

**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.