

Federal Advisory Committee Act

I. Introduction

The General Law Division of the Office of General Counsel for HHS provides the agency with legal advice relating to the Federal Advisory Committee Act (FACA) and the General Services Administration's regulations that implement the statute.

II. What is the FACA?

The FACA is a statute (5 U.S.C. Appendix 2) that controls the circumstances by which agencies or officers of the federal government can establish or control committees or groups to obtain advice or recommendations where one or more members of the group are not federal employees.

III. Why there is a FACA?

A. "FACA was enacted to **cure** specific ills, above all the **wasteful expenditures of public funds for worthless committee meetings and biased proposals . . .**" Public Citizen v. United States Department of Justice, 491 U.S. 440, 453 (1989).

B. "Its purpose was to ensure that **new advisory committees be established only when essential** and that their **number be minimized**, that they be **terminated when they have outlived their usefulness**; that their creation, operation, and duration be subject to **uniform standards and procedures**; that **Congress and the public remain apprized** of their existence, activities, and cost; and that their work be **exclusively advisory in nature.**" Public Citizen, 491 U.S. at 446.

IV. How does the FACA affect you and your committee?

A. Operating in a fishbowl

1. Public meetings.

a. Provide advance (in general, at least 15 calendar days) Federal Register notice of meeting.

b. Permit interested persons to attend, appear before, or file statements. Meeting held at a **reasonable time** and in a **place reasonably accessible** to the public. Meeting **room size is sufficient** to accommodate committee members, committee or agency staff, and interested members of public.

Public is permitted to file a written statement with the committee. Member of the **public may speak** at advisory committee meeting if the agency's guidelines so permit.

c. Portions of meetings may be closed for reasons stated in the Government in the Sunshine Act (5 U.S.C. § 552b). This determination must be made in advance and in writing by the agency. The common Government in the Sunshine Act exemptions for HHS are the ones that protect trade secrets and confidential commercial information or information that may cause a clearly unwarranted invasion of personal privacy. The meeting notice must state why a portion of a meeting is closed.

d. Two types of meetings do not have to be formally closed following the procedures in c. above.

i. Meetings of two or more committee or subcommittee members convened solely to gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting of the advisory committee, or to draft position papers for deliberation by the advisory committee (preparatory meetings).

ii. Meetings convened solely to discuss administrative matters of the committee or to receive administrative information from a federal officer or agency (administrative meetings).

2. Committee's records available to the public in a timely manner (i.e., by the day of the meeting). These are the records that are made available to and prepared for or by the advisory committee. These records are subject to redaction or withholding pursuant to the Freedom of Information Act exemptions.

3. Detailed minutes.

4. Meetings attended or chaired by designated federal official ("DFO"). DFO also must approve or call meeting, approve agenda (the "approve agenda" requirement does not apply to Presidential advisory committees), and adjourn meeting when it's in the public interest.

5. Make transcripts available.

6. File 8 copies of the committee's report with the Library of Congress.

B. Advisory role

1. Section 9(b) of the FACA requires that advisory committees be utilized **solely for advisory functions**, unless a statute or Presidential directive specifically provides otherwise.
2. Section 9(b) of the FACA requires that **determinations of action** to be taken and **policy** to be expressed with respect to matters upon which an advisory committee reports or makes recommendations **be made solely by the President or an officer of the Federal Government**.

C. Subcommittees

1. Meetings of 2 or more advisory committee or subcommittee members to gather information or do work for deliberation at a later committee meeting do not implicate the FACA. The subcommittee must report to the parent committee, and the parent committee must deliberate on any recommendations made by the subcommittee.
2. Subcommittees would implicate the FACA if they make recommendations directly to the agency or federal official rather than for consideration by the chartered advisory committee, or if the parent committee adopts the subcommittee's recommendations without further deliberation.

V. What could happen if the FACA was not followed?

- A. We could be prevented from implementing committee recommendations or work product.
- B. We could be forced to start over (this may result in abandonment of a project).

VI. Questions and Answers, Conclusion