Recommendation 89-3

Conflict-of-Interest Requirements for Federal Advisory Committees

(Adopted June 15, 1989)

The law and practice regarding conflict-of-interest requirements for federal advisory committee members have developed from the interaction of three statutory schemes: the Federal Advisory Committee Act,[1] the conflict-of-interest laws, and the federal personnel laws. However, none of these statutory schemes was drafted to deal specifically with conflict-of-interest standards for government advisers.

In 1982 the Office of Government Ethics issued guidance to agencies that sought to meld a coherent analytical framework from the three statutory schemes. In determining whether the conflict-of-interest laws applied, the Office distinguished between those advisers who were selected as committee members because of their individual qualifications, and were thus deemed to be special government employees (SGE's), and those who instead were selected as representatives of nongovernmental groups or organizations (or in some cases, as independent contractors). While this guidance has reduced the confusion somewhat, the determination of a committee member's status as an SGE or a representative of a nongovernmental group or organization remains difficult, and agency practice in classifying advisory committee members as SGE's or representatives varies greatly and often appears arbitrary.

The classification of an advisory committee member as an SGE or a representative is significant because only the former are subject to the conflict-of-interest and financial disclosure laws. The most significant of these laws for advisory committee members is section 208 of Title 18, United States Code, which makes it a criminal offense to participate "personally and substantially" as a government employee "through decision, * * * recommendation, the rendering of advice, investigation, or otherwise in * * * any particular matter in which to his knowledge, he, his spouse, minor child, partner, organization * * * has a financial interest." The term "particular matter" in section 208 has been interpreted broadly by the Department of

[1] 5 U.S.C. App. I.

Justice and the Office of Government Ethics to extend to all discrete matters that are the subject of agency action, including rulemaking and general policy matters.[2]

Section 208 is especially a problem for advisory committee members. Often they have been selected precisely because they are especially well qualified to provide advice concerning problems in a particular field in which they themselves may be active both professionally and financially.

Because of its breadth, Congress provided for agency waivers of section 208's prohibition, either by rule or on a case-by-case basis, where the appointing official makes a determination that the employee's interest is too remote or insubstantial to affect the integrity of his or her services. Agencies, however, may be unable or reluctant under current law to grant a waiver where a financial interest is significant, even though the agency concludes that any bias arising from that interest will be offset through committee balance, disclosure of the interest, or the individual's status as only an adviser and not as a decisionmaker.

Faced with the specter of criminal liability and the limitations of waivers, or simply for administrative convenience, some agencies have adopted a policy of declaring most or all of their advisory committee members to be interest group representatives, rather than SGE's, except in the clearest cases. Thus, in practice, agencies may be requiring too little disclosure from members who are not SGE's, while imposing significant burdens, principally potential criminal liability, on those members who are SGE's.

In this recommendation the Conference urges the establishment of a uniform minimal disclosure requirement for all advisory committee members, whether or not they are classified as SGE's.[3] The recommendation seeks to balance the government's and the public's need for information to evaluate potential conflicts of interest and the burden placed on the individual who agrees to serve on an advisory committee, frequently without pay.

[2] The test of whether a financial interest exists with respect to the matter is whether the government action in which the employee participates will have a "direct and predictable effect" on the entity in question. Participation in the presence of a known conflict constitutes a violation of section 208, whether or not the employee's action furthers or is likely to further his or her financial interest.

[3] The Conference recognizes that advisory committee members who are classified as special government employees may be required to furnish financial information pursuant to regulations of the appointing agency or the Office of Government Ethics. It is further noted that the Office of Government Ethics has under consideration a proposed regulation governing financial disclosure for all government employees, including special government employees.

The Conference also recommends Congress direct agencies to determine, when chartering or renewing the charter of an advisory committee, whether or not the committee's responsibilities require indentifying its members as special government employees for purposes of the conflict-of-interest laws. The recommendation (¶ 2) includes criteria for making this determination. This approach places the burden of foreseeing and preventing conflicts of interest on the agency that seeks an individual's services on an advisory committee, rather than on the individual asked to serve, as does reliance on section 208 waivers.

This recommendation does not extend to privately established advisory committees that are utilized for advice in particular matters because the members of these committees are not appointed by a federal agency. Consequently, an agency's relationship with such committees must be considered on an *ad hoc* basis. Nevertheless, the Conference believes agencies should be alert to possibilities for bias or self-interest in the advice of utilized committees and, where appropriate, should request information respecting the affiliations and interests of the members.

Recommendation

1. *Disclosure by Advisory Committee Members*. (a) Congress should require that each individual selected to serve on a federal advisory committee, excluding a regular government employee, furnish to the agency or appointing authority at the time of the appointment or designation—

(1) The identity of the individual's principal employment;

(2) A list of positions held (whether paid or unpaid) and any contractual relationships for the performance of services with any corporation, company, firm, partnership or other business enterprise, any non-profit organization, any labor organization, or any educational or other institution whose activities or purposes may be (or may foreseeably become) relevant to the purposes and functions of the advisory committee as determined by the agency or appointing authority and described in the committee charter;

(3) The identity, but not value or amount, of any other sources of income or any interests in a trade or business, real estate, or other asset held for investment or production of income, exceeding $1,000 in value which are relevant to the purposes and functions of the advisory

committee as determined by the agency or appointing authority and described in the committee charter;

(b) Advisory committee members should be required to file updated disclosure reports annually.

(c) The agency or appointing authority should make publicly available the information furnished pursuant to subparagraphs (a)(1) and (a)(2) above. The financial information described in subparagraph (a)(3) should ordinarily be held confidential unless the member consents to its release or the agency determines after consulting with the member that public disclosure is required in the public interest.

2. *Classification of Advisory Committee Members*. Congress, by amendment to the Federal Advisory Committee Act or other pertinent statute, should require each agency to determine, when chartering or renewing the charter of an advisory committee, whether its responsibilities are such as to require some or all of its members to be identified as special government employees for purposes of the conflict-of-interest laws. Congress should require the agency to consult with the Office of Government Ethics in making such a determination, and it should direct the agency to be guided by the following considerations—

(a) Ordinarily, where an advisory committee is expected to provide advice of a general nature from which no preference or advantage over others might be gained by a particular person or organization, the members of the committee need not be special government employees.

(b) The members of an advisory committee which renders advice with respect to the agency's disposition of particular matters involving a specific party or parties should be considered special government employees.

(c) The principal consideration in classifying an advisory committee member should be the nature of the committee's function rather than whether the member receives compensation.

3. *Coverage.* This recommendation applies to advisory committees which are established and whose members are appointed or designated by the federal government, and to advisory committees whose operations are funded by the government. It does not apply to privately established advisory committees which are "utilized" by the federal agencies in particular matters.

4. *Technical Amendment*. Congress should amend 18 U.S.C. 207(g) to provide that a partner of a special government employee shall not be barred from any representational activity because of that employee's participation in a particular matter where the employee himself would not be barred from such representation by 18 U.S.C. 203 or 205.

Citations:

54 FR 28969 (July 10, 1989)

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