



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*

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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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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.

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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*

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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***

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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.

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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***

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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***

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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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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:

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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.

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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.