

September 29, 2011

M E M O R A N D U M

To: Committee on Collaborative Governance

Fr: Philip Harter and John Kamensky

Re: Proposed recommendation with respect to amending FACA

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

We therefore propose a new recommendation:

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

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

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