Administrative Conference Recommendation 2011-7

The Federal Advisory Committee Act – Issues and Proposed Reforms

Adopted December 9, 2011

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,[1] 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 create advisory committees. Advisory committees are classified as either "discretionary" or "non-discretionary." "Discretionary" advisory committees include those that an agency forms of its

[1] *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).

own initiative or in response to a statute authorizing the creation of a committee.[2] "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.[3]

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.[4] 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."[5] 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.[6]

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

[2] 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).

[3] 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).

[4] 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").

[5] 5 U.S.C. App. 2 §§ 9(b)(2), (c); 1970 HOUSE REPORT at 19.

[6] 5 U.S.C. App. 2 §§ 7(b), 9(c), 14(a); 1970 HOUSE REPORT at 4, 12, 15–16.

agency, and (c) provide "advice or recommendations" to the President or a federal agency.[7] 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,[8] (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,[9] (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,[10] and (d) 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.[11]

All advisory committees subject to FACA must comply with a number of procedural requirements.[12] 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.[13] 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

[7] 5 U.S.C. App. 2 § 3(2). Nonetheless, FACA specifically exempts certain meetings that otherwise satisfy these requirements. *See supra* note 1.

[8] *Ass'n of Am. Physicians & Surgeons v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993).

[9] *Byrd v. United States Envtl. 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).

[10] *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.

[11] *In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005).

[12] 5 U.S.C. App. 2 § 3(2).

[13] *Id.* §§ 7(c), 9(c); 41 C.F.R. §§ 102-3.60–75.

committee's work.[14] 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 individual expert 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.[15] 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,[16] and receive comments from individuals interested in the committee's work.[17] The public, upon request, must be given access to all documents presented to or prepared for or by the advisory committee.[18] Finally, agencies must re-charter each existing committee every two years and, 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.[19]

[14] 5 U.S.C. App. 2 §§ 5(b)(2), (c); 41 C.F.R. §§ 102-3.30(c), 102-3.60(b)(3).

[15] 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).

[16] 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).

[17] 5 U.S.C. App. 2 § 10; 41 C.F.R. §§ 102-3.140, 102.3-150.

[18] 5 U.S.C. App. 2 § 10(b); 41 C.F.R. § 102-3.170.

[19] 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-

Agencies are also subject to Executive Order 12,838, issued by President Clinton in 1993, which required agencies to reduce the number of their discretionary advisory committees by one-third.[20] 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.[21] Administrative agencies collectively can maintain a total of 534 discretionary advisory committees without exceeding the cap.

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.[22] Congress has specifically authorized this process, known as "negotiated rulemaking," in the Negotiated Rulemaking Act of 1990.[23] In most instances, negotiated rulemaking committees are subject to FACA,[24] 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[25] and that negotiated rulemaking committees be balanced to include

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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).

[20] Exec. Order No. 12,838, 58 Fed. Reg. 8207 (Feb. 10, 1993).

[21] Office of Management & Budget, Circular A-135: Management of Federal Advisory Committees, 59 Fed. Reg. 53856, 53857 (Oct. 26, 1994).

[22] DAVID M. PRITZKER & DEBORAH S. DALTON, NEGOTIATED RULEMAKING SOURCEBOOK 1 (Administrative Conference of the U.S. 1995).

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

[24] 5 U.S.C. § 565(a)(1).

[25] *Id.* § 563.

representatives from all relevant stakeholder communities.[26] 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.[27] 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 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.

[26] *Id.* §§ 563(a)(2)–(3), 564(a)(3)–(4), 565(a)(1).

[27] H.R. 3124, 112th Cong. § 3(b) (2011).

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 alleviate barriers and perceived barriers[28] to the government's use of advisory committees by proposing a simplified process by which agencies create advisory committees and select their members and by recommending the removal of the arbitrary cap on the number of advisory committees.[29]

[28] The Conference's empirical research indicated that the principal sources of delay in the committee formation process are within agencies themselves rather than resulting from delays associated with GSA's review of proposed committee charters. Nevertheless, informed observers were concerned that there exists a widespread perception among agencies that GSA's review of proposed charters constitutes a de facto approval process rather than a consultation requirement, thereby causing some agencies to invest excessive time in drafting committee charters prior to submission to GSA for review.

[29] Though the 469 discretionary advisory committees in existence are currently well short of the 534 discretionary committees authorized, the cap can nevertheless create procedural burdens for agencies and inhibit their ability to obtain needed outside advice. Since GSA allots each agency a specific number of potential discretionary advisory committees, an agency that intends to exceed its individual ceiling must request that GSA adjust that ceiling. Agency officials interviewed as part of the research also indicated that individuals outside of the CMO's office were sometimes unsure of whether the agency was likely to exceed its discretionary committee ceiling and were therefore reluctant to request additional 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 to avoid triggering the Act. One such amendment would require subcommittees to comply with all provisions of FACA other than chartering, including the open meeting requirements.[30] The 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.[31] 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 and 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.

[30] H.R. 3124, 112th Cong. § 3(b) (2011).

[31] 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.

RECOMMENDATION

Alleviating Procedural Burdens That Inhibit the Effective Use of Advisory Committees

1. Congress should amend the Federal Advisory Committee Act ("FACA") and the General Services Administration ("GSA") should amend its FACA implementing regulations to eliminate any requirement that agencies consult with the Administrator of GSA prior to forming or renewing an advisory committee or implementing a major change to the charter of an existing committee. Specifically, Congress should delete the phrase "after consultation with the Administrator" from section 9(a)(2) of FACA, and GSA should eliminate or suitably revise 41 C.F.R. §§ 102-3.60, 102-3.85(a), which currently require such consultation with GSA's Committee Management Secretariat.[32] Agencies should still be required to prepare and file committee charters and should be permitted (but not required) to consult with GSA to obtain advice regarding preparation of the charter or other aspects of committee formation. Agencies should also still be required to file charters as under current law,[33] including filing with GSA for informational purposes and for inclusion in the FACA database. GSA should continue to post all committee charters online.

2. Agencies should identify and prioritize those factors for achieving balance among committee members that are directly relevant to the subject matter and purpose of the committee's work. The committee charter should include a description of the committee's mission and the most relevant balance factors.

[32] GSA would continue to offer advice on committee formation and operation to agencies that seek such advice, and its regulations might authorize agencies to obtain advice on committee formation and operation from the Committee Management Secretariat.

[33] 5 U.S.C. App. 2 § 9(c); 41 C.F.R. § 102-3.70.

3. 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.

4. 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

5. 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). Congress and/or GSA should also consider including a clearer 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.

6. 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.

7. 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. 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 make no final decisions on behalf of the full committee. 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 make final decisions on behalf of the full committee.

Enhancing Transparency and Objectivity

8. 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.[34]

[34] 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 40–45 (Oct. 2004).

(c) Agencies that grant conflict of interest waivers under 18 U.S.C. § 208(b) should post such waivers on their websites without awaiting a public request for releasing them.[35] Agencies should make appropriate provisions for redacting from such waivers information that they may keep confidential pursuant to 18 U.S.C. § 208(d)(1).

9. Agencies should post on a committee website 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 should attempt to post 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.

10. 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.[36]

11. 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 nominations for potential committee members, from the public, from expert communities with

[35] The Office of Government Ethics has issued guidance describing the type of information that a waiver should contain. U.S. Office of Government Ethics, Memorandum from Robert I. Cusick, Director, to Designated Agency Ethics Officials Regarding Waivers under 18 U.S.C. § 208 (Feb. 23, 2007).

[36] 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.

experience in the subject matter of the committee's assignment, and/or from groups especially likely to be affected by the committee's work.