



ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Collaborative Governance Minutes of Meeting – October 18, 2011

Committee Members

Jody Freeman, Chair (by video Skype)
Stephen Burns
Daniel Elliott
Philip Harter (by video Skype)
Michael Herz (by telephone)
James Johnson
John Kamensky
Miriam Nisbet
Patrick Patterson
Sallyanne Payton (by telephone)
Alasdair Roberts (by telephone)
Christopher Schroeder (by telephone)

Other ACUS Members

Jeffrey Lubbers
Alan Morrison

Administrative Conference Staff

Paul Verkuil
Jonathan Siegel
David Pritzker
Reeve Bull

Public

Karen Carrington, USDA
Jillian Fox, DOD (by telephone)
Charlie Johnson, DHS
Elizabeth Kopley, VA
Alice Kottmyer, State Department
Brian Murphy
Vincent Salamone, OGE
Michael Smallberg, Project on Government
Oversight

The meeting commenced at 1:30 PM. The meeting was conducted by Committee Chair Jody Freeman, who participated via Internet video. Ms. Freeman opened the meeting by welcoming the committee members and others present. After participants in the meeting were identified, Ms. Freeman summarized the steps taken subsequent to the last committee meeting on September 20. She thanked members of the subcommittee formed to draft the text of proposed recommendations concerning the Federal Advisory Committee Act, based on the committee's discussion at that meeting. Members of the subcommittee were Ms. Freeman, Mr. Kamensky, Mr. Lubbers, and Mr. Schroeder, assisted by Mr. Siegel, Mr. Bull and Mr. Pritzker.

Documents under consideration by the committee at the October 18 meeting included: the subcommittee's draft recommendation, dated October 14; memorandum to the committee from Mr. Harter, dated October 17; comments from Senior Fellow Alan Morrison, received October 17; and comments from the General Services Administration (GSA), submitted by Robert Flaak, Director, Office of Committee and Regulatory Management (received and distributed during the meeting). [Note: These documents and the "manager's amendment" cited below are all available on the Administrative Conference (ACUS) website at: <http://www.acus.gov/research/the-conference-current-projects/faca-in-the-21st-century/>]

As an initial matter, Mr. Siegel introduced a "manager's amendment," which included some relatively minor stylistic and other changes suggested by Mr. Morrison. The committee approved those suggestions.

Discussion of Mr. Harter's Amendment

Mr. Harter presented a proposed amendment to the draft recommendation, described in more detail in his memorandum, which would advise Congress "to amend FACA to permit agencies to establish advisory committees on their own and without having to engage in the chartering process or consult with GSA. The committees would still be required by FACA to be balanced and open. The amendment would replace paragraph #1 in the draft, which addressed centralizing the committee formation process at an agency in a single office or official."

Mr. Harter cited instances in connection with negotiated rulemaking in which agencies found the committee chartering process to be an obstacle. He said that when agencies need outside advice, they should be able to obtain it

without having to seek permission or undergo review by another agency. He added that if agencies had the flexibility to make their own decisions about how to obtain expert advice, they would not be so reluctant to work under FACA. In his view, the charter itself is not in practice an aid to transparency. Also, under Mr. Harter's proposal, agency committee management officers would still exist and GSA would still be available as a source of information and experience with FACA, but agencies would have added flexibility.

Ms. Nisbet noted that at her agency, the National Archives and Records Administration (NARA), some people were concerned about reducing transparency, and the current procedures help the public to see what is happening with advisory committees. Mr. Harter responded that his proposal would decrease the likelihood of avoidance of FACA by agencies and its requirements of openness and transparency. He added that eliminating the formality and bureaucracy of chartering would not affect what the public would normally see.

Mr. Morrison disagreed about eliminating charters, saying that they tell what the committee is supposed to be doing and they are very valuable for understanding the objectives of the committee. Mr. Kamensky observed that the Act specifies what a charter is supposed to contain and that this is important information to get out, but the immediate question is whether GSA should have to approve the charter. Mr. Harter explained that under his proposal, guidelines from GSA would remain, but not any controls. He also stated that the existing Federal Register notices for committee meetings are adequate to state what the committee is supposed to be doing. Mr. Siegel responded that the Federal Register meeting notices often do not include information about the overall goals of the committee.

At this point, Mr. Bull announced that GSA had just submitted some comments on the draft recommendation the committee was considering. Copies were made and distributed to attendees, and Mr. Bull called the attention of committee members to GSA comments relating to issues under discussion. In particular, he noted GSA's comments on the Harter proposal:

"One of the primary reasons FACA was enacted was the failure of agencies to properly administer advisory committees – Congress concluded that, in the period prior to the enactment of FACA, a complete lack of oversight and basic management controls contributed to inactive and meaningless advisory committees.

* * *

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

Mr. Kamensky cited some of his own experience in the 1990s with the "reinventing government" initiative. In a somewhat analogous situation, agencies seeking approval from OMB for information collections would spend time trying to guess what OMB's concerns would be, resulting in unnecessary delay. So the delay was in the agencies, but it was because the agencies got the policy message from the administration that they didn't want more proposals approved. Mr. Harter responded that such agency behavior was consistent with his advisory committee experience. Mr. Bull reported that his research showed the delay is internal to the agency; but the impetus for this is the chartering requirement, for which an agency might feel obliged to take more time and steps to review.

Mr. Smallberg spoke in support of Mr. Morrison's comments, saying that the charters can be extremely important for public information, especially for committees that do not have websites. He also mentioned legislation pending in Congress that would provide more information on the required content of committee charters.

Mr. Kamensky endorsed the idea of having the charter as a notice to the public, but not requiring GSA approval. Mr. Bull pointed out that under current law, GSA approval is not actually required, but the consultation process is.

After some discussion of alternative wordings, Ms. Freeman tried to summarize the general direction of the emerging views:

- Keep the charter requirement for informational purposes, serving a transparency function
- Leave the management controls of advisory committees within the agency
- Clarify the Act to eliminate any real or perceived permission aspect of the process
- Retain GSA's authority to issue guidelines
- Retain the concept of having a central repository of charters that would be accessible to the public

On the last point, it was observed that GSA currently has a FACA database with the charters, which is available online.

Committee members voted for this set of principles as a substitute to Mr. Harter's proposed amendment, and then voted to accept the result as an amendment to the draft recommendation. Ms. Freeman asked the ACUS staff to draft appropriate language to express what the committee had thereby adopted. It was also agreed that the newly adopted principles would replace section #1 of the draft recommendation.

At this point, Mr. Harter left the meeting.

Discussion of Other Sections of the Draft Recommendation

Recommendation #2 (concerning clarification by Congress of the intended mission, duration, budget and preferred membership balance for statutorily established committees). Ms. Freeman noted the value of asking Congress to be clearer about its intentions when it creates new committees by statute.

Recommendation #3 (concerning elimination of the cap on the number of advisory committees). Ms. Freeman stated that #3 was not controversial in the full committee or the drafting subcommittee.

Mr. Morrison said he has no strong views on whether this is a good idea, but questioned what support there is for the recommendation. Mr. Bull explained that the cap permits up to 534 discretionary committees, and that there are now 469. However, this number is allocated among individual agencies. GSA reports that the total number has never run up against the cap, but agencies have reported that they are not always sure if they are exceeding their own cap. If an agency needed to exceed its own cap, it would have to go to GSA for an adjustment. Mr. Lubbers suggested that these limitations can have a chilling effect on creating committees.

Recommendation #4 (concerning elimination of the subcommittee exemption). Ms. Freeman reminded the committee that it had decided not to endorse replacing the subcommittee exemption by a preparatory work exemption, and that Mr. Schroeder had stated at the September 20 meeting that such a change in FACA would likely create confusion and lead to a lot of litigation. Instead, the draft says that if Congress does eliminate the subcommittee exemption, as provided in pending legislation, then it should be replaced with a preparatory work exemption. The drafting subcommittee decided not to include recommendations to eliminate the contractor and nonvoting member exemptions because the research had not identified the specific problems or collected data to show the conditions under which problems might arise.

Mr. Siegel mentioned that GSA does not support this recommendation because of a belief that it would undermine transparency and openness. However, Mr. Siegel said that #4 would not create any new problems, because the GSA regulations already contain a preparatory work exemption. The draft just says that if the subcommittee exemption is eliminated, Congress should codify what is now in the regulations for preparatory work.

Recommendation #5 (concerning clarification of the regulations with respect to virtual meetings conducted via the Internet over an extended period of time). Ms. Freeman noted that this recommendation had been unobjectionable at every stage of the committee's discussions. Mr. Siegel reported that GSA does not support #5 because they believe it is duplicative of existing regulations. It was reported by ACUS staff that agencies have specifically said they would need some clarification from GSA before they would consider such virtual meetings. Most agencies seem not to be aware that this option is available to them. Mr. Siegel also mentioned that ACUS on the same day had published a notice in the Federal Register announcing its first virtual meeting.

Recommendation #6 (concerning amendment of the Negotiated Rulemaking Act). It was mentioned that GSA supports this recommendation. No concerns were expressed.

Recommendation #7 (concerning ethics requirements for advisory committee members).

It was noted that #7(a) is directed to Congress to be more specific about the classification of members of statutorily created advisory committees. Mr. Salamone commented that this would eliminate the need for an agency to try to determine what Congress intended as to whether individuals on the committee would be representative members or special government employees. Ms. Freeman stated that the research found some confusion on this point and the recommendation puts a spotlight on the problem. Mr. Salamone added that among the things that OGE looks at, when it reviews legislative bills, is whether there is any language concerning the ethics status of advisory committee members that will determine if ethics rules will apply to particular members of a committee.

Mr. Bull explained that #7(b) highlights an issue about misclassification of committee members as representatives, based simply on their fields of expertise, a problem noted by GAO in a 2004 report. The recommendation is intended to make clear what the principle is.

Commenting on #7(c), Mr. Morrison spoke in favor of making public any waivers granted to committee members under the applicable ethics legislation, with appropriate provisions for redacting confidential information. However, he suggested clearly relating the level of disclosure to the level of disclosure required for federal employees. Mr. Siegel explained that #7(c) just says: to whatever extent an agency has to reveal information about waivers, that information should be posted online. It does not address what should be included because the research did not cover that question. Mr. Salamone called attention to OGE's regulations and guidance on this matter, and Mr. Morrison suggested making some reference to this in the recommendation.

Recommendation #8 (concerning the posting of committee documents online).

After some discussion, a sentence referring to committees' not being required to post "documents that are not critical to understanding the work of the committee, such as intermediate drafts of reports" was deleted because its meaning was not entirely clear.

Mr. Siegel noted that GSA said this recommendation is duplicative of existing requirements and called attention to NARA's General Records Schedule 26. Ms. Nisbet stated that the latter addresses disposal issues, whereas the recommendation is only about posting, not disposal.

Recommendation #9 (concerning live webcasts of meetings and posting recorded broadcasts online following meetings).

No concerns were expressed.

Recommendation #10 (concerning achieving balance in committee membership).

It was noted that #10 is intended to advise agencies that on some occasions, to reduce delay, they should focus on the most relevant balance factors and spend less time on achieving balance on factors less directly relevant to the committee's mission. The committee agreed to a suggestion by Mr. Morrison to insert a reference to not unduly increasing the size of the committee as a consideration.

Recommendation #11 (concerning offering the public an opportunity to comment on proposed committee membership lists).

Mr. Siegel noted GSA's comment that this is duplicative of language in H.R. 3124, currently pending in Congress.

In response to Mr. Morrison's observation about #11(b) that merely listing a name will not tell the public what this person would bring to the committee, Ms. Freeman suggested adding: "and providing relevant biographical information," and this change was accepted.

Approval of Proposed Recommendation

The committee approved the entire recommendation (with the amendments discussed and adopted, and with the substitute to Mr. Harter's amendment), for forwarding to the ACUS Council for inclusion on the plenary session agenda.

Mr. Siegel advised the committee that the other ACUS committees have routinely authorized their chairs to accept on behalf of the committee any modifications to the language of the proposed recommendation that may occur later, provided such changes are consistent with the direction of the committee. The committee agreed to authorizing Ms. Freeman to act in this manner.

The meeting was adjourned at 3:35 PM.