

ACQUISITION ADVISORY PANEL  
Meeting Minutes  
February 9, 2005  
White House Conference Center, Truman Room  
Washington, D.C.

The Acquisition Advisory Panel convened its first meeting at 9:00 A.M. on February 9, 2005, at The White House Conference Center, Truman Room, Washington D.C. The Administrator of the Office of Federal Procurement Policy (OFPP), Mr. David Safavian, opened the meeting by welcoming newly appointed Panel members. He said that while the establishment of the Panel has been a long-time coming, he is happy the Panel has now been launched and that he is confident that the members are among the best and brightest in the federal acquisition community. Mr. Safavian stated that the purpose of this first meeting was administrative and procedural, and that it was not intended to cover issues of substance. He introduced the Chair, Ms. Marcia Madsen and the Designated Federal Official (DFO), Ms. Laura Auletta. He additionally recognized the efforts of Stuart Bender, Assistant General Counsel and Designated Agency Ethics Officer, Office of Management and Budget (OMB), as well as Rob Burton, and Stan Kaufman, both from OFPP.

Mr. Safavian then asked all private sector Panel members to stand for their swearing in. He explained that the government employees did not need to do this as they were already sworn in upon entering Federal service. Ms. Bess Weaver performed the swearing in of the following Panel members as Special Government Employees (SGEs):

Mr. Jonathan Etherton  
Mr. Joshua Schwartz  
Ms. Marcia Madsen  
Mr. Marshall Doke, Jr.  
Mr. Carl De Maio  
Dr. Allan Burman  
Mr. Louis Addeo

In addition to the Panel members, Ms. Bethany Noble was also sworn in as an SGE to act as a consultant.<sup>1</sup>

All SGEs were required to sign an Oath of Office affidavit following the meeting (Attachment 1).

In accordance with the provisions of Public Law 92-463, the meeting was open to the public from 9:00 A.M. to adjournment. Attachment 2 is a list of public attendees and their affiliations.

## TOPICS DISCUSSED

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<sup>1</sup> The role of the uncompensated consultant was established by the Office of Management and Budget as part of the administrative support to the Panel.

Panel Chair, Ms. Madsen welcomed all Panel members and attendees and thanked everyone for their energy in advance. She announced that the first substantive meeting will be held on February 28<sup>th</sup> at the Department of Interior, Rachel Carson Conference Room. A Federal Register Notice will be published this Friday [February 11, 2005] with pertinent information.

The Committee has already received public statements (Attachments 3 and 4). Written comments are always welcome. Ms. Madsen announced that public comments from the floor would not be taken for this procedural and administrative meeting.

Ms. Madsen introduced Ms. Laura Auletta, Designated Federal Official and the support staff, Ms. Anne Terry, Ms. Pamela Gale and Ms. Pamela Gouldsberry.

The DFO, Ms. Auletta reviewed the agenda (See Attachment 5).

Ms. Auletta introduced Mr. Robert Flaak, Senior Policy Advisor in the General Services Administration (GSA) Office of Governmentwide Policy, Office of Administrative Policy, the Committee Management Secretariat. Ms. Auletta told the panel that while working at the Environmental Protection Agency, Mr. Flaak either served as the DFO or oversaw more than 500 FACA reviews. Mr. Flaak noted that today's meeting, while not required to be open to the public as it was administrative in nature, was announced in the Federal Register (Attachment 6) and opened to the public in the interests of transparency. He provided an overview of the Federal Advisory Committee Act (FACA) and, in the course, discussed other laws and regulations (e.g., Freedom of Information Act (FOIA), Government in the Sunshine, and National Archives and Records Administration (NARA) regulations) pertinent to advisory committee operations. He also addressed a number of procedural and operational issues including the following: the role of participants (e.g., Chair, Designated Federal Official, Committee Management Officer, Agency Officials, Members, Subcommittees, and the Public); types of meetings (administrative vs. substantive); public participation (oral and written statements); recordkeeping; the charge to the Panel, and; preparation of the final report. Mr. Flaak also recommended that all questions from the media be coordinated through the Chair or the DFO. Panel member Mr. Carl DeMaio asked what the process is for FOIAing e-mails. Mr. Flaak responded that this was mostly handled through the Act but that an e-mail from one panel member to another is not usually subject to FOIA but that correspondence that goes through the DFO is. He closed his remarks by noting one role of the GSA is to use performance measures to evaluate effectiveness of advisory committees. (See Attachment 7 - Prepared Statement, Attachment 8 - FACA Brochure, and Attachment 9, 41 CFR Parts 101-6 and 102-3).

Ms. Auletta, DFO, called the roll. The following Acquisition Advisory Panel members were present:

Public Sector

Deidre A. Lee  
David A. Drabkin  
Thomas Luedtke  
Frank J. Anderson, Jr.  
James A. Hughes, Jr.  
Roger Waldron

Private Sector

Marcia G. Madsen  
Louis Addeo  
Allan V. Burman  
Carl DeMaio  
Marshall J. Doke, Jr.  
Jonathan Lewis Etherton

Academia

Joshua I. Schwartz

Panel Member Ms. Melanie R. Sabelhaus was not present. Michael McHale, SBA, was in the audience to take notes for her. A list of Advisory Panel Members was available at the meeting for the public and is included at Attachment 10.

Ms. Madsen then introduced Stuart Bender, Assistant General Counsel and Designated Agency Ethics Officer, OMB, who presented an ethics briefing to the Panel on the avoidance and prevention of conflicts of interest. He noted that public service was a public trust and, therefore, they must recuse or disqualify themselves when there is a financial conflict of interest. Members, he said, should avoid even the potential of the appearance of a conflict of interest. The test is "would a reasonable person with knowledge of the relevant facts question a member's impartiality?" He also advised Panel members of their duties and responsibilities, Federal ethics statutes, and Office of Government Ethics (OGE) Standards of Conduct applicable to all executive branch employees. Mr. Bender stated that he had reviewed all panel members' financial disclosures and that Panel members were responsible for advising him of any changes to their financial position, including job changes. Mr. Bender's presentation followed his handout (Attachment 11).

The DFO, Ms. Laura Auletta, reviewed the charter and bylaws and operating procedures (Attachments 12 and 13, respectively). Key points covered included:

- a. The Panel is to be known as the "Acquisition Advisory Panel"
- b. Reference to Section 1423 of the Services Acquisition Reform Act, National Defense Authorization Act for Fiscal year 2004, included in each Panel member's folder and available to the public with the other materials from this meeting at the table by the door (Attachment 14).
- c. All members should keep her apprised of attendance.
- d. DFO approves the agenda and must be present at all Panel meetings. Both Panel Members and the Public may submit suggested agenda items.
- e. Minutes will be available once certified by the Chair.
- f. Members should advise DFO when they are bringing documents to meetings so that copies may be made for distribution to the public.
- g. The Bylaws and Operating Procedures require that the Chair request a motion for any vote. Ms. Madsen will discuss what constitutes a quorum later in the meeting.
- h. Documents will be posted to a website that is being created.

The Chair, Ms. Madsen, discussed procedural issues and potential schedules for future meetings, including:

- a. Development of a schedule of meetings six months in advance to allow for planning.
- b. Copies of all documents discussed were available in hard copy at the meeting, including presentations, the agenda, and written public documents received in time to make copies. An OMB website is in the process of being established and all documentation required by FACA will be posted and made available to the public.
- c. No public comments were received from the floor, but copies of written comments previously received were available as handouts. Future meetings will be handled in a similar manner.
- d. The schedule of meetings will be presented at the February 28<sup>th</sup> meeting.
- e. Most meetings will be full day in duration.
- f. At least two meetings may be held outside of the Washington, D.C. area, perhaps on the west coast or in the southwest.
- g. There will probably be 15 or 16 meetings of which she expects at least two will be reserved for the acceptance of public comments from the floor.
- h. Consistent with the statute, topics will cover a broad spectrum of subjects.
- i. Ms. Madsen suggested that a quorum normally consists of ½ of the membership plus 1 member, which equates to 8 members for this Panel.
- j. If a Panel member is unable to attend a meeting, he/she may send someone, but not as a voting member or to sit at the Panel table. The expectation is that Panel members will attend most meetings.
- k. Meetings will be conducted with some degree of formality, using Roberts Rules, basic parliamentary procedures, to ensure meetings are kept on track.
- l. Comments will be accepted in writing or via the website. When oral comments are allowed, commenters are requested to register in beforehand and submit comments in advance to the DFO.
- m. Meetings will be working meetings.
- n. Working groups will be established given the Panel's broad charter.

Questions from other Panel members were solicited. There were none.

**The DFO adjourned the meeting at 9:50 A.M.**

Because this was an administrative meeting only, the Chair of the Panel is not required to certify the minutes.

Laura Auletta  
Designated Federal Officer (Executive Director)  
Acquisition Advisory Panel

Index of Attachments to Minutes  
Acquisition Advisory Panel  
February 9, 2005  
White House Conference Center, Truman Room

- Attachment 1 -- Special Government Employee Affidavit
- Attachment 2 -- List of Public Attendees
- Attachment 3 -- Public Comments (Professional Services Council)
- Attachment 4 -- Public Comments (National Contract Management Agency)
- Attachment 5 -- Agenda
- Attachment 6 -- Federal Register
- Attachment 7 -- Prepared Statement (A. Robert Flaak)
- Attachment 8 -- FACA brochure
- Attachment 9 -- 41 CFR
- Attachment 10 -- List of Panel Members
- Attachment 11 -- Ethics Guidelines (Stuart Bender)
- Attachment 12 -- Charter
- Attachment 13 -- Bylaws
- Attachment 14 -- Title XIV, Section 1423















# APPOINTMENT AFFIDAVITS

Member, Services Acquisition Reform Act Advisory Panel  
(Position to which Appointed)

02/09/2005  
(Date Appointed)

OMB  
(Department or Agency)

\_\_\_\_\_  
(Bureau or Division)

Washington, D.C.  
(Place of Employment)

I, Bethany Noble, do solemnly swear (or affirm) that--

## A. OATH OF OFFICE

I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

## B. AFFIDAVIT AS TO STRIKING AGAINST THE FEDERAL GOVERNMENT

I am not participating in any strike against the Government of the United States or any agency thereof, and I will not so participate while an employee of the Government of the United States or any agency thereof.

## C. AFFIDAVIT AS TO THE PURCHASE AND SALE OF OFFICE

I have not, nor has anyone acting in my behalf, given, transferred, promised or paid any consideration for or in expectation or hope of receiving assistance in securing this appointment.

  
(Signature of Appointee)

Subscribed and sworn (or affirmed) before me this 9 day of February, 2005

at Washington  
(City)

District of Columbia  
(State)

(SEAL)

  
(Signature of Officer)

Commission expires 08/15/2009  
(If by a Notary Public, the date of his/her Commission should be shown)

Notary Public  
(Title)

Note - If the appointee objects to the form of the oath on religious grounds, certain modifications may be permitted pursuant to the Religious Freedom Restoration Act. Please contact your agency's legal counsel for advice.







STATEMENT BY  
ALAN CHVOTKIN  
SENIOR VICE PRESIDENT AND COUNSEL  
PROFESSIONAL SERVICES COUNCIL

TO THE SERVICES ACQUISITION ADVISORY ("1423") PANEL

FEBRUARY 9, 2005

Madam chair and distinguished members of the Services Acquisition Advisory Panel:

On behalf of the Professional Services Council (PSC) and its members, congratulations on your selection to this important advisory panel. PSC was a strong supporter of the creation of the Panel during the Congressional consideration of the Services Acquisition Reform Act (SARA) and we have waited more than a year for this Panel to be appointed. We now look forward to working with you, the federal agencies and the public in developing a set of recommendations to meet the Panel's charter for improving the federal government's ability to buy commercial items and professional services.

As you know, the Professional Services Council is the leading national trade association that represents more than 170 companies of all business sizes providing professional and technical services to virtually every agency of the federal government, including information technology, engineering, logistics, operations and maintenance, consulting, international development, scientific, environmental, and social sciences.

While this first public session was announced as an administrative session only, we asked for the opportunity to present our views on how the Panel should conduct its deliberations to achieve the greatest results in the limited time allotted. We look forward to future opportunities to present our substantive recommendations.

In our view, the key to the Panel's success will be to ensure the transparency of your work and constant communications and interaction with all stakeholders in your deliberations and in developing your recommendations.

Research

First, we strongly encourage you to move expeditiously to identify and commence the preliminary research on the laws, regulations and practices affecting the policy areas addressed in the statute – and beyond. This should be an evolving process since the federal acquisition system is an integrated, inter-dependent fabric and changes in one part could have an effect on

other areas. This may lead the Panel to consider an evolving set of preliminary recommendations over the yearlong effort, with no preliminary recommendation adopted as final until all of the recommendations have been considered comprehensively.

Related to that research, we urge you to make the research and all other substantive information provided to the Panel promptly available to the public by establishing a Panel website where you can post the information provided. This public access will allow interested parties to comment on the information available and provide supplemental information for the Panel's consideration. The website can also be a convenient tool to supplement the required legal procedures to inform the public about the Panel's work, including future meeting dates, agendas, areas of inquiry and requests for public comment.

### Outreach

Second, we strongly recommend an aggressive and formal outreach to federal agencies, practitioners and the public. This would include a mechanism for any person or organization to submit recommendations for the Panel's consideration, to add to the research published and to comment on the recommendations – even if they are wrong! While the Panel will be solely responsible for the final recommendations, no one should have the option of sitting out the debate and then simply criticizing the recommendations at the end. A portion of the credibility of the Panel's recommendations will be the extent to which proponents and opponents have had an opportunity to scrutinize and debate the recommendations.

### Public Sessions

Third, we strongly support and encourage the full Panel, or a subcommittee, to hold frequent public sessions in the D.C. area and, to the extent possible, around the country. As we see all the time at PSC when discussing policy issues with our national membership, the perspectives and recommendations of the community in the Washington, D.C. area, or at an agency headquarters, may not be the same as those of contractors that do business outside of D.C. or those of front-line organizations in the field. Since many of you travel extensively as part of your "day" job, we encourage you to identify opportunities for outreach sessions around the country to give small businesses, front-line officials and others the opportunity for involvement and investment in the Panel's work.

In addition, use these public sessions for meaningful interaction with the public about their experiences, practices, recommendations and concerns. As we have seen with the Section 800 Panel's actions and the FAR 15 rewrite, collaboration with the public early on and throughout the Panel's deliberations contributed significantly to the ultimate success of the final product and added to the quality and credibility of the final recommendations.

### Subcommittees

We encourage the Panel to create subcommittees that will delve more deeply into individual topic areas and permit these subgroups to meet separately (but in public) from the full Panel to

focus on specific areas of interest. Any Panel member should feel free to attend any Panel meeting, however.

### Staff

The Panel will have a limited dedicated staff but many of you have access to policy professionals and practitioners that can supplement the Panel's work. Industry organizations, including PSC and the Council of Defense and Space Industries Associations (CODSIA), of which PSC is a member, have mechanisms in place for broad outreach to interested participants that can supplement the substantive research and analysis that the Panel may consider and obtain quality feedback on initiatives. We encourage you to leverage the resources of PSC and other organizations – and we would not object to disclosing our identity to the Panel and the public on material we submit to any member of the Panel. Except for any staff support a Panel member receives to assist him or her in fulfilling the work on the Panel, we believe this disclosure and attribution of submissions from outside the Panel, regardless of source, is an important element of transparency.

### Conclusion

Despite our disappointment with the delay in establishing this important Panel, we compliment each of you on your selection and look forward to working with you over the coming year to develop a clear, credible and implementable set of recommendations for enhancing the Federal Government's use of commercial items and its acquisition of services. The Professional Services Council, and our members, looks forward to actively contributing to your work and offering our views on the issues as you develop them.

In the interim, if PSC or I can be of any further assistance, please do not hesitate to let me know.



8700 Greensboro Drive  
Suite 200  
Falls Church, VA 22042  
703 392 0082  
800.344.8096  
703 448 9939 fax  
www.ncmahq.org

February 3, 2005

Ms. Marcia Madsen  
Chairwoman  
Services Acquisition Reform Act (SARA)  
Section 1423 Advisory Panel

Dear Ms. Madsen,

Congratulations on your appointment to chair this prestigious panel.

My colleagues in the contracting profession hope that as the Panel deliberates on its recommendations for improving Federal government contracting, that the knowledge and expertise of the professionals in the field are taken into consideration.

The National Contract Management Association (NCMA) is the professional association for contract management. Included in our membership are more than 5,000 Federal contracting specialists and more than 10,000 of their industry counterparts, as well as a significant number of commercial contracting professionals outside of the Government contracting industry. These are the people in the trenches negotiating, awarding and administering contracts and subcontracts on a daily basis. In addition, many Federal and industry contracting executives are active members, to include several appointees to the Section 1423 Panel.

I invite you, the other Panel members, and your staff to review our monthly publication, *Contract Management*, to help you learn who these people are, the challenges they face, and the effective and often innovative ways they accomplish their objectives. We believe this will aid you immeasurably as you move forward.

I also extend an invitation to meet with you, the Panel, or your staff, at your convenience, to discuss the contracting profession. NCMA would be willing and able to organize meetings (private or town hall format) with contracting professionals to provide you the opportunity to gain their perspective.

It is important to note that NCMA is not a lobbying organization. We are not trying to influence policy. We are trying to help facilitate an important dialogue on behalf of the professional contract management community.

NCMA looks forward to contributing to the work of the Section 1423 Panel in any way we can.

Very sincerely,

  
Neal J. Couture, CPCM  
Executive Director

Agenda  
SARA Acquisition Advisory Panel  
February 9, 2005  
White House Conference Center  
Truman Room

- 9:00 – 9:15 Welcome and Swearing In (OFPP Administrator – David Safavian)
- 9:15 – 9:30 Welcome (Chair-Marcia Madsen)
- 9:30 – 9:35 Introduction/Agenda (Laura Auletta, DFO)
- 9:35 – 10:15 What is FACA? (Office of Governmentwide Policy, Office of Administration and Policy, Committee Management Secretariat – Robert Flaak)
- 10:15 – 10:45 Ethics Briefing (OFPP OGC – Stuart Bender)
- 10:45 – 11:00
- Discussion of Charter/By-Laws (DFO – Laura Auletta)
  - Procedural Issues and Potential Schedule (Chair – Marcia Madsen)
  - Use of working groups
  - Miscellaneous
- 11:00 Meeting Adjourned

[Federal Register: January 27, 2005 (Volume 70, Number 17)]

[Notices]

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From the Federal Register Online via GPO Access [wais.access.gpo.gov]

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OFFICE OF MANAGEMENT AND BUDGET

Acquisition Advisory Panel

AGENCY: Executive Office of the President, Office of Management and Budget.

ACTION: Notice of Federal Advisory Committee meeting.

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SUMMARY: Pursuant to the provisions of the Federal Advisory Committee Act (Pub. L. 92-463, as amended), notice is hereby given that the Acquisition Advisory Panel established in accordance with the Services Acquisition Reform Act of 2003 will meet on February 9, 2005 at 9 a.m., eastern time. Location for the meeting will be the Truman Room of the White House Conference Center, 726 Jackson Place, NW., Washington, DC 20503. The meeting is open to the public and written statements may be filed with the panel. Due to limited availability of seating, members of the public will be admitted on a first-come, first-served basis. This is the first meeting of the panel, and will be organizational in nature. Discussion of substantive procurement-related topics is not anticipated.

SUPPLEMENTARY INFORMATION: The purpose of the panel is to provide independent advice and recommendations to the Office of Federal Procurement Policy and Congress pursuant to Section 1423 of the Service Acquisition Reform Act of 2003. The panel's charter is to review Federal contracting laws, regulations, and government-wide policies, including the use of commercial practices, performance-based contracting, performance of acquisition functions across agency lines of responsibility, and government-wide contracts.

Requests for additional information or written statements should be directed to Ms. Laura Auletta, Designated Federal Officer, at [laura.auletta@gsa.gov](mailto:laura.auletta@gsa.gov) or (202) 208-7279.

Dated: January 21, 2005.

David H. Safavian,  
Administrator for Federal Procurement Policy.

[FR Doc. 05-1566 Filed 1-26-05; 8:45 am]

BILLING CODE 3110-01-P

STATEMENT OF  
ROBERT FLAAK  
SENIOR POLICY ADVISOR  
COMMITTEE MANAGEMENT SECRETARIAT  
GENERAL SERVICES ADMINISTRATION

ON

THE FEDERAL ADVISORY COMMITTEE ACT

BEFORE THE

ACQUISITION ADVISORY PANEL

WHITE HOUSE CONFERENCE CENTER  
726 JACKSON PLACE, NW  
WASHINGTON, DC

ON

February 9, 2005

Ms. Chairwoman and Members of the Panel.

Thank you for the opportunity to appear today to discuss the Federal advisory committee process. Service on Federal advisory committees, both at the agency level and those that advise the President directly, is an extraordinary challenge and opportunity. The challenge is how to make this often complex process work; the opportunity lies in the potential for results that will benefit the American public.

My name is Robert Flaak and I have some 20 years of experience in operations, policy development, and management of Federal advisory committees, most of this at the US EPA Science Advisory Board. Over the past 15 years or so, I have also been deeply involved in the work of the GSA Committee Management program as a trainer, advisor, committee member, and manager.

Today, I will provide an overview of the Federal Advisory Committee Act and the advisory committee process, and offer my observations on some of the important procedural and operational questions facing this panel as you begin your deliberations.

## **Introduction**

Advisory committees have played an important role in shaping programs and policies of the federal government from the earliest days of the Republic. Since President George Washington sought the advice of such a committee during the Whiskey Rebellion of 1794, the contributions made by these groups have been impressive and diverse. Through enactment of the Federal Advisory Committee Act (FACA) of 1972 (Public Law 92-463), the U.S. Congress formally recognized the merits of seeking the advice and assistance of our nation's citizens. At the same time, the Congress also sought to assure that advisory committees:

- Provide advice that is relevant, objective, and open to the public;
- Act promptly to complete their work; and
- Comply with reasonable cost controls and recordkeeping requirements.

The purpose of FACA is to ensure that advice rendered to the executive branch by the various advisory committees, task forces, boards, and commissions formed over the years by Congress and the president, be both objective and accessible to the public. The Act not only formalized a process for establishing, operating, overseeing, and terminating these advisory bodies, but also created the Committee Management Secretariat (within OMB), an organization whose task it is to monitor and report executive branch compliance with the Act.

In 1976, Executive Order 12024 delegated to the Administrator of GSA all responsibilities of the President for implementing the Federal Advisory Committee Act (FACA), including moving the Secretariat to GSA in 1977. Executive Orders and congressional revisions have further refined the extension and the application of the Act in 1993, 1997, and 1998, and the extent and nature of the Secretariat's reporting of the activities of the committees.

## **Role of GSA – The Committee Management Secretariat**

The CMS is a component of GSA's Office of Governmentwide Policy. Federal staffing consists of an Acting Director and four Committee Management Specialists.

With approximately 1,000 advisory committees in existence at any given time, special attention is required to assure compliance with the FACA, the Freedom of Information Act, and related regulations, as well as to encourage effective and efficient use of committee resources. While executive branch departments and agencies are responsible for continually reviewing committee performance in these areas, the General Services Administration (through its Committee Management Secretariat) was designated by the President in 1977 to monitor committee activities governmentwide. As part of this responsibility, the Secretariat:

- Conducts annual reviews of advisory committee accomplishments;
- Responds to inquires from agencies on establishing new committees or the renewal of existing groups;
- Prepares an annual report covering a summary of committee activities; and

- Maintains a FACA database on the worldwide web from which advisory committee information may be obtained via the Internet.

Together, GSA and the federal community work to eliminate the overlap or duplication of advisory bodies, terminate unnecessary or inactive committees, and develop committee management regulations, guidelines, and training in response to requirements of the executive branch and Congress.

### **Training for FACA**

The Secretariat conducts between four and seven training courses a year, both in the Washington area and throughout the US. The goal of the training program is to educate those federal employees directly involved with the operation of federal advisory committees. Students are rigorously instructed in the nuances of FACA.

### **Annual Comprehensive Review**

The Secretariat conducts an ongoing review of federal advisory committees, boards, and commissions to confirm that the committees are fulfilling the purpose for which they were established. This review is accomplished through the utilization of specific criteria, and by means of on-site visits, as well as examination of meeting minutes and annual reports.

### **Annual Report of the President**

From 1972 through 1998, the Secretariat annually compiled a consistent set of statistical data on federal advisory committees, as required by FACA. This data was made available to the public, the president, and Congress via a printed annual report and copies of the detail provided by each committee and agency are available in the Library of Congress. The data included information on the distribution of Federal Advisory Committee Resources, comparisons of real versus nominal costs, actual and projected advisory committee costs, FTE staff levels by agency, a breakout of presidential advisory committees, and a past year to present year comparison of open meetings versus closed meetings. The printed and transmitted Annual Report was discontinued by Congress effective with the 1999 report since the information is now available online.

### **FACA Consultation**

Agencies consult with the Secretariat before creating an advisory committee, and the Secretariat verifies, among other things, that the committee is prepared to file a charter that meets all the requirements of FACA.

### **Performance Guidelines**

As required by Section 7(c) of FACA, the Secretariat seeks to quantify and qualify those guidelines and criteria by which various categories of advisory committees throughout the executive branch may improve their performance in terms of quality of advice and efficiency of delivery. Secretariat staff attend meetings and review reports and minutes in an effort to validate and verify suitable guidelines. To supplement this process, the Secretariat has distributed a performance evaluation questionnaire to advisory committee members and officers. The agencies, with the secretariat, are now working on the results,

which will be released to the agencies for their use in advisory committee planning and management.

### **Legal Consultations**

The Secretariat is also consulted for interpretation as regards the Sunshine Law, FACA, the GSA Final Rule, and other sections of current and pending legislation that involves the creation of federal advisory committees. As necessary, the Secretariat consults with GSA FACA legal counsel.

### **Special Projects**

The Secretariat provides support to both the White House and the Office of Management Budget (OMB) when the need arises. For example, the Secretariat currently assists OMB with the implementation of Executive Order 12838 that mandates a reduction in the number of advisory committees. The Secretariat also provides technical support to OMB in the management of several governmentwide databases.

### **Role of Federal Advisory Committees**

With the expertise from advisory committee members, federal officials and the nation have access to information and advice on a broad range of issues affecting federal policies and programs. The public, in return, is afforded an opportunity to participate actively in the federal government's decision-making process.

### **Federal Agency Responsibility**

Each federal agency that sponsors advisory committees must adhere to the requirements established by the FACA, as well as those administrative guidelines provided by the Secretariat.

### **Complying with FACA**

Any advisory group, with limited exceptions, that is established or utilized by a federal agency and that has at least one member who is not a federal employee, must comply with the FACA. To find out if a group comes under the FACA, any individual may contact the sponsoring agency's Committee Management Officer, or the GSA Committee Management Secretariat.

### **Requirements for Establishing and Managing Advisory Committees**

Under the Federal Advisory Committee Act, advisory committees can be created only when they are essential to the performance of a duty or responsibility conveyed upon the executive branch by law. Before committees can be set up, high-level officials within the sponsoring agency must review and approve the request. Once a committee is approved, a charter is prepared outlining the committee's mission and specific duties and forwarded to GSA's Committee Management Secretariat for final review. Following a required public notification period, and the filing of the charter with Congress, the committee may begin operation.

### **Expiration of a Committee's Charter**

Unless the renewal of a committee charter is justified under the FACA, the charter automatically expires after a two-year period (or as otherwise provided by law).

### **Advisory Committee Members**

Federal advisory committee members are drawn from nearly every occupational and industry group and geographical section of the United States and its territories. The FACA requires that committee memberships be "fairly balanced in terms of the points of view represented and the functions to be performed." As a result, members of specific committees often have both the expertise and professional skills that parallel the program responsibilities of their sponsoring agencies. In balancing committee memberships, agencies are expected to assure that major-and sometimes strongly opposing-viewpoints are represented to provide a foundation for developing advice and recommendations that are fair and comprehensive.

### **Appointing Committee Members**

Agency officials, members of Congress, the general public, or professional societies or current and former committee members may nominate potential candidates for membership. Selection of committee members is made based on the FACA's requirements and the potential member's background and qualifications. The President or heads of agencies makes final selection. Prior to accepting an appointment with a federal advisory committee, each prospective member should meet with the appropriate agency Committee Management Officer and Designated Agency Ethics Official, to discuss duties and obligations, allowable expenses, and compensation limitations.

### **Federal Ethics and Conflict of Interest Laws**

Agency officials must provide prospective advisory committee members with information regarding any applicable standards of conduct including those imposed by federal conflict of interest statutes. In some instances, members may be subject to special limitations during the course of their service on an advisory committee. For some members, these restrictions also may apply (for limited periods) after their committee assignments have ended. Some agencies may impose additional administrative requirements as well. To avoid potential conflicts, each advisory committee member should assure that he or she receives adequate information from the sponsoring agency and completes any required appointment papers and disclosure forms prior to service on a committee. Oral briefings and other explanatory material may be obtained through the sponsoring agency's Committee Management Officer, Designated Agency Ethics Official, or from the Office of Government Ethics, which has governmentwide jurisdiction on federal ethics issues.

### **Limits on Membership Terms**

Each agency sets limits (unless provided by law) on the lengths of terms for serving on advisory committees to allow for continually new membership.

### **Open Access to Committee Meetings and Operations**

Under the provisions of the Federal Advisory Committee Act, federal agencies sponsoring advisory committees must:

- Arrange meetings for reasonably accessible and convenient locations and times;
- Publish adequate advance notice of meetings in the *Federal Register*;
- Open advisory committee meetings to the public (with some exceptions-see the section on "Government in the Sunshine Act" below);
- Make available for public inspection, subject to the Freedom of Information Act, papers and records, including detailed minutes of each meeting; and
- Maintain records of expenditures.

### **Government in the Sunshine Act**

Advisory committee meetings may be closed or partially closed to the public based upon provisions of the Government in the Sunshine Act of 1976 (Public Law 94-409).

Examples of meetings that may be closed under the FACA are:

- Those including discussions of classified information;
- Reviews of proprietary data submitted in support of Federal grant applications; and
- Deliberations involving considerations of personnel privacy.

Today, an average of 1,000 advisory committees with more than 60,000 members advise the President and the Executive Branch on such issues as the disposal of high-level nuclear waste, the depletion of atmospheric ozone, the national fight against Acquired Immune Deficiency Syndrome (AIDS), and on efforts to rid the Nation of illegal drugs or to improve schools, highways, and housing, and on other major programs.

### **General Data About Advisory Committees**

Based on information reported by Federal agencies in FY2003, there were:

- 976 active federal advisory committees, of which:
  - o 216 are scientific and technical advisory committees.
  - o 316 are non-scientific
  - o 156 are national policy related
  - o 288 are grant review, regulatory-negotiation, or other
- 51 Presidential advisory committees
- 6728 meetings held
  - o 2245 open to the public
  - o 4141 closed to the public
  - o 342 partially closed
- 62106 total members serving
- 1526 Federal Staff Support years (FTE)
- \$284 million in expenditures (salaries, travel, rentals, printing, postage, etc)

Thank you. I would be pleased to respond to any questions.



GSA Office of Governmentwide Policy

## For More Information...

For more information on the requirements of the Federal Advisory Committee Act, contact the General Services Administration's Committee Management Secretariat at (202) 273-3556, or via the Internet at

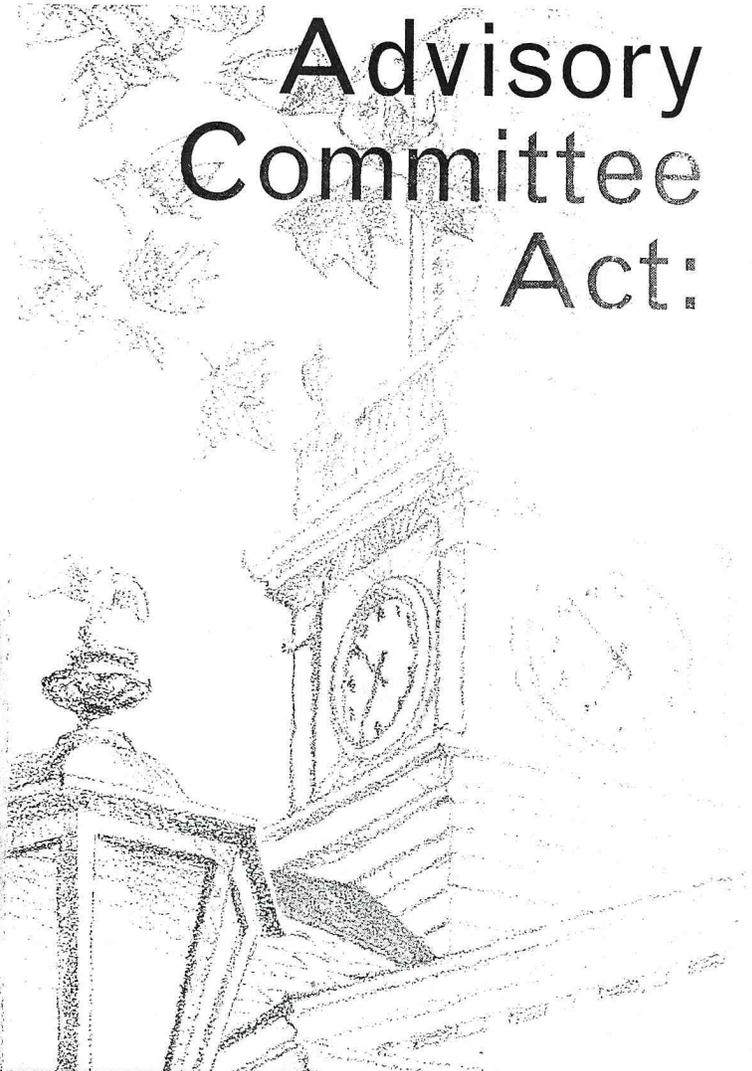
<http://www.gsa.gov/committeemanagement>

Examples of materials available from Committee Management Secretariat are:

- Federal Advisory Committee Act
- Government in the Sunshine Act
- GSA Final Rule on Federal Advisory Committee Management
- List of agency committee affiliations
- List of agency Committee Management Officers
- *The Federal Advisory Committee Act: An Overview*
- *The First Decisions (FACA Video)*
- Information on the Federal Advisory Committee Act Training course.

Other materials, such as samples of nominating letters and charters, are available from each sponsoring agency.

# The Federal Advisory Committee Act:



GSA Office of Governmentwide Policy

U.S. General Services Administration  
Committee Management Secretariat  
Washington, DC 20405

## An Overview

**T**hrough enactment of the *Federal Advisory Committee Act (FACA) of 1972 (Public Law 92-463)*, the U.S. Congress formally recognized the merits of seeking the advice and assistance of our Nation's citizens. At the same time, the Congress also sought to assure that advisory committees:

- ♦ Provide advice that is relevant, objective, and open to the public;
- ♦ Act promptly to complete their work; and
- ♦ Comply with reasonable cost controls and recordkeeping requirements.

### **Role of Federal Advisory Committees**

With the expertise from advisory committee members, Federal officials and the Nation have access to information and advice on a broad range of issues affecting Federal policies and programs. The public, in return, is afforded an opportunity to participate actively in the Federal Government's decisionmaking process.

### **Federal Agency Responsibility**

Each Federal agency that sponsors advisory committees must adhere to the requirements established by the FACA, as well as those administrative guidelines provided by the U.S. General Services Administration's (GSA) Committee Management Secretariat. GSA has had the responsibility for overseeing the FACA since 1977.

### **GSA's Role Under the FACA**

With approximately 1,000 advisory committees in existence at any given time, special attention is required to assure compliance with the FACA, the Freedom of Information Act, and related regulations, as well as to encourage effective and efficient use of committee resources.

While Executive Branch departments and agencies are responsible for continually reviewing committee performance in these areas, the General Services Administration was designated by the President in 1977 to monitor committee activities governmentwide. As part of this responsibility, GSA:

- ♦ Conducts annual reviews of advisory committee accomplishments;
- ♦ Responds to inquiries from agencies on establishing new committees or the renewal of existing groups;
- ♦ Maintains a FACA database on the worldwide web from which advisory committee information may be obtained via the Internet.

Together, GSA and the Federal community work to eliminate the overlap or duplication of advisory bodies, terminate unnecessary or inactive committees, and develop committee management regulations, guidelines, and training in response to requirements of the Executive Branch and Congress.

### **Complying with FACA**

Any advisory group, with limited exceptions, that is established or utilized by a Federal agency and that has at least one member who is not a Federal employee, must comply with the FACA. To find out if a group comes under the FACA, any individual may contact the sponsoring agency's Committee Management Officer, or the GSA Committee Management Secretariat (see the last section "*For More Information...*").

### **Requirements for Establishing and Managing Advisory Committees**

Under the Federal Advisory Committee Act, advisory committees can be created only when they are essential to the performance of a duty or responsibility conveyed upon the Executive Branch by law. Before committees can be set up, high-level officials within the sponsoring agency must review and approve the request. Once a committee is approved, a charter is prepared outlining the committee's mission and specific duties and forwarded to GSA's Committee Management Secretariat for final review. Following a required public notification period, and the filing of the charter with Congress, the committee may begin operation.

### **Committee Management Officer and Designated Federal Official**

The Federal Advisory Committee Act also provides that each agency sponsoring a Federal advisory committee must appoint a Committee Management Officer to oversee the administration of the Act's requirements.

In addition, a Designated Federal Official must be assigned to each committee to:

- ♦ Call, attend, and adjourn committee meetings;
- ♦ Approve agendas;
- ♦ Maintain required records on costs and membership;
- ♦ Ensure efficient operations;
- ♦ Maintain records for availability to the public; and
- ♦ Provide copies of committee reports to the Committee Management Officer for forwarding to the Library of Congress.

### **Expiration of a Committee's Charter**

Unless the renewal of a committee charter is justified under the FACA, the charter automatically expires after a two-year period (or as otherwise provided by law).

### **Advisory Committee Members**

Federal advisory committee members are drawn from nearly every occupational and industry group and geographical section of the United States and its territories. The FACA requires that committee memberships be "fairly balanced in terms of the points of view represented and the functions to be performed."

As a result, members of specific committees often have both the expertise and professional skills that parallel the program responsibilities of their sponsoring agencies. In balancing committee memberships, agencies are expected to assure that major—and sometimes strongly opposing—viewpoints are represented to provide a foundation for developing advice and recommendations that are fair and comprehensive.

### **Appointing Committee Members**

Agency officials, Members of Congress, the general public, or professional societies or current and former committee members may nominate potential candidates for membership.

Selection of committee members is made based on the FACA's requirements and the potential member's background and qualifications. Final selection is made by the President or heads of agencies.

Prior to accepting an appointment with a Federal advisory committee, each prospective member should meet with the appropriate agency Committee Management Officer and Designated Agency Ethics Official, to discuss duties and obligations, allowable expenses, and compensation limitations.

### **Federal Ethics and Conflict of Interest Laws**

Agency officials must provide prospective advisory committee members with information regarding any applicable standards of conduct—including those imposed by Federal conflict of interest statutes. In some instances, members may be subject to special limitations during the course of their service on an advisory committee. For some members, these restrictions also may apply (for limited periods) after their committee assignments have ended.

Some agencies may impose additional administrative requirements as well. To avoid potential conflicts, each advisory committee member should assure that he or she receives adequate information from the sponsoring agency and completes any required appointment papers and disclosure forms prior to service on a committee.

Oral briefings and other explanatory material may be obtained through the sponsoring agency's Committee Management Officer, Designated Agency Ethics Official, or from the Office of Government Ethics, which has governmentwide jurisdiction on Federal ethics issues.

### **Limits on Membership Terms**

Each agency sets limits (unless provided by law) on the lengths of terms for serving on advisory committees to allow for continually new membership.

### **Open Access to Committee Meetings and Operations**

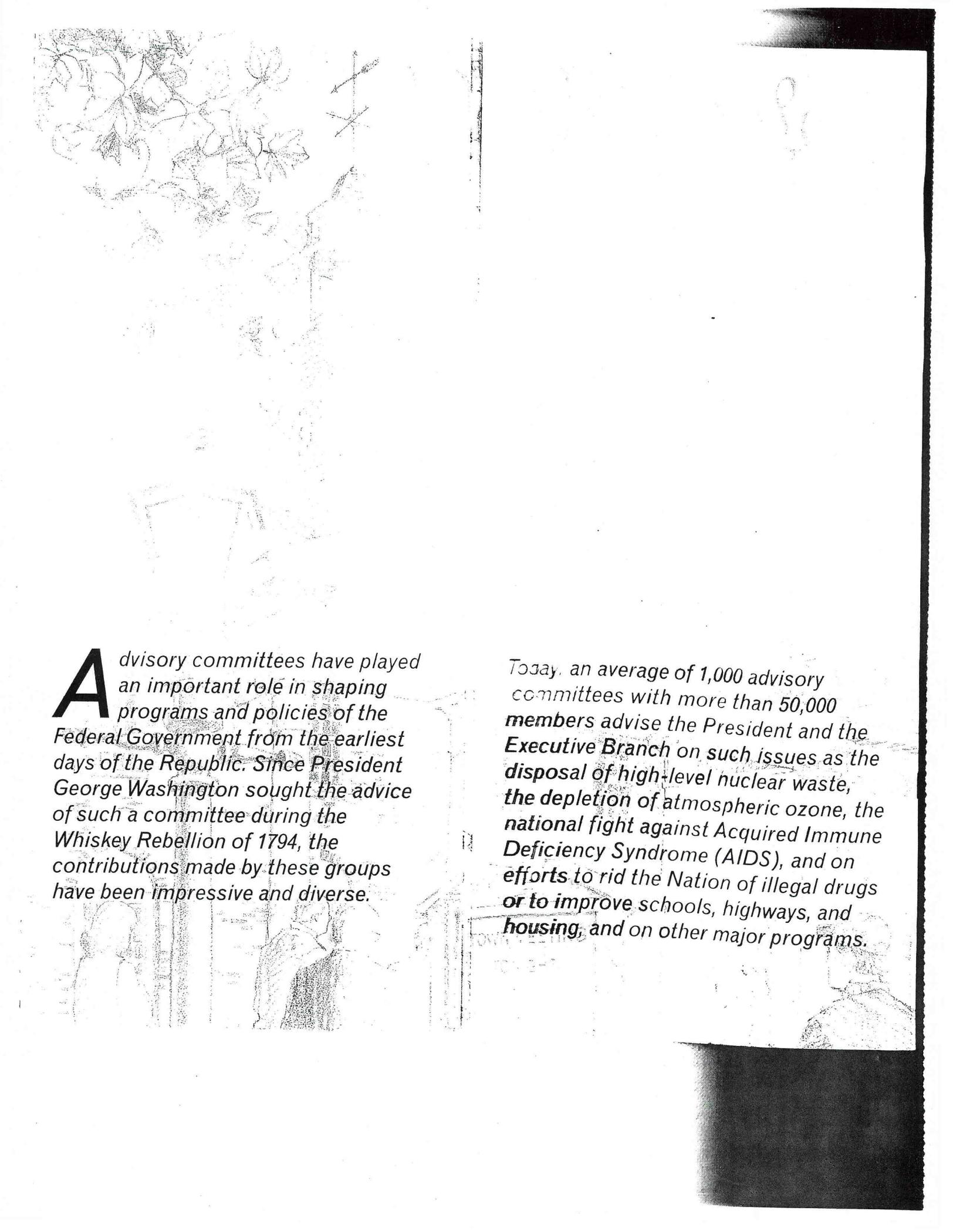
Under the provisions of the Federal Advisory Committee Act, Federal agencies sponsoring advisory committees must:

- ♦ Arrange meetings for reasonably accessible and convenient locations and times;
- ♦ Publish adequate advance notice of meetings in the *Federal Register*;
- ♦ Open advisory committee meetings to the public (with some exceptions—see the section on "Government in the Sunshine Act" below);
- ♦ Make available for public inspection, subject to the Freedom of Information Act, papers and records, including detailed minutes of each meeting; and
- ♦ Maintain records of expenditures.

### **Government in the Sunshine Act**

Advisory committee meetings may be closed or partially closed to the public based upon provisions of the Government in the Sunshine Act of 1976 (Public Law 94-409). Examples of meetings that may be closed under the FACA are:

- ♦ Those including discussions of classified information;
- ♦ Reviews of proprietary data submitted in support of Federal grant applications; and
- ♦ Deliberations involving considerations of personnel privacy.



**A** *dvisory committees have played an important rôle in shaping programs and policies of the Federal Government from the earliest days of the Republic. Since President George Washington sought the advice of such a committee during the Whiskey Rebellion of 1794, the contributions made by these groups have been impressive and diverse.*

*Today, an average of 1,000 advisory committees with more than 50,000 members advise the President and the Executive Branch on such issues as the disposal of high-level nuclear waste, the depletion of atmospheric ozone, the national fight against Acquired Immune Deficiency Syndrome (AIDS), and on efforts to rid the Nation of illegal drugs or to improve schools, highways, and housing, and on other major programs.*



# Federal Register

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Thursday,  
July 19, 2001

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**Part II**

**General Services  
Administration**

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**41 CFR Parts 101-6 and 102-3  
Federal Advisory Committee Management;  
Final Rule**

## GENERAL SERVICES ADMINISTRATION

### 41 CFR Parts 101-6 and 102-3

[FPMR Amendment A-57]

RIN 3090-AG49

### Federal Advisory Committee Management

AGENCY: Office of Governmentwide  
Policy, GSA.

ACTION: Final rule.

**SUMMARY:** The General Services Administration (GSA) is revising Federal Property Management Regulations (FPMR) coverage on Federal advisory committee management and moving it into the Federal Management Regulation (FMR). A cross-reference is added to the FPMR to direct readers to the coverage in the FMR. The FMR coverage is written in plain language to provide agencies with updated regulatory material that is easy to read and understand. This action is necessary due to legislative and policy changes that have occurred, and judicial decisions that have been issued since the regulation was last updated. It is based also on suggestions for improvement from other Federal agencies and interested parties, and clarifies how the regulation applies or does not apply to certain situations.

**EFFECTIVE DATE:** August 20, 2001.

**FOR FURTHER INFORMATION CONTACT:** Charles F. Howton, Deputy Director, Committee Management Secretariat (202) 273-3561, or electronically at the following Internet address: [charles.howton@gsa.gov](mailto:charles.howton@gsa.gov).

#### SUPPLEMENTARY INFORMATION:

##### A. Background

GSA's authority for administering the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. (also referred to as "the Act"), is contained in section 7 of the Act and Executive Order 12024 (42 FR 61445; 3 CFR 1977 Comp., p. 158). Under Executive Order 12024, the President delegated to the Administrator of General Services all of the functions vested in the President by the Act. GSA's responsibilities for administering the Act have been delegated to the Associate Administrator for Governmentwide Policy and to the Director of the Committee Management Secretariat.

In a previous issue of the *Federal Register* (62 FR 31550, June 10, 1997), GSA published an Advance Notice of Proposed Rulemaking (ANPRM) and requested comments. Additional

comments were requested from the Interagency Committee on Federal Advisory Committee Management. GSA requested comments on: (1) Suggested issues to address; (2) specific recommendations about changes needed in the current Federal Advisory Committee Management subpart; (3) examples of situations where FACA was either a useful tool or a hindrance to public involvement; and (4) GSA's intent to include illustrative examples and principles. On January 14, 2000, GSA published a proposed rule in the *Federal Register* (65 FR 2504) and requested comments over a 60-day period ending on March 14, 2000. All comments received were considered in drafting this final rule.

This final rule provides administrative and interpretive guidelines and management controls for Federal agencies to implement the provisions of the Act, and is intended to improve the management and operation of Federal advisory committees in the executive branch.

##### B. Discussion of Comments

Twenty-six commenters responded to the invitation for comments, including twenty commenters from the executive branch and six commenters from non-Federal sources. Of the twenty comments received from executive branch sources, three comments were submitted by subcomponents of a Federal department or agency. A total of fifty-nine specific issues or recommendations were identified, of which seven were either fully supportive of the proposed rule or concerned typographical errors. GSA addressed the disposition of the remaining fifty-two issues or recommendations as follows:

##### *The Final Rule Should Include More Guidance Relating to the Management of Advisory Committees, Including the Impact of Other Statutes and Issues on Day-to-Day Operations*

Several commenters provided suggestions regarding the addition of guidance on issues that, although not addressed by the Act, likely would improve the management of advisory committees. For example, one commenter suggested that the final rule include a provision to encourage agencies to streamline their internal processes and procedures in order to expedite the establishment of advisory committees. Other commenters requested that GSA: (1) Provide more detailed provisions on the compensation of advisory committee members and staff, and experts and consultants; (2) expand the range of

information required to be listed in an advisory committee's charter to include the nature and disposition of records; and (3) incorporate new regulatory requirements for increasing access to advisory committee information, such as providing meeting notices, minutes, and reports via the Internet.

In response to these recommendations, GSA expanded the number of examples included within the final rule to illustrate how other statutes or issues potentially could affect the effective management of advisory committees.

In addition, GSA reorganized the examples and other guidance into appendices to avoid any ambiguity between actions required by the Act and the final rule, and actions that are suggested only within an implementing framework of "best practices." In the final rule, a "Key Points and Principles" appendix appears at the end of each subpart to which it relates.

In applying the "best practices" offered in the appendices, users of the final rule should continue to examine the extent to which other factors, including agency-specific statutory provisions and internal agency procedures, may affect a specific advisory committee or program. Although GSA believes that the examples contained in the appendices to the final rule represent the circumstances most commonly encountered during the day-to-day management of advisory committees, the listing is not exhaustive and must be supplemented based upon the unique requirements of the user.

##### *Provide Additional Guidance Regarding What Advisory Committees and Their Subcommittees Must Do To Comply With the Act*

Many commenters expressed concern over language contained in the preamble to the proposed rule relating to coverage of subcommittees under the Act. The preamble to the proposed rule noted that:

The applicability of the procedural requirements contained in FACA and this proposed rule to subcommittees of advisory committees has been clarified. GSA's current FACA regulation does not make clear that subcommittees reporting to a parent committee are not subject to FACA. Indeed, the regulation states just the opposite, providing that "[s]ubcommittees that do not function independently of the full or parent advisory committee" are subject to all requirements of FACA except the requirement for a charter. (See 41 CFR 101-6.1007(b)(3).) This provision is problematic for two reasons. First, it applies FACA more broadly than the statute itself requires. Second, it essentially creates a special type

of advisory committee that is subject to some, but not all of FACA's requirements, which has no foundation in the statute. Under FACA, a group is either an advisory committee subject to all of the statutory requirements, or it is not an advisory committee, and therefore not subject to any of its requirements. Because a subcommittee which reports to a parent committee is not an "advisory committee" under FACA, there is no legal basis for applying any of FACA's requirements to such a subcommittee.

In evaluating the comments received, GSA notes that there were no objections to the exclusions contained in § 102-3.185 of the proposed rule (now § 102-3.160 of the final rule), relating to "What activities of an advisory committee are not subject to the notice and open meeting requirements of the Act?" The exclusions in § 102-3.160 of the final rule continue to cover the types of activities routinely performed by subcommittees. By this reasoning GSA sought to bring into harmony these activities with those provisions in the proposed rule differentiating subcommittees reporting to a parent advisory committee from those reporting directly to a Federal officer or agency.

However, the preamble to the proposed rule did not explain and describe adequately the legal framework for GSA's decision to differentiate subcommittees that report only to a parent advisory committee more clearly from advisory committees that report directly to a Federal officer or agency. The Act defines the term "advisory committee" as "any committee, \* \* \* or any subcommittee or other subgroup thereof which is established or utilized by the President or an agency in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government". Under this definition, a subcommittee is an "advisory committee" subject to the Act if it provides advice to the President or a Federal officer or agency. Most subcommittees, however, report only to a parent advisory committee and it is the parent committee that is normally responsible for providing advice or recommendations to the Government. In this conventional scenario, the subcommittee is not subject to the Act because it is not providing advice to the Government.

Case law supports this conclusion. In *National Anti-Hunger Coalition v. Executive Committee*, 557 F.Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983), the question presented was whether the Act applied to task forces reporting to the Executive Committee of the President's Private Sector Survey on

Cost Control in the Federal Government. The task forces had no authority to make recommendations to agencies or to the President. Instead, their function was to do the "preliminary work of the survey, including fact-gathering, statistical evaluations, and the formulation of preliminary reports." (557 F.Supp. at 526). Although it was undisputed that the Executive Committee was subject to the Act, the court held that the Act did not apply to the task forces under the following reasoning:

There is no question that the task forces are intimately involved in the gathering of information about federal programs and the formulation of possible recommendations for consideration of the Committee. That is not enough to render them subject to the FACA. The Act itself applies only to committees "established or utilized by" the President or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies." The Act does not cover groups performing staff functions such as those performed by the so-called task forces. (557 F.Supp. at 529). (See also *Association of American Physicians and Surgeons v. Clinton*, 997 F.2d 898, 911-913 (D.C. Cir. 1993).)

GSA believes that as a result of this decision, subcommittees that report to a parent advisory committee generally are not subject to the Act. GSA also believes that subcommittees whose advice or recommendations are provided directly to a Federal officer or agency are subject to the Act. However, GSA further believes that this decision does not shield those subcommittees from coverage under the Act whose advice or recommendations are not subject to deliberation by their parent advisory committees.

From this reasoning, it is not permissible for parent advisory committees simply to "rubber-stamp" the advice or recommendations of their subcommittees, thereby depriving the public of its opportunity to know about, and participate contemporaneously in, an advisory committee's deliberations. Agencies are cautioned to avoid excluding the public from attending any meeting where a subcommittee develops advice or recommendations that are not expected to be reviewed and considered by the parent advisory committee before being submitted to a Federal officer or agency. These exclusions may run counter to the provisions of the Act that require contemporaneous access to the advisory committee deliberative process.

To address these issues more clearly, GSA strengthened language in the final rule by: (1) Adding a new § 102-3.35 that outlines policies relating to subcommittees; (2) clarifying language

in § 102-3.145 relating to subcommittee meetings; and (3) clarifying the examples contained in Appendix A to Subpart C.

#### *Correct and Clarify the Definition of "Utilized"*

Nine commenters recommended that GSA revise its definition of the term, "utilized" to conform to governing case law.

As noted by some of the commenters, the definition of the term "utilized" in § 102-3.30 of the proposed rule inadvertently misstated the applicable legal test. The proposed rule stated that a committee is "utilized within the meaning of the Act when the President or a Federal agency exercises actual management and control over its operation." This construction would require an agency both to have management of the committee and to exercise control over the committee before the committee can be deemed "utilized." The proper statement of the "utilized" test is whether an agency either has management of the committee or, in some fashion other than management, exercises control over the committee.

The controlling legal authority is *Washington Legal Foundation v. U. S. Sentencing Commission*, 17 F.3d 1446 (D.C. Cir. 1994). In that case, the appeals court gave structure to the U.S. Supreme Court's prior decision interpreting the term "utilized." (See *Public Citizen v. Department of Justice*, 491 U.S. 440 (1989).) The appeals court ruled that the word "utilized" indicates "something along the lines of actual management or control of the advisory committee." (17 F.3d at 1450). The operative criterion for determining whether a committee has sufficiently close ties to an agency in order to render it "utilized" is whether the agency has either *management* of the committee or exerts some other type of *control*, but not necessarily both.

Similarly, § 102-3.50(b) of the proposed rule (now § 102-3.185(b) of the final rule) used the phrase "actual management and control" with regard to section 15 of the Act. In explaining the relationship between Federal agencies and the National Academy of Sciences (NAS) and the National Academy of Public Administration (NAPA) covered by section 15 of the Act, § 102-3.50(b) of the proposed rule states that "[a]gencies must not manage or control the specific procedures adopted by each academy." However, committees covered by section 15 of the Act must be under *both* the actual management *and* the control of the academies, not that of a Federal agency. In this instance, the use of the conjunctive

word "and" is appropriate and indicates that the academies cannot relinquish either management or control of their committees to Federal agencies.

Accordingly, GSA revised the language contained in the final rule by changing *management and control* to *management or control* in the definition of the term "utilized," now in § 102-3.25 of the final rule, and in those instances in which it appears in the "Key Points and Principles" guidance in the appendices to the final rule.

*Clarify the Application of the Act to Agency Interactions With the Public*

Several commenters noted that Federal agencies are increasingly reliant on local communities, individual citizens, and interested parties to obtain information, advice, or recommendations on which to base decisions. They expressed concerns that: (1) Uncertainty about the scope of the Act creates a disincentive for Federal officers and agencies wishing to engage in public outreach; (2) the requirements of the Act are being interpreted differently within and among agencies; and (3) GSA's current regulations do not adequately differentiate between those groups and activities covered by the Act and others that are not. (See 41 CFR 101-6.10.)

GSA recognizes that the broad definition in the Act of an "advisory committee" might be interpreted to extend coverage by the Act to any gathering or two or more persons from whom the President or other Federal officers or agencies seek advice or recommendations. However, in the cases discussed above, the courts have rejected such a broad reading of "advisory committee." GSA believes that the sections in the final rule on definitions and on groups not covered by the Act, §§ 102-3.25 and 102-3.40, respectively, clarify the limits of the coverage by, or scope of, the Act when applied together.

Within this group of comments, GSA noted a consistent theme related to the need for more information regarding public participation tools and techniques that would allow for more collaboration that is not subject to the Act. Although advisory committees support Federal decisions in a variety of situations, GSA believes that the ability of agencies to interact with the public in numerous other ways is particularly important because advisory committees are only one method for agencies to obtain the views of the public for their programs. Federal agencies may engage in continuous collaboration using diverse, but complimentary, tools, techniques, and methods. Whether or

not a selected approach includes the use of advisory committees, the potential or perceived applicability of the Act must not prevent constructive collaboration from taking place. Agencies are encouraged to contact GSA concerning not only the use of Federal advisory committees, but also for information about alternative forms of public involvement.

In GSA's view, agencies have broad latitude to consult with the public using many different approaches that are not subject to the Act. Public consultation formats that generally fall outside of the scope of the Act include public meetings, information exchange forums, meetings initiated with or by non-governmental organizations, Federal participation on groups that are not established or utilized by the Government, and certain work products generated by contractors as a result of consultation with the public.

While FACA is not a public participation statute, it directly affects how the executive branch is held accountable for the use and management of Federal advisory committees as a major means of obtaining public involvement. Within this context, agencies wishing to consult with private individuals, non-governmental organizations, or with the public at large through other assemblages often must consider whether or not the Act applies to a given situation.

The number and range of scenarios presented by the commenters underscore the importance of presenting a clearer understanding of how advisory committees are established by Federal agencies or how the Government's relationship with groups not established within the meaning of the Act may nevertheless become subject to the Act if they are *utilized*. Based upon the comments received, the circumstances under which advisory committees are *established* within the executive branch appear to be well understood. Accordingly, GSA retained the language contained in § 102-3.30 of the proposed rule in § 102-3.25 of the final rule and throughout subpart B.

However, as noted in the above discussion of the proposed rule's treatment of the term "utilized," agencies must determine whether or not their relationship with a group created by non-Federal entities constitutes *actual management or control* within the meaning of the Act. To help agencies make this determination, GSA has included within the final rule several new examples illustrating the application of the *actual management or control* test to different situations.

These additions are contained in the "Key Points and Principles" guidance in Appendix A to Subpart A.

*Explain the Relationship Between Committees Established by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA) and the Act*

The Federal Advisory Committee Act Amendments of 1997, Public Law 105-153, December 17, 1997, established separate procedures for committees that are managed and controlled by NAS or NAPA. Subpart E of the final rule contains implementing instructions for the new section 15 of FACA.

*Clarify the Distinction Between Advisory Committees Subject to the Act and Operational Committees Not Covered by the Act*

Five commenters suggested that further guidance in the final rule is necessary to assist agencies in differentiating an operational committee not covered by the Act from one that performs primarily advisory functions and is, therefore, subject to the Act. GSA added guidance within Appendix A to Subpart A listing those characteristics generally associated with committees having primarily operational, as opposed to advisory, functions.

*Clarify the Applicability of the Act to Advisory Committee Meetings Conducted Through Electronic Means*

Four commenters supported GSA's language contained in the proposed rule extending the definition of "committee meeting" to meetings conducted in whole or part through electronic means. However, two commenters suggested additional clarifications, which GSA has adopted.

First, GSA slightly modified the definition of "committee meeting" contained in § 102-3.25 of the final rule to include a "gathering" of advisory committee members whether in person or through electronic means. This change was made to highlight coverage by the Act of both physical and "virtual" meetings conducted by such means as a teleconference, videoconference, the Internet, or other electronic medium.

Second, GSA amended the language contained in § 102-3.140 of the final rule to provide for adequate public access to advisory committee meetings that are conducted in whole or part through electronic means. This change complements existing policy covering advisory committee meetings that are held within a physical setting, such as a conference room, by ensuring that agencies adequately plan for public

participation by adding additional capability (such as a designated number of public call-in lines for a teleconference) to ensure access to committee deliberations.

*Provide Additional Guidance on Balanced Representation and Selection of Members*

One commenter expressed concern that the proposed rule did not contain sufficient guidance on balanced representation and the selection of members. GSA recognizes that the guidance contained in the proposed rule is limited to the language of the Act, but believes that the provisions of section 5(c) of the Act are broad enough to allow for agency discretion in determining advisory committee representation and membership relative to applicable statutes, Executive orders, and the needs of the agency responsible for the advisory committee.

However, GSA added a list of possible considerations within Appendix A to Subpart B that, while not comprehensive or universally applicable, may help in developing a plan for balancing an advisory committee's membership.

*Emphasize the Importance of Maximizing an Advisory Committee's Independent Judgment*

Five commenters offered various suggestions to address the requirement contained in section 5(b)(3) of the Act, which is intended to ensure that the work products of an advisory committee reflect the group's independent judgment.

Included among these suggestions were recommendations from the U.S. Office of Government Ethics (OGE) that GSA modify the language contained in § 102-3.155 of the proposed rule (now contained in Appendix A to Subpart C of the final rule) to clarify the applicability of conflict of interest statutes and other Federal ethics rules to advisory committee members. GSA adopted all of OGE's suggestions.

The remaining suggestions received concerned the appointment of advisory committee members, including a recommended change to § 102-3.155 of the proposed rule (now Appendix A to Subpart C) to clarify that: (1) An agency may appoint a member to an advisory committee based upon the recommendation of an organization to be represented; and (2) recommendations from an advisory committee may be a part of an agency's process to nominate new members. GSA adopted these changes and suggestions.

*Provide Additional Guidance on the Management of Federal Records*

GSA received suggestions from the National Archives and Records Administration (NARA) regarding three areas where additional guidance on records management issues could be useful. Specifically, NARA recommended that § 102-3.190 of the proposed rule: (1) Be expanded to include all recordkeeping requirements specified by the Act, not just those relating to advisory committee minutes; (2) include a statement that records should be scheduled for disposition before actual termination of the advisory committee; and (3) with regard to information that must be included within an advisory committee's charter, include a determination as to whether its records fall within the Presidential Records Act, 44 U.S.C. Chap 22.

GSA addressed these recommendations by expanding § 102-3.200 of the proposed rule (now Appendix A to Subpart D) to include additional guidance relating to records management and to highlight the applicability and importance of Federal recordkeeping statutes and policies to advisory committee operations. GSA decided to include this guidance within this appendix because the Act generally is silent on records management issues, with the exception of the responsibilities of the Committee Management Officer (CMO) in section 8(b)(2) of the Act.

Pursuant to the National Archives and Records Administration Act, 44 U.S.C. Chap. 21, the Archivist of the United States is responsible for records management in the Federal Government, including the issuance of regulations and guidance for records retention and disposition. The Archivist, working in conjunction with the agencies' Records Management Officers, also is responsible for identifying records that are appropriate for transfer to the permanent Archives of the United States and those that must be processed in accordance with the Presidential Records Act.

*Strengthen Provisions Relating to the Public's Access to Advisory Committee Records*

Two commenters suggested that the final rule contain more explicit guidance regarding the public's access to committee records under section 10(b) of the Act. In particular, the commenters recommended adding language describing the circumstances under which records may be withheld pursuant to the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552.

GSA believes that timely access to advisory committee records is an important element of the public access provisions of the Act and, therefore, agrees with these suggestions. GSA further believes that there are two separate, but equally important issues related to the availability of advisory committee records under section 10(b) of FACA: (1) The extent to which records may be protected from disclosure under FOIA; and (2) the extent to which agencies may require that requests for non-exempt records be processed under the request and review process established by section 552(a)(3) of FOIA.

Section 10(b) of the Act provides that:

Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

The purpose of section 10(b) of the Act is to provide for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend advisory committee meetings, ensures that interested parties have a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. Records covered by the exemptions set forth in section 552(b) of FOIA generally may be withheld. However, it should be noted that FOIA Exemption 5 generally cannot be used to withhold documents reflecting an advisory committee's internal deliberations.

An opinion of the Office of Legal Counsel, U.S. Department of Justice, 12 Op. O.L.C. 73, April 29, 1988, entitled "Disclosure of Advisory Committee Deliberative Materials," concludes that FOIA Exemption 5 "is not generally applicable to materials prepared by or for an advisory committee, but that it does extend to protect privileged documents delivered from the agency to an advisory committee." The opinion further states that:

This construction gives meaning to exemption 5 without vitiating Congress' enumeration of deliberative documents such as working papers and drafts as subject to disclosure. It is also supported by a close reading of exemption 5 itself. Because by its terms exemption 5 protects only inter-agency and intra-agency documents and because an advisory committee is not an agency, documents do not receive the protection of exemption 5 by virtue of the fact that they are prepared by an advisory committee. On

the other hand, documents prepared by an agency do not lose the protection of exemption 5 by virtue of the fact that they are delivered to an advisory committee.

In determining whether or not such records fall within these narrow exclusions, the OLC opinion provides that consideration should be given to determining whether or not section 10(b) of FACA is applicable in the first instance. As noted in the OLC opinion:

Section 10(b) itself applies only to materials made available to or prepared for or by an advisory committee established by statute or reorganization plan or established or utilized by the President or an agency. 5 U.S.C. app. I, 3(2), 10(b). Accordingly, in determining whether a document is to be disclosed the first issue is not whether it is subject to an exemption under 5 U.S.C. 552 but whether it meets this threshold definition.

In explaining this threshold determination of whether particular records are subject to the section 10(b) disclosure requirement, the OLC opinion states that:

The courts and this Office have construed the concept of advisory committees established or utilized by the President or an agency to preclude section 10(b)'s application to the work prepared by a staff member of an advisory committee or a staffing entity within an advisory committee, such as an independent task force limited to gathering information, or a subcommittee of the advisory committee that is not itself established or utilized by the President or agency, so long as the material was not used by the committee as a whole.

Although advisory committee records may be withheld under the provisions

of FOIA if there is a *reasonable expectation* that the records sought fall within the exemptions contained in section 552(b) of FOIA, agencies may not require members of the public or other interested parties to file requests for non-exempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA.

In *Food Chemical News v. Department of Health and Human Services*, 980 F.2d 1468, 299 U.S. App. DC 25, the appeals court held that:

Under section 10(b) of FACA an agency is generally obligated to make available for public inspection and copying all materials that were made available to or prepared for or by an advisory committee. Except with respect to those materials that the agency reasonably claims to be exempt from disclosure pursuant to FOIA, a member of the public need not request disclosure in order for FACA 10(b) materials to be made available. Thus, whenever practicable, all 10(b) materials must be available for public inspection and copying before or on the date of the advisory committee meeting to which they apply.

Accordingly, GSA included language within § 102-3.170 of the final rule describing the policy to be followed in implementing section 10(b) of the Act, and included additional guidance in Appendix A to Subpart D concerning the applicability of FOIA to records covered by section 10(b) of FACA.

*Improve the Organization of the Final Rule*

During the course of evaluating comments received from all sources,

GSA conducted a review of the proposed rule's general organization and structure for the purpose of achieving greater clarity and consistency in presentation. This effort led to a number of changes, such as redesignating the "Key Points and Principles" sections following each subpart as appendices. Other changes were made throughout the final rule to improve alignment between section headings and the material that follows. Similar changes were made within the appendices in order to improve the linkage between the examples or questions and the corresponding guidance.

In addition, GSA reorganized the final rule to redesignate subpart B as subpart E to improve the flow of information distinguishing Federal advisory committees subject to the Act from those committees created by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA) which, if not utilized by the executive branch, are not subject to the Act's provisions. Section numbers previously assigned in the proposed rule affected by the redesignation of subpart B as subpart E, subpart C as subpart B, subpart D as subpart C, and subpart E as subpart D have been changed accordingly.

**C. Technical and Procedural Comments**

The final rule incorporates several technical and procedural recommendations made by a range of commenters, particularly in the following sections or appendices:

Section/Appendix	Modification
102-3.60	Specific procedures for consulting with the Secretariat have been eliminated. GSA will issue separate guidance to agencies covering the administration of the consultation requirement.
Appendix A to Subpart B	Addition of guidance relating to the achievement of "balanced" advisory committee membership.
Appendix A to Subpart B	Addition of guidance covering the legal duration of the charter of an advisory committee required by statute where Congress authorizes the advisory committee for a period exceeding two years.
Appendix A to Subpart C	Addition of guidance addressing the designation of an alternate Designated Federal Officer (DFO).
102-3.130	All references to compensation limits imposed by the Act have been updated, and references to alternative similar agency compensation systems other than the General Schedule have been included.
102-3.130	All references to the word, "handicapped," have been replaced with the phrase, "with disabilities."
Appendix A to Subpart D	Addition of guidance regarding activities that are not subject to the notice and open meeting requirements of the Act.
102-3.165	The requirement for the completion of advisory committee meeting minutes now requires the DFO to ensure certification within the time limit specified.

**D. Consultation With Other Federal Agencies**

Pursuant to section 7(d) of the Act, the guidelines contained in this final

rule with respect to uniform fair rates of compensation for comparable services of members and staff of, and experts and consultants to advisory committees have

been established after consultation with the U.S. Office of Personnel Management (OPM).

Although not required by the Act, the guidelines contained in this final rule that refer to the applicability of conflict of interest statutes and other Federal ethics rules to advisory committee members have been established after consultation with the U.S. Office of Government Ethics (OGE).

Although not required by the Act, the guidelines contained in this final rule that relate to the management of advisory committee records have been established after consultation with the National Archives and Records Administration (NARA).

#### E. Executive Order 12866

GSA has determined that this final rule is a significant rule for the purposes of Executive Order 12866 of September 30, 1993.

#### F. Regulatory Flexibility Act

GSA has determined that this final rule will not have a significant economic impact on a substantial number of small entities (including small businesses, small organizational units, and small governmental jurisdictions) within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The rule does not impact small entities and applies only to Federal officers and agencies.

#### G. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

#### H. Small Business Regulatory Enforcement Fairness Act

This final rule is being submitted for Congressional review as prescribed under 5 U.S.C. 801.

#### List of Subjects in 41 CFR Parts 101-6 and 102-3

Advisory committees, Government property management.

Dated: July 5, 2001.

Stephen A. Perry,  
Administrator of General Services.

For the reasons set forth in the preamble, GSA amends 41 CFR chapters 101 and 102 as follows:

#### CHAPTER 101—[AMENDED]

#### PART 101-6—MISCELLANEOUS REGULATIONS

1. Subpart 101-6.10 is revised to read as follows:

#### Subpart 101-6.10—Federal Advisory Committee Management

Authority: Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)); sec. 7, 5 U.S.C., App.; and E.O. 12024, 3 CFR, 1977 Comp., p. 158.

§ 101-6.1001 Cross-reference to the Federal Management Regulation (FMR) (41 CFR chapter 102, parts 102-1 through 102-220).

For Federal advisory committee management information previously contained in this subpart, see FMR part 102-3 (41 CFR part 102-3).

#### CHAPTER 102—[AMENDED]

2. Part 102-3 is added to subchapter A of chapter 102 to read as follows:

#### PART 102-3—FEDERAL ADVISORY COMMITTEE MANAGEMENT

##### Subpart A—What Policies Apply To Advisory Committees Established Within the Executive Branch?

Sec.

102-3.5 What does this subpart cover and how does it apply?

102-3.10 What is the purpose of the Federal Advisory Committee Act?

102-3.15 Who are the intended users of this part?

102-3.20 How does this part meet the needs of its audience?

102-3.25 What definitions apply to this part?

102-3.30 What policies govern the use of advisory committees?

102-3.35 What policies govern the use of subcommittees?

102-3.40 What types of committees or groups are not covered by the Act and this part?

Appendix A to Subpart A of Part 102-3—Key Points and Principles

##### Subpart B—How Are Advisory Committees Established, Renewed, Reestablished, and Terminated?

102-3.45 What does this subpart cover and how does it apply?

102-3.50 What are the authorities for establishing advisory committees?

102-3.55 What rules apply to the duration of an advisory committee?

102-3.60 What procedures are required to establish, renew, or reestablish a discretionary advisory committee?

102-3.65 What are the public notification requirements for discretionary advisory committees?

102-3.70 What are the charter filing requirements?

102-3.75 What information must be included in the charter of an advisory committee?

102-3.80 How are minor charter amendments accomplished?

102-3.85 How are major charter amendments accomplished?

Appendix A to Subpart B of Part 102-3—Key Points and Principles

##### Subpart C—How Are Advisory Committees Managed?

102-3.90 What does this subpart cover and how does it apply?

102-3.95 What principles apply to the management of advisory committees?

102-3.100 What are the responsibilities and functions of GSA?

102-3.105 What are the responsibilities of an agency head?

102-3.110 What are the responsibilities of a chairperson of an independent Presidential advisory committee?

102-3.115 What are the responsibilities and functions of an agency Committee Management Officer (CMO)?

102-3.120 What are the responsibilities and functions of a Designated Federal Officer (DFO)?

102-3.125 How should agencies consider the roles of advisory committee members and staff?

102-3.130 What policies apply to the appointment, and compensation or reimbursement of advisory committee members, staff, and experts and consultants?

Appendix A to Subpart C of Part 102-3—Key Points and Principles

##### Subpart D—Advisory Committee Meeting and Recordkeeping Procedures

102-3.135 What does this subpart cover and how does it apply?

102-3.140 What policies apply to advisory committee meetings?

102-3.145 What policies apply to subcommittee meetings?

102-3.150 How are advisory committee meetings announced to the public?

102-3.155 How are advisory committee meetings closed to the public?

102-3.160 What activities of an advisory committee are not subject to the notice and open meeting requirements of the Act?

102-3.165 How are advisory committee meetings documented?

102-3.170 How does an interested party obtain access to advisory committee records?

102-3.175 What are the reporting and recordkeeping requirements for an advisory committee?

Appendix A to Subpart D of Part 102-3—Key Points and Principles

##### Subpart E—How Does This Subpart Apply to Advice or Recommendations Provided to Agencies by the National Academy of Sciences or the National Academy of Public Administration?

102-3.180 What does this subpart cover and how does it apply?

102-3.185 What does this subpart require agencies to do?

Appendix A to Subpart E of Part 102-3—Key Points and Principles

Authority: Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)); sec. 7, 5 U.S.C., App.; and E.O. 12024, 3 CFR, 1977 Comp., p. 158.

### Subpart A—What Policies Apply to Advisory Committees Established Within the Executive Branch?

#### § 102-3.5 What does this subpart cover and how does it apply?

This subpart provides the policy framework that must be used by agency heads in applying the Federal Advisory Committee Act (FACA), as amended (or "the Act"), 5 U.S.C., App., to advisory committees they establish and operate. In addition to listing key definitions underlying the interpretation of the Act, this subpart establishes the scope and applicability of the Act, and outlines specific exclusions from its coverage.

#### § 102-3.10 What is the purpose of the Federal Advisory Committee Act?

FACA governs the establishment, operation, and termination of advisory committees within the executive branch of the Federal Government. The Act defines what constitutes a Federal advisory committee and provides general procedures for the executive branch to follow for the operation of these advisory committees. In addition, the Act is designed to assure that the Congress and the public are kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees.

#### § 102-3.15 Who are the intended users of this part?

(a) The primary users of this Federal Advisory Committee Management part are:

- (1) Executive branch officials and others outside Government currently involved with an established advisory committee;
- (2) Executive branch officials who seek to establish or utilize an advisory committee;
- (3) Executive branch officials and others outside Government who have decided to pursue, or who are already engaged in, a form of public involvement or consultation and want to avoid inadvertently violating the Act; and
- (4) Field personnel of Federal agencies who are increasingly involved with the public as part of their efforts to increase collaboration and improve customer service.

(b) Other types of end-users of this part include individuals and organizations outside of the executive branch who seek to understand and interpret the Act, or are seeking additional guidance.

#### § 102-3.20 How does this part meet the needs of its audience?

This Federal Advisory Committee Management part meets the general and

specific needs of its audience by addressing the following issues and related topics:

(a) *Scope and applicability.* This part provides guidance on the threshold issue of what constitutes an advisory committee and clarifies the limits of coverage by the Act for the benefit of the intended users of this part.

(b) *Policies and guidelines.* This part defines the policies, establishes minimum requirements, and provides guidance to Federal officers and agencies for the establishment, operation, administration, and duration of advisory committees subject to the Act. This includes reporting requirements that keep Congress and the public informed of the number, purpose, membership, activities, benefits, and costs of these advisory committees. These requirements form the basis for implementing the Act at both the agency and Governmentwide levels.

(c) *Examples and principles.* This part provides summary-level key points and principles at the end of each subpart that provide more clarification on the role of Federal advisory committees in the larger context of public involvement in Federal decisions and activities. This includes a discussion of the applicability of the Act to different decisionmaking scenarios.

#### § 102-3.25 What definitions apply to this part?

The following definitions apply to this Federal Advisory Committee Management part:

*Act* means the Federal Advisory Committee Act, as amended, 5 U.S.C., App.

*Administrator* means the Administrator of General Services.

*Advisory committee* subject to the Act, except as specifically exempted by the Act or by other statutes, or as not covered by this part, means any committee, board, commission, council, conference, panel, task force, or other similar group, which is established by statute, or established or utilized by the President or by an agency official, for the purpose of obtaining advice or recommendations for the President or an agency official's responsibilities.

*Agency* has the same meaning as in 5 U.S.C. 551(1).

*Committee Management Officer ("CMO")*, means the individual designated by the agency head to implement the provisions of section 8(b) of the Act and any delegated responsibilities of the agency head under the Act.

*Committee Management Secretariat ("Secretariat")*, means the organization established pursuant to section 7(a) of the Act, which is responsible for all matters relating to advisory committees, and carries out the responsibilities of the Administrator under the Act and Executive Order 12024 (3 CFR, 1977 Comp., p. 158).

*Committee meeting* means any gathering of advisory committee members (whether in person or through electronic means) held with the approval of an agency for the purpose of deliberating on the substantive matters upon which the advisory committee provides advice or recommendations.

*Committee member* means an individual who serves by appointment or invitation on an advisory committee or subcommittee.

*Committee staff* means any Federal employee, private individual, or other party (whether under contract or not) who is not a committee member, and who serves in a support capacity to an advisory committee or subcommittee.

*Designated Federal Officer ("DFO")*, means an individual designated by the agency head, for each advisory committee for which the agency head is responsible, to implement the provisions of sections 10(e) and (f) of the Act and any advisory committee procedures of the agency under the control and supervision of the CMO.

*Discretionary advisory committee* means any advisory committee that is established under the authority of an agency head or authorized by statute. An advisory committee referenced in general (non-specific) authorizing language or Congressional committee report language is discretionary, and its establishment or termination is within the legal discretion of an agency head.

*Independent Presidential advisory committee* means any Presidential advisory committee not assigned by the Congress in law, or by President or the President's delegate, to an agency for administrative and other support.

*Non-discretionary advisory committee* means any advisory committee either required by statute or by Presidential directive. A *non-discretionary advisory committee* required by statute generally is identified specifically in a statute by name, purpose, or functions, and its establishment or termination is beyond the legal discretion of an agency head.

*Presidential advisory committee* means any advisory committee authorized by the Congress or directed by the President to advise the President.

*Subcommittee* means a group, generally not subject to the Act, that reports to an advisory committee and not directly to a Federal officer or

agency, whether or not its members are drawn in whole or in part from the parent advisory committee.

*Utilized* for the purposes of the Act, does not have its ordinary meaning. A committee that is not established by the Federal Government is *utilized* within the meaning of the Act when the President or a Federal office or agency exercises actual management or control over its operation.

**§ 102-3.30 What policies govern the use of advisory committees?**

The policies to be followed by Federal departments and agencies in establishing and operating advisory committees consistent with the Act are as follows:

(a) *Determination of need in the public interest.* A discretionary advisory committee may be established only when it is essential to the conduct of agency business and when the information to be obtained is not already available through another advisory committee or source within the Federal Government. Reasons for deciding that an advisory committee is needed may include whether:

(1) Advisory committee deliberations will result in the creation or elimination of (or change in) regulations, policies, or guidelines affecting agency business;

(2) The advisory committee will make recommendations resulting in significant improvements in service or reductions in cost; or

(3) The advisory committee's recommendations will provide an important additional perspective or viewpoint affecting agency operations.

(b) *Termination.* An advisory committee must be terminated when:

(1) The stated objectives of the committee have been accomplished;

(2) The subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's functions by another entity;

(3) The agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government;

(4) In the case of a discretionary advisory committee, upon the expiration of a period not to exceed two years, unless renewed;

(5) In the case of a non-discretionary advisory committee required by Presidential directive, upon the expiration of a period not to exceed two years, unless renewed by authority of the President; or

(6) In the case of a non-discretionary advisory committee required by statute, upon the expiration of the time explicitly specified in the statute, or implied by operation of the statute.

(c) *Balanced membership.* An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.

(d) *Open meetings.* Advisory committee meetings must be open to the public except where a closed or partially-closed meeting has been determined proper and consistent with the exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), as the basis for closure.

(e) *Advisory functions only.* The function of advisory committees is advisory only, unless specifically provided by statute or Presidential directive.

**§ 102-3.35 What policies govern the use of subcommittees?**

(a) In general, the requirements of the Act and the policies of this Federal Advisory Committee Management part do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency. However, this section does not preclude an agency from applying any provision of the Act and this part to any subcommittee of an advisory committee in any particular instance.

(b) The creation and operation of subcommittees must be approved by the agency establishing the parent advisory committee.

**§ 102-3.40 What types of committees or groups are not covered by the Act and this part?**

The following are examples of committees or groups that are not covered by the Act or this Federal Advisory Committee Management part:

(a) *Committees created by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA).* Any committee created by NAS or NAPA in accordance with section 15 of the Act, except as otherwise covered by subpart E of this part;

(b) *Advisory committees of the Central Intelligence Agency and the Federal Reserve System.* Any advisory committee established or utilized by the Central Intelligence Agency or the Federal Reserve System;

(c) *Committees exempted by statute.* Any committee specifically exempted from the Act by law;

(d) *Committees not actually managed or controlled by the executive branch.* Any committee or group created by non-Federal entities (such as a contractor or private organization), provided that these committees or groups are not actually managed or controlled by the executive branch;

(e) *Groups assembled to provide individual advice.* Any group that meets with a Federal official(s), including a public meeting, where advice is sought from the attendees on an individual basis and not from the group as a whole;

(f) *Groups assembled to exchange facts or information.* Any group that meets with a Federal official(s) for the purpose of exchanging facts or information;

(g) *Intergovernmental committees.* Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government and elected officers of State, local and tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities. However, the purpose of such a committee must be solely to exchange views, information, or advice relating to the management or implementation of Federal programs established pursuant to statute, that explicitly or inherently share intergovernmental responsibilities or administration (see guidelines issued by the Office of Management and Budget (OMB) on section 204(b) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1534(b), OMB Memorandum M-95-20, dated September 21, 1995, available from the Committee Management Secretariat (MC), General Services Administration, 1800 F Street, NW., Washington, DC 20405-0002);

(h) *Intragovernmental committees.* Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government;

(i) *Local civic groups.* Any local civic group whose primary function is that of rendering a public service with respect to a Federal program;

(j) *Groups established to advise State or local officials.* Any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies; and

(k) *Operational committees.* Any committee established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically authorized by statute or Presidential directive, such as making or implementing Government decisions or policy. A committee designated operational may be covered by the Act if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether a committee is primarily operational. If so, it does not fall under

the requirements of the Act and this part.

**Appendix A to Subpart A of Part 102-3—Key Points and Principles**

This appendix provides additional guidance in the form of answers to frequently

asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

**APPENDIX A TO SUBPART A**

Key points and principles	Section(s)	Question(s)	Guidance
<p>I. FACA applies to advisory committees that are either "established" or "utilized" by an agency.</p>	<p>102-3.25, 102-3.40(d), 102-3.40(f)</p>	<p>1. A local citizens group wants to meet with a Federal official(s) to help improve the condition of a forest's trails and quality of concessions. May the Government meet with the group without chartering the group under the Act?</p> <p>2. May an agency official attend meetings of external groups where advice may be offered to the Government during the course of discussions?</p> <p>3. May an agency official participate in meetings of groups or organizations as a member without chartering the group under the Act?</p> <p>4. Is the Act applicable to meetings between agency officials and their contractors, licensees, or other "private sector program partners?"</p>	<p>A. The answer to questions 1, 2, and 3 is yes, if the agency does not either "establish" or "utilize" (exercise "actual management or control" over) the group. (i) Although there is no precise legal definition of "actual management or control," the following factors may be used by an agency to determine whether or not a group is "utilized" within the meaning of the Act: (a) Does the agency manage or control the group's membership or otherwise determine its composition? (b) Does the agency manage or control the group's agenda? (c) Does the agency fund the group's activities? (ii) Answering "yes" to any or all of questions 1, 2, or 3 does not automatically mean the group is "utilized" within the meaning of the Act. However, an agency may need to reconsider the status of the group under the Act if the relationship in question essentially is indistinguishable from an advisory committee established by the agency.</p> <p>B. The answer to question 4 is no. Agencies often meet with contractors and licensees, individually and as a group, to discuss specific matters involving a contract's solicitation, issuance, and implementation, or an agency's efforts to ensure compliance with its regulations. Such interactions are not subject to the Act because these groups are not "established" or "utilized" for the purpose of obtaining advice or recommendations.</p>
<p>II. The development of consensus among all or some of the attendees at a public meeting or similar forum does not automatically invoke FACA.</p>	<p>102-3.25, 102-3.40(d), 102-3.40(f)</p>	<p>1. If, during a public meeting of the "town hall" type called by an agency, it appears that the audience is achieving consensus, or a common point of view, is this an indication that the meeting is subject to the Act and must be stopped?</p>	<p>A. No, the public meeting need not be stopped. (i) A group must either be "established" or "utilized" by the executive branch in order for the Act to apply. (ii) Public meetings represent a chance for individuals to voice their opinions and/or share information. In that sense, agencies do not either "establish" the assemblage of individuals as an advisory committee or "utilize" the attendees as an advisory committee because there are no elements of either "management" or "control" present or intended.</p>

## APPENDIX A TO SUBPART A—Continued

Key points and principles	Section(s)	Question(s)	Guidance
III. Meetings between a Federal official(s) and a collection of individuals where advice is sought from the attendees on an individual basis are not subject to the Act.	102-3.40(e)	<ol style="list-style-type: none"> <li>1. May an agency official meet with a number of persons collectively to obtain their individual views without violating the Act?</li> <li>2. Does the concept of an "individual" apply only to "natural persons?"</li> </ol>	<p>A. The answer to questions 1 and 2 is yes. The Act applies only where a group is established or utilized to provide advice or recommendations "as a group." (i) A mere assemblage or collection of individuals where the attendees are providing individual advice is not acting "as a group" under the Act. (ii) In this respect, "individual" is not limited to "natural persons." Where the group consists of representatives of various existing organizations, each representative individually may provide advice on behalf of that person's organization without violating the Act, if those organizations themselves are not "managed or controlled" by the agency.</p>
IV. Meetings between Federal, State, local, and tribal elected officials are not subject to the Act.	102-3.40(g)	<ol style="list-style-type: none"> <li>1. Is the exclusion from the Act covering elected officials of State, local, and tribal governments acting in their official capacities also applicable to associations of State officials?</li> </ol>	<p>A. Yes. The scope of activities covered by the exclusion from the Act for intergovernmental activities should be construed broadly to facilitate Federal/State/local/tribal discussions on shared intergovernmental program responsibilities or administration. Pursuant to a Presidential delegation, the Office of Management and Budget (OMB) issued guidelines for this exemption, authorized by section 204(b) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1534(b). (See OMB Memorandum M-95-20, dated September 21, 1995, published at 60 FR 50651 (September 29, 1995), and which is available from the Committee Management Secretariat (MC), General Services Administration, 1800 F Street, NW, Washington, DC 20405-0002).</p>
V. Advisory committees established under the Act may perform advisory functions only, unless authorized to perform "operational" duties by the Congress or by Presidential directive.	102-3.30(e), 102-3.40(k)	<ol style="list-style-type: none"> <li>1. Are "operational committees" subject to the Act, even if they may engage in some advisory activities?</li> </ol>	<p>A. No, so long as the operational functions performed by the committee constitute the "primary" mission of the committee. Only committees established or utilized by the executive branch in the interest of obtaining advice or recommendations are subject to the Act. However, without specific authorization by the Congress or direction by the President, Federal functions (decisionmaking or operations) cannot be delegated to, or assumed by, non-Federal individuals or entities.</p>

APPENDIX A TO SUBPART A—Continued

Key points and principles	Section(s)	Question(s)	Guidance
<p>VI. Committees authorized by the Congress in law or by Presidential directive to perform primarily "operational" functions are not subject to the Act.</p>	<p>102-3.40(k)</p>	<p>1. What characteristics are common to "operational committees?"                  2. A committee created by the Congress by statute is responsible, for example, for developing plans and events to commemorate the contributions of wildlife to the enjoyment of the Nation's parks. Part of the committee's role includes providing advice to certain Federal agencies as may be necessary to coordinate these events. Is this committee subject to FACA?</p>	<p>A. In answer to question 1, non-advisory, or "operational" committees generally have the following characteristics: (i) Specific functions and/or authorities provided by the Congress in law or by Presidential directive; (ii) The ability to make and implement traditionally governmental decisions; and (iii) The authority to perform specific tasks to implement a Federal program.                  B. Agencies are responsible for determining whether or not a committee primarily provides advice or recommendations and is, therefore, subject to the Act, or is primarily "operational" and not covered by FACA.                  C. The answer to question 2 is no. The committee is not subject to the Act because: (i) Its functions are to plan and implement specific tasks; (ii) The committee has been granted the express authority by the Congress to perform its statutorily required functions; and (iii) Its incidental role of providing advice to other Federal agencies is secondary to its primarily operational role of planning and implementing specific tasks and performing statutory functions.</p>

**Subpart B—How Are Advisory Committees Established, Renewed, Reestablished, and Terminated?**

**§ 102-3.45 What does this subpart cover and how does it apply?**

Requirements for establishing and terminating advisory committees vary depending on the establishing entity and the source of authority for the advisory committee. This subpart covers the procedures associated with the establishment, renewal, reestablishment, and termination of advisory committees. These procedures include consulting with the Secretariat, preparing and filing an advisory committee charter, publishing notice in the *Federal Register*, and amending an advisory committee charter.

**§ 102-3.50 What are the authorities for establishing advisory committees?**

FACA identifies four sources of authority for establishing an advisory committee:

(a) *Required by statute.* By law where the Congress establishes an advisory committee, or specifically directs the President or an agency to establish it (*non-discretionary*);

(b) *Presidential authority.* By Executive order of the President or other Presidential directive (*non-discretionary*);

(c) *Authorized by statute.* By law where the Congress authorizes, but does

not direct the President or an agency to establish it (*discretionary*); or

(d) *Agency authority.* By an agency under general authority in title 5 of the United States Code or under other general agency-authorizing statutes (*discretionary*).

**§ 102-3.55 What rules apply to the duration of an advisory committee?**

(a) An advisory committee automatically terminates two years after its date of establishment unless:

(1) The statutory authority used to establish the advisory committee provides a different duration;

(2) The President or agency head determines that the advisory committee has fulfilled the purpose for which it was established and terminates the advisory committee earlier;

(3) The President or agency head determines that the advisory committee is no longer carrying out the purpose for which it was established and terminates the advisory committee earlier; or

(4) The President or agency head renews the committee not later than two years after its date of establishment in accordance with § 102-3.60. If an advisory committee needed by the President or an agency terminates because it was not renewed in a timely manner, or if the advisory committee has been terminated under the provisions of § 102-3.30(b), it can be

reestablished in accordance with § 102-3.60.

(b) When an advisory committee terminates, the agency shall notify the Secretariat of the effective date of the termination.

**§ 102-3.60 What procedures are required to establish, renew, or reestablish a discretionary advisory committee?**

(a) *Consult with the Secretariat.* Before establishing, renewing, or reestablishing a discretionary advisory committee and filing the charter as addressed later in § 102-3.70, the agency head must consult with the Secretariat. As part of this consultation, agency heads are encouraged to engage in constructive dialogue with the Secretariat. With a full understanding of the background and purpose behind the proposed advisory committee, the Secretariat may share its knowledge and experience with the agency on how best to make use of the proposed advisory committee, suggest alternate methods of attaining its purpose that the agency may wish to consider, or inform the agency of a pre-existing advisory committee performing similar functions.

(b) *Include required information in the consultation.* Consultations covering the establishment, renewal, and reestablishment of advisory committees must, as a minimum, contain the following information:

(1) *Explanation of need.* An explanation stating why the advisory committee is essential to the conduct of agency business and in the public interest;

(2) *Lack of duplication of resources.* An explanation stating why the advisory committee's functions cannot be performed by the agency, another existing committee, or other means such as a public hearing; and

(3) *Fairly balanced membership.* A description of the agency's plan to attain fairly balanced membership. The plan will ensure 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 advisory committee. Advisory committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed.

**§ 102-3.65 What are the public notification requirements for discretionary advisory committees?**

A notice to the public in the Federal Register is required when a discretionary advisory committee is established, renewed, or reestablished.

(a) *Procedure.* Upon receiving notice from the Secretariat that its review is complete in accordance with § 102-3.60(a), the agency must publish a notice in the Federal Register announcing that the advisory committee is being established, renewed, or reestablished. For the establishment of a new advisory committee, the notice also must describe the nature and purpose of the advisory committee and affirm that the advisory committee is necessary and in the public interest.

(b) *Time required for notices.* Notices of establishment and reestablishment of advisory committees must appear at least 15 calendar days before the charter is filed, except that the Secretariat may approve less than 15 calendar days when requested by the agency for good cause. This requirement for advance notice does not apply to advisory committee renewals, notices of which may be published concurrently with the filing of the charter.

**§ 102-3.70 What are the charter filing requirements?**

No advisory committee may meet or take any action until a charter has been filed by the Committee Management Officer (CMO) designated in accordance with section 8(b) of the Act, or by another agency official designated by the agency head.

(a) *Requirement for discretionary advisory committees.* To establish, renew, or reestablish a discretionary advisory committee, a charter must be filed with:

(1) The agency head;

(2) The standing committees of the Senate and the House of Representatives having legislative jurisdiction of the agency, the date of filing with which constitutes the official date of establishment for the advisory committee;

(3) The Library of Congress, Anglo-American Acquisitions Division, Government Documents Section, Federal Advisory Committee Desk, 101 Independence Avenue, SE., Washington, DC 20540-4172; and

(4) The Secretariat, indicating the date the charter was filed in accordance with paragraph (a)(2) of this section.

(b) *Requirement for non-discretionary advisory committees.* Charter filing requirements for non-discretionary advisory committees are the same as those in paragraph (a) of this section, except the date of establishment for a Presidential advisory committee is the date the charter is filed with the Secretariat.

(c) *Requirement for subcommittees that report directly to the Government.* Subcommittees that report directly to a Federal officer or agency must comply with this subpart and include in a charter the information required by § 102-3.75.

**§ 102-3.75 What information must be included in the charter of an advisory committee?**

(a) *Purpose and contents of an advisory committee charter.* An advisory committee charter is intended to provide a description of an advisory committee's mission, goals, and objectives. It also provides a basis for evaluating an advisory committee's progress and effectiveness. The charter must contain the following information:

- (1) The advisory committee's official designation;
- (2) The objectives and the scope of the advisory committee's activity;
- (3) The period of time necessary to carry out the advisory committee's purpose(s);
- (4) The agency or Federal officer to whom the advisory committee reports;
- (5) The agency responsible for providing the necessary support to the advisory committee;
- (6) A description of the duties for which the advisory committee is responsible and specification of the authority for any non-advisory functions;

(7) The estimated annual costs to operate the advisory committee in dollars and person years;

(8) The estimated number and frequency of the advisory committee's meetings;

(9) The planned termination date, if less than two years from the date of establishment of the advisory committee;

(10) The name of the President's delegate, agency, or organization responsible for fulfilling the reporting requirements of section 6(b) of the Act, if appropriate; and

(11) The date the charter is filed in accordance with § 102-3.70.

(b) The provisions of paragraphs (a)(1) through (11) of this section apply to all subcommittees that report directly to a Federal officer or agency.

**§ 102-3.80 How are minor charter amendments accomplished?**

(a) *Responsibility and limitation.* The agency head is responsible for amending the charter of an advisory committee. Amendments may be either minor or major. The procedures for making changes and filing amended charters will depend upon the authority basis for the advisory committee. Amending any existing advisory committee charter does not constitute renewal of the advisory committee under § 102-3.60.

(i) *Procedures for minor amendments.* To make a minor amendment to an advisory committee charter, such as changing the name of the advisory committee or modifying the estimated number or frequency of meetings, the following procedures must be followed:

(1) *Non-discretionary advisory committees.* The agency head must ensure that any minor technical changes made to current charters are consistent with the relevant authority. When the Congress by law, or the President by Executive order, changes the authorizing language that has been the basis for establishing an advisory committee, the agency head or the chairperson of an independent Presidential advisory committee must amend those sections of the current charter affected by the new statute or Executive order, and file the amended charter as specified in § 102-3.70.

(2) *Discretionary advisory committees.* The charter of a discretionary advisory committee may be amended when an agency head determines that technical provisions of a filed charter are inaccurate, or specific provisions have changed or become obsolete with the passing of time, and that these amendments will not alter the advisory committee's objectives and scope

substantially. The agency must amend the charter language as necessary and file the amended charter as specified in § 102-3.70.

**§ 102-3.85 How are major charter amendments accomplished?**

Procedures for making major amendments to advisory committee charters, such as substantial changes in

objectives and **scope, duties, and estimated costs, are the same as in § 102-3.80, except that for discretionary advisory committees an agency must:**

- (a) Consult with the Secretariat on the amended language, and explain the purpose of the changes and why they are necessary; and
- (b) File the amended charter as specified in § 102-3.70.

**Appendix A to Subpart B of Part 102-3—Key Points and Principles**

This appendix provides additional guidance in the form of answers to frequently asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

**APPENDIX A TO SUBPART B**

Key points and principles	Section(s)	Question(s)	Guidance
I. Agency heads must consult with the Secretariat prior to establishing a discretionary advisory committee.	102-3.60, 102-3.115 .....	1. Can an agency head delegate to the Committee Management Officer (CMO) responsibility for consulting with the Secretariat regarding the establishment, renewal, or reestablishment of discretionary advisory committees?	A. Yes. Many administrative functions performed to implement the Act may be delegated. However, those functions related to approving the final establishment, renewal, or reestablishment of discretionary advisory committees are reserved for the agency head. Each agency CMO should assure that their internal processes for managing advisory committees include appropriate certifications by the agency head.
II. Agency heads are responsible for complying with the Act, including determining which discretionary advisory committees should be established and renewed.	102-3.60(a), 102-3.105 .....	1. Who retains final authority for establishing or renewing a discretionary advisory committee?	A. Although agency heads retain final authority for establishing or renewing discretionary advisory committees, these decisions should be consistent with §102-3.105(e) and reflect consultation with the Secretariat under § 102-3.60(a).
III. An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.	102-3.30(c), 102-3.60(b)(3) ..	1. What factors should be considered in achieving a "balanced" advisory committee membership?	A. The composition of an advisory committee's membership will depend upon several factors, including: (i) The advisory committee's mission; (ii) The geographic, ethnic, social, economic, or scientific impact of the advisory committee's recommendations; (iii) The types of specific perspectives required, for example, such as those of consumers, technical experts, the public at-large, academia, business, or other sectors; (iv) The need to obtain divergent points of view on the issues before the advisory committee; and (v) The relevance of State, local, or tribal governments to the development of the advisory committee's recommendations.
IV. Charters for advisory committees required by statute must be filed every two years regardless of the duration provided in the statute.	102-3.70(b) .....	1. If an advisory committee's duration exceeds two years, must a charter be filed with the Congress and GSA every two years?	A. Yes. Section 14(b)(2) of the Act provides that: Any advisory committee established by an Act of Congress shall file a charter upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

**Subpart C—How Are Advisory Committees Managed?**

**§ 102-3.90 What does this subpart cover and how does it apply?**

This subpart outlines specific responsibilities and functions to be carried out by the General Services Administration (GSA), the agency head, the Committee Management Officer (CMO), and the Designated Federal Officer (DFO) under the Act.

**§ 102-3.95 What principles apply to the management of advisory committees?**

Agencies are encouraged to apply the following principles to the management of their advisory committees:

- (a) *Provide adequate support.* Before establishing an advisory committee, agencies should identify requirements and assure that adequate resources are available to support anticipated activities. Considerations related to support include office space, necessary supplies and equipment, Federal staff

support, and access to key decisionmakers.

- (b) *Focus on mission.* Advisory committee members and staff should be fully aware of the advisory committee's mission, limitations, if any, on its duties, and the agency's goals and objectives. In general, the more specific an advisory committee's tasks and the more focused its activities are, the higher the likelihood will be that the advisory committee will fulfill its mission.

(c) *Follow plans and procedures.* Advisory committee members and their agency sponsors should work together to assure that a plan and necessary procedures covering implementation are in place to support an advisory committee's mission. In particular, agencies should be clear regarding what functions an advisory committee can perform legally and those that it cannot perform.

(d) *Practice openness.* In addition to achieving the minimum standards of public access established by the Act and this part, agencies should seek to be as inclusive as possible. For example, agencies may wish to explore the use of the Internet to post advisory committee information and seek broader input from the public.

(e) *Seek feedback.* Agencies continually should seek feedback from advisory committee members and the public regarding the effectiveness of the advisory committee's activities. At regular intervals, agencies should communicate to the members how their advice has affected agency programs and decisionmaking.

**§ 102-3.100 What are the responsibilities and functions of GSA?**

(a) Under section 7 of the Act, the General Services Administration (GSA) prepares regulations on Federal advisory committees to be prescribed by the Administrator of General Services, issues other administrative guidelines and management controls for advisory committees, and assists other agencies in implementing and interpreting the Act. Responsibility for these activities has been delegated by the Administrator to the GSA Committee Management Secretariat.

(b) The Secretariat carries out its responsibilities by:

- (1) Conducting an annual comprehensive review of Governmentwide advisory committee accomplishments, costs, benefits, and other indicators to measure performance;
- (2) Developing and distributing Governmentwide training regarding the Act and related statutes and principles;
- (3) Supporting the Interagency Committee on Federal Advisory Committee Management in its efforts to improve compliance with the Act;
- (4) Designing and maintaining a Governmentwide shared Internet-based system to facilitate collection and use of information required by the Act;
- (5) Identifying performance measures that may be used to evaluate advisory committee accomplishments; and
- (6) Providing recommendations for transmittal by the Administrator to the

Congress and the President regarding proposals to improve accomplishment of the objectives of the Act.

**§ 102-3.105 What are the responsibilities of an agency head?**

The head of each agency that establishes or utilizes one or more advisory committees must:

- (a) Comply with the Act and this Federal Advisory Committee Management part;
- (b) Issue administrative guidelines and management controls that apply to all of the agency's advisory committees subject to the Act;
- (c) Designate a Committee Management Officer (CMO);
- (d) Provide a written determination stating the reasons for closing any advisory committee meeting to the public, in whole or in part, in accordance with the exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), as the basis for closure;
- (e) Review, at least annually, the need to continue each existing advisory committee, consistent with the public interest and the purpose or functions of each advisory committee;
- (f) Determine that rates of compensation for members (if they are paid for their services) and staff of, and experts and consultants to advisory committees are justified and that levels of agency support are adequate;
- (g) Develop procedures to assure that the advice or recommendations of advisory committees 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;
- (h) Assure that the interests and affiliations of advisory committee members are reviewed for conformance with applicable conflict of interest statutes, regulations issued by the U.S. Office of Government Ethics (OGE) including any supplemental agency requirements, and other Federal ethics rules;
- (i) Designate a Designated Federal Officer (DFO) for each advisory committee and its subcommittees; and
- (j) Provide the opportunity for reasonable participation by the public in advisory committee activities, subject to § 102-3.140 and the agency's guidelines.

**§ 102-3.110 What are the responsibilities of a chairperson of an independent Presidential advisory committee?**

The chairperson of an independent Presidential advisory committee must:

- (a) Comply with the Act and this Federal Advisory Committee Management part;

(b) Consult with the Secretariat concerning the designation of a Committee Management Officer (CMO) and Designated Federal Officer (DFO); and

(c) Consult with the Secretariat in advance regarding any proposal to close any meeting in whole or in part.

**§ 102-3.115 What are the responsibilities and functions of an agency Committee Management Officer (CMO)?**

In addition to implementing the provisions of section 8(b) of the Act, the CMO will carry out all responsibilities delegated by the agency head. The CMO also should ensure that sections 10(b), 12(a), and 13 of the Act are implemented by the agency to provide for appropriate recordkeeping. Records to be kept by the CMO include, but are not limited to:

- (a) *Charter and membership documentation.* A set of filed charters for each advisory committee and membership lists for each advisory committee and subcommittee;
- (b) *Annual comprehensive review.* Copies of the information provided as the agency's portion of the annual comprehensive review of Federal advisory committees, prepared according to § 102-3.175(b);
- (c) *Agency guidelines.* Agency guidelines maintained and updated on committee management operations and procedures; and
- (d) *Closed meeting determinations.* Agency determinations to close or partially close advisory committee meetings required by § 102-3.105.

**§ 102-3.120 What are the responsibilities and functions of a Designated Federal Officer (DFO)?**

The agency head or, in the case of an independent Presidential advisory committee, the Secretariat, must designate a Federal officer or employee who must be either full-time or permanent part-time, to be the DFO for each advisory committee and its subcommittees, who must:

- (a) Approve or call the meeting of the advisory committee or subcommittee;
- (b) Approve the agenda, except that this requirement does not apply to a Presidential advisory committee;
- (c) Attend the meetings;
- (d) Adjourn any meeting when he or she determines it to be in the public interest; and
- (e) Chair the meeting when so directed by the agency head.

**§ 102-3.125 How should agencies consider the roles of advisory committee members and staff?**

FACA does not assign any specific responsibilities to members of advisory

committees and staff, although both perform critical roles in achieving the goals and objectives assigned to advisory committees. Agency heads, Committee Management Officers (CMOs), and Designated Federal Officers (DFOs) should consider the distinctions between these roles and how they relate to each other in the development of agency guidelines implementing the Act and this Federal Advisory Committee Management part. In general, these guidelines should reflect:

(a) *Clear operating procedures.* Clear operating procedures should provide for the conduct of advisory committee meetings and other activities, and specify the relationship among the advisory committee members, the DFO, and advisory committee or agency staff;

(b) *Agency operating policies.* In addition to compliance with the Act, advisory committee members and staff may be required to adhere to additional agency operating policies; and

(c) *Other applicable statutes.* Other agency-specific statutes and regulations may affect the agency's advisory committees directly or indirectly. Agencies should ensure that advisory committee members and staff understand these requirements.

**§ 102-3.130 What policies apply to the appointment, and compensation or reimbursement of advisory committee members, staff, and experts and consultants?**

In developing guidelines to implement the Act and this Federal Advisory Committee Management part at the agency level, agency heads must address the following issues concerning advisory committee member and staff appointments, and considerations with respect to uniform fair rates of compensation for comparable services, or expense reimbursement of members, staff, and experts and consultants:

(a) *Appointment and terms of advisory committee members.* Unless otherwise provided by statute, Presidential directive, or other establishment authority, advisory committee members serve at the pleasure of the appointing or inviting authority. Membership terms are at the sole discretion of the appointing or inviting authority.

(b) *Compensation guidelines.* Each agency head must establish uniform compensation guidelines for members and staff of, and experts and consultants to an advisory committee.

(c) *Compensation of advisory committee members not required.* Nothing in this subpart requires an agency head to provide compensation to

any member of an advisory committee, unless otherwise required by a specific statute.

(d) *Compensation of advisory committee members.* When an agency has authority to set pay administratively for advisory committee members, it may establish appropriate rates of pay (including any applicable locality pay authorized by the President's Pay Agent under 5 U.S.C. 5304(h)), not to exceed the rate for level IV of the Executive Schedule under 5 U.S.C. 5315, unless a higher rate expressly is allowed by another statute. However, the agency head personally must authorize a rate of basic pay in excess of the maximum rate of basic pay established for the General Schedule under 5 U.S.C. 5332, or alternative similar agency compensation system. This maximum rate includes any applicable locality payment under 5 U.S.C. 5304. The agency may pay advisory committee members on either an hourly or a daily rate basis. The agency may not provide additional compensation in any form, such as bonuses or premium pay.

(e) *Compensation of staff.* When an agency has authority to set pay administratively for advisory committee staff, it may establish appropriate rates of pay (including any applicable locality pay authorized by the President's Pay Agent under 5 U.S.C. 5304(h)), not to exceed the rate for level IV of the Executive Schedule under 5 U.S.C. 5315, unless a higher rate expressly is allowed by another statute. However, the agency head personally must authorize a rate of basic pay in excess of the maximum rate of basic pay established for the General Schedule under 5 U.S.C. 5332, or alternative similar agency compensation system. This maximum rate includes any applicable locality payment under 5 U.S.C. 5304. The agency must pay advisory committee staff on an hourly rate basis. The agency may provide additional compensation, such as bonuses or premium pay, so long as aggregate compensation paid in a calendar year does not exceed the rate for level IV of the Executive Schedule, with appropriate proration for a partial calendar year.

(f) *Other compensation considerations.* In establishing rates of pay for advisory committee members and staff, the agency must comply with any applicable statutes, Executive orders, regulations, or administrative guidelines. In determining an appropriate rate of basic pay for advisory committee members and staff, an agency must give consideration to the significance, scope, and technical complexity of the matters with which

the advisory committee is concerned, and the qualifications required for the work involved. The agency also should take into account the rates of pay applicable to Federal employees who have duties that are similar in terms of difficulty and responsibility. An agency may establish rates of pay for advisory committee staff based on the pay these persons would receive if they were covered by the General Schedule in 5 U.S.C. Chapter 51 and Chapter 53, subchapter III, or by an alternative similar agency compensation system.

(g) *Compensation of experts and consultants.* Whether or not an agency has other authority to appoint and compensate advisory committee members or staff, it also may employ experts and consultants under 5 U.S.C. 3109 to perform work for an advisory committee. Compensation of experts and consultants may not exceed the maximum rate of basic pay established for the General Schedule under 5 U.S.C. 5332 (that is, the GS-15, step 10 rate, excluding locality pay or any other supplement), unless a higher rate expressly is allowed by another statute. The appointment and compensation of experts and consultants by an agency must be in conformance with applicable regulations issued by the U. S. Office of Personnel Management (OPM) (See 5 CFR part 304.).

(h) *Federal employees assigned to an advisory committee.* Any advisory committee member or staff person who is a Federal employee when assigned duties to an advisory committee remains covered during the assignment by the compensation system that currently applies to that employee, unless that person's current Federal appointment is terminated. Any staff person who is a Federal employee must serve with the knowledge of the Designated Federal Officer (DFO) for the advisory committee to which that person is assigned duties, and the approval of the employee's direct supervisor.

(i) *Other appointment considerations.* An individual who is appointed as an advisory committee member or staff person immediately following termination of another Federal appointment with a full-time work schedule may receive compensation at the rate applicable to the former appointment, if otherwise allowed by applicable law (without regard to the limitations on pay established in paragraphs (d) and (e) of this section). Any advisory committee staff person who is not a current Federal employee serving under an assignment must be appointed in accordance with applicable agency procedures, and in consultation with the DFO and the

members of the advisory committee involved.

(j) *Gratuitous services.* In the absence of any special limitations applicable to a specific agency, nothing in this subpart prevents an agency from accepting the gratuitous services of an advisory committee member or staff person who is not a Federal employee, or expert or consultant, who agrees in advance and in writing to serve without compensation.

(k) *Travel expenses.* Advisory committee members and staff, while engaged in the performance of their

duties away from their homes or regular places of business, may be allowed reimbursement for travel expenses, including per diem in lieu of subsistence as authorized by 5 U.S.C. 5703, for persons employed intermittently in the Government service.

(l) *Services for advisory committee members with disabilities.* While performing advisory committee duties, an advisory committee member with disabilities may be provided services by a personal assistant for employees with disabilities, if the member qualifies as

an individual with disabilities as provided in section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, and does not otherwise qualify for assistance under 5 U.S.C. 3102 by reason of being a Federal employee.

**Appendix A to Subpart C of Part 102-3—Key Points and Principles**

This appendix provides additional guidance in the form of answers to frequently asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

**APPENDIX A TO SUBPART C**

Key points and principles	Section	Question(s)	Guidance
I. FACA does not specify the manner in which advisory committee members and staff must be appointed.	102-3.105, 102-3.130(a)	1. Does the appointment of an advisory committee member necessarily result in a lengthy process?	A. No. Each agency head may specify those policies and procedures, consistent with the Act and this part, or other specific authorizing statute, governing the appointment of advisory committee members and staff. B. Some factors that affect how long the appointment process takes include: (i) Solicitation of nominations; (ii) Conflict of interest clearances; (iii) Security or background evaluations; (iv) Availability of candidates; and (v) Other statutory or administrative requirements. C. In addition, the extent to which agency heads have delegated responsibility for selecting members varies from agency to agency and may become an important factor in the time it takes to finalize the advisory committee's membership.
II. Agency heads retain the final authority for selecting advisory committee members, unless otherwise provided for by a specific statute or Presidential directive.	102-3.130(a)	1. Can an agency head select for membership on an advisory committee from among nominations submitted by an organization? 2. If so, can different persons represent the organization at different meetings?	A. The answer to question 1 is yes. Organizations may propose for membership individuals to represent them on an advisory committee. However, the agency head establishing the advisory committee, or other appointing authority, retains the final authority for selecting all members. B. The answer to question 2 also is yes. Alternates may represent an appointed member with the approval of the establishing agency, where the agency head is the appointing authority.
III. An agency may compensate advisory committee members and staff, and also employ experts and consultants.	102-3.130(d), 102-3.130(g), 102-3.130(e)	1. May members and staff be compensated for their service or duties on an advisory committee? 2. Are the guidelines the same for compensating both members and staff? 3. May experts and consultants be employed to perform other advisory committee work?	A. The answer to question 1 is yes. (i) However, FACA limits compensation for advisory committee members and staff to the rate for level IV of the Executive Schedule, unless higher rates expressly are allowed by other statutes. (ii) Although FACA provides for compensation guidelines, the Act does not require an agency to compensate its advisory committee members.

## APPENDIX A TO SUBPART C—Continued

Key points and principles	Section	Question(s)	Guidance
			<p>B. The answer to question 2 is no. The guidelines for compensating members and staff are similar, but not identical. For example, the differences are that: (i) An agency "may" pay members on either an hourly or a daily rate basis, and "may not" provide additional compensation in any form, such as bonuses or premium pay; while (ii) An agency "must" pay staff on an hourly rate basis only, and "may" provide additional compensation, so long as aggregate compensation paid in a calendar year does not exceed the rate for level IV of the Executive Schedule, with appropriate proration for a partial calendar year.</p> <p>C. The answer to question 3 is yes. Other work not part of the duties of advisory committee members or staff may be performed by experts and consultants. For additional guidance on the employment of experts and consultants, agencies should consult the applicable regulations issued by the U. S. Office of Personnel Management (OPM). (See 5 CFR part 304.)</p>
<p>IV. Agency heads are responsible for ensuring that the interests and affiliations of advisory committee members are reviewed for conformance with applicable conflict of interest statutes and other Federal ethics rules..</p>	<p>102-3.105(h) .....</p>	<p>1. Are all advisory committee members subject to conflict of interest statutes and other Federal ethics rules? 2. Who should be consulted for guidance on the proper application of Federal ethics rules to advisory committee members?</p>	<p>A. The answer to question 1 is no. Whether an advisory committee member is subject to Federal ethics rules is dependent on the member's status. The determination of a member's status on an advisory committee is largely a personnel classification matter for the appointing agency. Most advisory committee members will serve either as a "representative" or a "special Government employee" (SGE), based on the role the member will play. In general, SGEs are covered by regulations issued by the U. S. Office of Government Ethics (OGE) and certain conflict of interest statutes, while representatives are not subject to these ethics requirements.</p> <p>B. The answer to question 2 is the agency's Designated Agency Ethics Official (DAEO), who should be consulted prior to appointing members to an advisory committee in order to apply Federal ethics rules properly.</p>
<p>V. An agency head may delegate responsibility for appointing a Committee Management Officer (CMO) or Designated Federal Officer (DFO); however, there may be only one CMO for each agency..</p>	<p>102-3.105(c), 102-3.105(i) .....</p>	<p>1. Must an agency's CMO and each advisory committee DFO be appointed by the agency head?</p>	<p>A. The answer to question 1 is no. The agency head may delegate responsibility for appointing the CMO and DFOs. However, these appointments, including alternate selections, should be documented consistent with the agency's policies and procedures.</p>

## APPENDIX A TO SUBPART C—Continued

Key points and principles	Section	Question(s)	Guidance
VI. FACA is the principal statute pertaining to advisory committees. However, other statutes may impact their use and operations..	102-3.125(c) .....	<p>2. May an agency have more than one CMO?</p> <p>1. Do other statutes or regulations affect the way an agency carries out its advisory committee management program?</p>	<p>B. The answer to question 2 also is no. The functions of the CMO are specified in the Act and include oversight responsibility for all advisory committees within the agency. Accordingly, only one CMO may be appointed to perform these functions. The agency may, however, create additional positions, including those in its sub-components, which are subordinate to the CMO's agencywide responsibilities and functions.</p> <p>A. Yes. While the Act provides a general framework for managing advisory committees Governmentwide, other factors may affect how advisory committees are managed. These include: (i) The statutory or Presidential authority used to establish an advisory committee; (ii) A statutory limitation placed on an agency regarding its annual expenditures for advisory committees; (iii) Presidential or agency management directives; (iv) The applicability of conflict of interest statutes and other Federal ethics rules; (v) Agency regulations affecting advisory committees; and (vi) Other requirements imposed by statute or regulation on an agency or its programs, such as those governing the employment of experts and consultants or the management of Federal records.</p>

#### Subpart D—Advisory Committee Meeting and Recordkeeping Procedures

##### § 102-3.135 What does this subpart cover and how does it apply?

This subpart establishes policies and procedures relating to meetings and other activities undertaken by advisory committees and their subcommittees. This subpart also outlines what records must be kept by Federal agencies and what other documentation, including advisory committee minutes and reports, must be prepared and made available to the public.

##### § 102-3.140 What policies apply to advisory committee meetings?

The agency head, or the chairperson of an independent Presidential advisory committee, must ensure that:

(a) Each advisory committee meeting is held at a reasonable time and in a manner or place reasonably accessible to the public, to include facilities that are readily accessible to and usable by persons with disabilities, consistent with the goals of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794;

(b) The meeting room or other forum selected is sufficient to accommodate advisory committee members, advisory committee or agency staff, and a

reasonable number of interested members of the public;

(c) Any member of the public is permitted to file a written statement with the advisory committee;

(d) Any member of the public may speak to or otherwise address the advisory committee if the agency's guidelines so permit; and

(e) Any advisory committee meeting conducted in whole or part by a teleconference, videoconference, the Internet, or other electronic medium meets the requirements of this subpart.

##### § 102-3.145 What policies apply to subcommittee meetings?

If a subcommittee makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory committee, then the subcommittee's meetings must be conducted in accordance with all openness requirements of this subpart.

##### § 102-3.150 How are advisory committee meetings announced to the public?

(a) A notice in the Federal Register must be published at least 15 calendar days prior to an advisory committee meeting, which includes:

(1) The name of the advisory committee (or subcommittee, if applicable);

(2) The time, date, place, and purpose of the meeting;

(3) A summary of the agenda, and/or topics to be discussed;

(4) A statement whether all or part of the meeting is open to the public or closed; if the meeting is closed state the reasons why, citing the specific exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), as the basis for closure; and

(5) The name and telephone number of the Designated Federal Officer (DFO) or other responsible agency official who may be contacted for additional information concerning the meeting.

(b) In exceptional circumstances, the agency or an independent Presidential advisory committee may give less than 15 calendar days notice, provided that the reasons for doing so are included in the advisory committee meeting notice published in the Federal Register.

##### § 102-3.155 How are advisory committee meetings closed to the public?

To close all or part of an advisory committee meeting, the Designated Federal Officer (DFO) must:

(a) Obtain prior approval. Submit a request to the agency head, or in the case of an independent Presidential

advisory committee, the Secretariat, citing the specific exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), that justify the closure. The request must provide the agency head or the Secretariat sufficient time (generally, 30 calendar days) to review the matter in order to make a determination before publication of the meeting notice required by § 102-3.150.

(b) *Seek General Counsel review.* The General Counsel of the agency or, in the case of an independent Presidential advisory committee, the General Counsel of GSA should review all requests to close meetings.

(c) *Obtain agency determination.* If the agency head, or in the case of an independent Presidential advisory committee, the Secretariat, finds that the request is consistent with the provisions in the Government in the Sunshine Act and FACA, the appropriate agency official must issue a determination that all or part of the meeting be closed.

(d) *Assure public access to determination.* The agency head or the chairperson of an independent Presidential advisory committee must make a copy of the determination available to the public upon request.

**§ 102-3.160 What activities of an advisory committee are not subject to the notice and open meeting requirements of the Act?**

The following activities of an advisory committee are excluded from the procedural requirements contained in this subpart:

(a) *Preparatory work.* Meetings of two or more advisory 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; and

(b) *Administrative work.* Meetings of two or more advisory committee or subcommittee members convened solely to discuss administrative matters of the advisory committee or to receive administrative information from a Federal officer or agency.

**§ 102-3.165 How are advisory committee meetings documented?**

(a) The agency head or, in the case of an independent Presidential advisory committee, the chairperson must ensure that detailed minutes of each advisory committee meeting, including one that is closed or partially closed to the public, are kept. The chairperson of each advisory committee must certify the accuracy of all minutes of advisory committee meetings.

(b) The minutes must include:

(1) The time, date, and place of the advisory committee meeting;

(2) A list of the persons who were present at the meeting, including advisory committee members and staff, agency employees, and members of the public who presented oral or written statements;

(3) An accurate description of each matter discussed and the resolution, if any, made by the advisory committee regarding such matter; and

(4) Copies of each report or other document received, issued, or approved by the advisory committee at the meeting.

(c) The Designated Federal Officer (DFO) must ensure that minutes are certified within 90 calendar days of the meeting to which they relate.

**§ 102-3.170 How does an interested party obtain access to advisory committee records?**

Timely access to advisory committee records is an important element of the public access requirements of the Act. Section 10(b) of the Act provides for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. Although advisory committee records may be withheld under the provisions of the Freedom of Information Act (FOIA), as amended, if there is a *reasonable expectation* that the records sought fall within the exemptions contained in section 552(b) of FOIA, agencies may not require members of the public or other interested parties to file requests for non-exempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA.

**§ 102-3.175 What are the reporting and recordkeeping requirements for an advisory committee?**

(a) *Presidential advisory committee follow-up report.* Within one year after a Presidential advisory committee has submitted a public report to the President, a follow-up report required by section 6(b) of the Act must be prepared and transmitted to the Congress detailing the disposition of the advisory committee's recommendations. The Secretariat shall assure that these reports are prepared and transmitted to the Congress as directed by the President, either by the President's delegate, by the agency responsible for providing support to a Presidential advisory committee, or by the responsible agency or organization designated in the charter of the

Presidential advisory committee pursuant to § 102-3.75(a)(10). In performing this function, GSA may solicit the assistance of the President's delegate, the Office of Management and Budget (OMB), or the responsible agency Committee Management Officer (CMO), as appropriate. Reports shall be consistent with specific guidance provided periodically by the Secretariat.

(b) *Annual comprehensive review of Federal advisory committees.* To conduct an annual comprehensive review of each advisory committee as specified in section 7(b) of the Act, GSA requires Federal agencies to report information on each advisory committee for which a charter has been filed in accordance with § 102-3.70, and which is in existence during any part of a Federal fiscal year. Committee Management Officers (CMOs), Designated Federal Officers (DFOs), and other responsible agency officials will provide this information by data filed electronically with GSA on a fiscal year basis, using a Governmentwide shared Internet-based system that GSA maintains. This information shall be consistent with specific guidance provided periodically by the Secretariat. The preparation of these electronic submissions by agencies has been assigned interagency report control number (IRCN) 0304-GSA-AN.

(c) *Annual report of closed or partially-closed meetings.* In accordance with section 10(d) of the Act, advisory committees holding closed or partially-closed meetings must issue reports at least annually, setting forth a summary of activities and such related matters as would be informative to the public consistent with the policy of 5 U.S.C. 552(b).

(d) *Advisory committee reports.* Subject to 5 U.S.C. 552, 8 copies of each report made by an advisory committee, including any report of closed or partially-closed meetings as specified in paragraph (c) of this section and, where appropriate, background papers prepared by experts or consultants, must be filed with the Library of Congress as required by section 13 of the Act for public inspection and use at the location specified § 102-3.70(a)(3).

(e) *Advisory committee records.* Official records generated by or for an advisory committee must be retained for the duration of the advisory committee. Upon termination of the advisory committee, the records must be processed in accordance with the Federal Records Act (FRA), 44 U.S.C. Chapters 21, 29-33, and regulations issued by the National Archives and Records Administration (NARA) (see 36 CFR parts 1220, 1222, 1228, and 1234),

or in accordance with the Presidential Records Act (PRA), 44 U.S.C. Chapter 22.

**Appendix A to Subpart D of Part 102-3—Key Points and Principles**

This appendix provides additional guidance in the form of answers to frequently

asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

**APPENDIX A TO SUBPART D**

Key points and principles	Section(s)	Question(s)	Guidance
I. With some exceptions, advisory committee meetings are open to the public.	102-3.140, 102-3.145(a), 102-3.155.	1. Must all advisory committee and subcommittee meetings be open to the public?	A. No. Advisory committee meetings may be closed when appropriate, in accordance with the exemption(s) for closure contained in the Government in the Sunshine Act, 5 U.S.C. 552b(c). (i) Subcommittees that report to a parent advisory committee, and not directly to a Federal officer or agency, are not required to open their meetings to the public or comply with the procedures in the Act for announcing meetings. (ii) However, agencies are cautioned to avoid excluding the public from attending any meeting where a subcommittee develops advice or recommendations that are not expected to be reviewed and considered by the parent advisory committee before being submitted to a Federal officer or agency. These exclusions may run counter to the provisions of the Act requiring contemporaneous access to the advisory committee deliberative process.
II. Notices must be published in the Federal Register announcing advisory committee meetings.	102-3.150 .....	1. Can agencies publish a single Federal Register notice announcing multiple advisory committee meetings?	A. Yes, agencies may publish a single notice announcing multiple meetings so long as these notices contain all of the information required by § 102-3.150. (i) "Blanket notices" should not announce meetings so far in advance as to prevent the public from adequately being informed of an advisory committee's schedule. (ii) An agency's Office of General Counsel should be consulted where these notices include meetings that are either closed or partially closed to the public.

APPENDIX A TO SUBPART D—Continued

Key points and principles	Section(s)	Question(s)	Guidance
<p>III. Although certain advisory committee records may be withheld under the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552, agencies may not require the use of FOIA procedures for records available under section 10(b) of FACA.</p>	<p>102-3.170 .....</p>	<p>1. May an agency require the use of its internal FOIA procedures for access to advisory committee records that are not exempt from release under FOIA?</p>	<p>A. No. Section 10(b) of FACA provides that: Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist. (i) The purpose of section 10(b) of the Act is to provide for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend advisory committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. (ii) Although advisory committee records may be withheld under the provisions of FOIA if there is a reasonable expectation that the records sought fall within the exemptions contained in section 552(b) of FOIA, agencies may not require members of the public or other interested parties to file requests for non-exempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA. (iii) Records covered by the exemptions set forth in section 552(b) of FOIA may be withheld. An opinion of the Office of Legal Counsel (OLC), U.S. Department of Justice concludes that: FACA requires disclosure of written advisory committee documents, including predecisional materials such as drafts, working papers, and studies. The disclosure exemption available to agencies under exemption 5 of FOIA for predecisional documents and other privileged materials is narrowly limited in the context of FACA to privileged "inter-agency or intra-agency" documents prepared by an agency and transmitted to an advisory committee. The language of the FACA statute and its legislative history support this restrictive application of exemption 5 to requests for public access to advisory committee documents. Moreover, since an advisory committee is not itself an agency, this construction is supported by the express language of exemption 5 which applies only to inter-agency or intra-agency materials. (iv) Agencies first should determine, however, whether or not records being sought by the public fall within the scope of FACA in general, and section 10(b) of the Act in particular, prior to applying the available exemptions under FOIA. (See OLC Opinion 12 Op. O.L.C. 73, dated April 29, 1988, which is available from the Committee Management Secretariat (MC), General Services Administration, 1800 F Street, NW., Washington, DC 20405-0002.)</p>

APPENDIX A TO SUBPART D—Continued

Key points and principles	Section(s)	Question(s)	Guidance
<p>IV. Advisory committee records must be managed in accordance with the Federal Records Act (FRA), 44 U.S.C. Chapters 21, 29–33, and regulations issued by the National Archives and Records Administration (NARA) (see 36 CFR parts 1220, 1222, 1228, and 1234), or the Presidential Records Act (PRA), 44 U.S.C. Chapter 22.</p>	<p>102–175(e) .....</p>	<p>1. How must advisory committee records be treated and preserved?</p>	<p>A. In order to ensure proper records management, the Committee Management Officer (CMO), Designated Federal Officer (DFO), or other representative of the advisory committee, in coordination with the agency's Records Management Officer, should clarify upon the establishment of the advisory committee whether its records will be managed in accordance with the FRA or the PRA.</p> <p>B. Official records generated by or for an advisory committee must be retained for the duration of the advisory committee. Responsible agency officials are encouraged to contact their agency's Records Management Officer or NARA as soon as possible after the establishment of the advisory committee to receive guidance on how to establish effective records management practices. Upon termination of the advisory committee, the records must be processed in accordance with the FRA and regulations issued by NARA, or in accordance with the PRA.</p> <p>C. The CMO, DFO, or other representative of an advisory committee governed by the FRA, in coordination with the agency's Records Management Officer, must contact NARA in sufficient time to review the process for submitting any necessary disposition schedules of the advisory committee's records upon termination. In order to ensure the proper disposition of the advisory committee's records, disposition schedules need to be submitted to NARA no later than 6 months before the termination of the advisory committee.</p> <p>D. For Presidential advisory committees governed by the PRA, the CMO, DFO, or other representative of the advisory committee should consult with the White House Counsel on the preservation of any records subject to the PRA, and may also confer with NARA officials.</p>

**Subpart E—How Does This Subpart Apply to Advice or Recommendations Provided to Agencies by the National Academy of Sciences or the National Academy of Public Administration?**

**§ 102–3.180** What does this subpart cover and how does it apply?

This subpart provides guidance to agencies on compliance with section 15 of the Act. Section 15 establishes requirements that apply only in connection with a funding or other written agreement involving an agency's use of advice or recommendations provided to the agency by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA), if such advice or recommendations were developed by use of a committee created by either academy. For purposes of this subpart,

NAS also includes the National Academy of Engineering, the Institute of Medicine, and the National Research Council. Except with respect to NAS committees that were the subject of judicial actions filed before December 17, 1997, no part of the Act other than section 15 applies to any committee created by NAS or NAPA.

**§ 102–3.185** What does this subpart require agencies to do?

(a) *Section 15 requirements.* An agency may not use any advice or recommendation provided to an agency by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA) under an agreement between the agency and an academy, if such advice or recommendation was developed by use of a committee created by either academy, unless:

(1) The committee was not subject to any actual management or control by an agency or officer of the Federal Government; and

(2) In the case of NAS, the academy certifies that it has complied substantially with the requirements of section 15(b) of the Act; or

(3) In the case of NAPA, the academy certifies that it has complied substantially with the requirements of sections 15(b) (1), (2), and (5) of the Act.

(b) *No agency management or control.* Agencies must not manage or control the specific procedures adopted by each academy to comply with the requirements of section 15 of the Act that are applicable to that academy. In addition, however, any committee created and used by an academy in the development of any advice or recommendation to be provided by the

academy to an agency must be subject to both actual management and control by that academy and not by the agency.

(c) *Funding agreements.* Agencies may enter into contracts, grants, and cooperative agreements with NAS or NAPA that are consistent with the requirements of this subpart to obtain advice or recommendations from such academy. These funding agreements require, and agencies may rely upon, a written certification by an authorized

representative of the academy provided to the agency upon delivery to the agency of each report containing advice or recommendations required under the agreement that:

(1) The academy has adopted policies and procedures that comply with the applicable requirements of section 15 of the Act; and

(2) To the best of the authorized representative's knowledge and belief, these policies and procedures

substantially have been complied with in performing the work required under the agreement.

**Appendix A to Subpart E of Part 102-3—Key Points and Principles**

This appendix provides additional guidance in the form of answers to frequently asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

APPENDIX A TO SUBPART E

Key points and principles	Section(s)	Question(s)	Guidance
I. Section 15 of the Act allows the National Academy of Sciences (NAS) and the National Academy of Public Administration (NAPA) to adopt separate procedures for complying with FACA.	102-3.185(a) .....	1. May agencies rely upon an academy certification regarding compliance with section 15 of the Act if different policies and procedures are adopted by NAS and NAPA?	A. Yes. NAS and NAPA are completely separate organizations. Each is independently chartered by the Congress for different purposes, and Congress has recognized that the two organizations are structured and operate differently. Agencies should defer to the discretion of each academy to adopt policies and procedures that will enable it to comply substantially with the provisions of section 15 of the Act that apply to that academy.
II. Section 15 of the Act allows agencies to enter into funding agreements with NAS and NAPA without the academies' committees being "managed" or "controlled".	102-3.185(c) .....	1. Can an agency enter into a funding agreement with an academy which provides for the preparation of one or more academy reports containing advice or recommendations to the agency, to be developed by the academy by use of a committee created by the academy, without subjecting an academy to "actual management or control" by the agency?	A. Yes, if the members of the committee are selected by the academy and if the committee's meetings, deliberations, and the preparation of reports are all controlled by the academy. Under these circumstances, neither the existence of the funding agreement nor the fact that it contemplates use by the academy of an academy committee would constitute actual management or control of the committee by the agency.

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Former OFPP Administrator under former President Bush. Developed government-wide policies affecting service contracts, among them performance-based contracting – a key area cited by SARA for review by the Panel -- past performance and management oversight. Consultant to major contracting agencies on contract reform, contributor to Government Executive, member of National Academy of Public Administration.

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Expert in congressional oversight and legislation regarding acquisition policy and management, primary drafter of Federal Acquisition Streamlining Act, extensive experience as Senate Armed Services Committee staff member specializing in oversight of DOD acquisition management.

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Responsible for primary training institution for Federal acquisition workforce and on Board of Directors for National Contract Management Association. Retired Brigadier General, former program director and project manager, procurement director and contracting officer, knows government acquisition from all perspectives.

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Extensive experience in government contract law from both government and private sectors, including as a trial attorney.

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The senior acquisition executive responsible for implementing NASA's acquisition program, including all the areas called out in SARA, and a member of the SARA-mandated Chief Acquisition Officers Council, in charge of the Human Capital Working Group.

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Responsible for the \$30 billion Federal Supply Service program, provides expertise regarding all aspects of government-wide acquisition contracts, a key area identified by SARA for review by the Panel.

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**AN ETHICS GUIDE FOR**  
**ADVISORY COMMITTEE MEMBERS**  
**AT THE OFFICE OF MANAGEMENT AND BUDGET,**  
**EXECUTIVE OFFICE OF THE PRESIDENT.**

At the Office of Management and Budget (OMB), we are fortunate to have experts from outside of the Government to provide advice as members of advisory committees. This guide will assist you to identify potential ethical issues as you begin your service on an OMB advisory committee. It is important that you understand potential conflicts of interest and other ethics issues that may arise from your appointment to an OMB advisory committee. This guidance briefly summarizes the statutes and regulations that are most likely to affect you.

**1. Where Can I Get Advice?**

The OMB General Counsel's Office is available to provide advice on any ethics question you may have, many of which may be answered in a telephone call or by e-mail. We are here to help and, if you have any questions at all during your service on an advisory committee, you are encouraged to contact Mr. Stuart Bender, OMB Ethics Officer, in the General Counsel's Office at (202) 395-7533, fax (202) 395-3108, or e-mail at [Stuart\\_Bender@omb.eop.gov](mailto:Stuart_Bender@omb.eop.gov).

**2. What is a Special Government Employee?**

In OMB, members of advisory committees may be appointed as Special Government Employees (SGEs). It is important to note that as an SGE, you will essentially become a Federal employee at those times you are attending committee meetings and are involved in conducting official work for the committee. This means that upon such appointment, you will assume the responsibilities, obligations, and restrictions that are part of Federal public service. Because SGEs are not full-time Federal employees, several of these restrictions apply to you only in limited circumstances.

Service as an SGE may be compensated or uncompensated, but it is always temporary. In fact, you should not serve for more than 130 days during any period of 365 consecutive days. This 130-day period is an aggregate of all your Federal SGE service, not just your appointment at OMB. For example, it includes any days you have served as an SGE in other Federal agencies. If you have served in other Federal agencies within the last year, please advise the OMB Ethics Officer, so that you do not exceed the 130-day period of appointment.

### 3. Financial Disclosure

You were required to file a financial disclosure report as part of the vetting process prior to your appointment. The purpose of financial disclosure is to protect you from violating any of the criminal conflict of interest statutes, discussed below, and to ensure the public and OMB that your advice is free from any real or perceived conflicts of interest. **It is your responsibility to update the OMB Ethics Officer about any new financial interests that have not been previously disclosed on your financial disclosure report.**

### 4. Conflict of Interest Statutes

You are required to comply with various criminal statutes while you are an SGE. These statutes are codified at 18 U.S.C. 201, 203, 205, 207, and 208, and are divided into the following subject areas: (a) financial conflicts of interest; (b) representational activities; and (c) limitations on representation after you leave the Government.

#### **a.) Financial Conflicts of Interest and Recusals (Disqualifications)**

A conflict of interest occurs when a Federal employee, who has a financial interest in a particular matter, takes some official government action that has a direct and predictable affect on that financial interest.

The main financial conflict of interest statute, 18 U.S.C. 208(a), prohibits you from participating personally and substantially in any particular matter that affects your financial interests, as well as the financial interests of your spouse, minor child, general partner, an organization in which you serve as an officer, director, trustee, general partner, or employee, or an organization with which you are negotiating or with which you have an arrangement for prospective employment. The primary reason you are required to disclose your financial interests is to alert the OMB Ethics Officer to any potential conflict of interest prior to your participation in a particular matter involving an entity in which you have a financial interest. **As noted above, you are under an obligation to promptly inform the Ethics Officer if you obtain subsequent new financial interests after you filed your financial disclosure report.**

Generally, OMB advisory committees address broad policy matters, not particular matters. This greatly reduces the potential for ethical conflicts of interest. However, occasionally, due to their financial interests, some committee members appointed from the private sector may have an actual or potential conflict of interest arising with respect to certain areas such as government procurement. For those members, a conflict of interest waiver may be issued by OMB, in accordance with Section 208(b)(3) and the implementing Office of Government Ethics regulations. The waiver permits a committee member to participate in any particular matter of general applicability where the disqualifying financial interest will not have a special or distinct effect on the member's financial interests. Even with such a waiver, however, those members must still promptly

recuse (disqualify) themselves from participating personally and substantially on any particular matter in their committee work that would affect their financial interests. If an SGE had a financial interest in any of these companies, even with a waiver, the SGE would need to recuse themselves from participating in a committee discussion or vote on such matter to avoid a conflict of interest. Since waivers are complex legal documents, you should seek specific advice from the OMB Ethics Officer.

If at any time during your service on the advisory committee, you become aware of a financial conflict of interest, you must immediately disqualify yourself from acting in a governmental capacity in the particular matter and immediately notify the OMB Ethics Officer.

**(i). Requirement to Avoid the Appearance of a Conflict of Interest**

Although you are prohibited by 18 U.S.C. 208(a) from participating in committee matters in which you would have a direct effect on your financial interests, there may be other circumstances in which your participation in a particular matter involving specific parties, while not a violation of Section 208(a), would raise an appearance of a conflict of interest. In such a situation, a question could be raised regarding your impartiality in a particular matter. The ethics regulations require you to avoid any situation which could create the appearance of a conflict of interest. The standard is whether a reasonable person with knowledge of the relevant facts to question your impartiality. If you are unsure whether a situation could create the appearance of the loss of impartiality, you should promptly contact the OMB Ethics Officer to determine the appropriate steps to be taken.

**(ii). Acceptance of Gifts from Outside Sources**

Any gift given to you because of your service on the advisory committee will raise concerns and may be prohibited. 5 C.F.R. 2635.202. You may, however, properly accept gifts given to you because of your personal, outside business, or employment relationships. There are other exceptions, but since they are often fact specific, you should consult the Ethics Officer before accepting any gifts that may have been provided because of your service on the committee.

**(iii). Foreign Gifts and Decorations Act**

During the period of your appointment as an SGE, you may not accept a gift above a minimum value (\$305 in 2005) from a foreign government or an international organization. This prohibition applies to gifts offered to you by foreign governments even if such gifts have no nexus to your Government appointment. The restriction also extends to such gifts given to your spouse and dependents.

**b.) Representational Activities**

Two statutes, 18 U.S.C. §§ 203 and 205, prohibit Federal employees, including SGEs, from acting as an agent or attorney for private entities before any agency or court, respectively, of the Executive or Judicial Branches. Section 203 (c) prohibits compensated representation while section 205 prohibits even uncompensated representations by SGEs.

For SGEs, Sections 203 (c) and 205 (c) prohibit representational services only in any particular matter involving a specific party:

- (1) in which you have participated personally and substantially as a SGE; or
- (2) which is pending before OMB and you served as an SGE for more than 60 days during the immediately preceding 365 days.

Representational services include written or oral communications as well as physical appearances made on behalf of someone else with the intent to influence or persuade the Government. Examples of such matters include applications for Federal funding and pending investigations.

**(i). Providing Expert Testimony**

If, during your service on the Committee as an SGE, you are asked to testify, as an expert witness, in a judicial or administrative proceeding where the United States is a party or has a direct and substantial interest, you may only do so on behalf of the United States, unless you have received prior written authorization from the OMB General Counsel.

Similarly, you may not serve, except on behalf of the United States, as an expert witness, with or without compensation, in any proceeding before a Federal court or agency in which OMB is a party or has a direct and substantial interest, unless you have received prior written authorization from the OMB General Counsel.

**(ii). Lobbying Activities**

While the time you spend performing your official duties as an SGE is intermittent and usually brief, please remember that whenever you are acting as a committee member, you are prohibited from engaging in any activity that directly or indirectly encourages or directs any person or organization to lobby one or more members of Congress. (18 U.S.C. 1913) This statute does not bar you, in your official capacity, from appearing before any individual or group for the purpose of informing or educating the public about a particular policy, or from communicating directly with Members of Congress on official matters. Any communications to members of Congress

initiated by you, in your official capacity as a member of an advisory committee, must first be coordinated through OMB's Office of the General Counsel and OMB's Office of Legislative Affairs as well as the Office of Federal Procurement Policy (OFPP).

**(iii). Foreign Government Employment Ban**

The Constitution prohibits Federal employees, including SGEs, from accepting any compensation from, or employment with, a foreign government or the political subdivision of a foreign government, including a public university, a commercial enterprise owned or operated by a foreign government, or an international organization controlled by a foreign government. The ban does not apply to a foreign privately-owned corporation. U.S. Constitution, Art. 1 § 9, cl. 8. If you have a contract with, or are consulting for, a foreign government, you must immediately contact the OMB Ethics Officer.

**(iv). Foreign Agents**

You may not act as an agent or lobbyist of a foreign principal required to register under the Foreign Agents Registration Act or the Lobbying Disclosure Act of 1995 unless OMB certifies that your employment is in the national interest. 18 U.S.C. § 219. If you are currently registered under either of these statutes, please immediately contact the OMB Ethics Officer.

**(v.) Non-Disclosure of Internal Government Information**

You may not disclose classified, proprietary or predecisional information that you receive in the course of your official duties. Before disclosing information please first confirm with the appropriate OMB personnel that the information may be released.

**(vi). Teaching, Speaking, and Writing in a Personal Capacity**

Generally, during the term of your appointment, you may continue to receive fees, honoraria, and other compensation for teaching, speaking, and writing undertaken in your

personal or non-Government capacity. For example, you may receive compensation for teaching, speaking, or writing in your personal, non-governmental capacity on a subject within your discipline or inherent area of expertise based on your educational background or experience. In addition, you may teach a course that is part of the regularly established curriculum of an institution of higher education or a program of education or training sponsored and funded by the Federal, state, or local governments.

However, the law imposes limitations on teaching, speaking or writing that is related to your official duties on the advisory committee. You are prohibited from receiving compensation for teaching, speaking, or writing (“activity”) that “relates to the employee’s official duties.” 5 C.F.R. 2635.807. For you, the “relatedness” test is met if:

- the activity is undertaken as an official Governmental duty; or
- the invitation was extended to you primarily because of your position as an SGE in the Government rather than your expertise on the particular subject matter; or
- the invitation was extended to you, directly or indirectly, by a person who has interests that may be affected substantially by the performance or nonperformance of your official government duties; or
- the information conveyed through the activity draws substantially on ideas or official government data that are confidential or not publicly available.

If you use or permit the use of your position on an OMB Advisory Committee as one of several biographical details given to identify yourself in connection with your personal teaching, speaking, or writing (whether or not compensated), you should include a disclaimer that the views presented are solely your own views and do not necessarily represent the views of the Federal government.

Many OMB SGEs hold senior and influential positions in their private lives. However, please remember that you may not use, or permit the use of, your official OMB advisory committee title, position, or authority associated with your Government position to imply an OMB or Government endorsement of a non-Federal entity, event, product, service, or enterprise. (5 C.F.R. 2635.702.) Provided that you act exclusively outside the scope of your official position and abide by the restrictions discussed above, you may participate and support the activities of non-Federal entities in your personal capacity.

#### **(vii). Misuse of Position**

The prohibition on misuse of position, which applies to all Federal employees (including SGEs) bars the use of public office for private gain. (5 C.F.R. 2635.702.) This broad prohibition generally is triggered by the following:

1. Using your Government title, position, or authority for your own private gain, or for the private gain of friends, relatives, clients, or anyone with whom you

are affiliated in a non-Governmental capacity (including nonprofit organizations in which you serve as an officer, member, employee, or persons with whom you have or seek an employment or business relationship);

2. Using non-public Government information in a financial transaction to further your private interests or those of another, or disclosing confidential or non-public information without authorization.

**(viii.) Hatch Act**

The Hatch Act, which limits the political activities of Federal employees on partisan political campaigns, applies to you only while you are conducting Government business. 5 U.S.C. §§ 7321-7326. If you plan on engaging in such activities, please first contact the OMB Ethics Officer.

**c. Limits on Representations After Your Committee Appointment Ends**

18 U.S.C. 207, prohibits former employees, including SGEs, from representing another person or entity to OMB or to another Federal agency or court in any particular matter involving a specific party in which the former SGE participated personally and substantially while serving as an SGE with the Government. You will receive further ethics guidance on post-employment matters near the end of your membership on the committee. Of course, committee members may raise any questions about this issue at any time with the OMB Ethics Officer.

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As noted above, this guide is intended to be an introduction to the statutes and regulations that apply to SGEs. You are encouraged to contact the OMB Ethics Officer at any time to discuss any of the issues raised in this guide and/or any other ethics questions.

For quick reference, your Ethics Officer's contact information is:

Stuart A. Bender  
Assistant General Counsel and Ethics Officer  
Office of Management and Budget  
Telephone: (202) 395-7533  
Fax: (202) 395-3108  
E-mail: [Stuart\\_Bender@omb.eop.gov](mailto:Stuart_Bender@omb.eop.gov)

## CHARTER

### ACQUISITION ADVISORY PANEL

1. **Official Designation:** Acquisition Advisory Panel (the Panel).
2. **Scope and Objectives:** The Panel will provide independent advice and recommendations to the Office of Management and Budget (OMB) to comply with Section 1423 of the National Defense Authorization Act for Fiscal Year 2004. The Panel will review Federal laws, regulations, and government-wide policies regarding: the use of commercial practices; performance-based contracting; performance of acquisition functions across agency lines of responsibility; and government-wide contracts. The Panel shall consist of at least nine recognized experts in acquisition law and government acquisition policy, and shall review such promulgations with a view toward: protecting the best interests of the Government; ensuring financial and ethical integrity of Federal acquisitions; and promoting the effective, efficient and fair award and administration of Federal contracts.
3. **Period of Performance:** The Panel shall submit its report of findings, conclusions, and recommendations within one year.
4. **Federal Official to Whom the Panel Reports:** The Panel shall report to the OMB Administrator for Federal Procurement Policy.
5. **Agency Responsible for Providing Necessary Support:** OMB shall provide the Panel with administrative support.
6. **Description of Duties for Which the Panel is Responsible:** The duties of the Panel shall be solely advisory. In its review of Federal laws, regulations and policies, the Panel shall make any recommendations to modify such laws, regulations and policies that are considered necessary as a result of such review.
7. **Estimated Annual Operating Costs in Dollars and Person-Years:** The services of the Panel members will be voluntary. The total estimated operating costs are estimated to be \$100,000 budgeted in FY 2005 plus the equivalent of 5 full-time FTEs detailed as staff to the Panel.
8. **Estimated Number and Frequency of Panel Meetings:** It is anticipated that the Panel will meet once a month, with a total of approximately 12 meetings.
9. **Planned Termination Date:** The Panel shall terminate following the issuance of its report.
10. **Date the Charter is filed:** October 1, 2004.

**OFFICE OF MANAGEMENT AND BUDGET**  
**ACQUISITION ADVISORY PANEL**  
**BYLAWS AND OPERATING PROCEDURES**

**Section I. Purpose**

The Purpose of the Office of Management and Budget (OMB) Acquisition Advisory Panel (the Panel) is to provide independent advice and recommendations to OMB regarding selected aspects of government acquisition to comply with Section 1423 of the National Defense Authorization Act for Fiscal Year 2004. Specifically, the Panel will review Federal laws, regulations, and governmentwide policies regarding: the use of commercial practices; performance-based contracting; performance of acquisition functions across agency lines of responsibility; and governmentwide contracts. The Panel will review such promulgations with a view toward: protecting the best interests of the Government; ensuring financial and ethical integrity of Federal acquisitions; and promoting the effective, efficient and fair award and administration of Federal contracts.

**Section II. Authority**

The authority of the Panel is derived from Section 1423 of the National Defense Authorization Act for Fiscal Year 2004. The Panel is subject to the Federal Advisory Committee Act (FACA), as outlined in its Charter, filed with Congress on October 1, 2004.

**Section III. Membership Selection and Appointment**

The OMB Administrator for Federal Procurement Policy (Administrator) appoints Panel members for such terms as may be appropriate for accomplishing the Panel's mission. The Panel shall consist of at least nine recognized experts in acquisition law and Government acquisition policy, and reflect the diverse experiences in the public and private sectors and academia. The Administrator will appoint a Chairman and a Designated Federal Officer (DFO) for the Panel. Members of the Panel will include special government employees, representatives, or regular government employees, as appropriate.

Membership includes the responsibility to attend Panel meetings personally. OMB reserves the authority to replace any member who is unable to fully participate in the Panel's meetings. Alternate members will not be permitted to represent those individuals appointed by OMB without prior written agreement.

**Section IV. Meeting Procedures**

The Panel will meet as required. Meetings will be called by the DFO in consultation with the Chairman according to the following considerations:

#### A. Agenda

The DFO will approve the agenda for all meetings. OMB will provide administrative support to the Panel and will distribute the agenda to the members prior to each meeting as well as publish notices of the meetings in the Federal Register. Any Panel member may submit items for the agenda to the DFO or Chairman. Non-members, including members of the public, may also suggest items.

#### B. Minutes and Records

The DFO will prepare minutes of each meeting and will distribute copies to Panel members. Minutes of open meetings will be available to the public upon request. Minutes of closed meetings will also be available to the public upon request, subject to the withholding of matters about which public disclosure would be harmful to the interests of the Government, industry, or others, and which are exempt from disclosure of the Freedom of Information Act. The minutes will include a record of the persons present (including the names of Panel members, staff, and members of the public from whom written or oral presentations were made) and a complete and accurate description of the matters discussed and conclusions reached, and copies of all reports received, issued or approved by the Panel.

All documents, reports, or other materials prepared by, or for, the Panel constitute official Government records and will be maintained according to OMB policies and procedures.

#### C. Open Meetings

Unless otherwise determined in advance, all meetings of the Panel will be open to the public; members of the public may attend any such meeting or portion of such meeting. Members of the public may also offer comments at such open meetings, in the manner published in the Federal Register notice which announces the meeting.

All materials brought before, or presented to, the Panel during the conduct of an open meeting, including the minutes of the proceedings of an open meeting, will be available to the public for review or copying at the time of the scheduled meeting.

#### D. Closed meetings

Meetings of the Panel will be closed only in limited circumstances and in accordance with applicable law. In addition, requests for closed meetings must be approved by OMB General Counsel in sufficient time to enable notice in the Federal Register at least 15 calendar days in advance of the session.

Where the DFO has determined in advance that discussions during a Panel meeting will involve matters about which public disclosure would be harmful to the interests of the Government, industry, or others, an advance notice of a closed meeting, citing the applicable exemptions of the Government in the Sunshine Act, will be published in the Federal Register. The notice may announce the closing of all or just part of a meeting. If, during the course of an open meeting

matters inappropriate for public disclosure arise during discussions, the Chairman will order such discussion to cease and will reschedule it for closed session. Notices of closed meetings will be published in the Federal Register at least 15 calendar days in advance.

#### **Section V. Voting**

When a decision or recommendation of the Panel is required, the Chairman will request a motion for a vote. Any member, including the Chairman, may make a motion for a vote. No second after a proper motion will be required to bring any issue to vote. The Panel shall agree on the number of members required for a quorum.

#### **Section VI: Role of Panel Officials**

Chairman. The Chairman works with the DFO to establish priorities, identify issues which must be addressed, determine the level and types of staff and administrative support required, and serves as the focal point for the Panel's membership. In addition, the Chairman is responsible for certifying the accuracy of minutes developed by the Panel to document its meetings.

DFO. The DFO serves as the Government's agents for all matters related to the Panel's activities. By law, the DFO: (1) must approve or call the meetings of the Panel; (2) must approve agendas; (3) must attend all meetings; (4) may adjourn the meetings; and (5) may Chair meetings of the Panel when so authorized by the Administrator.

The DFO is responsible for providing adequate staff support to the Panel, including: (1) notifying members of the time and place for each meeting; (2) maintaining records of all meetings, including subgroup of working group activities, as required by law; (3) maintaining the roll; (4) preparing the minutes of all meetings of the Panel's deliberations, including subgroup and working group meetings; (5) attending to official correspondence; (6) maintaining official Panel records and filing all papers and submissions prepared for or by the Panel, including those items generated by subgroups and working groups; (7) acting as the Panel's agent to collect, validate and pay all vouchers for pre-approved expenditures (however, see Section VII below); and (8) preparing and handling all reports, including those required by FACA.

Committee Management Officer (CMO). The CMO will carry out all responsibilities delegated by the Director of OMB. The CMO will ensure appropriate recording occurs. Records to be kept by the CMO include, but are not limited to: (1) charter membership and documentation; (2) annual comprehensive review; (3) agency guidelines; and (4) closed meeting determinations.

#### **Section VII: Expenses and Reimbursement**

No funds were appropriated to operate the Panel. Accordingly, the services of the Panel members and agency staff will be voluntary and without reimbursement, including any travel or per diem costs.

14-10

1 **SEC. 1423. STATUTORY AND REGULATORY REVIEW.**

2 (a) ESTABLISHMENT.—Not later than 90 days after the  
3 date of the enactment of this Act, the Administrator for Fed-  
4 eral Procurement Policy shall establish an advisory panel to re-  
5 view laws and regulations regarding the use of commercial  
6 practices, performance-based contracting, the performance of  
7 acquisition functions across agency lines of responsibility, and  
8 the use of Governmentwide contracts.

9 (b) MEMBERSHIP.—The panel shall be composed of at  
10 least nine individuals who are recognized experts in acquisition  
11 law and Government acquisition policy. In making appoint-  
12 ments to the panel, the Administrator shall—

13 (1) consult with the Secretary of Defense, the Admin-  
14 istrator of General Services, the Committees on Armed  
15 Services and Government Reform of the House of Rep-  
16 resentatives, and the Committees on Armed Services and  
17 Governmental Affairs of the Senate; and

18 (2) ensure that the members of the panel reflect the  
19 diverse experiences in both the public and private sectors,  
20 including academia.

21 (c) DUTIES.—The panel shall—

22 (1) review all Federal acquisition laws and regulations,  
23 and, to the extent practicable, government-wide acquisition  
24 policies, with a view toward ensuring effective and appro-  
25 priate use of commercial practices and performance-based  
26 contracting; and

27 (2) make any recommendations for the modification of  
28 such laws, regulations, or policies that are considered nec-  
29 essary as a result of such review—

30 (A) to protect the best interests of the Federal  
31 Government;

32 (B) to ensure the continuing financial and ethical  
33 integrity of acquisitions by the Federal Government;  
34 and

35 (C) to amend or eliminate any provisions in such  
36 laws, regulations, or policies that are unnecessary for  
37 the effective, efficient, and fair award and administra-



1           tion of contracts for the acquisition by the Federal  
2           Government of goods and services.

3           (d) REPORT.—Not later than one year after the establish-  
4           ment of the panel, the panel shall submit to the Administrator  
5           and to the Committees on Armed Services and Government Re-  
6           form of the House of Representatives and the Committees on  
7           Armed Services and Governmental Affairs of the Senate a re-  
8           port containing a detailed statement of the findings, conclu-  
9           sions, and recommendations of the panel.

10                           **PART II—OTHER ACQUISITION**  
11                                   **IMPROVEMENTS**

12           **SEC. 1426. EXTENSION OF AUTHORITY TO CARRY OUT**  
13           **FRANCHISE FUND PROGRAMS.**

14           Section 403(f) of the Federal Financial Management Act  
15           of 1994 (Public Law 103-356; 31 U.S.C. 501 note) is amended  
16           by striking “October 1, 2003” and inserting “December 31,  
17           2004”.

18           **SEC. 1427. IMPROVEMENTS IN CONTRACTING FOR AR-**  
19           **CHITECTURAL AND ENGINEERING SERV-**  
20           **ICES.**

21           (a) TITLE 10.—Section 2855(b) of title 10, United States  
22           Code, is amended in paragraph (2), by striking “\$85,000” and  
23           inserting “\$300,000”.

24           (b) ARCHITECTURAL AND ENGINEERING SERVICES.—Ar-  
25           chitectural and engineering services (as defined in section 1102  
26           of title 40, United States Code) shall not be offered under mul-  
27           tiple-award schedule contracts entered into by the Adminis-  
28           trator of General Services or under Governmentwide task and  
29           delivery order contracts entered into under sections 2304a and  
30           2304b of title 10, United States Code, or sections 303H and  
31           303I of the Federal Property and Administrative Services Act  
32           of 1949 (41 U.S.C. 253h and 253i) unless such services—

33           (1) are performed under the direct supervision of a  
34           professional architect or engineer licensed, registered, or  
35           certified in the State, territory (including the Common-  
36           wealth of Puerto Rico), possession, or Federal District in  
37           which the services are to be performed; and

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27 (2) make any recommendations for the modification of  
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29 essary as a result of such review—

30 (A) to protect the best interests of the Federal  
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## 14-11

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30 2304b of title 10, United States Code, or sections 303H and  
31 303I of the Federal Property and Administrative Services Act  
32 of 1949 (41 U.S.C. 253h and 253i) unless such services—

33 (1) are performed under the direct supervision of a  
34 professional architect or engineer licensed, registered, or  
35 certified in the State, territory (including the Common-  
36 wealth of Puerto Rico), possession, or Federal District in  
37 which the services are to be performed; and

