



RAIL ENERGY TRANSPORTATION ADVISORY COMMITTEE

PRESENTATION ON THE FEDERAL ADVISORY COMMITTEE ACT AND GOVERNMENT ETHICS

**Office of the General Counsel
Surface Transportation Board**

March 14, 2013



FACA BACKGROUND

- **Advisory committees to the Federal Government have a long and storied history**
 - George Washington/Whiskey Rebellion
 - Warren Commission/JFK
 - Three Mile Island Commission, 9/11 Commission, BRAC Commission
- **Today, over 1000 Federal advisory committees advise the Executive Branch, with over 60,000 committee members**
- **The STB has two other advisory committees**
 - **Railroad-Shipper Transportation Advisory Council, established by Congress (49 U.S.C. Sec. 726) (Non-FACA)**
 - **National Grain Car Council (FACA)**



What is a FACA Advisory Committee?

- **Under the 1972 Federal Advisory Committee Act (FACA), Committees:**
 - Provide important balanced and relevant advice
 - Act promptly to complete work
 - Comply with reasonable cost controls and recordkeeping requirements
 - Open to the public
- **Established by Statute, the President, or a Federal Agency**
 - To obtain advice or recommendations
 - Containing at least one non-Federal employee



General FACA Requirements

- Develop and file a charter with Congress
- Maintain a balanced membership
- Hold open public meetings
- Keep detailed minutes or summaries of meetings
- Allow public filing of written statements
- Announce all meetings in Federal Register
 - 15 days in advance
- Maintain all committee documents for public inspection



Designated Federal Officer (“DFO”)

- Each FACA advisory committee must have a DFO who:
 - Calls, attends and adjourns meetings
 - Works closely with advisory committee Chair
 - Prepares Federal Register notices for meetings, etc.
 - Approves agendas, press releases, etc.
 - Maintains required official records of committee, including minutes, membership and cost records
 - Maintains meeting records for availability to the public



Designated Federal Officers ("DFO") for RETAC

Scott M. Zimmerman

Branch Chief

Office of Proceedings

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Why Does FACA Require Public Meetings?

Public Meetings

- Goals of the FACA statute include:
 - Preventing inappropriate influence on government decisions
 - Eliminating government decisions made behind closed doors
 - Improving public confidence in Agency decision-making
 - Allowing public contemporaneous access to decision process



Public Meetings – cont'd

- **FACA is a public access, not a public participation statute:**
 - All “deliberations” of a FACA advisory committee seeking to reach “consensus” on advice to be given to the Agency are to occur in a public meeting.
 - GSA says “consensus” requires a quorum:
 - For RETAC, a quorum equals a simple majority of members (1/2 of number of members, plus 1)

Main objective is openness and accountability to the public.



Public Meetings – cont'd

To Assure Public Access:

- Advance notice of meeting: Time, location and agenda – must be published in the Federal Register at least 15 calendar days before the scheduled meeting.
- Accessible meeting location: But Agency is not required to accommodate all of the public.
- Accessible committee information: Includes minutes and documents considered at each meeting. Posting committee information on website is recommended.
- Public may submit documents/written statements: Committee is free to use public input as it sees fit.
- Teleconferences are possible: But need public access, e.g., separate room with speakerphone, call-in/meet-me line, and must still publish a Federal Register notice of the meeting.



Public Meetings – cont'd

“Closed Meetings” – Exceptions to Public Meeting Requirement:

- National security
- Trade secrets, or commercial or financial information
- Criminal investigatory records
- Issuance of subpoenas or litigation strategy
- Specifically exempted by statute
- Personnel issues
- Closing a FACA meeting takes place under “Government in Sunshine Act.” Must be planned in advance, reviewed by the General Counsel’s Office and approved by Agency Head. Written Agency determination required, with public access to the determination.



Public Meetings – cont'd

“Non-FACA Meetings” – Activities not Subject to FACA:

- Purely administrative sessions
 - Schedule
 - Membership
 - Operating principles
- Preparatory meetings
 - Drafting sub-groups
- Purely fact-finding meetings
 - Site visits by sub-groups
 - Research, information-gathering
- “Non-FACA meeting” determination memo required in advance; signed by DFO and the General Counsel’s Office



ETHICS for FACA Committee Members

Be Aware of Your Limits



What Ethics Laws Apply to you?

Answer: That Depends on your status as a FACA Committee Member.

There are generally 3 categories of FACA Committee Members:

- (1) Federal Employees
- (2) Special Government Employee
- (3) Representative

What category you fall in will determine the level of government ethics that applies to you!



ETHICS PUBLIC SERVICE

Public service is a public trust. Every citizen deserves to have complete confidence in the integrity of the Federal Government. As public servants, we should adhere to the principles of ethical conduct.



What is your status as a FACA Committee Member?

We look to several factors in designating your status:

- (A) Receipt of Compensation
- (B) Use of Outside Recommendations
- (C) Spokesperson for Nongovernmentals

In other words, if you look like a Federal Employee, you probably will be treated like one under our ethics laws, including conflict of interest statutes.



Ethics (Status) – cont'd

Agency officials will determine your status, and **HERE IT IS:**

You are designated a “**REPRESENTATIVE.**”

Representatives are not Government employees.

Individuals who serve on advisory committees as representatives are appointed to a committee to provide it with the points of view of nongovernmental entities or of a recognizable group of persons (e.g., an industry sector, labor unions, or environmental groups, etc.). It is expected that representatives will represent a particular point of view or interest.



Ethics (Status) – cont'd

“Representatives” are Not Subject to Government Criminal Conflict of Interest Statutes.

- As Representatives, these laws would obviate the purpose of your services
- Representatives are not required to file financial disclosure reports
- HOWEVER, that does not mean that Representatives are “off the hook”
- Representatives are subject to a more narrow but important standard:

Representative FACA Committee Members should comport themselves with integrity as not to trade upon their position for their personal benefit.



Ethics (Overview) – Cont.

While, as representatives, you are not subject to most Government Ethics laws, you should still comport yourself with integrity and not use your position with RETAC for personal gain.

Good guidelines to maintain the integrity of your committee are:

- Ask if a particular action is appropriate, rather than whether it is legal.
- Ask if a particular action might embarrass your committee, its members, or the Board.



Questions?

FACA or Ethics:

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