



## **Committee on Collaborative Governance Draft Recommendation**

### **The Federal Advisory Committee Act – Issues and Proposed Reforms**

The Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, governs the process whereby the President or an administrative agency obtains advice from groups that include one or more non-federal employees. It places various limits on the formation of such groups and requires that group meetings be open to public attendance and permit at least a limited degree of public participation. Though Congress has occasionally amended FACA,<sup>1</sup> the original framework of the 1972 Act has essentially remained intact to the present day. Nevertheless, FACA has faced criticism, with some contending that the Act imposes excessive procedural burdens and others arguing that it does not require agencies to do enough to promote openness and transparency. This recommendation offers proposals to Congress, the General Services Administration (GSA), and agencies that use advisory committees, to alleviate certain procedural burdens associated with the existing regime, clarify the scope of the Act, and enhance the transparency and objectivity of the advisory committee process.

#### *Overview of FACA*

Congress, the President, and administrative agencies each can form advisory committees. Advisory committees are classified as either “discretionary” or “non-discretionary.” “Discretionary” advisory committees include those that an agency forms of its own initiative or in response to a statute authorizing the creation of a committee.<sup>2</sup> “Non-discretionary” advisory committees include those formed by the President and those that Congress, by statute, specifically directs the President or an agency to establish.<sup>3</sup> Executive Order 12,838, issued by President Clinton in 1993, required agencies to reduce the number of

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<sup>1</sup> See, e.g., Federal Advisory Committee Act Amendments of 1997, Pub. L. No. 105-153, 111 Stat. 2689 (1997) (exempting meetings of the National Academy of Sciences and National Academy of Public Administration from FACA); Unfunded Mandates Reform Act, Pub. L. No. 104-4, 109 Stat. 48 (1995) (exempting certain interactions between federal agencies and state, local, and tribal officials from the requirements of FACA).

<sup>2</sup> 41 C.F.R. § 102-3.50. There are currently 271 committees established by agencies and 198 committees authorized by statute for a total of 469 discretionary committees. See FACA Database, <http://www.fido.gov/facadatabase/rptgovttotals.asp> (last visited October 5, 2011).

<sup>3</sup> 41 C.F.R. § 102-3.50. There are currently 556 committees required by statute and 48 committees created by the President for a total of 604 non-discretionary committees. See FACA Database, <http://www.fido.gov/facadatabase/rptgovttotals.asp> (last visited October 5, 2011).



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their discretionary advisory committees by one-third.<sup>4</sup> The Office of Management & Budget then issued Circular A-135, which capped the number of agency discretionary committees at the reduced levels permitted by the Executive Order.<sup>5</sup> Administrative agencies collectively can maintain a total of 534 discretionary advisory committees without exceeding the cap.

FACA furthers three major goals. First, the Act promotes transparency and public participation in the advisory committee process, providing for open meetings and permitting interested members of the public to submit written and/or oral comments to advisory committees.<sup>6</sup> Second, the Act seeks to ensure objective advice and limit the influence of special interests on advisory committees by requiring that the membership of an advisory committee “be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”<sup>7</sup> Third, the Act seeks to preserve federal resources by requiring justifications for any new committees and periodic review of existing committees to ensure that they continue to serve a useful purpose.<sup>8</sup>

In order to trigger FACA, an assemblage of individuals must include at least one non-federal employee as well as meet the following requirements: (a) work as a group, (b) be “established” by statute or “established or utilized” by the President or an administrative agency, and (c) provide “advice or recommendations” to the President or a federal agency.<sup>9</sup> The courts have held that certain types of interactions do not meet this threshold for triggering FACA. Specifically, courts have held that (a) assemblages of persons providing advice to the government individually are not “groups” subject to FACA,<sup>10</sup> (b) groups formed by private contractors that are not subject to direct management or control by an administrative agency are not “utilized” by the agency so as to trigger FACA,<sup>11</sup> (c) subcommittees that report to a parent committee are not subject to FACA’s open meeting requirements since the subcommittee does not itself provide “advice or recommendations” to the agency,<sup>12</sup> and (d)

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<sup>4</sup> Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 10, 1993).

<sup>5</sup> Office of Management & Budget, Circular A-135: Management of Federal Advisory Committees, 59 Fed. Reg. 53856, 53857 (Oct. 26, 1994).

<sup>6</sup> 5 U.S.C. App. 2 § 10; HOUSE COMM. ON GOV’T OPERATIONS, THE ROLE & EFFECTIVENESS OF FED. ADVISORY COMMS., H.R. Rep. No. 91-1731, at 17–21 (1970) (hereinafter “1970 HOUSE REPORT”).

<sup>7</sup> 5 U.S.C. App. 2 §§ 9(b)(2), (c); 1970 HOUSE REPORT at 19.

<sup>8</sup> 5 U.S.C. App. 2 §§ 7(b), 9(c), 14(a); 1970 HOUSE REPORT at 4, 12, 15–16.

<sup>9</sup> 5 U.S.C. App. 2 § 3(2).

<sup>10</sup> *Ass’n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993).

<sup>11</sup> *Byrd v. United States Env’tl. Prot. Agency*, 174 F.3d 239, 246–47 (D.C. Cir. 1999); *Food Chem. News v. Young*, 900 F.2d 328, 333 (D.C. Cir. 1990).

<sup>12</sup> *Nat’l Anti-Hunger Coal. v. Exec. Comm. of the President’s Private Sector Survey of Cost Control*, 711 F.2d 1071, 1075–76 (D.C. Cir. 1983); 41 C.F.R. § 102-3.35.



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groups in which the non-government members lack a formal vote or veto over the “advice or recommendations” the committee ultimately provides do not implicate FACA.<sup>13</sup>

All advisory committees subject to FACA must comply with a number of procedural requirements.<sup>14</sup> Prior to the committee’s commencing its work, an agency creating a discretionary committee must consult with the General Services Administration (GSA) regarding the need for the proposed committee, and all committees must have a charter setting forth the committee’s mission.<sup>15</sup> The members selected to serve on the proposed committee must reflect an appropriate balance of the points of view and fields of expertise relevant to the committee’s work.<sup>16</sup> FACA only requires that committees achieve balance on factors specifically relevant to the committee’s work, but a number of agencies have adopted policies of achieving balance on additional factors. Committee members selected to provide objective advice are appointed as “Special Government Employees” (SGEs) and must comply with ethics requirements similar to those applicable to regular government employees, whereas members chosen to represent a particular interest group with a stake in the committee’s work are appointed as “representatives” and are not subject to ethics requirements.<sup>17</sup> Once a committee is formed, the agency must announce any committee meetings in advance in the Federal Register, permit interested members of the public to attend such meetings,<sup>18</sup> and receive comments from individuals interested in the committee’s work.<sup>19</sup> The public, upon request, - must be given access to all documents prepared for or by the advisory committee upon request.<sup>20</sup> Finally, agencies must re-charter each existing committee every two years and,

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<sup>13</sup> *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005).

<sup>14</sup> 5 U.S.C. App. 2 § 3(2).

<sup>15</sup> *Id.* §§ 7(c), 9(c); 41 C.F.R. §§ 102-3.60–75.

<sup>16</sup> 5 U.S.C. App. 2 §§ 5(b)(2), (c); 41 C.F.R. §§ 102-3.30(c), 102-3.60(b)(3).

<sup>17</sup> 5 U.S.C. App. 2 §§ 5(b)(3), (c); 18 U.S.C. § 202(a); 41 C.F.R. § 102-3.105(h); U.S. Office of Government Ethics, Memorandum from J. Jackson Walter, Director of the Office of Government Ethics, to Heads of Departments & Agencies of the Executive Branch regarding Members of Federal Advisory Committees & the Conflict-of-Interest Statutes 3–5 (July 9, 1982).

<sup>18</sup> Under certain circumstances, a committee may close an entire meeting or parts thereof. 5 U.S.C. App. 2 § 10(d); 41 C.F.R. § 102-3.155. In recent years, the majority of committee meetings have been either partially or fully closed from public attendance. See FACA Database: FY2010 Government Totals, <http://fido.gov/facadatabase/rptgovttotals.asp> (last visited September 21, 2011) (noting that, thus far in 2011, 71% of committee meetings have been completely closed, 4% partially closed, and 25% fully open).

<sup>19</sup> 5 U.S.C. App. 2 § 10; 41 C.F.R. §§ 102-3.140, 102.3-150.

<sup>20</sup> 5 U.S.C. App. 2 § 10(b); 41 C.F.R. § 102-3.170.



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as part of that process, show that the committee has continued relevance and that the costs of its continued existence do not outweigh the benefits it provides.<sup>21</sup>

In certain instances, agencies may wish to form advisory committees consisting of representatives from different stakeholder communities to negotiate the text of a proposed rule.<sup>22</sup> Congress has specifically authorized this process, known as “negotiated rulemaking,” in the Negotiated Rulemaking Act of 1990.<sup>23</sup> In most instances, negotiated rulemaking committees are subject to FACA,<sup>24</sup> except as modified by the Negotiated Rulemaking Act or another statute. The Negotiated Rulemaking Act provides some of the same protections as FACA, requiring that the agency make certain findings regarding the need for a negotiated rulemaking committee<sup>25</sup> and that negotiated rulemaking committees be balanced to include representatives from all relevant stakeholder communities.<sup>26</sup> However, requirements pertaining to notices and openness of meetings stem from FACA rather than from the Negotiated Rulemaking Act.

### *Research Methodology*

Both governmental agencies and private groups have criticized the existing FACA regime. Many agencies contend that it is overly cumbersome and limits their ability to obtain outside advice. Numerous private groups have argued that the statute does not adequately promote transparency or preserve a role for the public to participate in the work of committees. Congress has also recently proposed various reforms to FACA that would, as a general matter, extend the scope of the Act and require agencies to undertake various steps to increase transparency in their use of advisory committees.<sup>27</sup> In light of the recent interest expressed in reforming FACA, study of the Act is timely. In order to identify the problems driving these concerns and formulate potential solutions, the Conference undertook an extensive study, seeking input from individuals and groups within and outside of the federal

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<sup>21</sup> 5 U.S.C. App. 2 § 14; 41 C.F.R. § 102-3.60. In addition to the re-chartering process, the Administrator of GSA conducts an annual review of existing committees designed to ensure that such committees continue to serve useful purposes and to recommend eliminating any committees that do not, 5 U.S.C. App. 2 § 7(b); 41 C.F.R. § 102-3.100(b)(1), and the head of each agency is responsible for eliminating any advisory committee that no longer justifies the expenditure of resources required to perpetuate it, 41 C.F.R. §§ 102-3.30(b), 102-3.105(e).

<sup>22</sup> DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 1 (Administrative Conference of the U.S. 1995).

<sup>23</sup> Pub. L. No. 101-648, 104 Stat. 4969 (1990) (codified at 5 U.S.C. § 561 *et seq.*).

<sup>24</sup> 5 U.S.C. § 565(a)(1).

<sup>25</sup> *Id.* § 563.

<sup>26</sup> *Id.* §§ 563(a)(2)–(3), 564(a)(3)–(4), 565(a)(1).

<sup>27</sup> H.R. 3124, 112th Cong. § 3(b) (2011).



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government. The data-gathering effort included: (a) two separate surveys, with one focusing on agency Committee Management Officers (CMOs), who are responsible for compliance with FACA, and the other focusing on “clients” of advisory committees such as agency program officers and general counsel’s offices; (b) a workshop with approximately 50 participants, including numerous agency representatives with extensive experience in the use of advisory committees and members of non-governmental organizations that promote government transparency; and (c) dozens of interviews of FACA experts (not limited to CMOs) both within and outside of the federal government.

### *Research Results*

The data gathered suggest that FACA and/or its implementation by administrative agencies has given rise to at least three types of problems: (1) procedural burdens that inhibit the effective use of advisory committees without substantially furthering the policies of the Act; (2) confusion about the scope of the statute that may discourage agencies from using committees or induce them to engage in “work-arounds” to avoid triggering its requirements; and (3) agency practices that either undermine or fail to fully promote the transparency and objectivity of the advisory committee process.

The recommendations below propose reforms to address these problems. The first group of recommendations seeks to ~~reduce~~alleviate barriers to the government’s use of advisory committees by ~~alleviating excessive procedural burdens associated with the committee formation process~~ reducing inefficiencies in the process by which agencies create advisory committees and select their members<sup>28</sup> and removing the arbitrary cap on the number of advisory committees.

The second set of recommendations seeks to clarify the Act’s scope, in light of cases interpreting the Act, and in anticipation of congressional amendments recently under consideration that might inhibit agencies’ use of advisory committees or lead to use of alternative procedures. One such amendment would require subcommittees to comply with all provisions of FACA other than chartering, including the open meeting requirements.<sup>29</sup> The

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<sup>28</sup> A number of agency respondents stated that delays in the committee formation process hindered their ability to make effective use of advisory committees. Agency respondents that identified such issues indicated that such delays were generally not caused either by the requirements of FACA itself or by recommendations made by GSA in its consultative role but rather by internal agency requirements associated with committee formation. Many agency respondents indicated that the internal requirement of multiple levels of approval for the formation of a committee and efforts to achieve balance on a wide array of factors could cause significant delays.

<sup>29</sup> H.R. 3124, 112th Cong. § 3(b) (2011).



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Conference recommends that if Congress eliminates the subcommittee exemption, then it should codify what is currently a regulatory exemption allowing agencies to conduct preparatory work in closed meetings, without a requirement of advance public notice.<sup>30</sup> The Conference also recommends that GSA clarify the Act's applicability to "virtual meetings" conducted via web forum to ensure that agencies are not chilled from using this technique. Finally, the Conference recommends that Congress clarify the applicability of FACA principles to negotiated rulemaking committees.

The third set of recommendations proposes that both Congress and agencies adopt certain procedures that would enhance the transparency and objectivity of the advisory committee process without imposing onerous procedural or financial burdens on the agencies. These include "best practices" related to committee formation and operation (such as posting committee documents online, webcasting committee meetings, and soliciting input on potential committee members) and recommendations related to the classification of committee members for purposes of applying ethics standards.

Some knowledgeable observers have argued that the various inadequacies associated with the existing FACA regime justify an even more extensive set of reforms, suggesting that Congress might reassess whether FACA is the optimal mechanism for furthering the various policies it was designed to promote and whether an alternative statutory approach might more effectively serve those policies (or even whether those policies remain relevant). For example, Congress might repeal the requirement that committees be formally chartered and instead leave agencies free to decide whether and how to form advisory committees. The research and surveys conducted by Conference staff were not specifically aimed at this possibility, but instead targeted potential improvements to the existing FACA regime, in light of criticisms in the academic literature, judicial decisions, and current proposals in Congress to modify but not repeal FACA. However, the survey instruments did ask for input on problems encountered with the statute's operation, and did invite broad criticism. Neither the survey responses nor the follow-up interviews support the more extensive changes urged by a minority of Conference members. Nevertheless, it is clear that the landscape has changed significantly since FACA was

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<sup>30</sup> Concerns have also been expressed that exemption from FACA of meetings of committees formed by private contractors at agencies' behest, and committees wherein all voting members are federal employees, creates the potential for circumvention of the Act. See Reeve T. Bull, *The Federal Advisory Committee Act: Issues & Proposed Reforms* 17–18, 20–21, 40–42 (September 12, 2011). The Conference believes that additional research concerning the extent to which agencies utilize such exemptions and the extent to which their use thereof defeats the policies the Act was intended to serve would be beneficial in determining whether such exemptions should be either eliminated entirely or scaled back so as to apply only in a specific set of circumstances.





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enacted in 1972. In this light, the recommendations below are not intended to foreclose the possibility that Congress might revisit FACA and consider enacting an alternative statutory regime. Indeed, experience with the Act over time, judicial interpretations of its provisions, alternative approaches to chartering and managing committees such as those authorized by Congress for use by the National Academy of Sciences and National Academy of Public Administration, and the emergence of new technologies suggest that it may indeed be appropriate for Congress to revisit FACA and determine whether an alternative regime might be superior. In the meantime, however, these recommendations are designed to enhance the application of the existing framework by ensuring that it effectively promotes its goals of transparency, objectivity, and productivity without imposing onerous procedural burdens.

### RECOMMENDATION

#### ***Alleviating Procedural Burdens That Inhibit the Effective Use of Advisory Committees***

1. In order to reduce unnecessary delay in the formation of new advisory committees, instead of requiring a multi-layer approval process, agencies should centralize the committee formation process in a single office or official, such as the Agency's Chief Operating Officer.<sup>31</sup> The central authority should be authorized to receive input from other offices and to approve the committee charter, the members selected, and other details of establishing and launching an advisory committee.<sup>32</sup> The central authority would receive input from other branches of the agency with an interest in the formation of the committee and should be given final authority for approving these aspects of committee formation.

2. Whenever Congress creates an advisory committee through legislation, it should indicate its intent as to the mission, estimated duration, budget, and preferred membership balance for the committee. Whenever such committees are exempted from the biennial review process, Congress should provide guidance concerning the intended duration of each such committee or, alternatively, a clear explanation of the committee's mission and a provision that the committee should terminate upon completion of that mission.

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<sup>31</sup> GPRA Modernization Act of 2010, Pub. L. No. 111-352, § 8, 124 Stat. 3866, 3878 (Jan. 4, 2011) (codified at 31 U.S.C. § 1123).

<sup>32</sup> Though the agency head must approve the establishment of any discretionary advisory committee as a matter of formal record, 5 U.S.C. App. 2 § 9(a)(2), the agency head ~~is not required to approve every individual step may~~ delegate the authority to approve the individual steps involved in creating the committee, such as finalizing the charter, appointing committee members, etc.



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3. The President and the Office of Management and Budget should eliminate the cap on the number of discretionary advisory committees established by Executive Order 12,838 and Circular A-135.

### ***Clarifying the Scope of FACA***

4. Congress should not eliminate the exemption for subcommittees that report to parent committees currently stated in 41 C.F.R. § 102-3.35 unless it codifies an exemption providing that members of committees or subcommittees may meet to conduct “preparatory work” without complying with the notice and open meeting requirements of the Act. The statutory definition of “preparatory work” should be similar to that currently provided in FACA’s implementing regulations at 41 C.F.R. § 102-3.160(a).<sup>33</sup>

5. GSA should amend section 102-3.140(e) of the FACA implementing regulations to clarify that, in addition to holding teleconferenced or webconferenced meetings, agencies also may host virtual meetings that can occur electronically in writing over the course of days, weeks or months on a moderated, publicly accessible web forum. Agencies with advisory committees should be aware that they have the option of holding committee meetings via such online forums. To the extent they conduct meetings by web forum, agencies should monitor the process and determine whether it is an efficient and transparent means of hosting meetings.

6. Congress should amend the Negotiated Rulemaking Act (5 U.S.C. § 561 *et seq.*) to provide that committees engaged in negotiated rulemaking are exempt from FACA but that such committees should be required to announce full committee meetings in advance and open them to public attendance.<sup>34</sup> The amendments should codify existing procedures that allow caucuses or other sub-groups of committee members to meet privately, provided that such caucuses or sub-groups take no final action on behalf of the full committee.

### ***Enhancing Transparency and Objectivity***

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<sup>33</sup> Congress might also include a more extensive list of activities that constitute “preparatory work” than that currently contained in the implementing regulations, including activities such as (i) drafting documents for consideration at a committee meeting, (ii) conducting research or preliminary analysis on topics for discussion at a committee meeting, (iii) engaging in pre-decisional deliberations, (iv) choosing meeting topics, and (v) considering future projects for the committee to undertake.

<sup>34</sup> In the event that Congress does eliminate the FACA exemption applicable to subcommittees of advisory committees, 41 C.F.R. § 102-3.35, but does not exempt negotiated rulemaking committees from FACA, it should create a carve-out allowing negotiated rulemaking caucuses or other sub-groups to continue to hold meetings privately so long as they do not take final action on behalf of the full committee.





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7. Congress and agencies should adopt the following procedures with respect to the ethics requirements applicable to advisory committee members:

(a) In creating statutory advisory committees, Congress should specify the intended classification of committee members for purposes of applying federal ethics laws. Congress should explicitly classify as “representatives,” not subject to ethics standards, those members who are selected to represent the perspective or interests of a particular group with a stake in the work of the advisory committee. It should explicitly classify as “special government employees” (SGEs), subject to specified federal ethics laws and rules, members who are chosen to provide individual, independent, expert advice.

(b) Congress and individual agencies should prevent misuse of the “representative” designation by limiting it to individuals selected to represent some entity or group with a stake in the committee’s work and should not apply that designation to persons who, by virtue of their expertise, might be said to “represent” a field of study or discipline but do not represent the views of a particular interest group. Such members are more appropriately classified as SGEs.<sup>35</sup>

(c) Agencies that grant conflict of interest waivers under 18 U.S.C. § 208(b) should post such waivers on their websites, with appropriate provisions made for redacting information that they may keep confidential pursuant to 18 U.S.C. § 208(d)(1).

8. Agencies should post on a committee website all documents “which were made available to or prepared for or by each advisory committee” (i.e., documents that must be made publicly available on request under section 10(b) of FACA) and that reflect the substantive work of the committee. Agencies need not post documents that are not critical/important to understanding the work of the committee, such as intermediate drafts of

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<sup>35</sup> In 2004, the Government Accountability Office issued a report suggesting that a number of agencies had improperly classified individuals possessing expertise in a particular field of study as representatives on the theory that they “represented” that discipline. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-04-328, ADDITIONAL GUIDANCE COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE & BALANCE 5 (2004). Since that time, the Office of Government Ethics has issued a number of memoranda to Designated Agency Ethics Officials clarifying the distinction between SGEs and representatives and advising agencies to appoint persons selected to provide independent, expert advice as SGEs. See generally U.S. Office of Government Ethics, Memorandum from Marilyn L. Glynn, General Counsel, to Designated Agency Ethics Officials Regarding Federal Advisory Committee Appointments (Aug. 18, 2005); U.S. Office of Government Ethics, Memorandum to Designated Agency Ethics Officials (July 19, 2004). The Office of Government Ethics also enhanced its examination of agencies’ classification of committee members when conducting an ethics program review. United States Office of Government Ethics, Ethics Program Review Guidelines 40–42 (Oct. 2004).



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reports or general correspondence received by the committee. Agencies should attempt to post all documents relevant to upcoming meetings (e.g., draft reports, recommendations, or meeting agendas) as early as possible in advance of the meeting to which they relate and other materials that document the events of past meetings (e.g., minutes or transcripts) as quickly after the meeting as possible.

9. Agencies should provide live webcasts of open committee meetings and/or post recordings following such meetings unless the costs are prohibitive. When selecting a webcasting technology, agencies should assess the likely level of public interest in their committees' work, the cost of different technologies (as well as the cost savings such technologies can create), and their available resources.<sup>36</sup>

10. In order to reduce unnecessary delay in forming advisory committees, agencies should identify and prioritize achieving balance among committee members on those factors directly relevant to the subject matter and purpose of the committee's work. The committee charter should include a description of the agency's mission and the most relevant balance factors. Agencies should consider exercising their discretion not to pursue balance for other, less directly relevant factors, when doing so would consume considerable additional time without substantially furthering the mission of the committee.

11. Agencies should adopt the following "best practices" related to selecting members to serve on advisory committees:

(a) Upon creating a new advisory committee, agencies should announce the committee's mission in the Federal Register and/or on the agencies' website and invite public nominations for potential committee members. Agencies may solicit nominations from the general public, from expert communities with experience in the subject matter of the committee's assignment, and/or from groups especially likely to be affected by the committee's work.

(b) Prior to finalizing the membership of an advisory committee, agencies should announce in a Federal Register notice and/or on the agency's website a list of persons from whom potential committee members may be selected and provide an opportunity for public input related to the proposed members' professional credentials and potential conflicts of interest or sources of bias. Such public comments should be kept

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<sup>36</sup> GSA has negotiated government-specific terms of service for a number of technology products and maintains these terms for agency use on the web at "apps.gov"; the site includes several free webcasting programs that agencies should consider using for providing webcasts of committee meetings.



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confidential to the extent permissible by law, though the agency should notify potential committee members of the possibility of disclosure of those comments under the Freedom of Information Act. The agency should also selectannounce a slate of potential committee members that is larger than the number of slots on the committee so as to minimize any negative implications associated with not being selected to serve.