

Response to the Draft Recommendations of the Administrative Conference of the United States Concerning the Federal Advisory Committee Act in the 21st Century from the Project on Government Oversight, OMB Watch and Union of Concerned Scientists
April 15, 2011

We appreciate the Administrative Conference of the United States' (ACUS) interest in the opportunities that new technology and social media offer for increasing public knowledge and participation in federal advisory committees. As part of its research project, "FACA in the 21st Century," ACUS's Committee on Collaborative Governance is appropriately examining how to give agencies and advisory committees more flexibility to utilize the countless new technologies and that have developed since the law was enacted in 1972.

However, we do have questions, concerns and additional suggestions regarding the ACUS draft recommendations issued on March 17, 2011. We understand that these recommendations have been pared down for the time being. Nevertheless, given the fluidity of the process, we will comment on all six of the draft recommendations as presented in the March 17 draft.

1. The General Services Administration (GSA) should amend the Federal Advisory Committee Act (FACA) committee management rules to permit expanded electronic meeting opportunities by clarifying the extent to which "new media" (or "social media") can be used by agencies in connection with advisory committees that are governed by FACA. The rules should also illustrate, by examples, options for using these media to obtain public input to agency decision-making, including development of a public consensus on specific issues that do not trigger the applicability of FACA.

Our groups strongly endorse revisions to committee management rules to permit federal advisory panels to use new technology, such as webcasting, to make their meetings more accessible to the public. We also urge that GSA strongly encourage all federal agencies to post webcasts of all their meetings on the web within two weeks of the meeting. This would save agencies the time and resources required to compile a written transcript, and would ensure a timely record of each meeting.

However, we also have some questions and concerns about the second part of this recommendation. While we agree that new media should be fully utilized to allow for public comments and participation, we have questions about the context in which agencies would use social media as a substitute for an advisory panel's deliberations in order to get a "public consensus" on specific issues. While some federal agencies convene stakeholder groups to ascertain their views, this is not the case for federal scientific advisory panels. These panels are specifically convened to gather the views of scientific experts on regulatory issues.

FACA is intended to ensure that federal agencies, particularly those concerned with rule-making, have access to outside expert guidance and advice. At best, social media can only provide a rough indicator of public opinion. At worst, social media can be manipulated by special interests with resources to hide a policy agenda through an "astroturf" campaign that recruits individuals to send in comments in order to trigger a

certain public policy outcome. We would oppose using electronic media to obtain “public consensus” to substitute for the informed deliberations of a federal advisory panel; instead, we recommend that social media be used only to allow public participation to enhance and support the work of the official committee.

2. GSA should announce that, under current law, federal advisory committees can conduct meetings wherein committee members post comments on a web forum that would be available over the course of several weeks or months and would permit members of the public to view all postings. Such meetings must comply with FACA requirements for advance public notice and public access to the meetings.

We support agencies using new media to provide additional tools for committee members to communicate outside of full face-to-face meetings. Web meetings that could be viewed by the public could be a terrific way to increase efficiency and collaboration.

3. GSA should incorporate into its training sessions for committee management officers and its informational materials about FACA a discussion of ways in which new or social media can be used by advisory committees without violating FACA. The emphasis should be upon finding ways to obtain the potential benefits within the requirements of existing law.

We strongly endorse this recommendation.

4. Agencies should experiment with creative techniques of using new or social media as a means of reducing the costs of advisory committee activities, as well as obtaining broader sources of useful information by advisory committees.

We welcome agencies experimenting with social media, provided that these experiments in no way preclude the transparency of advisory panels. Agencies should reaffirm that it is the obligation of advisory panels to deliberate in a fashion that is publicly accessible and permits public comment.

We also believe technology should be used to help federal agencies recruit a larger pool of experts from across the country and achieve the goal of using as many non-conflicted experts as possible. GSA should encourage federal agencies to solicit members using a variety of social media with the following guidelines:

- *When forming or adding members to an advisory panel, agencies should solicit suggestions of nominees from the public as a request for comments in the Federal Register, and also provide a mechanism for interested persons to comment through the agency’s official website.*
- *The public also should have the opportunity to submit public comments after an agency posts a list of the names and bios of advisory committee nominees under consideration who have agreed to serve if named to the committee.*

- *Agencies should develop mechanisms on their websites for the public to report an undisclosed conflict of any advisory panel member to the agency. The report would be confidential, but the GSA/Office of Government Ethics (OGE)/agency would be required to investigate it.*
- *After advisory committee members are chosen, agencies should publicly disclose on their websites information about each member's qualifications and background and former employers and funding source, and whether the member is serving as a special government employee or representative.*

5. Each agency that uses advisory committees should examine its internal review processes for establishing new advisory committees, for referring new issues within the scope of existing advisory committees to those committees, and scheduling meetings, and should seek ways to eliminate delay from these processes.

*While we support agencies examining their processes and reducing delays, we are concerned with the lack of specificity in this recommendation. **We would oppose any agency strategy that might reduce the transparency and accountability of FACA.***

6. Congress should not alter by legislation GSA's interpretation of existing law that permits a subcommittee to study and analyze assigned issues, develop proposals, and write drafts in advance of a meeting of the full committee, for presentation, debate, and ultimate acceptance, modification or rejection by the full committee.

We would strongly oppose any effort to use the subcommittee loophole in current law to evade the requirements of FACA.

Although we understand that many CMOs find FACA's open meeting and disclosure requirements to be burdensome, we believe they exist for an important reason: to ensure that committees are providing the government with the best possible advice on critical policy issues. As part of the oversight process, the public must be given the necessary information and tools to evaluate the advice provided by committees, verify that committees are maintaining balanced membership, and review potential conflicts of interest for committee members.

We are concerned that subcommittees may convene and do all their work in secret, without any public participation, and that a subcommittee may take on most of the work of the full committee, thus subverting FACA. There is currently far too much inconsistency when it comes to information provided by different agencies and committees. The overuse of FACA-exempt subcommittees can further limit public oversight and create the serious potential for undue influence by special interests or agency officials.

Thank you for the opportunity to share our thoughts on your draft FACA recommendations. We welcome further discussions, which can be arranged by contacting Celia Wexler at UCS at 202-390-5481

Sincerely,
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