September 15, 2011

M E M O R A N D U M

To: ACUS Committee on Collaborative Governance

Fr: Philip Harter

Re: Comments on FACA Proposed Recommendations

I will not able to attend the meeting on Tuesday since I have to teach a class in which FACA plays a significant role. I regret that since I have been interested in and concerned about the relationship of FACA and what is now called collaborative governance since the beginning. Indeed, ACUS Rec. 82-4, which was based on my report, recommended that Congress should provide for negotiated rulemaking "free of the restrictions of the Federal Advisory Committee Act." I have lived with its practical effects for decades, testified about it before Congress, and written about it, so I had hoped to attend the next iteration in which potential solutions are sought. Alas, it was not to be. I would, however, like to submit the following comments for the Committee's consideration.

The report provides important background information as to the evolution of FACA and the types of problems it was designed to address. It also provides helpful insights into the views on a range of interests.

Do we need FACA anymore? At the outset, I suggest the committee consider whether FACA makes sense anymore. It was a "command and control" approach to an issue that was enacted 40 years ago. Inasmuch as many regulatory regimes have been subjected to searching consideration as to whether they are still needed or whether there may be a better way of achieving the underlying goal, I submit that such an inquiry is appropriate for FACA. As far as I know, no one seriously challenges the underlying performance goals of FACA that committees should reflect an appropriate balance and mix of the relevant interests and that the committees should operate in an open, transparent manner. Those can be stand alone requirements, however. It may be, as parts of the report indicate, that there are not major costs in terms of either dollars or time that result directly from FACA (although it does continue to cause some ripples), but the question is whether it has significant benefits that cannot be achieved with a much less intrusive approach.

I obviously do not want to push the simile too far, but if we do not look at whether there might be a better way I fear it is as if we are making recommendations to the CAB as to how to process airline rate requests faster or proposing a new CAFE standard by recommending that people drive smaller cars and go slower. Rather, we need to

figure out what is the best way to achieve our objective. Many of the issues that are addressed in the report and proposed recommendations arise as the result of the structure of the Act as opposed to the standards it imposes.

Exceptions. I do not have a position on the first three exceptions. I do on the "subcommittee" exception. In my experience, the ability to hold meetings of either a subcommittee of the FACA committee, in which all members are drawn from the parent committee, or a workgroup, in which some members are from the committee but some are not, without having to comply with the full panoply of FACA requirements is essential. I agree with the analysis that says they are important for preparing information for the consideration of the full committee. I am concerned, however, with the part of the analysis that proposes the exception should continue to apply only if the workgroup "do[es] not involve formal debate or voting." I am not sure what that means. If a workgroup is charged with surveying the factual underpinning of an issue or making a series of recommendations — both of which will be decided by the FACA committee — doing so may well entail significant debate and disagreement; if it didn't, the workgroup likely would not be needed. I am not sure what "formal debate" is, but under common parlance, I would certainly include the robust discussions that customarily happen in workgroups. I would, therefore, propose that the exception be continued for workgroups whose purpose are to prepare materials for the consideration and decision of the plenary committee. My own view is that workgroup meetings should generally be open, except that it is often impractical to give the full notice of their meeting — I have regularly empanelled groups to meet the very next day. In this internet era, I would be comfortable providing notice of the time and place on the web so that anyone who was interested could attend.

I do think that any recommendation ACUS makes with respect to a "preparatory work" exception needs to develop just what that exception is as opposed to recommending that it be precise. I agree with that, but we should do it! To me the sine non qua is the "preparation" part meaning the full committee will indeed make the decision and not the smaller group.

Notice this discussion is relevant only if chartering continues to be required.

Committee Formation Process. I gather from the report, which comports with my experience, that a good deal of the time in establishing a committee is finding appropriate members and that a good deal of that is caused by a lack of agreement over the criteria to be used in selecting the membership. FACA itself is Delphic at best; opaque at worst. I submit that it would be significantly helpful for ACUS to make a specific recommendation that interprets and provides useable guidance to agencies on how to implement the requirement that the "committee … be fairly balanced in terms of the points of view represented." Unclear standards necessarily lead to disagreements and multiple levels of review. For example, I had one experience in which the criteria changed multiple times as the process wended its way through the agency. In my view, one of the set of criteria was laughable in terms of what FACA sought to achieve, but it

took a month or more to reconcile the differences. Agencies may be afraid of being second guessed, not clear on what they are supposed to do, or fear alienating a constituent. In all events, clear criteria would help. Thus, I would propose that ACUS to develop explicit guidelines for Recommendation 3. I suggest that a starting point might be that the committee should reflect a fair mix in terms of the perspectives that are relevant to the subject matter of the committee. The Negotiated Rulemaking Act, for example, provides that the committee "adequately represents the interests that will be significantly affected by the proposed rule." 5 U.S.C. § 565(a)(1). In this case, trying to be too fine, or too inclusive can interfere dramatically with selecting members who will raise the relevant issues. The key is to achieve sufficient diversity that the significant issues are raised and thoroughly vetted.

That said, I am dubious that centralization would cure the current problem. My guess — and it is only that — is that much of the multiplicity of review stems from the lack of understanding as to what is expected of the membership. There is, therefore, wrangling over who to include (or not). Centralization might cure part of that problem by de facto vesting in an office what the criteria are but so long as those criteria are not shared, I would think the wrangling would continue. Moreover, centralization leads to its own form of rigidity. For example, in one case I was in, only one person was authorized to make particular decisions. Others were willing, able, and eager to go forward but had to await their turn on her schedule, a process that took six months.

Cap. I agree with the removal of the cap. I have always thought that the mere existence of a cap seems to signal that advisory committees are bad ideas that need to be restricted and apportioned. I would trust agency heads to make that decision with "a little advice from their friends" if problems develop.

Excepting Negotiated Rulemaking Committees; Alternative A. I agree with proposed recommendation 6 (Alternative A) that reg neg committees should be exempted from FACA. Interestingly, there is an argument that they already are exempt, so this would codify that view. At the Committee meeting this spring, the representatives of GSA asserted that FACA is *not* a collaboration statute. Their assertion was neither supported nor developed, but since I had never really thought about it that way, I decided to investigate just where that notion might lead. Interestingly, it potentially leads to some results that are of particular moment here. The definition of an advisory committee in FACA is any group "which is … established or utilized by [an] agenc[y] … in the interest of obtaining advice or recommendations …." 5 U.S.C. App 2, §3(2). Perhaps the purpose of an agreement seeking collaboration (i.e., a reg neg or the establishment of a policy that is not a rule) is ***not*** advice. Rather, its purpose is an agreement. Therefore, under this reasoning, FACA does not apply to agreement seeking collaborations. That position can be supported by reference to GSA's regs that say FACA does not apply to "any committee established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically authorized by statute or Presidential directive, such as making or implementing Government decisions or policy." §102-3.40(k). The Reg Neg Act in turn charges a reg neg committee with considering and discussing "issues for the purpose of

reaching a consensus in the development of a proposed rule."§562(7). That certainly sounds operational. Moreover, the GSA regs provide that a committee that is "not actually managed or controlled" by an agency is not subject to the Act. §102-3.40(d). The Reg Neg Act provides that the agency member of the committee "shall participate in the deliberations and activities of the committee with the same rights and responsibilities as other members of the committee." §566(b). This means the agency does not control the committee's deliberations.

Further, the Reg Neg Act already addresses the committee membership issue by saying that it must "adequately represent the interests that will be significantly affected by a proposed rule. §565(a)(1).

Operationally, once a reg neg committee has been established, I have always conceptualized it as falling under the Administrative Dispute Resolution Act. 5 U.S.C. §571 et seq. ADRA explicitly provides for confidential caucuses of less than an entire committee. §574. To the extent that FACA does not apply to subcommittees or workgroups, there is no conflict between the two statutes. If, however, the RegNeg statute is to be amended to provide for open meetings and notice, which I support, then it might be a good idea to clarify that caucuses consisting of less than the entire committee can meet in closed session.

Excepting Negotiated Rulemaking Committees; Alternative B. The use of standing committees to provide advice and a form of negotiated rulemaking can indeed be helpful. Several agencies have used them quite successfully. Indeed, I drafted the first charter for such a committee. They should not, however, be taken as a full substitute for a negotiated rulemaking committee. The standing committee necessarily has a fixed membership that is not tailored to the specific issues that will be confronted in a particular rulemaking. The proper "balance and mix" of members is, as we have seen, quite dependent on what is being addressed. Thus, in my view, the use of standing committees should be used to provide general advice on a subject as opposed to the details of a proposed rule.

If that view is not accepted, I again am strongly of the view that ACUS's role is to provide agencies with advice as to when the use of such a structure is or is not appropriate. It is not helpful to say simply that agencies "should, as appropriate, consider the use" of such a process.

Conflict of Interest Standards. I generally like the approach and analysis of this section. Since I am quoted in the summary of the workshop on this issue, I would like to clarify my position. I have long been bothered by what I think is simply a wrong legal analysis with respect to who is and who is not an SGE. The representative committee member seems straightforward and right. But, if someone is chosen for a committee because of their expertise, that does **not**, it seems to me, make them an employee of the agency even if they are paid. We hire lawyers, mechanics, and plumbers to help us solve our problems, but they are not necessarily our employees.

Indeed, most often they are independent contractors precisely because we lack the level of control and direction that is essential to the relationship of employee. Whether or not they are paid is irrelevant to the analysis.

It may be, like the analysis of the report, time to step back and look more at what is being done by whom and craft conflict of interest standards to provide protection from abuse without strangling the process. It seems to me that this is a good start.

I wish you well in your deliberations and wish I would be among you.