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**FEDERAL ADVISORY  
COMMITTEE ACT**

Issues Related to the  
Independence and Balance  
of Advisory Committees

Statement of Robin M. Nazzaro, Director  
Natural Resources and Environment



April 2, 2008



Highlights of GAO-08-611T, testimony before the Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives

## Why GAO Did This Study

Because advisory committees provide input to federal decision makers on significant national issues, it is essential that their membership be, and be perceived as being, free from conflicts of interest and balanced as a whole. The Federal Advisory Committee Act (FACA) was enacted in 1972, in part, because of concerns that special interests had too much influence over federal agency decision makers. The General Services Administration (GSA) develops guidance on establishing and managing FACA committees. The Office of Government Ethics (OGE) develops regulations and guidance for statutory conflict-of-interest provisions that apply to some advisory committee members.

As requested, this testimony discusses key findings and conclusions in our 2004 report, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*; GAO's recommendations to GSA and OGE and their responses; and potential changes to FACA that could better ensure the independence and balance of advisory committees. For our 2004 work, we reviewed policies and procedures issued by GSA, OGE, and nine federal agencies that sponsor many committees. For this testimony, we obtained information from GSA and OGE on actions the agencies have taken to implement our recommendations; we also reviewed data in GSA's FACA data base on advisory committee appointments.

To view the full product, including the scope and methodology, click on GAO-08-611T. For more information, contact Robin M. Nazzaro at (202) 512-3841 or nazzaror@gao.gov.

## FEDERAL ADVISORY COMMITTEE ACT

### Issues Related to the Independence and Balance of Advisory Committees

#### What GAO Found

In 2004, we concluded that additional governmentwide guidance could help agencies better ensure the independence of federal advisory committee members and the balance of federal advisory committees. For example, OGE guidance to federal agencies did not adequately ensure that agencies appoint individuals selected to provide advice on behalf of the government as "special government employees" subject to conflict-of-interest regulations. Further, we found that some agencies were inappropriately appointing most or all members as "representatives"—expected to reflect the views of the entity or group they are representing and not subject to conflict-of-interest reviews—even when the agencies call upon the members to provide advice on behalf of the government and thus should have been appointed as special government employees. In addition, GSA guidance to federal agencies and agency-specific policies and procedures needed to be improved to better ensure that agencies collect and evaluate information, such as previous or ongoing research, that could be helpful in determining the viewpoints of potential committee members regarding the subject matters being considered and in ensuring that committees are, and are perceived as being, balanced. We also identified several promising practices for forming and managing federal advisory committees that could better ensure that committees are independent and balanced as a whole, such as providing information on how the members of the committee are identified and screened and indicating whether the committee members are providing independent or stakeholder advice.

To help improve the effectiveness of federal advisory committees so that members are, and are perceived as being, independent and committees as a whole are properly balanced, we made 12 recommendations to GSA and OGE to provide additional guidance to federal agencies under three broad categories: (1) the appropriate use of representative appointments; (2) information that could help ensure committees are, in fact, and in perception, balanced; and (3) practices that could better ensure independence and balanced committees and increase transparency in the federal advisory process. GSA and OGE implemented our recommendations to clarify the use of representative appointments. However, current data on appointments indicate that some agencies may continue to inappropriately use representatives rather than special government employees on some committees. Further, GSA said it agrees with GAO's other recommendations, including those relating to committee balance and measures that would promote greater transparency in the federal advisory committee process, but has not issued guidance in these areas as recommended, because of limitations in its authority to require agencies to comply with its guidance.

In light of indications that some agencies may continue to use representative appointments inappropriately and GSA's support for including GAO's 2004 recommendations in FACA—including those aimed at enhancing balance and transparency—the Subcommittee may wish to incorporate the substance of GAO's recommendations into FACA as it considers amendments to the act.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss our 2004 report on the independence and balance of federal advisory committees in the context of possible amendments to the Federal Advisory Committee Act (FACA).<sup>1</sup> In fiscal year 2007, 52 agencies sponsored 915 active federal advisory committees with a total of about 65,000 members. Federal advisory committees have been called the “fifth arm of government” because of the significant role they play in advising federal agencies, the Congress, and the President on important national issues.<sup>2</sup> To be effective, advisory committees must be—and, just as importantly, be perceived as being—independent and balanced as a whole. As we reported in 2004, controversies regarding the federal advisory committee system have included concerns that some appointments have been based on ideology rather than expertise or were weighted to favor one group of stakeholders over others.

Members appointed to federal advisory committees to provide advice on behalf of the government on the basis of their best judgment are appointed as “special government employees.” Members may also be appointed to federal advisory committees as “representatives” to provide stakeholder advice—that is, advice reflecting the views of the entity or interest group they are representing, such as industry, labor, or consumers. The General Services Administration (GSA) is responsible for developing regulations and guidance regarding the establishment of advisory committees under FACA. The Office of Government Ethics (OGE) is responsible for developing regulations and guidance for federal advisory committee members serving as special government employees who must meet certain federal requirements pertaining to freedom from conflicts of interest.<sup>3</sup> In addition to OGE and GSA regulations and guidance, federal agencies have their own policies and procedures to establish and manage advisory committees.

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<sup>1</sup>GAO, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*, GAO-04-328 (Washington, D.C.: Apr. 16, 2004).

<sup>2</sup>In this view, federal advisory committees follow the executive, legislative, judicial, and regulatory “arms” of government. Hearings on S. 1637, S. 2064, S. 1964 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92nd Congress, 1st Sess., pt. 1 at 12 (1971).

<sup>3</sup>Federal conflict-of-interest statutes (18 U.S.C. § 201), including the principal criminal financial conflict-of-interest statute (18 U.S.C. § 208), apply to regular and, in large part, special government employees.

As requested, my testimony today addresses (1) key findings and conclusions in our 2004 report, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance*,<sup>4</sup> (2) the recommendations we made in that report to GSA and OGE to address deficiencies we identified and their responses to the recommendations, and (3) potential changes to FACA that could better ensure the independence and balance of advisory committees as the Subcommittee considers amendments to the act. For our 2004 work, we reviewed relevant policies and procedures issued by GSA, OGE, and nine federal agencies that sponsor many advisory committees.<sup>5</sup> For this testimony, we supplemented our 2004 report with information we obtained from GSA and OGE on actions the agencies have taken to implement our recommendations. Several recommendations remained open as of March 2008, and we followed up with GSA and OGE to identify their responses to these recommendations. Using the GSA FACA database, we updated some advisory committee information about selected agencies and reviewed governmentwide data on appointments to advisory committees. Finally, in light of the GSA and OGE responses to our recommendations and the actions taken by some agencies sponsoring advisory committees regarding appointments, we identified potential changes to FACA that the Congress may wish to consider to help GSA and OGE better ensure independence and balance. We conducted this work from March 17, 2008, to April 2, 2008, in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

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<sup>4</sup>GAO-04-328.

<sup>5</sup>We reviewed committees at the Department of Energy, the Environmental Protection Agency, the Department of Health and Human Services (as well as at three of its agencies—the Centers for Disease Control and Prevention, the National Institutes of Health, and the Food and Drug Administration), the Department of the Interior, the National Aeronautics and Space Administration, and the Department of Agriculture.

## BACKGROUND

When the Congress enacted FACA in 1972, one of the principal concerns it was responding to was that certain special interests had too much influence over federal agency decision makers. In this act, the Congress articulated certain principles regarding advisory committees, including broad requirements for balance, independence, and transparency. Specifically, FACA requires that the membership of committees be “fairly balanced in terms of points of view presented and the functions to be performed by the advisory committee.”<sup>6</sup> Courts have interpreted this requirement as providing agencies with broad discretion in balancing their committees.

Further, FACA requires that any legislation or agency action that creates a committee contain provisions to ensure that the advice and recommendations of the committee will be independent and not inappropriately influenced by the appointing authority (the agency) or any special interest. Finally, FACA generally requires that agencies announce committee meetings ahead of time and give notice to interested parties about such meetings. With some exceptions, the meetings are to be open to the public, and agencies are to prepare meeting minutes and make them available to interested parties.<sup>7</sup> FACA also set broad guidelines for the creation and management of federal advisory committees, most of which are created or authorized by the Congress. Agencies also establish committees using their general statutory authority, and some are created by presidential directives.

Further, the act requires that all committees have a charter, and that each charter contain specific information, including the committee’s scope and objectives, a description of duties, and the number and frequency of meetings. As required by FACA, advisory committee charters generally expire at the end of 2 years unless renewed by the

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<sup>6</sup>Pub. L. No. 92-463, 86 Stat. 770 (1972) (classified at 5 U.S.C. app. 2).

<sup>7</sup>The President or head of an agency may determine that a meeting be closed if, for example, the meeting will include discussions of classified information, reviews of proprietary data submitted in support of federal grant applications, or deliberations involving considerations of personal privacy.

agency or by the Congress. This requirement encourages agencies to periodically reexamine their need for specific committees. GSA, through its Committee Management Secretariat, is responsible for prescribing administrative guidelines and management controls applicable to advisory committees governmentwide. However, GSA does not have the authority to approve or deny agency decisions regarding the creation or management of advisory committees.

To fulfill its responsibilities, GSA has developed regulations and other guidance to assist agencies in implementing FACA requirements, provides training to agency officials, and was instrumental in creating the Interagency Committee on Federal Advisory Committee Management. GSA also has created and maintains an online FACA database (available to the public at [www.fido.gov/facadatabase](http://www.fido.gov/facadatabase)) for which the agencies provide and verify the data, which include committee charters; membership rosters; budgets; and, in many cases, links to committee meeting schedules, minutes, and reports. The database also includes information about a committee's classification (e.g., scientific and technical, national policy issue, or grant review).

While GSA's Committee Management Secretariat provides FACA guidance to federal agencies, each agency also develops its own policies and procedures for following FACA requirements. Under FACA, agency heads are responsible for issuing administrative guidelines and management controls applicable to their agency's advisory committees. Generally, federal agencies have a reasonable amount of discretion with regard to creating committees, drafting their charters, establishing their scope and objectives, classifying the committee type, determining what type of advice they are to provide, and appointing members to serve on committees.<sup>8</sup> In addition, to assist with the management of their federal advisory committees, agency heads are required to appoint a committee management officer to oversee the agency's compliance with FACA requirements, including recordkeeping. Finally, agency heads must appoint a designated federal

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<sup>8</sup>However, when the Congress authorizes an agency to establish a particular committee or a President establishes a committee, the agency may have less flexibility in establishing and managing the committee because such things as the committee's objectives, the types of expertise and backgrounds of members, and even the type of advice that is to be provided may be specified by the Congress or the President.

official for each committee to oversee its activities. Among other things, the designated federal official must approve or call the meetings of the committee, approve the agendas (except for presidential advisory committees), and attend the meetings.

OGE is responsible for issuing regulations and guidance for agencies to follow in complying with statutory conflict-of-interest provisions that apply to all federal employees, including special government employees serving on federal advisory committees. A special government employee is statutorily defined as an officer or employee who is retained, designated, appointed, or employed by the government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days. Many agencies use special government employees, either as advisory committee members or as individual experts or consultants. Special government employees, like regular federal employees, are to provide their own best judgment in a manner that is free from conflicts of interest and without acting as a stakeholder to represent any particular point of view.<sup>9</sup> Accordingly, special government employees appointed to federal advisory committees are hired for their expertise and skills and are expected to provide advice on behalf of the government on the basis of their own best judgment. Special government employees are subject to the federal financial conflict-of-interest requirements, although ones that are somewhat less restrictive than those for regular federal government employees.<sup>10</sup> Specifically, special government employees serving on federal advisory committees are provided with an exemption that allows them to participate in particular matters that have a direct and predictable effect on their financial interest if the interest arises from their nonfederal employment and the matter will not have a special or distinct effect on the employee or employer other than as part of a class. This exemption does not extend to a committee member's personal financial and other interests in the matter, such as stock ownership in the employer. If a committee member has a potential financial conflict of interest that

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<sup>9</sup>Office of Government Ethics, *Letter to the Chairman of a National Commission*, June 24, 1993 (93 x 14).

<sup>10</sup>The criminal financial conflict-of-interest statute and related OGE regulations prohibit regular and special government employees from participating in a "particular matter" that may have a direct and predictable effect on their financial interest, unless granted a waiver. A particular matter is one that involves deliberation, decision, or action that is focused on the interests of specific people or a discrete and identifiable class of people. 5 C.F.R. § 2640.103(a)(1).

is not covered under this or other exemptions, a waiver of the conflict-of-interest provisions may be granted if the appointing official determines that the need for the special government employee's services outweighs the potential for conflict of interest or that the conflict is not significant. This standard for granting waivers is less stringent than the standard for regular government employees.

The principal tool that agencies use to assess whether nominees or members of advisory committees have conflicts of interest is the OGE Form 450, *Executive Branch Confidential Financial Disclosure Report*, which special government employees are required to submit annually. The Form 450 requests financial information about the committee member and the member's spouse and dependent children, such as sources of income and identification of assets, but it does not request filers to provide the related dollar amounts, such as salaries.<sup>11</sup> Even if committees are addressing broad or general issues, rather than particular matters, committee members hired as special government employees are generally required to complete the confidential financial disclosure form.<sup>12</sup> Agencies appoint ethics officials who are responsible for ensuring agency compliance with the federal conflict-of-interest statutes, and OGE conducts periodic audits of agency ethics programs to evaluate their compliance and, as warranted, makes recommendations to agencies to correct deficiencies in their ethics programs.

Under administrative guidance initially developed in the early 1960s, a number of members of federal advisory committees are not hired as special government employees, but are instead appointed as representatives. Members appointed to advisory committees as representatives are expected to represent the views of relevant stakeholders with an interest in the subject of discussion, such as an industry, a union, an environmental organization, or other such entity. That is, representative members are expected to represent a particular and known bias—it is understood that information, opinions, and advice from representatives are to reflect the bias of the particular group that they are

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<sup>11</sup>Some agencies, such as the Environmental Protection Agency and the Food and Drug Administration, have developed alternative confidential financial disclosure forms that request additional information on activities and affiliations, such as expert legal testimony.

<sup>12</sup>Special government employees who serve in excess of 60 days above a certain salary level, however, must file a public disclosure form.



appointed to represent. Because these individuals are to represent outside interests, they do not meet the statutory definition of federal employee or special government employee and are therefore not subject to the criminal financial conflict-of-interest statute. According to GSA and OGE officials, in 2004 reliable governmentwide data on the number of representative members serving on federal advisory committees were not available.

### FINDINGS AND CONCLUSIONS FROM OUR 2004 REPORT ON THE INDEPENDENCE AND BALANCE OF COMMITTEES

In 2004, we concluded that additional governmentwide guidance could help agencies better ensure the independence of federal advisory committee members and the balance of federal advisory committees. We found that OGE guidance to federal agencies had shortcomings and did not adequately ensure that agencies appropriately appoint individuals selected to provide advice on behalf of the government as special government employees. We found that some agencies were inappropriately appointing members as representatives who, as a result, were not subject to conflict-of-interest reviews. In addition, GSA guidance to federal agencies, and agency-specific policies and procedures, needed to be improved to better ensure that agencies elicit from potential committee members information that could be helpful in determining their viewpoints regarding the subject matters being considered—information that could help ensure that committees are, and are perceived as being, balanced. Specifically, we found the following:

- OGE guidance on the appropriate use of representative or special government employee appointments to advisory committees had limitations that we believed were a factor in three of the agencies we reviewed continuing the long-standing practice of essentially appointing all members as representatives. That is, the Department of Energy, the Department of the Interior, and the Department of Agriculture had appointed most or all members to their federal advisory committees as representatives—even in cases where the members were called

upon to provide advice on behalf of the government and thus would be more appropriately appointed as special government employees. Because conflict-of-interest reviews are required only for federal or special government employees, agencies do not conduct conflict-of-interest reviews for members appointed as representatives. As a result, the agencies could not be assured that the real or perceived conflicts of interest of their committee members who provided advice on behalf of the government were identified and appropriately mitigated. Further, allegations that the members had conflicts of interest could call into question the independence of the committee and jeopardize the credibility of the committee's work.

- In addition to the FACA requirement for balance, it is important that committees are perceived as balanced in order for their advice to be credible and effective. However, we reported that GSA guidance did not address what types of information could be helpful to agencies in assessing the points of view of potential committee members, nor did agency procedures identify what information should be collected about potential members to make decisions about committee balance. Consequently, many agencies did not identify and systematically collect and evaluate information pertinent to determining the points of view of committee members regarding the subject matters being considered. For example, of the nine agencies we reviewed, only the Environmental Protection Agency (EPA) consistently (1) collected information on committee members appointed as special government employees that enabled the agency to assess the points of view of the potential members and (2) used this information to help achieve balance. Without sufficient information about prospective committee members prior to appointment, agencies cannot ensure that their committees are, and are perceived as being, balanced.

We identified several promising practices for forming and managing federal advisory committees that could better ensure that committees are, and are perceived as being, independent and balanced. These practices include (1) obtaining nominations for

committees from the public, (2) using clearly defined processes to obtain and review pertinent information on potential members regarding potential conflicts of interest and points of view, and (3) prescreening prospective members using a structured interview. In our view, these measures reflect the principles of FACA by employing clearly defined procedures to promote systematic, consistent, and transparent efforts to achieve independent and balanced committees. In addition, we identified selected measures that could promote greater transparency in the federal advisory committee process and improve the public's ability to evaluate whether agencies have complied with conflict-of-interest requirements and FACA requirements for balance, such as providing information on how the members of the committees are identified and screened and indicating whether the committee members are providing independent or stakeholder advice. Implemented effectively, these practices could help agencies avoid the public criticisms to which some committees have been subjected. That is, if more agencies adopted and effectively implemented these practices, they would have greater assurance that their committees are, and are perceived as being, independent and balanced.

#### OUR 2004 RECOMMENDATIONS TO GSA AND OGE AND THEIR RESPONSES

Because the effectiveness of competent federal advisory committees can be undermined if the members are, or are perceived as, lacking in independence or if committees as a whole do not appear to be properly balanced, we made 12 recommendations to GSA and OGE to provide additional guidance to federal agencies under three broad categories: (1) the appropriate use of representative appointments; (2) information that could help ensure committees are, in fact and in perception, balanced; and (3) practices that could better ensure independent and balanced committees and increase transparency in the federal advisory process. While our report focused primarily on scientific and technical federal advisory committees, the limitations of the guidance and the promising practices we identified pertaining to independence and balance are pertinent to federal advisory committees in general. Thus, our recommendations were directed to GSA and OGE because of their responsibilities for providing governmentwide guidance on federal

ethics and advisory committee management requirements. GSA and OGE have taken steps to implement many, but not all, of the recommendations we made in 2004.

Regarding representative appointments, we recommended that guidance from OGE to agencies could be improved to better ensure that members appointed to committees as representatives were, in fact, representing a recognizable group or entity. OGE agreed with our conclusion that some agencies may have been inappropriately identifying certain advisory committee members as representatives instead of special government employees and issued OGE guidance documents in July 2004 and August 2005 that clarified the distinction between special government employees and representative members. In particular, as we recommended, OGE clarified that (1) members should not be appointed as representatives purely on the basis of their expertise, (2) appointments as representatives are limited to circumstances in which the members are speaking as stakeholders for the entities or groups they represent, and (3) the term “representative” or similar terms in an advisory committees’ authorizing legislation or other documents does not necessarily mean that members are to be appointed as representatives. We also recommended that OGE and GSA modify their FACA training materials to incorporate the changes in guidance regarding the appointment process, which they have done. In addition, we recommended that GSA expand its FACA database to identify each committee member’s appointment category and, for representative members, the entity or group represented. GSA quickly implemented this recommendation and now has data on appointments beginning in 2005.

We also recommended that OGE and GSA direct agencies to review their appointments of representative and special government employee committee members to make sure that they were appropriate. OGE’s 2004 and 2005 guidance documents addressed this issue by, among other things, recommending that agency ethics officials periodically review appointment designations to ensure that they are proper. OGE’s guidance expressed the concern that some agencies may be designating their committee members as representatives primarily to avoid subjecting them to the disclosure statements required for special government employees to identify potential conflicts of interest. The

guidance further stated that such improper appointments should be corrected immediately. OGE also suggested that for the committees required to renew their charters every 2 years, agencies use the rechartering process to ensure that the appointment designations are correct.<sup>13</sup> In March 2008, the Director of GSA's Committee Management Secretariat told us that while GSA has not issued formal guidance directing agencies to review appointment designations, it has addressed this recommendation by examining the types of appointments agencies are planning when it conducts desk audits of committee charters for both new and renewed committees and by providing information on appropriate appointments at quarterly meetings with committee management staff and at FACA training classes. The GSA official said that when GSA sees questionable appointments—for example, subject matter experts being appointed as representatives instead of as special government employees—it recommends that agency staff clear this decision with their legal counsel. However, he added that agencies are not compelled to respond to GSA guidance, and some have not changed their long-standing appointment practices despite GSA's questions and suggestions. He noted that, under FACA, GSA has the authority to issue guidance but not regulations.

Neither OGE nor GSA implemented our recommendation aimed at ensuring that committee members serving as representative members do not have points of view or biases other than the known interests they are representing. Because members appointed to committees as representatives do not undergo the conflict-of-interest review that special government employees receive, we recommended that representative members, at a minimum, receive ethics training and be asked whether they know of any reason their participation on the committee might reasonably be questioned—for example, because of any personal benefits that could ensue from financial holdings, patents, or other interests. OGE neither agreed or disagreed with this recommendation when commenting on our draft report but subsequently stated in its comments on the published report that it does not have the authority to prescribe rules of conduct for persons who are not employees or officers of the executive branch, such as committee

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<sup>13</sup>Under FACA, advisory committee charters generally expire at the end of 2 years unless renewed by the agency or Congress. Some committees, however, do not expire under the terms of the legislation creating them.

members appointed as representatives. The GSA official said while the agency supports the intent of our recommendation, it defers to OGE on ethics matters. However, in this case, given the limitations OGE identified, it may be more appropriate for GSA to take the lead on implementing this recommendation under FACA.

Regarding the importance of ensuring that committees are, in fact and in perception, balanced in terms of points of view and functions to be performed, we recommended that GSA issue guidance to agencies on the types of information that they should gather about prospective committee members. While GSA has not issued formal guidance in this regard, it does include in its FACA training materials examples of agency practices that do ask prospective members about, for example, their previous or ongoing involvement with the issue or public statements or positions on the matter being reviewed.

Finally, to better ensure independent and balanced committees and increase transparency in the federal advisory process, we recommended that GSA issue guidance to agencies to help ensure that the committee members, agency and congressional officials, and the public better understand the committee formation process and the nature of the advice provided by advisory committees. Specifically, we recommended that GSA issue guidance that agencies should

- identify the committee formation process used for each committee, particularly how members are identified and screened and how the committees are assessed for balance;
- state in the appointment letters whether the members are special government employees or representatives and, in cases where appointments are as representatives, the letters should further identify the entity or group that they are to represent; and

- state in the committee products the nature of the advice that was to be provided—that is, whether the product is based on independent advice or on consensus among the various identified interests or stakeholders.

In its comments on our draft 2004 report and in a July 2004 letter regarding the published report, GSA stated that addressing these recommendations would require further consultation with OGE and affected executive agencies. In the ensuing years, GSA has not issued formal guidance implementing these recommendations. In March 2008, the Director of the Committee Management Secretariat told us that he generally supports the intent of the recommendations but that GSA is reluctant to direct agencies to carry out these aspects of their personnel or advisory committee practices without the statutory authority to do so. He noted that regarding the recommendation addressing the committee formation process, GSA's FACA management training materials provide information on the best practice employed by some of EPA's federal advisory committees of articulating their committee formation process and providing this information on their committees' Web pages. We consider this action a partial implementation of the recommendation.

#### POTENTIAL CHANGES TO FACA THAT COULD HELP AGENCIES BETTER ENSURE INDEPENDENCE, BALANCE, AND TRANSPARENCY

You asked us to provide recommendations for improving the Federal Advisory Committee Act. Regarding the key recommendations we made aimed at addressing the inappropriate use of representative appointments, while both OGE and GSA were fully responsive to our recommendations to issue guidance to federal agencies clarifying such appointments, appointment data we reviewed raise questions about agency compliance. For example, in 2004, we reported that three of the nine agencies we reviewed had historically used representative appointments for all or most of their advisory committees, even when the agencies called upon the members to provide independent advice on behalf of the government. Overall, based our review of the latest data on committee appointments, for these three agencies, this appointment practice continued

through fiscal year 2007. Further, of these three agencies, which we identified as having questionable practices with respect to appointments for scientific and technical committees in 2004, one is still appointing members to scientific and technical committees primarily as representatives, and one has reduced the number of representative appointments but still has a majority of representative appointments. The third shifted substantially away from representative appointments for its scientific and technical committees in 2006 following our report—but made appointments to two new committees in 2007 with representative members that might be more appropriately appointed as special government employees.

Regarding the agency that is still primarily using representative members on its scientific and technical committees, not only do the subject matters being considered by many of these committees suggest that the government would be seeking independent expert advice rather than stakeholder advice, but the agency's identification of the entities or persons some representatives are speaking for suggests this agency is not abiding by the OGE and GSA guidance regarding representative appointments. For example, for some committees, this agency identifies the entity that all of the individual representative members are speaking for as the advisory committee itself. We believe these instances likely reflect an inappropriate use of representative rather than special government employee appointments. In addition, we note that some members appointed as representatives are described in the FACA database as representing an expertise or "academia" generally. As discussed above, the OGE guidance clarified that generally members may not be appointed as representatives to represent classes of expertise. Thus, it is not clear that agencies inappropriately using representative appointments have taken sufficient corrective action or that such actions will be sustained despite steps OGE and GSA have taken to clarify the appropriate use of representatives in response to our recommendations.

Governmentwide data collected by GSA show that from 2005 (when GSA began to collect the data in response to our recommendation to do so) through 2007, the percentage of committee members appointed as special government employees



increased from about 28 percentage to about 32 percent; the members appointed as representatives declined from just over 17 percent to about 16 percent.<sup>14</sup> In March 2008, the Director of the Committee Management Secretariat at GSA told us that it is not clear whether these data indicate that the problem of inappropriate use of representative appointments has been fixed. He emphasized that GSA can suggest to agencies that they change the type of committee appointments they make but cannot direct them to do so. He noted that the agencies that historically have relied on representative appointments may not feel compelled to comply with the guidance because “it is not in the law.” Finally, he said GSA would support incorporating the substance of our recommendations regarding representative and special government employees into FACA. Clarifying appointment issues in the act could resolve questions about or challenges to GSA’s authorities and thereby better support agency compliance with GSA and OGE guidance on this critical issue.

In consideration of the above, the Subcommittee may want to consider amendments to FACA that could help prevent the inappropriate use of representative appointments and better ensure the independence of committee members by clarifying the nature of advice to be provided by special government employees versus representative members of advisory committees and require that all committee members, not just special government employees, be provided ethics training.

In addition, as discussed above, our 2004 recommendations to GSA addressing (1) committee balance and (2) practices that could better ensure independent and balanced committees and increase transparency have either not been implemented or have been partially addressed. We believe it is significant that, on the basis of its understanding of its authorities and its experience in overseeing federal advisory committees—including trying to convince agencies to follow its guidance and training materials—GSA told us in March 2008 that it would support incorporating the substance of our recommendations in these areas into FACA. Not only are our recommendations consistent with four

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<sup>14</sup>GSA identifies three other types of appointments that were not the focus of our 2004 report. They are peer review consultants (at the National Institutes of Health only), regular government employees, and ex officio members.

categories (or objectives) of amendments to the act that GSA told us the agency generally supports, but they identify actions that GSA believes could help achieve its objectives, such as enhancing the federal advisory committee process and increasing the public's confidence both in the process and in committee recommendations.

Consequently, we believe the Subcommittee may also wish to incorporate into FACA the substance of our recommendations addressing (1) the types of information agencies should consider in assessing prospective committee members' points of view to better ensure the overall balance of committees and (2) the committee formation process, clarity in appointment letters as to the type of advice members are being asked to provide, and (3) identifying in committee products the nature of the advice provided. Along these lines, we understand that the proposed legislative amendments to FACA that may be introduced today may incorporate some of our 2004 recommendations. Overall, we believe that additions to FACA along the lines discussed in our testimony and detailed in our 2004 report could provide greater assurance that committees are, and are perceived as being, independent and balanced.

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Mr. Chairman, this concludes my prepared statement. I would be pleased to respond to any questions that you or other Members of the Subcommittee may have at this time.

#### GAO Contacts and Staff Acknowledgments

For further information about this testimony, please contact Robin M. Nazzaro on (202) 512-3841 or [nazzaror@gao.gov](mailto:nazzaror@gao.gov). Contact points for our Congressional Relations and Public Affairs Offices may be found on the last page of this statement. Contributors to this testimony include Christine Fishkin (Assistant Director), Ross Campbell, Carol Kolarik, Nancy Crothers, Richard P. Johnson, and Jeanette Soares.