

FEDERAL ADVISORY COMMITTEE ACT:
INHIBITING EFFECTS UPON
THE UTILIZATION OF NEW MEDIA IN
COLLABORATIVE GOVERNANCE &
AGENCY POLICY FORMATION

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Introduction

The Federal Advisory Committee Act governs the 900 committees which advise federal agencies in about 7,000 meetings each year. The purposes of the 1972 FACA were to reduce the number of then-existing outside advisory groups, to open their meetings and records to the public, and to structure the committee operations to be more visible and accountable. In recent years some observers have said that the 1972 statute has come to constrain agency interactions with members of the public, and some have encouraged the agencies to use more of the “new media” electronic tools to be more efficient and less costly. This study surveyed some of the agency committee managers, examined the published literature, interviewed numerous agency officials, and reviewed the case law. This draft report surveys the conventional and electronic solutions to real and perceived limitations that are imposed by FACA upon agency interactions and advice.

Scope of the Study

This study of collaborative governance techniques using “new media,” including the communication devices known as “social media,” examines the real and perceived constraints upon agency committee managers under the 1972 Federal Advisory Committee Act (FACA). The consultant interviewed federal committee management officers (CMO), some Designated Federal Officials (DFO), and a few attorneys of the agency legal offices collectively described as general counsel (GC). With the

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assistance of Administrative Conference (ACUS) staff and the central office handling advisory committee matters at the General Services Administration (GSA), other agencies were polled via email, and several views were received. In addition, several non-federal veterans of the advisory committee process offered their views when informed of the study. Cooperation was obtained from many but not all agencies that were contacted. The views expressed in this paper, except where noted to the contrary, reflect the views of numerous participants. No effort was made to drive the commenters to any particular consensus, but the consultant has distilled various resources to aid in the conclusions and suggestions for action.

The task assigned was: *“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.”*

1. The Federal Advisory Committee Act 1972-2011

“Consensus” advice to the government was the focal point of advisory committees for decades before 1972. Typically, the advisors were assembled in one room with the Secretary or Director, and collectively communicated a common viewpoint to that convening official and the agency staff. That was the model of advice transmission between advisors and agencies under the 1962 and 1972 executive orders.²

A. The Early Models

Agencies have been receiving advice for as long as there have been agencies. The power of those who gave advice has evolved, but the political climate within which the FACA was adopted in 1972 was a remedial approach to address prior perceived difficulties³. Too many of the advisory groups were perceived as being influential with agencies during the 1950s,

² Exec. Orders 11007, 11671.

³ Background of FACA is addressed in detail in 2 James O’Reilly, Federal Information Disclosure ch. 24 (3d Ed. 2010 Supp.)

but the groups were not publicly accountable,⁴ so President John F. Kennedy imposed a mild control under a 1962 Executive Order.⁵

The model of the ideal public meeting of an advisory committee was static in time and place; the advising function would occur in a conference room, and if the topic was not classified or confidential, public attendees could sit and watch the members interact with agency staff and with each other, and vote on a set of recommendations. These would be funneled to agency managers, sending their conclusions through an employee who was designated to work with the chair and members of the committee. The 1971-72 debate on the bill that became FACA showed a concern that committees too often met in secret and that agencies delegated too much power to these private persons.⁶ The sponsors of advisory committee legislation desired that committee members should be selected with “balance”⁷; the Senate sponsor, Senator Lee Metcalf, suggested that one third of seats on an advisory committee be reserved for representatives of the public interest.⁸

The advisory committee concept in 1972 emphasized public attendance and public access to non-confidential documents being considered by the committee.⁹ In hindsight, the structure of public attendance in FACA did not contemplate the use of rapid electronic “collaborative governance” instruments for idea sharing, tools that are available in 2011. That is not a criticism but a reflection of contemporary context as of the time of its passage.

B. The Framework of FACA

FACA as passed includes directions from Congress to its committees when creating advisory committees in legislation; directions to agencies when the agency is creating a new advisory committee; directions for the

⁴ Scholars have not always agreed about FACA, see 2 James O’Reilly, *Federal Information Disclosure ch.*, 24 (3d Ed. 2010 Supp.) and see articles in the Bibliography appended. One useful approach is taken in Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act & Good Government*, 14 *Yale J. on Reg.* 451 (1997).

⁵ Exec. Order 11007 (1962).

⁶ Richard Wegman, *The Utilization and Management of Federal Advisory Committees* (Kettering Foundation, 1983)

⁷ 5 U.S.C. App. 2 §5(b)(2)

⁸ S. 1637, 92d Cong. 1st Sess. (1971)

⁹ The conference committee chose the House vehicle, see S. Conf. Rept. 92-1403, 92d Cong. 2d Sess. (1972).

OMB (later GSA) in overseeing committee work; and operational requirements. FACA contains restrictions on creation of new committees, obligations for approval of committees, procedures for chartering, operation, renewal and termination, and provisions on public access and for closing sessions related to confidential or classified matters.¹⁰

The FACA has several important purposes which were explained in the 1971-72 legislative history¹¹ and expanded upon in later case law.

First, it promotes transparency in administrative agency decisional processes, by publishing notice of committees and agendas, disclosing detailed charters, and standardizing who can advise what agency, in scheduled or repeated meetings with whom, how and when.¹²

Secondly, it exposes decisional documents of that advising process, so that the public can view (with some classified documents exceptions) what the agencies offer to the advisors for their consideration.

Third, it draws from advisors their “consensus” of expert response to agency scenarios, licenses, approvals, strategies, etc., sometimes with a public vote among the advisers.

Fourth, it allows attendance at the session by observers (and sometimes allows them to offer public input as speakers).

Finally, it communicates the outcome, e.g. the recommendation and any recorded vote, to those outside, through minutes or transcripts or both.¹³

C. The Role of Delegation to GSA

FACA’s passage in 1972 resulted in Presidential delegations of oversight authority in Executive Orders 12024 (1977) to OMB and 12838 (1993) to GSA. In 2000, GSA’s proposed rules on FACA were issued for public comment. Some agencies responded, but only 6 comments from outside the federal government were submitted. The final rules were

¹⁰ 5 U.S.C. App. 2

¹¹ S. Conf. Rept. 92-1403, 92d Cong. 2d Sess. (1972).

¹² 5 U.S.C. App. 2

¹³ The details are described at length in 2 James O’Reilly, Federal Information Disclosure ch. 24 (3d Ed. 2010 Supp.)

published July 19, 2001¹⁴, went into effect August 20, 2001, and have not been changed since. GSA has expressed the view that: “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.”¹⁵

D. FACA Coverage

This paper will now briefly look at the issue of FACA coverage definitions. Of the federal information oversight statutes, FACA has drawn the least amount of litigation and a very small amount of law review commentary (see Bibliography).

FACA’s first test is jurisdictional -- whether a specific group has the legal character of an “advisory committee” at all. FACA applies if a group of individuals from the private or non-federal governmental sector is used by an agency “in the interest of obtaining advice or recommendations.”¹⁶ The group must be either “established” or “utilized” by a federal “agency,” to have the basic attributes of an advisory committee.¹⁷ The predicate to having the FACA apply is to have a group that satisfies the statute’s prerequisites. The statutory language is ambiguous, and agencies separately define their terms of coverage in line with the 2001 GSA rules.

Exclusions from FACA are numerous. One-time meetings, individual to individual meetings, meetings with contractor-organized groups, or visits by the agency staff to meetings of existing private sector groups, are not subject to FACA¹⁸. Federal agency disputes with challengers about the coverage have been relatively few compared to other administrative transparency statutes like the Freedom of Information Act.¹⁹ Courts sometimes have had to parse the terms of coverage.²⁰ But the agencies that

¹⁴ 66 Fed. Reg. 37727 (July 19, 2001)

¹⁵ GSA Committee Management Secretariat, to Administrative Conference (March 1, 2011).

¹⁶ 5 U.S.C. App. 2 §3(2)(C)

¹⁷ 5 U.S.C. App. 2 §3(2)(C)

¹⁸ See e.g. *Grigsby Branford & Co. v U.S.*, 869 F. Supp. 984 (D.D.C. 1994); *Natural Resources Defense Council v Dept. of Energy*, 353 F.3d 40 (D.C. Cir., 2004)

¹⁹ Contrast the few dozen FACA cases with 5,500 FOIA cases, for example.

²⁰ See e.g. *Public Citizen v U.S. Dept. of Justice*, 491 U.S. 440 (1989); *Judicial Watch v Clinton*, 76 F.3d 1232 (D.C. Cir. 1996)

apply these ambiguous terms to cover or exclude their own committees are in a weak posture to ask for judicial deference to their interpretations, since the FACA delegated authority to a central expert body (currently the GSA) rather than to empower specific agency determinations of the statutory terms.

These two statutory words, “established” and “utilized,” are terms of art when used in the FACA context.²¹ “Established” connotes an active formation effort for the group by a federal agency. A pre-existing nonfederal entity is not “established” when an agency asks for its advice, e.g. a bar association committee that rates candidates.²² Agencies routinely ask organized entities outside the agency to provide views on agency programs.

As a general matter, an agency’s receiving advice from individual commenters does not implicate the statute, since the agency has not “established” the group of persons providing input. For instance, the internet sharing of drafts prior to meetings would seem to be common practice. Agencies already receive web-based comments directly, through their blogs, and through Regulations.gov. But the advisory committee commentary on a proposed document would receive more attention than a casual commenter. The very looseness of internet input is a contrast to the FACA structure of input. In general, a person contributing advice to the agency may use anonymous URLs, can lift segments of comments to send to agencies from blogs, wikis or other sources with or without attribution, and these inputs to the agency will generally be out of the “control” of the “designated federal official” who is to oversee each meeting.²³

“Utilized” is a more difficult term to apply for FACA purposes.²⁴ The courts have had varying degrees of interest in the agency’s utilization of the output of a group, as an indicator of the committee’s relative status vis-à-vis the agency.²⁵ A moderated panel of wiki contributors or a listserv limited to members of a particular background, e.g. administrative law professors or teachers of legislation and election law, will be an informal gathering of like minded persons who probably will never be in the same room at the same

²¹ 5 U.S.C. App. 2 §3(2)(C)

²² Public Citizen v. U.S. Dept. of Justice, 491 U.S. 440 (1989)

²³ 5 U.S.C. App. 2 §10(f).

²⁴ 5 U.S.C. App. 2 §3(2)(C)

²⁵ Sofamor Danek Group, Inc. v. Gaus, 61 F.3d 929 (D.C. Cir. 1995); Aluminum Co. of America v. National Marine Fisheries Service, 92 F.3d 902 (9th Cir. 1996).

time.²⁶ They can be resources from whom the federal agency staff can draw useful insights; but the group is amorphous, like a “cloud” of independent thinkers.

If the group of individuals had existed before the government agency had asked for its advice,²⁷ the utilization of this existing ‘virtual’ group will not be an advisory committee, under the case law.²⁸ Such a group outside the federal government, that has a role and existence apart from federal issues,²⁹ or a group that advises congressional but not administrative recipients of advice,³⁰ or groups that did not otherwise meet the “utilized” standards,³¹ would be excluded.

2. New Media

It is not simple to apply the highly structured terms of the 1972 FACA and the 2001 GSA rules to the “noisy” electronic feedback of a 2011 interaction via new media. Dozens of commenters can be sending feedback to a listserv that the agency used to pose questions before it began a rulemaking project. If we assume the new media participants were to take on the legal existence of a “committee,” when are they an “advisory” committee? Has the group in fact played a role in advising the federal agency? The court precedents interpreting FACA have been ambiguous,³² and the advising function has many features. An advisory committee is a group of individuals, not all of whom are federal employees, which has a role to provide advice or recommendations to a federal agency.³³

Most new media feedback vehicles have participants who are not so much “formed” or “utilized,” as they are volunteer commentators, streams of opinions that are composed of ad hoc accretions of multiple individual persons wanting to give their inputs to others in their group. These “new

²⁶ See e.g. the listserv for administrative law teachers, adminlaw@chicagokent.kentlaw.edu.

²⁷ See e.g. *Huron Environmental Activist League v. U.S. E.P.A.*, 917 F. Supp. 34 (D.D.C. 1996).

²⁸ The bar group that rated candidates was excluded in a controversial Supreme Court decision more than two decades ago. *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440 (1989).

²⁹ *International Brominated Solvents Ass'n v. American Conference of Governmental Indus. Hygienists, Inc.*, 393 F. Supp. 2d 1362 (M.D. Ga. 2005)

³⁰ *Manshardt v. Federal Judicial Qualifications Committee*, 408 F.3d 1154 (9th Cir. 2005); Opinion of Assistant Attorney General T. Olsen to K. B. Kamalii, Native Hawaiian Study Commission (Jan. 4, 1982),

³¹ *Wool Growers Assoc. v. Schafer*, 637 F. Supp. 2d 868 (D. Idaho 2009), order clarified, 2009 WL 3806371 (D. Idaho 2009)

³² The case law is addressed at length in 2 James O'Reilly, *Federal Information Disclosure* ch. 24 (3d Ed. 2010 Supp.)

³³ 5 U.S.C. App. 2 § 3(2).

media” uses do not, as a general matter, implicate FACA. For instance, a typical agency blog’s comment stream is not collective or consensus focused. Like any broadcast of a conversational dialogue, comments are open and whoever chooses to reply can do so without forming a collective response from all others.³⁴

Nevertheless, other “new media” applications are more likely either to implicate the statute or come sufficiently close to doing so that agencies may be somewhat reluctant to use them. For instance, in the case of a “private Wiki,” the moderator can decide on the structure of the feedback loop and may restrict access to give comments to only a set of pre-identified participants as co-drafters of the Wiki text. If the agency actually selected a group of participants to participate in drafting a “Wiki,” the participants’ efforts in reaching collective consensus could potentially implicate the statute. Similarly, a group of persons specifically invited by an agency to participate in a LinkedIn or Googlegroup application may qualify as an advisory committee subject to the statute. A private sector person acting as the group moderator on LinkedIn receives opt-in request messages and may exclude some persons who are not selected to be members. Our research to date has not found such an entity invited by a federal agency to be a “virtual” advisory committee, but one or more examples may exist.

3. The Survey

The GSA Committee Management Secretariat (GSA) aided the consultant in identifying agency personnel familiar with FACA operations. 50 agencies were solicited by a GSA email for a brief set of 7 questions; only 2 responded. 15 agency employees (selected to mix Cabinet and non-Cabinet agencies) were approached directly by email and phone by the consultant for a longer set of questions. Most of the agencies had CMOs who were willing to be interviewed off the record. Several non-CMO veterans of the advisory committee process also gave their views on the questions, as volunteers with experience who had learned of the existence of the study. Because of the sensitivity felt by the CMOs concerning this topic, the consultant agreed to keep their identifying details confidential. Since the agency typically has one person as its CMO, naming the specific agencies would reveal the source person as well.

³⁴ See e.g. <http://www.facebook.com/departmentoflabor>.

The set of questions posed for those interviews were:

1. Your agency regularly interacts with outsiders for “advice” on agency programs or policies. Has the FACA limited your agency’s use of communications and collaboration with persons outside the agency regarding policy matters, and if so, how?
2. What effort is being made by agency outreach or public relation staffs to use the “social media” to gain more input to the agency? In doing so, how they have reconciled these actions with FACA?
3. Does the agency have informal guides on consideration of the “best practices” for social media use in dealing with the public?
4. Please identify any action that agency managers would like to do, but which they believe that they cannot do because of the constraints of the current FACA system.
5. How does your agency currently utilize the advisory committee members outside of the formally announced committee meetings?
6. Is policy formation one of the areas in which advisory committee members are used?
7. Are there individual members of your agency’s FACA committees that serve as a more flexible source of ongoing advice to agency staff? Are they used often for this advice? When they are asked, and their views are solicited outside of announced meetings, does your agency staff believe that this interaction would pose a problem under the agency’s FACA rules?
8. Does your agency routinely draw on the wisdom of selected members without having fixed pre-announced meetings, or without hiring the members as federal contractors?
9. Is there any aspect of FACA that inhibits the agency’s informal ad-hoc use of advisory committee members?
10. Does or could your agency have a website dialogue among agency staff and committee members before meetings are held, to which the public would have access, as they discuss the issues within the sphere of that advisory committee?
11. The current FACA committee rules do not apply to small subcommittee groups. Does or could the agency use the FACA rules’ “subcommittee” exception to allow email exchanges between groups of advisory committee members, in a subgroup smaller than the full committee?
12. Is there any aspect of FACA that you would recommend be altered to assist in your agency’s current and future work, compared to the existing language of the 1972 FACA?

The survey methodology of contacting CMOs, the most experienced persons who deal with advisory committees, has the benefit of extracting lessons from a more extensive set of experiences than would be available to the average agency staff member. But it also has the limitation that the CMOs are more directly invested in the current system which they manage for their agencies than, for example, an agency senior manager or an agency general counsel might be. A cohort of CMOs is perhaps much more likely to support the existing FACA regime than is a group of agency staff who have used (or considered using) an advisory committee.

A wider audience in drawing conclusions, beyond CMOs, would be ideal if it were truly representative. To get the right mix, one would need to have a selection protocol for interviewees that captures the proper weighting of views. One would ideally seek to discern opinions from an accurate selection of the occasional users of FACA including some managers, staff members and those who regularly interact with the CMOs. Achieving a “balance” of views is an ideal in FACA but may be infeasible across agencies and across agency staffs. On balance it was deemed better to have the most experienced agency members give their interviews, and to be open to additional inputs as the ACUS process moves ahead.

As an adjunct to the interviews, we reviewed the published literature about FACA (see bibliography) and observed the comments of scholars about its operations.³⁵ In theory one could seek a broad feedback from agency managers and agency counsel, then solicit the 65,000 members of federal advisory committees,³⁶ but the validity of that self-selected response of anecdotal experience would be debatable.

³⁵ The consultant first wrote about FACA in 1976 in his treatise, *Federal Information Disclosure*, now entering its 4th edition in 2011, and has read each case and significant policy document on FACA while writing semi-annual supplements to volume 2 of the treatise.

³⁶ Statistic was of 2007 covering 915 active FACA committees. GAO Testimony, Robin Nazzaro, “Issues Related to the Independence and Balance of Advisory Committees”, at page 1, GAO-08-611T, House Subcom. On Information Policy (April 2, 2008)

4. Results of the Survey

A. Some Want to Avoid FACA, by Legal Means

Agency CMOs recognize that the delay in assembling, scheduling and announcing a meeting for an existing committee makes it unlikely that the CMO can respond to agency managers' desire for rapid feedback and quick advice on a timely issue. This is a practical problem for the CMO who wants to be responsive and helpful. A major health agency takes about 82 days from the date of an agency manager's request that the existing chartered advisory committee consider a particular issue or product problem, until the meeting is held. Several in Cabinet departments told of the pattern of frustration among new political appointees who arrived at the agency with a desire for rapid results, but who had to wait for answers. So patterns of contractor use, sequential individual meetings, "town hall" non-consensus sessions, and other forms of non-FACA alternatives are utilized by the agency to speed response.

B. How Can New Media Help Avoid FACA Barriers?

Among agency CMOs interviewed, there were several creative alternatives that could be offered when a barrier of FACA delay interferes with a rush project of external advice that is requested by an agency manager. Conventional options discussed later in this report include meetings in sequence between the agency and the known set of interested persons or associations, which are the simplest alternative to a FACA meeting; no group consensus is involved.

The use of electronic "new media" affords additional options. The following are ways to get advice to the agency management through new media without triggering FACA.

Those agencies that discussed agency outreach efforts to use new media to gain more input to the agency did not report that FACA was a barrier. Several agency policies on new media use have been developed, and these were discussed with the agency public affairs person whom the CMO invited to be on the call for our interview³⁷; but these new media outreach

³⁷See e.g. Dept of Defense Directive Type Memorandum DTM-09026 (Feb. 25, 2010)

plans or policies did not devote attention to FACA considerations. There is not a sense among CMOs that FACA inhibits the agency use of new media, since the new media responses like Twitter and Facebook are not in the form of the structured “consensus advice” which FACA envisions. There are new media opportunities which the agencies are using to varying degrees, but the CMOs did not report a sense of inhibition of new media by the strictures of the FACA rules.

(1) Group Survey Software

Survey tools for public response sampling are another benefit of the use of social media. Engines like “SurveyMonkey.com” allow the survey drafter to get collective ratings of preference among items from the pre-identified addressees of the survey, members of a group who can vote for certain responses, as with any survey within any group. The availability of the survey also may be announced on broader media with the URL designated, and may be open to any contributor who learns of the existence of the survey and who wishes to have the group consider his or her views among the statistical compilation of all votes received. For example, should there be a cap on annual total nitrous oxide emissions from any permit-holding coal-fired utility power plant of zero, 500 tons, or 1,000 tons? The survey is only as useful as its polling base and statistically representative sampling; an answer of “zero” might be selected by a cohort largely composed of asthma patients, while “1,000” might be selected by a group from a coal mining state. Note that if the survey is done by a federal agency through one of these polling mechanisms, the agency does not individually receive substantive feedback from voters in this process. Whoever chooses to “vote” via the survey tool expresses an opinion, but their identities and affiliations are not transparent. This is not a FACA violation, since no “group” consensus is achieved.

(2) Outputs of Opinions

Another vehicle of electronic support for collective governance is the immediate dissemination of individual opinions during a hearing or trial or during a rulemaking comment period, with the brief communications made via email or by Twitter software. The 140-word tweet in real-time comments expresses one view of an event: the FDA hearing on diet supplements, or the EPA greenhouse gas public meetings, etc. These are expressions of individual views toward the public proceeding, and they do not call for

collective decisions, though others may tweet with contrary opinions. Twitter opinions come from defined persons and may be rebutted immediately by other defined persons. The Twitter input is not usually being solicited by the federal agency, though it may be in rare circumstances when the agency wants to obtain the most rapid brief expressions of opinions about the current controversy of the day. Since no group consensus is being sought, these uses of “new media” do not implicate FACA.

(3) Facebook and Equivalent

The well known social media site Facebook can be used by an agency to post a decision or a rule or a policy issue. Once it is posted, the recipients who read the message postings can give selected feedback: they can “like” the posting or/and become “friends” for this issue once the issue is given its own Facebook page. For example, antibiotic use in chickens is being regulated to prevent harm to humans from excessive residues in food. Farmers and their opponents could start competing Facebook pages (“savehealthyfood.org” versus “preservethefamilyfarm.com”) and the agency staff members would learn insights about the topic from the comments on each of the competing pages. A Facebook “note” could be posted to show new data of the agency; then perhaps 300 people with an interest in the topic could post their comments; and perhaps 500 people could “like” the expression of a commenter while 2,000 could become “friends” of another competing Facebook page expressing a contrary view (“fightdrugoveruse.org”).

One CMO expressed his agency manager’s frustration that the agency had launched a new Facebook page and had 1,800 friends, but lacked feedback on the new consumer-friendly usage features because the agency counsel cautioned against surveys of the “friends.” It was apparently feared that soliciting advice from a group of named persons to give feedback on an agency action might be deemed to be use of an unauthorized advisory committee. The CMO compared this to the whitehouse.gov page (exempt from FACA) which invited visitors to “advise the advisor.” Likewise, a Cabinet officer was going on a tour of small businesses, but could not do an advance survey of views among small business owners, so a consultant was asked to gather the information. (In the latter example the CMO cited both FACA and the Paperwork Reduction Act as barriers to gathering of views.)

(4) Sequential E-Mail Threads Within a Known Class of Persons

Important to the analysis of new media documents in this report is the status of those persons who are allowed to edit and endorse a final product of a group's web dialogue. A group document with 12 authors who are affiliated is commonplace within a common hierarchy. Things are different when a document styled or intended as a "consensus" is started by an author who is an employee at a federal agency, who then selects a group, and then the text is modified by a broader group of invited, non-agency persons, ending up as a collective recommendation to the agency leadership that carries some weight of authority, because the outside views were melded with the agency staff views. Wiki group or googlegroups document contributors can be privately selected among a closed group, or entirely public, or open to identifiable subscribers who opt in, with the concurrence of the Wiki moderator. This use of "new media" may implicate FACA.

(5) Listservs

Another new media vehicle is the "listserv" communication of e-mails on issues with feedback made in other e-mails addressed to the list, the posting of which will be moderated by a coordinating person. Options include "googlegroups" and others. The list member has the opportunity to view and respond to documents that others outside the group generally will not see; the listserv feedback of messages aids the moderator in producing a collectively improved product, but it is the moderator's choice on how and whether and when to accept the input from listserv members. No physical meeting takes place. It can be argued that this could a "virtual meeting" subject to FACA if the agency staff moderated and selected members for the listserv.

(6) Drafting Through a Wiki Software

The most useful collaborative drafting tool among the new media tools, the "Wiki"³⁸ is oriented to collaborating on the drafting of a common text. The most visible example is "Wikipedia", the collection of articles and essays which is the product of tens of thousands of volunteer contributors. A more typical Wiki draft is a document, prepared by one or more people

³⁸ <http://en.wikipedia.org/wiki/Wiki>

affiliated with a named group or interested in a particular topic, which document then can be edited on-line by others with additions, deletions and rearrangements proposed by various persons, and with changes that are usually accepted by a moderator (or put on hold, pending a group decision regarding the further modification of the draft document). The self-actuated group of volunteers then is polled as to its acceptance of the revised text, and it goes forward to a collective decision as the reflection of that group's views.

With the use of a Wiki, the creator has options: private or public; allow anyone to edit or only allow selected people to edit; password restricted or not. A wiki will automatically save every version of a document and identify who made what changes at what time. Meetings could be convened by private groups. While the document is being altered on screen(s), the group can be discussing the issues on a Webinar or on a Skype video feed. One agency has considered use of SharePoint group software, another collective sharing possibility. FACA status under these circumstances will be very fact-determined, and no generic conclusion can be declared.

(7) LinkedIn and Googlegroups

Business networking sites such as LinkedIn allow members to post their items to a LinkedIn group and then to review comments about the topic in a group setting. The LinkedIn group is composed of persons who volunteer for the group, are then accepted by a coordinator/moderator, and the group hears the feedback of other group members who choose to provide input. A similar program, googlegroups.com, allows a comparable form of feedback among members. Messages may be available only to members who are accepted by the googlegroup's moderator, or the panel could be open to anyone wishing to read the draft document. A group on LinkedIn or Googlegroups could qualify as a committee if the agency specifically chose the membership and the members worked towards group consensus. If the agency did not choose the membership, then it would be a harder question, though the group still might be "utilized" if the agency were heavily involved. Again the facts will determine the likely legal consequences under FACA.

(8) Blogs

The last and simplest social media system may be the use of conventional blog communications by agency heads with feedback coming in the form of blog comment responses. Assistant Secretary X posts her short essay on the X Blog; Mr. Y posts a comment in response. Blogs are not typically consensus vehicles, although individuals may come closer to consensus more rapidly by exchanging blog postings and comments. As such, some blogs in which consensus is being sought may implicate FACA, whereas other blogs that feature posting by a single person or seriatim comments not focused on reaching any particular consensus probably do not.

C. Use of Member Individual Advice between FACA Meetings

The survey asked if there is any aspect of FACA that inhibits the agency's informal ad-hoc use of advisory committee members. None was reported. One question asked about interactions with outsiders for "advice" on agency programs or policies. This is frequently done 1-to-1 by staff, but the great majority of CMOs surveyed said FACA had not limited their agency's use of communications and collaboration with persons outside the agency regarding policy matters. The survey asked how the agency currently utilizes the advisory committee members outside of the formally announced committee meetings, and the responses were that the chair of the committee and the staff member who is the designated federal official (DFO) would handle those interactions; the CMOs were not involved. The formation and oversight of policy issues ["What should we do? How are we being perceived by constituents?"] was one of the areas in which advisory committee members are used but usually informally. Contacts occur from staff to member or within the structure of the linkages between committee chair, DFO and agency staff. In some cases, the individual members of an agency's FACA committees may be asked for advice by agency staff, but the occasions are not regarded by the CMOs responding as covered by FACA because no "consensus" of the collective group was asked.

D. Other Conclusions from the Survey

(1) CMOs were asked if the agency has web-based dialogue among agency staff and committee members before meetings are held and whether these pre-meeting interactions are publicly accessible. Few responded, and they

regard the pre-meeting interactions with committee chairs and DFOs as a normal part of operating a committee. None reported that the individual calls or pre-meetings were inhibited by FACA.

(2) As a general matter, agency managers do not find the current FACA regime overly constraining. The survey asked about actions that agency managers would like to do, but which they believe that they cannot do because of the constraints of the current FACA system. We heard only a few examples; most were satisfied with the current system. However, several volunteered that when delays under FACA were a concern, the CMOs could show the agency manager how to obtain equivalent insights without an advisory committee [Note that CMO views and the views of their constituents may differ. The survey did not have a means to reach a truly representative sample of agency managers.]

Those CMOs surveyed explain that if there is a question about the delays or constraints of FACA, the CMO will engage in a dialogue with the agency staff member about how to draw in the type of outside advice desired, without creating a new FACA committee and/or without awaiting the next session of an existing agency committee. Several agency CMOs observed that when they are requested to help staff members obtain a consensus of outside opinions, they explain the delays and paperwork to the inquiring person, and then describe how to use alternative means to gather the same type of inputs, while avoiding a FACA violation. They strive to arrange the interaction so as to get the type of responses the agency staff member wishes, typically by inducing the staff member to call for a series of 1-to-1 interviews that ask the advisors individually to opine or otherwise assist the agency. For example, when told that a new committee would take months of justification, hierarchical approvals, charter drafts and vetting of proposed members, the result is that the inquirer drops the issue, and other options are requested. At a scientific agency, one meeting of an existing committee would take 82 days to set up, so alternatives are offered. In practice, agency managers appreciate the suggestions for alternatives as means to avoid these problems.

(3) Overt violations of FACA were not reported during the survey. A small minority of CMOs are aware of instances in which there could have been a FACA problem, but none of those interviewed spoke of any intentional violations of the threshold provisions of the FACA.

E. Questions of Changes to the FACA Statute

Most agency CMOs did not offer suggested revisions of the statute, in response to our survey question. Their primary legislative concern was that the subcommittee exception not be rescinded as it would have been under the 2010 House-passed H.R. 1320. As noted above, the methodology of the survey was focused on CMOs, and we recognize that others may wish to have aspects of FACA changed. A single CMO said that FACA “is in desperate need of an update.” This person would prefer to rapidly invite members when needed for online interaction, but did not have suggestions for the alteration. But most CMOs declined to suggest changes.

As to the principal FACA norms of public notice, observer attendance, chartering, etc. there was support from the CMOs for the system to remain as it is, since the CMOs as a group favor the public observation and the sense of structured legitimacy which the FACA charter provides. They would prefer that there be less delay and rework in charters for new FACA committees. (A CMO at an agency which has many classified documents concerns noted that a minority of its FACA committee meetings were open to observers, but the majority of its meetings discussed items for which the members had to have appropriate levels of security clearance and had to be held “live” inside a secure facility.)

F. Issues Not Addressed in the Survey

Other venues have suggested changes to the rate of closure of advisory committee meetings. More than 64% of all FACA meetings were closed to the public in 2007.³⁹ Some have suggested changes to member selection to reduce the potential for conflicts of interest.⁴⁰ Numerous scholars have authored studies on potential improvements in FACA operations, listed in the bibliography. These are FACA issues which are not addressed in the scope of this paper, without expressing a view on their merits.

³⁹ Mary Alice Baish, “2008 Government Secrecy Report Card”. American Assn. of Law Libraries Spectrum at 8 (Nov. 2008)

⁴⁰ GAO Testimony, Robin Nazzaro, “Issues Related to the Independence and Balance of Advisory Committees”, GAO-08-611T, House Subcom. On Information Policy (April 2, 2008)

5. Current & Future Best Practices

A. Best Practices for Advice by Conventional Means

Agencies should, of course, always comply scrupulously with the letter of both FACA and its implementing rules. Nevertheless, the survey uncovered a number of “best practices” by which agencies could efficiently conduct committee meetings while fully complying with all relevant law.

Avoiding FACA by using channels of communication that are not seeking a group consensus is one such “best practice.” Garnering public response to policy makers inside the agency need not be done on a group basis. So, one best practice might be to avoid the FACA by working actively to receive a sequence of individuals’ comments and advice in a “town hall” format, but to avoid seeking a group consensus when doing so.

Timing is a primary concern. Excessive delays in the lead time needed for scheduling a meeting inhibit agency responses to crises such as epidemics and other urgent demands. Several alternatives exist:

(1) Some CMOs have said that an agency manager who has an urgent need for specialist advice today will have to pay a contractor to assemble a group, and will receive a report of the consensus under the letterhead of the consultant, not that of the agency DFO. These consultant groups are not “advisory committees” although the end point of their advice is known to everyone participating.⁴¹

(2) Some CMOs said that the agency can circumvent the delay by having an “open forum” meeting with no overt consensus requested, thereby avoiding FACA coverage, with or without a Federal Register announcement of the open forum.

(3) Managers can sit in an office while a series of sequential visitors come through with their separate advice. Each of the visitors may have interacted together outside of the office, but when they come into the agency, the FACA requirements can be avoided by scheduling the “serial meetings” with individual commenters, avoiding one consensus moment of collective

⁴¹ Byrd v US EPA, 174 F.3d 239 (DC Cir 1999), cert. den. 120 S. Ct. 1418 (2000).

advice. To the extent that each commenter echoes the others' views, the agency has obtained its collective input. But such a process is artificial ("ossified" to use an administrative scholar's term) since the agency must take considerably more time or expense in the act of collection of these redundant views, compared to simpler group dialogues that would ordinarily occur.

B. Best Practices of Working Through Subgroups

The agency CMO can help the committee to operate more efficiently by the use of subcommittees. On one aspect, the law is silent but the rules speak: a subcommittee of two or more members may be assigned by the chairman of the existing FACA committee to develop a proposal, write a draft, study a sub-issue in advance of a meeting, etc.⁴² The CMOs surveyed expressed support for retaining the faster and less cumbersome option of delegation of projects to subcommittees.⁴³ Agencies sometimes recommend that chartering a new committee be avoided where the project could be accomplished by a subcommittee of an existing advisory committee.⁴⁴

The work of the subcommittee is excluded from FACA by the GSA rules,⁴⁵ but its existence would be disclosed in the minutes of the prior FACA meeting. Because it is excluded, agency subcommittees can presumably use electronic means of sharing drafts, web-based communications, listserv sharing of comments with "reply all" feedback, asynchronous posting of drafts for comments in a "virtual" meeting, etc. Then the work of the subcommittee would come to the scheduled FACA meeting for discussion and potential ratification. Note that the advice does not move from the subcommittee to the agency staff members.

Each of those CMOs who mentioned the issue spoke against the recent congressional bill that would have eliminated the subcommittee exception.⁴⁶ In the 2009 House committee report, criticism of a loophole in FACA cited the 2001 GSA rules and stated that "an advisory committee can

⁴² 41 C.F.R. 102-3.35

⁴³ 41 C.F.R. 102-3.35

⁴⁴ EPA, "Collaboration and FACA at EPA", at 6

⁴⁵ 41 C.F.R. 102-3.160(a), "convened solely to gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting of the advisory committee, or to draft position papers for deliberation by the advisory committee..." and see 41 C.F.R. 102-3.35, "report to a parent advisory committee and not directly to a Federal officer or agency".

⁴⁶ H.R. 1320 §3(b), passed House but died in Senate committee, 111th Cong. 2d Sess. (2010).

avoid the open meeting and disclosure requirements of FACA by conducting its business through subcommittees.”⁴⁷ The CMOs believe that efficient and timely drafting by an exempt subcommittee makes the main FACA committee more productive. Loss of that flexibility was seen as an inhibition to the function of rendering timely advice.

C. Future Option of Asynchronous Web-Posting “Virtual Meetings”

Jonathan Siegel, David Pritzker, and Reeve Bull of ACUS prepared a separate report discussing the possibility of an asynchronous web meeting wherein Committee members would discuss committee business in a web forum over the course of several days. Access information for the web forum would be announced in advance in the Federal Register, and members of the public would be able to view all postings on the forum and submit comments for consideration by the Committee. A more extensive discussion of this proposal appears in a separate report prepared by the aforesaid members of ACUS’s staff.⁴⁸ In addition, the author of the present report asked survey respondents about whether they have conducted meetings of this type or would find the ability to conduct such meetings beneficial, the responses to which are summarized below.

For those CMOs willing to have a longer interview, we asked about the use of “virtual” meetings using internet technology and non-concurrent comments submitted from remote locations of the committee members. GSA rules allow a teleconference or videoconference, including a webcast.⁴⁹ Could an agency give notice that it will “host” a meeting of an advisory committee that occurs solely on line, over a 5-day period, with comments received and responded to, then reaching a consensus by vote of the committee members on the 5th day, all of it on line but under the direction of a designated federal official as “moderator”? No respondent among the CMOs had experience with such a meeting that would be wholly separate from an in-person session.

NASA cautioned that any deliberations done outside of a physical meeting would be “possible” but “must have public access, e.g., dial-in

⁴⁷ H. Rept. 111-135 at 3, Federal Advisory Committee Act Amendments of 2009”, 111th Cong. 1st Sess. (2009)

⁴⁸ Available at <http://www.acus.gov/research/the-conference-current-projects/faca-in-the-21st-century/>.

⁴⁹ 41 C.F.R. 102-3.140(e).

meet-me line” and must have Federal Register notice.⁵⁰ Several expressed concern that FACA’s command that⁵¹ “No advisory committee shall conduct any meeting *in the absence of*” the DFO would prevent a meeting at which the DFO was not continuously “present.” The agency implementing rules appear to require the DFO to be present (in the physical sense) at a site from which the DFO could keep the discussion within the agenda about which notice was given.⁵² For example, NASA follows the GSA rules: “An advisory committee shall not conduct a meeting in the absence of the DFO. The DFO may also adjourn any meeting, when the DFO believes it to be in the public interest.”⁵³

The virtual web-only meeting saves a great deal of overhead cost for the agency in a difficult budget climate. Records of the inputs to the virtual meeting would be retained, certified by the DFO, and posted on the agency website.⁵⁴ The public could read the web notices, follow the web discussion and send in their comments to the DFO at a designated URL, and once cleared by the DFO, the comments would be accessible through a button on the committee’s web page that clearly defines these inputs as public comments, not a reflection of committee views.

No CMO reported in our interviews that an advisory committee had asked them to allow the committee to hold meetings without the contemporaneous physical presence of most of the members (though some said that agency FACA committees occasionally allow the video or audio “conferencing in” of members with individual needs or schedule problems, into the location of the FACA committee session).

6. Conclusions

The purposes and overall functioning of FACA will remain valid as the complexities of government continue to increase with health care, financial and environmental programs, among others. External sources of knowledge remain invaluable to bring a sense of realism to the policy

⁵⁰ Presentation to NASA Advisory Council by P. Diane Rausch, NASA CMO at 13 (April 2010)

⁵¹ 5 U.S.C. App. 2 §10(e)

⁵² See e.g. Dept. of Energy, DOE M 515.1-1 6(a)(3)(e), the DFO will “authorize the adjournment of any committee meeting in the event of unwarranted departure from the agenda of the meeting or if adjournment is determined to be in the public interest.” (Oct. 22, 2007)

⁵³ NASA Office of International and Intergovernmental Relations, Subject: FACA Committees, Revalidated 8/24/09, at 3.

⁵⁴ 41 C.F.R. 102-3.165.

choices that are being considered by the agencies. Congress continues to create advisory committees, and agencies continue to create discretionary advisory committees, to meet the perceived needs of the agencies. The agency “best practices” of 2011 include activities that follow each step of the 2001 GSA rules, in order to keep the agency committees fully compliant.

But the efficient operation of advisory committees during depressed budget years will drive some agencies to reduce committee utilization and frequency. A trend to operate the advisory committee function, at lower costs, using electronic means, is inevitable. Cost reduction through new media use has confronted the limitation that certain desired “new media” uses are potentially vulnerable to challenges under FACA.

The decision of an agency in 2011 to save costs on its advisory committee operations is a reflection of budget pressures upon agency managers. Several CMOs mentioned the agency-wide push for reduction in “overhead cost” as a current problem for their committees. Across the board cuts in areas other than direct program delivery make the FACA budget susceptible to reductions. If the travel and lodging costs of the operation of a committee can be reduced, through electronic alternative means of conducting meetings, then an agency can do “more with less.”

The CMOs are generally satisfied with FACA and with the current advisory committee systems which they manage for their agencies. If electronic means to establish web-only meetings can be conformed to the FACA, directly or by statutory amendment, then the driver of change is likely to be the fiscal constraints on agency overhead costs. Portions of the 2009-2010 legislative proposals would have harmed the agency ability to flexibly deploy subcommittees.⁵⁵ GSA indicated that it may be considering amendments to its 2001 rules to accommodate “virtual” web-only meetings. GSA should consider using its FACA authority in modified rules to permit expanded electronic meeting opportunities as one way to serve the needs of the agencies.

⁵⁵ H.R. 1320 §3(b), 111th Cong. 2d Sess. (2010).

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