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The Federal Advisory Committee Act – Issues and Proposed Reforms

Committee on Collaborative Governance

Proposed Recommendation | December 8–9, 2011

1 The Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, governs the process
2 whereby the President or an administrative agency obtains advice from groups that include one
3 or more non-federal employees. It places various limits on the formation of such groups and
4 requires that group meetings be open to public attendance and permit at least a limited degree
5 of public participation. Though Congress has occasionally amended FACA,¹ the original
6 framework of the 1972 Act has essentially remained intact to the present day. Nevertheless,
7 FACA has faced criticism, with some contending that the Act imposes excessive procedural
8 burdens and others arguing that it does not require agencies to do enough to promote
9 openness and transparency. This recommendation offers proposals to Congress, the General
10 Services Administration (GSA), and agencies that use advisory committees, to alleviate certain
11 procedural burdens associated with the existing regime, clarify the scope of the Act, and
12 enhance the transparency and objectivity of the advisory committee process.

13

14 *Overview of FACA*

15

16 Congress, the President, and administrative agencies each can form advisory
17 committees. Advisory committees are classified as either “discretionary” or “non-

¹ See, e.g., Federal Advisory Committee Act Amendments of 1997, Pub. L. No. 105-153, 111 Stat. 2689 (1997) (exempting meetings of the National Academy of Sciences and National Academy of Public Administration from FACA); Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995) (exempting certain interactions between federal agencies and state, local, and tribal officials from the requirements of FACA).



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18 discretionary.” “Discretionary” advisory committees include those that an agency forms of its
19 own initiative or in response to a statute authorizing the creation of a committee.² “Non-
20 discretionary” advisory committees include those formed by the President and those that
21 Congress, by statute, specifically directs the President or an agency to establish.³

22

23 FACA furthers three major goals. First, the Act promotes transparency and public
24 participation in the advisory committee process, providing for open meetings and permitting
25 interested members of the public to submit written and/or oral comments to advisory
26 committees.⁴ Second, the Act seeks to ensure objective advice and limit the influence of
27 special interests on advisory committees by requiring that the membership of an advisory
28 committee “be fairly balanced in terms of the points of view represented and the functions to
29 be performed by the advisory committee.”⁵ Third, the Act seeks to preserve federal resources
30 by requiring justifications for any new committees and periodic review of existing committees
31 to ensure that they continue to serve a useful purpose.⁶

32

33 In order to trigger FACA, an assemblage of individuals must include at least one non-
34 federal employee as well as meet the following requirements: (a) work as a group, (b) be
35 “established” by statute or “established or utilized” by the President or an administrative

² 41 C.F.R. § 102-3.50. There are currently 271 committees established by agencies and 198 committees authorized by statute for a total of 469 discretionary committees. See FACA Database, <http://www.fido.gov/facadatabase/rptgovttotals.asp> (last visited October 5, 2011).

³ 41 C.F.R. § 102-3.50. There are currently 556 committees required by statute and 48 committees created by the President for a total of 604 non-discretionary committees. See FACA Database, <http://www.fido.gov/facadatabase/rptgovttotals.asp> (last visited October 5, 2011).

⁴ 5 U.S.C. App. 2 § 10; HOUSE COMM. ON GOV'T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. Rep. No. 91-1731, at 17–21 (1970) (hereinafter “1970 HOUSE REPORT”).

⁵ 5 U.S.C. App. 2 §§ 9(b)(2), (c); 1970 HOUSE REPORT at 19.

⁶ 5 U.S.C. App. 2 §§ 7(b), 9(c), 14(a); 1970 HOUSE REPORT at 4, 12, 15–16.



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36 agency, and (c) provide “advice or recommendations” to the President or a federal agency.⁷
37 The courts have held that certain types of interactions do not meet this threshold for triggering
38 FACA. Specifically, courts have held that (a) assemblages of persons providing advice to the
39 government individually are not “groups” subject to FACA,⁸ (b) groups formed by private
40 contractors that are not subject to direct management or control by an administrative agency
41 are not “utilized” by the agency so as to trigger FACA,⁹ (c) subcommittees that report to a
42 parent committee are not subject to FACA’s open meeting requirements since the
43 subcommittee does not itself provide “advice or recommendations” to the agency,¹⁰ and (d)
44 groups in which the non-government members lack a formal vote or veto over the “advice or
45 recommendations” the committee ultimately provides do not implicate FACA.¹¹

46

47 All advisory committees subject to FACA must comply with a number of procedural
48 requirements.¹² Prior to the committee’s commencing its work, an agency creating a
49 discretionary committee must consult with the General Services Administration (GSA) regarding
50 the need for the proposed committee, and all committees must have a charter setting forth the
51 committee’s mission.¹³ The members selected to serve on the proposed committee must
52 reflect an appropriate balance of the points of view and fields of expertise relevant to the

⁷ 5 U.S.C. App. 2 § 3(2).

⁸ *Ass’n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993).

⁹ *Byrd v. United States Env’tl. Prot. Agency*, 174 F.3d 239, 246–47 (D.C. Cir. 1999); *Food Chem. News v. Young*, 900 F.2d 328, 333 (D.C. Cir. 1990).

¹⁰ *Nat’l Anti-Hunger Coal. v. Exec. Comm. of the President’s Private Sector Survey of Cost Control*, 711 F.2d 1071, 1075–76 (D.C. Cir. 1983); 41 C.F.R. § 102-3.35.

¹¹ *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005).

¹² 5 U.S.C. App. 2 § 3(2).

¹³ *Id.* §§ 7(c), 9(c); 41 C.F.R. §§ 102-3.60–75.



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53 committee's work.¹⁴ FACA only requires that committees achieve balance on factors
54 specifically relevant to the committee's work, but a number of agencies have adopted policies
55 of achieving balance on additional factors. Committee members selected to provide objective
56 advice are appointed as "Special Government Employees" (SGEs) and must comply with ethics
57 requirements similar to those applicable to regular government employees, whereas members
58 chosen to represent a particular interest group with a stake in the committee's work are
59 appointed as "representatives" and are not subject to ethics requirements.¹⁵ Once a
60 committee is formed, the agency must announce any committee meetings in advance in the
61 Federal Register, permit interested members of the public to attend such meetings,¹⁶ and
62 receive comments from individuals interested in the committee's work.¹⁷ The public, upon
63 request, must be given access to all documents prepared for or by the advisory committee.¹⁸
64 Finally, agencies must re-charter each existing committee every two years and, as part of that
65 process, show that the committee has continued relevance and that the costs of its continued
66 existence do not outweigh the benefits it provides.¹⁹

¹⁴ 5 U.S.C. App. 2 §§ 5(b)(2), (c); 41 C.F.R. §§ 102-3.30(c), 102-3.60(b)(3).

¹⁵ 5 U.S.C. App. 2 §§ 5(b)(3), (c); 18 U.S.C. § 202(a); 41 C.F.R. § 102-3.105(h); 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 & the Conflict-of-Interest Statutes 3–5 (July 9, 1982).

¹⁶ Under certain circumstances, a committee may close an entire meeting or parts thereof. 5 U.S.C. App. 2 § 10(d); 41 C.F.R. § 102-3.155. In recent years, the majority of committee meetings have been either partially or fully closed from public attendance. See FACA Database: FY2010 Government Totals, <http://fido.gov/facadatabase/rptgovttotals.asp> (last visited September 21, 2011) (noting that, thus far in 2011, 71% of committee meetings have been completely closed, 4% partially closed, and 25% fully open).

¹⁷ 5 U.S.C. App. 2 § 10; 41 C.F.R. §§ 102-3.140, 102.3-150.

¹⁸ 5 U.S.C. App. 2 § 10(b); 41 C.F.R. § 102-3.170.

¹⁹ 5 U.S.C. App. 2 § 14; 41 C.F.R. § 102-3.60. In addition to the re-chartering process, the Administrator of GSA conducts an annual review of existing committees designed to ensure that such committees continue to serve useful purposes and to recommend eliminating any committees that do not, 5 U.S.C. App. 2 § 7(b); 41 C.F.R. § 102-



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67

68 Agencies are also subject to Executive Order 12,838, issued by President Clinton in 1993,
69 which required agencies to reduce the number of their discretionary advisory committees by
70 one-third.²⁰ The Office of Management & Budget then issued Circular A-135, which capped the
71 number of agency discretionary committees at the reduced levels permitted by the Executive
72 Order.²¹ Administrative agencies collectively can maintain a total of 534 discretionary advisory
73 committees without exceeding the cap.

74

75 In certain instances, agencies may wish to form advisory committees consisting of
76 representatives from different stakeholder communities to negotiate the text of a proposed
77 rule.²² Congress has specifically authorized this process, known as “negotiated rulemaking,” in
78 the Negotiated Rulemaking Act of 1990.²³ In most instances, negotiated rulemaking
79 committees are subject to FACA,²⁴ except as modified by the Negotiated Rulemaking Act or
80 another statute. The Negotiated Rulemaking Act provides some of the same protections as
81 FACA, requiring that the agency make certain findings regarding the need for a negotiated
82 rulemaking committee²⁵ and that negotiated rulemaking committees be balanced to include

3.100(b)(1), and the head of each agency is responsible for eliminating any advisory committee that no longer justifies the expenditure of resources required to perpetuate it, 41 C.F.R. §§ 102-3.30(b), 102-3.105(e).

²⁰ Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 10, 1993).

²¹ Office of Management & Budget, Circular A-135: Management of Federal Advisory Committees, 59 Fed. Reg. 53856, 53857 (Oct. 26, 1994).

²² DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 1 (Administrative Conference of the U.S. 1995).

²³ Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified at 5 U.S.C. § 561 *et seq.*).

²⁴ 5 U.S.C. § 565(a)(1).

²⁵ *Id.* § 563.



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83 representatives from all relevant stakeholder communities.²⁶ However, requirements
84 pertaining to notices and openness of meetings stem from FACA rather than from the
85 Negotiated Rulemaking Act.

86

87 *Research Methodology*

88

89 Both governmental agencies and private groups have criticized the existing FACA
90 regime. Many agencies contend that it is overly cumbersome and limits their ability to obtain
91 outside advice. Numerous private groups have argued that the statute does not adequately
92 promote transparency or preserve a role for the public to participate in the work of
93 committees. Congress has also recently proposed various reforms to FACA that would, as a
94 general matter, extend the scope of the Act and require agencies to undertake various steps to
95 increase transparency in their use of advisory committees.²⁷ In light of the recent interest
96 expressed in reforming FACA, study of the Act is timely. In order to identify the problems
97 driving these concerns and formulate potential solutions, the Conference undertook an
98 extensive study, seeking input from individuals and groups within and outside of the federal
99 government. The data-gathering effort included: (a) two separate surveys, with one focusing
100 on agency Committee Management Officers (CMOs), who are responsible for compliance with
101 FACA, and the other focusing on “clients” of advisory committees such as agency program
102 officers and general counsel’s offices; (b) a workshop with approximately 50 participants,
103 including numerous agency representatives with extensive experience in the use of advisory
104 committees and members of non-governmental organizations that promote government
105 transparency; and (c) dozens of interviews of FACA experts (not limited to CMOs) both within
106 and outside of the federal government.

107

²⁶ *Id.* §§ 563(a)(2)–(3), 564(a)(3)–(4), 565(a)(1).

²⁷ H.R. 3124, 112th Cong. § 3(b) (2011).



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108 *Research Results*

109

110 The data gathered suggest that FACA and/or its implementation by administrative
111 agencies has given rise to at least three types of problems: (1) procedural burdens that inhibit
112 the effective use of advisory committees without substantially furthering the policies of the Act;
113 (2) confusion about the scope of the statute that may discourage agencies from using
114 committees or induce them to engage in “work-arounds” to avoid triggering its requirements;
115 and (3) agency practices that either undermine or fail to fully promote the transparency and
116 objectivity of the advisory committee process.

117

118 The recommendations below propose reforms to address these problems. The first
119 group of recommendations seeks to alleviate barriers and perceived barriers²⁸ to the
120 government’s use of advisory committees by simplifying the process by which agencies create
121 advisory committees and select their members and removing the arbitrary cap on the number
122 of advisory committees.²⁹

123

²⁸ The Conference’s empirical research indicated that the principal sources of delay in the committee formation process are within agencies themselves rather than resulting from delays associated with GSA’s review of proposed committee charters. Nevertheless, informed observers were concerned that there exists a widespread perception among agencies that GSA’s review of proposed charters constitutes a de facto approval process rather than a consultation requirement, thereby causing some agencies to invest excessive time in drafting committee charters prior to submission to GSA for review.

²⁹ Though the 469 discretionary advisory committees in existence are currently well short of the 534 discretionary committees authorized, the cap can nevertheless create procedural burdens for agencies and inhibit their ability to obtain needed outside advice. Since GSA allots each agency a specific number of potential discretionary advisory committees, an agency that intends to exceed its individual ceiling must request that GSA adjust that ceiling. Agency officials interviewed as part of the research also indicated that individuals outside of the CMO’s office were sometimes unsure of whether the agency was likely to exceed its discretionary committee ceiling and were therefore reluctant to request additional committees.



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124 The second set of recommendations seeks to clarify the Act’s scope in light of cases
125 interpreting the Act and in anticipation of congressional amendments recently under
126 consideration that might inhibit agencies’ use of advisory committees or lead to use of
127 alternative procedures to avoid triggering the Act. One such amendment would require
128 subcommittees to comply with all provisions of FACA other than chartering, including the open
129 meeting requirements.³⁰ The Conference recommends that if Congress eliminates the
130 subcommittee exemption, then it should codify what is currently a regulatory exemption
131 allowing agencies to conduct preparatory work in closed meetings, without a requirement of
132 advance public notice.³¹ The Conference also recommends that GSA clarify the Act’s
133 applicability to “virtual meetings” conducted via web forum to ensure that agencies are not
134 chilled from using this technique and that Congress clarify the applicability of FACA principles to
135 negotiated rulemaking committees.

136

137 The third set of recommendations proposes that both Congress and agencies adopt
138 certain procedures that would enhance the transparency and objectivity of the advisory
139 committee process without imposing onerous procedural or financial burdens on the agencies.
140 These include “best practices” related to committee formation and operation (such as posting
141 committee documents online, webcasting committee meetings, and soliciting input on
142 potential committee members) and recommendations related to the classification of
143 committee members for purposes of applying ethics standards.

144

³⁰ H.R. 3124, 112th Cong. § 3(b) (2011).

³¹ Concerns have also been expressed that exemption from FACA of meetings of committees formed by private contractors at agencies’ behest, and committees wherein all voting members are federal employees, creates the potential for circumvention of the Act. See Reeve T. Bull, *The Federal Advisory Committee Act: Issues & Proposed Reforms* 17–18, 20–21, 40–42 (September 12, 2011). The Conference believes that additional research concerning the extent to which agencies utilize such exemptions and the extent to which their use thereof defeats the policies the Act was intended to serve would be beneficial in determining whether such exemptions should be either eliminated entirely or scaled back so as to apply only in a specific set of circumstances.



RECOMMENDATION

145 *Alleviating Procedural Burdens That Inhibit the Effective Use of Advisory Committees*

146

147 1. Congress should amend the Federal Advisory Committee Act (“FACA”) and the
148 General Services Administration (“GSA”) should amend its FACA implementing regulations to
149 eliminate any requirement that agencies consult with the Administrator of GSA prior to forming
150 or renewing an advisory committee or implementing a major change to the charter of an
151 existing committee. Specifically, Congress should delete the phrase “after consultation with the
152 Administrator” from section 9(a)(2) of FACA, and GSA should eliminate or suitably revise 41
153 C.F.R. §§ 102-3.60, 102-3.85(a), which currently require such consultation with GSA’s
154 Committee Management Secretariat.³² Agencies should still be required to prepare and file
155 committee charters and should be permitted (but not required) to consult with GSA to obtain
156 advice regarding preparation of the charter or other aspects of committee formation. Agencies
157 should also still be required to file charters as under current law,³³ including filing with GSA for
158 informational purposes and for inclusion in the FACA database. GSA should continue to post all
159 committee charters online.

160

161 2. Agencies should identify and prioritize those factors for achieving balance among
162 committee members that are directly relevant to the subject matter and purpose of the
163 committee’s work. The committee charter should include a description of the committee’s
164 mission and the most relevant balance factors. Agencies should consider exercising their
165 discretion to pursue balance for other, less directly relevant factors, only when doing so would

³² GSA would continue to offer advice on committee formation and operation to agencies that seek such advice, and its regulations might authorize agencies to obtain advice on committee formation and operation from the Committee Management Secretariat.

³³ 5 U.S.C. App. 2 § 9(c); 41 C.F.R. § 102-3.70.



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166 not consume considerable additional time or unduly increase the size of the committee without
167 substantially furthering the mission of the committee.

168

169 3. Whenever Congress creates an advisory committee through legislation, it should
170 indicate its intent as to the mission, estimated duration, budget, and preferred membership
171 balance for the committee. Whenever such committees are exempted from the biennial
172 review process, Congress should provide guidance concerning the intended duration of each
173 such committee or, alternatively, a clear explanation of the committee's mission and a
174 provision that the committee should terminate upon completion of that mission.

175

176 4. The President and the Office of Management and Budget should eliminate the cap on
177 the number of discretionary advisory committees established by Executive Order 12,838 and
178 Circular A-135.

179

180 *Clarifying the Scope of FACA*

181

182 5. Congress should not eliminate the exemption for subcommittees that report to
183 parent committees currently stated in 41 C.F.R. § 102-3.35 unless it codifies an exemption
184 providing that members of committees or subcommittees may meet to conduct "preparatory
185 work" without complying with the notice and open meeting requirements of the Act. The
186 statutory definition of "preparatory work" should be similar to that currently provided in
187 FACA's implementing regulations at 41 C.F.R. § 102-3.160(a).³⁴

188

³⁴ Congress and/or GSA might also include a clearer list of activities that constitute "preparatory work" than that currently contained in the implementing regulations, including activities such as (i) drafting documents for consideration at a committee meeting, (ii) conducting research or preliminary analysis on topics for discussion at a committee meeting, (iii) engaging in pre-decisional deliberations, (iv) choosing meeting topics, and (v) considering future projects for the committee to undertake.



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189 6. GSA should amend section 102-3.140(e) of the FACA implementing regulations to
190 clarify that, in addition to holding teleconferenced or webconferenced meetings, agencies also
191 may host virtual meetings that can occur electronically in writing over the course of days,
192 weeks or months on a moderated, publicly accessible web forum. Agencies with advisory
193 committees should be aware that they have the option of holding committee meetings via such
194 online forums. To the extent they conduct meetings by web forum, agencies should monitor
195 the process and determine whether it is an efficient and transparent means of hosting
196 meetings.

197

198 7. Congress should amend the Negotiated Rulemaking Act (5 U.S.C. § 561 *et seq.*) to
199 provide that committees engaged in negotiated rulemaking are exempt from FACA but that
200 such committees should be required to announce full committee meetings in advance and open
201 them to public attendance.³⁵ The amendments should codify existing procedures that allow
202 caucuses or other sub-groups of committee members to meet privately, provided that such
203 caucuses or sub-groups take no final action on behalf of the full committee.

204

205 ***Enhancing Transparency and Objectivity***

206

207 8. Congress and agencies should adopt the following procedures with respect to the
208 ethics requirements applicable to advisory committee members:

209

210 (a) In creating statutory advisory committees, Congress should specify the intended
211 classification of committee members for purposes of applying federal ethics laws.

212 Congress should explicitly classify as “representatives,” not subject to ethics standards,

³⁵ In the event that Congress does eliminate the FACA exemption applicable to subcommittees of advisory committees, 41 C.F.R. § 102-3.35, but does not exempt negotiated rulemaking committees from FACA, it should create a carve-out allowing negotiated rulemaking caucuses or other sub-groups to continue to hold meetings privately so long as they do not take final action on behalf of the full committee.



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213 those members who are selected to represent the perspective or interests of a
214 particular group with a stake in the work of the advisory committee. It should explicitly
215 classify as “special government employees” (SGEs), subject to specified federal ethics
216 laws and rules, members who are chosen to provide individual, independent, expert
217 advice.

218
219 (b) Congress and individual agencies should prevent misuse of the “representative”
220 designation by limiting it to individuals selected to represent some entity or group with
221 a stake in the committee’s work and should not apply that designation to persons who,
222 by virtue of their expertise, might be said to “represent” a field of study or discipline but
223 do not represent the views of a particular interest group. Such members are more
224 appropriately classified as SGEs.³⁶

225
226 (c) Agencies that grant conflict of interest waivers under 18 U.S.C. § 208(b) should post
227 such waivers on their websites without awaiting a public request for releasing them.³⁷

228 Agencies should make appropriate provisions for redacting from such waivers
229 information that they may keep confidential pursuant to 18 U.S.C. § 208(d)(1).

³⁶ In 2004, the Government Accountability Office issued a report suggesting that a number of agencies had improperly classified individuals possessing expertise in a particular field of study as representatives on the theory that they “represented” that discipline. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-328, ADDITIONAL GUIDANCE COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE & BALANCE 5 (2004). Since that time, the Office of Government Ethics has issued a number of memoranda to Designated Agency Ethics Officials clarifying the distinction between SGEs and representatives and advising agencies to appoint persons selected to provide independent, expert advice as SGEs. See generally U.S. Office of Government Ethics, Memorandum from Marilyn L. Glynn, General Counsel, to Designated Agency Ethics Officials Regarding Federal Advisory Committee Appointments (Aug. 18, 2005); U.S. Office of Government Ethics, Memorandum to Designated Agency Ethics Officials (July 19, 2004). The Office of Government Ethics also enhanced its examination of agencies’ classification of committee members when conducting an ethics program review. United States Office of Government Ethics, Ethics Program Review Guidelines 40–42 (Oct. 2004).

³⁷ The Office of Government Ethics has issued guidance describing the type of information that a waiver should contain. U.S. Office of Government Ethics, Memorandum from Robert I. Cusick, Director, to Designated Agency Ethics Officials Regarding Waivers under 18 U.S.C. § 208 (Feb. 23, 2007).



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230

231 9. Agencies should post on a committee website documents “which were made
232 available to or prepared for or by each advisory committee” (i.e., documents that must be
233 made publicly available on request under section 10(b) of FACA) and that reflect the
234 substantive work of the committee. Agencies should attempt to post documents relevant to
235 upcoming meetings (e.g., draft reports, recommendations, or meeting agendas) as early as
236 possible in advance of the meeting to which they relate and other materials that document the
237 events of past meetings (e.g., minutes or transcripts) as quickly after the meeting as possible.

238

239 10. Agencies should provide live webcasts of open committee meetings and/or post
240 recordings following such meetings unless the costs are prohibitive. When selecting a
241 webcasting technology, agencies should assess the likely level of public interest in their
242 committees’ work, the cost of different technologies (as well as the cost savings such
243 technologies can create), and their available resources.³⁸

244

245 11. Agencies should adopt the following “best practices” related to selecting members
246 to serve on advisory committees:

247

248 (a) Upon creating a new advisory committee, agencies should announce the
249 committee’s mission in the Federal Register and/or on the agencies’ website and invite
250 public nominations for potential committee members. Agencies may solicit
251 nominations from the general public, from expert communities with experience in the
252 subject matter of the committee’s assignment, and/or from groups especially likely to
253 be affected by the committee’s work.

254

³⁸ GSA has negotiated government-specific terms of service for a number of technology products and maintains these terms for agency use on the web at “apps.gov”; the site includes several free webcasting programs that agencies should consider using for providing webcasts of committee meetings.



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255 (b) Prior to finalizing the membership of an advisory committee, agencies should
256 provide in a Federal Register notice and/or on the agency's website a list of persons
257 from whom potential committee members may be selected and a brief biographical
258 statement for each such individual setting forth his or her relevant professional
259 credentials. Agencies should then provide an opportunity for public input related to the
260 proposed members' professional credentials and potential conflicts of interest or
261 sources of bias. Such public comments should be kept confidential to the extent
262 permissible by law, though the agency should notify potential committee members of
263 the possibility of disclosure of those comments under the Freedom of Information Act.
264 The agency should also consider announcing a slate of potential committee members
265 that is larger than the number of positions on the committee so as to minimize any
266 negative implications associated with not being selected to serve.

From: Robert E. Rutkowski
To: Assembly of the Administrative Conference
Re: Comments on Proposed FACA Recommendation
Date: December 3, 2011

Dear Chairman:

I draw your attention to The Project On Government Oversight's public comment, <http://www.pogo.org/pogo-files/letters/government-corruption/gc-coi-20111202.html>, to the Assembly of the Administrative Conference of the United States (ACUS) regarding the proposed recommendation dealing with the Federal Advisory Committee Act (FACA).

The Committee has scaled back or eliminated some sensible recommendations that were included in an earlier draft report.

A draft report prepared by ACUS Attorney Advisor Reeve Bull on September 12, 2011, included a recommendation for Congress to eliminate the contractor, non-voting member, and subcommittee exceptions to FACA. The Committee's research documented a strong need for these reforms:

In *Food Chemicals News v. Young* and *Byrd v. United States EPA*, the D.C. Circuit held that FACA does not apply in cases where the agency does not exert sufficient control over a private entity to "utilize" the group. ACUS's data-gathering efforts suggested that this "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."

In a case related to Vice President Cheney's energy task force, the D.C. Circuit held that private sector committee members do not "provide advice or recommendations" to an agency unless they have the right to vote on committee proposals. ACUS's draft report pointed out that a committee could easily exploit this loophole in order to evade FACA. And ACUS's research found almost no evidence to suggest that committees or agencies actually need this loophole in order to efficiently obtain advice from outside experts.

Although some agency representatives told ACUS that the subcommittee exception is necessary in order to prepare for committee meetings, other participants in ACUS's FACA workshop pointed out that the loophole creates a "potential for abuse."

Other experts have also highlighted the problems associated with these FACA loopholes. In 2008 testimony before the House Oversight and Government Reform Committee, Professor Sidney Shapiro explained that the D.C. Circuit's decisions have enabled agencies to circumvent FACA, and recommended that Congress close the loopholes. Indeed, the legislation recently approved by the House Oversight and Government Reform Committee would eliminate the contractor, non-voting member, and subcommittee exceptions.

In its final proposal, however, ACUS's Committee states that Congress should not get rid of the subcommittee exception unless it also codifies a "preparatory work" exemption. And there is no longer a recommendation calling on Congress to eliminate the contractor and non-voting member loopholes.

I urge ACUS to recommend closing these loopholes once again in order to send a clear message that it is possible to reduce the procedural burden on advisory committees while still ensuring that they operate with transparency and independence.

I hope you will take the time to review these comments and give them the weight they deserve.

Yours sincerely,
Robert E. Rutkowski

cc: House Minority Leadership

2527 Faxon Court
Topeka, Kansas 66605-2086
P/F: 1 785 379-9671
E-mail: r_e_rutkowski@att.net

From: Stephen Buckley
To: Assembly of the Administrative Conference
Re: Comments on Proposed FACA Recommendation
Date: December 2, 2011

To whom it may concern,

Any FACA committee can improve and increase the public's engagement with, and contributions to, the committee's efforts if it allows members of the public to view all those comments that have already been received by the committee.

This is consistent with ACUS recommendations with respect to public participation in "Agency Innovations in E-rulemaking" (from page 2; see below). Imagine the recommendation created when this same language replaces "rulemaking" with "FACA proceedings".

Some agencies have specialized webpages that *allow users to submit and view comments* on all of the agency's open rulemakings, or to view information on the status of their priority rulemakings. Links from some agency home pages make rulemaking information easy to locate. Other agencies have innovated by using social media to get the public involved in the rulemaking processes from the earliest stages.

<http://www.acus.gov/wp-content/uploads/downloads/2011/11/Proposed-E-Rulemaking-Innovations-Recommendation-11-14-2011.pdf>

No one wants to spend time preparing extensive comments when there is no indication that it will result in any contribution to the final product. In other words: How does one know that their thoughts will not end up in a "black hole". The prompt posting of comments online will address that concern.

Sincerely,

Stephen Buckley

sbuckley@igc.org

24/7 voice: (508) 348-9090

<http://www.twitter.com/transpartisan>



PROJECT ON GOVERNMENT OVERSIGHT

December 2, 2011

Administrative Conference of the United States
1120 20th Street NW
Suite 706 South
Washington, DC 20036

To Whom It May Concern:

The Project On Government Oversight (POGO) would like to provide the following public comment to the Assembly of the Administrative Conference of the United States (ACUS) regarding the proposed recommendation dealing with the Federal Advisory Committee Act (FACA).

POGO is a nonpartisan independent watchdog that champions good government reforms. As such, we have a keen interest in ensuring that federal advisory panels are operating with sufficient transparency and independence as required by FACA.

We greatly appreciate that ACUS's Committee on Collaborative Governance has engaged with the public interest community on its proposals for reducing FACA's procedural burdens while promoting the goals of transparency and independence. Indeed, we believe the Committee's proposed recommendations would go a long way toward achieving these goals. At the same time, we believe ACUS could strengthen its proposal by calling for the elimination of loopholes that have allowed much of the work of advisory panels to be conducted in secret.

In particular, we would like to offer our support for the following proposed recommendations: clarify that agencies have the authority to host asynchronous virtual meetings (Recommendation 6); ensure that agencies correctly designate committee members as representatives or special government employees and disclose conflict-of-interest waivers (Recommendation 8); encourage agencies to post key committee documents online (Recommendation 9) and to provide live webcasts of committee meetings (Recommendation 10); and provide agencies with guidance on best practices for selecting committee members (Recommendation 11). These recommendations, if adopted, would help to reduce conflicts of interest and facilitate the public's oversight of federal advisory panels. It's worth noting that the House Oversight and Government Reform Committee recently approved legislation that would advance these same goals.¹

¹ Project On Government Oversight, "House Committee Passes Legislation to Improve Oversight of Federal Advisory Committees," October 13, 2011. <http://pogoblog.typepad.com/pogo/2011/10/house-committee-passes-legislation-to-improve-oversight-of-federal-advisory-committees.html>

We are concerned, however, that the Committee has scaled back or eliminated other sensible recommendations that were included in an earlier draft report.

A draft report prepared by ACUS Attorney Advisor Reeve Bull on September 12, 2011, included a recommendation for Congress to eliminate the contractor, non-voting member, and subcommittee exceptions to FACA.² The Committee's research documented a strong need for these reforms:

- In *Food Chemicals News v. Young* and *Byrd v. United States EPA*, the D.C. Circuit held that FACA does not apply in cases where the agency does not exert sufficient control over a private entity to “utilize” the group. ACUS's data-gathering efforts suggested that this “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.”³
- In a case related to Vice President Cheney's energy task force, the D.C. Circuit held that private sector committee members do not “provide advice or recommendations” to an agency unless they have the right to vote on committee proposals. ACUS's draft report pointed out that a committee could easily exploit this loophole in order to evade FACA. And ACUS's research found almost no evidence to suggest that committees or agencies actually need this loophole in order to efficiently obtain advice from outside experts.⁴
- Although some agency representatives told ACUS that the subcommittee exception is necessary in order to prepare for committee meetings, other participants in ACUS's FACA workshop pointed out that the loophole creates a “potential for abuse.”⁵

Other experts have also highlighted the problems associated with these FACA loopholes. In 2008 testimony before the House Oversight and Government Reform Committee, Professor Sidney Shapiro explained that the D.C. Circuit's decisions have enabled agencies to circumvent FACA, and recommended that Congress close the loopholes.⁶ Indeed, the legislation recently approved the House Oversight and Government Reform Committee would eliminate the contractor, non-voting member, and subcommittee exceptions.

In its final proposal, however, ACUS's Committee states that Congress should not get rid of the subcommittee exception unless it also codifies a “preparatory work” exemption. And there is no longer a recommendation calling on Congress to eliminate the contractor and non-voting member loopholes.

² Reeve Bull, Administrative Conference of the United States, *The Federal Advisory Committee: Issues and Proposed Reforms*, September 12, 2011, p. 66. <http://www.acus.gov/wp-content/plugins/download-monitor/download.php?id=315> (Downloaded December 2, 2011) (Hereinafter “ACUS Draft Report”)

³ ACUS Draft Report, p. 41

⁴ ACUS Draft Report, pp. 41-42

⁵ ACUS Draft Report, p. 43

⁶ Testimony of Sidney A. Shapiro, University Distinguished Chair in Law, Associate Dean for Research and Development, Wake Forest School of Law, and Member Scholar, Center for Progressive Reform, before the Subcommittee on Information Policy, Census, and National Archives of the House Committee on Oversight and Government Reform, Hearing on the Federal Advisory Committee Act of 2008, April 2, 2008. <http://www.pogoarchives.org/m/go/shapiro-testimony-20080402.pdf>

We understand that the Committee may not have found enough recent examples of agencies abusing the FACA loopholes in order to justify keeping this recommendation. Nonetheless, we believe the Committee's research documented a strong potential for future abuses. We urge ACUS to recommend closing these loopholes once again in order to send a clear message that it is possible to reduce the procedural burden on advisory committees while still ensuring that they operate with transparency and independence.

Thank you for consideration of these comments.

Sincerely,

Angela Canterbury
Director of Public Policy
Project On Government Oversight

Michael Smallberg
Investigator
Project On Government Oversight

From: USACITIZEN1@LIVE.COM

To: Assembly of the Administrative Conference

Re: Comments on Proposed FACA Recommendation

Date: November 21, 2011

1. faca is dead and buried. committees are set up by insiders for what they want out of the gancy. most american federal agencies have been regulatorily captured by those they were set up to regulate.

2. clear conflict of interest in allowing an agency head to have a personal relationship with someone like corzine and his global holdings company. we need a law inplace to prohibit those who are personal friends of stockbroekers, etc. to disassociate themselves from all cases where they have a personal relationship. CONFLICT OF INTEREST WAS CLEARLY PRESENT.

FWS. IS AN EXAMPLE OF AN AGENCY BEING SET UP AS A PRIVATE HUNTING CLUB TO KILL WILDLIFE IN THIS COUNTRY.

USACITIZEN1@LIVE.COM



October 18, 2011

MEMORANDUM FOR

**REEVE T. BULL
ATTORNEY- ADVISOR
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES**

FROM: ROBERT FLAAK 
**DIRECTOR
OFFICE OF COMMITTEE AND REGULATORY
MANAGEMENT**

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

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

Recommendation

Alleviating Procedural Burdens that Inhibit the Effective Use of Advisory Committees

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

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

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

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

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

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

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

Clarifying the Scope of FACA

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

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

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

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

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

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

Enhancing Transparency and Objectivity

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Reeve,

I have read both your draft recommendation and the proposed alternative (which I do not support mainly because I think charters are a good thing - how can you know where you are going unless you get your directions from the agency from the start?). I am writing now to give you some minor suggestions that are not worth taking the time of the committee tomorrow.

Page 1, second paragraph: I would note that ACUS is a FACA committee & abides by its requirements.

Page 2, first full paragraph, next to last line: does “existing” refer to all committees or only discretionary ones?

Page 3, full paragraph: I suggest making clear whether these requirements for SGE's are disclosure or disqualification or other.

Same paragraph, sentence after note 19: it would be clearer if you moved the words “upon request” to the start of the sentence. Also, next sentence, I would insert “discretionary” after “existing” (assuming that is correct).

Page 5, second full paragraph: The part before note 28 sounds like the burdens are imposed by FACA or GSA, but note 28 and the recommendation are to the contrary. Clarify/soften the language in text.

Page 6, note 30. I am disappointed that the contractor exemption change is not included, but yield to your belief that you do not have the record needed to support it. Can you at least commit to trying to develop that record, in this footnote? If not, I may raise this in committee or at the plenary (OK, I was one of the losing counsel in *Food Chemical News*, but it is a terrible decision).

Recommendation 3: I do not oppose it, but there is no basis in the preamble for it. It looks like the current number is within the cap and so what's the problem. Of course, it is silly to make agencies compete for advisory committees, like budget dollars, and there may be other reasons that should be included, if briefly.

Page 7, Note 32: I would change the phrase “is not required to approve” to “may delegate the authority to approve,” which sounds more accurate.

Recommendation 5, line 3: Not to quibble too much, but can electronic meetings be “in writing”? I would delete the phrase.

Page 8, note 33: Does GSA have the authority to issue regulations doing these other things? If so, should ACUS recommend that it consider doing them?

Recommendation 7(a). I suggest that this recommendation be amended to add a requirement that the basis on which a person is designated as an SGE, including basic information on employment and financial interests be set forth, so that everyone knows the biases of all committee members.

Recommendation 7(c): 18 USC 208(d)(1), which I have pasted in below,¹ is a highly convoluted provision and I fear that the import of what you want disclosed and redacted will not be clear. Without trying to draft the specific language, I think what should be disclosed is the kind of information that the public would receive on the forms that government officials must file every year: name of entity and a range of dollar amounts. That works for people who have contracts with an interested party or own stock, but would not work for full time employees of such entities or lawyers who represent such entities because those circumstances could not obtain for government employees. The point is to obtain information that would enable the public to assess the nature and general degree of connection to an interested entity without disclosing the details of the connection. I would be happy to work with the committee on this, but the current attempt at shorthand does not do the job properly, even though I think we are in agreement on what should be disclosed regarding waivers. I would also have similar disclosures for SGE's. I think GSA can mandate that agencies do this if the agencies do not and think we should say that as well.

Recommendation 8, line 4: The word "critical" could be seen to be very narrow. How about "important" instead?

Recommendation 10, line 2: Insert the words "among committee members" after "balance" to clarify what is being balanced.

Same recommendation, next to last line after "time," insert "or unnecessarily increasing the size of the committee" which is another problem with excessive balancing.

Recommendation 11(b): Do you envision posting only the names of the prospective committee members? I would suggest adding "a brief statement of their experience that is relevant to the work of the committee."

Further in that recommendation, in the last line on page 10, I think you mean to include the words "of those comments" after "disclosure," but, if not, then some clarification is needed.

Further in that recommendation, in line 1 on page 11, I think the word "select" should be "announce," since the selection has not yet taken place, but the announcement has.

Hope these are helpful. Most of them will not be made tomorrow, but I may raise the more significant ones. I will be around today and in the morning if you want to discuss them.

Alan

¹ (d)(1) Upon request, a copy of any determination granting an exemption under subsection (b)(1) or (b)(3) shall be made available to the public by the agency granting the exemption pursuant to the procedures set forth in section 105 of the Ethics in Government Act of 1978. In making such determination available, the agency may withhold from disclosure any information contained in the determination that would be exempt from disclosure under section 552 of title 5. For purposes of determinations under subsection (b)(3), the information describing each financial interest shall be no more extensive than that required of the individual in his or her financial disclosure report under the Ethics in Government Act of 1978.

October 17, 2011

M E M O R A N D U M

To: ACUS Committee on Collaborative Governance

Fr: Philip Harter

Re: Proposed recommendation with respect to amending FACA

The excellent report which precedes the draft recommendations demonstrates rather vividly that FACA is indeed inhibiting beneficial collaboration and that it will take more than tinkering with its administration to cure the ill. It says, for example, “Many agencies contend that [FACA] is overly cumbersome and limits their ability to obtain outside advice.” At p. 4. The summary of the research then provides that “procedural burdens ... inhibit the effective use of advisory committees without substantially furthering the policies of the Act.” At p. 5. Finally, the report says, “it may indeed be appropriate for Congress to revisit FACA and determine whether an alternative regime might be superior.” Given the research that has been done that time is now and ACUS has an important role in providing Congress with advice as to how to revise FACA to maintain its important substantive requirements while facilitating beneficial consultation and collaboration.

John Kamensky and I earlier suggested that “Congress should replace the procedural provisions of Federal Advisory Committee Act with a statute that provides performance requirements to achieve the basic goals of FACA.” After reading the report and draft recommendations, as well as engaging in some further consultation, I have an alternative proposal that will achieve most of our initial goal while maintaining the parts of FACA that have developed important settled meaning. The premise is that the consultation, control, and chartering imposed by FACA is the root cause of much, if not most of the problems with delay and hence avoidance of FACA by agencies. I therefore propose the Conference recommend that Congress should amend FACA itself to permit agencies to establish advisory committees on their own and without having to engage in the chartering process. The committees would still be required by FACA itself to be balanced and open.

Agencies are responsible for administering vast and complex programs. I believe they can be trusted to administer advisory committees. Should an agency misuse its authority, it can and should be held politically accountable just as it would be for other derelictions.

My formal proposal, therefore, is to replace the current first draft recommendation with one that says:

To foster the ability of administrative agencies to secure timely advice and

collaboration of diverse representatives of the private sector in an open and public process, Congress should authorize agencies to establish committees pursuant to the Federal Advisory Committee Act without having to comply with procedural burdens that currently inhibit the effective use of committees without substantially furthering the substantive policies of the Act. Specifically, Congress should authorize agencies to create and use committees without being subjected to the controls imposed by §§7(c) and 8(a) and (b), without the head of the agency having to consult with the Administrator of the General Services Administration prior to establishing a committee, and without having to prepare and distribute a formal charter as required by §9(d).

The result of the proposal would be:

§ 7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(c) The Administrator shall ~~prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible,~~ provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

§ 8. Responsibilities of agency heads; Advisory Committee Management Officer, designation

(a) ~~Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.~~

(b) ~~The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall—~~

- ~~(1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;~~
- ~~(2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and~~
- ~~(3) carry out, on behalf of that agency, the provisions of section 552 of title 5,~~

~~United States Code, with respect to such reports, records, and other papers.~~

§ 9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is—

(1) specifically authorized by statute or by the President; or

(2) determined as a matter of formal record, ~~by the head of the agency involved after consultation with the Administrator~~ with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

~~(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, 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 committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:~~

~~(A) the committee's official designation;~~

~~(B) the committee's objectives and the scope of its activity;~~

~~(C) the period of time necessary for the committee to carry out its purposes;~~

~~(D) the agency or official to whom the committee reports;~~

~~(E) the agency responsible for providing the necessary support for the committee;~~

~~(F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;~~

~~(G) the estimated annual operating costs in dollars and man-years for such committee;~~

~~(H) the estimated number and frequency of committee meetings;~~

~~(I) the committee's termination date, if less than two years from the date of the committee's establishment; and~~

~~(J) the date the charter is filed.~~

~~A copy of any such charter shall also be furnished to the Library of Congress.~~

September 29, 2011

M E M O R A N D U M

To: Committee on Collaborative Governance

Fr: Philip Harter and John Kamensky

Re: Proposed recommendation with respect to amending FACA

We believe the Conference should recommend that Congress replace the existing Federal Advisory Committee Act with a statute that would provide the important substantive goals of FACA while allowing agencies far more flexibility in establishing committees. Based on decades of experience with a variety of agencies and programs, we are firmly of the belief that the structure of FACA inhibits agencies from using collaborative processes in appropriate circumstances. This results in a significant reduction in the amount of information available to agencies in terms of scientific and technical know-how as well as creative ideas for addressing complex issues.

We therefore propose a new recommendation:

1. Congress should replace the procedural provisions of Federal Advisory Committee Act with a statute that provides performance requirements to achieve the basic goals of FACA. Such a statute might be based on the Negotiated Rulemaking Act. The contours of such a statute should provide:
 - a. Agencies should be authorized to establish committees to address specified issues. The purpose of the committee might be to provide advice to the agency, furnish a means of consultation, or be the vehicle for the agency to collaborate with those in the private sector.
 - b. Each committee should be required to consist of representatives of the interests that will be significantly affected by the subject matter of the committee.
 - c. To provide notice that the agency is going to establish such a committee and to ensure adequate representation on it, the agency should be required to publish a notice of its plan to establish the committee and request nominations of individuals who believe their interests are not represented on the committee.
 - d. As is currently the case and as modified by these recommendations, meetings of the committee must be open and the public able to attend and participate in accordance with the current provisions of FACA.

- e. To ensure adequate and wholesome representation, the agency should be authorized to pay a committee member a reasonable rate of compensation if it determines the member could not otherwise participate and that participation is necessary for adequate representation

- f. To ensure compliance with the performance requirements of the new statute while avoiding the complexities and limitations of the current approach, Congress should provide for some sort of administrative appeal for someone who believes they were injured by an agency's not complying with these requirements. One approach would be to provide that person who is aggrieved by the composition or operation of such a committee may file a complaint with GSA. GSA would then be directed to conduct an informal investigation into the allegation expeditiously and to provide the opportunity for an informal hearing on the matter. It would then submit a report on its determination. The agency would be directed to give due regard to GSA's findings in deciding whether changes in the committee or its operations are warranted.

September 15, 2011

MEMORANDUM

To: ACUS Committee on Collaborative Governance

Fr: Philip Harter

Re: Comments on FACA Proposed Recommendations

I will not be able to attend the meeting on Tuesday since I have to teach a class in which FACA plays a significant role. I regret that since I have been interested in and concerned about the relationship of FACA and what is now called collaborative governance since the beginning. Indeed, ACUS Rec. 82-4, which was based on my report, recommended that Congress should provide for negotiated rulemaking “free of the restrictions of the Federal Advisory Committee Act.” I have lived with its practical effects for decades, testified about it before Congress, and written about it, so I had hoped to attend the next iteration in which potential solutions are sought. Alas, it was not to be. I would, however, like to submit the following comments for the Committee’s consideration.

The report provides important background information as to the evolution of FACA and the types of problems it was designed to address. It also provides helpful insights into the views on a range of interests.

Do we need FACA anymore? At the outset, I suggest the committee consider whether FACA makes sense anymore. It was a “command and control” approach to an issue that was enacted 40 years ago. Inasmuch as many regulatory regimes have been subjected to searching consideration as to whether they are still needed or whether there may be a better way of achieving the underlying goal, I submit that such an inquiry is appropriate for FACA. As far as I know, no one seriously challenges the underlying performance goals of FACA that committees should reflect an appropriate balance and mix of the relevant interests and that the committees should operate in an open, transparent manner. Those can be stand alone requirements, however. It may be, as parts of the report indicate, that there are not major costs in terms of either dollars or time that result directly from FACA (although it does continue to cause some ripples), but the question is whether it has significant benefits that cannot be achieved with a much less intrusive approach.

I obviously do not want to push the simile too far, but if we do not look at whether there might be a better way I fear it is as if we are making recommendations to the CAB as to how to process airline rate requests faster or proposing a new CAFE standard by recommending that people drive smaller cars and go slower. Rather, we need to

figure out what is the best way to achieve our objective. Many of the issues that are addressed in the report and proposed recommendations arise as the result of the structure of the Act as opposed to the standards it imposes.

Exceptions. I do not have a position on the first three exceptions. I do on the “subcommittee” exception. In my experience, the ability to hold meetings of either a subcommittee of the FACA committee, in which all members are drawn from the parent committee, or a workgroup, in which some members are from the committee but some are not, without having to comply with the full panoply of FACA requirements is essential. I agree with the analysis that says they are important for preparing information for the consideration of the full committee. I am concerned, however, with the part of the analysis that proposes the exception should continue to apply only if the workgroup “do[es] not involve formal debate or voting.” I am not sure what that means. If a workgroup is charged with surveying the factual underpinning of an issue or making a series of recommendations — both of which will be decided by the FACA committee — doing so may well entail significant debate and disagreement; if it didn’t, the workgroup likely would not be needed. I am not sure what “formal debate” is, but under common parlance, I would certainly include the robust discussions that customarily happen in workgroups. I would, therefore, propose that the exception be continued for workgroups whose purpose are to prepare materials for the consideration and decision of the plenary committee. My own view is that workgroup meetings should generally be open, except that it is often impractical to give the full notice of their meeting — I have regularly empanelled groups to meet the very next day. In this internet era, I would be comfortable providing notice of the time and place on the web so that anyone who was interested could attend.

I do think that any recommendation ACUS makes with respect to a “preparatory work” exception needs to develop just what that exception is as opposed to recommending that it be precise. I agree with that, but we should do it! To me the sine non qua is the “preparation” part meaning the full committee will indeed make the decision and not the smaller group.

Notice this discussion is relevant only if chartering continues to be required.

Committee Formation Process. I gather from the report, which comports with my experience, that a good deal of the time in establishing a committee is finding appropriate members and that a good deal of that is caused by a lack of agreement over the criteria to be used in selecting the membership. FACA itself is Delphic at best; opaque at worst. I submit that it would be significantly helpful for ACUS to make a specific recommendation that interprets and provides useable guidance to agencies on how to implement the requirement that the “committee ... be fairly balanced in terms of the points of view represented.” Unclear standards necessarily lead to disagreements and multiple levels of review. For example, I had one experience in which the criteria changed multiple times as the process wended its way through the agency. In my view, one of the set of criteria was laughable in terms of what FACA sought to achieve, but it

took a month or more to reconcile the differences. Agencies may be afraid of being second guessed, not clear on what they are supposed to do, or fear alienating a constituent. In all events, clear criteria would help. Thus, I would propose that ACUS to develop explicit guidelines for Recommendation 3. I suggest that a starting point might be that the committee should reflect a fair mix in terms of the perspectives that are relevant to the subject matter of the committee. The Negotiated Rulemaking Act, for example, provides that the committee “adequately represents the interests that will be significantly affected by the proposed rule.” 5 U.S.C. § 565(a)(1). In this case, trying to be too fine, or too inclusive can interfere dramatically with selecting members who will raise the relevant issues. The key is to achieve sufficient diversity that the significant issues are raised and thoroughly vetted.

That said, I am dubious that centralization would cure the current problem. My guess — and it is only that — is that much of the multiplicity of review stems from the lack of understanding as to what is expected of the membership. There is, therefore, wrangling over who to include (or not). Centralization might cure part of that problem by de facto vesting in an office what the criteria are but so long as those criteria are not shared, I would think the wrangling would continue. Moreover, centralization leads to its own form of rigidity. For example, in one case I was in, only one person was authorized to make particular decisions. Others were willing, able, and eager to go forward but had to await their turn on her schedule, a process that took six months.

Cap. I agree with the removal of the cap. I have always thought that the mere existence of a cap seems to signal that advisory committees are bad ideas that need to be restricted and apportioned. I would trust agency heads to make that decision with “a little advice from their friends” if problems develop.

Excepting Negotiated Rulemaking Committees; Alternative A. I agree with proposed recommendation 6 (Alternative A) that reg neg committees should be exempted from FACA. Interestingly, there is an argument that they already are exempt, so this would codify that view. At the Committee meeting this spring, the representatives of GSA asserted that FACA is *not* a collaboration statute. Their assertion was neither supported nor developed, but since I had never really thought about it that way, I decided to investigate just where that notion might lead. Interestingly, it potentially leads to some results that are of particular moment here. The definition of an advisory committee in FACA is any group “which is ... established or utilized by [an] agenc[y] ... in the interest of obtaining advice or recommendations ...” 5 U.S.C. App 2, §3(2). Perhaps the purpose of an agreement seeking collaboration (i.e., a reg neg or the establishment of a policy that is not a rule) is *not* advice. Rather, its purpose is an agreement. Therefore, under this reasoning, FACA does not apply to agreement seeking collaborations. That position can be supported by reference to GSA’s regs that say FACA does not apply to “any committee established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically authorized by statute or Presidential directive, such as making or implementing Government decisions or policy.” §102-3.40(k). The Reg Neg Act in turn charges a reg neg committee with considering and discussing “issues for the purpose of

reaching a consensus in the development of a proposed rule.”§562(7). That certainly sounds operational. Moreover, the GSA regs provide that a committee that is “not actually managed or controlled” by an agency is not subject to the Act. §102-3.40(d). The Reg Neg Act provides that the agency member of the committee “shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee.” §566(b). This means the agency does not control the committee's deliberations.

Further, the Reg Neg Act already addresses the committee membership issue by saying that it must “adequately represent the interests that will be significantly affected by a proposed rule. §565(a)(1).

Operationally, once a reg neg committee has been established, I have always conceptualized it as falling under the Administrative Dispute Resolution Act. 5 U.S.C. §571 et seq. ADRA explicitly provides for confidential caucuses of less than an entire committee. §574. To the extent that FACA does not apply to subcommittees or workgroups, there is no conflict between the two statutes. If, however, the RegNeg statute is to be amended to provide for open meetings and notice, which I support, then it might be a good idea to clarify that caucuses consisting of less than the entire committee can meet in closed session.

Excepting Negotiated Rulemaking Committees; Alternative B. The use of standing committees to provide advice and a form of negotiated rulemaking can indeed be helpful. Several agencies have used them quite successfully. Indeed, I drafted the first charter for such a committee. They should not, however, be taken as a full substitute for a negotiated rulemaking committee. The standing committee necessarily has a fixed membership that is not tailored to the specific issues that will be confronted in a particular rulemaking. The proper “balance and mix” of members is, as we have seen, quite dependent on what is being addressed. Thus, in my view, the use of standing committees should be used to provide general advice on a subject as opposed to the details of a proposed rule.

If that view is not accepted, I again am strongly of the view that ACUS’s role is to provide agencies with advice as to when the use of such a structure is or is not appropriate. It is not helpful to say simply that agencies “should, as appropriate, consider the use” of such a process.

Conflict of Interest Standards. I generally like the approach and analysis of this section. Since I am quoted in the summary of the workshop on this issue, I would like to clarify my position. I have long been bothered by what I think is simply a wrong legal analysis with respect to who is and who is not an SGE. The representative committee member seems straightforward and right. But, if someone is chosen for a committee because of their expertise, that does **not**, it seems to me, make them an employee of the agency even if they are paid. We hire lawyers, mechanics, and plumbers to help us solve our problems, but they are not necessarily our employees.

Indeed, most often they are independent contractors precisely because we lack the level of control and direction that is essential to the relationship of employee. Whether or not they are paid is irrelevant to the analysis.

It may be, like the analysis of the report, time to step back and look more at what is being done by whom and craft conflict of interest standards to provide protection from abuse without strangling the process. It seems to me that this is a good start.

I wish you well in your deliberations and wish I would be among you.

Informal Comments of Professor Alan Morrison on the FACA Project

My main suggestion relates to selection of committee members and assuring balance. My idea is to require that the agency include in its charter *its* understanding of the mission of the committee and how it understands that the issue of balance should be addressed in terms of the mission. Your paper gives examples where balance would make no sense (geography where there is no issue of geography or race where the issue is a technical one relating to nuclear reactors), but the point seems clear. The charter would also indicate whether expertise from representatives of particular interests was necessary, which would help with your two group concept. GSA would examine the charter to see that the agency included these criteria and that they seemed clear and sensible for this mission. Then the agency would decide whether to seek outside input or not, but it would have guidelines in picking the committee members. And if the charter said that farmers or consumers needed to be represented in a committee about food safety, and there were no such representatives, either a court on judicial review (if that is available and that is not a battle I want to fight here) or the public when the report comes out, can point to this obvious disparity and ask the agency or Congress to draw appropriate conclusions about bias, etc. In addition, it would be useful that those members chosen to fill specific slots were so designated in a public document. This relates to Rec 3 and the discussion on page 59.

Second, on the issue of waivers, telling the public that there has been a waiver, without telling the public the general issue of what the waiver is, tells the public nothing. Does the person work for a company with an interest in the matter; did the person do work for the company as a consultant, in another area, some time ago? Does the person's spouse own \$100 or \$100,000 in stock of a relevant company? No exact dollar amounts need be included, but ranges, like on federal disclosure forms, are adequate (and perhaps even less). But there has to be something, and all committee member bios should be posted on the committee website.

Third, I am not sure how I feel about on line forums, in which the "discussion" continues over several days. It reminds me of our discussions about the Sunshine Act where there are meetings between fewer than a quorum to avoid openness requirements, but the result is that there is no collegial discussion. Is there a problem with committee members dropping in & out and missing parts of the conversation? The only specific point I would make is to delete the words "as appropriate" at the end of Rec 2 - after "should consider" this seems quite redundant.

Fourth, similar to the last part of the prior suggestion, I would delete "to the extent possible" in Rec 4 to Congress about what it should do. Let's tell Congress what it should do and not water it down further. It will do what it wants to anyway, and we should be on record as saying what the statute should contain.

Fifth, Rec 8 dealing with live webcasts suggests a balancing test. I suggest that it be made clear that the test should be applied on a committee by committee basis, and perhaps on a meeting by meeting basis, because all committees and all meetings are not created equal.

Sixth, on page 60, the discussion about numbers and percentages troubles me for two reasons. First, the most important aspect of balance is not numbers, but having one person who can speak up for a point of view. Time and again a lone voice can assure that issues are raised and that

solutions are found that do a much better job of taking some interest into account than if no one is there to represent that viewpoint. Most committees end up proceeding by consensus, not votes, and so actual numerical balance is not vital. Second, if there is one viewpoint on an issue that is very much in the minority, it does not do any harm to the committee to have that viewpoint represented, and it eliminates the ability of others to criticize the committee on that ground. Suppose there was climate change committee: how much harm would it do to have one responsible (whatever that means in some situations, but at least it includes people with appropriate credentials) person who is a denier or extreme skeptic? The chair can control proceedings. So just take out those numbers.

Seventh, on page 60 you raise the issue of having names publicly designated as committee members so that the public can express their views as being somehow unfair to the nominees. That happens all the time with Senate confirmees and it is just a fact of life. More to the point, the NAS uses such a process for its committees and it has not been a serious problem. I think an agency can list the names of enough people to fill the panel and expect that, absent special circumstances, the panel will survive as is. And if not, the problem is more likely to be not enough of something, rather than one person who should not serve for some reason. That is a consequence of my view that numbers alone are less important than having an articulate spokesman for particular viewpoints.

Last, I think that the idea underlying the two types of members has some appeal, but it seems unclear and/or strained as written. I think it needs more work and perhaps some draft language for FACA would be useful, not because it would be enacted, but to sharpen our thinking and so that the conference as a whole would understand this better.

Hope this is helpful, Alan

**GSA Comments on ACUS Draft Report Dated September 12, 2011:
The Federal Advisory Committee Act: Issues and Proposed Reforms**

Overall Comment:

- GSA notes that a key tenet of the FACA statute, independence (5 U.S.C. App, para. 5(b)(3)), is not addressed in the ACUS draft report. It is important for a Federal Advisory Committee to conduct fact finding, draft its own reports, and draw its own conclusions, all without being inappropriately influenced by the appointing authority or by any special interest. This approach results in the development of advice and recommendations (transmitted to the Executive Branch) that are the advisory committee's independent judgment.

Overarching Technical Comments:

- References to the Unfunded Mandates Reform Act provision regarding Federal advisory committees are incorrect (e.g., pages 6, 21). GSA recommends using the exact language from the statute.
- Page 11, footnote 56: The statement "...whereas the regulations provide that subcommittees are exempt from FACA..." is incorrect. Section 102-3.35(a) of the FACA regulation policy subpart states that "In general, the requirements of the Act and the policies of this...part do not apply to subcommittees that report to a parent advisory committee..." However, agency heads, CMOs, and DFOs all have responsibilities related to subcommittees, as specified in the regulation subpart that discusses how advisory committees are managed.
- Page 13, Section 2(a): GSA recommends ACUS use the complete definition of "advisory committee."
- Page 15, Section 2(b): The statement "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" is incorrect. FACA only applies to the Executive Branch of government, not Congress. To correct the statement, replace "Congress" with "one or more agencies or officers of the federal government." As a general comment, all references to FACA applying to the federal government should be clear that FACA applies only to the Executive Branch.
- On page 19, Section 2(c) GSA disagrees with the statement: Preparatory work and administrative work undertaken by a committee do not fall within the purview of the Act **because they are not specifically directed towards providing policy advice.** The text in red is not included in the regulatory language and is ACUS' interpretation of GSA's regulation. GSA disagrees with the ACUS interpretation. Since preparatory work often forms the basis of a committee's advice, it often leads to policy advice that is transmitted to the Executive Branch of government.
- A point of clarification regarding the advisory committee cap. Regarding the statement on page 38 that "...some agencies were unsure of whether they were likely to exceed the

cap...”, CMOs and GSA have real time access to the number of committees allocated to each agency through the GSA FACA database. This is a management tool used by the CMOs and GSA to manage the discretionary committee limitation imposed by OMB Circular A-135 and E.O. 12838. Agencies are more likely to affirmatively limit establishment of new discretionary committees due to budgetary constraints as opposed to fear of exceeding the cap. Related to this, on page 50, the actual discretionary ceiling is 534 committees (the amount remaining after applying the requirements of E.O. 12838). We do not disagree with the recommendation to rescind both E.O. 12838 and OMB Circular A-135.

- Page 39, Part C: Recommendation, first paragraph and footnote 225: ACUS has incorrectly characterized the FACA Training Conference hosted by GSA on September 7-8, 2011. The training conference theme was Transparency and Open Government, and although some sessions included discussion of Gov 2.0 tools with agencies providing examples of current practices, GSA did not provide training on permissible uses of new media - agencies already have considerable latitude in applying new media tools to their advisory committee operations. In addition to revising the sentence “...GSA’s providing training on permissible uses of new media, a process that GSA has already begun to undertake,” GSA requests ACUS replace footnote 225 with a link to GSA’s website materials: www.data.gov and www.efaca.gov. Characterizing the FACA Training Conference as “GSA provided extensive information on how agencies can exploit advances in social media while maintaining compliance with FACA” is not factual.
- Regarding ACUS’ proposal for a more robust preparatory work exception, GSA has the following comments:
 - ACUS is proposing that Congress include a revised definition of Preparatory Work to allow full committee meetings behind closed doors, as long as the committee members do not engage in “formal debate or voting on committee advice or recommendations.” This would allow chartered FACA committees to deliberate on substantive matters and not be subject to the notice and open meeting requirements of FACA.
 - Instead of a “more robust preparatory work” definition, GSA believes ACUS is greatly expanding the use of this activity beyond what is intended in the FACA regulations.
 - GSA is aware of committees that have tried to use the existing regulatory definition of Preparatory Work to hold full committee meetings behind closed doors, similar to what ACUS is proposing. The end result - the public was completely unaware of committee activities; few committee meetings were open to the public; and the public did not have access to the deliberative discussions that were the basis of advice and recommendations transmitted to the government. GSA sees this as an abuse of the Preparatory Work activity that was intended to allow data gathering and other non-deliberative activities to occur by committee members in preparation for a meeting of the advisory committee in a public forum.

Public Comment on FACA Project

From: bk1492@aol.com [mailto:bk1492@aol.com]

Sent: Friday, September 02, 2011 4:13 PM

Subject: public comment on federal register re

committee on collaboration -

no committee should be able to reauthorize itself to stay operational. all committees when formed should have a two year existence. any committee wanting to continue to exist should let the public comment on its effectiveness. faca is not observed at all. the committees are set up one way with one point of view. there is no honest discussion of both sides at these committees. they vote 100% one way with no dissent. they only choose those to sit with them who agree with all that they have done. we need to open up 50% of the seats on committees to ordinary folks from the hinterlands. it is time to get people with a view to govt that is bigger than just the skanky corrupt washington beltway. all meetings should be on webinar. dont go to ames to escape reporters who will report what you do and to escape notice from the public. thats why we have all this legislation in the summer or over christmas, isnt it? all meetings should be in dc on webinar.

jean public address if required

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,
OMB Watch
Project On Government Oversight (POGO)
Union of Concerned Scientists

Additional Comments from the Union of Concerned Scientists, the Project On Government Oversight, and OMB Watch on ACUS Review of the Federal Advisory Committee Act in the 21st Century

April 15, 2011

Our respective nonprofit organizations have deep and long expertise as observers of, and participants in, federal advisory panels. Many of our organizations also are pioneers in creative uses of new/social media.

We are concerned because the draft commissioned study and preliminary recommendations do not include an exploration of many best practices we have identified as stakeholders interested in increasing accountability and transparency in federal advisory committees and throughout the government. We understood the scope of the study was much broader.¹

There are several potential best practices to consider that were not a part of the study drafted by Professor James T. O'Reilly. For example, the paper acknowledges that it will not be addressing issues such as the significant percentage of closed advisory committee meetings and potential conflicts of interest affecting committee members; yet these are exactly the types of issues that could and should be addressed by making committees more open and accountable to the public through the use of social media and collaborative governance tools.

We support Dr. O'Reilly's conclusion that agencies and committees should have more flexibility to utilize electronic communications without triggering the various open meeting and disclosure requirements under FACA, but we also believe there need to be clear rules in place to ensure that the core work of the committee is not being conducted secretly by individuals with real or perceived conflicts of interest.

We agree there is ample opportunity for agencies to reduce the costs and delays associated with full face-to-face committee meetings by utilizing new/social media tools, such as virtual meetings via asynchronous messages. We also agree that GSA should issue rules and provide examples to give agencies and committees more guidance on the proper use of new/social media under FACA.

However, we are concerned by statements made in Dr. O'Reilly's paper regarding the use of subcommittees that are exempt from FACA. Survey respondents expressed a desire to use subcommittees to develop proposals, write drafts, study sub-issues in advance of a full committee meeting. These respondents also voiced their opposition to a provision in recent FACA legislation that would have eliminated the subcommittee exemption. (Our concerns about

¹ Here is the scope of the study assigned by ACUS:

Conduct a study of potential improvements to the Federal Advisory Committee Act ("FACA" or "the Act") and agency practices under the Act. The study shall identify best agency practices with respect to FACA and it shall particularly investigate, although it need not be limited to, challenges that the Act poses to use of 21st-century media (such as e-mail, social media, interactive web forums or other websites, and the like) and to "collaborative governance" efforts, and shall consider how the Act or practices under the Act might be improved with respect to these Challenges.

the subcommittee loophole in current law are articulated in more detail in our response to the draft recommendations.)

Furthermore, there are other important transparency measures that should be best practices for agencies that are not prohibited by FACA that were excluded from the study. (Though we admit the way to ensure widespread use of technology for more transparency and collaboration is to mandate it.) For example, agencies should make all FACA information available on the Internet in a timely fashion. 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. We also would ask for additional requirements for public disclosures of conflicts of interest and financial forms.

We know that the committee has asked for revisions to the O'Reilly study, and Dr. O'Reilly has graciously sought out the NGO community for its comments on the ACUS proposals. We also suggest that ACUS should attempt to engage the agencies through their Open Government Working Group participants. We would be happy to work with you in your efforts to cast a wider net to survey advisory committee members, staff, DFOs, CMOs, agency Open Government Teams, agency ethics officers, GSA and OGE officials, and other public end-users, so that ACUS can formulate realistic recommendations that will enable committees to operate with greater efficiency while still allowing for transparency and oversight.

Administrative Conference Committee on Collaborative Governance
FACA Project, Meeting on April 21, 2011
Comments submitted by Committee Member Philip J. Harter

I do have a few thoughts — perish the thought it might be otherwise! — and so I thought I'd pass them along. My points:

- Overall, the tenor of the draft recommendation seems to be on FACA and how the new media can facilitate an agency's compliance with FACA while reducing costs and perhaps increasing participation. I think to a large extent that emphasis is backwards: as we discussed briefly at the last meeting, it would be better if the focus were on the new media/technologies and how they can increase public participation and information flow between agencies and the public. Part of that analysis is, to be sure, the application of FACA as well as clarifying what are safe harbors in the use of the technologies without implicating a debilitating FACA.
- To that end, I suggest deleting the words "for the use of advisory committees" in the last line of the third paragraph of the Background section. In keeping with my view above, I would also suggest flipping the title to be "The New Technologies and the Federal Advisory Committee Act." The focus there is on the new and what they can achieve on their own and as a means of facilitating compliance with FACA.
- I concur with the views of the NGOs that were distributed last week. Perhaps that means that recommendations should be made to agencies to comply with the spirit of FACA with its balance and openness even if FACA does not apply squarely. That would also go a long way toward my view as to how FACA ought to be changed generally.
- Perhaps I remain an old-fashioned curmudgeon in this as well as other fields, but I really do not agree that an agency's sequential consultation with a fixed group, as EPA did so proudly in its diesel rule, is not an advisory committee subject to FACA. The agency sought — and worked hard to obtain — the views of a closed group for a preferred source of advice. The fact that each member of the group could not see the nose of the others does not mean it ain't one of those beasts: the word meeting does not appear in the definition.
- I would suggest that the Committee consider changing the word "permit" to "encourage" in the second line of Recommendation 2.
- In keeping with our discussion at the last meeting, the words "by advisory committees" should be deleted in the third line of the 4th Recommendation.
- It might be interesting to have a discussion concerning the position of GSA — and Jim Tozzi — that FACA is not a public participation statute. I certainly agree that that was the case when it was first enacted. But, I am also of the view that as administrative procedures have evolved, so too has FACA. Indeed, it has become **the** vehicle for Collaborative Governance in which a broad, binding policy is worked out. In fact, one can argue rather forcibly that the original incarnation of § 553 was not participation but rather a means of informing — a/k/a providing advice and information — the agency. The times they do change. And, like the metamorphous of § 553 itself, the conceptual framework with which people regard it can go a long way towards influencing how it is used and administered.

GSA Comments on a March 14, 2011 ACUS Proposal: Ongoing Web Forum Meetings of Federal Advisory Committees: A Proposed Use of “New Media” under the Federal Advisory Committee Act

GSA comments on the March 14, 2011 ACUS proposal are noted below. In addition, a copy of the ACUS proposal (with yellow highlighted text that relates to comment 4 below) is included as an attachment.

- (1) The proposal is an ACUS proposal that was provided to GSA for comment, not a joint project between ACUS and GSA. It is up to ACUS to decide what GSA comments to accept and incorporate, which then become part of the ACUS proposal. In addition, if the ACUS proposal is being sent to GSA for consideration, it would be inappropriate for GSA to be a partner in its creation. Other than noting that GSA provided comments on the ACUS proposal and some of those comments have been incorporated, references to GSA or CMS input should be removed from the proposal. This includes text throughout the proposal, Section F in its entirety, and the Appendix.
- (2) FACA is not a collaborative governance statute. FACA was adopted to allow Federal agencies to receive independent advice and recommendations from the public. This advice is advisory only and is not to be inappropriately influenced by the agency receiving the advice (41 C.F.R § 102–3.105 (g)). ACUS staff has concurred with GSA that FACA is not a collaborative governance statute, and informed us that the term was only being used because the collaborative governance subcommittee was the closest fit for their FACA in the 21st Century project. However, the term continues to be used, and is in fact included on page 1 of the proposal and is further embedded as an integral component of the ACUS proposal. We would suggest that this term not be used in this proposal since it has already been agreed that FACA is not, in fact, a collaborative governance statute.
- (3) The GSA 2001 FACA regulations already allow advisory committee meetings to be conducted in whole or in part by teleconference, videoconference, the Internet, or other electronic medium, as long as they meet the meeting requirements outlined in 41 C.F.R. §102–3.140. It is, therefore, unclear to GSA why ACUS is proposing a recommendation that asks GSA to announce that agencies can conduct online meetings when they are already allowed to do so under the current regulations.
- (4) References to how FACA committees operate should either cite the appropriate section of the law or FACA regulation (there are numerous factual errors in the proposal), or cite that the general statements regarding how FACA committees operate are the opinions of ACUS. See yellow highlighted text in the attachment for examples where the proposal's statements are not tied to the text of either the statute or FACA regulations. Further, many of the highlighted comments are clearly not supported by the law or the regulations.
- (5) Statements directly attributed to GSA (i.e., CMS has taken the position...) are incorrectly presented in the proposal or simply inaccurate and should be deleted.



ATTACHMENT

Ongoing Web Forum Meetings of Federal Advisory Committees: *A Proposed Use of “New Media” under the Federal Advisory Committee Act*

Recommendation: 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.

I. Project Overview

The Administrative Conference of the United States (“ACUS”) has opened a study entitled “FACA in the 21st Century,” which is designed to explore agencies’ use of “new media” and innovative techniques of collaborative governance under the Federal Advisory Committee Act (“FACA”).¹ The study aims both to identify “best practices” amongst agencies in their current uses of advisory committees and to propose potential changes to the statute itself and to the 2001 General Services Administration (“GSA”) rules² implementing it in order to promote the optimal use of “new media” and collaborative governance amongst agencies.

ACUS has commissioned a study by Professor Jim O’Reilly of the University of Cincinnati College of Law wherein he generally addresses these issues. In addition to Professor O’Reilly’s work, ACUS staff Jon Siegel (Director of Research & Policy), David Pritzker (Deputy General Counsel and Staff Counsel for the FACA project), and Reeve Bull (Attorney Advisor and Project Advisor for the FACA project) have undertaken a study of whether agencies may conduct ongoing “virtual meetings” on the web, in which committee members can post their comments in a publicly available web forum. ACUS staff has worked closely with the Committee Management Secretariat (“CMS”) at GSA on this issue. This report addresses how an ongoing “virtual meeting” would comply with FACA and the GSA rules as well as various requirements identified by CMS in discussions between them and ACUS staff. The report ultimately concludes that agencies can conduct such ongoing web meetings in full compliance with current law.

¹ 5 U.S.C. App. §§ 1–16.

² 41 C.F.R. pts. 101-6, 102-3.



II. The Proposal- An Ongoing Web Forum

Exploiting “New Media” and Enhancing Public Transparency/Collaboration via a Web Forum Meeting

When FACA was enacted in 1972,³ many of the technological advances of the last two decades that have become integral to everyday life and to conducting the business of the federal government did not exist. At the time, interactions amongst advisory committee members occurred either in person-to-person exchanges or in telephone conversations. In preparing for the meetings, committee members would confer either in-person or over the telephone. Upon deciding upon the agenda for the meeting, the committee would then convene a physical gathering attended by committee members and interested members of the public.

The “Internet Revolution” introduced a number of communications tools that advisory committees have utilized to facilitate communications amongst committee members and promote expanded public participation in committee business. For instance, email greatly facilitates exchanges amongst committee members, allowing greatly expedited exchange of information. Webcasting has allowed the meetings of advisory committees to be broadcast to a much larger audience. When enacting the current rules implementing FACA in 2001, GSA included provisions clarifying the applicability of FACA to meetings conducted by electronic means.⁴ Nevertheless, some uncertainty remains regarding precisely how committees can exploit such new technologies in preparing for and conducting committee meetings.

For instance, the extent to which committees may use email to prepare for committee meetings is somewhat uncertain. FACA imposes a number of requirements on “meetings” of advisory committees, including requiring them to be noticed in the Federal Register and opened to public participation. Thus, the question arises of whether an email exchange amongst committee members prior to a physical meeting constitutes a “virtual meeting,” which would be unlawful as the email exchange was neither announced in the Federal Register nor made available for public participation. Committees often avoid this problem in one of two ways. First, exchanges designed solely to “gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting” constitute “preparatory work” that does not trigger the applicability of FACA.⁵ Second, exchanges amongst groups smaller than the entire advisory

³ Federal Advisory Committee Act of 1972, Pub. L. No. 92-463, 86 Stat. 770 (1972).

⁴ Federal Advisory Committee Management, 66 Fed. Reg. 37,728, 37,730–31 (July 19, 2001).

⁵ 41 C.F.R. § 102-3.160(a).



committee fall under a “subcommittee exception” and also do not trigger FACA.⁶ Thus, advisory committees will often divide into a number of “subcommittees” that will prepare materials for consideration at meetings and will otherwise avoid attempting to reach consensus on any non-preparatory matter prior to an actual meeting.⁷

Though the “preparatory work” and “subcommittee exceptions” have enabled agencies to exchange emails without repeatedly triggering FACA, their use prevents the public from viewing certain work of the committee.⁸ Nevertheless, some such exceptions are likely necessary, lest every email exchanged between committee members constitute an improper “virtual meeting.” In order to resolve this tension and otherwise promote the optimal usage of “new media” developments, GSA should consider the possibility of agencies’ hosting “virtual meetings” via an ongoing web forum. The committee wishing to host the web forum would issue a Federal Register notice at least 15 days in advance of the opening of the forum announcing the date it will open, the website on which it will occur, the duration of the forum (which could be as long as several months), and the process for submitting comments to the committee for its consideration. The forum would be “moderated,” meaning that the Designated Federal Officer (“DFO”)⁹ for the committee would view every proposed comment prior to its posting on the forum. Committee members would have the ability to submit comments to the moderator and view all posted comments and uploaded documents on the forum. Members of the public could view all comments and uploaded documents but could not submit comments directly; rather, they would email, fax, or mail comments to the DFO, who could then screen the comments for inappropriate content and then post them on the forum for consideration by committee members. When the web forum concludes, the DFO will prepare detailed minutes summarizing the outcome of the forum based upon the comments submitted over the course of the meeting.

⁶ *Id.* § 102-1.35(a).

⁷ To the extent that committee members communicate via email in preparation for these meetings, the emails themselves arguably constitute “records” or “documents” that must be made available to the public upon request. 5 U.S.C. App. § 10(b). CMS has taken the position that every email exchanged between two or more committee members, including an email that is not made available to the entire committee, is a record that must be preserved and made available for public viewing. Such documents must be made available only on request, however, and need not be publicly posted.

⁸ In this light, Congress has recently considered the possibility of closing the “subcommittee exception.” A bill passed by the House (but not ultimately enacted into law) provides that essentially all major FACA requirements apply to smaller working groups within advisory committees. H.R. REP. NO. 111-135, at 3, 11–12 (2009).

⁹ The DFO is an officer or employee of the federal government designated to chair or attend each meeting of the advisory committee. 5 U.S.C. App. § 10(e).



Such a forum would enable committee members to freely use electronic communications without the concern of improperly triggering FACA (since the forum will have been announced in the Federal Register and made available to the public). The forum also would greatly enhance public access to the deliberations of committee members, allowing them to view exchanges that likely would have previously been private under the “preparatory work” or “subcommittee exceptions.” Of course, web forum meetings would not constitute the exclusive means of committee meetings, and committees would likely often continue to use more traditional in-person and teleconferenced meetings. Nevertheless, allowing for web forum meetings would open another avenue for committees to conduct business while promoting optimal public transparency and participation.

Legal Analysis of the Proposed Web Forum Meeting

Though FACA and the implementing rules focus primarily upon physical meetings, nothing in either the statute or the regulations would prohibit the proposed “virtual meeting.” Indeed, the GSA rules announce 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.”¹⁰ Of course, a number of the requirements contained in the statute and rules would apply somewhat differently to ongoing “virtual meetings” than to traditional in-person meetings. CMS pointed to a number of provisions contained in FACA, its implementing rules, and other statutes that would need to be considered in conducting an ongoing web forum meeting. These suggestions are presented in the Appendix to this document. This section analyzes each of the major requirements set forth in FACA and its implementing regulations as well as the specific concerns raised in CMS’s comments and explains how an ongoing web forum meeting would meet each of these requirements.

A. The Statute and Rules Set forth Certain Responsibilities for the DFO

Legal Requirements: The statute and rules require that the DFO perform the following functions: (1) “[a]pprove or call the meeting of the advisory committee”¹¹; (2) “[a]pprove the agenda” for the committee meeting¹²; (3) “[a]ttend the meetings” of the advisory committee¹³; (4) “[a]djourn any meeting when he or she determines it to be in the public interest”¹⁴; and (5)

¹⁰ 41 C.F.R. § 102-3.140(e).

¹¹ 5 U.S.C. App. § 10(f); 41 C.F.R. § 102-3.120(a).

¹² 5 U.S.C. App. § 10(f); 41 C.F.R. § 102-3.120(b).

¹³ 5 U.S.C. App. § 10(e); 41 C.F.R. § 102-3.120(c).

¹⁴ 5 U.S.C. App. § 10(e); 41 C.F.R. § 102-3.120(d).



“[c]hair the meeting when so directed by the agency head.”¹⁵ In light of the statutory and regulatory responsibilities of the DFO, CMS suggested that the DFO would need to “monitor[] the website 24/7” in order to attend the meeting and execute his or her responsibilities (such as adjourning the meeting if deemed to be in the public interest).¹⁶ CMS also inquired as to what the role of the Committee Chair would be and how the public would be informed of the respective roles of the DFO and Chair.¹⁷

How the Proposal Meets Those Requirements: A moderated web forum, in which the DFO serves as the moderator, would meet each of the statutory and regulatory requirements as those requirements are interpreted by CMS. The DFO, in consultation with the Committee Chair, would approve the web forum in advance and approve the agenda for the ongoing discussion. The DFO would also “[c]hair” the meeting (*i.e.*, moderate the discussion) at the direction of the Committee Chair. Though the DFO would not necessarily be logged onto the web forum “24/7,” as CMS suggests might be necessary to satisfy the attendance requirements, he or she would be privy to all postings as the moderator, insofar as he or she would view each submission prior to posting it to the website. As such, the DFO would effectively be “in attendance” at the meeting at all times active discussion is occurring by serving as a central clearinghouse for every posting. The DFO could also adjourn the meeting (*i.e.*, terminate the web forum) if the postings strayed too far from topic. Alternatively, if only some of the submissions strayed from topic, the DFO could simply decline to post the immaterial submissions (and remind the offending party of the need to stay on topic). The Committee Chair would advise the DFO on moderating the discussion and would post fairly regularly to ensure that the discussion remained on topic. The public would be advised of the respective roles of the DFO and Committee Chair in the Federal Register notice announcing the web forum as well as on the forum webpage.

B. Advisory Committee Meetings Must Ensure Reasonable Opportunities for Public Attendance and Participation

Legal Requirements: FACA requires that advisory committee meetings be “open to the public.”¹⁸ The implementing rules provide clarification of the precise steps committees must take in order to ensure adequate opportunities for public attendance and participation. With respect to public attendance, the meeting must be held “at a reasonable time and in a manner or

¹⁵ 41 C.F.R. § 102-3.120(e).

¹⁶ App. at 4.

¹⁷ *Id.*

¹⁸ 5 U.S.C. App. § 10(a)(1).



place reasonably accessible to the public.”¹⁹ The forum selected must accommodate all committee members and a reasonable number of public attendees.²⁰ With respect to public participation, members of the public must be permitted to “file a written statement” with the committee and, “if the agency’s guidelines permit,” must be able to “address the advisory committee.”²¹

CMS acknowledges that the proposed web forum would meet at least some of the statutory and regulatory requirements.²² Nevertheless, they raise several concerns regarding public access and participation. With respect to public access, they inquire as to how the website would be made available to persons having disabilities or lacking web access.²³ With respect to public participation, they ask how the committee members will know when a public comment has been posted and how such comments could be screened for “inappropriate” content prior to posting.²⁴ They also raise the concern that allowing comments only by email submission would foreclose the possibility for submitting comments by other means, such as via fax or traditional mail.²⁵

How the Proposal Meets Those Requirements: As an initial matter, it is worthwhile to note that a meeting by web forum holds the promise of *substantially* enhancing the possibility for public attendance at advisory committee meetings. Though the “digital divide” is undoubtedly a real and pressing issue,²⁶ the number of persons lacking web access is likely significantly smaller than the number of persons who do not live within the immediate vicinity of a physical meeting of an advisory committee and therefore cannot attend the meeting without great personal expense. Though some advisory committees allow *both* physical and virtual attendance by webcasting their physical meetings, neither the statute nor the implementing rules require them to do so. Furthermore, several means of mitigating the “digital divide” exist. For instance, many public libraries offer free online access to their patrons. As such, a web forum meeting is likely to *significantly enhance* opportunities for public attendance and participation rather than restrict

¹⁹ 41 C.F.R. §§ 102-3.105, 102-3.140(a).

²⁰ *Id.* § 102-3.140(b).

²¹ 5 U.S.C. App. § 10(a)(3); 41 C.F.R. §§ 102-3.140(c)–(d).

²² App. at 2–3.

²³ *Id.* at 2, 7.

²⁴ *Id.* at 4, 7.

²⁵ *Id.* at 4.

²⁶ See, e.g., Peter K. Yu, *Bridging the Digital Divide: Equality in the Information Age*, 20 *Cardozo Arts & Ent. L.J.* 1, 2 (2002) (“The digital revolution has transformed the lives of many, but also has left untouched the lives of many others.”).



them. Nevertheless, access to the forum could be expanded to include persons completely lacking web access, as explained more fully below.

The proposal meets each of the requirements of the statute and regulations. The web forum would almost certainly be held at a reasonable time and in a place reasonably accessible to the public insofar as it would be constantly available for public viewing merely by going to the committee's webpage. The page could accommodate thousands of public attendees (limited only by bandwidth restrictions), which is orders of magnitude greater than the attendance limits for a physical meeting and undoubtedly a "reasonable" number as required by the rules. The ability to "file a written statement" with the committee or to "address the advisory committee" would essentially be equivalent in the case of an ongoing moderated web forum: interested members of the public could submit comments to the DFO, who would screen them for inappropriate content and then post them to the forum for the consideration of the committee members.

The web forum meeting could also accommodate each of CMS's concerns. The website could be designed in a manner to comply with all legal requirements for access by persons with disabilities (*e.g.*, it could be made compatible with software designed to convert text to audio for blind attendees).²⁷ With respect to the "digital divide" issue, interested participants lacking personal web access could relatively easily access the site at a local library or other source of free internet access.²⁸ To the extent accessing the internet is not an option (for instance, for elderly citizens who might be unfamiliar with operating a computer), the committee could offer the option of obtaining printouts of the committee proceedings through the mail. By the same token, members of the public who wish to comment could be given the opportunity to submit comments by traditional mail or fax: the Federal Register Notice announcing the meeting could provide the DFO's physical address and a fax number, and comments could be mailed or faxed to the DFO. The DFO would have the ability to screen all comments (whether submitted via email, traditional mail, or fax) for inappropriate content, and he or she could notify the committee members whenever such a public comment has been posted to the forum.

²⁷ 29 U.S.C. § 794; *see also* Section II.F.1., *infra*.

²⁸ Though accessing the internet may be inconvenient for some, particularly those who live in rural areas, the difficulty entailed in driving to a local library is likely to be considerably less severe than that involved in travelling to the forum of an advisory committee meeting (many such meetings are held in Washington, DC, which is extremely inconvenient for Americans living in the West and relatively inconvenient for anyone living outside of the Beltway). A local library is likely to be within reasonable driving distance whereas a meeting in Washington, DC probably is not for most United States citizens.



C. Committees Must Announce Meeting Information 15 Days in Advance in the Federal Register

Legal Requirements: Prior to any meeting of an advisory committee, **the committee must publish** a Federal Register notice 15 days in advance of the meeting announcing the meeting and providing certain meeting details.²⁹ The required details of the meeting notice include in relevant part: (1) the “time, date, place, and purpose of the meeting”³⁰; (2) a “summary of the agenda, and/or topics to be discussed”³¹; (3) a statement of whether the meeting is open or closed, providing a justification for any total or partial closure³²; and (4) the name and contact information for the DFO in order to allow interested members of the public to contact him or her for additional information.³³

CMS acknowledges that the proposal would meet many of the legal requirements but raises a number of concerns.³⁴ First, CMS inquires as to how the DFO or Committee Chair would handle discussions that deviate from the topic of the meeting.³⁵ Second, CMS asks several questions related to the handling of comments during the meeting, including whether the DFO or Committee Chair would provide introductory remarks, how the committee would handle comments from specially invited guests, how committee member technical questions would be addressed, and how the forum would handle discussion of multiple topics (including how the public would know which topic is being discussed).³⁶

How the Proposal Meets Those Requirements: The proposal meets all legal requirements. The Committee would publish a Federal Register notice announcing the web forum 15 days in advance of the forum’s availability online. The notice would provide the dates over which the forum will be available (“time”), the URL for the forum (“place”), and the details of the meeting (“purpose”). The notice would summarize the agenda for the meeting, providing a list of topics to be discussed and the timeline for discussing those topics. It would state whether all or part of the meeting was to be closed to public participation (*i.e.*, the website would only be available to committee members) and the reasons for closure. Finally, it would provide the name, email,

²⁹ 5 U.S.C. App. § 10(a)(2); 41 C.F.R. § 102-3.150(a).

³⁰ 41 C.F.R. § 102-3.150(a)(2).

³¹ *Id.* § 102-3.150(a)(3).

³² *Id.* § 102-3.150(a)(4).

³³ *Id.* § 102-3.150(a)(5).

³⁴ App. at 3–4.

³⁵ *Id.* at 3.

³⁶ *Id.*



telephone and fax numbers, and physical address of the DFO, thereby allowing members of the public without internet access to contact the DFO by alternative means.

The proposal also meets CMS's various concerns. First, because the forum would be moderated, the DFO could handle any deviations from the topic simply by refusing to post immaterial submissions (and reminding the submitting party to adhere to the subject matter of the meeting). The DFO and Committee Chair could provide initial postings describing the goals of the meeting ("introductory remarks"), receive comments from specially invited guests and post them if relevant, answer any technical questions of committee members, and announce which topics will be discussed at which times to ensure that the public is aware of the current topic of discussion.

D. The Public Must Have Access to Documents Considered by the Committee

Legal Requirements: FACA requires that every document "made available to or prepared for or by each advisory committee" must be made available on request for "public inspection and copying."³⁷ CMS acknowledges that the proposal complies with this requirement for online participants but again raises the concern regarding the availability of such materials to those lacking internet access.³⁸

How the Proposal Meets Those Requirements: The advantages of an online web forum vis-à-vis a traditional meeting are particularly apparent in the arena of ensuring compliance with FACA's provisions requiring public access to committee documents. CMS has taken the position that any written exchange (including email) between committee members qualifies as a "record" that must be made available for public viewing on request, even if the exchange does not go to the entire committee.³⁹ Maintaining a database containing all such exchanges could prove incredibly cumbersome for advisory committees. For instance, if one committee member emails another using personal email addresses, the exchange qualifies as a "record" that must be maintained by the agency and made available for public viewing on request per CMS's interpretation of the statute. For that reason, CMS advises committee members to copy the DFO on all email exchanges, though one can easily envision a scenario where a committee member

³⁷ 5 U.S.C. App. § 10(b); 41 C.F.R. § 102-3.170.

³⁸ App. at 5.

³⁹ For instance, an email from Committee Member A to Member B asking about the meaning of a term in a document considered by the Committee qualifies as a "record" under CMS's interpretation. This record must be made available to any interested member of the public upon his or her request.



simply forgets to copy the DFO on an email exchange. An online web forum efficiently resolves that issue: all exchanges would be available for public viewing on the committee's website.

With respect to the "digital divide" issue, as previously noted, a large percentage of citizens have personal web access, and a large percentage of those who lack personal access have ready access to free internet at local libraries. Of the remaining citizens who either lack easy web access or are unfamiliar with computers, such persons can request access to printouts of the meetings by calling or mailing the DFO listed in the Federal Register notice.

E. FACA Requires Detailed Minutes of All Advisory Committee Meetings

Legal Requirements: "[D]etailed minutes" of every advisory committee meeting must be kept.⁴⁰ The minutes must include: (1) the "time, date, and place of the advisory committee meeting"⁴¹; (2) a list of all persons present at the meeting (including committee members, agency staff, and members of the public)⁴²; (3) description of each matter discussed and the resolution thereof,⁴³; and (4) a copy of all reports and other documents received, issued, or approved by the committee.⁴⁴ The DFO **and Committee Chair** must ensure that the minutes are certified within 90 days of the conclusion of the meeting.⁴⁵

How the Proposal Meets Those Requirements: Following the conclusion of the web forum meeting, the DFO will review the postings. He or she will then prepare minutes providing: (1) a statement of when the meeting occurred and at what website it took place (the "time, date, and place" of the meeting); (2) a list of all participants, including committee members and agency staff as well as all members of the public who submitted comments; (3) a description of each major topic of discussion and the conclusion reached thereon; and (4) copies of all documents received or promulgated by the committee. The DFO will then submit those minutes to the Committee Chair for his or her certification within 90 days of the conclusion of the web forum.

F. Various Other Issues Raised by CMS

⁴⁰ 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165.

⁴¹ 41 C.F.R. § 102-3.165(b)(1).

⁴² 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165(b)(2).

⁴³ 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165(b)(3).

⁴⁴ 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165(b)(4).

⁴⁵ 5 U.S.C. App. § 10(c); 41 C.F.R. § 102-3.165(c).



In addition to the matters discussed above, CMS raised a number of additional concerns. The following section addresses how the proposal would meet each of these concerns.

(1) CMS asks “How does [the proposal] address Section 508 compliance?”⁴⁶ The site(s) used for web fora by each advisory committee would be created in full compliance with section 508 of the Rehabilitation Act (*e.g.*, it would be made compatible with screen readers for use by the blind and assistive listening devices for use by the deaf).

(2) CMS notes that Section 11(a) of FACA requires that committees “make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.”⁴⁷ The postings on the web forum would serve as the transcript of the meeting. Were a member of the public interested in obtaining a physical copy of this transcript, the committee would provide it to him or her at cost of duplication.

(3) CMS notes that Section 13 of FACA requires that at least eight copies of the advisory committee’s report and, where appropriate, background papers prepared by consultants be made available to the Library of Congress.⁴⁸ At the conclusion of the web forum, eight copies of the report and consultants’ background papers would be made available to the Library of Congress.

(4) CMS raises a number of issues regarding committee decisionmaking, including inquiries as to how the committee would handle voting and to what constitutes a quorum of the committee.⁴⁹ Neither the statute nor the rules imposes a formal quorum requirement for federal advisory committees, so the fact that only a small percentage of committee members may be simultaneously online is not problematic. With respect to voting, once the discussions of the committee members neared conclusion, the DFO and Committee Chair could announce a date at which all committee members are asked to log onto the forum and cast their votes on committee proposals.

(5) CMS asks whether web forum meetings would be supplemented with other types of meetings, such as those conducted over teleconference or in-person.⁵⁰ Though a committee could lawfully conduct all of its meetings by web forum, the committee certainly

⁴⁶ App. at 2.

⁴⁷ App. at 6–7; *see also* 5 U.S.C. App. § 11(a).

⁴⁸ App. at 7; *see also* 5 U.S.C. App. § 13.

⁴⁹ App. at 8.

⁵⁰ *Id.*



would want to consider whether holding additional in-person meetings or teleconferenced/webconferenced meetings would be useful. A committee could exploit a variety of meeting formats, using the meeting type that best suits its needs in any given context.

(6) CMS asks whether the meeting recordkeeping would comply with the National Archives and Record Administration's General Records Schedule 26.⁵¹ General Records Schedule 26 provides detailed guidance on retention periods for various documents associated with advisory committees. All postings and documents considered by the committee would be available on the web forum, and the committee would ensure that it retained copies of those documents as required by Schedule 26.

(7) CMS inquires as to how the committee would capture the time spent by committee members, which is relevant both for determining the pay for members receiving compensation and for committee members who are Special Government Employees (who are limited in the number of days per year that they can work on committee matters).⁵² As is the case with traditional advisory committee meetings, members will be asked to keep track of the time they spend on committee business. Keeping an accurate record of such time would presumably be somewhat easier in the case of a web forum meeting, for the website could keep track of the amount of time each member spends logged into the system.

III. Conclusion

For the reasons discussed, an advisory committee meeting conducted via a web forum would fully comply with the requirements of FACA and its implementing rules as well as satisfying the various concerns expressed by CMS regarding such a meeting. In this light, the Conference recommends that GSA, with the assistance of the Conference, issue an announcement recognizing the legality of such meetings. In so doing, GSA would both facilitate agencies' use of new technology and open a new mode of committee meetings that would greatly serve transparency and public participation in committee business, goals both of the Obama Administration and of FACA itself.⁵³

CMS appropriately points to issues arising from the lack of universal access to the internet. Nevertheless, as discussed above, the vast majority of citizens could access the online forum either on a personal internet connection or at a public terminal such as a local library, and

⁵¹ *Id.*

⁵² *Id.*

⁵³ 5 U.S.C. App. § 2(b)(5).



the remainder of the population would be able to obtain printouts of the postings and documents submitted in connection with the meeting. Similarly, members of the public could submit comments either electronically or via fax or traditional mail, making participation in the forum effectively available to the entire population. This opportunity for virtually universal attendance and participation contrasts starkly with participation in traditional in-person meetings, wherein attendance is cost effective only for citizens who live relatively close to the site of the meeting. Moreover, the web forum would provide access to information to which members of the public do not typically have ready access. For instance, committees often make use of the “sub-committee exception” to determine the agenda for committee meetings and decide upon the topics to be discussed thereat. Members of the public could potentially request copies of these communications if they were memorialized in emails,⁵⁴ but collecting and providing copies of the documents would require significant expenditure of effort on the part of the committee. By contrast, *all* communications exchanged amongst committee members, including those amongst groups smaller than the entire committee, would be collected and made readily available on the proposed web forum.

In short, a web forum meeting would in no way *detract* from the current regime’s opportunities for public attendance at and participation in committees’ work, and it would *enhance* the opportunities for such public interaction in many important respects. As times evolve and technology progresses, the government must ensure that its institutions evolve in concert. Advisory committee meetings conducted by web forum would constitute a small but significant step in that direction.

⁵⁴ *Id.* § 10(b).



Appendix⁵⁵

Virtual Meeting Question and Proposal From ACUS

Question: Can an agency conduct a multiple day “virtual meeting” in a publicly accessible website forum under the Federal Advisory Committee Act?

The Federal Advisory Committee Act (FACA) established a structure for creating, managing, and terminating Federal advisory committees, and required the opportunity for public input. The statute clearly states the only purpose of Federal advisory committees is to provide independent advice and recommendations to the Executive Branch of government. FACA is neither a public participation statute nor a collaborative process between the government, a Federal advisory committee, and the public.

ACUS PROPOSAL

(1) The agency announces 15 days in advance in the *Federal Register*:

- the date and time (i.e. beginning on a specific date and continuing in an online discussion for a number of days, weeks, or months) and place (i.e. the web address) of the meeting, noting that advisory committee members will discuss issues related to a specific topic of interest to the committee via online postings over an extended period of time (e.g. for three months following the initiation of the forum);
- an invitation to members of the public to submit written comments for consideration during the meeting; and
- other information required for a *Federal Register* notice.

(2) After the initiation of the forum, members of the public could view all postings and document submissions. Though members of the public would not be able to post statements directly on the forum, they would be free to submit comments at any time to the DFO, who would then post the comments on the forum for the committee’s consideration.

(3) All documents to be discussed in the forum would be posted to the web in advance, and the public would have real-time access to the process of revising the documents as it occurs on the

⁵⁵ This document was provided to ACUS Attorney Advisor Reeve Bull by Lorelei Kowalski of CMS on March 2, 2011. It contains CMS’s response to a document outlining the virtual meeting proposal that ACUS staff Jon Siegel and Reeve Bull submitted to CMS in December 2010.



forum. Members of the public could submit written statements for consideration during the ongoing discussion.

ANALYSIS

GSA evaluated the ACUS proposal against the requirements in the Federal Advisory Committee Act (5 U.S.C. App.) and the GSA Final Rule (41 C.F.R. Parts 101-6 and 102-3) for convening Federal advisory committee meetings. The analysis is organized by relevant sections of the Act, followed by the citation(s) for the corresponding section(s) in the Final Rule. The ACUS and GSA analyses that evaluate the ACUS proposal against these statutory and regulatory requirements follow. At the end of the analysis GSA raises additional considerations that are not direct FACA requirements, but could affect the use of online technology in a FACA forum.

A. Section 10 (a) (1): Each advisory committee meeting shall be open to the public.

ACUS Proposal:

Members of the public will be able to log onto the web forum and view all postings thereon. They also may submit written comments to the DFO for the committee's consideration (or even participate in the discussions if permitted by the agency's guidelines).

GSA Analysis:

The proposed meeting is only open to the public with access to a computer. How does ACUS propose to allow the interested public without computer access to obtain timely printouts of the ongoing discussions and documents uploaded to the website? How does ACUS propose to address Section 508 compliance?

B. 41 C.F.R. § 102–3.140 (a): The agency head...must ensure that: **Each advisory committee meeting is held at a reasonable time and in a manner or place reasonably accessible to the public**, to include facilities that are readily accessible to and usable by persons with disabilities, consistent with the goals of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794.

ACUS Proposal:

The web forum will be available at all hours of the day (“reasonable time”) and will be easily accessible on the web (“place reasonably accessible to the public”).

GSA Analysis:



How does ACUS propose to make the website accessible to and usable by persons with disabilities? What other means does the public have access to the deliberations and postings other than online access?

C. 41 C.F.R. § 102–3.140 (b): The meeting room or other forum selected is sufficient to accommodate advisory committee members, advisory committee or agency staff, and a reasonable number of interested members of the public.

ACUS Proposal:

The forum will be available for viewing by an essentially unlimited number of members of the public (“accommodate . . . a reasonable number of public attendees”).

GSA Analysis:

The ACUS proposal appears to be compliant with the regulatory requirement.

D. Section 10 (a) (2): timely notice of each such meeting shall be published in the *Federal Register*; 41 C.F.R. § 102–3.150 (a): A notice in the *Federal Register* must be published at least 15 calendar days prior to an advisory committee meeting.

ACUS Proposal:

The committee will publish a *Federal Register* notice at least 15 days in advance of the initiation of the web forum announcing it and inviting public participation.

GSA Analysis:

The ACUS proposal meets the statutory and regulatory requirements.

E. 41 C.F.R. § 102–3.150 (a): requires *Federal Register* notices to include, at a minimum, the following information:

(2) The time, date, place, and purpose of the meeting

ACUS Proposal:

The notice will state the date and time at which the web forum will commence and describe the purpose of the online discussion. It will also note the “place” of the meeting (i.e. the URL of the web forum).

GSA Analysis:

The *Federal Register* notice needs to indicate a beginning and end date and time. How does ACUS propose to ensure that the committee member discussions do not deviate over time from the purpose noticed in the *Federal Register*?



(3) A summary of the agenda, and/or topics to be discussed

ACUS Proposal:

The Federal Register notice will describe the goals of the online discussion and the topics that participants will be discussing.

GSA Analysis:

To comply with FACA, the website discussion could only involve the topic(s) identified in the *Federal Register* notice. How does ACUS propose to handle a situation in which committee members start discussing topic(s) that have not been previously noticed to the public via a *Federal Register* notice? Who are the “participants” that ACUS refers to in their proposal?

FACA meeting agendas typically include introductory remarks from the DFO and Chair. How will this be addressed in a website forum? FACA meeting agendas often include invited speakers to provide technical information to committee members – how would this be handled via a website forum? Committee members often have technical questions for the agency – how would this be handled via a website forum? If there is more than one topic to be discussed, how will the public know when to participate or view the discussions on each topic?

(4) A statement whether all or part of the meeting is open to the public or closed; if the meeting is closed state the reasons why, citing the specific exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), as the basis for closure.

GSA Analysis:

The ACUS proposal partially meets this requirement; the meeting is only open to the public with access to a computer, and ACUS does not identify alternative means of providing the website information to those who do not have access to a computer.

(5) The name and telephone number of the Designated Federal Officer (DFO) or other responsible agency official who may be contacted for additional information concerning the meeting.

GSA Analysis:

While not specifically mentioned in the ACUS proposal, GSA assumes this information would be included in the *Federal Register* notice.

F. Section 10 (a) (3) and 41 C.F.R. § 102–3.140 (c) and (d): Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee.



ACUS Proposal:

The DFO will provide his or her email address for submission of public comments. He or she will then post comments for consideration of the committee. The agency can write its guidelines such that the committee meets this requirement [41 C.F.R. §102–3.140 (d): address the advisory committee if the agency’s guidelines so permit] in any of the following ways: (a) only comments submitted by email to the DFO will be considered; (b) the committee can determine whether specific members of the public will be given posting privileges in the forum on a case-by-case basis; or (c) all members of the public can be given posting privileges.

GSA Analysis:

How will the committee members know when public comments have been posted? What does ACUS propose as the public comment policy for the website forum? We believe ACUS misunderstood the intent of 41 C.F.R. § 102–3.140 (d) – to allow the opportunity for oral comment. The ACUS proposal above states only comments submitted by email to the DFO will be considered, but that restricts the methods by which the public can submit comment – mail and faxed comments should also be permitted. It is unclear why ACUS would be giving deferential treatment to specific members of the public (i.e., giving some of them posting privileges); how would ACUS determine this? In addition, if any or all members of the public were given posting privileges, how would the DFO be able to monitor and screen out inappropriate comments?

G. Section 10 (b) and 41 C.F.R. § 102–3.170: Subject to section 552 of Title 5, United States Code, the **records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying** at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

ACUS Proposal:

Every draft of every document considered by the committee will be available for public viewing on the web forum.

GSA Analysis:

Timely access to advisory committee records is an important element of the public access requirements of the Act. Section 10(b) of the Act provides for the contemporaneous



availability of advisory committee records that, when taken in conjunction with the ability to attend committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. The ACUS proposal complies with these requirements for online participants, but does not include any options for those who cannot participate online. Again, how does the public that does not have access to a computer obtain copies of materials from the website?

H. Section 10 (c) and 41 C.F.R. § 102–3.165 (a) and (b): Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

ACUS Proposal:

The entire proceeding of the meeting will be memorialized online, which should itself meet the requirement for “detailed minutes.” Alternatively, if a summary of the online proceedings is needed or desired, the DFO can prepare minutes stating the duration of the meeting and the website on which it occurred, listing the persons who participated, describing major matters discussed, and including any other germane issue, and then certify those minutes within 90 days of the conclusion of the web forum.

GSA Analysis:

The FACA statute and regulation require that minutes be prepared for every FACA meeting. The “detailed minutes,” as proposed by ACUS, are deficient since they do not fully address the requirements for minutes as described by the FACA regulation. Minutes are a succinct summary of what happened at the meeting, and a verbatim transcript, webcast, or a web-based discussion cannot perform that function. The minutes are required to include: the time, date, and place of the advisory committee meeting; a list of the persons who were present at the meeting; an accurate description of each matter discussed and the resolution, if any, made by the advisory committee regarding such matter, and copies of each report or other document received, issued, or approved by the advisory committee at the meeting. The minutes are a standalone document certified by the chair within 90 calendar days of the meeting to which they relate.

I. Section 10(e) and 41 C.F.R. § 102-3.120 (c) (d) and (e): There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he



determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

ACUS Proposal:

The DFO will have continuing access to the web forum for its entire duration. The DFO will be given the capacity to terminate the web forum and will do so if he or she deems it to be in the public interest.

GSA Analysis:

The statute and regulations require that the DFO have control over the meeting, not just access to the meeting. If the DFO is not monitoring the website 24/7, how can the regulatory requirement that “no advisory committee shall conduct any meeting in the absence of the DFO” be met? How would it be possible for a DFO to be online during the entire meeting? How does ACUS propose to address the regulatory requirement that the DFO be present for the entire meeting, and not just when he/she decides to check on the status of the discussion? The DFO is given the authority to adjourn a meeting when determined to be in the public interest – unless the DFO controls the postings on the website, how does ACUS propose to ensure the DFO could adjourn a meeting in a timely manner in the public interest?

What is the role of the Chair during the website meeting? How is the public informed of the role of the DFO and Chair during the website meeting?

J. Sec. 10 (f) and 41 C.F.R. § 102-3.120 (a): The DFO must “approve or call the meeting of the advisory committee.” Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

ACUS proposal:

The DFO will consult with the Committee Chair to decide when the online forum will begin, approving any final decision that is made (or beginning the forum himself if appropriate).

The DFO, in consultation with the Committee Chair, will approve the topic of discussion for the web forum.

GSA Analysis:

The ACUS proposal appears to address the requirements of Section 10(f) and 41 C.F.R. § 102-3.120(a).



K. Section 11 (a): Except where prohibited by contractual agreements entered into prior to the effective date of this Act, **agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.**

ACUS Proposal:

Not addressed.

GSA Analysis:

This section requires an agency to make available copies of transcripts of advisory committee meetings. How would members of the public without access to a computer obtain copies of materials from the website? How does ACUS propose to address this?

L. Section 13: Subject to section 552 of Title 5, United States Code, the Administrator shall **provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee** and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

ACUS Proposal:

Not addressed.

GSA Analysis:

Although ACUS is proposing to develop committee reports online, the proposal should acknowledge that hard copies of each final committee report will be transmitted to the Library of Congress, in the format and quantity required by the Library of Congress.

M. 41 C.F.R. § 102–3.105: The head of each agency that establishes or utilizes one or more advisory committees must: (j) **Provide the opportunity for reasonable participation by the public in advisory committee activities**, subject to § 102–3.140 and the agency's guidelines.

ACUS Proposal:

Not addressed.

GSA Analysis:

The ACUS proposal appears to comply with this requirement for online participants, but does not include any options for those who cannot participate online.

N. 41 C.F.R. § 102–3.120 (b): **The DFO is required to approve the [meeting] agenda.**



ACUS Proposal:

Not addressed.

GSA Analysis:

The ACUS proposal does not discuss an agenda, just topics and purpose of the website meeting. Does ACUS plan on developing an agenda for the website meeting? How will the Chair and DFO ensure that the agenda is followed during the meeting?

ADDITIONAL CONSIDERATIONS

- (1) Please describe the concept of online postings. Do you mean via a blog? Who has the authority to post to the website? Is the website on a Federal agency webpage? Website standard operating procedures for government agencies require screening of inappropriate/irrelevant material. What procedures are proposed to screen material prior to posting? Who decides what material is posted? The DFO, or the Committee Chair? If individuals choose to post graphic materials, how does ACUS ensure the postings are 508 compliant?
- (2) If multiple topics are discussed, how does ACUS propose to organize the discussions? Is more than one DFO required?
- (3) What does ACUS propose as the public comment policy for the website? For example, to whom does the public submit comments to and what happens to those comments?
- (4) How does the committee decide via a website forum on the advice/recommendations that will be transmitted to the agency? How does ACUS propose to handle committee member voting? If the entire committee membership does not participate in the website meeting, what constitutes a quorum for the meeting to proceed?
- (5) Would website meetings be supplemented with other types of committee meetings, such as teleconferences or face-to-face meetings?
- (6) What does ACUS propose as the electronic record policy for a website meeting? Does your proposal meet the requirements of General Records Schedule 26, as promulgated by NARA for recordkeeping of Federal advisory committees?
- (7) How does ACUS propose to capture the time spent by each committee member during the website meeting? SGEs are limited by statute in how many days they can work as SGEs in a rolling 365 day period. This is also relevant for those members who receive compensation.

