

**From: Robert E. Rutkowski**  
**To: Assembly of the Administrative Conference**  
**Re: Comments on Proposed FACA Recommendation**  
**Date: December 3, 2011**

Dear Chairman:

I draw your attention to The Project On Government Oversight's public comment, <http://www.pogo.org/pogo-files/letters/government-corruption/gc-coi-20111202.html>, to the Assembly of the Administrative Conference of the United States (ACUS) regarding the proposed recommendation dealing with the Federal Advisory Committee Act (FACA).

The Committee has scaled back or eliminated some sensible recommendations that were included in an earlier draft report.

A draft report prepared by ACUS Attorney Advisor Reeve Bull on September 12, 2011, included a recommendation for Congress to eliminate the contractor, non-voting member, and subcommittee exceptions to FACA. The Committee's research documented a strong need for these reforms:

In *Food Chemicals News v. Young* and *Byrd v. United States EPA*, the D.C. Circuit held that FACA does not apply in cases where the agency does not exert sufficient control over a private entity to "utilize" the group. ACUS's data-gathering efforts suggested that this "contractor exception creates too grave a danger that committees will circumvent the statute by the simple expedient of instructing a contractor to form a committee rather than doing so directly."

In a case related to Vice President Cheney's energy task force, the D.C. Circuit held that private sector committee members do not "provide advice or recommendations" to an agency unless they have the right to vote on committee proposals. ACUS's draft report pointed out that a committee could easily exploit this loophole in order to evade FACA. And ACUS's research found almost no evidence to suggest that committees or agencies actually need this loophole in order to efficiently obtain advice from outside experts.

Although some agency representatives told ACUS that the subcommittee exception is necessary in order to prepare for committee meetings, other participants in ACUS's FACA workshop pointed out that the loophole creates a "potential for abuse."

Other experts have also highlighted the problems associated with these FACA loopholes. In 2008 testimony before the House Oversight and Government Reform Committee, Professor Sidney Shapiro explained that the D.C. Circuit's decisions have enabled agencies to circumvent FACA, and recommended that Congress close the loopholes. Indeed, the legislation recently approved the House Oversight and Government Reform Committee would eliminate the contractor, non-voting member, and subcommittee exceptions.

In its final proposal, however, ACUS's Committee states that Congress should not get rid of the subcommittee exception unless it also codifies a "preparatory work" exemption. And there is no longer a recommendation calling on Congress to eliminate the contractor and non-voting member loopholes.

I urge ACUS to recommend closing these loopholes once again in order to send a clear message that it is possible to reduce the procedural burden on advisory committees while still ensuring that they operate with transparency and independence.

I hope you will take the time to review these comments and give them the weight they deserve.

Yours sincerely,  
Robert E. Rutkowski

cc: House Minority Leadership

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