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Mr. Chairman, Members of the Subcommittee, thank you for inviting me to speak on the General Services Administration's (GSA's) implementation of the Federal Advisory Committee Act (FACA); steps GSA has taken to implement recommendations made by the Government Accountability Office (GAO) in its April 2004 report (*Federal Advisory Committees – Additional Guidance Could Help Agencies Better Ensure Independence and Balance*, GAO-04-028); and GSA's recommendations for improving the Act.

While citizen-advisors have been called upon since the earliest days of the Republic to obtain objective and informed advice, it was not until after the end of World War II that advisory committees became institutionalized as a unique tool of democratic government. As the influence and number of advisory committees grew, so did concerns within the Executive and Legislative Branches regarding their management, cost, and accountability. In 1962, President Kennedy issued an Executive Order establishing guidelines for using such groups, and these guidelines were expanded in 1964.

In 1972, Congress passed the Federal Advisory Committee Act to accomplish two important objectives: (1) to establish the means for providing Congressional and Executive Branch oversight over the number and costs of advisory committees; and (2) to ensure that advisory committees operate in plain view of the public. Simply stated, the Act's purpose is to illuminate how agencies make decisions based upon advice and recommendations from individuals outside of Government, while also making sure that the costs to support advisory committees are commensurate with the benefits received.

Today, advisory committees are used by over 60 departments and agencies to address issues that reflect the complex mandates undertaken by the Government. During fiscal year 2007, over 65,000 committee members served

on more than 900 committees and provided advice and recommendations on such matters as vaccine research and safety, nuclear, biological and chemical threat reduction, civil rights, veterans' health and rehabilitation, management of natural resources, and strategies for national defense, protection of the environment, and human health and welfare.

FACA IMPLEMENTATION BY GSA

Several important government-wide roles and responsibilities are assigned by the Act to the Administrator of General Services and to GSA's Committee Management Secretariat which, taken together with those specific functions reserved for the Congress and Executive Branch Departments and agencies, are designed to improve the management and accountability of advisory committees. Among the statutory responsibilities assigned to the Administrator are:

- Conducting an annual comprehensive review of the activities and responsibilities of each advisory committee (section 7(b));
- Requesting information from agencies to help GSA carry out its responsibilities (section 7(b));
- Issuing administrative guidelines and management controls applicable to advisory committees (section 7(c)); and
- Issuing guidelines on committee member compensation in conjunction with the Office of Personnel Management (section 7(d)).

GSA Committee Management Secretariat Programs

The Secretariat provides agencies with tools to ensure successful oversight of their Federal advisory committee program, using a combination of shared management approaches, web-based tools, interagency coordination, and the application of best practice guidance. Compliance and oversight are managed by the Secretariat through the following programs:

- GSA FACA Rule – 41 CFR 102-3 provides agency with detailed guidance on the implementation of FACA. The current rule was issued in July 2001 and was developed by an interagency work group. The guidance in the rule follows from the language in FACA and from case law. The Secretariat is preparing to update the rule in 2010.
- Case Law Digest – This is a compendium of FACA Case Law that was developed by an interagency team led by GSA. It provides citations and summaries of FACA-relevant case law up through 2003. It is currently being updated by an interagency team including representatives from GSA, EPA, and DOJ – there are approximately 30 new cases being added.
- GSA Desk Officers – All agencies with Federal advisory committees are assigned to a Secretariat Desk Officer. Desk Officers coordinate advisory committee establishments, renewals and terminations, FACA policy interpretation, and best practice guidance with the agencies' Committee Management Officers (CMO's).
- Shared Management System (SMS) - The Secretariat uses a web-based Shared Management System (also known as the FACA Database) to manage and compile meeting, membership, charter, costs and other administrative and operational data on all Federal advisory committees. This data is available to the public via the GSA website.
- Annual Comprehensive Review (ACR) – The Annual Comprehensive Review of Federal Advisory Committees is required by section 7(b) of the Act. The Secretariat uses the Shared Management System to capture

and display this information. Agency compliance with reporting requirements is measured via a publicly-accessible scorecard (red-yellow-green) at the close of each fiscal year.

- Performance Measures - The Secretariat has incorporated performance measures for advisory committees in the Shared Management System. Data are collected from individual advisory committees during the ACR, with government-wide and agency roll-up. These measures examine advisory committee outcomes such as number of recommendations accepted by an agency and the estimated value of the advice impacted by advisory committees.
- Advisory Committee Engagement Survey (ACES) -The Secretariat periodically administers this online survey to advisory committee members and staff, and FACA decision makers. ACES measures the extent to which sponsoring agencies address factors that are critical to the success of advisory committees.
- Interagency Committee on Federal Advisory Committee Management (IAC) - Chaired by GSA, this 60-member interagency committee brings all CMOs together quarterly for discussions on FACA policy, best practices, training, and compliance issues. The IAC hosts numerous interagency work groups to manage FACA issues of interest (e.g., updating the case law digest; developing regulatory updates; improving training programs; refining the ACES questionnaire; developing updates to the SMS; developing presidential transition packages for FACA programs; etc.)
- FACA Training Program – Since 1989, the Secretariat has conducted a FACA training program which includes a formal introductory FACA course given five to six times a year to approximately 300 Federal employees.

GSA's introductory FACA course addresses the following topics: FACA history, laws related to FACA, legal and other ethics issues, recordkeeping, committee operations, membership processes, public interactions, and the use of the Secretariat's Shared Management System. The Secretariat also administered a one-day CMO training seminar in FY2007, and a two-day FACA Training Conference in FY2008.

Overview of Department and Agency Responsibilities

Responsibilities assigned by FACA to departments and agencies that sponsor Federal advisory committees include:

- Establishing uniform administrative guidelines and management controls (section 8(a));
- Appointing a Committee Management Officer (CMO) to provide oversight of the agency's entire committee inventory (section 8(b));
- Consulting with the Secretariat regarding proposals to establish advisory committees (section 9(a)(2));
- Filing Charters with the Congress prior to initiating committee activities (section 9(c));
- Maintaining records, minutes, and reports covering closed meetings (section 10(b)(c)(d));
- Appointing a Designated Federal Officer (DFO) for each committee (section 10(e));
- Maintaining financial records (section 12(a));
- Providing support services (section 12(b)); and
- Terminating advisory committees as appropriate, consistent with FACA (section 14(a)(1)(A)).

Agency CMOs are responsible for implementing FACA on behalf of the agency head. Within each agency, individual DFOs must work with their respective CMO to implement the Act's requirements at the committee level. Together, the CMO

and DFO are responsible for ensuring compliance with FACA, the agency's internal operating procedures, guidelines issued by GSA, and any other applicable statutes or regulations, such as those issued by the United States Office of Government Ethics (OGE), the National Archives and Records Administration (NARA), or the Office of Personnel Management (OPM). Although the Act is quite detailed in the specific procedures agencies must follow with respect to the establishment of advisory committees, the conduct of meetings, and the availability of records, it provides substantial flexibility to agency heads in other areas, such as membership selection and tenure. GSA believes this is appropriate given the diverse needs of the Executive Branch and the necessity for agencies to quickly adopt new operating procedures where conditions warrant.

Balance and Influence of the Appointing Authority

The Act does not include provisions covering individual committee member conflicts of interest. The applicability of conflict of interest laws and various ethical requirements for members of advisory committees who serve as Special Government Employees (SGEs) are covered by other laws and by regulations or other guidance issued by the U.S. Office of Government Ethics.

The Act, however, does include two important provisions designed to promote the objectivity of advisory committee deliberations. First, section 5(b)(2) requires "the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the committee." Second, section 5(b) requires "provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest, but will instead

be the result of the advisory committee's independent judgment." Thus, while the Act stresses the importance of assuring an advisory committee's independent judgment, it also requires that the composition of advisory committees reflect the expertise and interests that are necessary to accomplish the committee's mission.

The Act does not define those factors that should be considered in achieving "balance." However, the Secretariat's guidelines provide that, "*...in the selection of members for the advisory committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the committee. Committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed.*" (41 CFR 102-3.60(b)(3)) In their efforts to balance the points of view of a committee's membership, agencies focus primarily on the subject matter to be addressed by the committee; nevertheless, while not required by FACA, other factors may be appropriate in relation to a committee's function, such as geographical representation; racial or ethnic diversity; occupational affiliation; or the need to consult with State, local, or tribal governments. GSA describes these factors further in section III of Appendix A to Subpart B, 41 CFR 102-3.

Similarly, FACA does not outline specific steps that must be taken to ensure that advice and recommendations offered by an advisory committee are free from inappropriate influence by the appointing authority or special interests. Accordingly, each agency is responsible for developing specific operating procedures, consistent with the Act and GSA's guidelines to ensure an advisory committee's independence, and to promote a balanced committee membership.

GSA RESPONSE TO GAO RECOMMENDATIONS

In its April 2004 report (*Federal Advisory Committees – Additional Guidance Could Help Agencies Better Ensure Independence and Balance*, GAO-04-328), the U.S. Government Accountability Office (GAO) recommended a number of improvements that both GSA and OGE could make to improve the independence and balance of Federal advisory committees. The following is a summary of the recommendations (some are merged) that were made to GSA and how GSA addressed each recommendation.

To ensure distribution of the GAO recommendations to agency FACA managers, GSA provided the GAO report to all agency CMOs at the time of the September 23, 2004 meeting of the Interagency Committee on Federal Advisory Committee Management. CMOs were also provided with both GSA and OGE planned responses and action plans

for addressing the recommendations. Attendees were briefed on the GAO report and GSA's planned actions. In addition, OGE briefed the attendees on its responses to the GAO recommendations.

GAO Recommendation - (The Director of OGE and) the GSA Committee Management Secretariat (should) direct Federal agencies to review their representative appointments to Federal advisory committees either as the 2-year charters expire or, for those committees with indefinite charters, within 1 year to determine if the appointments are appropriate and to reappoint members as special government employees, where appropriate, and direct agency committee management officials to consult with agency ethics officials in making decisions about the type of appointments that should be made for each committee.

Response: OGE issued DAEOgrams DO-04-022 (7/19/04) and DO-05-012 (8/12/05) to further assist agencies in distinguishing between SGEs and Representatives during the member designation process and to

improve agency designation practices for purposes of applying Federal ethics rules to members serving as SGEs. *These documents serve to strengthen the CMO-DAEO consultation process called for in Appendix A to Subpart C (IV.2.) of the GSA FACA guidelines. (Basic guidance regarding the applicability of the Conflict of Interest Statutes and Federal Advisory Committee members is contained in OGE Advisory Opinion 82 x 22 (7/9/82).)* In addition, I understand that OGE in 2004 modified its ethics program review guidelines pertaining to advisory committees and has focused particular attention on ensuring that agency ethics officials are properly designating the status of advisory committee members for purposes of applying Federal ethics rules to members serving as SGEs. *During GSA's formal FACA Management Training course, agencies are further advised to contact their ethics and FACA attorneys for input when selecting members of any type, and in particular when choosing between SGEs and Representatives. This guidance appears in section IV.2.B of Appendix A to Subpart C of 41 CFR 102-3.*

For charters subject to renewal under FACA beginning with FY 2006, GSA added a member designation review date transaction column in the on-line consultation module of the FACA Database. (Designations for committees with indefinite charters (i.e., exempt from renewal) were reviewed during FY 2006.) The pertinent new instructions for this renewal consultation requirement were added to the Database HELP feature and Manuals.

Since 2006, GSA has also taken an aggressive posture in reviewing advisory committee charters during consultations on new establishments, renewals and amendments. Although FACA only requires that agencies "consult" with GSA on charters (see FACA 9(a)(2)), GSA's approach is to have GSA Desk Officers review the charter language for compliance with current regulatory requirements as well as for compliance with the revised

requirements (which include a section on membership designation) for charters that GSA intends to incorporate into the next revision of 41 CFR 102-3. This Desk Officer review is followed by a second review by the Director, Committee Management Secretariat, to ensure that charters have language specified by FACA and the implementing guidelines, and to ensure that member designations are appropriate. GSA formally notifies agencies in writing of any concerns with charter language.

GAO Recommendation - GSA (and OGE) (should) revise the training materials for the FACA management course, incorporating the additional OGE guidance as recommended above, and ensure that the course materials highlight the fact that appointment decisions should be based on the type of advice the committee members are to provide.

Response - GSA and OGE made the appropriate revisions to both the Meeting Management and Ethics Training Classes of the GSA FACA Management Training Course for FY2005, focusing on the member designation process and the CMO-DAEO relationship involved, and incorporating the current OGE guidance. The course material is reviewed regularly (with major updates in the summer of 2006 and 2007 during GSA sponsored instructor training meetings), and is updated as new guidance is issued.

GAO Recommendation - (OGE and) GSA (should) direct agencies to determine, for each relevant committee, the potential for such other (unknown points of view or) biases and take appropriate steps to ensure their representative members do not have such biases. At a minimum, Representatives should receive ethics training and be asked whether they know of any reason their participation on the committee might reasonably be questioned--....

Response - GSA believes that responsible agency CMOs or other officials, as appropriate, should determine for each relevant committee, the extent to which their potential Representatives should be vetted during

the initial planning for fairly-balanced membership, and in the preliminary review processes during membership selection. Whether Representatives should be asked to participate in member briefings is subject to an agency's decision. GSA believes it is helpful for Representatives to receive necessary information on the agency's expectations regarding any standard of behavior, with respect to a member's duties and role on a Federal Advisory Committee. Further, a structured interview conducted by an agency during the vetting or appointment process would assist in making sensible and defensible choices in achieving balance. During presentations in the GSA FACA Management Training Course, GSA recommends that agencies follow this approach."

GAO Recommendation - GSA (should) provide guidance to agencies regarding what background information might be relevant in assessing committee members' points of view.

Response - *GSA believes that considerations of potential members' points of view to be represented with respect to the functions to be performed by a committee are to be made by an agency during the initial planning process for fairly-balanced membership, and that each member will be designated appropriately prior to a committee's meeting or taking any action. Each agency is in the best position to determine from its program clientele, customers, and stakeholders, the pertinent points of view and their effect on a committee's functioning, and what views should be represented by members, interested parties, and other participants.*

GSA's current guidance in 41 CFR 102-3.60 has been more aggressively applied during the consultation process for the establishment of new discretionary Federal advisory committees, especially with regard to the description of the agency's plan to attain fairly-balanced membership. Proposed charters are assessed by the Secretariat, and commented upon as necessary, particularly with respect to the designation of members.

Finally, as we note in Section III of Appendix A to Subpart B of 41 CFR 102-3, the composition of an advisory committee depends on a number of factors (i.e., committee mission, perspectives needed, need for divergent views, geographical, ethnic, social, economic or scientific impact of recommendations). Agencies have to make individual determinations based on the function of the committee being established and the anticipated role of the members.

GAO Recommendation - GSA (should) issue guidance that agencies should: identify the committee (membership) formation process for each committee... ; state in the appointment letters to committee members whether they are appointed as Special Government Employees (SGEs) or Representatives (and identify the latter's entity or group); identify each member's appointment category on the GSA FACA Database (and for Representative members, the entity or group represented); and state in the committee products the nature of the advice provided (independent or consensus)...

Response - *In the FACA Management Training Course, GSA recommends that agencies use a standardized process for membership selection. This includes use of the Federal Register and the Internet to recruit members, and a formalized process for evaluating those candidates. A copy of an official agency document used for this purpose is handed out for illustration.*

GSA added several new fields for member designation categories in the FACA Database module beginning with the FY 2005 Annual Comprehensive Review (ACR) of each committee. Also, a field has been added for the identification of the represented group when an individual has been designated as a "Representative Member." Instructions have been added to the Database HELP feature and Manuals. GSA's final

Member Designation Categories and Selection Criteria were issued to CMOs at the May 12, 2005 Interagency Committee (IAC) Meeting, and CMO instructions for the FY 2005 ACR were issued at the September 15, 2005 IAC Meeting. Minutes of these IAC meetings are posted on the GSA website.

In September 2007, GSA held a one-day CMO Training Seminar attended by 60 participants (primarily CMOs) from 40 Federal agencies. Presenters represented GSA, the National Archives and Records Administration, the Department of Homeland Security, and the U.S. Office of Government Ethics. Broad topics presented at this seminar included the application of ethics rules to FACA members and improving advisory committee practices; FACA recordkeeping for CMOs; and managing presidential transition for advisory committees. During the seminar, CMOs were briefed on the need for a clear plan for membership, on ensuring that their advisory committee members understood if they were Special Government Employees or Representative members, and if the latter, who they represented. CMOs were also advised to include member designation in their advisory committee appointment letters: OGE has also advised in its 2004 DAEOgram that ethics officials ensure that appointment letters or other appointment documentation state clearly a member's designation and that Government ethics rules apply to a member who serves as an SGE.

In December 2007, GSA held a national FACA Training Conference attended by over 225 FACA professionals from over 50 Federal agencies. Thirty-five speakers and panelists presented on the role of the CMO; external views on advisory committee contributions; managing committees for excellence; forming successful committees, FACA policy advice, using

the GSA Shared Management System, and communications and accountability. Participants were trained on and received materials on documenting the advisory committee membership formation process.

GSA recommends that agencies make maximum use of the Internet, and display relevant agency and committee documents and products on agency websites, as appropriate, that would serve to be informative and contemporaneously available to all interested parties and the public at large. Such usage enhances the public participation aspects of FACA and ensures and increases transparency in the advisory committee process. GSA's Shared Management System provides for an agency to enter either the agency or specific committee website URL to which information can be posted. This is particularly true for draft and final advisory committee advice or recommendations.

Although some agencies apply voting criteria to their final products (report, advice, or recommendations), many more use a consensus-based approach. Regardless of the approach used, and we discuss this in the FACA Management Training Course briefly, agencies and their advisory committees will normally use the method best suited to their needs. Generally, advisory committee procedures documents that form the basis for the operation of the committee, or meeting transcripts, minutes, draft and final reports, comments, and the information in the FACA meeting record will clearly identify how advice was generated.