

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

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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.~~