

## USEITI Public Workshop -- June 22, 2012: Supplemental Information to Address Questions Re: the Federal Advisory Act (FACA)

The questions and answers below are factual in nature and are intended to supplement the information provided at the USEITI Public Workshop held on Friday, June 22, 2012, and to address questions raised by stakeholder participants. This information is not intended as legal advice and is not meant to supplant full legal review of FACA-related questions posed during DOI's consideration of establishing a Federal Advisory Committee or other mechanism in support of EITI. Any errors and omissions are the sole responsibility of the Consensus Building Institute (CBI), the US EITI facilitator.

- 1. What are the authorities for establishing advisory committees?** The FACA identifies four sources of authority for establishing advisory committees. They are: (1) a statute requires the establishment of a committee; (2) a Presidential Executive Order or directive requires the establishment of a committee; (3) a statute authorizes but does not mandate creation of a committee; or (4) agency-authorizing statutes allow for the creation of discretionary committees.
- 2. When does FACA apply?** When an agency has not yet decided to establish an advisory committee under the FACA and it is meeting with non-federal entities, several factors are considered to determine whether the requirements of FACA should apply. These factors include:
  - a. Federal agency establishes and exercises management or control over the group
  - b. Group provides collective advice to federal agency
  - c. Federal agency selects members
  - d. Federal agency funds the group's activities
  - e. Federal agency sets agenda for the group
  - f. Federal agency arranges meeting dates and locations
  - g. Federal agency uses the group on a recurring basis
  - h. Federal agency gives the group formal structure
- 3. How does the FACA process work?** There are many internal and external steps to creating a FACA managed by DOI. A brief description of these elements follows.
  - a. Internal steps –
    - i. A charter is drafted and circulated for approval through various DOI offices, including the Solicitor's Office (General Law and Ethics), programmatic office and appropriate Assistant Secretary.
    - ii. Names of potential members are sent to the Committee Management Officer (CMO), who coordinates the vetting of potential members' names for ethics and other issues. Once this is done, the members may be appointed by the Secretary.
  - b. External steps –
    - i. Consultation on vetting of potential members
    - ii. Consultation with General Services Administration (GSA) is required for discretionary committees.

- iii. A Federal Register Notice is required for a discretionary committee. A notice of establishment is required at least 15 days before the charter is filed. This might take less time if good cause is shown to GSA.
  - iv. No committee may meet or take action until a charter has been filed by the CMO or other properly designated agency official. The charter is filed with the Secretary, standing committees of the House and Senate having legislative jurisdiction over the agency (the date this is done is considered the official establishment date of the committee), the Library of Congress, and the GSA.
- 4. How is a FACA committee funded?** The agency responsible for establishing and maintaining the committee funds the committee out of its appropriations. The program office most closely aligned with the work of the committee is generally responsible for designating the funds to be used to cover these costs. Direct and indirect costs of committee management include establishment, Federal Register notices, facilitation, maintaining appropriate records, communications at and between committee meetings (website development, webinars, etc.). Appropriations law prohibits the agency from taking contributions from other federal agencies to support the operation of the FACA committee. The agency may potentially take donations of money and in-kind services from non-federal entities to support the operation of the committee, subject to gift acceptance authority and donations policy.
- 5. What does the committee charter cover?** An advisory committee charter is intended to provide a description of an advisory committee’s mission, goals, and objectives. Items that must be included in the charter are: official designation; objectives and scope of the committee’s activity; period of time necessary to carry out committee purposes; agency or official to whom the advisory committee reports; description of the duties for which the committee is responsible; estimated annual costs to operate the committee; estimated number and frequency of meetings; planned termination date, if less than 2 years from the date of establishment; name of the President’s delegate, agency or organization responsible for complying with FACA reporting requirements; and the date the charter is filed.
- 6. What factors should be considered in achieving a “balanced” advisory committee membership?** The FACA mandates that Federal advisory committees be balanced in the points of view represented by the members, but leaves it to the discretion of each agency on how to do this. The FACA regulations offer several factors that should be considered by agencies in determining a balanced membership. These factors include:
- a. The committee’s mission;
  - b. The geographic, ethnic, social, economic, or scientific impact of the committee’s recommendations;
  - c. Types of specific perspectives required, such as those of consumers, technical experts, public-at-large, academia, business, or other sources;
  - d. The need to obtain divergent points of view on the issues before the committee; and
  - e. The relevance of State, local, or tribal governments to the development of the committee’s recommendations.
- 7. May government employees be appointed to serve on an advisory committee?** Yes. A Federal employee appointed to serve on a FACA committee generally performs the duties of a

committee member as part of his/her duties as a Federal employee. That is, if a committee has a purpose that is tied to a particular program area or is in need of program expertise, the agency establishing the committee may appoint a federal employee to serve in that role.

- 8. What is the difference between “representative” members and “special government employee” members on a FACA committee?** Representative members are specifically appointed to a committee to provide the committee with the points of views of nongovernmental entities or of a recognizable group of persons, such as an industry sector, labor union, environmental group, or other group that has interests in the subject matter under a committee’s charge. Representative members are not appointed to exercise their own individual best judgment on behalf of the government. Instead, representative members serve as the voice of groups or entities with a financial or other stake in matters before the committee.

Special government employee members are expected to provide their own independent judgment in committee deliberations. They are generally appointed to a committee because of a specific expertise (technical, scientific, etc.) that is needed to help the committee carry out its functions. Special government employees are not expected to represent the interests or views of a particular sector or group. When someone is appointed to a committee as a special government employee, certain government ethics rules apply, including financial disclosure requirements and the requirement that they will serve without conflicts of interest.

- 9. Can lobbyists serve on a FACA Committee?** According to the OMB guidance on this issue, which was published in the Federal Register on October 5, 2011, the most pertinent points based on the discussion at the workshop on Friday are as follows. A link to the full guidance may be found here: <https://www.federalregister.gov/articles/2011/10/05/2011-25736/final-guidance-on-appointment-of-lobbyists-to-federal-boards-and-commissions>

- a) Who is affected by the policy? The policy applies to federally registered lobbyists and does not apply to individuals who are registered as lobbyists only at the state level. A lobbyist affected by the policy is someone who is subject to the registration and reporting requirements of the Lobbying Disclosure Act of 1995 at the time of appointment to the advisory committee, board, or commission.
- b) Can a former lobbyist serve on an advisory committee, board, or commission? Someone who previously served as a federally registered lobbyist may be appointed or re-appointed only if he/she has been de-listed by his/her employer as an active lobbyist. Such de-listing must reflect the actual cessation of lobbying activities or if he/she has not appeared on a quarterly lobbying report for three consecutive quarters as a result of actual cessation of lobbying activities.
- c) Does the policy restrict the appointment of individuals who are themselves not federally registered lobbyists but are employed by organizations that engage in lobbying activities? No, the policy only applies to federally registered lobbyists and does not apply to non-lobbyists employed by organizations that lobby.
- d) Does the policy also restrict the participation of lobbyists as members of a subcommittee or

other work group that performs preparatory work for its parent board, advisory committee or commission? Yes, the policy does not permit the appointment of federally registered lobbyists to a subcommittee or any other subgroup that performs preparatory work for a parent board, advisory committee, or commission. The goal of the policy is to restrict the undue influence of lobbyists on federal government commissions, which includes subcommittees or other bodies, regardless of whether the positions require formal appointment.

- e) Does the policy also restrict lobbyists from appearing before a board, advisory committee, or commission to provide information, testimony, etc.? No, lobbyists may appear before such bodies to provide information, testimony, or input in the same manner as non-lobbyists. The policy is meant to restrict/prevent lobbyists from being in privileged positions in government. It is not intended to prevent lobbyists or others from petitioning their government. Boards, advisory committees and commissions should endeavor to hear from a balanced set of perspectives and are not gathering information and advice exclusively from registered lobbyists.
- f) Will there be any waivers available for circumstances in which a federally registered lobbyist possesses unique or exceptional value to a board, advisory committee or commission? The policy makes no provisions for waivers and waivers will not be permitted under this policy.