the position of an extreme minority in the scientific community? The Government Accountability Office has recommended that agencies not only seek committee members from diverse disciplines but also strive to achieve balance in the points of view represented amongst committee members,<sup>146</sup> though it does not indicate how well-accepted a viewpoint must be before it can justifiably claim the right to representation at advisory committee discussions.

In any event, in light of the open-ended nature of FACA’s balance requirements, courts are highly deferential in determining whether or not a given committee’s membership is properly balanced. Indeed, the Ninth Circuit has held that FACA itself does not provide sufficient guidance on the balance requirements for a claim that an agency violated those requirements to be justiciable.<sup>147</sup> Other courts have held that claims that an agency violated FACA’s balance requirements are justiciable, but the agency’s actions are reviewed with a high degree of deference.<sup>148</sup> Thus, courts are unlikely to enjoin an agency from relying on the work product of an advisory committee as a consequence of imbalanced committee membership, but agencies that wish to comply scrupulously with FACA may nonetheless struggle with determining whether they have sufficiently ensured that their committees are appropriately balanced.

*d. Ensuring Unbiased Advice*

Both FACA and its implementing regulations contain few provisions related to ensuring that committee members provide objective, unbiased advice. FACA broadly states that agencies should “assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or any special interest.”<sup>149</sup> The implementing regulations provide little additional clarification, stating simply that the agency head must ensure that the committee members comply with relevant conflict of interest statutes

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<sup>146</sup> U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-328, ADDITIONAL GUIDANCE COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE AND BALANCE 39–40 (2004) (“Additional information about the candidates’ viewpoints and potential biases would better ensure that the committees are, and are perceived as being, fairly balanced in terms of points of view—and that no one interest or viewpoint dominates.”) (hereafter “GAO 2004 Report”); *see also* U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-08-611T, ISSUES RELATED TO THE INDEPENDENCE & BALANCE OF ADVISORY COMMITTEES 14 (2008) (reiterating the Government Accountability Office’s call for agencies to consider the points of view of potential committee members in achieving overall balance) (hereafter “GAO 2008 Report”).

<sup>147</sup> *Ctr. for Policy Analysis on Trade & Health v. Office of the United States Trade Representative*, 540 F.3d 940, 945–46 (9th Cir. 2008) (holding that FACA and a separate statute appertaining to a committee’s work did not provide sufficient detail on the dimensions on which balance must be achieved so as to support a justiciable claim, though acknowledging that a separate statute could provide sufficient supplementary detail in another case).

<sup>148</sup> *See, e.g., Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1232–33 (10th Cir. 2004) (concluding that FACA’s balance requirements are justiciable); *Cargill, Inc. v. United States*, 173 F.3d 323, 334 (5th Cir. 1999) (“[W]e conclude that the functional balance and adequate staffing requirements, while subject to a deferential standard of review, are justiciable.”);

<sup>149</sup> 5 U.S.C. App. 2 §§ 5(b)(3), (c).



and ethics regulations, including those promulgated by the Office of Government Ethics (“OGE”).<sup>150</sup>

Notwithstanding the lack of detail in FACA and its implementing regulations, OGE has developed extensive guidance on the ethics rules that should apply to advisory committee members. As a general matter, the set of ethics standards (or lack thereof) that applies to committee members depends critically on the initial designation of each member as either a Special Government Employee (“SGE”) or as a representative. Congress specifically created the SGE category by statute<sup>151</sup> to implement a hybrid class of ethics standards for individuals who provide significant services to the government and therefore should be subject to certain ethical obligations but who should not be subject to the full panoply of standards applicable to full government employees.<sup>152</sup> Unless if a statute specifically provides that a committee member should serve as an SGE, individual agencies enjoy the discretion of whether to appoint committee members as SGEs or representatives. As a general matter, SGEs are selected as a consequence of their individual expertise, whereas representatives, as the name implies, are selected to represent a particular group.<sup>153</sup> In making this determination, the following factors support appointment of a committee member as a representative: lack of compensation,<sup>154</sup> appointment as the result of a recommendation by an outside group, and ability to speak on behalf of an outside organization.<sup>155</sup>

SGEs are essentially subject to the same ethics standards that apply to full-time government employees, though the standards often apply somewhat less stringently to SGEs.<sup>156</sup> Perhaps most significantly, SGEs are subject to conflict of interest standards that prohibit them from participating in any particular matter that has a direct effect on their own financial interests

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<sup>150</sup> 41 C.F.R. § 102-3.105(h).

<sup>151</sup> 18 U.S.C. § 202(a) (“[T]he term ‘special Government employee’ shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for not to exceed one hundred and thirty days during any period of three hundred and sixty-five consecutive days, temporary duties either on a full-time or intermittent basis . . .”).

<sup>152</sup> 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> (hereafter “SGE Standards Summary”).

<sup>153</sup> U.S. Office of Government Ethics, Memorandum from J. Jackson Walter, Director of the Office of Government Ethics, to Heads of Departments & Agencies of the Executive Branch regarding Members of Federal Advisory Committees and the Conflict-of-Interest Statutes 3–4 (July 9, 1982), available at [http://www.usoge.gov/ethics\\_guidance/opinions/advop\\_files/1982/82x22.pdf](http://www.usoge.gov/ethics_guidance/opinions/advop_files/1982/82x22.pdf) (hereafter “Walter Memorandum”).

<sup>154</sup> Though a member’s receipt of compensation is virtually dispositive of his or her qualifying as an SGE, the lack of compensation is merely one factor to consider in determining whether or not he or she is appropriately classified as a representative. U.S. Office of Government Ethics, Memorandum from Marilyn L. Glynn, General Counsel, to Designated Agency Ethics Officials regarding Federal Advisory Committee Appointments 5–6 (Aug. 18, 2005), available at [http://www.usoge.gov/ethics\\_guidance/opinions/advop\\_files/2005/05x4.pdf](http://www.usoge.gov/ethics_guidance/opinions/advop_files/2005/05x4.pdf) (hereafter “Glynn Memorandum”).

<sup>155</sup> Walter Memorandum, *supra* note 153, at 4–5.

<sup>156</sup> SGE Standards Summary, *supra* note 152, at 5–14.

or those of certain closely related persons.<sup>157</sup> A conflicted SGE may receive a waiver, however, if the official responsible for his or her appointment certifies that the conflict is insufficient to bias the proposed committee member's advice or that the need for the potential committee member's services outweighs the risk posed by the conflict.<sup>158</sup> Representatives, by contrast, are not formally subject to any ethics standards, though some agencies choose to impose certain ethical restrictions on their representative committee members.<sup>159</sup>

As a matter of logic, appointing certain committee members as representatives exempt from conflict of interest standards makes sense, given that representatives will speak on behalf of a particular group and therefore, essentially by definition, have an inherent conflict of interest. The agency will presumably discount any bias inherent in representative members' advice while still considering the advice to the extent the partisan perspective of a particular group affected by an agency's decisionmaking is relevant. The process is susceptible to abuse, however, insofar as the agency enjoys essentially complete discretion in determining whether to appoint committee members as SGEs or representatives. In this light, the Government Accountability Office has found that agencies sometimes appoint an excessively large number of committee members as representatives.<sup>160</sup> Specifically, agencies sometimes determine that potential committee members "represent" certain fields of study (e.g., toxicology, epidemiology), even though such persons should more properly be classified as SGEs insofar as they are chosen for specific expertise they possess.<sup>161</sup>

*e. Meeting Notice Requirements*

Pursuant to FACA, "timely notice of each [committee] meeting shall be published in the Federal Register."<sup>162</sup> The implementing regulations elaborate upon the definition of "timely" notice and provide details on what information such notice must include. Specifically, the notice must appear in the Federal Register at least 15 days in advance of the proposed advisory committee meeting.<sup>163</sup> Though a committee may give less than 15 days advanced notice in "exceptional circumstances," it must include its reasons for doing so in the Federal Register

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<sup>157</sup> 18 U.S.C. § 208; SGE Standards Summary, *supra* note 152, at 11.

<sup>158</sup> 18 U.S.C. §§ 208(b)(1), (3); SGE Standards Summary, *supra* note 152, at 11–12.

<sup>159</sup> *See, e.g.*, Glynn Memorandum, *supra* note 154, at 4 n.10 (noting that "some agencies do address potential conflicts of interest of their representative members to some extent" and chronicling certain efforts of the Department of the Interior in this respect). The Administrative Conference of the United States has previously recommended that agencies impose certain ethics standards on all members of their advisory committees, regardless of the formal status of each committee member. Administrative Conference of the United States, Recommendation 1989-3, *Conflict-of-Interest Requirements for Federal Advisory Committees*, 54 Fed. Reg. 28,964 (July 10, 1989).

<sup>160</sup> GAO 2004 Report, *supra* note 146, at 5; *see also* GAO 2008 Report, *supra* note 146, at 7.

<sup>161</sup> GAO 2004 Report, *supra* note 146, at 23.

<sup>162</sup> 5 U.S.C. App. 2 § 10(a)(2).

<sup>163</sup> 41 C.F.R. § 102-3.150(a). For agencies scheduling committee meetings, the 15-day advance notice requirement means that the agency must submit its proposed notice to the Federal Register at least 18 days in advance of the scheduled meeting, since the Federal Register must receive the draft notice 3 business days prior to its publication. National Archives and Records Administration, *Federal Register Document Drafting Handbook* 8-5 (1998).

notice announcing the meeting.<sup>164</sup> At a minimum, the Federal Register notice must include (a) the name of the advisory committee that proposes to meet; (b) the time, date, place, and purpose of the meeting; (c) a summary of the meeting agenda; (d) a statement of whether the meeting is open, closed, or partially closed (including the justification for any complete or partial closure of the meeting); and (e) the name and telephone number of the Designated Federal Officer (“DFO”) or another agency official whom members of the public may contact regarding meeting information.<sup>165</sup>

*f. Public Participation Requirements*

FACA contains two provisions directly applicable to public participation at scheduled committee meetings: (a) it broadly states that “[e]ach advisory committee meeting shall be open to the public”<sup>166</sup> and (b) it provides that “[i]nterested persons shall be permitted to attend, appear before, or file statements with any advisory committee.”<sup>167</sup> The implementing regulations elaborate considerably on each requirement, explaining the steps committees must take to ensure that their meetings are sufficiently “open” and describing precisely how members of the public may participate in committee meetings.

With respect to the openness of meetings, the agency head must ensure that committee meetings are held “at a reasonable time” and “in a manner or place reasonably accessible to the public,” including providing access for persons with disabilities.<sup>168</sup> In addition, the regulations provide that the meeting room must have sufficient capacity to accommodate the committee members as well as “a reasonable number of interested members of the public.”<sup>169</sup> With respect to public participation, under all circumstances, any interested member of the public is “permitted to file a written statement with the advisory committee.”<sup>170</sup> Further, if the “agency’s guidelines so permit,” members of the public may also “speak or otherwise address the advisory committee.”<sup>171</sup> If an agency fears that public attendees at the meetings of its advisory committees will become disruptive or otherwise interfere with the efficient conduct of meetings, it can implement guidelines for public participation or simply limit public input to the filing of written statements.

Though the open meeting and public participation requirements are fairly straightforward, the rise of “new media” has complicated the picture somewhat. The implementing regulations succinctly state that “[a]ny advisory committee meeting conducted in whole or part by a teleconference, videoconference, the Internet, or other electronic medium

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<sup>164</sup> 41 C.F.R. § 102-3.150(b).

<sup>165</sup> *Id.* § 102-3.150(a).

<sup>166</sup> 5 U.S.C. App. 2 § 10(a)(1).

<sup>167</sup> *Id.* § 10(a)(3).

<sup>168</sup> 41 C.F.R. § 102.3.140(a).

<sup>169</sup> *Id.* § 102-3.140(b).

<sup>170</sup> *Id.* § 102-3.140(c). Unlike the process for comments submitted during informal rulemakings, which the agency must consider to the extent they present “relevant matter,” 5 U.S.C. § 553(c), FACA does not contain any formal requirement that the agency consider the comments or address the relevant matter, if any, presented therein.

<sup>171</sup> 41 C.F.R. § 102-3.140(d).

meets” the open meeting and public participation requirements.<sup>172</sup> Thus, committee members could, for instance, meet remotely via teleconference so long as they provide a dial-in number for members of the public to listen to the call and, if the agency’s guidelines permit, comment during the discussion. The Internet, however, opens a number of potential avenues for “virtual meetings” that much less closely resemble traditional in-person meetings. For instance, committee members might discuss a topic via a series of “reply all” email messages. Such a “virtual meeting” likely violates the “open meeting” requirements, however, since the public would not have real-time access to the emails as they are being circulated (i.e., the public could not “attend” the meeting).<sup>173</sup> Consequently, though the regulations clearly contemplate that committees can use “new media” to conduct meetings, any proposal for exploiting such technological advances must carefully ensure that it satisfies the open meeting and public participation requirements of FACA.

***g. Closing Committee Meetings***

The open meeting and public participation requirements of FACA do not apply to any portion of a committee meeting that the President or agency head decides should be closed.<sup>174</sup> To close a committee meeting, the President or agency head must determine that one of the exceptions to the open meeting requirements of the Government in the Sunshine Act is met.<sup>175</sup> Those exceptions protect, inter alia, information that must be kept secret for reasons of national security, trade secrets or other confidential financial information, certain personal information, and certain information related to law enforcement.<sup>176</sup>

Though meetings may be closed under appropriate circumstances, the agency must follow a specific procedure in doing so. The committee’s Designated Federal Officer must submit his or her justification for closing the meeting, citing the specific section(s) of the Sunshine Act that apply, to the agency head, who must be given sufficient time (usually 30 calendar days) to consider the request.<sup>177</sup> The agency’s general counsel also must review the request.<sup>178</sup> If the agency head determines that the meeting should be closed, he or she must issue a written determination to that effect and make a copy thereof available to the public upon

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<sup>172</sup> *Id.* § 102-3.140(e).

<sup>173</sup> Any meeting in which a covered group prepares advice or recommendations for consideration by the President or federal agencies is subject to FACA. 5 U.S.C. App. 2 § 3(2). The implementing regulations provide that meetings that take place in electronic fora are subject to FACA’s requirements. 41 C.F.R. § 102-3.140(e). Thus, so long as the emails exchanged are substantive and pertain to advice or recommendations that the committee might provide (as opposed to emails relating to purely procedural matters, such as scheduling meetings, which likely are exempt from FACA under the “administrative work” exception), the email exchange likely constitutes a “virtual meeting” subject to the Act.

<sup>174</sup> 5 U.S.C. App. 2 § 10(d).

<sup>175</sup> See 5 U.S.C. § 552b(c) (Sunshine Act exceptions permitting closed meetings).

<sup>176</sup> *Id.*

<sup>177</sup> 41 C.F.R. § 102-3.155(a).

<sup>178</sup> *Id.* § 102-3.155(b).

request.<sup>179</sup> Finally, the committee must still issue an annual report containing a “summary of its activities” related to meetings that it has closed.<sup>180</sup>

Notwithstanding the statute’s presumption in favor of open meetings and the fairly extensive procedural requirements for closing committee meetings, empirical studies have indicated that the majority of committee meetings are either partially or fully closed.<sup>181</sup> Thus, agencies apparently make fairly liberal use of the mechanism for closing committee meetings, though the frequency with which committee meetings are closed varies from agency to agency.<sup>182</sup>

#### *h. Committee Document Requirements*

FACA and associated statutes impose a number of requirements related to the production, retention, and public availability of committee documents. With respect to documents prepared over the course of the committee’s work, FACA requires that “the records, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents that were made available to or prepared for or by each advisory committee shall be available for public inspection and copying,” except if the documents qualify for one of the exceptions under the Freedom of Information Act (“FOIA”).<sup>183</sup> Of the various FOIA exceptions, the exemption for “pre-decisional materials,”<sup>184</sup> popularly known as “exemption 5,” likely would cover the largest number of committee documents. The Office of Legal Counsel, however, has interpreted that exception extremely narrowly as it applies to documents of federal advisory committees, holding that “exemption 5 is not generally applicable to materials prepared by or for an advisory committee, but that it does extend to protect privileged documents delivered from the agency to an advisory committee.”<sup>185</sup> The Office of Legal Counsel reached this conclusion because “by its

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<sup>179</sup> 5 U.S.C. App. 2 § 10(d); 41 C.F.R. §§ 102-3.155(c)–(d).

<sup>180</sup> 5 U.S.C. App. 2 § 10(d).

<sup>181</sup> According to the FACA database maintained at Federal Interagency Databases Online (“FIDO”), in fiscal year 2010, 28% of committee meetings were fully open, 68% were completely closed, and 4% were partially closed. *See* FACA Database: FY2010 Government Totals, <http://fido.gov/facadatabase/rptgovttotals.asp> (last visited July 26, 2011); *see also* U.S. GOVERNMENT ACCOUNTABILITY OFFICE, GAO/GGD-98-147, VIEWS OF COMMITTEE MEMBERS & AGENCIES ON FEDERAL ADVISORY COMMITTEE ISSUES 4 (1998) (“The overall responses we received from committee members on the issue of public participation were mixed. About 27 percent of the respondents said that all of their committee meetings were open to the public, and 37 percent said that all of their committee meetings were closed to the public. Another 19 percent of respondents said some meetings or portions of meetings were closed.”); Rebecca J. Long & Thomas C. Beierle, *The Federal Advisory Committee Act & Public Participation in Environmental Policy* 33 (Jan. 1999) (noting that only 42 percent of committee meetings were open to the public in fiscal year 1997).

<sup>182</sup> Long & Beierle, *supra* note 181, at 33 (“While only 42 percent of all federal advisory committee meetings were open to the public during FY 1997, virtually all EPA, DOE, and DOI advisory committees were open to the public.”).

<sup>183</sup> 5 U.S.C. App. 2 § 10(b); *see also* 5 U.S.C. § 552(b) (FOIA exceptions).

<sup>184</sup> *Id.* § 552(b)(5) (“This section does not apply to matters that are . . . inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency . . .”).

<sup>185</sup> *Disclosure of Advisory Committee Deliberative Materials*, 12 Op. O.L.C. 73, 77 (1988).

terms exemption 5 protects only inter-agency and intra-agency documents and because an advisory committee is not an agency.”<sup>186</sup> Thus, though *meetings* between committee members in preparation for a full advisory committee meeting need not be made open for public participation,<sup>187</sup> the *documents* the members consider during those preparatory sessions are generally subject to public disclosure.

Nevertheless, FACA does not necessarily require every scrap of paper viewed by an advisory committee member to be made publicly available. First, by its terms, FACA only requires documents that were “made available to or prepared for or by *each advisory committee*” be made available to the public.<sup>188</sup> Thus, much as meetings of subcommittees are not subject to the various procedural requirements under FACA,<sup>189</sup> documents distributed amongst groups smaller than the entire advisory committee presumably are not subject to public disclosure. Second, FACA requires only that committee documents be “available for public inspection and copying,”<sup>190</sup> not that the agency undertake affirmative steps to make all committee documents available absent a specific request. Of course, some committees voluntarily make their documents available without specifically receiving a request to do so, such as by posting relevant documents on the committee’s website, but doing so is not a FACA requirement.

FACA also requires committees to prepare certain documents in connection with committee meetings. Most notably, it provides that “[d]etailed minutes of each meeting of each advisory committee shall be kept.”<sup>191</sup> The minutes must include a list of meeting attendees; the time, date, and place of the meeting; a complete description of matters discussed and conclusions reached; and copies of all reports considered by the committee.<sup>192</sup> The DFO must ensure that the committee chair certifies the minutes within 90 days of the relevant advisory committee meeting.<sup>193</sup>

FACA’s implementing regulations provide that “[o]fficial records generated by or for an advisory committee must be retained for the duration of the advisory committee.”<sup>194</sup> The National Archives and Records Administration (“NARA”) has issued guidance that elaborates on the relatively sparse provisions relating to document retention in the regulations. NARA’s General Records Schedule 26 sets forth certain official records that must be retained for the life of the committee, including the charter, meeting minutes, official reports, and documents supporting recommendations (including documents considered by subcommittees).<sup>195</sup> Once the committee ceases to exist, documents of that type must be transferred to NARA for archiving.<sup>196</sup>

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<sup>186</sup> *Id.*

<sup>187</sup> 41 C.F.R. § 102-3.160(a).

<sup>188</sup> 5 U.S.C. App. 2 § 10(b) (emphasis added).

<sup>189</sup> 41 C.F.R. § 102-3.35.

<sup>190</sup> 5 U.S.C. App. 2 § 10(b).

<sup>191</sup> *Id.* § 10(c).

<sup>192</sup> *Id.*; 41 C.F.R. § 102-3.165.

<sup>193</sup> 5 U.S.C. App. 2 § 10(c); 41 C.F.R. § 102-3.165(c).

<sup>194</sup> 41 C.F.R. § 102-3.175(e).

<sup>195</sup> National Archives and Records Administration, General Records Schedule 26 § 2(a).

<sup>196</sup> *Id.*

Documents that simply relate to the day-to-day workings of committees, such as staff correspondence, public mail, and extra copies of documents falling into the first category may be destroyed after three years.<sup>197</sup> Documents posted on the web may be deleted when they are no longer needed, so long as the original document is appropriately preserved in paper form.<sup>198</sup> Committee web pages also may be deleted when no longer needed, but the committee must first consult with NARA to determine whether certain portions merit retention.<sup>199</sup>

*i. Management of Advisory Committees*

FACA imposes a number of requirements related to the ongoing management of existing advisory committees and assigns certain roles to agency staff in that management process. Specifically, the head of the agency must issue guidelines governing the work of the agency's committees, annually review the need to perpetuate each existing advisory committee, determine the compensation (if any) for committee members and consultants, ensure that committee members are not inappropriately influenced by special interests or the agency itself, ensure that the committee members follow all relevant ethical requirements, and appoint one agency employee to serve as a Committee Management Officer ("CMO") for all committees and individual agency employees to serve as Designated Federal Officers ("DFO") for each of the agency's advisory committees.<sup>200</sup>

The CMO and DFOs, in turn, generally handle the day-to-day affairs of an agency's advisory committees. Specifically, the CMO is responsible for "exercis[ing] control and supervision over the establishment, procedure, and accomplishments of advisory committees established by the agency" and maintaining all committee records (including the charter, the annual comprehensive review, the agency's advisory committee guidelines, and documentation for closed meetings).<sup>201</sup> The DFO is responsible for calling each committee meeting, approving the agenda thereof, attending the meeting, adjourning the meeting when he or she deems it to be in the public interest, and chairing the meeting when directed to do so by the agency head.<sup>202</sup>

*j. Review and Termination of Existing Committees*

A major motivation for the enactment of FACA was the need to ensure that advisory committees are "terminated when they are no longer carrying out the purposes for which they were established."<sup>203</sup> In addition to requiring that agency heads regularly review the work of their agencies' advisory committees to ensure that they do not outlive their useful lifespan,<sup>204</sup> FACA creates a formal process by which GSA's Committee Management Secretariat regularly

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<sup>197</sup> *Id.* § 2(b).

<sup>198</sup> *Id.* § 2(c).

<sup>199</sup> *Id.*

<sup>200</sup> 5 U.S.C. App. 2 § 8; 41 C.F.R. § 102-3.105.

<sup>201</sup> 5 U.S.C. App. 2 § 8(b); 41 C.F.R. § 102-3.115.

<sup>202</sup> 41 C.F.R. § 102-3.120.

<sup>203</sup> 5 U.S.C. App. 2 § 2(b)(3).

<sup>204</sup> 41 C.F.R. § 102-3.105(e).

reviews the usefulness of existing advisory committees. In performing this review, the Committee Management Secretariat requests information from existing committees and then conducts an annual review to determine whether each committee is accomplishing its intended purpose, whether its mission should be revised, and whether it should be merged with another committee or abolished entirely.<sup>205</sup>

In addition to GSA's annual comprehensive review, the chartering requirements impose an additional check on the perpetuation of unnecessary advisory committees. Specifically, unless otherwise specified by statute, all advisory committee charters expire after two years by default.<sup>206</sup> Thus, all discretionary committees must be reexamined for continued relevance every two years, as must those statutory advisory committees for which Congress does not provide for a different lifespan. Once the charter has expired, the agency may renew the committee's charter if it determines that the committee continues to serve a useful purpose. In so doing, the agency must provide a justification for perpetuating the committee, including an explanation of the need for the committee and of the inability of existing committees to assume the functions of the committee at issue.<sup>207</sup> Additionally, if the agency determines to change the mission of one of its existing advisory committees, it must consult with the Committee Management Secretariat, explaining the justification for the change, and then file an amended charter.<sup>208</sup> In theory, the chartering requirements ensure that existing advisory committees do not persist beyond the completion of their mission by requiring periodic reevaluations and that the agency does not improperly expand the scope of a committee's work by requiring consultation with the Committee Management Secretariat when the committee structure undergoes any major change.

If the agency determines that a committee has outlived its useful lifespan, either of its own accord or as part of the annual review by the Committee Management Secretariat or the re-chartering process, it must terminate the committee.<sup>209</sup> An agency should terminate an existing committee when it has accomplished its stated objectives, its work has become obsolete, or the costs of the committee outweigh its benefits.<sup>210</sup>

## Part B: Research Methodology and Findings

As the background sections illustrate, FACA attempts to promote efficiency and transparency in agencies' use of advisory committees by imposing a number of procedural requirements. The statute maintains a delicate balance between furthering those policies, on one hand, and imposing such onerous procedural burdens that agencies can no longer effectively make use of advisory committees, on the other. The background sections suggest that, as a general matter, FACA, its implementing regulations, and other associated statutes and regulations have created a regime that effectively controls potential abuses in the advisory

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<sup>205</sup> 5 U.S.C. App. 2 § 7; 41 C.F.R. §§ 102-3.100, 102-3.175(b).

<sup>206</sup> 41 C.F.R. § 102-3.55(a).

<sup>207</sup> *Id.* § 102-3.60.

<sup>208</sup> *Id.* § 102-3.85.

<sup>209</sup> *Id.* § 102-3.30(b).

<sup>210</sup> *Id.*



committee process while nonetheless maintaining a relatively efficient system for convening and operating advisory committees. Nevertheless, the background sections also demonstrate that, in a number of instances, the FACA standards are somewhat unclear, creating uncertainty for agencies regarding whether the Act applies to any given interaction or whether or not meetings are conducted in full compliance with FACA. The existing FACA regime also arguably imposes a number of requirements that create heavy procedural burdens without substantially advancing the Act's dual goals of promoting efficiency and transparency. Conversely, in some instances, the Act perhaps does not go far enough in promoting such goals, failing to require or encourage certain practices that would greatly facilitate efficiency and transparency without imposing significant procedural burdens on agencies.

In conducting the research underlying this report, the Administrative Conference staff broadly analyzed the existing FACA regime with an eye towards determining whether or not it is effectively advancing its underlying goals without imposing an unnecessary burden on agencies' ability to obtain outside advice. The research proceeded in five phases. First, Professor Jim O'Reilly of the University of Cincinnati Law School conducted a survey of CMOs at twelve agencies that make relatively extensive use of advisory committees on behalf of the Conference. Professor O'Reilly's survey generally inquired as to whether FACA limits agencies' ability to meet with outsiders and posed a number of specific questions related to agencies' use of "new media." The results of Professor O'Reilly's survey suggested that agencies make relatively generous use of FACA's "exceptions" to avoid the procedural strictures of the Act.<sup>211</sup>

In the second phase, the Administrative Conference staff sought additional detail on potential issues created by FACA and elucidation of the procedural burdens that might lead agencies to avoid triggering the Act. Conference staff reviewed the existing FACA literature, including bills before Congress containing proposed FACA reforms, reports from governmental entities (such as the Government Accountability Office), reports from private organizations (such as the Bipartisan Policy Center), and law review articles to obtain a sense of the major issues that have arisen in the implementation of FACA. Conference staff also spoke informally with a number of experts who have written on the Act.

In the third phase of the research, the Conference staff prepared a list of questions designed to elicit information on each of the major issues identified during the literature review. A copy of the list of inquiries appears in Appendix B to this article. The Conference staff circulated this set of inquiries to all government members of the Administrative Conference, which include representatives from major federal agencies.<sup>212</sup> The staff asked these Conference members to circulate the survey to the persons within their agencies who receive advice provided

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<sup>211</sup> The results of Professor O'Reilly's survey are summarized in his report to the Conference, which is available at <http://www.acus.gov/wp-content/uploads/downloads/2011/04/OReilly-FACA-Report-4-15-2011-Redline2.pdf>. Since several survey respondents requested anonymity, Professor O'Reilly's report does not identify the respondents by name or agency but rather provides a general overview of the survey results.

<sup>212</sup> For a full list of government members of the Administrative Conference, please visit the following webpage: <http://www.acus.gov/about/the-assembly/government-members/>.

by advisory committees or deal with the legal aspects of committee activities.<sup>213</sup> The Conference ultimately received 21 responses from federal agencies. In addition, the Conference staff sought general views on potential problems under FACA from public members of the Conference, which include law professors, private attorneys, members of non-profit organizations, and other members of the private sector.<sup>214</sup> Four public members provided input. A summary of all responses (including those from government and public members) appears in Appendix C to the report.<sup>215</sup> By seeking input from the public and private sectors, the Conference sought to obtain a balanced perspective on the strengths and weaknesses of the current FACA regime.

In the fourth phase of the research, the Conference convened a workshop to consider the most salient issues under FACA identified by the initial literature review and membership questionnaire. The Conference again sought to obtain a mix of viewpoints, inviting federal employees with extensive experience in the use of advisory committees, scholars who have written on issues under FACA, representatives from non-profit organizations that advocate government transparency, and interested members of the public. Approximately 50 such individuals participated in the workshop. The topics considered at the workshop included the following:

- (1) Should the conflict of interest standards applicable to advisory committee members be modified?
- (2) Should the chartering and re-chartering process for new and existing advisory committees be revised?
- (3) Should the “exceptions” to FACA’s coverage be eliminated, amended, or clarified?
- (4) What steps should committees take to promote transparency beyond the minimum requirements of FACA? For instance, should committees solicit public input on potential committee members, post committee documents online, or webcast committee meetings?
- (5) Would hosting virtual, asynchronous meetings of advisory committees via web forum be useful?
- (6) What other issues under FACA are particularly pressing?

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<sup>213</sup> Specifically, the survey requested that Conference members forward the inquiries to “those who receive and use the advice that [advisory] committees provide” and/or “people who deal with the legal aspects of FACA compliance.” Since Professor O’Reilly’s survey already produced input from CMOs, the second survey sought information from the “clients” of the agencies’ advisory committees.

<sup>214</sup> For a full list of the public members of the Administrative Conference, please visit the following webpage: <http://www.acus.gov/about/the-assembly/public-members/>. Several of the Conference’s public members have written or testified on FACA issues and have litigated a number of cases dealing with the Act.

<sup>215</sup> Since several survey respondents asked that their responses not be publicly promulgated, the report provides only a general overview of survey responses and does not identify individual respondents by name or agency.

A brief summary of the input received at the FACA workshop appears in Appendix D to this report.

In the fifth phase of the research, the Administrative Conference staff conducted detailed telephone interviews with a number of governmental FACA experts, designed to follow up on certain points raised in the workshop and ensure that the information gathered includes the views of all relevant entities. First, several workshop participants identified relatively broad problems, such as delays in committee formation, and Conference staff sought additional detail on such topics. For instance, with respect to the issue of delays in committee formation, Conference staff contacted the individuals who raised that issue at the workshop to gain additional information on the precise reasons for such delays. Second, Conference staff contacted a number of individuals who work in agency program offices or who otherwise deal with the issues associated with convening advisory committees and receiving their advice, so as to ensure that the data included the views of “clients” of advisory committees in addition to the perspectives of those responsible for the day-to-day details of operating such committees and the legal aspects of FACA compliance. Third, Conference staff contacted several individuals specifically recommended by members of the Conference as possessing expertise in the source of delays related to “standing up” committees. Conference staff both posed general questions about such delays and specifically inquired as to whether the delays are caused externally, either by formal FACA requirements or suggestions made by GSA in its charter consultation role, or internally, arising from “gloss” that agencies themselves place on the various FACA requirements or from internal requirements separate from the FACA regime.

Ultimately, the Conference’s data gathering efforts produced an extensive body of information containing input from an array of parties involved in the advisory committee process. Professor O’Reilly’s survey, the membership inquiries, and the workshop gathered input both from CMOs, who deal with the “nuts-and-bolts” of FACA compliance, and federal employees that receive committees’ work product and deal with the legal aspects of FACA compliance, who are closely attuned to any delays or inefficiencies in the process. Of the 51 agencies that host one or more advisory committees, 29 have one or more representatives who serve as government members of the Administrative Conference, and those 29 agencies tend to be those that have the largest numbers of committees. Of those 29 agencies, 22 responded to the membership survey, sent a representative to the workshop, or participated in both. A number of private sector FACA experts and members of the public interested in the work of advisory committees (including several representatives from open government organizations) attended the workshop and provided their views. Finally, the Conference staff has intensively reviewed the FACA literature and interviewed a number of FACA experts. Thus, the data reflect the views both of government agencies that seek outside advice and of private parties with an interest in ensuring that the advice-seeking process functions openly and transparently. The results of this extensive data gathering effort are summarized briefly below and analyzed at greater detail in Appendices B–D at the end of this report.

As a general matter, the data gathered provide context on the primary issues under FACA and potential solutions thereto. In the early stages of the FACA project, the Administrative Conference staff received a number of requests from its government members to conduct a

detailed study of FACA, given the constraints that the statute can pose on agencies' ability to interact with the private sector. At the same time, the Conference staff also received informal suggestions from members of non-profit open government organizations urging the Conference to examine revisions to the Act that would promote increased transparency. The results of the research suggest that both sets of concerns are legitimate. In some instances, FACA is unclear, creating some trepidation on the part of agencies in interacting with outsiders, and in other cases the existing FACA regime creates procedural burdens for agencies that outweigh any countervailing benefit in increased transparency or efficiency. At the same time, under the existing FACA regime, agencies often fail to undertake relatively simple "best practices" that would greatly increase transparency at a relatively minimal cost to the agency. Advances in technology have greatly simplified the process of advertising and involving the public in committee work, and agencies should exploit those technologies to the extent possible.

With respect to burdens created by the existing FACA regime, the informal discussions between Conference staff and government members in the early stages of the project suggested that a major problem in agencies' compliance with FACA is unnecessary delays. Some suggested that convening an advisory committee generally requires at least several months of initial groundwork, and the process can often exceed one year. Thus, in its data gathering, the Conference staff focused closely on identifying the sources of these delays. As a general matter, the data gathered suggest that the most significant delays occur in the early stages of the committee process, while the committee is selecting members and preparing its charter. Though a few respondents to the government member survey suggested that post-formation delays can pose an issue, with some pointing to the requirement of announcing meetings 15 days in advance in the Federal Register as a burden, the data gathered strongly suggest that the most significant delays arise from the committee formation process.

Delays in convening committees could theoretically be caused by either or both of the following issues: (1) in its consultative role in committee chartering, GSA could point to various flaws in proposed charters and/or potential improvements thereto (or could simply require a lengthy amount of time to review the charter), and implementing GSA's suggestions could require a significant time commitment on the part of agencies or (2) agencies could themselves impose relatively extensive procedural burdens in forming committees that could significantly delay the formation process. In order to elucidate which of these concerns comprised the primary source of delay (or whether they both contribute to delay), the Conference staff structured the membership survey to ask separately about delays in chartering and internal processes imposed by agencies, the workshop inquiries also specifically addressed the question of the primary source of delays, and Conference staff interviewed a number of government employees who had pointed to delays as an issue and specifically asked about delays of both types and about which proves more significant.

As a general matter, the data gathered suggest that the latter source of delay is far more significant. Though GSA often does point to various flaws in proposed charters, and though rectifying those issues can take time, the respondents indicated that internally imposed requirements create far more significant delays than do any suggestions tendered by GSA during the committee formation process. Specifically, a number of agency respondents indicated that

their agencies had developed internal plans for achieving optimal balance of committees and that complying with those balance plans could be very time consuming. A number of agency respondents also indicated that the internal review process often consisted of multiple levels and that the formation of committees could become protracted while the proposed committee proceeded through the various levels of review. Section C.2.a will examine recommendations for resolving these issues.

Though much less significant than the concern over delays resulting from committee formation, some agencies expressed some consternation regarding the use of new media.<sup>216</sup> Of course, agencies can likely exploit many of the recent advances in social media with little concern of running afoul of FACA. For instance, an agency's receiving comments on its Facebook page or posing a question to the general public via Twitter or a blog and receiving responses thereto is unlikely to trigger FACA, since the agency has not established any formal committee from which it is seeking group advice but instead is simply receiving individual inputs from an amorphous, unorganized assemblage of individuals.<sup>217</sup> Thus, the various government employees surveyed or polled by Conference staff did not express significant concerns regarding the use of social media. Nevertheless, many agencies expressed concerns regarding the use of email, given the risk that an email exchange amongst committee members could result in a "virtual meeting," as examined in A.3.f. In this light, committees often avoid the use of email or simply advise their committees to exchange emails only amongst small groups, thereby exploiting the subcommittee exception.<sup>218</sup> Of course, this creates procedural burdens for agencies, given the prevalence of email communication in modern culture. In this light, this report presents two sets of recommendations designed to alleviate such concerns: (1) in section C.1.b, it presents a proposal for a "virtual meeting" whereby committee members could exchange preliminary thoughts via electronic means in full compliance with FACA and (2) in section C.1.a, it recommends replacing the subcommittee exception with a more robust preparatory work exception, which would allow private pre-meeting exchanges amongst all committee members, by email or otherwise.

Administrative law scholars and several agency respondents and workshop participants have suggested that FACA's various procedural burdens can be particularly problematic for committees that conduct negotiated rulemaking,<sup>219</sup> a process by which the relevant stakeholders meet to negotiate the text of a proposed rule.<sup>220</sup> In this light, Section C.2.c proposes various

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<sup>216</sup> As Committee on Collaborative Governance members will recall, the initial focus of the project was on the use of new media under FACA. As will be addressed in Part C, this report carries forward the project's initial interest in uses of new media, providing a number of specific recommendations for their use by committees, while also examining the Act more broadly.

<sup>217</sup> See *Physicians & Surgeons*, 997 F.2d at 911 (FACA only applies to assemblages of persons providing advice as a group); *Nader*, 396 F. Supp. at 1234 (FACA only applies to committees with some formal organization).

<sup>218</sup> 41 C.F.R. § 102-3.35.

<sup>219</sup> Jeffrey S. Lubbers, *Achieving Policymaking Consensus: The (Unfortunate) Waning of Negotiated Rulemaking*, 49 S. TEX. L. REV. 987, 1001 (2008) ("A fourth impediment to using [negotiated rulemaking] is the applicability of FACA to the process.").

<sup>220</sup> DAVID M. PRITZKER & DEBORAH S. DALTON, *NEGOTIATED RULEMAKING SOURCEBOOK 1* (1995) ("The essence of the idea is that in certain situations it is possible to bring together representatives of the agency and the various

potential reforms designed to mitigate the procedural burden imposed on negotiated rulemaking committees.

A separate procedural burden that did not necessarily pose a tremendous issue for agencies but that nevertheless created some consternation was Executive Order 12,838's cap on the number of advisory committees. As shown in Section A.1.e, the cap created by the order has not yet been exceeded, and agencies likely are not in any imminent danger of exceeding it, but the data gathering suggested that some agencies were unsure of whether they were likely to exceed the cap and therefore limited their formation of new committees. Section C.2.b addresses this issue by recommending rescission of the cap. The purpose of the cap is to ensure that committees do not proliferate unnecessarily, yet FACA already contains a number of provisions designed to achieve that end, and the marginal value of the cap is therefore minimal.

As a general matter, the data did not suggest that confusion over the scope of FACA's coverage posed a major problem for agencies, though some uncertainty in the Act's applicability to certain interactions does exist. When asked whether FACA posed an impediment to their desired interactions with outsiders or whether uncertainty in the scope of FACA's coverage chilled outside communications, the majority of agency survey respondents indicated that it did not. Nevertheless, a number of survey respondents, workshop participants, and interviewees did indicate that certain clarifications in the scope of FACA's coverage would be beneficial. In particular, a number of respondents strongly suggested that committees require an efficient means of conducting pre-meeting exchanges outside of the purview of FACA. Many committees have accomplished such exchanges by making use of FACA's subcommittee exception,<sup>221</sup> yet Congress has proposed to repeal that exception in H.R. 1144.<sup>222</sup> Furthermore, the subcommittee exception is an imperfect mechanism for permitting agencies to conduct preparations for committee meetings outside of FACA's purview, given that some preparatory activities may require the input of the full committee. In that light, Section C.1.a recommends replacing the subcommittee exception with a more robust, statutorily enshrined exception allowing committees to efficiently prepare for meetings.<sup>223</sup>

Finally, the data gathering suggested that a number of revisions to the existing FACA regime could enhance the transparency of committees. First, the Act contains a number of exceptions, most notably the contractor and non-voting member exception, that are generally seen as improper loopholes to the statute's coverage. Though they certainly allow committees to meet more expeditiously, most respondents, including several from federal agencies, felt that the exceptions created improper statutory work-arounds, allowing agencies to exploit technicalities

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interest groups to negotiate the text of a proposed rule. The negotiators try to reach a consensus through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them.”).

<sup>221</sup> *Id.*

<sup>222</sup> H.R. 1144, 112th Cong. § 102(b) (2011)

<sup>223</sup> Though the regulations contain a preparatory work exception, 41C.F.R. § 102-3.160(a), it is somewhat vague, and Section C.1.a therefore recommends providing a more concrete definition of “preparatory work” that would be of greater use to agencies.

to exempt activities that likely should fall within the purview of FACA. Accordingly, Section C.1.a recommends the repeal of certain exceptions while suggesting the retention of others that are critical to allowing committees to meet efficiently. Second, given its vintage, FACA fails to acknowledge various uses of new media that would greatly enhance transparency without imposing a major procedural burden on agencies, such as posting committee documents, webcasting committee meetings, and soliciting public input on potential committee members as appropriate. Though the report does not recommend that agencies be required to undertake such activities, given the wide variation in agencies' needs and resources, it does commend such practices to agencies as a series of "best practices" in Section C.3.a. Finally, the data gathered and various references in the FACA literature suggest that the existing ethics regime, though generally sound, does feature some inefficiencies, with certain committee members who should be subject to ethics provisions enjoying exemption and other committee members being subject to such provisions when they likely should be exempt. A sound ethics regime is critical to ensuring objectivity on committees, and Section C.3.b therefore recommends certain revisions that would ensure that the ethics system covers the appropriate individuals without deterring committee service by casting too wide of a net.

### Part C: Recommendations

In its initial consideration of Professor O'Reilly's report, the Committee on Collaborative Governance held two meetings to consider both that report and a series of draft recommendations prepared by Conference staff.<sup>224</sup> As a general matter, the initial recommendations focused closely on the use of new media, recommending that agencies explore potential uses of new media and that GSA provide guidance intended to elucidate permissible uses thereof. This report carries forward the spirit of those recommendations. It continues to endorse agencies' exploring potential uses of new media and GSA's providing training on permissible uses of new media, a process that GSA has already begun to undertake.<sup>225</sup> Rather than generally recommending that agencies explore the use of new media, however, the report identifies a number of new media uses that agencies can and should exploit, such as hosting asynchronous virtual meetings, posting committee documents online, and posting webcasts of committee meetings. Of course, the report does not intend these recommendations to serve as an exhaustive list, and individual agencies and GSA should, as a general matter, continue to exploit media advances and integrate those technologies into their advisory committee programs as appropriate.

The report also looks much more broadly at FACA and seeks to identify changes in the existing regime, whether or not related to new media, that will allow committees to operate effectively without thwarting the policies of efficiency and transparency that the Act was

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<sup>224</sup> Both Professor O'Reilly's report and the initial recommendations are available on the webpage for the FACA project, available at <http://www.acus.gov/research/the-conference-current-projects/faca-in-the-21st-century/>.

<sup>225</sup> For instance, in a FACA conference it hosted on September 7–8, 2011, GSA provided extensive information on how agencies can exploit advances in social media while maintaining compliance with FACA. The materials from the conference are available at <http://www.facatrainingconference.com/>, under the "Conference Tracks" tab.

designed to serve. Specifically, section C.1 examines certain clarifications in the Act designed to eliminate unnecessary uncertainty about the scope of FACA's coverage and the associated risk that agency usage of advisory committees will be chilled.<sup>226</sup> Section C.2 considers various adjustments to the existing FACA regime designed to remove unnecessary impediments to committees' meeting efficiently, focusing particularly on sources of delay in the use of committees. Finally, section C.3 then examines various revisions to the existing regime and certain "best practices" designed to promote transparency without imposing an onerous procedural burden on agencies.

## 1. Clarifying the Scope of FACA

### a. *FACA Exceptions*

As explored in Section 2 of the report, federal courts and agencies have interpreted FACA such that it does not apply to certain interactions between the government and outside groups. Under these so-called "exceptions," FACA does not apply to (a) subcommittees that report to a parent committee ("subcommittee exception"); (b) interactions in which the government seeks advice from outside experts individually ("individual advice exception"); (c) groups convened by government contractors, even if done at the behest of a federal agency ("contractor exception"); and (d) groups in which the private participants are not able to vote on committee determinations ("non-voting member exception").

In H.R. 1144, Congress proposes to eliminate the subcommittee, contractor, and non-voting member exceptions.<sup>227</sup> Notably, Congress has not attempted to eliminate the individual advice exception. This report agrees that the contractor and non-voting member exceptions should be eliminated and that the individual advice exception should be retained. With respect to the subcommittee exception, this report favors elimination thereof but argues that it should be replaced with a more robust, statutorily sanctioned exception for "preparatory work" that more effectively allows groups of committee members to prepare for committee meetings without encountering excessive procedural burdens under FACA.

The contractor exception is premised on the notion that an agency can almost never exert sufficient control over a private entity to "utilize" that group within the meaning of FACA.<sup>228</sup> Though the cases establishing the contractor exception adopt a reasonable interpretation of the word "utilize," particularly given the Supreme Court's narrow construction of that term in *Public*

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<sup>226</sup> Several of the recommendations in section C.1 are also relevant to promoting other policies besides clarifying the scope of the Act. For instance, rescinding the contractor and non-voting member exceptions, as recommended in C.1.a, would foster transparency, and allowing asynchronous virtual meetings, as recommended in C.1.b, would alleviate procedural burdens caused by agencies' reluctance to allow committee members to circulate emails to the entire group.

<sup>227</sup> H.R. 1144, 112th Cong. § 102 (2011).

<sup>228</sup> See *Byrd*, 174 F.3d at 246; *Food Chem. News*, 900 F.2d at 333.



*Citizen*,<sup>229</sup> as a matter of policy, the exemption of committees convened by contractors has arguably created an inappropriate loophole in FACA’s coverage. Indeed, an agency could theoretically outsource the committee formation process while still exercising a relatively high degree of control over the contractor’s operation of the committee, which seems like an improper end run around the statute.<sup>230</sup> In ACUS’s data gathering efforts, several survey<sup>231</sup> and workshop participants criticized the contractor exception whereas very few defended it, and those who did asserted only that FACA exceptions generally were beneficial to agencies rather than offering a specific defense of exempting committees convened by contractors. No agency specifically asserted that the contractor exception was critical to its ability to efficiently obtain outside advice. The contractor exception has also been heavily disparaged in proposals for FACA reform.<sup>232</sup>

Of course, the contractor exception can expedite agencies’ efforts to obtain advice by exempting a type of activity from the purview of FACA. For instance, an agency could likely form a committee much more expeditiously by working through a contractor than by establishing the committee itself insofar as the process would not be subject to the formal chartering requirements. Similarly, contractor-convened committees can meet more expeditiously insofar as they are exempt from the notice and open meeting requirements. Indeed, as a general matter, privately organized committees likely should not be subject to FACA unless the government exerts a fairly high degree of control in their formation,<sup>233</sup> given the difficulty that would arise from requiring a private organization to comply with FACA’s various procedural requirements, such as chartering and conducting open meetings. Nevertheless, the data gathered suggest that the contractor exception creates too grave a danger that committees will circumvent the statute by the simple expedient of instructing a contractor to form a committee rather than doing so directly. Though any exchange in which the agency merely uses advice of an independently formed private group should continue to fall below the purview of FACA, in instances where the agency actually directs a contractor to form a committee, it likely has exerted sufficient control over the committee that the contractor should conduct meetings in full compliance with the Act, notwithstanding the holdings of *Byrd* and *Food Chemical News*. In this light, the report recommends that Congress eliminate the contractor exception.

The non-voting member exception similarly arises from a relatively formalistic interpretation of FACA’s requirements, holding that private sector committee members do not

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<sup>229</sup> 491 U.S. at 462.

<sup>230</sup> See *Byrd*, 174 F.3d at 246–47 (holding that a government contractor convened committee did not implicate FACA even where the agency provided the contractor convening the committee with a “task order” defining the objective, method, and scope of studies to be performed; gave the contractor a list of recommended committee members; and reserved the power to approve the contractor’s selection of committee members).

<sup>231</sup> Unless otherwise noted, “survey” hereafter refers to the survey of the Conference’s government members and the general FACA inquiry sent to public members rather than the survey of CMOs conducted by Professor O’Reilly.

<sup>232</sup> See, e.g., *Hearing on the Federal Advisory Committee Act (FACA) of 2008*, 110th Cong. 56–57 (2008) (testimony of Professor Sidney A. Shapiro) (decrying the “[c]ontractor [l]oophole”); Bipartisan Policy Center, *supra* note 108, at 25 (“Federal agencies should not be able to circumvent the [requirements of FACA] by contracting out the appointment or operation of advisory committees.”).

<sup>233</sup> *Public Citizen*, 491 U.S. at 462; *Byrd*, 174 F.3d at 246; *Food Chem. News*, 900 F.2d at 333.

provide “advice or recommendations” to an agency unless if they have the right to vote on or veto committee proposals.<sup>234</sup> One can easily envision how a committee might use this exception to evade FACA’s requirements: an agency could simply structure a committee to include only government employees as voting members but could still receive extensive advice from private sector participants without triggering FACA.<sup>235</sup> Like the contractor exception, the non-voting member exception was criticized by several workshop participants and was only defended indirectly insofar as some asserted generally that the exceptions were collectively useful. It also has been criticized in FACA reform proposals.<sup>236</sup>

Of course, like the contractor exception, the non-voting member exception does create a relatively efficient means for seeking outside advice, outside of the confines of FACA. To the extent that agencies must structure meetings to exploit the exception in order to efficiently obtain outside advice, a strong argument could be made for retention of the exception. The data gathered, however, tends to suggest that agencies do not extensively use the non-voting member exception. Indeed, given the tension between the D.C. Circuit’s *Cheney* decision and its earlier holding in *Physicians & Surgeons*, wherein the court focused not on whether committee members exercised a vote or veto (and specifically asserted that a committee need not achieve “consensus” to trigger FACA) but rather on whether group interaction existed,<sup>237</sup> some agencies indicated that they continue to treat committees involving non-voting members as being subject to the Act, given the ambiguity in the case law. Furthermore, no survey respondent, workshop participant, or agency interviewee indicated that the non-voting member exception was critical to agencies’ efficiently obtaining outside advice. In this light, the report recommends that Congress eliminate the non-voting member exception.

The individual advice exception, like the other two analyzed thus far, similarly arises from judicial interpretation of the statute: assemblages of persons from whom advice is received individually are not “groups” under the purview of FACA.<sup>238</sup> Unlike the others, however, the exception has not been subject to widespread criticism. Congress has not proposed to eliminate the exception in any of the recent FACA reform bills. It has generally not been criticized in the literature. Several survey respondents and workshop participants from government agencies indicated that the exception was critical to their efficiently obtaining outside advice. A handful of workshop participants indicated that agencies should document contacts with outsiders, but

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<sup>234</sup> *Cheney*, 406 F.3d at 728 (“[H]aving neither a vote nor a veto over the advice the committee renders to the President, [private sector committee participants are] no more . . . member[s] of the committee than the aides who accompany Congressmen or cabinet officers to committee meetings.”).

<sup>235</sup> Indeed, the committee’s vote could become a mere formality insofar as the agency will ultimately make the determination of how to utilize the committee’s work product. Thus, the committee could document all advice received from participants, public and private, and then hold a pro forma vote on the formal recommendation that the committee would issue. The agency could then ignore the formal recommendation and simply focus on the underlying advice.

<sup>236</sup> See, e.g., *Hearing on the Federal Advisory Committee Act (FACA) of 2008*, 110th Cong. 58–59 (2008) (testimony of Professor Sidney A. Shapiro) (recommending elimination of the “[n]onvoting [p]articipant [l]oophole”)

<sup>237</sup> 997 F.2d at 913.

<sup>238</sup> *Am. Physicians & Surgeons*, 997 F.2d at 913.

they did not argue that such exchanges should be subject to the full rigors of FACA.<sup>239</sup> Of course, subjecting such individual exchanges to FACA would promote transparency, at least to the extent it did not deter the government from meeting with outside parties entirely, but extending the Act to such activities would be extremely difficult to implement in practice. For instance, an agency likely would be unable to post requests for comments on its website or to hold a town-hall meeting seeking individually stated views from the public attendees without preparing a charter for the group from whom advice is sought and announcing all meetings in advance, a burden that would likely prove prohibitive to engaging in such practices. Given the impracticality of subjecting such exchanges to FACA, the strong support voiced in favor of the exception, and the lack of any significant criticism thereof, this report recommends that Congress retain the individual advice exception.

The final exception, that for meetings of subcommittees, has proven considerably more controversial, with strong arguments raised both for its retention and its elimination. H.R. 1144 would eliminate the exception outright.<sup>240</sup> FACA experts have criticized the subcommittee exception, arguing that, so long as it does not “rubber stamp” the subcommittee’s work, the parent committee can move much of the important work to the subcommittee level and thereby evade FACA’s transparency requirements.<sup>241</sup> Several workshop participants echoed this sentiment, asserting that the subcommittee exception creates the potential for abuse and should be eliminated. On the other hand, some workshop participants and survey respondents, all of whom hailed from federal agencies, asserted that the subcommittee exception is critical to their efficient use of advisory committees. Thus, the available evidence poses a conundrum: outright elimination of the exception would render it difficult for committees to meet effectively, but retention of the exception preserves a relatively simple means of circumventing FACA.

To resolve the dilemma, one must delve more deeply into the purported justifications for the exception. As a general matter, workshop participants and survey respondents who defended the exception averred that it was critical to prepare for committee meetings. Specifically, they emphasized that they frequently used working groups containing selected committee members to prepare draft documents, decide on topics for committee meetings, and plan future committee business, all preparatory activities. Though the implementing regulations do contain an exception for “[p]reparatory work,”<sup>242</sup> it is somewhat vague,<sup>243</sup> and committees therefore use

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<sup>239</sup> This report takes no position either in favor of or against the documentation of ex parte contacts between agencies and outside individuals, which is an issue beyond the scope of the current project.

<sup>240</sup> H.R. 1144, 112th Cong. § 102(b) (2011).

<sup>241</sup> *Hearing on the Federal Advisory Committee Act (FACA) of 2008*, 110th Cong. 59 (2008) (testimony of Professor Sidney A. Shapiro).

<sup>242</sup> 41 C.F.R. § 102.3-160(a).

<sup>243</sup> Specifically, the preparatory work exception in the regulations refers only to two activities as being exempted: (a) conducting pre-meeting research and (b) drafting position papers. 41 C.F.R. § 102-3.160(a). Though these activities are important aspects of committee preparation, they do not exhaust the universe of activities for which a preparatory work exception is appropriate. For instance, the regulations do not make clear whether committee member’s deciding on potential topics of discussion at a meeting are exempt. As such, the preparatory work exception proposed in the report would be defined much more broadly, including all activities that do not involve

subcommittees as a “safe harbor” to ensure that they are operating below the purview of FACA when preparing for meetings.<sup>244</sup>

In this light, the subcommittee exception would largely be unnecessary if agencies could take advantage of a relatively clear “preparatory work” exception that would permit them to conduct the initial work required to prepare for full meetings outside of the full strictures of FACA. Under the proposed exception, any exchange amongst committee members that does not involve formal debate or voting upon final advice or recommendations that will be provided to an agency should fall within a “preparatory work” exception. The proposed preparatory work exception would include most activities that formerly qualified for the subcommittee exception, such as using working groups to draft papers or decide on topics for discussion at a meeting. Further, the preparatory work exception would allow such preliminary activities to be conducted privately even if the entire committee engaged therein, which would be more efficient in cases wherein the entire group’s input is useful. At the same time, replacing the subcommittee exception with a preparatory work exception would eliminate the risk that committees would delegate almost all major tasks to subcommittees: any activity involving formal debate or vote on a committee’s recommendation would be subject to FACA, regardless of whether it is undertaken by a subcommittee or the full committee. Section 10(b) of FACA would apply to such exchanges, requiring that all documents considered by the full group be made publicly available on request, but the notice and open meeting requirements would not apply.<sup>245</sup> Committees could, of course, choose to make such preparatory deliberations open to the public,<sup>246</sup> but they would not be required to do so.

Thus, this report recommends that Congress eliminate the subcommittee exception, as contemplated in H.R. 1144, but that it couple that change with the creation of a new, statutorily enshrined “preparatory work” exception. The exception should explicitly establish that exchanges that do not involve formal debate or voting on committee advice or recommendations are not subject to the notice or open meeting requirements of the Act, though associated documents (e.g., intermediate drafts of reports) must be made publicly available on request. Congress might include an enumerated, non-exhaustive list of activities that qualify as preparatory work (e.g., drafting documents for consideration at meetings, deciding on meeting topics, considering future projects for the committee) so as to ensure that committees are not chilled from conducting pre-meeting exchanges out of uncertainty concerning whether they trigger FACA. Conversely, Congress should ensure that the exception is defined sufficiently

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formal consideration of or voting on committee advice. The exception would also ideally contain a list of activities that qualify as preparatory work.

<sup>244</sup> Furthermore, the preparatory work exception is contained only in the regulations, which are not entitled to *Chevron* deference, and receives no mention in the statute. *Public Citizen*, 491 U.S. at 463 n.12; *Am. Physicians & Surgeons*, 997 F.2d at 913. Of course, the subcommittee exception also is contained only in the regulations, but it is clearer in scope than the preparatory work exception.

<sup>245</sup> 5 U.S.C. §§ 10(a)–(b); 41 C.F.R. §§ 102-3.140, 102-3.150, 102-3.170.

<sup>246</sup> One means of opening such initial exchanges to the public would be by conducting the preliminary discussions on an online web forum to which the public would have access. This proposal is discussed at greater length in Section C.1.b.

narrowly that any exchange involving debate or voting on the advice or recommendations that the committee ultimately provides is subject to the full set of FACA requirements.

*Recommendation 1:* Congress should eliminate the contractor and non-voting member exceptions. It should leave the individual advice exception intact. It should eliminate the subcommittee exception but should replace it with a statutory exception for “preparatory work” of committees, which should be defined as precisely as possible to ensure that committees make effective use of the exception.

***b. Asynchronous Virtual Meetings of Advisory Committees***

FACA’s implementing regulations contain a clear acknowledgement of the propriety of agencies’ exploiting “new media” to conduct advisory committee meetings, stating that “[a]ny advisory committee meeting conducted in whole or part by a teleconference, videoconference, the Internet, or other electronic medium meets the requirements of this subpart.”<sup>247</sup> Pursuant to this guidance, federal advisory committees have already conducted meetings via teleconference or videoconference, allowing committee members to interact from remote locations and members of the public to listen to the conversation by calling into the meeting or viewing it via streaming video over the Internet. Advisory committees also frequently hold in-person meetings and webcast the event so that a larger number of citizens can view the committees’ deliberations. To the author’s knowledge, however, advisory committees have never conducted *asynchronous* virtual meetings in which committee members discuss a topic over the course of weeks or months on a publicly available online web forum. Despite its novelty, such a method of hosting committee meetings is lawful under FACA and its implementing regulations,<sup>248</sup> and agencies should consider using this method for committee meetings to the extent it is beneficial to do so.

Though the framers of FACA clearly did not contemplate the occurrence of asynchronous virtual committee meetings when FACA was passed, such meetings comply with all of the requirements of the statute and implementing regulations. First, such meetings would comply with all of the relevant requirements for providing advance notice of committee meetings. The committee would issue a Federal Register notice 15 days in advance stating the time period for the meeting (which could be as long as several months) and the web address at which it will occur (i.e., the “time, date, [and] place . . . of the meeting”<sup>249</sup>; providing a summary of the meeting agenda and a statement of whether the meeting will be open or closed<sup>250</sup>; and giving the

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<sup>247</sup> 41 C.F.R. § 102.3.140(e).

<sup>248</sup> This report provides a brief analysis of the provisions of FACA and its implementing regulations that would be implicated by an agency’s hosting an asynchronous virtual committee meeting via web forum. The Administrative Conference has also prepared a more detailed document containing an in-depth analysis of those requirements as well as the requirements of other statutes and potential policy concerns associated with such meetings. See generally Reeve T. Bull, *Ongoing Web Forum Meetings of Federal Advisory Committees: A Proposed Use of “New Media” under the Federal Advisory Committee Act* (Mar. 17, 2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/03/FACA-Web-Forum-Memo-3-17-2011- 2 .pdf>.

<sup>249</sup> 41 C.F.R. § 102-3.150(a)(2).

<sup>250</sup> *Id.* §§ 102-3.150(a)(3)–(4).

name and contact information for the committee's DFO.<sup>251</sup> The DFO, pursuant to his or her statutory duties, would call or approve each meeting and its associated agenda<sup>252</sup> and would moderate the forum by approving all submissions prior to their posting, thereby fulfilling the requirement that the DFO "[a]ttend the meetings" of the committee.<sup>253</sup> The virtual meetings would be "open to the public" insofar as any interested citizen could merely log on to the committee's web site and view all postings.<sup>254</sup> Members of the public also could submit comments to the DFO for posting, thereby meeting the requirement that citizens may "file a written statement."<sup>255</sup> All committee documents would be made available in a "reading room" on the committee website,<sup>256</sup> and the committee would prepare and post minutes summarizing the forum discussions at the conclusion of the process.<sup>257</sup>

The advantages of holding a committee meeting via a virtual web forum are numerous. First, such a forum holds the potential of vastly improving the transparency of advisory committees by allowing a substantially increased number of citizens to view and contribute to a committee's work.<sup>258</sup> At traditional committee meetings, public access is effectively limited to those who live in relatively close proximity to the forum at which the meeting occurs. In a virtual meeting, the pool of potential public participants includes all citizens with Internet access.<sup>259</sup> Second, the use of virtual meetings could create considerable cost savings for agencies, eliminating the travel costs required to convene the committee members in a single forum.<sup>260</sup> Third, by facilitating the process of holding long-term discussions on specific topics, virtual web forum meetings hold the potential to vastly increase the amount of committee work to which the public has access. Currently, committees often make use of the "preparatory work" exception<sup>261</sup> or perform research leading up to a committee meeting at the subcommittee level<sup>262</sup>

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<sup>251</sup> *Id.* § 102-3.150(a)(5).

<sup>252</sup> 5 U.S.C. App. 2 § 10(f); 41 C.F.R. §§ 102-3.120(a)–(b).

<sup>253</sup> 5 U.S.C. App. 2 § 10(e); 41 C.F.R. § 102-3.120(c).

<sup>254</sup> 5 U.S.C. App. 2 § 10(a)(1).

<sup>255</sup> 5 U.S.C. App. 2 § 10(a)(3); 41 C.F.R. § 102-3.140(c). The implementing regulations also provide that, "if the agency's guidelines permit," members of the public should be permitted to "address the advisory committee." 41 C.F.R. § 102-3.140(d). Since the entire forum will occur in a written medium, the ability to "address the advisory committee" collapses into the ability to "file a written statement." *Id.* §§ 102-3.140(c)–(d).

<sup>256</sup> 5 U.S.C. App. 2 § 10(b); 41 C.F.R. § 102-3.170.

<sup>257</sup> 5 U.S.C. App. 2 § 10(c); 41 C.F.R. § 102-3.165.

<sup>258</sup> *See Bull, supra* note 248, at 6.

<sup>259</sup> *Id.* Of course, as a result of the so-called "digital divide," not all members of the public will be able to participate. Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 CARDOZO ARTS & ENT. L.J. 1, 2 (2002). Nonetheless, citizens without an in-home internet connection can often obtain web access at a local library, and agencies could presumably provide physical print-outs of the forum discussions for citizens who are unfamiliar with using computers. *Bull, supra* note 248, at 6.

<sup>260</sup> Of course, agencies would likely continue to make use of traditional, in-person meetings. Nevertheless, in circumstances wherein the agency wishes to meet quickly or inexpensively or where the need for an in-person meeting is otherwise diminished, agencies could greatly benefit from the option of hosting virtual meetings via web forum.

<sup>261</sup> 41 C.F.R. § 102-3.160(a).

<sup>262</sup> *Id.* § 102-3.35.

to avoid the need for convening a full committee meeting when conducting initial background discussions. With a virtual meeting, the committee could conduct much of this preparatory work in full view of the public, since any thought a committee member wished to express, however minor, could easily be posted to the forum. Thus, virtual meetings promise to increase transparency of committee meetings, to expand public participation, and to improve the efficiency of the meeting process.

Several workshop participants and survey respondents expressed interest in holding asynchronous web meetings. Though they did not feel committees should be required to host such meetings and indicated that they would continue to hold in-person meetings and explore the use of technology to hold other types of “virtual meetings,” such as webcasting traditional meetings, many voiced support for the idea, and none suggested that such meetings would be unlawful or should be prohibited for reasons of policy.

*Recommendation 2:* GSA should amend section 102-3.140(e) of the implementing regulations to clarify that, in addition to hosting teleconferenced or webconferenced meetings, agencies also may host asynchronous virtual meetings that can occur over the course of days, weeks, or months, on a moderated web forum. Agencies with advisory committees should consider holding certain committee meetings via such online forums as appropriate.

## **2. Streamlining FACA’s Procedural Requirements**

### ***a. Committee Formation Process***

As explored in Section 3, agencies must take a number of steps prior to forming an advisory committee. They must ensure that they select a balanced slate of committee members,<sup>263</sup> prepare a committee charter,<sup>264</sup> and consult with GSA to discuss the need for the proposed committee and obtained feedback on the committee’s charter.<sup>265</sup> In addition to the steps formally required by FACA and its implementing regulations, many agencies have implemented additional internal processes related to committee formation. For instance, some agencies have highly detailed committee balance plans that require that the membership of a proposed committee is balanced on a number of different dimensions. In light of the various procedures associated with “standing up” an advisory committee, the committee formation process can often take several months.

In order to identify potential mechanisms for streamlining this process, the Administrative Conference staff asked survey respondents, workshop participants, and a number of federal agency interviewees to discuss potential sources of delay in committee formation. The Conference staff also specifically asked whether the delays are primarily external to agencies, being caused either by FACA’s procedural requirements or by suggestions made by GSA during the charter review process (or delays in GSA’s charter review), or internal to agencies

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<sup>263</sup> 5 U.S.C. App. 2 §§ 5(b)(2), (c); 41 C.F.R. § 102-3.75.

<sup>264</sup> 5 U.S.C. App. 2 § 9(c); 41 C.F.R. § 102-3.75.

<sup>265</sup> 41 C.F.R. § 102-3.60.

themselves, being caused by “gloss” agencies place on the statutory requirements. As a general matter, the responses gathered tend to support the latter conclusion. Though GSA often points out issues in proposed committee charters, and though agencies generally feel obliged to resolve these issues notwithstanding the fact that GSA merely provides advice and does not formally approve such charters, the data suggests that the amount of time required to resolve these issues is relatively minimal in comparison to the amount of time required to comply with various self-imposed procedural burdens that certain agencies implement. First, many respondents suggested that the member selection process can be excessively time consuming due to various internal procedural requirements. In particular, federal agency respondents pointed to steps designed to ensure balanced membership as a source of delay, given that finding potential members who satisfy all of the various dimensions on which the agency wishes to achieve balance can be time consuming. Second, several respondents noted that internal approval of committee formation can become prolonged due to the requirement for multiple levels of review. Finally, some respondents asserted that delays often arise from agency resource constraints, suggesting that committee formation is often not a high priority and that much of the delay results from failure of the relevant parties to complete the required steps in a timely fashion. For instance, one agency suggested that the committee formation process generally takes 8–9 months but the agency was able to form a committee in 3 weeks when it placed a very high priority on the process.

Of course, experience will vary from agency to agency, and this report therefore does not attempt to recommend any “one-size-fits-all” solution to the delays in committee formation. Rather, it attempts to provide suggestions for streamlining committee formation while recognizing that many of the internal processes agencies have adopted can serve useful purposes. First, agencies should assess every proposed advisory committee in light of its mission and tailor the formation process accordingly. For instance, a committee dealing with water rationing in the Southwest need not include members from locales outside of the affected area in the name of “geographic balance.” A committee dealing with poverty relief programs should be socioeconomically balanced, but a scientific peer review panel likely need not be balanced on that dimension.

At the same time, agency balance plans can serve the important policy of ensuring that committee members come from a variety of different backgrounds, regardless of whether FACA formally requires balance on those dimensions. In this light, the report recommends that agencies consider the following when forming advisory committees: factors relevant to the committee’s work (e.g., socioeconomic diversity on a poverty relief panel), factors that are desirable but are not directly relevant to the committee’s work, and the time and resources available to the committee. The agency should always strive to achieve balance on the relevant factors; on the other factors, the agency may also attempt to achieve balance but should consider whether or not doing so is possible given its time and resource constraints. On relatively large committees or those whose work is not particularly time sensitive, achieving an ideal membership balance may be possible; on smaller committees or those under tight time constraints, such an ideal balance may not be possible. In any event, courts review committee



balance with a very high level of deference (if it is even reviewable at all),<sup>266</sup> and agencies therefore need not expend excessive effort in ensuring that committee membership is perfectly balanced in every instance.

Agencies should also consider centralizing the approval process for committee formation in a single office (such as the General Counsel's Office) or individual (such as the Committee Management Officer) granted final authority to approve committee formation on the agency's behalf.<sup>267</sup> When agency representatives who indicated that their agencies utilize multiple levels of approval were asked about the reason for doing so, the primary explanations were that committees approved by the top brass tend to enjoy greater prestige and that requiring multiple levels of review increases the likelihood that any potential problems will be caught and that the committee meets the agency's policy aims. Such concerns are undoubtedly legitimate, but the same ends could likely be accomplished by centralizing the committee review process in a single office (such as the General Counsel's office) or official (such as the CMO) rather than instituting a multiple level approval chain. Specifically, the agency could employ a "hub and spokes" model, wherein each individual office reports its concerns to a central person or group, rather than a multi-link chain terminating at the top of the agency. The agency head could periodically convey his or her desired policies in the use of advisory committees to the central hub, which would be responsible for ensuring that those policies were implemented. The central office would also strive to meet the concerns of other agency offices with jurisdiction over committee formation. Though the proposed model could still result in delays, given that all affected entities may not expeditiously report to the central office, it would likely expedite the process somewhat by eliminating the need for one level to sign off before proceeding to the next level.

As a related matter, federal agency survey respondents and workshop participants also expressed some frustration with the process of convening committees that are required by statute. Specifically, to the extent that Congress establishes a committee but fails to articulate its mission in any detail, agencies often struggle with determining the appropriate balance of committee members, with setting forth the committee's purpose and expected duration in its charter, and with determining when the committee has completed its mission. Thus, when adopting legislation to create an advisory committee, Congress should provide as much detail as possible to ensure that the committee will function efficiently. Specifically, Congress should define the committee's mission and objectives, set forth an approximate duration for the committee's work, and provide an estimated cost for the committee's work if it intends the committee to operate within a specific budget.<sup>268</sup> To the extent that Congress intends a particular balance amongst the

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<sup>266</sup> See, e.g., *Ctr. for Policy Analysis*, 540 F.3d at 945–46 (finding a claim that an agency violated the balance requirements nonjusticiable); *Cargill*, 173 F.3d at 334 (applying deference to the review of the balance requirement).

<sup>267</sup> For committees formed at the behest of individual agencies, the agency head must personally make the determination of a need for a committee, 5 U.S.C. App. 2 § 9(a)(2), but he or she need not personally approve the charter, the slate of members chosen for committee service, or other aspects of committee formation. These mechanical aspects of the process could be delegated to a lower level office or official.

<sup>268</sup> See 5 U.S.C. App. 2 § 9(c) (setting forth these requirements, amongst others, as the elements of the committee charter).

committee members, it should set forth that desired balance in the authorizing legislation.<sup>269</sup> Congress should not generally exempt committees it creates from the two-year charter renewal process<sup>270</sup> unless it explicitly sets forth the committee's mission and provides an estimated timeline for the committee's work, such that statutory committees do not unnecessarily languish once they have achieved their purposes.

*Recommendation 3:* Agencies should assess each committee that they propose to establish to determine precisely what factors should influence committee membership and strive to achieve balance on those factors in all instances. Agencies should also consider any other balance factors they consider desirable as well as the resources they have available and attempt to achieve balance on those factors as appropriate under the circumstances. In addition, agencies should centralize the committee formation process in an individual or office and should strive to eliminate any unnecessary levels of review.

*Recommendation 4:* Congress should, to the extent possible, set forth the mission, estimated duration, budget, and preferred membership balance for all statutorily established committees. It is particularly critical that Congress do so for committees that it exempts from the two year renewal process established by FACA.

***b. The Advisory Committee Cap***

As explored above, shortly after taking office, President Clinton issued Executive Order 12,838, which, amongst other things, required that agencies reduce the total number of discretionary advisory committees they hosted by one-third.<sup>271</sup> The following year, the Office of Management and Budget issued Circular A-135, which essentially froze the number of discretionary advisory committees agencies could host at the level set by the executive order, i.e., two-thirds the total number of discretionary committees in existence prior to the issuance of the executive order.<sup>272</sup> GSA currently administers this cap by maintaining an overall "budget" of approximately 530 discretionary committees that can be established by all federal agencies.<sup>273</sup> At present, federal agencies collectively host 465 discretionary advisory committees.<sup>274</sup> Agencies are not individually allocated a specific number of discretionary advisory committees to host; so long as the collective total falls below the cap, no agency will be prohibited from chartering a new committee.

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<sup>269</sup> See *id.* §§ 5(b)(2); 41 C.F.R. § 102-3.75 (FACA balance requirements).

<sup>270</sup> 5 U.S.C. App. 2 § 14(a)(1)(B) (statutory committees terminate after two years unless authorizing legislation provides otherwise); 41 C.F.R. § 102-3.55(a)(1).

<sup>271</sup> Exec. Order No. 12,838, § 3, 58 Fed. Reg. 8,207 (Feb. 10, 1993).

<sup>272</sup> Office of Management & Budget, Circular No. A-135, 59 Fed. Reg. 53,856, 53,857 (Oct. 26, 1994) ("The Office of Management and Budget shall . . . set advisory committee ceilings for each agency within the government-wide advisory committee reduction goal established by the Executive order.").

<sup>273</sup> *GSA's Actions to Implement the Federal Advisory Committee Act*, 105th Cong. (1997) (statement of G. Martin Wagner, Associate Administrator, Office of Governmentwide Policy, General Services Administration).

<sup>274</sup> U.S. General Services Administration, Types of Federal Advisory Committees, <http://www.gsa.gov/portal/content/248961> (last visited on August 23, 2011) (listing 266 agency authorized committees and 199 statutorily authorized committees for a total of 465 discretionary committees).

Notwithstanding the fact that federal agencies have not exceeded the overall cap on discretionary advisory committees and that the number of such committees has remained relatively constant over the years, agencies may be somewhat reluctant to form additional committees, even if such committees would be beneficial, for fear of contributing to an increase in aggregate committee usage that would ultimately trigger the cap. Several survey respondents and workshop participants expressed support for repealing the cap, and none defended it.<sup>275</sup> Some agency respondents noted that agency officials considering formation of a committee are not always aware that they are not in imminent danger of exceeding the cap and therefore attempt to minimize the number of committees they form. Furthermore, the cap reflects an inappropriate bias against advisory committees, implying that any committees beyond an arbitrary number are necessarily inefficient. Several workshop participants asserted that, in fact, advisory committees are an exceptional bargain for the government, leading to advice worth far more than the relatively minimal expenses associated with committee meetings. Though ensuring that committees do not proliferate unnecessarily is an appropriate goal of the statute,<sup>276</sup> and though the cap absolutely ensures that committees will not proliferate beyond a set level, the Act already contains elaborate provisions designed to weed out committees that have outlived their useful lifespan, including the re-chartering requirement and GSA's annual review of existing committees.<sup>277</sup> Thus, the marginal value of imposing an arbitrary cap on the total number of discretionary committees is small to nonexistent.

*Recommendation 5:* The President and Office of Management and Budget should rescind Executive Order 12,838 and Circular A-135, respectively, thereby eliminating any cap on the number of advisory committees.

*c. Special Considerations for Negotiated Rulemaking Committees*

During the course of the Conference's data gathering effort, a number of individuals, including both government employees and members of the private sector, suggested that the Conference may wish to consider relaxing FACA's applicability to committees convened to conduct negotiated rulemaking or even exempting such committees from FACA's requirements entirely. Negotiated Rulemaking is a process whereby the government convenes the relevant stakeholders for purposes of negotiating the text of a proposed rule, prior to formally initiating the rulemaking process.<sup>278</sup> The Administrative Conference proposed the concept of negotiated

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<sup>275</sup> See also Coglianesse, *supra* note 19, at 954 ("At a minimum, the new administration should eliminate the formal and informal restrictions on the allowable number of discretionary advisory committees that have followed from Executive Order 12,838.").

<sup>276</sup> 5 U.S.C. App. 2 § 2(b)(2) ("[N]ew advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary.").

<sup>277</sup> *Id.* §§ 7(b), 9(c); 41 C.F.R. §§ 102-3.55-85.

<sup>278</sup> Pritzker & Dalton, *supra* note 220, at 1 ("The essence of the idea is that in certain situations it is possible to bring together representatives of the agency and the various interest groups to negotiate the text of a proposed rule. The negotiators try to reach a consensus through a process of evaluating their own priorities and making tradeoffs to achieve an acceptable outcome on the issues of greatest importance to them.").

rulemaking in the early 1980s,<sup>279</sup> and Congress explicitly authorized the process in the Negotiated Rulemaking Act of 1990.<sup>280</sup> Negotiated rulemaking committees are generally subject to the full rigors of FACA, absent a specific exemption.<sup>281</sup> In some specific instances, Congress has required use of negotiated rulemaking by an agency and has given a blanket exclusion from FACA.<sup>282</sup> More generally, the negotiated Rulemaking Act provides that in establishing and administering a negotiated rulemaking committee under the Act, “the agency will comply with the Federal Advisory Committee Act . . . except as otherwise provided in [the Negotiated Rulemaking Act].”<sup>283</sup> The requirements of FACA that are modified by the Negotiated Rulemaking Act relate to who chairs the meetings, the extent to which committee members’ expenses may be paid, provisions for terminating the committee, and an additional required public notice announcing the agency’s intent to establish the committee and inviting persons who believe their interests are not adequately represented to apply for membership.<sup>284</sup> An additional exclusion from FACA exists under the Unfunded Mandates Reform Act of 1995, in the special situation where all members are representatives of state, local tribal and federal entities.<sup>285</sup>

The survey respondents, workshop participants, and agency interviewees who identified issues related to negotiated rulemaking suggested that the Conference might consider whether negotiated rulemaking committees should be subject to FACA or, alternatively, whether FACA should apply differently to negotiated rulemaking committees. Based on these research findings and the relevant literature, this report recommends that, at the very least, special considerations should apply to negotiated rulemaking committees, and such committees should perhaps be exempt from FACA entirely. Unfortunately, Conference staff was not able to contact all relevant stakeholders prior to circulating this report, and it is still waiting to hear from a number of experts in the negotiated rulemaking process. In this light, rather than specifically endorsing one set of reforms, the report simply puts forth two potential recommendations based on the research conducted to date. The Conference staff will continue to conduct research and update the report accordingly. Committee members are invited to offer their views on this topic, suggest any potential avenues for additional research, and endorse one of the proposed reforms or instead propose some third set of reforms.

The first potential set of reforms would involve exempting negotiated rulemaking committees from FACA entirely. As Appendix A indicates, the number of committees dedicated to negotiated rulemaking gradually increased over the course of the 1990s, reaching a peak of 14 in 1999, but their use has since atrophied, with generally only 1–4 committees’ being dedicated to such activities in each of the last several years. One administrative law scholar has suggested

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<sup>279</sup> Administrative Conference of the United States, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,701 (July 15, 1982); Administrative Conference of the United States, Recommendation 85-5, *Procedures for Negotiating Proposed Regulations*, 50 Fed. Reg. 52,893 (Dec. 27, 1985).

<sup>280</sup> Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified at 5 U.S.C. § 561 *et seq.*).

<sup>281</sup> 5 U.S.C. § 562(7).

<sup>282</sup> *See, e.g.*, Higher Education Amendments of 1992, PL 102-325, § 497(c), 106 Stat. 448 (1992).

<sup>283</sup> 5 U.S.C. § 565(a)(1).

<sup>284</sup> Administrative Conference of the United States, *Building Consensus in Agency Rulemaking: Implementing the Negotiated Rulemaking Act* 16 (Oct. 1995) (report to Congress).

<sup>285</sup> 2 U.S.C. § 1534(b).

that the rigors of FACA have at least partly contributed to agencies' general disuse of negotiated rulemaking,<sup>286</sup> and several survey respondents, workshop participants, and agency interviewees, both from the private and public sectors, echoed this sentiment. In some instances, Congress has affirmatively exempted agencies' use of negotiated rulemaking from FACA.<sup>287</sup> Furthermore, the original Administrative Conference recommendation on negotiated rulemaking, Recommendation 82-4, provided that "[t]he legislation [establishing negotiated rulemaking] should provide substantial flexibility for agencies to adapt negotiation techniques to the circumstances of individual proceedings, as contemplated in this recommendation, free of the restrictions of the Federal Advisory Committee Act and any ex parte limitations."<sup>288</sup> The Negotiated Rulemaking Act states that "[n]othing in this [Act] should be construed as an attempt to limit innovation and experimentation with the negotiated rulemaking process or with other innovating rulemaking procedures otherwise authorized by law."<sup>289</sup>

Of course, exempting negotiated rulemaking committees from FACA wholesale would potentially undermine the statute's efforts to promote transparency. Nevertheless, the Negotiated Rulemaking Act could be amended to incorporate those aspects of FACA that promote transparency without incorporating those aspects that might unnecessarily prolong the process without producing substantial countervailing benefits. For instance, the statistics cited in Appendix A suggest that negotiated rulemaking committees have not proliferated excessively, and the Obama Administration has specifically encouraged increased collaboration amongst the public and private sectors,<sup>290</sup> so the chartering requirements, which are designed largely to quell the proliferation of unnecessary committees, likely need not apply to negotiated rulemaking committees. The public notice and open meeting requirements, by contrast, should perhaps continue to apply to such meetings, particularly given the concerns about stakeholders' inappropriately influencing the government in private meetings that partly motivated FACA's enactment and that would seem to be quite salient in negotiated rulemakings.<sup>291</sup> Accordingly, the Conference could recommend that negotiated rulemaking committees be exempt from FACA but that the Negotiated Rulemaking Act be amended to require that such committees hold public meetings (though meetings of sub-committees would, as under the present FACA regime, be exempt, for the reasons explored below) and announce those meetings in the Federal Register.

*Recommendation 6- Alternative A:* Congress should amend the Negotiated Rulemaking Act (5 U.S.C. § 561 *et seq.*) to provide that committees engaged in negotiated rulemaking are

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<sup>286</sup> Lubbers, *supra* note 219, at 1001 (2008) ("A fourth impediment to using [negotiated rulemaking] is the applicability of FACA to the process.").

<sup>287</sup> See, e.g., 20 U.S.C. § 6571(b)(4) (exempting the Department of Education from the strictures of FACA for a statutorily required negotiated rulemaking); Pub. L. No. 111-239, § 2(b)(2)–(3), 124 Stat. 2501 (2010) ("Any negotiated rulemaking committee established by the Secretary of Agriculture pursuant to [the section authorizing the negotiated rulemaking committee] shall not be subject to the Federal Advisory Committee Act . . .").

<sup>288</sup> Administrative Conference of the United States, Recommendation 82-4, *Procedures for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,701 (July 15, 1982).

<sup>289</sup> 5 U.S.C. § 561.

<sup>290</sup> *Transparency & Open Government*, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) (memorandum dated January 21, 2009).

<sup>291</sup> Croley & Funk, *supra* note 4, at 460.

exempt from FACA. Congress should also amend the Negotiated Rulemaking Act to provide that full meetings of such committees are open to the public (though meetings of sub-groups of committee members, or “caucuses,” can be conducted privately) and that such committees must provide advance notice of their meetings.

As an alternative, rather than exempting negotiated rulemaking committees from FACA, Congress could provide certain exceptions for such committees, and the committees themselves could undertake certain “best practices” that would simplify their compliance with FACA. Specifically, to the extent Congress repeals the subcommittee exception, as recommended in Section C.1.a, it should create a statutory carve out for negotiated rulemaking committees’ use of “caucuses,” which consist of smaller sub-groups of committee members, to discuss negotiating positions and other issues and report back to the full committee, often during the course of a formal meeting. Agency representatives surveyed by Conference staff indicated that the ability to have closed caucuses is critical in allowing parties to draft or determine negotiating positions, and this process would be greatly undermined by requiring such caucus discussions to be noticed in advance and opened for public participation.<sup>292</sup> This process has not been subject to abuse inasmuch as the issues discussed in caucus would normally need to be reported back to the full committee for plenary consideration. Since such caucus discussions often occur during the course of committee meetings, however, they would not necessarily qualify for the proposed statutory preparatory work exception.

In addition, one representative at an agency that utilizes negotiated rulemaking indicated that the procedural burdens created by the FACA chartering requirement can be mitigated by use of standing committees. Specifically, the agency creates a committee or set of committees dedicated solely to conducting negotiated rulemakings and then continuously renews the agency’s charter for that purpose, rather than chartering a new committee every time the agency wishes to undertake a negotiated rulemaking. Of course, agencies that wish to make use of this procedure would likely need to conduct a relatively large number of negotiated rulemakings. The agency must justify the necessity of each of its committees every two years as part of the formal charter renewal process,<sup>293</sup> and the agency may struggle to justify a committee if it does not intend to undertake any negotiated rulemakings in the immediate future. Nevertheless, if an agency plans to make relatively extensive use of negotiated rulemaking, it can save considerable time by use of a standing committee rather than forming a new committee every time that it wishes to conduct a negotiated rulemaking.<sup>294</sup>

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<sup>292</sup> See also Administrative Conference of the United States, Recommendations 82-4, *Procedure for Negotiating Proposed Regulations*, 47 Fed. Reg. 30,701 (1982) (“The negotiating group should be authorized to close its meeting to the public only when necessary to protect confidential data or when, in the judgment of the participants, the likelihood of achieving consensus would be significantly enhanced.”); Pritzker & Dalton, *supra* note 220, at 72 (“The Administrative Conference has suggested the usefulness of statutory language that would explicitly authorize private meetings of subgroups or caucuses of a negotiated rulemaking committee for the purpose of determining negotiating positions, alternative proposals, or other matters for consideration by the full committee in open session.”).

<sup>293</sup> 5 U.S.C. App. 2 § 14(a)(1); 41 C.F.R. §§ 102.3-65–75.

<sup>294</sup> Of course, as indicated in Section C.2.a, the major source of delay in committee formation often arises from agencies’ internal processes rather than the formal chartering requirement. As such, recommendation 3 applies fully

*Recommendation 6- Alternative B:* Agencies should, as appropriate, consider the use of standing committees to undertake all negotiated rulemaking activities and simply renew the charter of such committees rather than undertaking the chartering process anew for each proposed negotiated rulemaking committee. Congress should amend 5 U.S.C. § 565(a)(1) (Negotiated Rulemaking Act) to provide that negotiated rulemaking caucuses (i.e., informal discussions among members of a committee subgroup outside of or during a break in the committee’s formal meeting) may be held in private notwithstanding the requirements of FACA.

### **3. Enhancing Transparency and Objectivity in Federal Advisory Committees**

#### *a. Promoting Committee Transparency*

As a general matter, FACA effectively promotes transparency in ensuring that committee meetings are open to public attendance and public participation in creating an opportunity for citizens to submit information to advisory committee for consideration by the membership. Nevertheless, committees can undertake a variety of additional, relatively straightforward steps that would greatly advance the policies of transparency and public participation without imposing major compliance burdens or extensive costs on agencies. This section explores a series of “best practices” that agencies should generally pursue to ensure that their committees operate openly and transparently. The report does not, however, recommend that FACA or its implementing regulations be revised so as to require agencies to undertake such “best practices,” primarily because the costs of doing so might outweigh the benefits in certain instances. Nonetheless, in all cases, agencies should consider whether to implement these practices and should generally choose to do so unless if compelling circumstances advise in favor of dispensing with them.

#### *i. Posting Committee Documents Online*

As explained in Section 3, FACA requires only that committee documents that are prepared for or by the full committee be made available for public inspection and copying on request.<sup>295</sup> Thus, committees are under no formal obligation to publish their documents or otherwise take affirmative steps to ensure that the public may easily access such documents. Given FACA’s vintage, requiring a specific public request to trigger the document availability provision made logical sense in the early days of the statutory regime: in 1972, a committee could not widely disseminate its documents without incurring a considerable publication expense, and requiring the committee to do so would likely have been cost prohibitive for most agencies. In the wake of the “Internet revolution,” however, the cost of circulating committee

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to negotiated rulemaking committees. For instance, while a negotiated rulemaking committee should likely contain a balance of various stakeholders, the committee should only attempt to obtain balance on other factors to the extent it is able to do so under existing time and resource constraints.

<sup>295</sup> 5 U.S.C. App. 2 § 10(b); 41 C.F.R. § 102-3.170.

documents has diminished significantly. For instance, a committee could easily post important documents on its website for viewing by interested members of the public.<sup>296</sup>

In this light, commentators both from within and outside of the government have recommended that committees post all relevant documents associated with their work on a publicly available committee website.<sup>297</sup> Survey respondents and workshop participants generally echoed this sentiment, though several respondents from federal agencies suggested that the types of documents to be posted should be well defined, lest the posting process become exceedingly burdensome or the website contain a deluge of relatively trivial items that would conceal more important documents.

Accordingly, each committee should create a website, accessible from its parent agency's website and GSA's "eFACA" site.<sup>298</sup> Documents that may be of interest to the public and that committee members should consider posting on their web pages include, inter alia, Federal Register notices of committee meetings, reports and other formal documents considered by the committee, committee recommendations, biographies of committee members (including their professional affiliations and other information), meeting agendas, meeting minutes, public comments received by the committee, and transcripts or webcasts of previous meetings. Other documents, such as intermediate versions of reports, routine correspondence received by the committee, or other relatively peripheral documents are of lesser interest to the public and likely should not be posted, lest the committee webpage become unwieldy and conceal relevant information amidst a deluge of redundant or immaterial information.

As a general matter, agencies should attempt to post documents relevant to a scheduled committee meeting, such as reports to be considered or meeting agendas, at least 15 days in advance, such that they are available when the Federal Register notice announcing the meeting appears.<sup>299</sup> Papers or video files that chronicle the discussions occurring at committee meetings, such as transcripts, webcasts, and meeting minutes, should be made available as soon as

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<sup>296</sup> For background purposes, please see the webpage for this project on the Administrative Conference's website: <http://www.acus.gov/research/the-conference-current-projects/faca-in-the-21st-century/>. Though the Administrative Conference's various "committees" are technically subcommittees under FACA, since they report to a parent committee (the Assembly of the Administrative Conference), the Conference voluntarily treats its subcommittees as full committees for purposes of the FACA requirements other than chartering. As you will see, the webpage for this project includes relevant documents such as reports, committee memoranda, draft recommendations, meeting minutes, and public comments.

<sup>297</sup> See, e.g., *Hearing on the Federal Advisory Committee Act (FACA) of 2008*, 110th Cong. 44 (2008) (statement of Robert Flaak) ("GSA recommends that agencies make maximum use of the Internet, and display relevant agency and committee documents and products on agency websites, as appropriate, that would serve to be informative and contemporaneously available to all interested parties and the public at large."); Project on Government Oversight et al., *Additional Comments on ACUS Review of the Federal Advisory Committee Act in the 21<sup>st</sup> Century 2* (April 15, 2011) ("We'd like to see on the Advisory Committee's websites, perhaps hosted through/by GSA's management secretariat, timely information about the committee, including notices, agendas, meeting transcripts, forms, webcast meetings and archived video recordings of proceedings, documents, names, and brief biographies of its members.").

<sup>298</sup> GSA's "eFACA" site is available at <http://www.gsa.gov/portal/content/248953>.

<sup>299</sup> 41 C.F.R. § 102-3.150(a).



practicable following the committee meeting to which they relate. Of course, special circumstances may interfere with a committee's ability to post such materials expeditiously. For instance, a committee may need the time between the promulgation of the Federal Register notice and the scheduled meeting time to finalize a report for consideration at a meeting. In this light, this report does not recommend that FACA or its implementing regulations be amended to require the posting of such materials within any specific period of time. Rather, committees should simply be mindful of public interest in their work and should attempt to post all documents in a sufficiently timely manner that they will be useful to interested members of the public.

*Recommendation 7:* Agencies should post all documents relevant to a committee's substantive work on an easily accessible online forum, such as the committee's web page. Agencies should strive to post all documents that are relevant to upcoming meetings at least 15 days in advance and all documents that chronicle the events of committee meetings as quickly after the meetings as possible.

ii. *Webcasting Committee Meetings*

FACA does not contain any provision relevant to webcasting committee meetings, which is unsurprising in light of its enactment prior to the onset of the "digital age." The implementing regulations, the most recent iteration of which were enacted following the rise of the Internet, clarify that a committee is *permitted* to webcast its meetings or even hold virtual meetings over the Internet,<sup>300</sup> but they do not *require* committees to provide such online access to their deliberations. H.R. 1144 would alter this landscape by specifically requiring that committees provide either a transcript or an audio or video recording of their meetings.<sup>301</sup>

Webcasting committee meetings can significantly enhance transparency by vastly expanding the number of members of the public who can practicably view committee meetings. Attendance at traditional meetings is, for all intents and purposes, effectively limited to those who live within a few miles of the meeting site, whereas any individual throughout the nation with web access can view webcast meetings. Of course, to the extent that the committee's guidelines permit members of the public to "speak or otherwise address the advisory committee,"<sup>302</sup> persons viewing the meeting by webcast will be at a disadvantage vis-à-vis those attending the meeting in person, who can actually comment at the meeting itself. Nevertheless, remote participants can always submit their thoughts to the committee in writing.<sup>303</sup>

Though workshop participants and survey respondents mostly lauded the idea of webcasting committee meetings, some respondents from federal agencies raised concerns about

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<sup>300</sup> *Id.* § 102-3.140(e).

<sup>301</sup> H.R. 1144, 112th Cong. (2011) ("[T]he head of the agency to which the advisory committee reports shall make publicly available . . . [t]ranscripts or audio or video recordings of all meetings of the committee."); *see also* H.R. 1320, 111th Cong. (2009) (same).

<sup>302</sup> 41 C.F.R. § 102-3.140(d).

<sup>303</sup> *Id.* § 102-3.140(c).

the cost of doing so. Indeed, unlike posting committee documents, which is relatively costless to the agency so long as it already has a committee website, webcasting committee meetings can create considerable expenses, particularly if the agency utilizes a relatively high-quality video provider. In light of these costs, the report recommends only that agencies consider whether the benefits of providing expanded access through webcasting meetings outweigh the costs of doing so. As a general matter, agencies that conduct a large number of committee meetings are more likely to be able to justify the upfront cost associated with purchasing webconferencing technology. The agency should also assess the likely level of public interest in its work. For instance, committees that deal with controversial issues are likely to garner much greater public attention than committees that deal with relatively obscure, technical matters, and the benefits of webconferencing committee meetings may therefore be significantly greater for agencies that host a relatively large number of committees of the former type.

In considering the costs and benefits of such technology, agencies should also take into account the potential *savings* that such technologies can create. For instance, if the committee uses the webconferencing technology not only to broadcast in-person meetings but also to conduct certain meetings entirely by webconference, it can capture significant pecuniary savings by eliminating travel expenses. In addition, the agency could save considerable money by conducting certain meetings via an online web forum, as recommended in Section C.1.b, which would perhaps free funds to webcast in-person meetings. In short, though exploiting new technologies can create expenses for agencies, agencies also can capture significant savings by deploying such technologies, and they should consider such overall costs and benefits in deciding which technological investments will optimally promote efficient and transparent committee meetings.

*Recommendation 8:* Agencies should consider providing live webcasts of committee meetings and/or posting recorded broadcasts following such meetings. In determining whether to invest in webcasting technology, agencies should consider the likely level of public interest in their committees' work and the net costs and benefits of adopting such technologies. Agencies should also take into account the cost savings that such technologies can create when deciding whether to invest therein.

*iii. Soliciting Public Input on Potential Committee Members*

FACA's primary provision relating to the composition of advisory committees is its requirement that such committees "be fairly balanced in terms of the points of view represented and the functions to be performed."<sup>304</sup> As explored in Section A.3.c, agencies enjoy a great deal of discretion in ensuring that committees are proper balanced.<sup>305</sup> So long as they satisfy these open-ended balance requirements, agencies are essentially free to choose whomever they wish to

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<sup>304</sup> 5 U.S.C. App. 2 §§ 5(b)(2), 5(c).

<sup>305</sup> Indeed, agencies' authority in this regard is perhaps *carte blanche*, given that at least one Court of Appeals has held that, absent additional guidance from another statute on the required committee composition, challenges to committee action based on the balance requirement are non-justiciable. *Ctr. for Policy Analysis*, 540 F.3d at 945–46.

serve on advisory committees. Nevertheless, public opinion and perceived legitimacy can act as powerful checks on the work of advisory committees. First, if an agency staffs a committee with sub-stellar experts, the ultimate recipients of the committee's work and, in high profile committees, the general public will be less likely to accept the committee's conclusions. Second, as a consequence of the open-ended nature of the balance inquiry, it is unclear how well represented a particular viewpoint must be before it is entitled to representation on a "balanced" committee.<sup>306</sup> Thus, if a particular "scientific" viewpoint is extremely popular in the court of public opinion but is almost uniformly rejected in the scientific literature, an agency may face pressure to include adherents of that viewpoint on its committees, even if it accords the viewpoint influence disproportionate to its weight in the scientific community by so doing.<sup>307</sup>

One potential means of ensuring that the selection of committee members takes some account of public sentiment is soliciting public input on possible candidates for advisory committees. Specifically, prior to forming a committee, an agency could issue a Federal Register notice and/or an announcement on its website stating that it intends to form a committee to address a particular issue and requesting public input on experts with relevant training and experience. Once the agency has selected a preliminary slate of members, it could also seek public comment on such nominees to determine if the candidates are sufficiently qualified, have conflicts of interest, or are otherwise subject to some bias that would compromise their objectivity. This proposal has received some traction both in the FACA literature and in proposed FACA reform legislation. The Bipartisan Policy Center, Project on Government Oversight, Union of Concerned Scientists, and OMB Watch have endorsed these processes for soliciting the public's views on advisory committee candidates.<sup>308</sup> H.R. 1144 includes provisions requiring agencies to announce the formation of committees in the Federal Register

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<sup>306</sup> See, e.g., GAO 2004 Report, *supra* note 146, at 40 ("Additional information about the candidates' viewpoints and potential biases would better ensure that the committees are, and are perceived as being, fairly balanced in terms of points of view—and that no one interest or viewpoint dominates."); Bipartisan Policy Center, *supra* note 108, at 18, 24 (asserting that the scientific committees must achieve "balance among the applicable scientific disciplines" and, despite acknowledging that "[a]gencies should not shy away from including scientists on a panel who are considered 'outliers' on the question(s) under consideration," recommending that "the committee as a whole represents the mainstream").

<sup>307</sup> For instance, if a committee is to consist of three members and is to include one "skeptical" of a particular scientific consensus, the "skeptical" viewpoint enjoys a representation of 33.3% on the committee, even though it might only be accepted by a much smaller percentage of relevant scientists.

<sup>308</sup> Bipartisan Policy Center, *supra* note 108, at 18 ("Options for achieving greater transparency include: seeking recommendations for members on the Web and/or through contacts with relevant groups; publicly announcing on the Web the criteria for membership (such as the range of scientific disciplines that need to be included); and announcing proposed members on the Web . . . to solicit public comment."); Project on Government Oversight, *supra* note 297, at 2 (recommending that agencies forming advisory committees "solicit suggestions of nominees from the public as a request for comments in the Federal Register," "provide a mechanism for interested persons to comment [on potential committee nominees] through the agency's official website," and offer an opportunity for members of the public "to submit . . . comments after an agency posts a list of the names and bios of advisory committee nominees under consideration").

and on the agency website, to solicit public input on potential committee members, and to consider such public input when staffing the committee.<sup>309</sup>

Several workshop participants and survey respondents expressed support for the idea of soliciting public nominations for potential committee members, noting that it renders committees more transparent and promotes public involvement in committees' work. Other survey respondents, however, expressed concern that members of the public could become alienated if the committee does not ultimately include their preferred nominees, even if appointment of such individuals would compromise the balance of the committee. To provide an oversimplified example, imagine that 1% of scientists advocate a particular scientific theory but that 50% of the public subscribes to that viewpoint. Also imagine that an agency intends to appoint a ten member committee to consider an issue implicating that theory. Presumably, roughly 50% of the recommendations for committee members will nominate persons from the 1% of the scientific community that supports that viewpoint, but selecting five (50%) or even one (10%) committee member from that pool of nominees would accord that viewpoint a representation wildly disproportionate to its acceptance in the scientific community. If the committee declines to appoint adherents of that viewpoint, however, it will likely face public backlash.

In light of the potential drawbacks associated with soliciting public nominees for committee members, this report not only declines to recommend that agencies uniformly adopt that practice but also specifically advises against agencies' doing so in every instance. Rather, the agency should identify those instances in which soliciting public input on committee nominees would be beneficial and should do so only in those cases. Factors that would favor a committee's soliciting such input include: (a) lack of political controversy surrounding the subject matter for consideration by the committee; (b) likelihood that the leading experts in the field may not be immediately apparent to the agency; and (c) the comprehensibility of the subject matter of the committee's work. In other cases, an agency may instead wish to solicit committee nominations from a smaller subset of the general public. For instance, in the hypothetical offered in the previous paragraph, the committee might seek recommendations from the *scientific community* rather than broadly soliciting nominations from the *general public*. In still other cases, the urgency of a proposed committee's mission may foreclose the agency's seeking any input whatsoever on possible nominees. Thus, this report advises against a "one-size-fits-all" approach and instead urges agencies to identify the instances in which outside input on potential committee nominees would be beneficial and seek such input as appropriate.

Workshop participants and survey respondents generally praised the idea of seeking public input *after* a proposed slate of committee members has been selected. Indeed, many participants suggested that doing so would allow the public to comment on potential sources of committee member bias or conflicts of interest. Agencies should generally not post such comments so as to avoid embarrassing committee members.<sup>310</sup> Agencies also should be aware of

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<sup>309</sup> H.R. 1144, 112th Cong. § 101(c) (2011).

<sup>310</sup> Of course, were someone to request the public comments submitted on the proposed slate of committee members under FOIA, the agency would likely be required to disclose such information. Thus, to the extent an agency adopts this practice, it likely should inform its potential committee members that any comments received are not necessarily

the fact that committee members might suffer embarrassment if they are included in the original slate but are not ultimately chosen, which would imply either that they were unqualified or were subject to bias or a conflict of interest. Agencies could likely mitigate this issue somewhat by starting with a slate of potential committee members that is significantly larger than the number of available slots on the committee, thereby diminishing the stigma of not being selected, but doing so may not be practicable in all cases, particularly when the agency faces tight time constraints. In this light, the report does not recommend that committees undertake this process in every instance. Rather, the committee should consider the amount of time available, the risk of embarrassing potential committee members, and the likelihood of ferreting out sources of bias or conflicts of interest and then determine whether or not to solicit public comments on proposed members.

*Recommendation 9:* Agencies should consider announcing proposed committees in advance in the Federal Register and on the agencies' websites and, as appropriate, soliciting public input concerning potential committee members. Such input is particularly likely to be valuable when the committee's work is relatively uncontroversial and comprehensible and when the agency may benefit from the public's insight in finding qualified committee members. In cases where *general public* input is deemed inappropriate, the agency may still wish to solicit input from *experts* with experience in the subject matter of the committee's assignment or from groups particularly affected by the committee's work. Agencies should also consider publicly announcing the preliminary slate of committee members selected prior to finalizing the group and accepting confidential public input on potential conflicts of interest, bias, or other matters relevant to member selection.

***b. Committee Member Conflict of Interest Standards***

As explored in Section A.3.d, advisory committee members are currently subject to a bifurcated ethics regime: individuals chosen to provide expert advice are classified as SGEs and are subject to a less stringent version of the ethics rules applicable to federal employees whereas individuals chosen to represent a specific group, who are denominated as "representatives," are not subject to ethics standards. As a general matter, survey respondents and workshop participants expressed satisfaction with the existing ethics regime. Nevertheless, a handful of survey respondents and workshop participants expressed dissatisfaction with the existing system, with some arguing that it is overly burdensome and others contending that it is insufficiently stringent. Notwithstanding the wide array of survey responses, a few relatively uncontroversial propositions may be gleaned from the empirical research conducted and from past studies of the conflict of interest standards applicable to advisory committees:

(1) Federal agencies generally enjoy discretion in determining whether to classify committee members as SGEs or representatives,<sup>311</sup> and that discretion has occasionally been

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confidential and might be disclosed in the event of a FOIA request, but the agency should not generally post such comments or otherwise share them publicly absent any such request.

<sup>311</sup> Glynn memorandum, *supra* note 154, at 5 ("While Congress may sometimes specify in legislation the status of members serving on an advisory committee, it may not always do so or do so clearly. Where a committee's

subject to abuse, with some agencies classifying essentially all committee members as “representatives” so as to avoid the strictures of the ethics laws.<sup>312</sup> Though a “representative” should generally represent a specific organization or interest group,<sup>313</sup> agencies have occasionally classed committee members who “represent” a particular field or discipline as “representatives.”<sup>314</sup> This, of course, effectively obliterates any distinction between SGEs, who generally “are hired for their expertise and skills,”<sup>315</sup> and representatives: the difference between an expert in toxicology and a “representative” of the field of toxicology is fine to nonexistent.

(2) Several survey respondents and workshop participants suggested that specific types of committee members, such as those serving on peer review, grant award, or product approval panels, should be subject to relatively stringent ethics requirements, whereas other committee members, such as those serving on committees dealing with issues of general policymaking on which impartiality is less critical, need not be subject to extensive ethics standards. The FACA literature generally reinforces this distinction, contending that ethics standards are particularly appropriate when committee members are expected to provide neutral advice, especially concerning a technical matter, and are significantly less important in other contexts.<sup>316</sup>

(3) The federal ethics laws authorize committees to grant waivers to SGEs with conflicts of interest when the government determines that the conflict is insufficient to affect the proposed member’s integrity or that the need for the proposed member’s services outweighs the risk of a conflict.<sup>317</sup> Though a copy of the waiver must be made available to members of the public upon request,<sup>318</sup> the agency need not provide public notice when it grants such a waiver.<sup>319</sup> Several workshop participants criticized this lack of a requirement for public disclosure of waivers, stating that it leads to “undisclosed conflicts” in committee members.<sup>320</sup>

As a theoretical matter, the bifurcated analysis adopted in the existing ethics regime is appropriate: certain members are expected to provide neutral advice and should be subject to

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enabling authority does not contain any language sufficiently identifying a member’s status or that language is itself ambiguous, agency officials must determine the status of members serving on a committee.”).

<sup>312</sup> GAO 2004 Report, *supra* note 146, at 5; *see also* GAO 2008 Report, *supra* note 146, at 7.

<sup>313</sup> *See* Walter Memorandum, *supra* note 153, at 3–5; Glynn Memorandum, *supra* note 154, at 3, 5–9.

<sup>314</sup> GAO 2004 Report, *supra* note 146, at 23 (“We found that Energy, Interior, and USDA appoint some members to their committees on the basis that they represent various scientific or technical fields, such as biology or toxicology.”).

<sup>315</sup> *Id.* at 11.

<sup>316</sup> *See, e.g.*, Bipartisan Policy Center, *supra* note 108, at 17 (“All non-government members of scientific advisory committees should be appointed as Special Government Employees . . .”); James W. Conrad, Jr., Federal Approaches to Defining & Managing Conflict of Interest & Bias as They Bear on the Use of Science in Public Policy 13 (Mar. 18, 2009) (noting that classifying committee members as SGEs is particularly critical in the scientific context).

<sup>317</sup> 18 U.S.C. §§ 208(b)(1), (3); 5 C.F.R. §§ 2640.301–02.

<sup>318</sup> 5 C.F.R. § 2640.304.

<sup>319</sup> *Hearing on the Federal Advisory Committee Act (FACA) of 2008*, 110th Cong. 62 (2008) (testimony of Professor Sidney A. Shapiro).

<sup>320</sup> *See also id.*

ethics standards<sup>321</sup> whereas other members are essentially expected to provide biased or conflicted advice and need not be subject to such standards.<sup>322</sup> The problems identified in the survey and workshop, however, indicate that the existing scheme does not always result in appropriate classification of members into categories. In analyzing those responses and the relevant literature, it appears that a major source of confusion is the use of the term “representative” to define the class of persons not subject to ethics standards. First, committees have abused their discretion in classifying members by reading the term “representative” so broadly as to apply to any member that “represents” any discipline or concept (and thereby essentially eliminating the need to classify any member as an SGE). Second, individuals who represent specific organizations or institutions arguably do not constitute the entire universe of potential members a committee may wish to exempt from the ethics requirements applicable to SGEs.

In this light, this report recommends a slightly revamped ethics regime that does not rely on the term “representative.” Instead, it classifies committee members into two distinct, mutually exclusive categories that are arbitrarily denominated “Type I” and “Type II.” The Types are defined as follows:

Type I members include the following:

(1) Individuals chosen to represent a particular organization or interest group—This category would include all persons who were appropriately classified as “representatives” in the prior scheme.

(2) Individuals subject to known biases and/or conflicts of interest whose interested advice is nonetheless useful to the agency—Certain workshop participants indicated that the process of obtaining waivers for existing conflicts of interest is relatively difficult, with agencies seldom granting such waivers. In cases wherein an agency wishes to obtain advice from a party with a known conflict of interest or source of bias but cannot expeditiously analyze and waive the potential conflicts or protect against the potential sources of bias, it might instead simply wish to appoint the member without subjecting him or her to ethics requirements, yet such persons may not always qualify as “representatives.” For instance, were the Department of Treasury to seek advice on bailing out ailing automakers, it may seek the advice of Wall Street executives, given their expertise in financial markets, while knowing full well that the advice sought is probably subject to conflicts of interest insofar as the executives’ general livelihood and stock portfolios are likely to be significantly impacted by the fate of the automakers. It is difficult to classify such persons as “representatives” since they are not necessarily representing any specific group or interest (unless if the interest they represent is taken to be the business community generally), and it would be cumbersome to appoint them as SGEs and then waive all of their various conflicts, which might deter their desire to serve. In the proposed scheme, such

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<sup>321</sup> A separate issue, of course, is whether the panoply of ethics requirements that apply to such members is appropriate. Though a few survey respondents and workshop participants contended that the ethics standards were overly stringent, the vast majority of such persons indicated that the ethics standards currently applicable to SGEs are appropriate.

<sup>322</sup> GAO 2004 Report, *supra* note 146, at 13.

persons could simply be appointed as Type I members, and the agency and general public would know to consider any advice provided with appropriate reservations.

(3) Individuals chosen to offer advice on a matter of policy wherein impartiality is neither expected nor necessary— Several workshop participants suggested that unconflicted, unbiased advice is less significant on certain matters wherein the agency may expect to receive slanted advice, such as in a matter concerning a general policy question (e.g., an issue related to tax or education policy), opposed to advice wherein neutrality is critical (e.g., a grant review or product approval panel). Of course, ethical considerations may not always be irrelevant to general policymaking. For instance, were a committee to consider potential technological policies, committee members might be inclined to favor recommend policies that would favor technology stocks in their stock portfolios. Nevertheless, in some instances, conflict of interest and bias concerns may be sufficiently remote to justify non-application of ethics standards, yet not all committee members can easily be classed as “representatives” in such cases. For instance, were the Internal Revenue Service to convene a taxpayer citizens’ panel to consider the propriety of various deductions, it would be well aware that individual citizens will favor those deductions from which they benefit and be indifferent or hostile to those that are unavailable to them. Again, it is somewhat unwieldy to appoint such persons to a committee as “representatives,” since the group they “represent” is massive (i.e., the taxpaying public), and the Type I membership category would therefore be useful in this context as well.

The committee should publicly disclose the names of all committee members and indicate which members are classified as Type I. The committee also should publicly disclose all organizations “represented” by Type I members in the first group and all known biases and conflicts of Type I members in the second group.

Type II members include the following: All committee members who do not qualify for any of the Type I categories should be classified as Type II members. Individuals chosen for peer review, grant award, or product approval panels, or other committees in which member neutrality is expected should always be classed as Type II members (i.e., persons who qualify for one of the Type I categories should not be appointed to such committees), unless if the agency specifically wishes to appoint individuals representing a particular bias to such committees so as to achieve balance. All Type II members qualify as SGEs and are subject to the associated ethics restrictions. Whenever a Type II member receives a conflict of interest waiver, the committee should publicly announce the waiver on its website.

As explained in Section A.3.d, FACA itself does not presently contain formal ethics standards.<sup>323</sup> H.R. 1144 proposes to amend this omission by essentially codifying the existing system for appointing members as SGEs or representatives.<sup>324</sup> This report recommends that Congress instead adopt the proposed member classification scheme, which largely preserves the

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<sup>323</sup> FACA does assure “that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest,” 5 U.S.C. App. 2 §§ 5(b)(3), (c), but it does not address the distinction between SGEs and “representatives,” which are products of the Office of Government Ethics’ administration of federal employee criminal ethics laws.

<sup>324</sup> H.R. 1144, 112th Cong. § 101(b) (2011).



existing ethics system that has evolved over the past decades but includes a slightly more nuanced categorization of committee members that hopefully should eliminate some of the confusion and abuse that have arisen under the current system.

*Recommendation 10:* Congress should amend FACA to contain an ethics regime whereby potential committee members are classified as Type I members, as defined above, which are not subject to ethics standards, and Type II members, also defined above, which are classified as SGEs. Agencies should publicly disclose representations and known sources of bias or conflict of interest for Type I members and should similarly announce any waivers granted to Type II members.

### Conclusion

For the past 40 years, FACA has maintained a delicate balance between promoting efficiency and transparency in agencies' use of advisory committees, on one hand, and ensuring that committees are not stifled by crippling procedural burdens that preclude their ability to function effectively, on the other. As a general matter, the statute and its implementing regulations strike an appropriate balance, and it has been slightly readjusted over the years to ensure that a relative equipoise between the competing policies is maintained. The increasing interest in promoting public participation in government processes and the flurry of legislative activity relating to FACA in the last several years suggest that another readjustment is potentially in order. This report has analyzed the Act, its implementing regulations, and associated legal requirements in detail to attempt to identify a set of revisions that will optimally promote that balance. As a general matter, it has proposed changes to clarify the Act and eliminate certain unnecessary procedural burdens, on one hand, while proposing relatively simple "best practices" agencies might undertake and certain statutory revisions designed to enhance transparency and objectivity, on the other. Congress clearly was correct when it opined that advisory committees "provide[] a means by which the best brains and experience available in all fields of business, society, government and the professions can be made available to the Federal Government at little cost."<sup>325</sup> This report has hopefully elucidated a set of reforms that can ensure that the government preserves that critical source of outside advice while still furthering the goals of openness, transparency, and efficiency that FACA was enacted to promote.

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<sup>325</sup> HOUSE COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. REP. NO. 91-1731, at 4 (1970).

### Proposed Recommendations

**Recommendation 1:** Congress should eliminate the contractor and non-voting member exceptions. It should leave the individual advice exception intact. It should eliminate the subcommittee exception but should replace it with a statutory exception for “preparatory work” of committees, which should be defined as precisely as possible to ensure that committees make effective use of the exception.

**Recommendation 2:** GSA should amend section 102-3.140(e) of the implementing regulations to clarify that, in addition to hosting teleconferenced or webconferenced meetings, agencies also may host asynchronous virtual meetings that can occur over the course of days, weeks, or months, on a moderated web forum. Agencies with advisory committees should consider holding certain committee meetings via such online forums as appropriate.

**Recommendation 3:** Agencies should assess each committee that they propose to establish to determine precisely what factors should influence committee membership and strive to achieve balance on those factors in all instances. Agencies should also consider any other balance factors they consider desirable as well as the resources they have available and attempt to achieve balance on those factors as appropriate under the circumstances. In addition, agencies should centralize the committee formation process in an individual or office and should strive to eliminate any unnecessary levels of review.

**Recommendation 4:** Congress should, to the extent possible, set forth the mission, estimated duration, budget, and preferred membership balance for all statutorily established committees. It is particularly critical that Congress do so for committees that it exempts from the two year renewal process established by FACA.

**Recommendation 5:** The President and Office of Management and Budget should rescind Executive Order 12,838 and Circular A-135, respectively, thereby eliminating any cap on the number of advisory committees.

**Recommendation 6- Alternative A:** Congress should amend the Negotiated Rulemaking Act (5 U.S.C. § 561 *et seq.*) to provide that committees engaged in negotiated rulemaking are exempt from FACA. Congress should also amend the Negotiated Rulemaking Act to provide that full meetings of such committees are open to the public (though meetings of sub-groups of committee members, or “caucuses,” can be conducted privately) and that such committees must provide advance notice of their meetings.

**Recommendation 6- Alternative B:** Agencies should, as appropriate, consider the use of standing committees to undertake all negotiated rulemaking activities and simply renew the charter of such committees rather than undertaking the chartering process anew for each proposed negotiated rulemaking committee. Congress should amend 5 U.S.C. § 565(a)(1) (Negotiated Rulemaking Act) to provide that negotiated rulemaking caucuses (i.e., informal discussions among members of a committee subgroup outside of or during a break in the committee’s formal meeting) may be held in private notwithstanding the requirements of FACA.

**Recommendation 7:** Agencies should post all documents relevant to a committee's substantive work on an easily accessible online forum, such as the committee's web page. Agencies should strive to post all documents that are relevant to upcoming meetings at least 15 days in advance and all documents that chronicle the events of committee meetings as quickly after the meetings as possible.

**Recommendation 8:** Agencies should consider providing live webcasts of committee meetings and/or posting recorded broadcasts following such meetings. In determining whether to invest in webcasting technology, agencies should consider the likely level of public interest in their committees' work and the net costs and benefits of adopting such technologies. Agencies should also take into account the cost savings that such technologies can create when deciding whether to invest therein.

**Recommendation 9:** Agencies should consider announcing proposed committees in advance in the Federal Register and on the agencies' websites and, as appropriate, soliciting public input concerning potential committee members. Such input is particularly likely to be valuable when the committee's work is relatively uncontroversial and comprehensible and when the agency may benefit from the public's insight in finding qualified committee members. In cases where *general public* input is deemed inappropriate, the agency may still wish to solicit input from *experts* with experience in the subject matter of the committee's assignment or from groups particularly affected by the committee's work. Agencies should also consider publicly announcing the preliminary slate of committee members selected prior to finalizing the group and accepting confidential public input on potential conflicts of interest, bias, or other matters relevant to member selection.

**Recommendation 10:** Congress should amend FACA to contain an ethics regime whereby potential committee members are classified as Type I members, as defined above, which are not subject to ethics standards, and Type II members, also defined above, which are classified as SGEs. Agencies should publicly disclose representations and known sources of bias or conflict of interest for Type I members and should similarly announce any waivers granted to Type II members.

## Appendix A

*Historical Numbers of Advisory Committees Covered by FACA*

Year	Total Number of Federal Advisory Committees	Statutory (Created by Congress)	Presidential	Non-discretionary (Statutory + Presidential)	Created by Agency Authority	Authorized by Law	Discretionary (Agency Created + Statutorily Authorized)	Negotiated Rulemaking Committees
2011	1069	555	49	604	266	199	465	3
2010	1046	549	45	594	257	195	452	4
2009	953	431	35	466	281	206	487	2
2008	922	416	33	449	282	191	473	3
2007	924	425	35	460	273	191	464	1
2006	929	423	35	458	276	195	471	2
2005	945	428	36	464	290	191	481	4
2004	983	461	37	498	279	206	485	6
2003	976	449	43	492	271	213	484	7
2002	978	444	51	495	265	218	483	8
2001	991	435	56	491	279	221	490	10
2000	955	404	53	457	278	220	498	12
1999	951	403	51	454	271	226	497	14
1998	939	403	52	455	261	223	484	10
1997	963	424	50	474	261	228	489	9
1996	987	434	46	480	269	238	507	7
1995	970	414	38	452	262	256	518	2
1994	1,186	428	26	454	316	416	732	1
1993	1,304	499	31	530	397	377	774	0

**Appendix B**  
*FACA Membership Survey*

Administrative Conference Chairman Paul Verkuil circulated the attached survey to all government members of the Conference on July 1, 2011, asking for a response by July 18, 2011. Chairman Verkuil also invited public members to provide input on potential issues under the Federal Advisory Committee Act. The Conference ultimately received responses from 21 different government agencies and 4 public members of the Conference. The results of that survey are summarized in Appendix C.

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Dear Members,

In connection with the Committee on Collaborative Governance's project on the Federal Advisory Committee Act ("FACA"), ACUS staff has prepared a list of questions to solicit your input on the most pressing issues under the statute. Please either answer the questions yourself or refer them to a suitable person in your agency. A consultant engaged by the Conference has already surveyed agency FACA Committee Management Officers (CMOs), so we are not seeking responses from CMOs. Rather, our targets include the "clients" of FACA committees -- those who receive and use the advice that such committees provide, and/or people who deal with the legal aspects of FACA compliance. A suitable respondent would be a senior program officer or a member of your agency's General Counsel's office.

**To the respondent: We have provided a list of detailed questions asking about specific aspects of FACA compliance, but please do not feel obligated to respond to each specific inquiry. Rather, use the questions as a guide in identifying aspects of FACA that would be worthwhile to consider in an ACUS project. Even if your agency does not use advisory committees, feel free to answer any questions for which you have information based on your general experience with advisory committees. Finally, indicate which issues under FACA you deem particularly pressing and/or urgently in need of resolution (whether or not they are addressed in the list of questions).**

We plan to hold a workshop in early August and will consider the results of these questions in identifying possible topics, so **please respond to these questions by July 18**. Please send your responses and any questions to Deputy General Counsel David Pritzker ([dpritzker@acus.gov](mailto:dpritzker@acus.gov); 202-480-2093) or Attorney Advisor Reeve Bull ([rbull@acus.gov](mailto:rbull@acus.gov); 202-480-2083). Include the name, email address, and telephone number of the person who is responding to the questions. If you would prefer, you can also call Reeve or David to discuss your answers. We greatly appreciate your taking time to offer feedback!

**General Question:** Please comment on your agency's experience in setting up and conducting meetings of advisory committees under FACA (5 U.S.C. App. 2) and its implementing

regulations (41 C.F.R. 102-3). What works particularly well in that process? Conversely, what problems, if any, have you encountered in trying to set up FACA committees or conduct committee meetings, and what would you envision as possible solutions to those problems?

**Specific Questions:** The following questions identify potential issues with FACA based on our initial literature review. We do not necessarily expect you to provide a response to each question. If you provide answers to several of the questions, please indicate which issues you consider most important.

(1) In considering the various procedural requirements of FACA and its implementing regulations, describe what you see as the pluses and minuses of the main requirements, that is (a) whether you find that the requirements serve valuable purposes in terms of promoting the goals of FACA, and (b) whether the requirements impose unnecessary costs or burdens on your agency. In particular, give us your thoughts on the chartering requirements (5 U.S.C. App. 2 § 9(c)), the requirement to provide 15-days advance notice of FACA committee meetings in the Federal Register (5 U.S.C. App. 2 § 10(a)(2); 41 C.F.R. § 102-3.150(a)), and the requirement that committee meetings and documents be public (5 U.S.C. App. 2 § 10(a)(3), (b); 41 C.F.R. §§ 102-3.140, 102-3.170).

(2) What are the positives and negatives of other requirements associated with advisory committees imposed either by statutes or regulations other than FACA itself (e.g., NARA's General Records Schedule 26) or by your own agency's internal procedures (e.g., requirements for selecting committee members)?

(3) Does FACA unnecessarily constrain your agency's ability to meet with groups outside of the government? Conversely, do the exceptions to FACA (such as the sub-committee exception, the exception for seeking individual advice, or the exception for contractor-convened committees) improperly permit agencies to work around the basic FACA requirements?

(4) Is your agency ever reluctant to meet with groups outside of the government due to uncertainty concerning whether or not FACA applies?

(5) Does FACA deter your agency's use of "new media" (email, Facebook, Twitter, etc.) to interact with groups outside of the government or communicate among committee members?

(6) Do you consider the conflict of interest standards that apply to members of your agency's advisory committees appropriate as currently structured, or should the conflict standards be made either less or more stringent? In particular, would any of the following changes be helpful in policing against conflicts, or would they deter service on advisory committees without adding much value:

- Classifying more committee members as Special Government Employees rather than “representatives” or applying a common disclosure regime to all members regardless of status.
- Making certain information about committee members public (e.g., prior representations or identity [if not exact amount] of financial holdings).

(7) Should committees undertake any efforts beyond the technical requirements of FACA to promote greater public input to the committees? Conversely, are FACA’s public transparency requirements already sufficient? Consider, in this light, whether any of the following would be helpful or instead would impose unnecessary procedural burdens:

- Soliciting and considering input from the public about potential committee members.
- Making committee documents publicly available (e.g., by posting on your agency’s website).
- Hosting webcasts of committee meetings.
- Allowing members of the public to interact with committee members during meetings (rather than simply having a designated public comment period at the end of the meeting).

(8) Does FACA provide sufficient clarity to ensure that the membership of each of your agency’s advisory committees is balanced (5 U.S.C. App. 2 § 5(b)(3), (c)) or would a more detailed description of the factors on which balance must be achieved (either in the statute or implementing regulations) be helpful? What are the factors your agency considers in ensuring that its committees are balanced?

(9) How effective do you consider the chartering and charter renewal process managed by GSA in ensuring that committees do not outlive their useful lifespan? Are there other steps that agencies, the President, or Congress should take to ensure that committees disband when their mission is complete?

(10) Would it be useful to have a mechanism whereby FACA committees could meet over a period of days, weeks, or months, via a web-based message forum, to which committee members would post messages, and to which the public would have access?

Thank you for your participation; please contact us if you have any questions.

**Appendix C**

*Literature Review/Initial Interviews and Conference Member Survey*

The charts below contain four pieces of information: (a) topics identified in the Conference staff’s initial review of the FACA literature and in interviews with FACA experts; (b) the number of times the topic was addressed in the membership survey (with each agency’s response counting only once, even if the agency had a number of sub-groups whose responses were compiled in its response); (c) the number of times the topic was mentioned in the literature or in interviews Conference staff conducted with FACA experts (with each source that mentioned the issue counting once); and (d) a brief summary of the overall sentiment on the particular issue. For the sake of conciseness, only topics that were mentioned more than once are included in the charts.

The responses are grouped into two separate charts based on the level of consensus reached: (1) Chart 1 contains topics on which the survey responses, articles, and outside interviews showed essential agreement (though some contained a few dissenting views) and (2) Chart 2 contains topics on which there was divergence in opinion. All topics are assorted in decreasing order of interest, with the topics that garnered the most interest (based primarily on numbers of times the topic was mentioned) appearing first.

The charts characterize responses by source (agency survey respondents, private survey respondents, persons interviewed by staff, literature references) but do *not* identify the sources by name or organization. The report omits that information because a number of persons interviewed by the staff and survey respondents requested that their responses remain anonymous.

**Chart 1: Topics on Which the Responses Were Essentially in Agreement**

Potential Topic	Number of Mentions in Membership Questionnaire	Number of Mentions in Staff’s Literature Review/Initial Interviews	General Sentiment on the Issue
Posting Committee Materials Online	12	1	Agency survey respondents universally touted the value of making committee documents available online in advance of meetings, though most did not feel that the requirement should be mandatory, and one noted that only



			relatively important documents should be posted (lest the agency website be flooded with a deluge of relatively useless materials).
Soliciting Public Input on Potential Committee Nominees	14	3	With five exceptions, governmental survey respondents supported the idea of soliciting public input on potential committee nominees (and several already do so), though they generally opposed making such a process mandatory. Members of NGOs interested in governmental transparency strongly support this reform. One agency survey respondent, however, raised the concern that committee balance requirements may necessitate their rejecting popular nominees, which could alienate the public, and two other agency respondents expressed concerns about the amount of time that soliciting public input would take.
Asynchronous Virtual Web Meetings	13	1	The general consensus amongst agency survey respondents appeared to be that such meetings could be useful and lead to cost savings but that agencies should not be required to hold meetings in that manner and that many committees would prefer to continue to meet in-person.
Webcasting Committee Meetings	11	0	Several agency survey respondents praised the concept of webcasting committee meetings, though none thought that it should be required and four raised concerns about the cost of doing so.
Executive Order 12,838	2	3	The survey responses and FACA articles all state that the Executive Order's arbitrary cap on the number of advisory committees is counterproductive.

Closed Meetings	0	3	Several reports in the FACA literature support the idea of making it easier to close committee meetings but requiring that the committee give an explanation of its decision after the fact.
Exempting Negotiated Rulemaking Committees from FACA	2	0	One private survey respondent and one agency respondent mentioned exempting negotiated rulemaking committees from FACA as one possible means of promoting greater collaboration between agencies and the public.
Clarifying the “Utilized” Standard under <i>Public Citizen</i>	3	0	Two private survey respondents and one agency respondent proposed providing greater clarity on when an agency “utilizes” a committee so as to implicate FACA: one private respondent asserts that it should be easier to show that a committee has been utilized whereas the other private respondent and agency respondent simply assert that the standard should be clarified.

**Chart 2: Topics Where the Responses Showed Significant Disagreement**

Potential Topic	Number of Mentions in Membership Questionnaire	Number of Mentions in Staff’s Literature Review/Initial Interviews	General Sentiment on the Issue
Amending the Conflict of Interest Standards Applicable to Committee Members	15	11	Most governmental survey respondents indicated that classifying more committee members as SGEs or imposing a disclosure regime on all committee members regardless of classification would deter service on committees, though several indicated that they impose more rigorous ethics

			<p>requirements than they are required to implement. Several respondents proposed ideas for modifying the existing regime: (a) one agency respondent proposed treating erstwhile “representatives” as mere public attendees that are not formally part of the committee; (b) one private survey respondent proposed eliminating the SGE designation; and (c) another private survey respondent proposed very strict standards for committees dealing with a specific product or grant and a generally applicable disclosure regime for other committees.</p> <p>As a general matter, the FACA literature (including past ACUS recommendations) favors applying a common disclosure regime to all committee members and clarifying when members should be appointed as SGEs (with a GAO report indicating that a larger number of members should be appointed as SGEs than is currently the case).</p>
<p>Propriety of the FACA Exceptions</p>	<p>11</p>	<p>10</p>	<p>A significant rift between agencies and FACA experts outside of the government exists on this point: several governmental survey respondents and agency lawyers interviewed by Conference staff indicated that certain exceptions were critical, and no agency criticized any of the exceptions; most non-governmental FACA experts, by contrast, supported eliminating some or all of the exceptions. Nevertheless, some exceptions were much more popular than others: relatively few non-</p>

			<p>government experts criticized the <i>subcommittee</i> and <i>individual advice</i> exceptions (though the subcommittee exception received considerably more criticism than the individual advice exception), and many government respondents praised them; many non-government experts criticized the <i>contractor</i> and <i>non-voting member</i> exceptions, and no government respondent specifically praised them (though some said generally that all exceptions were important).</p>
Chartering	12	5	<p>Basically everyone agrees that agencies should be required to define the purpose of committees in advance, but there is disagreement on whether GSA should have any role in that process. With the exception of one agency, which experienced some minor delays in chartering, agencies generally find FACA’s chartering requirements and GSA’s role in the process to be appropriate, suggesting that external constraints are not a source of delay. By contrast, many agencies note that internal requirements associated with committee formation, particularly those appertaining to ensuring committee balance, can be a source of significant delay. Non-government respondents tended to favor devolving the chartering process to agencies and limiting the role of GSA.</p> <p>Some agency survey respondents suggested that the charter renewal process should not be required every 2 years (with 4–5 years being suggested</p>

			instead).
Clarifying the Committee Balance Requirements	13	4	All governmental survey respondents indicated that the existing guidance on the balance requirements is sufficient, though one agency survey respondent suggested that guidance in a GSA memorandum should be formally integrated into the implementing regulations. However, several publications concerning FACA, including a GAO report, suggest that the balance requirements are unclear and that greater clarification is needed. One private survey respondent raised the question of how the “balance” requirement applies to a “utilized” committee, presumably since the agency will not necessarily select the members thereof. Another private survey respondent suggested that it should be made clearer that courts can review whether committees have satisfied the “balance” requirements, though the standard of review should be generous, and the penalty for non-compliance should be limited to requiring that the lack of balance be noted in materials resulting from the committee’s work.
Whether FACA Chills Agencies’ Use of New Media	15	1	Government respondents to the agency survey uniformly indicated that FACA had not deterred their use of new media, though several indicated that guidance on what uses of new media are permissible would be beneficial. Lawyers from one agency whom Conference staff surveyed, however, indicated that a great deal of uncertainty surrounds FACA’s applicability to new media, and a private survey respondent

			indicated that email exchanges should not implicate FACA.
Federal Register Notice Requirement	11	4	Most sources agreed that the 15-day advanced notice requirement is useful and not overly burdensome, though one agency survey respondent suggested that only 7 days advance notice should be required. They were split on whether a website or email notice could replace the requirement for notice in the Federal Register.
Whether FACA Limits the Gathering of Outside Advice	11	0	By a margin of 7-4, the agency survey respondents did not feel that FACA improperly constrains their ability to meet with outside groups.
Whether FACA Chills Communication with Outsiders	12	0	Three agency survey respondents and one private respondent indicated that FACA has chilled agencies' efforts to seek outside advice. Eight other agency survey respondents indicated that it has not done so in their experience.
Allowing the Public to Speak during Meetings (Rather Than Having a Designated Public Comment Period)	9	2	Agency survey respondents were basically opposed to this idea, suggesting that it could make meetings difficult to control, lead to deviations from the meeting agenda, and potentially even render public attendees de facto committee members. One private respondent and a private attorney interviewed by Conference staff, however, saw value in permitting public attendees to interact with committee members during the meeting, noting that any deviations from topic could be handled by warning and/or removing disruptive attendees.
Ensuring that Committees Do Not Outlive	9	1	Two agency survey respondents felt that the current procedures for ensuring that committees do not outlive their useful

<p>Their Useful Lifespan</p>			<p>lifespan are sufficient. One agency respondent and a private respondent suggested that statutory committees are particularly likely to outlive their useful lifespan and can become a burden for agencies; three other agency respondents similarly suggested that there be a sunset provision for statutory committees. Another agency respondent proposed an informal review of committees for continued relevance every 2 years in lieu of a formal re-chartering process. Yet another agency respondent suggested that committees that do not issue any report for a number of years should presumptively be rejected when they apply for a new charter.</p>
<p>Minutes Requirement</p>	<p>3</p>	<p>0</p>	<p>One agency survey respondent proposed that minutes not be required for closed meetings. Another agency respondent suggested that minutes might not be needed when a transcript or webcast of the meeting exists, but also noted that they could serve a useful purpose as a summary of the meeting. Yet another agency respondent suggested that requiring that minutes be certified within 90 days can impose a burden on agencies.</p>
<p>NARA's General Records Schedule 26</p>	<p>2</p>	<p>1</p>	<p>Attorneys from an agency interviewed by Conference staff indicated that NARA's recordkeeping requirements for advisory committees were overly onerous. Two agency survey respondents, by contrast, expressed support for NARA's requirements.</p>

## Appendix D

### *Summary of FACA Workshop*

The following document contains a brief summary of the results of the Administrative Conference's Federal Advisory Committee Act ("FACA") workshop, held at the Occupational Safety and Health Review Commission's Hearing Room on August 16, 2011. The workshop was open to the public. The summary below focuses solely on recommendations for improving FACA and eschews any background discussion of FACA and its requirements, though several such background discussions occurred over the course of the workshop. The various recommendations considered at the workshop have been classified by subject matter. The topics considered include: (a) amending or clarifying the conflict of interest standards for committee members; (b) revising the committee formation process, including chartering and re-chartering; (c) amending or clarifying the "exceptions" to FACA's coverage; (d) "best practices" for promoting transparency in committee meetings; (e) the value of agencies' hosting asynchronous virtual web meetings of committees; and (f) any other issues workshop participants deemed relevant.

#### **I. Conflict of Interest Standards**

- David Vladeck (Director, FTC Bureau of Consumer Protection) proposed that members of committees dealing with product approval should be subject to more stringent ethics standards than members of committees dealing with issues relevant to general rulemaking.
- Richard Thomas (Associate General Counsel, Office of Government Ethics) noted that a number of aspects of the existing ethics laws permit agencies to tailor the conflict of interest regime to the needs of the particular committee: the ethics laws authorize conflict waivers (which are presumably easier to grant when a committee is dealing with less sensitive matters), SGEs can continue to serve on committees addressing "particular matter[s] of general applicability" even where an otherwise disqualifying matter related to their non-federal employment exists, and OGE allows agencies to adopt disclosure forms other than Form 450 to address the specific issues their committees face.
- Richard Thomas (Associate General Counsel, Office of Government Ethics) suggested that removing confidentiality for financial disclosures might deter prospective committee members from serving on committees.
- Vincent Salamone (Associate General Counsel, Office of Government Ethics) stated that the ability to appoint some committee members as "representatives," who are not subject to ethics standards, can be key to ensuring committee balance.
- Jamie Conrad (Attorney, Conrad Law & Policy Counsel) noted that many agencies improperly classify committee members as "representatives" rather than SGEs so as to



avoid implicating the federal ethics laws, a practice that both GAO and the Administrative Conference have criticized.

- Jamie Conrad (Attorney, Conrad Law & Policy Counsel) suggested that perhaps the appropriate threshold question is whether a committee is dealing with scientific/technical or general policy matters: if it is dealing with the former, committee members should generally be subject to ethics standards; if it is dealing with the latter, ethics standards may be unnecessary.
- Jamie Conrad (Attorney, Conrad Law & Policy Counsel) noted that it has become increasingly difficult to grant waivers to potential committee members, so much so that committees may not be able to recruit the most qualified candidates, some or all of whom may be “conflicted out.”
- Phil Harter (Professor, Vermont Law School) criticized the existing ethics regime for treating advisory committee members as “employees” (i.e., SGEs): it is illogical for an “employee” of the government to provide the government with advice. He also criticized the rule that any committee member who receives compensation for his or her service automatically qualifies as an SGE.
- Celia Wexler (Washington Representative, Union of Concern Scientists) asserted that many committee members have conflicts of interest that are undisclosed. Any proposed reform should ensure that existing conflicts are publicly disclosed.
- Alan Morrison (Professor, George Washington University Law School) argued that any waivers granted to committee members should be publicly disclosed, revealing the identity of the conflict of interest for which the waiver was granted and, if the conflict is financial, stating the approximate (but not necessarily exact) monetary value of the conflicting interest.

## II. Committee Formation Processes

- David Vladeck (Director, FTC Bureau of Consumer Protection) noted that the burdens associated with committee formation and chartering are fairly extensive and that agencies would benefit from some streamlining of the process.
- Robert Flaak (Director, Office of Committee and Regulatory Management, General Services Administration) stated that most delays in the committee formation process are a result of internal agency procedures, not of requirements imposed by FACA itself or by GSA in its consultation role in committee formation. GSA provides documentation that agencies can use for filing their charter and attempting to achieve a balanced committee membership.
- Robert Flaak (Director, Office of Committee and Regulatory Management, General Services Administration) noted that much of the delay in committee formation results

from agencies' requiring multiple levels of review when selecting potential committee members and finalizing committee charters.

- Phil Harter (Professor, Vermont Law School) asserted that Congress should closely scrutinize statutory advisory committees, which often do not have a clearly articulated mission and can sometimes outlive their useful lifespan. Discretionary committees, by contrast, are an exceptional bargain for agencies, allowing them to obtain outside advice with minimal expense. As such, barriers to the formation of such committees should be relaxed so far as possible.
- Phil Harter (Professor, Vermont Law School) suggested that the chartering function might be devolved to individual agencies (thereby removing any consultative role for GSA), which would expedite the process of committee formation.
- Sarah Shortall (Committee Counsel, Office of the Solicitor, Department of Labor) argued that GSA's annual review of existing committees provides any information Congress might need as to the utility of existing statutory committees and that requiring re-chartering of such committees every two years therefore adds very little marginal value.
- Karen Carrington (Attorney Advisor, General Law Division, Department of Agriculture) stated that the major delay in the committee formation process arises from agencies' requiring multiple levels of approval prior to finalizing a committee.
- Jeff Lubbers (Professor, American University Law School) recommended that Congress and the President make clear the type of membership balance they have in mind when setting up non-discretionary advisory committees.
- Marilyn Kuray (Acting Assistant General Counsel for Regulatory Issues, General Counsel's Office, Environmental Protection Agency) noted that agencies often require consideration of a litany of different factors in ensuring committee balance, which can considerably slow the process of committee formation.

### III. FACA "Exceptions"

- David Vladeck (Director, FTC Bureau of Consumer Protection) suggested that the non-voting participant exception, subcommittee exception, and contractor exception created improper loopholes in the statute and should be eliminated.
- Celia Wexler (Washington Representative, Union of Concerned Scientists) similarly argued that the non-voting participant, subcommittee, and contractor exceptions are improper (noting that the House of Representatives has already passed a bill eliminating these exceptions). The individual advice exception should be retained, but committees should document contacts with outside parties, even if the committee meets with such persons individually.
- Chris Hammond (General Law Division, Office of the General Counsel, Department of Health and Human Services) argued that the exceptions are useful to agencies in

consulting with outsiders and that limits on the abuse of such exceptions already exist. For instance, a parent committee cannot rubber stamp the advice of a subcommittee, thereby limiting agencies' ability to move all policymaking down to the subcommittee level.

- David Vladeck (Director, FTC Bureau of Consumer Protection) noted that it can be difficult to determine whether a committee has violated FACA by inappropriately using one of the various exceptions, given the lack of access to the committee's deliberations and work product.
- Jeff Lubbers (Professor, American University Law School) noted that negotiated rulemaking committees often make use of caucuses and that, if the subcommittee exception is eliminated, one might wish to create a carve out to allow negotiated rulemaking committees to continue to use such caucuses without triggering FACA's various procedural requirements.
- Sarah Shortall (Committee Counsel, Office of the Solicitor, Department of Labor) suggested that one might apply certain FACA requirements to subcommittees, such as requiring that documents be publicly available on request, without applying all such requirements to subcommittees.

#### **IV. Pro-Transparency Measures**

- David Vladeck (Director, FTC Bureau of Consumer Protection) noted that committee documents are often not readily accessible in the period prior to committee meetings.
- David Vladeck (Director, FTC Bureau of Consumer Protection) noted that the majority of committee meetings are closed, which casts some doubt on the statute's effectiveness in promoting transparency.
- Daniel Schuman (Policy Counsel, Sunlight Foundation) noted that technology can allow committees to promote transparency without imposing a substantial procedural burden on agencies (and can even mitigate FACA's procedural burden in some instances). In this light, committees should post important documents online, webcast committee meetings, and seek public comments on potential committee members, all of which would greatly increase transparency without creating a significant procedural burden for agencies.
- Alan Morrison (Professor, George Washington University Law School) noted that, to the extent agencies can outline in committee charters the type of balance they hope to achieve, the process of obtaining public input on potential committee members would be greatly facilitated.
- Alice Kottmyer (Attorney Advisor, Department of State) stated that webcasting committee meetings can be quite expensive and that she doubts all agencies would be able to afford such an expense.

- Daniel Schuman (Policy Counsel, Sunlight Foundation) noted that the cost of webcasting has diminished considerably in recent years and that agencies can use relatively low-cost options, such as Skype.
- David Vladeck (Director, FTC Bureau of Consumer Protection) noted that most committee documents are “born electronic” and therefore that committees should easily be able to post relevant documents. Promoting a consistent document posting policy across agencies would be quite beneficial.
- Jeff Lubbers (Professor, American University Law School) suggested that all committees might be required to have a website.
- Jamie Conrad (Attorney, Conrad Law and Policy Counsel) stated that the public comment period is often treated as an afterthought at committee meetings. It might be beneficial for committees to host an initial data gathering session wherein they actively seek input from members of the public prior to beginning a project.

**V. Asynchronous Virtual Meetings**

- Alice Kottmyer (Attorney Advisor, Department of State) suggested that an asynchronous web forum discussion may not constitute a “meeting” within the definition of FACA and therefore would be exempt from the statute’s requirements.
- Marilyn Kuray (Acting Assistant General Counsel for Regulatory Issues, General Counsel’s Office, Environmental Protection Agency) and Marcia Moore (Committee Management Officer, Department of Agriculture) noted that requiring DFOs to moderate a virtual web forum meeting would potentially divert too much time from other responsibilities they possess.
- Sarah Shortall (Committee Counsel, Office of the Solicitor, Department of Labor) suggested that asynchronous web meetings should not be the only sort of “virtual meeting” that agencies consider.

**VI. Other Issues**

- Phil Harter (Professor, Vermont Law School) and Jeff Lubbers (Professor, American University Law School) criticized the cap on the total number of discretionary advisory committees, noting that it reflected an improper bias against the formation of such committees.
- Alan Morrison (Professor, George Washington University Law School) suggested that FACA should perhaps not be applied to Presidential advisory committees. Applying the statute to such committees raises constitutional separation of powers issues, and courts have therefore been exceedingly reluctant to apply the statute to such committees. Unfortunately, these precedents often reaffirm the adage that “hard cases make bad law,”

insofar as their holdings are often generalized to non-Presidential committees (with the *Public Citizen* and *Cheney* decisions serving as sterling illustrations of this point), notwithstanding the diminished constitutional concerns in applying FACA to such committees.