

DCN: 12341

Sarkar, Rumu, CIV, WSO-BRAC

From: Hague, David, CIV, WSO-BRAC
Sent: Wednesday, November 30, 2005 12:27 PM
To: Battaglia, Charles, CIV, WSO-BRAC
Cc: Sarkar, Rumu, CIV, WSO-BRAC; Carnevale, Diane, CIV, WSO-BRAC

Charlie --

I understand that the FACA comprehensive report is on the agenda -- a review of matter might be useful.

I received an email from Jim Freeman in late Oct/early Nov reminding us of the the report requirement. I responded to Jim OOA 2 Nov that while the Commission continues to believe it is not a FACA entity we have complied with most FACA requirements and would submit the report. Since Marcy was the DFO designee at the time I told her of the requirement and at the same time asked Nat to make the necessary web connection to determine what needed to be done to complete the report. Shortly afterward Rumu was made the DFO and I took Nat (and Marcy) off of the task -- he had just begun and was still trying to make the necessary web connection. Rumu and I discussed the report and the need to submit it soon -- the input is readily available on the Commission website and in admin files. For example, the transcripts can probably serve as "minutes" of Commission meetings and budget and other information is in Commission records.

Dan began early on to make contemporary entries in the report but ran into technical difficulties. Those difficulties and our belief that the Commission is non-FACA resulted in the input process being put on hold.

Completion of the report should not be a great challenge.

David

Sarkar, Rumu, CIV, WSO-BRAC

From: Carnevale, Diane, CIV, WSO-BRAC
Sent: Wednesday, November 30, 2005 11:14 AM
To: Cowhig, Daniel, MAJ, DoD OGC
Cc: Battaglia, Charles, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC
Subject: RE: Email

OK thanks Dan - I will connect with Nat and Marcy now. Good information!

Diane

From: Cowhig, Daniel, MAJ, DoD OGC
Sent: Wednesday, November 30, 2005 10:35 AM
To: Carnevale, Diane, CIV, WSO-BRAC
Cc: Battaglia, Charles, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC
Subject: RE: Email

Diane -

I can be there, but I don't have any of the DFO material. Although we had determined that the commission is not a FACA committee, we had also decided to fill out the database to avoid antagonizing the WHS crowd. I passed my DFO-related files to Marcy. The plan as I understood it when I left was for her to take over as DFO, since the bulk of what remained were archiving-related matters. The database piece General Hague had passed to Nat, once the transcripts were finalized. The BRAC piece of the annual general report, if I remember rightly, is nothing more than completing the FIDO database entries.

V/R

Dan Cowhig
Major, U.S. Army
Prosecutor
Office of Military Commissions
United States Department of Defense

1851 S Bell ST STE 532
Arlington VA 22202-3550

Voice 703 602-4215 x 144
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cowhigd@dodgc.osd.mil
dan.cowhig@us.army.mil
dan.cowhig@us.army.smil.mil

www.defenselink.mil/news/commissions.html

-----Original Message-----

From: Carnevale, Diane, CIV, WSO-BRAC
Sent: Wednesday, November 30, 2005 10:22
To: Cowhig, Daniel, MAJ, DoD OGC
Cc: Battaglia, Charles, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC
Subject: RE: Email

Dan,

I will e-mail you once again to this same address - Charlie would appreciate you and Rumu, me and Magda to meet with him at 1:30 P.M. this afternoon in his office re: the Annual Comprehensive Report that you and I discussed earlier this morning. If you are unable to attend, then he would appreciate your calling in to the (703) 699-2951 number as we wrestle with the requirements, due dates, and who does/has been doing what on the ACR.

Thanks,
Diane

From: Cowhig, Daniel, MAJ, DoD OGC
Sent: Wednesday, November 30, 2005 9:25 AM
To: Carnevale, Diane, CIV, WSO-BRAC
Cc: Battaglia, Charles, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC
Subject: Email

Diane -

Did you email me at the BRAC email address? I don't have access to that one anymore ...

V/R

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Sarkar, Rumu, CIV, WSO-BRAC

From: Carnevale, Diane, CIV, WSO-BRAC
Sent: Tuesday, November 29, 2005 4:21 PM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Sarkar, Rumu, CIV, WSO-BRAC; Angulo, Magda, CIV, WSO-BRAC
Subject: Annual Comprehensive Review - BRAC

Importance: High

Dan,

Charlie wants to meet with you and Rumu tomorrow at 1:30 P.M. in his office regarding this report, with me. I had to brief him on the administrative input regarding the cost data requirements as well as the Commissioner appointment dates. The <http://www.fido.gov/facadatabase> site is what I will have to be working from, to complement Rumu's previous efforts with Jim Freeman. Jim had been kind enough to load the entire Commission report as well as all the FACA Committee meeting minutes. We will also have to cover FY2006 data - another surprise.

If you are not physically available (I recommend you try), then Charlie would like you to be available on the phone as part of a conference call. He would like you to call in to (703) 699-2951.

Thanks,
Diane

Sarkar, Rumu, CIV, WSO-BRAC

From: Hague, David, CIV, WSO-BRAC
Sent: Wednesday, November 09, 2005 9:54 AM
To: Wilson, Frank, CIV, WHS/APSD
Cc: Battaglia, Charles, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC; Reborchick, Margaret, CIV, WSO-BRAC

Frank,

RE below, we will try again to make the necessary connections and update the FACA database. We do so, however, out of a sense of comity, not obligation.

The Commission view remains that it is not a FACA entity, even though we have carefully attended to FACA notice and other requirements. Our position is based in part on the legislative history of the BRAC Commission which specifically states that FACA shall not be applicable to it.

"The Federal Advisory Committee Act (Public Law 92-463) provides a sunset for boards which exist to provide advice to executive agencies. The Commission established by this legislation is not an advisory committee because it does not fall within the definition of the that Act. Also, this legislation provides the sort of explicit sunset for the Commission to which the advisory committee was addressed. **Hence, none of the provisions of the Federal Advisory Committee Act should be applied to this Commission.** (Emphasis supplied.) (H.R. Conference Report 101-923 (Oct. 23, 1990) at 706, National Defense Authorization Act for Fiscal Year 1991, Title XXIX, Part A -- Defense Base Closures and Realignment Commission)."

Other sources, including the BRAC Act itself and discussion with counsel and other professional staff members of the Senate Armed Services Committee, lead to the same conclusion, viz, that FACA does not apply to the BRAC Commission.

The Commission's new DFO is to be Margaret Rose Reborchick, who is the Commission librarian and archivist. She is expected to remain with the Commission until it terminates.

Rumu Sarkar, who will be serving as the Commission General Counsel beginning next week, is the POC for this and related matters of a legal nature.

Thank you for your advice and other assistance and that of Jim Freeman and others on your staff during the past six months. The results to date of our combined efforts are reflected in the Commission report, the recommendations of which now have the force of law. We can all be proud of the good work done -- and it has truly been a team effort.

David

From: Wilson, Frank, CIV, WHS/APSD
Sent: Tuesday, November 08, 2005 11:17 AM

To: Carnevale, Diane, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC; Cirillo, Frank, CIV, WSO-BRAC
Cc: Freeman, James, CTR, WHS/APSD
Subject: ACTION EMAIL BRAC 05 DFO Duties
Importance: High

Dianne, Bob, and Frank,

I m sending this email to each of you because I m not sure who is still around nor who can best assist with this issue.

Description of the issue:

* Major Dan Cowhig was appointed as the BRAC 05 DFO by on 5 May 2005 (attached) and he has left the commission without completing the Annual Comprehensive Report (ACR) (consists of 10 web pages and a minimum of 158 data elements) by updating the data on the official GSA/FACA web site

* I tasked all GFO/DFOs to complete the Annual Comprehensive Review via attached memo dated 19 September 2005 (attached)

* Despite a request and a reminder by me Major Cowhig has not updated any information since May 2005 other than putting Mr. Principi's name on the GSA's FACA Database

* The ACR must be completed by 18 December 2005, and we are in the process of reviewing other committee reports now.

* The GSA/Committee Management Secretariat, (has policy responsibility for all Executive Branch FACA Committees) if it has to, is prepared to certify that the Defense Base Closure and Realignment Commission failed to comply with the FACA statute and submit its Annual Comprehensive Report ... we want to avoid this since DoD, as the commission's sponsor, will take the hit.

My request is to have you designate an individual that can work with Jim Freeman of my office to gather all the data and ensure that it gets entered into the official GSA web site. Your early attention to this issue would be most appreciated.

Frank

Frank Wilson, Civ., WHS/APSD

Chief, Administrative Services Division &

DoD, FACA Committee Management Officer

Suite 940, CGI (1235 South Clark St. Arlington, VA 22202)

(703) 601-2554 ext. 113

Sarkar, Rumu, CIV, WSO-BRAC

From: Battaglia, Charles, CIV, WSO-BRAC
Sent: Wednesday, November 09, 2005 3:42 PM
To: Hague, David, CIV, WSO-BRAC; Wilson, Frank, CIV, WHS/APSD
Cc: Sarkar, Rumu, CIV, WSO-BRAC; Reborchick, Margaret, CIV, WSO-BRAC; Carnevale, Diane, CIV, WSO-BRAC
Subject: RE: DFO

Frank, please be advised that Margaret Reborchick will be designated the DFO effective January 15, 2006. Until such time Rumu Sarkar will be the DFO.

From: Hague, David, CIV, WSO-BRAC
Sent: Wednesday, November 09, 2005 9:54 AM
To: Wilson, Frank, CIV, WHS/APSD
Cc: Battaglia, Charles, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC; Reborchick, Margaret, CIV, WSO-BRAC
Subject:

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Frank

Frank Wilson, Civ., WHS/APSD

Chief, Administrative Services Division &

DoD, FACA Committee Management Officer

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(703) 601-2554 ext. 113

Sarkar, Rumu, CIV, WSO-BRAC

From: Hague, David, CIV, WSO-BRAC
Sent: Wednesday, November 02, 2005 4:26 PM
To: Sarkar, Rumu, CIV, WSO-BRAC
Subject: FW: Annual Comprehensive Review
Importance: High
Attachments: CMO Memo - ACR_05.09.19.pdf

Rumu -- Pls check with Dan and see what we decided on this matter. I recall talking with Dan about it but don't remember the outcome of our conversation. We might want to complete the requirement even if not technically required to do so.

David

From: Freeman, James, CTR, WHS/APSD
Sent: Wednesday, November 02, 2005 4:22 PM
To: Hague, David, CIV, WSO-BRAC
Cc: Sarkar, Rumu, CIV, WSO-BRAC
Subject: Annual Comprehensive Review
Importance: High

Sir,

On September 19, 2005 Frank Wilson, as the Committee Management Officer for the Department of Defense, advised the Designate Federal Officers for all DoD-supported Federal advisory committees that the Annual Comprehensive Report was to be submitted for each committee' no later than November 1, 2005 (Attached).

Since the Annual Comprehensive Report for the Defense Base Closure and Realignment Commission was not completed prior to Major Cowhig's departure from the Commission our office needs to know when you or the Commission staff will comply with the statutory requirement for this Report. Completing the Report would have been simple if the FACA Database had been maintained throughout the Commission's existence, but unfortunately Major Cowhig made no updates to the Database since June 9, 2005.

For your information, the FACA Database is the Government's official repository of information on Federal advisory committees covered by the Federal Advisory Committee Act of 1972, as amended. Furthermore, it is the official source of information for the Congress, OMB and the GAO.

Your attention to this matter at the earliest opportunity would be greatly appreciated.

VR,

Jim Freeman



OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950



ADMINISTRATION &
MANAGEMENT

September 19, 2005

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Fiscal Year 2005 Annual Comprehensive Review of Federal Advisory Committees

In accordance with the section 7 (b) of the Federal Advisory Committee Act, as amended, the Committee Management Secretariat (CMS) has advised this office that the Annual Comprehensive Review (ACR) of Federal advisory committees for the Executive Branch must be completed no later than December 18, 2005. This Review can only be accomplished through the CMS's on-line FACA Database located at <http://www.fido.gov/facadatabase>.

In order to comply with the CMS data call the Designated Federal Officers for each DoD-supported or sponsored Federal advisory committee are directed to (a) update all data elements on the on-line FACA Database for their appropriate committees; and (b) advise this office when they have completed the Annual Comprehensive Review for their Federal advisory committee.

All Designated Federal Officers must complete the Annual Comprehensive Review for their Federal advisory committee no later than November 1, 2005. Individual Group Federal Officers may impose an earlier suspense on their Federal advisory committees and Designated Federal Officers; however, all actions must be completed no later than November 1, 2005.

Upon notification that the Designated Federal Officer has completed the Annual Comprehensive Review for their Federal advisory committee, this office will (a) review all committee's Annual Comprehensive Review; (b) consult with the Committee Management Secretariat on the submissions; and (c) certify each individual Annual Comprehensive Report.

As you review the on-line FACA Database you will see several CMS-directed changes to the format and to some of the data elements. Most of these changes are a result of changes in the program management suggested by the Government Accountability Office Reports. Of primary concern to the Department of Defense and its Designated Federal Officers is the break-out for Committee Member appointments. While the FACA Database lists four different categories (Representative, Ex-Officio, Special Government Employee, and Regular Employee), all Committee Members for DoD-supported or sponsored Federal advisory committees, based upon earlier agreements with the leadership of the Congress, will either be Regular Employees (Federal officers or employees) or Special Government Employees.

If you should have any questions please contact me or Jim Freeman (703-601-2554, extension 128).

Frank M. Wilson
Committee Management Officer
for the Department of Defense

1 Attachment
As stated

DISTRIBUTION:

Group Federal Officers:

OUSD (AT&L) – Ms. Cynthia Worley

OUSD (P&R) – Ms. Sandy Mullins

Organization of the Joint Chiefs of Staff – Mr. Jerome Mahar

Department of the Army – Ms. Marla-Jo Bonuccelli

Department of the Navy – Ms. Laura Wurzer

Department of the Air Force – Ms. Cynthia Burley

Advisory Committee Designated Federal Officers (not aligned under a GFO):

Board of Regents Uniformed Services University of the Health Sciences – Ms. Janet Taylor

Board of Visitors Joint Military Intelligence College – Mr. Ronald Garst

Board of Visitors National Defense University – Mr. Michael Mann

Defense Advisory Board for Employer Support of the Guard and Reserve – Captain Hooks

Defense Base Closure and Realignment Commission – Major Dan Cowhig

Defense Business Board – Ms. Kelly Van Niman

Defense Intelligence Agency Advisory Board – Ms. Victoria Prescott

Defense Policy Board – Ms. Ann Hansen

Department of Defense Historical Advisory Committee – Dr. Alfred Goldberg

Independent Review Panel to Study the Relationship Between Military Department General

Council and Judge Advocates – Mr. James Schwenk

National Security Education Board – Dr. Robert Slater

President's Information Technology Advisory Committee – Dr. Simon Szykman

Uniform Formulary Beneficiary Advisory Panel – Major Travis Watson

Advisory Committees (FACA-exempted) [INFORMATION ONLY]:

Commission on the National Guard and Reserves

Commission to Assess the Threat to the United States from Electromagnetic Pulse (EMP)
Attack

National Security Agency Emerging Technologies Panel

101ST CONGRESS
2^d Session

HOUSE OF REPRESENTATIVES

REPORT
101-923

NATIONAL DEFENSE AUTHORIZATION
ACT FOR FISCAL YEAR 1991

CONFERENCE REPORT

TO ACCOMPANY

H.R. 4739



OCTOBER 23, 1990.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1990

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vision (sec. 2814) that
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potential for civilian reuse, or, assuming continued military activi-
 ty, joint military-civilian use.

The House bill contained no similar provision.

The House recedes with an amendment that would ensure that
 all interested authorizing committees of Congress receive copies of
 the aircraft evaluation.

*Negotiations for joint civilian and military use of the airfield at
 Wheeler Air Force Base, Hawaii (sec. 2867)*

The Senate amendment contained a provision (sec. 2827) that
 would direct the Secretary of the Navy to enter into negotiations
 with the state of Hawaii to develop an agreement for joint military
 and civilian use of the aviation facilities at Barbers Point Naval
 Air Station, Hawaii.

The House bill contained no similar provision.

The House recedes with an amendment that would direct the
 Secretary of Defense to enter into negotiations with the state of
 Hawaii to develop an agreement for joint military and civilian use
 of Wheeler Air Force Base, Hawaii, instead of Barbers Point Naval
 Air Station, Hawaii.

*Extension of termination date for land conveyance at Eglin Air
 Force Base, Florida (sec. 2868)*

The conferees agree to a provision that would extend for three
 years the authority of the Secretary of the Air Force Base, Florida,
 which will clarify the installation's boundaries and settle associat-
 ed claims.

TITLE XXIX—BASE CLOSURES AND REALIGNMENTS

PART A—DEFENSE BASE CLOSURES AND REALIGNMENT COMMISSION

LEGISLATIVE PROVISIONS ADOPTED

Defense Base Closure and Realignment (secs. 2901-2911)

The House bill contained a provision (sec. 2831) that would direct
 the following:

1. The Secretary of Defense would formulate a five-year force
 structure plan for the armed forces based upon the prospective
 threat and funding levels, and a plan to implement the associ-
 ated reductions and closures of overseas military installations.

2. As a part of the defense budget request for fiscal years
 1992 and 1993, the Secretary would provide the Congress the
 force structure plan, a list of overseas installations to be re-
 duced or closed, and legislative proposals to establish a fair
 process of selecting military installations within the United
 States for closure or realignment, as well as proposals for the
 mitigation to communities and individuals adversely affected
 economically by such closures.

3. The Defense Department would be precluded from study-
 ing or implementing base closures or realignments of installa-
 tions within the United States (excluding those being carried
 out under Public Law 100-526 or those which do not meet the
 thresholds contained in section 2687 of title 10, United States

Code) until January 1, 1992, or until specifically authorized by Congress during the 102nd Congress, whichever occurs first.

4. The Defense Department would be directed to maintain the level of funding for facility repair and maintenance of military installations within the United States at no less than 75 percent of the average funding level for these installations between fiscal years 1985 and 1989.

5. The Secretary of Defense would be directed not to use the list of closure and realignment proposals which was transmitted to Congress on January 29, 1990, as the basis for any decisions concerning mission, personnel, or resource allocations. To the extent that the missions at installations on this list have been reduced or facility development and maintenance have been curtailed, the Secretary would be directed to remedy this damage.

6. Alter the current statute concerning base closures and realignments (10 U.S.C. 2687) to establish a two-year period in which to determine personnel reduction thresholds, and to clarify the applicability of this statute to defense agency activities being conducted in leased facilities.

The Senate amendment contained a provision (sec. 2805) that would amend section 2687 of title 10, United States Code, regarding the process of closing and realigning military installations. In codifying several of the streamlining provisions of the Base Closure and Realignment Act of 1988 (Public Law 100-526), the provision would establish a base closure account, direct the delegation of property disposal authority from the Administrator of General Services to the Secretary of Defense, and make the National Environmental Policy Act inapplicable to the decision to close installations.

The House recedes with an amendment that would establish a new process to deal with the closure and realignment of military installations within the United States. This process would be used biennially and remain in effect for six years. It would include public and Congressional review of the criteria used by the Secretary of Defense to select bases to propose for closure or realignment, and an independent commission which will publicly evaluate these closure and realignment proposals and report its findings to the President. The conferees expect the Secretary to justify any closure or realignment proposal made to the Commission with detailed analysis such as is currently required under section 2687 of title 10, United States Code, as well as a close linkage between the closure or realignment proposal and both the force structure plan and the criteria. Under the new process, both the President and the Congress would have opportunities to accept or reject the Commission's recommendations in their entirety under expedited procedures.

Any congressional disapproval of either the proposed criteria or the Commission's recommendation must be accomplished through a joint resolution, which requires the signature of the President or a two-thirds majority of both Houses of Congress in the case of a Presidential veto.

The conferees agree to clarify current base closure law to specifically apply to Department of Defense activities which occupy

leased facilities. They also add the establishment of a base closure disposal authority from the Secretary of Defense, and a total impact analysis process as actions.

The conferees prescribe a process and realignments under closures and realignments that involve numerous opportunities. A list of bases for study transmitted on January 29, 1990, raised suspicions about the selection process. A new process commission will permit base closures and realignments in a more rational manner.

The conferees expect the process of selection, grounded in the criteria approved under the process on the January 29, 1990, proposed list, the conferees expect all bases in the United States further expect that bases on the list be operated and maintained in a more rational manner.

The test for the Commission is the Secretary for closure and realignment. The criteria in making the recommendations will be the same as the criteria in making the recommendations.

The process established in the United States. The Department of Defense to move aggressively to bases overseas where U.S. national security require the current level of performance of the domestic base operations in no small measure on.

The conference agreement shall make available to the General of the United States in making its recommendations to the General Accounting Office. They occur, of the Services are selecting bases for closure and realignment. GAO will be able to report to how the process was conducted requirements. The conferees permitted to attend meetings or in the process. GAO is expected under this process through its officials and analyzing documents.

The base closure process can be a constitutional pitfall of excess. First, Congress is not really dependent of the criteria by which it

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leased facilities. They also adopt the Senate provisions regarding the establishment of a base closure account, delegation of property disposal authority from the Administrator of General Services to the Secretary of Defense, and the streamlining of the environmental impact analysis process associated with closure and realignment actions.

The conferees prescribe a new base closure process because closures and realignments under existing law have two failings. First, closures and realignments take a considerable period of time and involve numerous opportunities for challenges in court. Second, the list of bases for study transmitted by Secretary Cheney on January 29, 1990, raised suspicions about the integrity of the base closure selection process. A new process involving an independent, outside commission will permit base closures to go forward in a prompt and rational manner.

The conferees expect the Department to begin anew in its base selection process, grounded in the programmed force structure and the criteria approved under this process. While bases which appeared on the January 29, 1990 list may reappear on a new proposed list, the conferees expect that the Department will consider all bases in the United States on an equal footing. The conferees further expect that bases on the January 29th list will be properly operated and maintained while this base closure process is implemented.

The test for the Commission to apply to bases recommended by the Secretary for closure and realignment is whether the Secretary deviated substantially from the force structure plan and the final criteria in making the recommendations.

The process established in this bill only covers military installations in the United States. The conferees expect the Secretary of Defense to move aggressively to cease or reduce U.S. operations at bases overseas where U.S. national security interests no longer require the current level of permanently stationed U.S. forces. The credibility of the domestic base closure and realignment process depends in no small measure on the closure of bases overseas.

The conference agreement provides that the Secretary of Defense shall make available to the Commission and to the Comptroller General of the United States all information used by the Department in making its recommendations to the Commission. As it relates to the General Accounting Office (GAO), this provision is intended to permit the staff of GAO to monitor the activities, while they occur, of the Services and the Department of Defense in selecting bases for closure and realignment. Through this monitoring, GAO will be able to report to the Commission and to Congress on how the process was conducted and whether it met the statutory requirements. The conferees do not intend that GAO staff be permitted to attend meetings or interfere, in any way, in the deliberative process. GAO is expected to fulfill its statutory responsibilities under this process through its normal methodology of interviewing officials and analyzing documents.

The base closure process contained in this bill clearly avoids the constitutional pitfall of excessive delegation of legislative authority. First, Congress is not really delegating its authority. Both the content of the criteria by which bases will be selected for closure and

realignment and the final list of closures and realignments are subject to Congressional review. Second, while Congress obviously has a major role in the opening and closing of military installations, the decision to close a base is not so clearly a legislative power as to make Congress' determination to seek the help and advice of the Department of Defense and an independent commission a delegation of legislative authority. Third, by providing considerable Congressional involvement in the development of the governing criteria, and ensuring a clear power to disapprove, the conferees intend that Congress establish an intelligible principle for the Department and the Commission to use in making their decisions.

The current law providing procedures for base closures and realignments (10 U.S.C. 2687) contains a provision which makes those procedures explicitly inapplicable to closures or realignments made by the President for reasons of national security or military emergency. In that the base closure procedures provided in this bill only apply to closures and realignments which would otherwise be subject to section 2687 of title 10, United States Code, by definition, closures or realignments which could be carried out by the President without regard to section 2687 can be carried out by the President without regard to the procedures in this act. The conferees note, with approval, that the President has not abused this discretion. Accordingly, this provision would not affect the President's authority to undertake base closures or realignments on the basis of national security or military emergency.

The Federal Advisory Committee Act (Public Law 92-463) provides a sunset for boards which exist to provide advice to executive agencies. The Commission established by this legislation is not an advisory committee because it does not fall within the definition of that Act. Also, this legislation provides the sort of explicit sunset for the Commission to which the advisory committee was addressed. Hence, none of the provisions of the Federal Advisory Committee Act should be applied to this Commission.

The rulemaking (5 U.S.C. 553) and adjudication (5 U.S.C. 554) provisions of the Administrative Procedures Act (5 U.S.C. 551 et seq.) contain explicit exemptions for "the conduct of military or foreign affairs functions." An action falling within this exception, as the decision to close and realign bases surely does, is immune from the provisions of the Administrative Procedures Act dealing with hearings (5 U.S.C. 556) and final agency decisions (5 U.S.C. 557). Due to the military affairs exception to the Administrative Procedures Act, no final agency action occurs in the case of various actions required under the base closure process contained in this bill. These actions therefore, would not be subject to the rulemaking and adjudication requirements and would not be subject to judicial review. Specific actions which would not be subject to judicial review include the issuance of a force structure plan under section 2903(a), the issuance of selection criteria under section 2803(b), the Secretary of Defense's recommendation of closures and realignments of military installations under section 2803(d), the decision of the President under section 2803(e), and the Secretary's actions to carry out the recommendations of the Commission under sections 2904 and 2905.

The conferees note that the enhancement of the ability of the Department of Defense to implement proposals for base closures. The conferees are confident that the bill will create significant advantages over the current law, the conferees recognize that the bill will require further changes once the President has signed the bill. The conferees encourage the Department of Defense to proceed with any implementation of the bill subsequent to the passage of any implementation subsequent legislation.

In making proceedings, in the Commission open to designate the Commission understand that should the Commission attend any part of any closed proceedings of the Commission shall insure that the Commission is provided to appropriate.

PART B—OTHER PROVISIONS RELATIVE TO

LEGISLATIVE

Residual value of closing over.

The House bill contained a provision that would express the sense of Congress that the consideration equal to the fair market value of the property by the United States to military installations. The provision would advise the Secretary of Defense that would advise the Secretary of the market value of each overseas installation.

The Senate amendment would express the sense of Congress that the consideration equal to the fair market value of the property by the United States to military installations outside the United States.

The Senate amendment would express the sense of Congress that the consideration equal to the fair market value of the property by the United States to military installations; that the residual value of the property should be the lead agency in determining the environmental cleanup exceed that of the installation.

The Senate amendment would express the sense of Congress that the consideration equal to the fair market value of the property by the United States to military bases accruing to the Department of Defense. Subject to the provisions of the bill used only for real property and the provisions of the bill regarding military facilities with the provisions of the bill.

The House recedes with a provision that would express the sense of Congress that the consideration equal to the fair market value of the property by the United States in foreign military bases.

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The conferees note that the new procedures would considerably enhance the ability of the Department of Defense to promptly implement proposals for base closures and realignment. While the conferees are confident that these innovative procedures would create significant advantages for the Executive Branch over current law, the conferees recognize that there might be a need for further changes once the procedure has been implemented. The conferees encourage the Department to promptly advise the Congress of any implementation issues that need to be addressed in subsequent legislation.

In making proceedings, information, and deliberations of the Commission open to designated members of Congress, the conferees understand that should the Members of Congress be unable to attend any part of any closed Commission meeting, the Chairman of the Commission shall insure that full access to meeting proceedings is provided to appropriate staff of such member.

PART B—OTHER PROVISIONS RELATING TO BASE CLOSURES AND REALIGNMENTS

LEGISLATIVE PROVISIONS ADOPTED

Residual value of closing overseas bases (sec. 2921)

The House bill contained a provision (sec. 2832) that would express the sense of Congress that the United States ought to receive consideration equal to the fair market value of improvements made by the United States to military bases overseas which are being vacated. The provision would also require a report from the Secretary of Defense that would advise the Congress of the estimated fair market value of each overseas installation which will be vacated.

The Senate amendment contained a provision (sec. 1245) that would express the sense of Congress regarding the closure of U.S. military installations outside the United States.

The Senate amendment contained a provision (sec. 2811) that would express the sense of the Senate that the Department of Defense should be the lead agency in negotiations with host governments regarding the residual value of vacated overseas military installations; that the residual value be as high as possible; and that under no circumstances should the cost to the United States of environmental cleanup exceed the residual value of a closing overseas installation.

The Senate amendment contained another provision (sec. 2812) that would direct that the residual value from closing overseas military bases accruing to the United States be returned to the Department of Defense. Subject to appropriation, these sums could be used only for real property maintenance or environmental restoration of military facilities within the United States.

The House recedes with an amendment that would consolidate these four provisions into a single section. The section would contain no reference to environmental restoration costs because the conferees believe that the environmental restoration of bases used by the United States in foreign countries is a host nation responsibility.

Sarkar, Rumu, CIV, WSO-BRAC

To: Hague, David, CIV, WSO-BRAC
Subject: Applicability of FACA to the BRAC Commission

I have consulted with Madelyn Creedon, GC to the Senate Armed Forces Committee, and former GC of the 1995 BRAC Commission, and she advised me that the applicability of FACA to the BRAC '95 was never an issue before. BRAC '95 did not file a charter or formally comply with FACA rules. She argued that since BRAC 2005's recommendations, if not disapproved in whole by the President and/or Congress have the force of law, the BRAC's function is, therefore, not advisory in nature. (I realize that the past record may not completely support this position since past BRACs may have filed charters.)

Section 9(b) of FACA , 5 U.S.C. app. 2, specifies that, "advisory committees shall be utilized solely for advisory functions." The GAO, the U.S. Department of Justice and GSA all make a distinction between "advisory" and "operational." GSA's Final Rule provides the following guidance:

Non-advisory, or "operational" committees generally have the following characteristics: (i) [s]pecific functions and/or authorities provided by the Congress in law or by Presidential directive; (i) [t]he ability to make and implement traditionally Governmental decisions; and (iii) [t]he authority to perform specific tasks to implement a Federal program. (See 41 CFR parts 101-6 and 102-3, App. A to Subpart 102-3, Sec. VI (A)(Guidance)(July 19, 2001)).

Thus, it may be (successfully) argued that the 2005 BRAC Commission has been delegated by law certain government functions to implement U.S. military closures and realignments, consistent with BRAC's authorizing statute, and that both the executive and the legislative branches have relinquished their authority, in part, to the BRAC Commission, but reserving, in effect, veto power to reject the totality of the BRAC's recommendations.

Sec. 102-3.40(k) of GSA's Final Rule specifically exempts operational committees from the provisions of FACA, and states:

Any committee established to perform primarily operational as opposed to advisory functions [are exempt]. 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 [FACA] 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.

Finally, DOJ' s Office of Legal Counsel has stated that:

The key question . . . is whether a committee's functions are "operational" instead of advisory. Although that term may not be susceptible to precise definition, it has been employed by this Office to refer generally to the making or implementation of concrete decisions by the members of the committee or subcommittee, as opposed to offering advice to officials who will make the decisions themselves. *Applicability of the Federal Advisory Committee Act to Law Enforcement Coordinating Committees*, 5 Op. O.L.C. 283 (Sept. 10, 1981).

Thus, it may be posited that the 2005 BRAC is NOT an advisory commission but an operational one making concrete decisions that will have the force of law unless disapproved in full by the President or Congress. Further, that the BRAC is following FACA rules as a matter of policy (or good governance), and not as a matter of law.

I hope this helps, and please let me know if you have questions or would like me to pursue this further.

Rumu Sarkar
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Defense Base Closure and Realignment (BRAC) 2005
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05 MAY 2005

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JOH.

MEMORANDUM FOR MAJOR DANIEL J. COWHIG, U.S. ARMY, DEFENSE BASE
CLOSURE AND REALIGNMENT COMMISSION

SUBJECT: Appointment of Designated Federal Officer – Defense Base Closure and
Realignment Commission

In accordance with Sections 10(e) and 10(f) of the Federal Advisory Committee Act of
1972, as amended, you are hereby appointed the Designated Federal Officer for the Commission.
As the Designated Federal Officer, you will:

- Call, attend, and adjourn committee meetings;
- Approve the agenda;
- 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 Library of Congress

This supercedes my April 18, 2005, memorandum appointing Mr. Carmen C. Battaglia as
the Designated Federal Officer for the Defense Base Closure and Realignment Commission

Howard G. Becker
Deputy Director



ADMINISTRATION AND
MANAGEMENT

OFFICE OF THE SECRETARY OF DEFENSE
1950 DEFENSE PENTAGON
WASHINGTON, DC 20301-1950

May 6, 2005

MEMORANDUM FOR MR. DAVID HAGUE
GENERAL COUNSEL
DEFENSE BASE CLOSURE AND REALIGNMENT
COMMISSION

SUBJECT: Travel Reimbursements for Commission Members and Staff Members

All Commission Members and Staff Members who travel on official business for the Commission shall travel on Government travel orders and shall be provided per diem for the locality at the rates authorized by the Per Diem, Travel and Transportation Allowance Committee.

Notwithstanding, we understand Commission Members and Staff Members who travel may find themselves in situations where they attend official functions wherein the Government provides for individual meals, for example, the use of Official Representational Funds to pay for the Commission's dinner on May 2, 2005. Even though the Department of Defense authorized the use of Official Representational Funds for this function the Department cannot authorize the dual compensation of the Members.

When this happens the Commission Members or Staff Members must indicate on their individual travel vouchers that they received meals at Government expense so that adjustments can be made to their per diem rate. In addition, please remind your Commission Members and Staff Members that they must use Official Government Travel Cards when traveling on official Commission business and not their own personal credit cards.

Frank M. Wilson
Committee Management Officer
for the Department of Defense

Copy to:
Commission's Designated Federal Officer
WHS (FM)



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APPROPRIATE AUTHORIZATION**

January 17, 2005

MEMORANDUM OF LAW

TO: Executive Director, Patricia Walker

FROM: General Counsel, Rumu Sarkar

SUBJECT: Applicability of the Federal Advisory Committee Act (FACA) and
Related Legislation

EXECUTIVE SUMMARY: This memorandum will examine the applicability of the Federal Advisory Committee Act (FACA), the Government in the Sunshine Act (the "Sunshine Act"), and the Freedom of Information Act (FOIA). In addition, the applicability of the Congressional Accountability Act (CAA) to the Overseas Basing Commission (the "Commission") will be considered.

In sum, this memorandum will set forth the reasons why FACA, the Sunshine Act, and FOIA do not apply to the Commission, and why the CAA does apply. A separate memorandum sets forth recommendations that are advisory in nature to provide practical guidance on conducting the Commission's affairs in an efficient and legally compliant manner. Records management and disposition as well as close-out procedures for the Commission upon its termination will be discussed separately in other memoranda.

DISCUSSION:

A. FACA: The U.S. Supreme Court has found that "FACA's principal purpose was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them."¹ Congress passed FACA (made effective on 5 January 1973) to oversee and impose accountability on advisory committees "established or utilized" by the President, by a federal agency, or by Congress "in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal government."²

¹ Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 458 (1989). The Court further found that FACA's "purpose was to ensure that new advisory committees be established only when essential and that their number be minimized; that they be terminated when they have outlived their usefulness; that their creation, operation, and duration be subject to uniform standards and procedures; that Congress and the public be apprised of their existence, activities, and cost; and that their work be exclusively advisory in nature." Id. at 446.

² See 5 U.S.C. app. 2 § 3.

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Thus, FACA deals exclusively with two types of advisory committees, those that advise the President, and those that advise the executive agencies of the Federal government. Moreover, the legislative history of FACA demonstrates that it was not intended to cover commissions or committees that are established solely to advise Congress.³

The question of whether the Federal Advisory Committee Act (FACA), 5 U.S.C. app. 2 (2000), is applicable to commissions created solely to advise Congress has been considered before, and the U.S. Department of Justice, Office of Legal Counsel, has concluded that FACA does not apply to such commissions.

The Office of Legal Counsel considered the applicability of FACA to congressional advisory commissions in its opinion, *Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission*.⁴ In that case, a commission (the "Hawaiian Commission") was formed to publish a draft report and to distribute the draft to appropriate federal and state agencies, interested organizations, and the public in order to solicit their written comments. The Hawaiian Commission was then tasked with issuing a final report to the President and to two Congressional committees, making recommendations to Congress based on its findings and conclusions. The Office of Legal Counsel opinion closely considers whether sending a copy of the final report to the President makes the commission an advisory body to the President, thus triggering FACA.

The opinion concludes that:

Merely sending a copy of the [c]ommission's report to the President would not seem to make the [c]ommission advisory to the President when its recommendations are made only to Congress. Second, even if the final report itself could be characterized as "advice," it is unclear that such advice is really for the President where other factors and the underlying purpose of the study indicate that the [c]ommission was created to formulate policy recommendations to Congress for future legislation. That the President is to receive a copy of the study, perhaps simply as a courtesy or for his general information, does not mean the study was intended to "advise" him.⁵

Similarly, the Overseas Basing Commission has been tasked to "submit to the President and Congress a report which shall contain a detailed statement of the findings and conclusions of the Commission, together with recommendations for proposed legislation

³ See *Gannett News Service, Inc. v. Native Hawaiians Study Comm'n*, No. 82-0163, at *7, 1982 U.S. Dist. LEXIS 18398 (D.D.C. June 1, 1982). See also *Metcalf v. Nat'l Petroleum Council*, 553 F.2d 176, 178 n.14 (D.C. Cir. 1977) (stating that "FACA does not specifically mention Congressional advisory committees; presumably, the Congress can establish such committees for its own use.")

⁴ 6 Op. Off. Legal Counsel 39, 40 (1982).

⁵ *Id.* at 41; accord *Gannett News Service*, at *5; Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws, 13 Op. Off. Legal Counsel 285 (1989) (finding a commission to be advisory to Congress, not the President, even though the commission in question was statutorily required to submit its report to both the Congress and the President).

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and administrative actions as it considers appropriate.”⁶ This seems to indicate that the primary purpose of the Commission is to advise Congress on recommended legislation, rather than to advise the President. Indeed, it would raise constitutional questions if Congress appointed individuals to make such legislative proposals on behalf of the President, and required the submission of such proposed legislation to Congress.⁷ (Of course, all the Commissioners of the Commission have been appointed by members of Congress, rather than having been nominated or appointed by the President.)

The Hawaiians Study Commission opinion also closely examined the legislative history of the Hawaiian Commission’s organizational statute for further guidance. The opinion concludes that the legislative history supports the finding that the Hawaiian Commission was created to advise Congress, not the President and therefore, is not subject to FACA.⁸

The legislative history of the Overseas Basing Commission reveals that the executive branch itself considers the Commission to be a part of the legislative branch. The Office of Management and Budget (OMB), an integral part of the Executive Office of the President, issued a statement dated July 10, 2003, clearly indicating that the “Commission would be composed of members appointed by the Congressional leadership and would, therefore, be part of the Legislative Branch.”⁹

Finally, the Hawaiians Study Commission opinion also concludes that the Hawaiian Commission’s report will be not be “utilized” by a federal agency in a manner that triggers FACA.¹⁰ Under FACA’s definition of “utilized,” FACA “can only apply if the [advisory] committee is established, managed, or controlled for the purpose of obtaining advice or recommendations for the federal government.”¹¹ The Overseas Basing Commission is an independent, self-governing commission that is not influenced, managed or controlled by any federal agency or instrumentality. Therefore, there is no

⁶ Military Construction Appropriations Act, 2004, Pub. L. No. 108-132, § 128(b)(3)(A), 117 Stat. 1374 (2003).

⁷ In fact, the U.S. Justice Department has long recognized that under Article III, Section 3 of the U.S. Constitution, the President has “plenary and exclusive discretion” to submit legislative proposals to Congress. “Thus, Congress may not require executive branch officials to submit legislative proposals to the Congress.” *Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws*, 13 Op. Off. Legal Counsel, *supra* note 5, at 287. Moreover, the appointment by Congress of individuals tasked with making such legislative proposals for the executive branch may raise constitutional separation of powers questions. *Id.*

⁸ *Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission*, 6 Op. Off. Legal Counsel, *supra* note 4, at 46.

⁹ OMB Statement of Administration Policy, *S. 1357 – Military Construction Appropriations Bill, FY 2004*, July 10, 2003, at 2.

¹⁰ *Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission*, 6 Op. Off. Legal Counsel, *supra* note 4, at 46; *see also* Wash. Legal Found. v. U.S. Sentencing Commission, 17 F.3d 1446, 1450 (D.C. Cir. 1994) (stating that the word “utilized” in FACA is “a stringent standard, denoting something along the lines of actual management or control of the advisory committee.”) *Accord* Byrd v. U.S. Environmental Protection Agency, 174 F.3d 239, 246 (D.C. Cir. 1999); *see also* Sofamor Danek Group, Inc. v. Gaus, 61 F.3d 929, 936 (D.C. Cir. 1995).

¹¹ *Sofamor*, *supra* note 10, at 936.

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factual basis upon which to conclude that the Commission's work will be "utilized" by an executive branch agency within the narrowly defined context of FACA.

Nevertheless, section 128 of the Overseas Basing Commission's organizational statute does require the Commission's final report to "include a proposal by the Commission for an overseas basing strategy for the Department of Defense in order to meet the current and future mission of the Department." However, the inclusion of this proposed strategy does not automatically mean that it will be used to formulate policy or be adopted by the Department of Defense (DoD). Even if this were to be the case, at least one federal court has recognized that the subsequent use of a report of an advisory group by a federal agency does not trigger FACA.¹²

In conclusion, therefore, based on the above discussion and analysis, FACA does not apply to the Commission.¹³

B. Sunshine Act: The Sunshine Act was enacted in 1976 to "provide the public with information regarding the decision-making processes of the Federal Government 'while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.'"¹⁴ Accordingly, an agency subject to the Sunshine Act must give reasonable notice of its meetings and make its meetings open to public observation, unless the agency has properly decided to close the meeting, or a portion thereof, pursuant to one of the Act's ten exemptions,¹⁵ generally mirroring those exemptions found in FOIA.

The Sunshine Act applies to "any agency, as defined in section 552(e) of title [5] [i.e., FOIA], headed by a collegial body composed of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency."¹⁶

The Hawaiians Study Commission case, cited earlier, also examines at length the applicability of the Government in the Sunshine Act, 5 U.S.C. § 552b (2000). The opinion concluded that the Hawaiian Commission was: (a) not an advisory committee under FACA; (b) not an agency as defined by the Administrative Procedure Act (APA), 5

¹² *Id.* (finding that the "subsequent and optional" use of an advisory committee's work product by the Executive Branch does not implicate FACA).

¹³ On an additional note, the fact that the Overseas Basing Commission filed a charter with the General Services Administration (GSA) pursuant to FACA, and the fact that the funding for the Commission derives from the Military Construction Appropriations Act, 2004, a part of the appropriations bill for the DoD, an executive department, are not dispositive criteria in determining whether a commission should be part of the executive branch. See *Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws*, 13 Op. Off. Legal Counsel, *supra* note 5, at n. 11. In other words, these facts alone do not automatically transform the Overseas Basing Commission into a part of the executive branch.

¹⁴ *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 239 (D.C. Cir. 1981).

¹⁵ 5 U.S.C. § 552b(c). This section is also referenced in section 10 of FACA in recognition that meetings of FACA committees may be closed in accordance with the provisions of the Sunshine Act.

¹⁶ *Id.* at § 552b(a)(1).

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U.S.C. § 551, and FOIA, 5 U.S.C. § 552; and therefore, (c) not an agency for purposes of the Sunshine Act.¹⁷ The same conclusion applies to the Overseas Basing Commission.

In fact, the Sunshine Act does not apply to the Overseas Basing Commission for two reasons. First, none of its members were appointed by the President with the advice and consent of the Senate. As mentioned above, all of the Commissioners were appointed by members of Congress.

Secondly, the Commission is not an “agency” as defined by the Sunshine Act. The Sunshine Act incorporates the definition of “agency” as defined by FOIA, 5 U.S.C. § 552(e). FOIA, in turn, incorporates the definition of “agency” used in the APA, 5 U.S.C. § 551(1).

However, the APA specifically exempts Congress from its provisions under 5 U.S.C. § 551(1)(A). This section defines “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—the Congress.” The exemption for Congress has been broadly construed to mean the entire legislative branch.¹⁸ Therefore, since the application of the Sunshine Act is defined by the scope of the APA, congressional advisory committees (as part of the legislative branch) are exempt from its coverage.

In conclusion, the Overseas Basing Commission is not subject to the Sunshine Act since its members were not Presidentially appointed and Senate confirmed. Further, it is not an “agency” within the scope of the APA or FOIA and consequently, does not fall within the scope of the Sunshine Act.

However, it is recommended that notices of public hearings and meetings of the Commission be published as notices in the Federal Register in a timely fashion, if not actually 15 days in advance of such meetings,¹⁹ in order to solicit public participation and make the proceedings of the Commission as transparent as practicable. This recommendation has already been implemented by the Commission.

¹⁷ *Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission*, 6 Op. Off. Legal Counsel, *supra* note 4, at 46.

¹⁸ See Wash. Legal Found., *supra* note 10, 17 F.3d at 1449 (holding that “the Library of Congress (part of the legislative branch but a separate entity from ‘the Congress’ narrowly defined) is exempt from the APA because its provisions do not apply to ‘the Congress’—that is, the legislative branch”). See also *Symons*, *supra* note 14, 670 F.2d at 243 (finding that Congress chose a narrow definition of “agency” and not a broad, all-encompassing definition when it enacted the Sunshine Act).

¹⁹ The General Services Administration (GSA) has promulgated regulations requiring that FACA committees provide 15 days advance notice of their meetings by publication in the Federal Register. See 41 C.F.R. § 105-54.301(i). Please note, however, that the Federal Register Act explicitly exempts entities in the judicial and legislative branches of the government from its provisions. The Act defines an “agency” to mean “the President of the United States, or an executive department . . . but not the legislative or judicial branches of the Government.” See 4 U.S.C. § 1501. See also *Washington Legal Foundation*, *supra* note 10, 17 F.3d at 1449.

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C. Freedom of Information Act (FOIA):²⁰ For the reasons discussed above, the Commission does not fall within FOIA's definition of "agency." In other words, for purposes of FOIA, the definition of "agency" does not include "Congress" since FOIA uses the same definition as the one used in the APA. The exception for "Congress" has been broadly interpreted to apply "to Congress and its institutions . . . for example, the Library of Congress has been considered to be exempt from FOIA under the 'Congress' exemption."²¹ In *Mayo v. U.S. Government Printing Office*, the Court held that the US Government Printing Office was exempt from FOIA since it is "clearly a unit of the legislative branch."²²

The Court further noted that quasi-congressional bodies and institutions such as the General Accounting Office, the Office of Technology Assessment, the Copyright Office and the Government Printing Office are part of the legislative branch and, therefore, exempt from FOIA.²³ Thus, as part of the legislative branch, the Overseas Basing Commission is exempt from the requirements of FOIA.

Nevertheless, federal courts have recognized a "common law right of access"²⁴ to public records of advisory committees that are not otherwise subject to FACA or FOIA. If the document being sought is a public record, then the court has established a balancing test weighing the government's interest in keeping the document secret against the public's interest in disclosure.²⁵

Upon further consideration in additional proceedings in the *Washington Legal Foundation* case, the Court examined the documents that were not initially disclosed by the Sentencing Commission and found that the documents were preliminary or incidental to the commission's work. Although the commission was statutorily obligated to "consult with authorities" on various aspects of the federal criminal justice system, the Court held that the commission was not required to keep a record of its proceedings or its research. The records sought, therefore, were not public records and thus, were beyond the scope of the common law right of access. Thus, the Court did not rule on the

²⁰ FOIA, 5 U.S.C. § 552, establishes a presumption of law that all records of governmental agencies are accessible to the public, unless they are specifically exempted from disclosure by FOIA or another statute. Section 552(a)(2) requires that agencies make available for public inspection or copying (or for sale) certain basic agency records that are to be made available in agency reading rooms and, for records created on or after November 1, 1996, in "electronic" reading rooms accessible by computer. Finally, all other records, unless exempt from required disclosure under section 552(b) or excluded from FOIA coverage under section 552(c), must be disclosed to the public upon request.

²¹ *Mayo v. U.S. Gov't Printing Off.*, 839 F. Supp. 697 (N.D. Cal. 1992) (citing *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985)). *See also* *Ostheimer v. Chumbley*, 498 F. Supp. 890, 892 (D. Mont. 1980) (holding that the U.S. Tax Court was established by Congress as an Article I court in 1969, thus becoming a part of the legislative branch of government and, therefore, exempt from FOIA).

²² 839 F. Supp. at 700.

²³ *Id.*

²⁴ *See, e.g., Nixon v. Warner Comm., Inc.*, 435 U.S. 589 (1978).

²⁵ *See Washington Legal Foundation, supra*, note 10, 17 F.3d at 1451-52. *Accord*, *Pentagen Techs. Int'l, Ltd. v. Comm. on Appropriations of the U.S. House of Representatives*, 20 F. Supp.2d 41, 45 (D.D.C. 1998).

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balancing test, and did not require the Sentencing Commission to disclose the records in question.²⁶

While the Commission's records may not necessarily be "public records" subject to disclosure to the public under a common law right of access, it is recommended, however, that the official records of the Commission be made available to the public in a public reading room that has already been established on the Commission's premises, and that further, such documents also be made available as e-documents accessible on the Commission's website. These recommendations have already been implemented.

In addition, a separate memorandum will examine the scope of the application of the Federal Records Act, 44 U.S.C. §§ 3101-3107, and provide guidance on setting up a records management system, if required. Disposition and retirement of federal records will also be addressed. (This is a separate issue from the requirements of disclosing federal records to the public under FOIA.)

D. Congressional Accountability Act: And finally, to be noted in this context, the Congressional Accountability Act (CAA) of 1995, makes certain laws applicable to the legislative branch.²⁷ While advisory groups like the Commission are not specifically covered,²⁸ it is worthwhile to simply note for the record that the following laws, among others, have been made applicable to the legislative branch pursuant to 2 U.S.C. § 1302: (1) Fair Labor Standards Act of 1938, 29 U.S.C. § 201, et seq.; (2) Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.; (3) Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq.; (4) Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 et seq. ; (5) Family and Medical Leave Act of 1993, 29 U.S.C. § 2611 et seq.; (6) Occupational Safety and Health Act of 1970, 29 U.S.C. § 651 et seq. ; and (7) Rehabilitation Act of 1973, 29 U.S.C. § 701 et seq..

The CAA also established the Office of Compliance to oversee implementation of the Act and additional information is available on their website at <http://www.compliance.gov.html>. While this may not have any immediate relevance to the Commission's mission and the conduct of its work, it is hereby noted for the record.

CONCLUSION: As part of the legislative branch, the Commission is exempt from the provisions of FACA, the Sunshine Act and FOIA for the reasons discussed above. It is nevertheless recommended, and discussed in further detail in a separate memorandum, that Federal Register notices continue to be issued in a timely manner giving public notice of the Commission's meetings and that, further, official records be made available for public inspection and copying. These practices will, to the extent practicable, provide public access to the Commission's proceedings and official documents.

²⁶ *Washington Legal Foundation v. U.S. Sentencing Comm'n.*, 89 F.3d 897, 907 (D.C. Cir. 1996).

²⁷ 2 U.S.C. § 1301 (2000).

²⁸ *Id.*

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TALKING POINTS: January 11, 2005

Is FACA, Government in the Sunshine Act, and FOIA applicable to advisory commissions created to advise Congress?

I. FACA (5 U.S.C. app. 2)(2000):

A. Statutory Purpose and Legislative History:

- “FACA’s principal purpose was to enhance the public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them.” *Public Citizen v. United States Dep’t of Justice*, 491 U.S. 440, 458 (1989).
- The legislative history of FACA demonstrates that it was not intended to cover commissions or committees that are established solely to advise Congress. *See Gannett News Service, Inc. v. Native Hawaiians Study Comm’n*, No. 82-0163, at *7, 1982 U.S. Dist. LEXIS 18398 (D.D.C. June 1, 1982). *See also Metcalf v. Nat’l Petroleum Council*, 553 F.2d 176, 178 n.14 (D.C. Cir. 1977) (stating that “FACA does not specifically mention Congressional advisory committees; presumably, the Congress can establish such committees for its own use.”)

B. Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission, 6 Op. Off. Legal Counsel 39 (1982):

- Mere transmission of advisory committee report to President does not trigger FACA. (*Id.* at 40; *accord Gannett News Service*, at *5; Status of the Commission on Railroad Retirement Reform for Purposes of the Applicability of Ethics Laws, 13 Op. Off. Legal Counsel 285 (1989) (finding a commission to be advisory to Congress, not the President, even though the commission in question was statutorily required to submit its report to both the Congress and the President).
- Legislative history of the commission in question determines whether Congress intended the commission to advise the President. In OBC’s case, the Office of Management and Budget (OMB), an integral part of the Executive Office of the President, issued a statement dated July 10, 2003, clearly indicating that the “Commission would be composed of members appointed by the Congressional leadership and would, therefore, be part of the Legislative Branch.” (OMB Statement of Administration Policy, S. 1357 – *Military Construction Appropriations Bill, FY 2004*, July 10, 2003, at 2.)
- Advisory committee’s report will not be “utilized” by the executive branch. Under FACA’s definition of “utilized,” FACA “can only apply if the if the [advisory] committee is established, managed, or controlled for

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the purpose of obtaining advice or recommendations for the federal government.” (*Sofamor Danek Group, Inc. v. Gaus*, 61 F.3d 929, 936 (D.C. Cir. 1995). (*See also* *Wash. Legal Found. v. U.S. Sentencing Commission*, 17 F.3d 1446, 1450 (D.C. Cir. 1994) (stating that the word “utilized” in FACA is “a stringent standard, denoting something along the lines of actual management or control of the advisory committee.”) *Accord* *Byrd v. U.S. Environmental Protection Agency*, 174 F.3d 239, 246 (D.C. Cir. 1999).

- The OBC is an independent, self-governing commission that is not influenced, managed or controlled by any federal agency or instrumentality. Therefore, its report to Congress and the President will not be “utilized” by a federal agency in the narrowly defined context of FACA.
- Moreover, the possible subsequent use of its report by DoD does not trigger FACA. (*See Sofamor, supra* 61 F.3d at 936, finding that the “subsequent and optional” use of an advisory committee’s work product by the Executive Branch does not implicate FACA.)
- In light of the above, it appears that FACA does not apply to the OBC.

II. **Government in the Sunshine Act (the “Sunshine Act”)(5 U.S.C. § 552b)(2000):**

- The Sunshine Act applies to “any agency, as defined in section 552(e) of title [5] [i.e., FOIA], headed by a collegial body composed of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency.” (*Id.* at § 552b(a)(1)).
- The Sunshine Act may be deemed inapplicable to the OBC for two reasons. First, none of its members were appointed by the President with the advice and consent of the Senate. All of the Commissioners were appointed by members of Congress.
- Secondly, the Commission is not an “agency” as defined by the Sunshine Act. The Sunshine Act incorporates the definition of “agency” as defined by FOIA, 5 U.S.C. § 552(e). FOIA, in turn, incorporates the definition of “agency” used in the APA, 5 U.S.C. § 551(1). However, the APA specifically exempts Congress from its provisions under 5 U.S.C. § 551(1)(A). This section defines “agency” as “each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include— the Congress.”
- The APA exemption for Congress has been broadly construed to mean the entire legislative branch. (*See Wash. Legal Found., supra*, 17 F.3d at 1449 (holding that “the Library of Congress (part of the legislative branch but a separate entity from ‘the Congress’ narrowly defined) is exempt from the APA because its provisions do not apply to ‘the Congress’—that is, the legislative branch”). *See also* *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 243 (D.C. Cir.

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1981) (finding that Congress chose a narrow definition of “agency” and not a broad, all-encompassing definition when it enacted the Sunshine Act).

- Nevertheless, it is recommended that notices of public hearings and meetings of the Commission be published as notices in the Federal Register in a timely fashion, if not actually 15 days in advance of such meetings, in order to solicit public participation and make the proceedings of the OBC as transparent as practicable. This recommendation has already been implemented by the OBC.

III. FOIA (5 U.S.C. § 552)(2000):

- The OBC is excluded from FOIA’s definition of “agency” since the APA’s definition (excluding Congress) is used. The exception for “Congress” has been broadly interpreted to apply “to Congress and its institutions for example, the Library of Congress has been considered to be exempt from FOIA under the ‘Congress’ exemption.” (*Mayo v. U.S. Gov’t Printing Off.*, 839 F. Supp. 697 (N.D. Cal. 1992) (citing *Ethnic Employees of Library of Congress v. Boorstin*, 751 F.2d 1405, 1416 n.15 (D.C. Cir. 1985)).
- In *Mayo v. U.S. Government Printing Office*, *supra*, 839 F. Supp. at 700, the Court held that the US Government Printing Office was exempt from FOIA since it is “clearly a unit of the legislative branch.” The Court further noted that quasi-congressional bodies and institutions such as the General Accounting Office, the Office of Technology Assessment, the Copyright Office and the Government Printing Office are part of the legislative branch and, therefore, exempt from FOIA. (*Id.*)
- Thus, as part of the legislative branch, OBC may be held exempt from FOIA. However, it is recommended that the official records of the OBC be made available to the public in a public reading room that has already been established on the OBC’s premises, and that further, such documents also be made available as e-documents accessible on the Commission’s website. These recommendations have already been implemented.

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*1990 OLC LEXIS 61, *; 14 Op. O.L.C. 53*

OPINION OF THE OFFICE OF LEGAL COUNSEL

Application of Federal Advisory Committee Act to Editorial Board of Department of Justice Journal

An outside advisory or editorial board for a new Department of Justice publication would be subject to the Federal Advisory Committee Act if it deliberated as a body in order to formulate recommendations, but would not be subject to FACA if each individual member reviewed submissions to the journal and gave his or her own opinion about publication.

1990 OLC LEXIS 61; 14 Op. O.L.C. 53

March 27, 1990

CORE TERMS: editorial, advice, recommendations, regulation, advisory board, advisory committee, guidelines, advisory, deliberated, membership, contractor, collection, full-time, staff, Federal Advisory Committee Act, individual member, formulate

ADDRESSEE:

[*1]

MEMORANDUM FOR THE EXECUTIVE ASSISTANT TO THE ATTORNEY GENERAL

OPINIONBY: BARR

OPINION:

You have asked whether an outside advisory or editorial board for a new publication of the Department would be subject to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. §§ 1-15. We believe that the board would be subject to FACA if it deliberated as a body in order to formulate recommendations, but would not be subject to FACA if each individual member reviewed submissions to the journal and gave his own opinion about publication. n1

n1 We assume that the editorial or advisory board would not perform operational functions with respect to the publication. If the board actually made the final decisions about what to publish or how to run the journal, additional legal questions would be raised. See, e.g., 41 C.F.R. § 101-6.1004(g); 5 U.S.C. app. § 9(b); Public Citizen v. Commission on the Bicentennial of the U.S. Constitution, 622 F. Supp. 753 (D.D.C. 1985).

I.

The definition of "advisory committee" under FACA covers, among other things, "any committee, board, commission, council, conference, panel, **[*2]** task force, or other similar group, or any subcommittee or other subgroup thereof . . . which is . . . established or utilized by one or more agencies, in the interest of obtaining advice or recommendations for . . . one or more agencies or officers of the Federal Government." 5 U.S.C. app. § 3(2). An advisory board -- a committee that collectively reviews drafts of articles, makes recommendations about publication, and suggests editorial policy -- would probably come

within FACA. It would be "established" by the Department, "in the interest of obtaining advice or recommendations" for the Department. 5 U.S.C. app. § 3(2). As the legislative history of FACA shows, the term "established" is to be interpreted in its "most liberal sense, so that when an officer brings together a group by formal or informal means, by contract or other arrangement, and whether or not Federal money is expended, to obtain advice and information, such group is covered by the provisions" of the Act. S. Rep. No. 1098, 92d Cong., 2d Sess. 8 (1972). In view of this broad meaning, the advisory or editorial board would come within FACA if it deliberated **[*3]** as a body. n2

n2 On occasion, in determining whether a group is an "advisory committee," OLC has relied upon limiting draft guidelines for FACA that were published in the Federal Register, 28 Fed. Reg. 2306 (1973), but not adopted, 39 Fed. Reg. 12,389 (1974). These guidelines, OLC has stated, are an early administrative interpretation of FACA and thus entitled to some weight. See Memorandum for Irving P. Margulies, Deputy General Counsel, Department of Commerce, from Theodore B. Olson, Assistant Attorney General, Office of Legal Counsel, Re: President's Private Sector Survey on Cost Control at 6-7 (Dec. 15, 1982). Even under these guidelines, a group that has "all or most" of five "characteristics" would probably apply to the proposed board (fixed membership, establishment by federal official, defined purpose of providing advice on particular subjects, and regular or periodic meetings), and the last characteristic might also apply (an organizational structure, such as a group of officers, and a staff).

Furthermore, FACA would apply even though the advisory board, as we understand, could include some members who are **[*4]** full-time government officers or employees. Under the statute, the definition of "advisory committee" excludes "any committee which is composed wholly of full-time officers or employees of the Federal Government." 5 U.S.C. app. § 3(2) (iii). By implication, a committee that is not "wholly" composed of government employees or officers comes within the statute. See Center for Auto Safety v. Tiemann, 414 F. Supp. 215, 225 n.10 (D.D.C. 1976) (committee of state and federal employees is covered by FACA), remanded on other grounds sub nom. Center for Auto Safety v. Cox, 580 F.2d 689 (D.C. Cir. 1978); S. Rep. No. 1098 at 8 (FACA motivated by abuses involving committees "whose membership in whole or in part" comes from outside the government).

Although some courts have put limiting constructions on the meaning of "advisory committee," we do not believe that such a limiting construction could be justified here, if the editorial or advisory board deliberated as a body in order to make its recommendations. The definition of "advisory committee," if read as broadly as the language permits, is expansive.

[*5] See, e.g., Nader v. Baroody, 396 F. Supp. 1231, 1232 (D.D.C. 1975), vacated as moot, No. 75-1969 (D.C. Cir. Jan. 10, 1977). The language could extend to instances where application of FACA -- with its requirements of balanced membership, open meetings, and public availability of documents -- would unconstitutionally intrude on the exercise of the President's authority. Courts have construed the statute to avoid such outcomes. See Public Citizen v. United States Dep't of Justice, 491 U.S. 440 (1989) (FACA does not apply to American Bar Association's committee on judicial selection); Nader v. Baroody, 396 F. Supp. at 1234-35 (FACA does not apply to casual, day-to-day meetings by which the President gathers information and views); see also National Anti-Hunger Coalition v. Executive Comm. of the President's Private Sector Survey on Cost Control, 557 F. Supp. 524, 530 (D.D.C.) (**FACA**, if read broadly, could violate separation of powers), aff'd and remanded, 711 F.2d 1071 (D.C. Cir.), amended, 566 F. Supp. 1515 (D.D.C. 1983). **[*6]** However, no constitutional issues would be raised by applying **FACA** to the contemplated editorial or advisory board. The business of such a board would not touch on any "constitutionally specified task committed to the Executive," Public Citizen v. United States Dep't of Justice, 491 U.S. at 460, nor would regulating the board's activities under **FACA** interfere with the President's discharge of his duties.

II.

We believe that the Act would not reach an advisory board if the Department sought only the views of individuals rather than the views of the board as a whole. **FACA** applies by its terms to "advisory committees." "Advisory committee" is a term that connotes a body that deliberates together to provide advice. Therefore, as a matter of **statutory** construction, we believe that **FACA** does not apply to a group which simply acts as a forum to collect individual views rather than to bring a collective judgment to bear.

GSA regulations confirm the commonsense notion of what differentiates a "committee" from a collection of individuals. n3 The regulations state that **FACA** does not cover:

Any meeting initiated by a Federal official(s) with more than one [*7] individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations

41 C.F.R. § 101-6.1004(i). Although this provision is not entirely clear, it appears to mean that **FACA** does not cover a collection of individuals who do not perform a collegial and deliberative function and whose views are considered individually rather than as part of a "sense of the committee."

n3 In *Public Citizen v. United States Dep't of Justice*, the Court held that the GSA regulations were entitled to "diminished deference" because they were not issued until ten years after **FACA** was passed and because **FACA**, while empowering GSA to issue "administrative guidelines and management controls," 5 U.S.C. app. § 7(c), did not expressly authorize GSA to fill in the definitions of the **statutory** terms. 491 U.S. at 463 n.12. But see 491 U.S. at 477-81 (Kennedy, J., concurring in the judgment). Nevertheless, the Court did not view the regulations as wholly without weight. [*8]

The clearest example of such a collection of individuals would be a group of experts, each of whom reviews submissions in his own area of expertise. Nevertheless, even if each member of the editorial board reviews every article and sends his comments to the Department, the arrangement would still appear to fall outside **FACA**, because a collective judgment would not be sought. Indeed, since the regulation permits a meeting at which individual views are offered, it would, a fortiori, permit the solicitation of individual views of board members who are not at a meeting. The board members would merely be acting in the same way as individual contractors who offer consulting services to the government. Cf. H.R. Rep. No. 1017, 92d Cong., 2d Sess. 4 (1972) ("The term advisory committee does not include any contractor or consultant hired by an officer or agency of the government, since such contractor would not be a 'committee, board, commission, council . . . , or similar group" (alteration in original)). We caution, however, that this regulation has not been directly tested in the courts.

While the regulation also permits a group to meet without having to comply with **FACA**, as [*9] long as only individual views are offered, such an arrangement would be open to legal challenge. As a practical matter, the dynamics of such a gathering are likely to lead to members exchanging, analyzing, and debating the views presented, and it would be difficult

to argue, in that event, that the members were offering only discrete, individual opinions.

If the editorial or advisory board is set up as a vehicle for the presentation of individual views, it may be prudent to leave the board without any formal structure, such as officers or staff. One opinion in a case under FACA could be read to suggest that such "indicia of formality" may be relevant to whether the principle recognized in the GSA regulation would apply. See Natural Resources Defense Council, Inc. v. Herrington, 637 F. Supp. 116, 120 (D.D.C. 1986).

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The exemption for committees created by the National Academy of Sciences or the National Academy of Public Administration was added in the 1997 amendment.²⁹ While exempt from the section 3(2) definition, they are nevertheless subject to a set of procedures included in the 1997 legislation. FACA § 15. FACA § 4 further exempts committees whose enabling legislation specifically provides otherwise (this would be the case in any event); committees established or utilized by the Central Intelligence Agency or the Federal Reserve System; and certain state and local bodies.

Exemptions may, of course, appear in other statutes. For example, section 204(b) of the Unfunded Mandates Reform Act of 1995, Pub. L. No. 104-4, 109 Stat. 48, 66, 2 U.S.C. § 1534(b), renders FACA inapplicable to meetings between federal and state, local, or tribal officials, if they deal solely with federal programs “that explicitly or inherently share intergovernmental responsibilities or administration.”

Other exemptions derive from case law. The Justice Department has concluded that FACA does not apply to a body created jointly by the United States and another nation. 3 Op. Off. Legal Counsel 321 (1979). It has also found that the Smithsonian Institution is not an “agency” under FACA’s definition. Consequently, FACA would not apply to advisory bodies established by the Smithsonian. 12 Op. Off. Legal Counsel 122 (1988).

²⁹The original version of section 3(2), on the books until the 1997 amendment, exempted the Commission on Government Procurement and the Advisory Committee on Intergovernmental Relations. The Procurement Commission finished its job and went home in 1973. The ACIR was terminated in 1995, but extended the following year for the sole and limited purpose of performing a contract with the National Gambling Impact Study Commission. Treasury, Postal Service, and General Government Appropriations Act, 1996, Pub. L. No. 104-52, title IV, 109 Stat. 468, 480 (1995) (termination); Pub. L. No. 104-328, 110 Stat. 4004 (1996) (extension).

If the specific exemptions do not resolve the question, there are several principles that are relevant in assessing applicability. They are, unfortunately, often difficult to apply, and we do little more than note them and allude to the problem areas.³⁰

(2) Advisory versus operational

FACA applies to committees which are purely advisory. It does not apply to bodies that are "operational." See FACA § 9(b) ("[u]nless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions"); FACA § 2(b)(6) ("the function of advisory committees should be advisory only"). With respect to these provisions, as one court has said, "Congress intended that federal decision makers, not their advisers or delegates, execute federal policy." Consumers Union v. Department of Health, Education and Welfare, 409 F. Supp. 473, 477 (D.D.C. 1976), aff'd 551 F.2d 466 (D.C. Cir. 1977). The Justice Department has offered a useful test: does the body make or implement decisions itself, or does it offer advice to federal officials who themselves will then make the decisions? 5 Op. Off. Legal Counsel 283, 285 (1981).

Illustrative cases include Sofamor Danek Group v. Gaus, 61 F.3d 929 (D.C. Cir. 1995) ("Low Back Panel," although established by government, was charged with developing guidelines for health care practitioners rather than providing advice to federal government, and was therefore operational); Public Citizen v. Commission on the Bicentennial of the United States Constitution, 622 F. Supp. 753 (D.D.C. 1985) (Bicentennial Commission primarily operational and therefore exempt); 57 Comp. Gen. 51 (1977) (same result for National Commission on the Observance of International Women's Year); B-222831, May 30, 1986 (internal memorandum) (Statue of Liberty - Ellis Island Foundation). The fact that the commission may be required to submit reports to the President and/or Congress when it has finished its work does not change the result. Public Citizen, 622 F. Supp. at 758. These cases, by the way (except for Sofamor

³⁰Good references are Stephen P. Croley, Practical Guidance on the Applicability of the Federal Advisory Committee Act, 10 Admin. L.J. 111 (1996); Stephen P. Croley and William F. Funk, The Federal Advisory Committee Act and Good Government, 14 Yale J. on Reg. 451 (1997).

Danek), point to one type of body which is almost always operational—the commemorative or memorial commission. Their role is usually to plan, coordinate, and implement a particular celebration. Further examples of this type are the Christopher Columbus Quincentenary Jubilee Commission, Pub. L. No. 98-375, 98 Stat. 1257 (1984); the Civil War Centennial Commission, Pub. L. No. 85-305, 71 Stat. 626 (1957); and the National Capital Sesquicentennial Commission, Pub. L. No. 80-203, 61 Stat. 396 (1947).

The more difficult situation arises when a body has both advisory and operational functions. FACA clearly anticipates its applicability to committees with some operational functions. For example, a committee's charter—which is not required for an exempt entity—must specify “a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions.” FACA, § 9(c)(F). Also, the fragment of FACA § 9(b) quoted above explicitly recognizes the inclusion of nonadvisory functions if specifically provided by statute or Presidential directive. The GSA regulations implement this by exempting committees which are “established to perform primarily operational as opposed to advisory functions.” 41 C.F.R. § 101-6.1004(g). An illustrative case is Natural Resources Defense Council v. EPA, 806 F. Supp. 275 (D.D.C. 1992) (EPA's Governors' Forum on Environmental Management primarily operational because participating state governors acted as independent chief executives in partnership with EPA in implementing pertinent legislation). GSA's regulation provides further that a “primarily operational” committee can become subject to FACA “if it becomes primarily advisory in nature.” 41 C.F.R. § 101-6.1004(g).

(3) Who is being advised?

The definition in FACA § 3(2), quoted above, refers to bodies established or utilized “in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government.” FACA § 3(3) expressly incorporates the Administrative Procedure Act definition of “agency,” 5 U.S.C. § 551(1), which specifically excludes Congress. See also FACA § 2(a). Thus, assuming the absence of any other disqualifying factors, an advisory committee will be subject to FACA

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*1981 OLC LEXIS 50, *; 5 Op. O.L.C. 283, ***

OPINION OF THE OFFICE OF LEGAL COUNSEL

APPLICABILITY OF THE FEDERAL ADVISORY COMMITTEE ACT TO LAW ENFORCEMENT
COORDINATING COMMITTEES

1981 OLC LEXIS 50; 5 Op. O.L.C. 283

September 10, 1981

CORE TERMS: advisory committee, operational, subcommittee, advisory, memorandum, advice, exchange of information, recommendations, utilized, advise, comprised, exemptions, law enforcement, advisory committees, performing, federal agency, subgroup, coverage, decisions involving, federal employees, applicability, exempts

SYLLABUS:

[*1]

If the functions of Law Enforcement Coordinating Committees (LECCs) are limited to the exchange of information, or to making operational decisions involving law enforcement matters, they will not be covered by the Federal Advisory Committee Act (FACA). However, to the extent that a LECC performs "advisory functions" by giving advice and recommendations to federal officials, it would be subject to the FACA's requirements when performing those functions.

ADDRESSEE:

Memorandum Opinion for the Acting Director, Executive Office for United States Attorneys

OPINIONBY: OLSON

OPINION:

[283]** This responds to your request that we provide advice about the Federal Advisory Committee Act (FACA) n1 for the United States Attorneys who are charged with establishing Law Enforcement Coordinating Committees (LECCs). n2 The central issue that will be of concern to the United States Attorneys is whether the LECCs are "advisory committees" and thus subject to the FACA's procedural requirements. n3 So long as the actual operations of LECCs conform to the limitations stated in the Associated Attorney General's memorandum providing instructions about their establishment and functions, we conclude that the FACA will not apply to them. **[*2]**

n1 Pub. L. No. 92-463, 86 Stat. 770, 5 U.S.C. App. (1976).

n2 LECCs are to be established pursuant to Attorney General Order No. 951-81 (July 21, 1981). They are to be comprised of federal, state, and local law enforcement officials in each district.

n3 The FACA requires, *inter alia*, that a charter must be prepared before an advisory committee may be constituted, that public notice of all committee meetings must be provided, and that all meetings must be opened to the public unless one of the specific exemptions in 5 U.S.C. § 552b(c) -- made applicable to advisory committees in § 10(d) of

the FACA -- is found to apply. See §§ 9 & 10 of the FACA.

The FACA defines the term "advisory committee" broadly as any "committee, board, commission, council, conference, panel, task force, or other similar group," as well as any subgroup or subcommittee thereof, that is either "established" or "utilized" by a federal agency or the President in the interest of obtaining advice or recommendations. n4

[284]** The LECCs are clearly to be "established" as "committees," for they are to have a definite membership, regular meetings, agendas, a subcommittee structure, and other attributes **[*3]** of formal committee organizations. Cf. *Nader v. Baroody*, 396 F. Supp. 1231, 1233 (D.D.C. 1975), *vacated as moot*, No. 75-1969 (D.C. Cir 1977); *National Nutritional Foods Ass'n v. Califano*, 603 F.2d 327, 334-36 (2d Cir. 1979). Also, the FACA's specific exemptions from coverage do not apply to the LECCs. n5 Accordingly, the only basis for concluding that the LECCs are not "advisory committees" is that they may not be "established" or "utilized" by federal officials in the interest of obtaining advice in particular from the state and local officials who are to be members. n6 In specific terms, the functions of the LECCs may not be advisory at all but rather may be oriented toward (1) the exchange of information and/or (2) the performance of "operational" responsibilities. We will discuss each possibility in turn.

n4 See *Consumers Union of United States, Inc. v. Department of HEW*, 409 F. Supp. 473, 475 (D.D.C. 1976), *aff'd mem.*, 551 F.2d 466 (D.C. Cir. 1977) ("The Act defines advisory committee in a general, open-ended fashion"). It is not necessary for a "committee" to be "established" as an "advisory committee" in order for it to be covered by the FACA. It may be so covered as long as it is "utilized" as such a committee, even though never formally established as such.

n5 The FACA specifically exempts committees comprised wholly of full-time federal employees. See § 3(2). It also exempts committees established or used by the Central Intelligence Agency or the Federal Reserve System, see § 4(b); "any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies," see § 4(c); and certain particular committees in existence when the FACA was enacted, see § 3(2). The LECCs are not to be comprised solely of federal employees. They also could not be characterized as "local civic groups" or as "State or local committees" established to advise state or local officials or agencies. They also come within none of the other specific exemptions from coverage.

n6 A committee comprised solely of federal, state, and local employees may be an "advisory committee" if it provides a forum for the state and local officials to advise federal officials. See *Center for Auto Safety v. Cox*, 580 F.2d 689 (D.C. Cir. 1978). **[*4]**

(1) The FACA defines an "advisory committee" as a committee established or utilized "in the interest of obtaining advice or recommendations" for federal agencies or officers. See § 3(2). Thus, to the extent that a committee's function is to provide a forum for the exchange of information and data -- not advice and recommendations -- the committee by definition will not be an "advisory committee." n7

n7 It is possible for a committee to have mixed functions, some "advisory" and others not. To the extent that a committee has advisory functions at all, it would normally be considered an advisory committee when performing those functions, barring distinguishing factors.

With respect to the LECCs, the Associate Attorney General's memorandum states at several points that certain of a committee's or subcommittee's functions n8 are to be limited to the exchange of information. So long as that is the case, the FACA will not apply with respect to those functions. If in practice the committee's functions differ from those stipulated in the Associate Attorney General's memorandum, the FACA's applicability should be reexamined.

n8 The definition of "advisory committee" makes plain that a "subcommittee" or "subgroup" of an advisory committee is itself covered by the FACA. See § 3(2). **[*5]**

(2) A committee established by a federal agency also may not be an "advisory committee" so long as its functions are specifically operational, not advisory. This distinction is expressed in joint Department of Justice-Office of Management and Budget draft guidelines interpreting **[**285]** the FACA, 38 Fed. Reg. 2306 (Jan. 23, 1973). The distinction, which has been applied by this Department since the Act's passage, is confirmed by the legislative history. n9 The key question in applying it is whether a committee's functions are "operational" instead of advisory. Although that term may not be susceptible to precise definition, it has been employed by this Office to refer generally to the making or implementation of concrete decisions by the members of a committee or subcommittee, as opposed to offering advice to officials who will make the decisions themselves. See generally *Amending the Federal Advisory Committee Act: Hearings on S. 2947 Before the Subcommittee on Reports, Accounting, and Management, Senate Committee on Government Operations, 94th Cong., 2d Sess. (1976)* (testimony of Deputy Assistant Attorney General Lawton). This usage is consistent with the dictionary's **[*6]** definitions of "operational" as "of or relating to operation or an operation" and of "operation" as, *inter alia*, "doing or performing of a practical work" and "an exercise of power or influence." *Webster's Third New International Dictionary* 1581 (1976).

n9 See H.R. Rep. No. 1017, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S. Code Cong. & Ad. News 3494 ("The term advisory committee as used in this bill does not include committees or commissions which have operational responsibilities.").

In several places the Associate Attorney General's memorandum provides that the functions of certain subcommittees involve the performance of operational responsibilities. n10 These could include, for instance, making decisions about how to proceed in particular cases, of formulating operational procedures for handling a set of related cases or law enforcement problems. To the extent that the responsibilities of a subcommittee or a full committee are limited to such operational matters, the FACA would not apply.

n10 In order for a subcommittee or a full committee to be able to perform "operational" functions, it is necessary that members have the authority to so act. That is the reason for the stipulation in the Associate Attorney General's memorandum that LECC members are to have the authority to make operational decisions. **[*7]**

In sum, if the functions of the LECCs and their subcommittees are limited in the manner set forth in the Associate Attorney General's memorandum either to the exchange of information, or to making operational decisions involving law enforcement matters, they will not be covered by the FACA.

THEODORE B. OLSON

Assistant Attorney General

Office of Legal Counsel

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Subject View

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Subject Matter	Title	Text	Type	FACA Sections
	Carpenter v. Morton, 424 F.Supp. 603 (D.Nev. 1976).	The court addressed whether the Secretary of Interior was obligated to recharter the advisory boards created by the Taylor Grazing Act ("TGA"), 43 U.S.C. § 315, et seq., and terminated by Section 14 of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. II, § 1 - 15, et seq. In 1939, Congress amended the TGA to establish boards of grazing district advisors in the several districts. "Pursuant to the TGA, the Dep't of the Interior promulgated a regulation relating to the appointment, term of office and removal of members of grazing district boards." 43 CFR Section 4114.1-3. Plaintiffs were members of grazing boards until January 1995. The board members asserted that the boards established under the TGA were exempt from any effect of the FACA because to allow termination of the boards under the FACA would necessarily involve an implied repeal of the TGA. The court agreed that implied repeals were not favored but disagreed with the basic assertion of the board members. The court noted that the purpose of FACA, "as it relates to this controversy, is to provide a means by which advisory committees which had been established by Congress, the President and various agencies could be reviewed so that those no longer furthering the purpose for which they were established could be terminated." Carpenter, 424 F. Supp. at 604; 5 U.S.C. app. 2 II, § 2. "Section 14(a)(1) of the FACA provides that each advisory committee existing at the time of the effective date of the Act shall terminate within two years unless, among other things, the advisory is one established by an act of Congress and for which Congress has provided a longer duration period. Section 14(b)(1) contemplates that an advisory committee which had been terminated may be renewed." Carpenter, 424 F. Supp. at 604, 605; 5 U.S.C. app. II, § 14. The court concluded that when Congress enacted the FACA, it was concerned with the proliferation of advisory committees that had outlived their usefulness and that, to remedy this, Congress chose to terminate all advisory committees. Further, the court also concluded, however, that Congress contemplated that the FACA would affect provisions of existing substantive laws and that, if later decided the advisory boards were necessary, Congress could enact the necessary legislation to recharter them. Thus, the court found that the Secretary had no obligation or authority to recharter the advisory boards originally established under the TGA.	Case Law	2;14(a)(1);14(b)(1)

<p>Center for the Defense of Free Enterprise v. President's Comm'n on Americans Outdoors, No. C87 32C (W.D. Wash. Mar. 31, 1987) (order granting motion to intervene, and defendants' and intervenors' motion to dismiss).</p>	<p>On January 28, 1985, President Reagan established an advisory commission, the President's Commission on American Outdoors ("Commission"), to study outdoor recreation resources. After preparing its report, the Commission disbanded on January 31, 1987. Plaintiff, the Center for the Defense of Free Enterprise ("Center"), sought injunctive relief to prevent defendant from printing and disseminating the Commission's report. This request was based on alleged violations of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. II, § 1 - 15, et seq. Specifically, the Plaintiffs asserted "that the Commission held closed meetings in violation of FACA by failing to publish notice of each meeting in the Federal Register (5 U.S.C. app. II, § 10(a)(2)), failing to appoint a federal officer or employee to chair or attend each committee meeting (5 U.S.C. app. II, § 10(c)), and failing to keep minutes of meetings (5 U.S.C. app. II, § 10(c))." Center, No. C87-32C at 2. Further, Plaintiff asserted that the FACA violations dated back to December 12, 1985. The court granted the joint motion by the National Parks and Conservation Association ("NPCA"), the National Resources Defense Council ("NRDC"), Paul C. Pritchard, and Nathaniel P. Reed, to intervene as a group. NPCA and NRDC are non-profit organizations with large memberships. Paul Pritchard, president of the NPCA, and Nathaniel Reed, a NRDC trustee, were senior advisors to the Commission. The intervenors asserted that the Plaintiff could not demonstrate that it suffered actual prejudice from any failure to comply with FACA's technical requirements. Accordingly, the court noted that "the Ninth Circuit has adopted a harmless error doctrine which states that a federal agency's procedural errors are not per se prejudicial." <i>Del Norte County v. U.S.</i>, 732 F.2d 1462, 1466 (9th Cir. 1984). Plaintiff's members asserted that it had "inadequate access to the Commission decision-making process and could not make their opinions heard." Center, No. C87-32C at 8. In response to this allegation, the court stated that "if the plaintiff's members had opportunities to inform the Commission of their position on the subjects that the Commissions was required to study, then any violations of FACA constitutes harmless error." Center, No. C87-32C at 8. The court also concluded that the Plaintiff's requested remedy, injunctive relief, is inappropriate because the Commission only made recommendations. Moreover, the Commission did not promulgate specific regulations. Accordingly, in <i>National Nutritional Foods v. Califano</i>, 603 F.2d 327 (2d Cir. 1979), the court found that even though an advisory commission established by the Food and Drug Administration violated FACA, "the regulations that had been promulgated pursuant to the recommendations of the commission should not be invalidated because rulemaking procedures provided ample opportunity to remedy any infirmities which resulted from the FACA violations. This case presents even weaker facts to support invalidation of the Commission's Report. . . . Therefore, the Plaintiff has even more opportunity than did the plaintiffs in <i>Califano</i> to remedy any bias it might perceive in the Commission's report and the complaint should be dismissed on the grounds that any alleged violations constituted harmless error." Center, No. C87-32C at 9, 10.</p>	<p>Case Law</p>	<p>10(a)(2);10(C)</p>
<p>Federal</p>	<p>The Attorney General requested the Office of Legal</p>	<p>Office of</p>	<p>14(a)(1)(B);14</p>

Advisory
Committee Act
- Duration of
Veterans
Administration
Advisory
Committees, 3
Op. O.L.C. 170
(1979).

Counsel ("OLC") to reply to the Veterans Affairs' Administrator's letter to him, concerning the duration under the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. II, § 1- 15 et seq., of four statutorily created Veterans Administration ("VA") advisory committees. The OLC noted, "None of the acts establishing these advisory committees specifies whether the committee it creates shall exist for a certain term or indefinitely." Section 14 (a)(1)(B) of FACA states the following: "Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless - (B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law." Section 14(a)(2)(B) of FACA states the following: "Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless - (B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law." The OLC stated, "As the Administrator of Veterans Affairs suggested, because the statutes that created the four VA committees do not specify their terms of existence, they are governed by the automatic cutoff provisions quoted above unless their duration is, by implication, otherwise provided by law." Since the enactment of FACA, the OLC "has been frequently called upon by executive agencies to construe section 14(a) as applied to particular advisory committees. Because the offices responsible for promulgating guidelines for the management of Federal advisory committees have themselves issued no interpretation of the phrase 'duration is otherwise provided for by law,' the OLC has consistently applied an interpretation of the FACA that the OLC reached in 1973 (in consultation with the Office of Management and Budget) based on the manifest intent and legislative history of the FACA." In the OLC's view, "the duration of a statutorily created advisory committee may be otherwise provided for by law either expressly or by implication. Such duration is provided for by implication if the statute that creates or assigns functions to an advisory committee provides for it a specific function that is continuing in nature and is an integral part of the implementation of a statutory scheme. The statutory assignment to a committee of some regular and well-defined participation in an agency's administrative process would be sufficient to overcome the rebuttable presumption that, unless the statute that creates a committee deals expressly with termination, the committee is to terminate automatically in 2 years. Such an assignment must be more specific than the rendering of general advice to an agency with regard to some program area, which is the general function of most advisory committees." The OLC concluded that "the duration of advisory committees may be determined by implication from the particular statute involved, and thus be 'otherwise provided for by law,' within the meaning of the FACA. This would permit such committees to survive the FACA's 2-year cutoff provisions, 5 U.S.C. app. II, § 14(a)(1)(B) and (2)(B), notwithstanding the absence of any statute providing expressly for their termination. Under the above standards, Congress has so provided by law

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(a)(2)(B)

		<p>for the continuing duration of two VA advisory committees and for the extended duration of two other VA advisory committees for limited purposes only."</p>	
<p>Applicability of FACA</p>	<p>Advisory Committees - Application of the Russell Amendment (31 U.S.C. § 696), 3 Op. O.L.C. 263 (1979).</p>	<p>Counsel to the President requested an opinion concerning a proposed Executive order reconstituting the National Advisory Committee for Women. The issue was whether the Office of Legal Counsel ("OLC") concurred in the general view taken by the Office of Management and Budget ("OMB") that the so-called "Russell Amendment" (31 U.S.C. § 696) did not limit the use of Government funds to pay the expenses of an advisory committee if (1) the funds are otherwise available for use in the procurement of advice of the kind that the committee provides, and (2) the committee has no non-advisory functions. The Office of Legal Counsel concurred in OMB's view. The Russell Amendment states that no funds may be used to pay the expenses of any agency or instrumentality if (1) the agency or instrumentality has been in existence for more than one year and (2) Congress has not appropriated "any money specifically for such agency or instrumentality or specifically authorized the expenditure of funds by it." 31 U.S.C. § 696. The Russell Amendment, however, did not preclude the Government from paying the expenses of purely advisory committees. The OLC concluded that the Russell Amendment was not intended to prevent constitutional or statutory officers from using funds to procure advice on matters within their jurisdictions, i.e. advisory committees, if the funds were otherwise available for that purpose. Advisory committees become agencies under the Russell Amendment only if the officer to whom they report vests an advisory committee with actual authority to take substantive action for the government. Thus, if an agency or instrumentality performs functions that are indeed authorized by statute, and the law or appropriation makes funds available for the support of such functions, the Russell Amendment does not propose additional specific authorization requirements merely because the entity has been in existence for more than one year.</p>	<p>Office of Legal Counsel Opinions</p>
<p>Applicability of FACA</p>	<p>Applicability of the Federal Advisory Committee Act to Law Enforcement Coordinating Committees, 5 Op. O.L.C. 283 (1981).</p>	<p>The Acting Director of the Executive Office for United States Attorneys requested advice about the Federal Advisory Act ("FACA"), 5 U.S.C. app. II, § § 1 - 15, et seq, for the United States Attorneys who are charged with establishing Law Enforcement Coordinating Committees ("LECCs"). "The central issue was whether the LECCs are advisory committees and thus subject to the FACA's procedural requirements." The Office of Legal Counsel ("OLC") concluded, "So long as the actual operations of LECCs conform to the limitations stated in the Associated Attorney General's memorandum providing instructions about their establishment and functions, we conclude that the FACA will not apply to them." However, to the extent that a LECC performs advisory functions by giving advice and recommendations to federal officials, it would be subject to the FACA's requirements when performing those functions. The OLC noted that section 3(2) of FACA broadly defines an advisory committee as "any committee, board, commission, council, conference, panel, task force, or other similar group, as well as any subgroup or subcommittee thereof, that is either</p>	<p>Office of Legal Counsel Opinions</p> <p>3(2);6(c);10 (C)</p>

<p>Applicability of FACA</p>	<p>Applicability of the Federal Advisory Committee Act to the Nat'l Endowment for the Humanities, 4 Op. O.L.C. (Vol. B) 743 (1980).</p>	<p>The National Endowment for the Humanities' ("NEH") General Counsel requested an opinion concerning two issues: "first, whether the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. II, § 1 - 15, et seq., requires that the names of members of NEH advisory committees and their subgroups be made available to the public, and if so, at what time; and second, whether the meetings of such committees could, in appropriate circumstances, be closed to the public in order to protect the privacy interests of applicants for financial assistance." "The NEH has two advisory committees. The first is the National Council on the Humanities, created pursuant to section 8 of the National Foundation on the Arts and Humanities, Pub. L. No. 89-209, 79 Stat. 845 (1965), as codified at 20 U.S.C. § 957. The National Council advises the chairman regarding the Endowment's policies and procedures and regarding applications for financial assistance. The second advisory committee is the Humanities Panel, created by NEH and composed of hundreds of scholars and experts in various fields who meet in subgroups or panels to review and make recommendations regarding applications for financial assistance." The Office of Legal Counsel ("OLC") advised NEH's General Counsel that "the FACA requires that the names of members of the Humanities Panel of the NEH be made available to the public by subgroup, but does not require that such disclosure occur until after the particular subgroup's work has been completed."</p>	<p>Office of Legal Counsel Opinions 3(2)</p>
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<p>Applicability of FACA</p>	<p>Applicability of the Federal Advisory Committee Act to the Native Hawaiians Study Commission, 6 Op. O.L.C. 39 (1982).</p>	<p>The OLC noted that section 3(2) of the FACA expressly defines an advisory committee to include not only any committee, board, commission, council, conference, panel, task force, or other similar group, but also "any subcommittee or other subgroup thereof . . .", that otherwise meets the tests of an advisory body. "Accordingly, subgroups of the Humanities Panel are advisory committees in their own right." "The OLC also noted that section 10(c) of the FACA, the only provision of the FACA that speaks specifically about identifying the members of advisory committees (aside from section 6(c) which requires the President annually to report to Congress on the activities and status of advisory committees) concerns the required contents of the minutes of advisory committee meetings, which are, of their very nature, only made available to the public, if at all, after the work of the committees has been completed." The OLC also advised NEH's General Counsel that "the privacy exemption to the open meeting requirement of the Government in the Sunshine Act, 5 U.S.C. § 552b(c)(6), made applicable to federal advisory committees by the 1976 amendments to FACA, may permit closing some portions of meetings of subgroups of the Humanities Panel at which individual grant applications are discussed; however, the NEH has the responsibility to determine in advance what portions of subgroup meetings will not fall within an exemption to FACA's openness requirement, and to assure that those portions are closed to the public." The OLC noted, "The privacy exemption to the open meeting requirement calls for an assessment of whether the topic of discussion is of a personal or private nature and, second, whether in the particular case the topic is so personal that its disclosure would be a clearly unwarranted invasion of an individual's privacy interest. The latter determination requires a weighing of the interests in privacy against the interests in disclosure." See H.R. Rep. No. 880, Pt. I, 94th Cong., 2d Sess. 11 (1976).</p>	<p>Office of Legal Counsel Opinions</p>	<p>3(2)</p>
		<p>The Chairman of the Native Hawaiians Study Commission ("Commission") requested an opinion whether the Commission was subject to the requirements of the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. II, § 1 - 15 et seq., or the Government in the Sunshine Act, 5 U.S.C. § 552(b). The Office of Legal Counsel ("OLC") concluded "that the Commission was established to advise Congress, not the President or agencies in the Executive Branch, and was thus not subject to the FACA." The OLC noted that "the Commission could become subject to the FACA if it were utilized to advise the President or agencies." "The FACA imposes certain requirements on advisory committees to the President or to federal agencies. The definition of an 'advisory committee' includes, in relevant part, any commission that is established by the President, an agency, or Congress in the interest of obtaining advice or recommendations for the President or one more agencies or officers of the Federal government." 5 U.S.C. §3(2). The OLC stated, "The definition does not cover commissions that are established solely to advise Congress. Whether the Commission was established to advise the President or federal agencies or solely to advise Congress must be determined by reference to the Commission's authorizing act - the Native Hawaiians Study Commission Act ("NHSCA")." The</p>		

OLC noted, "The text of the NHSCA does not indicate that Congress established the Commission to obtain advice or recommendations for the President or federal agencies. The Commission's relationship with the President, however, is sufficiently ambiguous to require a review of the NHSCA's legislative history." "There is no indication whatever, in the text or in the legislative history, that the NHSCA established the Commission to advise federal agencies. The fact that the Commission sends a draft report to appropriate federal agencies for written comments suggests that it has the opposite relationship - that it is required to obtain the agencies' advice, rather than to advise agencies." The OLC stated, "The language of the NHSCA does not support the conclusion that Congress established the Commission to obtain advice or recommendations for the President. Moreover, the moderate open meeting provision and the manner of funding seem to suggest that the Commission was closely tied to Congress and intended to be subject to the FACA. These indications are not necessarily conclusive, however, because the President is to receive a copy of the Commission's final report. Because this might indicate the existence of a reporting relationship with the President, we turn to a review of the NHSCA's legislative history." "Three aspects of the NHSCA's legislative history strongly support the conclusion that Congress did not establish the Commission to advise the President. These include: (1) comments by the sponsors of the NHSCA that the Commission was to advise Congress; (2) the existence of two predecessor bills seeking to establish an advisory commission to Congress; and (3) the circumstances in which a Senate committee first added to a predecessor bill the requirement that the President should receive a copy of the Commission's report." The OLC also concluded that "the Commission was not subject to the GSA because the Commission was not an administrative agency, since it was created to undertake studies and not to exercise independent authority." "The Government in the Sunshine Act requires that certain meetings of agencies that fall within its coverage be open to public observation. The Government in the Sunshine Act applies, absent special exemptions, to any agency, as defined in section 552(e) of the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552(e), headed by a collegial body composed of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency. 5 U.S.C. 552b(a)(1)." The OLC concluded that the Commission was not subject to the GSA for two reasons. "First, none of its members were appointed to the Commission with the advice and consent of the Senate. The NHSCA only provides that members be appointed by the President. Second, the Commission was not an agency as that term has been used under the FOIA, 5 U.S.C. § 552 (e), whose definition the GSA expressly incorporates. The FOIA defines 'agency' as follows: 'For purposes of this section, the term 'agency' as defined in section 551(1) of the Administrative Procedure Act, 5 U.S.C. § 551, includes any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive

<p>Applicability of FACA</p>	<p>Application of the Federal Advisory Committee Act to Board of Department of Justice Journal, 14 Op. O.L.C. 53 (1990).</p>	<p>branch of the Government (including the Executive Office of the President), or any independent regulatory agency. 5 U.S.C. § 552(e)."</p>	<p>Office of Legal Counsel Opinions</p>	<p>3(2)</p>
<p>The Executive Assistant to the Attorney General requested an opinion whether an outside advisory or editorial board for a new publication of the U.S. Department of Justice ("Department") would be subject to the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. II, § 1 - 15, et seq. The Office of Legal Counsel ("OLC") concluded that the board would be subject to FACA if it deliberated as a body in order to formulate recommendations, but would not be the subject to FACA if each individual member received submissions to the journal and gave his own opinion about publication. The OLC stated that it believed "that the FACA would not reach an advisory board if the Department sought only the views of individuals rather than the views of the board as a whole." The OLC noted that the term "'advisory committee' connotes a body that deliberates together to provide advice." The OLC concluded "that FACA does not apply to a group which simply acts as a forum to collect individual views rather than to bring a collective judgment to bear." The OLC stated that the "General Services Administration's regulations confirm the commonsense notion of what differentiates a committee from a collection of individuals." "The regulations state that FACA does not cover: Any meeting initiated by a Federal official with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations . . ." 41 C.F.R. § 101-6.1004(i). The OLC concluded, "Although this provision is not entirely clear, it appears to mean that FACA does not cover a collection of individuals who do not perform a collegial and deliberative function and whose views are considered individually rather than as a part of a sense of the committee." Further, the OLC noted, "The clearest example of such a collection of individuals would be a group of experts, each of whom reviews submissions in his own area of expertise. Nevertheless, even if each member of the editorial board reviews every article and sends his comments to the Department, the arrangement would still appear to fall outside FACA, because a collective judgment would not be sought. Indeed, since the regulation permits a meeting at which individual views are offered, it would, permit the solicitation of individual views of board members who are not at a meeting. The board members would merely be acting in the same way as individual contractors who offer consulting services to the government." The OLC cautioned that "the regulation has not been directly tested in the courts." Finally, the OLC concluded, "If the editorial or advisory board is set up as a vehicle for the presentation of individual views, it may be prudent to leave the board without any formal structure, such as offices or staff. If the editorial or advisory board is set up as a vehicle for the presentation of individual views, it may be prudent to leave the board without any formal structure, such as officers or staff."</p>				

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FACA

Ass'n of
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et al. v.
Clinton, 187
F.3d 655 (D.C.
Cir. 1999).

Appellants, First Lady Hillary Rodham Clinton, and officials of the Executive Branch of the U.S. Government, including presidential advisor Ira C. Magaziner, challenged the district court's award of attorney fees to the appellees, Association of American Physicians and Surgeons, American Council for Health Care Reform and National Legal & Policy Center (collectively, "AAPS"). The appellate court stated that the district court "awarded fees under the common law on the ground that the government litigated in bad faith and under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412, on the ground that the government's litigating position was not substantially justified." AAPS, 187 F.3d at 657. The appellate court reversed the attorney's fee award, and held that the district court's findings of bad faith were without clear and convincing evidentiary support, and remanded for further consideration. AAPS filed this action February 24, 1993, alleging that the government had violated the Federal Advisory Committee Act ("FACA"), 5 U.S.C. app. II, § 1 - 15, et seq., by not filing an advisory committee charter for the President's Task Force on National Health Care Reform ("Task Force"). AAPS also claimed that the government violated FACA by denying access to meetings of both the Task Force and an interdepartmental working group overseen by Task Force member, Ira Magaziner. In opposition to AAPS's motion for preliminary injunction, the government filed a declaration by Magaziner stating that only federal government employees serve as members of the interdepartmental working group. The working group included approximately 300 "full-time permanent employees, who work for the Executive office of the President, for federal agencies, for members of Congress, or for Senate or House committees," and 40 "special government employees" who "have been employed by an agency or the Executive Office of the President for less than 130 days in a 365-day period, either with or without compensation." AAPS, 187 F.3d 657. In addition, the declaration also stated that the working group had "retained a wide range of consultants, who attend working group meetings on an intermittent basis, either with or without compensation." AAPS, 187 F.3d 657. On March 10, 1993, the district court granted AAPS's preliminary injunction, and found that the Task Force was an advisory committee within the meaning of FACA. The court held that the Task Force did not come within FACA's exemption for a "committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government," 5 U.S.C. app. II, § 3(2)(iii), because First Lady Hillary Rodham Clinton, who chaired the Task Force, was not a federal employee. However, the court found that the working group was not a FACA committee because it reported to the Task Force, and did not directly advise the President. The Court of Appeals reversed and remanded. In regard to the Task Force's FACA status, the court said "[t]he question whether the President's spouse is 'a full-time officer or employee' of the government is close enough for us properly to construe FACA not to apply to the Task Force merely because Mrs. Clinton is a member." AAPS v. Clinton, 997 F.2d 898, 910-11 (D.C. Cir. 1993). The court found that the record was insufficient to determine whether the working group constituted a FACA committee or

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3(2)

whether all of its members were full-time Federal employees. On April 11, 1994, AAPS filed a motion for summary judgment with a list of persons who it claimed were members of the working group, but who did not satisfy the requirements of FACA's federal employee exemption. The Government filed a cross-motion, and argued that the working group was not an advisory committee for purposes of FACA because it lacked "an organized structure, a fixed membership, and a specific purpose" and it was not operated "with formality." AAPS v. Clinton, 997 F.2d at 914. The government noted that it was not arguing that the working group should be exempted from FACA under the federal employee exemption, but that FACA was completely inapplicable because the working group lacked the requisite features for being considered an advisory committee. On May 16, 1994, AAPS moved to hold Magaziner in contempt for having made false and misleading statements in his Declaration, and for sanctions against the Government for "defending the case by asserting facts they knew not to be true" (namely "that only full-time employees of the federal government . . . were participants on the Task Force working groups."). AAPS, 187 F.3d at 659. Finally in July, 1994, the Government made the then defunct working group's documents available for inspection. The court then issued an order declaring the merits and the matter of civil contempt, moot. In 1997, the district court found the government's conduct was sanctionable. The court awarded AAPS' attorney's fees and costs of \$285,865 under both the common law's exception to the "American rule" against attorney's fees where the losing party has acted in 'bad faith', and under the Equal Access to Justice Act ("EAJA"). The EAJA provides for an award of attorney's fees where a position taken by the United States was not substantially justified. 28 U.S.C. § 2412(d)(1)(A). The government challenged the fee award and the findings of bad faith. On appeal, the court reversed, and found an inadequate basis for the district court's finding that the government acted in bad faith by not "timely advis[ing]" the court that "it was not making the 'all-employee' argument attributed to the Government by the . . . plaintiffs" when the Government informed the court in 1994. AAPS, 187 F.3d at 661. The court reasoned that the Government was under no "clear" duty to disavow that it was not claiming the federal employee exemption for the working group. The Government's silence "d[id] not amount to bad faith." AAPS, 187 F.3d at 661. The appellate court found no bad faith in the Government's failure "to correct or change" the Magaziner Declaration's representation that all members of the working group were federal employees. AAPS, 187 F.3d at 661. It stated, "[g]iven that the Government did not press the federal employee exemption, the representation, if false, was not material and therefore cannot be characterized as made in bad faith." AAPS, 187 F.3d at 661. "Further, this finding cannot stand because the district court's subsidiary findings of bad faith in drafting the Magaziner Declaration, on which the court rested the finding, are not supported by clear and convincing evidence." AAPS, 187 F.3d at 661. Thus, the court concluded that the attorney's fee award could not be upheld insofar as it rested on bad faith, and remanded for further consideration.

<p>Applicability of FACA</p>	<p>Ass'n of American Physicians and Surgeons, Inc. et al. v. Clinton, et al. 879 F.Supp. 106 (D.D.C. 1994).</p>	<p>Plaintiff Association of American Physicians and Surgeons, Inc. ("AAPS") brought this action against defendants, seeking to compel the production of certain documents in defendants' possession as participants in an interdepartmental working group of the President's Task Force on National Health Care Reform. Rather than continuing to withhold documents defendants had submitted for an in camera, ex parte review, all of the documents were made public. Subsequently, "defendants confirmed (without objection by plaintiffs) that the documents were available for public inspection at the National Archives, along with the computer disks that had not previously been made public." AAPS, 879 F.Supp. at 107. "The only remaining issue raised in the district court's Memorandum and Order of December 1, 1994, was whether any further search for additional documents should be required." AAPS, 879 F.Supp. at 107. The district court concluded that the "defendants had met their burden of establishing that no further search was required." AAPS, 879 F.Supp. at 107. "All working groups participants were advised, before the working group's termination, that any documents they created or reviewed were White House records, and that they should be provided to the White House." AAPS, 879 F.Supp. at 107. "Extensive follow-up efforts produced yet more documents, but plaintiffs have not cited a single instance to the court where any participant still has any White House records that have not now been made public." AAPS, 879 F.Supp. at 107. "Plaintiffs were given an opportunity to take discovery before the court ruled on defendants' motion to dismiss, and the court is now satisfied that defendants are legally entitled to dismissal based on the record before the court." AAPS, 879 F.Supp. at 107. This district court dismissed this action as moot. The remaining question was whether defendant Ira Magaziner, Senior Advisor to the President for Policy Development, was in criminal contempt for perjury to the United States Attorney for the District of Columbia and to the Attorney General of the United States. "On March 3, 1993, Mr. Magaziner signed a declaration, under penalty of perjury, in which he stated that only federal government employees serve as members of the interdepartmental working group." AAPS, 879 F.Supp. at 107. The court stated that Mr. Magaziner must be proven to have been intentionally untruthful at the time he signed the document before he can be found guilty of a criminal offense." AAPS, 879 F.Supp. at 108. The court noted that criminal contempt must be based on "evidence of deliberate willful misrepresentations." AAPS, 879 F.Supp. at 108. "Defendants urged the court to find that Mr. Magaziner had no such intent." AAPS, 879 F.Supp. at 109. The court stated that it couldn't do so at this time. The record was "insufficient as to what Mr. Magaziner knew and when he knew it." AAPS, 879 F.Supp. at 109.</p>	<p>Case Law</p>
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FEDERAL ADVISORY COMMITTEE ACT

FEDERAL ADVISORY COMMITTEE ACT

5 U.S.C. app.

As Amended

§1. Short title

This Act may be cited as the "Federal Advisory Committee Act Amendments."

§2. Findings and purpose

(a) The Congress finds that there are numerous committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch of the Federal Government and that they are frequently a useful and beneficial means of furnishing expert advice, ideas, and diverse opinions to the Federal Government.

(b) The Congress further finds and declares that--

- (1) the need for many existing advisory committees has not been adequately reviewed;
- (2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;
- (3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;
- (4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;
- (5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and
- (6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

§3. Definitions

For the purpose of this Act--

- (1) The term "Administrator" means the Administrator of General Services.
- (2) The term "advisory committee" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee"), which is--
 - (A) established by statute or reorganization plan, or
 - (B) established or utilized by the President, or
 - (C) established or utilized by one or more agencies,

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in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

(3) The term "agency" has the same meaning as in section 551(1) of Title 5, United States Code.

(4) The term "Presidential advisory committee" means an advisory committee which advises the President.

§4. Applicability; restrictions

(a) The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise.

(b) Nothing in this Act shall be construed to apply to any advisory committee established or utilized by--

(1) the Central Intelligence Agency; or

(2) the Federal Reserve System.

(c) Nothing in this Act shall be construed to apply to any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies.

§5. Responsibilities of Congressional committees; review; guidelines

(a) In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives shall make a continuing review of the activities of each advisory committee under its jurisdiction to determine whether such advisory committee should be abolished or merged with any other advisory committee, whether the responsibilities of such advisory committee should be revised, and whether such advisory committee performs a necessary function not already being performed. Each such standing committee shall take appropriate action to obtain the enactment of legislation necessary to carry out the purpose of this subsection.

(b) In considering legislation establishing, or authorizing the establishment of any advisory committee, each standing committee of the Senate and of the House of Representatives shall determine, and report such determination to the Senate or to the House of Representatives, as the case may be, whether the functions of the proposed advisory committee are being or could be performed by one or more agencies or by an advisory committee already in existence, or by enlarging the mandate of an existing advisory committee. Any such legislation shall--

(1) contain a clearly defined purpose for the advisory committee;

(2) require the membership of the advisory committee to be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee;

(3) contain appropriate provisions to assure that the advice and recommendations of the advisory committee 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;

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(4) contain provisions dealing with authorization of appropriations, the date for submission of reports (if any), the duration of the advisory committee, and the publication of reports and other materials, to the extent that the standing committee determines the provisions of section 10 of this Act to be inadequate; and

(5) contain provisions which will assure that the advisory committee will have adequate staff (either supplied by an agency or employed by it), will be provided adequate quarters, and will have funds available to meet its other necessary expenses.

(c) To the extent they are applicable, the guidelines set out in subsection (b) of this section shall be followed by the President, agency heads, or other Federal officials in creating an advisory committee.

§6. Responsibilities of the President; report to Congress; annual report to Congress; exclusion

(a) The President may delegate responsibility for evaluating and taking action, where appropriate, with respect to all public recommendations made to him by Presidential advisory committees.

(b) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate shall make a report to the Congress stating either his proposals for action or his reasons for inaction, with respect to the recommendations contained in the public report.

(c) [Annual report] Repealed by the Federal Reports Elimination and Sunset Act of 1995, Pub. L. No. 104-66, § 3003, 109 Stat. 707, 734-36 (1995), amended by Pub. L. No. 106-113, § 236, 113 Stat. 1501, 1501A-302 (1999) (changing effective date to May 15, 2000).

§7. Responsibilities of the Administrator of General Services; Committee Management Secretariat, establishment; review; recommendations to President and Congress; agency cooperation; performance guidelines; uniform pay guidelines; travel expenses; expense recommendations

(a) The Administrator shall establish and maintain within the General Services Administration a Committee Management Secretariat, which shall be responsible for all matters relating to advisory committees.

(b) The Administrator shall, immediately after October 6, 1972, institute a comprehensive review of the activities and responsibilities of each advisory committee to determine--

(1) whether such committee is carrying out its purpose;

(2) whether, consistent with the provisions of applicable statutes, the responsibilities assigned to it should be revised;

(3) whether it should be merged with other advisory committees; or

(4) whether it should be abolished.

The Administrator may from time to time request such information as he deems necessary to carry out his functions under this subsection. Upon the completion of the Administrator's review he shall make recommendations to the President and to either the agency head or the Congress with respect to action he believes should be taken. Thereafter, the Administrator shall carry out a similar review annually. Agency heads shall cooperate with the Administrator in making the reviews required by this subsection.

(c) The Administrator shall prescribe administrative guidelines and management controls applicable to advisory committees, and, to the maximum extent feasible, provide advice, assistance, and guidance to advisory committees to improve their performance. In carrying out his functions under

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this subsection, the Administrator shall consider the recommendations of each agency head with respect to means of improving the performance of advisory committees whose duties are related to such agency.

(d)(1) The Administrator, after study and consultation with the Director of the Office of Personnel Management, shall establish guidelines with respect to uniform fair rates of pay for comparable services of members, staffs, and consultants of advisory committees in a manner which gives appropriate recognition to the responsibilities and qualifications required and other relevant factors. Such regulations shall provide that--

(A) no member of any advisory committee or of the staff of any advisory committee shall receive compensation at a rate in excess of the rate specified for GS-18 of the General Schedule under section 5332 of Title 5, United States Code;

(B) such members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5, United States Code, for persons employed intermittently in the Government service; and

(C) such members--

(i) who are blind or deaf or who otherwise qualify as handicapped individuals (within the meaning of section 501 of the Rehabilitation Act of 1973 (29 U.S.C. §794)), and

(ii) who do not otherwise qualify for assistance under section 3102 of Title 5, United States Code, by reason of being an employee of an agency (within the meaning of section 3102(a)(1) of such Title 5),

may be provided services pursuant to section 3102 of such Title 5 while in performance of their advisory committee duties.

(2) Nothing in this subsection shall prevent--

(A) an individual who (without regard to his service with an advisory committee) is a full-time employee of the United States, or

(B) an individual who immediately before his service with an advisory committee was such an employee,

from receiving compensation at the rate at which he otherwise would be compensated (or was compensated) as a full-time employee of the United States.

(e) The Administrator shall include in budget recommendations a summary of the amounts he deems necessary for the expenses of advisory committees, including the expenses for publication of reports where appropriate.

S8. Responsibilities of agency heads: Advisory Committee Management Officer, designation

(a) Each agency head shall establish uniform administrative guidelines and management controls for advisory committees established by that agency, which shall be consistent with directives of the Administrator under section 7 and section 10. Each agency shall maintain systematic information on the nature, functions, and operations of each advisory committee within its jurisdiction.

(b) The head of each agency which has an advisory committee shall designate an Advisory Committee Management Officer who shall--

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- (1) exercise control and supervision over the establishment, procedures, and accomplishments of advisory committees established by that agency;
- (2) assemble and maintain the reports, records, and other papers of any such committee during its existence; and
- (3) carry out, on behalf of that agency, the provisions of section 552 of Title 5, United States Code, with respect to such reports, records, and other papers.

§9. Establishment and purpose of advisory committees; publication in Federal Register; charter: filing, contents, copy

(a) No advisory committee shall be established unless such establishment is--

- (1) specifically authorized by statute or by the President; or
- (2) determined as a matter of formal record, by the head of the agency involved after consultation with the Administrator, with timely notice published in the Federal Register, to be in the public interest in connection with the performance of duties imposed on that agency by law.

(b) Unless otherwise specifically provided by statute or Presidential directive, advisory committees shall be utilized solely for advisory functions. Determinations of action to be taken and policy to be expressed with respect to matters upon which an advisory committee reports or makes recommendations shall be made solely by the President or an officer of the Federal Government.

(c) No advisory committee shall meet or take any action until an advisory committee charter has been filed with (1) the Administrator, in the case of Presidential advisory committees, or (2) with the head of the agency to whom any advisory committee reports and with the standing committees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:

- (A) the committee's official designation;
- (B) the committee's objectives and the scope of its activity;
- (C) the period of time necessary for the committee to carry out its purposes;
- (D) the agency or official to whom the committee reports;
- (E) the agency responsible for providing the necessary support for the committee;
- (F) a description of the duties for which the committee is responsible, and, if such duties are not solely advisory, a specification of the authority for such functions;
- (G) the estimated annual operating costs in dollars and man-years for such committee;
- (H) the estimated number and frequency of committee meetings;
- (I) the committee's termination date, if less than two years from the date of the committee's establishment; and
- (J) the date the charter is filed.

A copy of any such charter shall also be furnished to the Library of Congress.

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§10. Advisory committee procedures; meetings; notice, publication in Federal Register; regulations; minutes; certification; annual report; Federal officer or employee, attendance

(a)(1) Each advisory committee meeting shall be open to the public.

(2) Except when the President determines otherwise for reasons of national security, timely notice of each such meeting shall be published in the Federal Register, and the Administrator shall prescribe regulations to provide for other types of public notice to insure that all interested persons are notified of such meeting prior thereto.

(3) Interested persons shall be permitted to attend, appear before, or file statements with any advisory committee, subject to such reasonable rules or regulations as the Administrator may prescribe.

(b) 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.

(c) Detailed minutes of each meeting of each advisory committee shall be kept and shall contain a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and copies of all reports received, issued, or approved by the advisory committee. The accuracy of all minutes shall be certified to by the chairman of the advisory committee.

(d) Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of Title 5, United States Code. Any such determination shall be in writing and shall contain the reasons for such determination. If such a determination is made, the advisory committee shall issue a report at least annually setting forth a summary of its activities and such related matters as would be informative to the public consistent with the policy of section 552(b) of Title 5, United States Code.

(e) There shall be designated an officer or employee of the Federal Government to chair or attend each meeting of each advisory committee. The officer or employee so designated is authorized, whenever he determines it to be in the public interest, to adjourn any such meeting. No advisory committee shall conduct any meeting in the absence of that officer or employee.

(f) Advisory committees shall not hold any meetings except at the call of, or with the advance approval of, a designated officer or employee of the Federal Government, and in the case of advisory committees (other than Presidential advisory committees), with an agenda approved by such officer or employee.

§11. Availability of transcripts; "agency proceeding"

(a) Except where prohibited by contractual agreements entered into prior to the effective date of this Act, agencies and advisory committees shall make available to any person, at actual cost of duplication, copies of transcripts of agency proceedings or advisory committee meetings.

(b) As used in this section "agency proceeding" means any proceeding as defined in section 551(12) of Title 5, United States Code.

§12. Fiscal and administrative provisions; record-keeping; audit; agency support services

(a) Each agency shall keep records as will fully disclose the disposition of any funds which may be at the disposal of its advisory committees and the nature and extent of their activities. The

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General Services Administration, or such other agency as the President may designate, shall maintain financial records with respect to Presidential advisory committees. The Comptroller General of the United States, or any of his authorized representatives, shall have access, for the purpose of audit and examination, to any such records.

(b) Each agency shall be responsible for providing support services for each advisory committee established by or reporting to it unless the establishing authority provides otherwise. Where any such advisory committee reports to more than one agency, only one agency shall be responsible for support services at any one time. In the case of Presidential advisory committees, such services may be provided by the General Services Administration.

§13. Responsibilities of Library of Congress; reports and background papers; depository

Subject to section 552 of Title 5, United States Code, the Administrator shall provide for the filing with the Library of Congress of at least eight copies of each report made by every advisory committee and, where appropriate, background papers prepared by consultants. The Librarian of Congress shall establish a depository for such reports and papers where they shall be available to public inspection and use.

§14. Termination of advisory committees; renewal; continuation

(a)(1) Each advisory committee which is in existence on the effective date of this Act shall terminate not later than the expiration of the two-year period following such effective date unless--

(A) in the case of an advisory committee established by the President or an officer of the Federal Government, such advisory committee is renewed by the President or that officer by appropriate action prior to the expiration of such two-year period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(2) Each advisory committee established after such effective date shall terminate not later than the expiration of the two-year period beginning on the date of its establishment unless--

(A) in the case of an advisory committee established by the President or an officer of the Federal Government such advisory committee is renewed by the President or such officer by appropriate action prior to the end of such period; or

(B) in the case of an advisory committee established by an Act of Congress, its duration is otherwise provided for by law.

(b)(1) Upon the renewal of any advisory committee, such advisory committee shall file a charter in accordance with section 9(c).

(2) Any advisory committee established by an Act of Congress shall file a charter in accordance with such section upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

(3) No advisory committee required under this subsection to file a charter shall take any action (other than preparation and filing of such charter) prior to the date on which such charter is filed.

(c) Any advisory committee which is renewed by the President or any officer of the Federal Government may be continued only for successive two-year periods by appropriate action taken by the President or such officer prior to the date on which such advisory committee would otherwise terminate.

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§15. Requirements relating to the National Academy of Sciences and the National Academy of Public Administration

(a) In General- An agency may not use any advice or recommendation provided by the National Academy of Sciences or National Academy of Public Administration that was developed by use of a committee created by that academy under an agreement with an agency, unless--

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

(2) in the case of a committee created after the date of the enactment of the Federal Advisory Committee Act Amendments of 1997, the membership of the committee was appointed in accordance with the requirements described in subsection (b)(1); and

(3) in developing the advice or recommendations, the academy complied with--

(A) subsection (b)(2) through (6), in the case of any advice or recommendation provided by the National Academy of Sciences; or

(B) subsection (b)(2) and (5), in the case of any advice or recommendation provided by the National Academy of Public Administration.

(b) Requirements- The requirements referred to in subsection (a) are as follows:

(1) The Academy shall determine and provide public notice of the names and brief biographies of individuals that the Academy appoints or intends to appoint to serve on the committee. The Academy shall determine and provide a reasonable opportunity for the public to comment on such appointments before they are made or, if the Academy determines such prior comment is not practicable, in the period immediately following the appointments. The Academy shall make its best efforts to ensure that (A) no individual appointed to serve on the committee has a conflict of interest that is relevant to the functions to be performed, unless such conflict is promptly and publicly disclosed and the Academy determines that the conflict is unavoidable, (B) the committee membership is fairly balanced as determined by the Academy to be appropriate for the functions to be performed, and (C) the final report of the Academy will be the result of the Academy's independent judgment. The Academy shall require that individuals that the Academy appoints or intends to appoint to serve on the committee inform the Academy of the individual's conflicts of interest that are relevant to the functions to be performed.

(2) The Academy shall determine and provide public notice of committee meetings that will be open to the public.

(3) The Academy shall ensure that meetings of the committee to gather data from individuals who are not officials, agents, or employees of the Academy are open to the public, unless the Academy determines that a meeting would disclose matters described in section 552(b) of Title 5, United States Code. The Academy shall make available to the public, at reasonable charge if appropriate, written materials presented to the committee by individuals who are not officials, agents, or employees of the Academy, unless the Academy determines that making material available would disclose matters described in that section.

(4) The Academy shall make available to the public as soon as practicable, at reasonable charge if appropriate, a brief summary of any committee meeting that is not a data gathering meeting, unless the Academy determines that the summary would disclose matters described in section 552(b) Title 5, United States Code. The summary shall identify the committee members present, the topics discussed, materials made available to the committee, and such other matters that the Academy determines should be included.

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(5) The Academy shall make available to the public its final report, at reasonable charge if appropriate, unless the Academy determines that the report would disclose matters described in section 552(b) of Title 5, United States Code. If the Academy determines that the report would disclose matters described in that section, the Academy shall make public an abbreviated version of the report that does not disclose those matters.

(6) After publication of the final report, the Academy shall make publicly available the names of the principal reviewers who reviewed the report in draft form and who are not officials, agents, or employees of the Academy.

(c) Regulations- The Administrator of General Services may issue regulations implementing this section.

§16. Effective Date

Except as provided in section 7(b), this Act shall become effective upon the expiration of ninety days following October 6, 1972.



Federal Register

Thursday,
July 19, 2001

Part II

General Services Administration

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]

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 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
following Internet address:
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 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 additional guidance on issues that, although addressed by the Act, likely would improve the management of committees. For example, one commenter suggested that agencies include a provision to streamline processes and procedures and expedite the establishment of committees. Commenters requested detailed provisions for compensation of members and staff, consultants; (2) expansion

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 examples contained in the final rule represent circumstances most commonly encountered during the management of advisory committees, the listing is not supplemented by additional requirements.

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However, the proposed rule does not describe adequately for GSA's decision-making subcommittees the parent advisory committee from advisory committees directly to a Federal committee" as "any committee or any subcommittee or thereof which is established by the President or an agency in the interest of obtaining advice or recommendations for the President or more agencies or officials 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 to a parent advisory committee and are not the parent committee that is normally responsible for providing advice or recommendations to the Government. 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. 1993), the court held that a subcommittee is not subject to the Act because it is not providing advice to the Government.

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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 on issues or policies within the scope of 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
I. FACA applies to advisory committees that are either "established" or "utilized" by an agency.	102-3.25, 102-3.40(d), 102-3.40(f)	<ol style="list-style-type: none"> 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? 2. May an agency official attend meetings of external groups where advice may be offered to the Government during the course of discussions? 3. May an agency official participate in meetings of groups or organizations as a member without chartering the group under the Act? 4. Is the Act applicable to meetings between agency officials and their contractors, licensees, or other "private sector program partners"? 	<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>
II. The development of consensus among all or some of the attendees at a public meeting or similar forum does not automatically invoke FACA.	102-3.25, 102-3.40(d), 102-3.40(f)	<ol style="list-style-type: none"> 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>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
<p>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.</p>	102-3.40(e)	<p>1. May an agency official meet with a number of persons collectively to obtain their individual views without violating the Act?</p> <p>2. Does the concept of an "individual" apply only to "natural persons?"</p>	<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>
<p>IV. Meetings between Federal, State, local, and tribal elected officials are not subject to the Act.</p>	102-3.40(g)	<p>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?</p>	<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, 2U.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>
<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.</p>	102-3.30(e), 102-3.40(k)	<p>1. Are "operational committees" subject to the Act, even if they may engage in some advisory activities?</p>	<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
VI. Committees authorized by the Congress in law or by Presidential directive to perform primarily "operational" functions are not subject to the Act.	102-3.40(k)	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?	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.

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.

(b) *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
<p>I. With some exceptions, advisory committee meetings are open to the public.</p>	<p>102-3.140, 102-3.145(a), 102-3.155.</p>	<p>1. Must all advisory committee and subcommittee meetings be open to the public?</p>	<p>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.</p>
<p>II. Notices must be published in the Federal Register announcing advisory committee meetings.</p>	<p>102-3.150</p>	<p>1. Can agencies publish a single Federal Register notice announcing multiple advisory committee meetings?</p>	<p>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.</p>

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>	102-3.170	<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
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.	102–175(e)	1. How must advisory committee records be treated and preserved?	<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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SUBCHAPTER A—GENERAL

Part 102-3—Federal Advisory Committee Management

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§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 i Federal Advisory Committee Act (FACA), as amended (or "the Act"), 5 U.S.C., App. committees they establish and operate. In addition to listing key definitions underlying interpretation of the Act, this subpart establishes the scope and applicability of the A 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 committ executive branch of the Federal Government. The Act defines what constitutes a Fe advisory committee and provides general procedures for the executive branch to fol operation of these advisory committees. In addition, the Act is designed to assure th Congress and the public are kept informed with respect to the number, purpose, me 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 involve established advisory committee;
- (2) Executive branch officials who seek to establish or utilize an advisory comi
- (3) Executive branch officials and others outside Government who have decid or who are already engaged in, a form of public involvement or consultation and wa inadvertently violating the Act; and
- (4) Field personnel of Federal agencies who are increasingly involved with the part of their efforts to increase collaboration and improve customer service.

(b) Other types of end-users of this part include individuals and organizations out executive branch who seek to understand and interpret the Act, or are seeking addi 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 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 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 requirements that keep Congress and the public informed of the number, purpose, activities, benefits, and costs of these advisory committees. These requirements apply for implementing the Act at both the agency and Governmentwide levels.

(c) *Examples and principles.* This part provides summary-level key points and 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. 1.

“Administrator” means the Administrator of General Services.

“Advisory committee” subject to the Act, except as specifically exempted by the Act or by statute, or as not covered by this part, means any committee, board, commission, conference, panel, task force, or other similar group, which is established by statute or is established or utilized by the President or by an agency official, for the purpose of providing advice or recommendations for the President or on issues or policies within the scope of 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 as prescribed in 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 recommendations.

“Committee member” means an individual who serves by appointment or invitation to 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 role for 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 section 10(e) and (f) of the Act and any advisory committee procedure prescribed by the agency under the control and supervision of the CMO.

“Discretionary advisory committee” means any advisory committee that is established by an agency head.

the authority of an agency head or authorized by statute. An advisory committee 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 the President or the President’s delegate, to provide 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 President or directed by the President to advise the President.

“Subcommittee” means a group, generally not subject to the Act, that reports to a committee and not directly to a Federal officer or agency, whether or not its members are 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 not established by the Federal Government is utilized within the meaning of the Act if 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 are, whether:

- (1) Advisory committee deliberations will result in the creation or elimination of (a) 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 passage 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 that exceeds two years, unless renewed;
- (5) In the case of a non-discretionary advisory committee required by the President upon the expiration of a period not to exceed two years, unless renewed by the President; or

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

(c) *Balanced membership.* An advisory committee must be fairly balanced in its 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 if a closed or partially-closed meeting has been determined proper and consistent with (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, 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 an 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 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 group created by non-Federal entities (such as a contractor or private organization) 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 part-time officers or employees of the Federal Government and elected officers of State 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 to exchange views, information, or advice relating to the management or implementation of 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. 6502, Memorandum M-95-20, dated September 21, 1995, available from the Committee Management Secretariat (MC), General Services Administration, 1800 F Street, NW., Washington, DC 20503-0002);

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

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

(j) *Groups established to advise State or local officials.* Any State or local committee, 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 functions as opposed to advisory functions. Operational functions are those specifically authorized by Executive Order or Presidential directive, such as making or implementing Government decisions or actions. 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 appendix does not apply.

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 addressed elsewhere in this subpart. The guidance follows:

Appendix A to Subpart A

Key Points and Principles	Section (s)	Question(s)	Guidance
FACA applies to advisory committees that are either "established" or "utilized" by an agency.	102-3.25, 102-3.40 (d), 102-3.40(f)	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? 2) May an agency official attend meetings of external groups where advice may be offered to the Government during the course of discussions? 3) May an agency official participate in meetings of groups or organizations as a member without chartering the group under the Act? 4) Is the Act applicable to meetings between agency officials and their contractors, licensees, or other "private sector program partners"?	A) The answer to questions 1, 2, and 3 is yes if the agency does not either "establish" or "utilize" (actual management or control over) the group. i) Although there is no precise legal definition of "management or control," the following factors may be used by an agency to determine whether the group is "utilized" within the meaning of the Act: a) Does the agency manage or control the membership or otherwise determine its composition? b) Does the agency manage or control the agenda? c) Does the agency fund the group's activities? ii) Answering "yes" to any or all of question 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 if the relationship in question is indistinguishable from an advisory committee established by the agency. B) The answer to question 4 is no. Agency interactions with contractors and licensees, individuals, or groups, to discuss specific matters involving contract solicitation, issuance, and implementation, or an agency's efforts to ensure compliance with 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.
The development of consensus among all or some of the attendees at a public meeting or similar forum does not automatically invoke FACA.	102-3.25, 102-3.40 (d), 102-3.40(f)	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?	A) No, the public meeting need not be stopped. i) A group must either be "established" or "utilized" by an agency in order for the Act to apply. ii) Public meetings represent a chance for individuals to voice their opinions and/or share information. Agencies do not either "establish" or "utilize" the attendees as an advisory committee because there are no elements of either

			management" or "control" present or intent
<p>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.</p>	<p><u>102-3.40</u> (e)</p>	<p>1) May an agency official meet with a number of persons collectively to obtain their individual views without violating the Act?</p> <p>2) Does the concept of an "individual" apply only to "natural persons?"</p>	<p>A) The answer to questions 1 and 2 is yes. It applies only where a group is established to provide advice or recommendations "as a group."</p> <p>i) A mere assemblage or collection of individuals where the attendees are providing individual advice is not acting "as a group" under the Act.</p> <p>ii) In this respect, "individual" is not limited to "natural persons." Where the group consists of members of various existing organizations, each member individually may provide advice on behalf of his or her organization without violating the Act, provided the organizations themselves are not "managed or controlled" by the agency.</p>
<p>IV. Meetings between Federal, State, local, and tribal elected officials are not subject to the Act.</p>	<p><u>102-3.40</u> (g)</p>	<p>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?</p>	<p>A) Yes. The scope of activities covered by the Act for intergovernmental activities is construed broadly to facilitate Federal/State/tribal discussions on shared intergovernmental responsibilities or administration. Pursuant to Presidential delegation, the Office of Management and Budget (OMB) issued guidelines for this purpose authorized by section 204(b) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1191b(b). OMB Memorandum M-95-20, dated September 21, 1995, published at 60 FR 48844 (September 29, 1995), and which is available from the Committee Management Secretariat (Management Services Administration, 1800 F Street, Washington, DC 20405-0002.)</p>
<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.</p>	<p><u>102-3.30</u> (e), <u>102-3.40</u> (k)</p>	<p>1) Are "operational committees" subject to the Act, even if they may engage in some advisory activities?</p>	<p>A) No, so long as the operational functions of the committee constitute the "primary" functions of the committee. Only committees established in the executive branch in the interest of or for the benefit of the executive branch or without specific authorization by the President, Federal functions (decisionmaking or operations) cannot be performed, or assumed by, non-Federal individuals.</p>
<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><u>102-3.40</u> (k)</p>	<p>1) What characteristics are common to "operational committees?"</p> <p>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, congressional committees generally have the following characteristics:</p> <p>i) Specific functions and/or authorities provided by Congress in law or by Presidential directive;</p> <p>ii) The ability to make and implement traditional governmental decisions; and</p> <p>iii) The authority to perform specific tasks to carry out a Federal program.</p> <p>B) Agencies are responsible for determining whether a committee primarily provides advice or recommendations and is, therefore, subject to the Act, or is primarily "operational" and not covered by the Act.</p> <p>C) The answer to question 2 is no. The committee is not subject to the Act because:</p> <p>i) Its functions are to plan and implement specific programs;</p> <p>ii) The committee has been granted the exclusive authority by the Congress to perform its statutory functions; and</p> <p>iii) Its incidental role of providing advice to other agencies is secondary to its primary role of performing its specific functions.</p>

agency head must consult with the Secretariat. As part of this consultation, agency is 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 will use 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 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 necessary for 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 persons appropriate to the nature and functions of the advisory committee. Advisory committee membership 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. In the case of 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 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 an emergency cause. This requirement for advance notice does not apply to advisory committee renewal 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 with the Committee Management Officer (CMO) designated in accordance with section 8(b) of the charter 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 establishment for the advisory committee;

(3) The Library of Congress, Anglo-American Acquisitions Division, Government Documents Section, Federal Advisory Committee Desk, 101 Independence Avenue, NE, 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 it 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 provide 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 intended to provide a description of an advisory committee's mission, goals, and objectives also provides a basis for evaluating an advisory committee's progress and effectiveness. Every advisory committee 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;
- (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 a specification of the authority for any non-advisory functions;
- (7) The estimated annual costs to operate the advisory committee in dollars and cents per person year;
- (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 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 (a)(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 the establishment of a new advisory committee under 102-3.60.

(b) *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 technical changes made to current charters are consistent with the relevant authority of Congress by law, or the President by Executive order, changes the authorizing language

been the basis for establishing an advisory committee, the agency head or the of an independent Presidential advisory committee must amend those sections of th charter affected by the new statute or Executive order, and file the amended charte in 102-3.70.

(2) *Discretionary advisory committees*. The charter of a discretionary advisory may be amended when an agency head determines that technical provisions of a fi are inaccurate, or specific provisions have changed or become obsolete with the pe and that these amendments will not alter the advisory committee’s objectives and s substantially. The agency must amend the charter language as necessary and file t 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 substantial changes in objectives and scope, duties, and estimated costs, are the s: 102-3.80, except that for discretionary advisory committees an agency must:

- (a) Consult with the Secretariat on the amended language, and explain the purpc 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 : questions and identifies key points and principles that may be applied to situations i elsewhere in this subpart. The guidance follows:

Appendix A to Subpart B

Key Points and Principles	Section (s)	Question(s)	Guidance
Agency heads must consult with the Secretariat prior to establishing a discretionary advisory committee.	<u>102-3.60</u> , <u>102-3.115</u>	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 function to implement the Act may be dele However, those functions related the final establishment, renewal, reestablishment of discretionary : committees are reserved for the : Each agency CMO should assure internal processes for managing committees include appropriate c the agency head.
Agency heads are responsible for complying with the Act, including determining which discretionary advisory committees should be established and renewed.	<u>102-3.60</u> (a), <u>102-3.105</u>	1) Who retains final authority for establishing or renewing a discretionary advisory committee?	A) Although agency heads retain fin establishing or renewing discretic committees, these decisions sho consistent with <u>102-3.105(e)</u> and consultation with the Secretariat i (a).
II. An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.	<u>102-3.30</u> (c), <u>102-3.60(b)</u> (3)	1) What factors should be considered in achieving a “balanced” advisory committee membership?	A) The composition of an advisory c membership will depend upon se including: i) The advisory committee’s mission ii) The geographic, ethnic, social, ec scientific impact of the advisory c recommendations; iii) The types of specific perspective example, such as those of consu experts, the public at-large, acad business, or other sectors; iv) The need to obtain divergent poi

<p>V. Charters for advisory committees required by statute must be filed every two years regardless of the duration provided in the statute.</p>	<p>102-3.70(b)</p>	<p>1) If an advisory committee's duration exceeds two years, must a charter be filed with the Congress and GSA every two years?</p>	<p>he issues before the advisory comm</p> <p>v) The relevance of State, local, or t governments to the development advisory committee's recommend</p> <p>A) Yes. Section 14(b)(2) of the Act p any advisory committee establish of Congress shall file a charter up expiration of each successive twc following the date of enactment o establishing such advisory comm</p>
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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 Office 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 advisory committees:

(a) *Provide adequate support.* Before establishing an advisory committee, agencies should identify requirements and assure that adequate resources are available to support the committee's 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 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 identify and document regarding what functions an advisory committee can perform legally and those that they should perform.

(d) *Practice openness.* In addition to achieving the minimum standards of public participation 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 been used in 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 and issues regulations on Federal advisory committees to be prescribed by the Administrator of the 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 Secretariat.

(b) The Secretariat carries out its responsibilities by:

- (1) Conducting an annual comprehensive review of Governmentwide advisory accomplishments, costs, benefits, and other indicators to measure performance;
- (2) Developing and distributing Governmentwide training regarding the Act and statutes and principles;
- (3) Supporting the Interagency Committee on Federal Advisory Committee Management's efforts to improve compliance with the Act;
- (4) Designing and maintaining a Governmentwide shared Internet-based system for 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 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 its 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 Freedom of Information Act 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 the 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; and will instead be the result of the advisory committee's independent judgment;
- (h) Assure that the interests and affiliations of advisory committee members are in conformance with applicable conflict of interest statutes, regulations issued by the U.S. Government Ethics (OGE) including any supplemental agency requirements, and other 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 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 committee 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 have the responsibilities delegated by the agency head. The CMO also should ensure that sections 12(a), and 13 of the Act are implemented by the agency to provide for appropriate records. 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 annual comprehensive review of Federal advisory committees, prepared according to 3.175(b);

(c) *Agency guidelines.* Agency guidelines maintained and updated on committee operations and procedures; and

(d) *Closed meeting determinations.* Agency determinations to close or partially close 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 subcommittee. The DFO 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;

(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 committee members 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's Federal Advisory Committee Management part. In general, these guidelines should:

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

(c) *Other applicable statutes.* Other agency-specific statutes and regulations may apply to an 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: to uniform fair rates of compensation for comparable services, or expense reimbursement for 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 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 section 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 appoint 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 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 annual rate basis. The agency may not provide additional compensation in any form, such as 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 is allowed by another statute. However, the agency head personally must authorize a rate of 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 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 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 difficulty and responsibility. An agency may establish rates of pay for advisory committee members based on the pay these persons would receive if they were covered by the General Schedule under 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 authority to

appoint and compensate advisory committee members or staff, it also may employ 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 in the General Schedule under 5 U.S.C. 5332 (that is, the GS-15, step 10 rate, excluding 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 the 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 Official 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 on 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 established in paragraphs (d) and (e) of this section). Any advisory committee staff member 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 member 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 reimbursed for travel expenses, including per diem in lieu of subsistence, as authorized under 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 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 (b) (1) (B) 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 discussed elsewhere in this subpart. The guidance follows:

Appendix A to Subpart C

Key Points and Principles	Section (s)	Question(s)	Guidance
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 procedures, consistent with the Act and this 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;

			<p>iii) Security or background evaluations;</p> <p>iv) Availability of candidates; and</p> <p>v) Other statutory or administrative requirements</p> <p>C) In addition, the extent to which agency heads delegated responsibility for selecting members to agency and may become an impact the time it takes to finalize the advisory committee membership.</p>
<p>Agency heads retain the final authority for selecting advisory committee members, unless otherwise provided for by a specific statute or Presidential directive.</p>	<p><u>102-3.130(a)</u></p>	<p>1) Can an agency head select for membership on an advisory committee from among nominations submitted by an organization?</p> <p>2) If so, can different persons represent the organization at different meetings?</p>	<p>The answer to question 1 is yes. Organizations propose for membership individuals to represent an advisory committee. However, the agency establishing the advisory committee, or other authority, retains the final authority for selecting members.</p> <p>The answer to question 2 also is yes. Alternately represent an appointed member with the appointing authority, where the agency head appointing authority.</p>
<p>An agency may compensate advisory committee members and staff, and also employ experts and consultants.</p>	<p><u>102-3.130(d)</u>, <u>102-3.130(e)</u>, <u>102-3.130(g)</u></p>	<p>1) May members and staff be compensated for their service or duties on an advisory committee?</p> <p>2) Are the guidelines the same for compensating both members and staff?</p> <p>3) May experts and consultants be employed to perform other advisory committee work?</p>	<p>A) The answer to question 1 is yes.</p> <p>i) However, FACA limits compensation for advisory committee members and staff to the rate for Executive Schedule, unless higher rates are allowed by other statutes.</p> <p>ii) Although FACA provides for compensation, the Act does not require an agency to compensate committee members.</p> <p>B) The answer to question 2 is no. The guidelines for compensating members and staff are similar. For example, the differences are that:</p> <p>i) An agency "may" pay members on either a daily rate basis, and "may not" provide additional compensation in any form, such as bonuses or pay; while</p> <p>ii) An agency "must" pay staff on an hourly rate and "may" provide additional compensation, aggregate compensation paid in a calendar year may exceed the rate for level IV of the Executive Schedule appropriate proration for a partial calendar year.</p> <p>C) The answer to question 3 is yes. Other work duties of advisory committee members or staff performed by experts and consultants. For guidance on the employment of experts and consultants, agencies should consult the applicable regulations by the U. S. Office of Personnel Management (5 CFR part 304.)</p>
<p>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><u>102-3.105(h)</u></p>	<p>1) Are all advisory committee members subject to conflict of interest statutes and other Federal ethics rules?</p> <p>2) Who should be consulted for guidance on the proper application of Federal ethics rules to advisory committee members?</p>	<p>The answer to question 1 is no. Whether an advisory committee member is subject to Federal ethics rules depends on the member's status. The determination of a member's status on an advisory committee is a personnel classification matter for the appointing authority. Most advisory committee members will serve as "representative" or a "special Government employee" (SGE), based on the role they perform. In general, SGEs are covered by regulations of the U. S. Office of Government Ethics (OGE) and are subject to conflict of interest statutes, while representatives are not subject to these ethics requirements.</p> <p>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.</p>

<p>Y. 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><u>102-3.105 (c)</u>, <u>102-3.105 (i)</u></p>	<p>1) Must an agency's CMO and each advisory committee DFO be appointed by the agency head? 2) May an agency have more than one CMO?</p>	<p>order to apply Federal ethics rules properly. A) The answer to question 1 is no. The agency delegate responsibility for appointing the CMO. However, these appointments, including alternate selections, should be documented consist with agency's policies and procedures. B) The answer to question 2 also is no. The CMOs are specified in the Act and include responsibility for all advisory committees within the agency. Accordingly, only one CMO may perform these functions. The agency may, however, have additional positions, including those in its subordination which are subordinate to the CMO's agency responsibilities and functions.</p>
<p>VI. FACA is the principal statute pertaining to advisory committees. However, other statutes may impact their use and operations.</p>	<p><u>102-3.125 (c)</u></p>	<p>1) Do other statutes or regulations affect the way an agency carries out its advisory committee management program?</p>	<p>A) Yes. While the Act provides a general framework for managing advisory committees Government factors may affect how advisory committees are managed. These include: i) The statutory or Presidential authority used to establish the advisory committee; ii) A statutory limitation placed on an agency's annual expenditures for advisory committees; iii) Presidential or agency management directives; iv) The applicability of conflict of interest statutes and Federal ethics rules; v) Agency regulations affecting advisory committees; 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 the records that must be kept by Federal agencies and what other documentation, including 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 reasonably accessible to the public, to include facilities that are readily accessible to 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 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.

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 c

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

If a subcommittee makes recommendations directly to a Federal officer or agency recommendations will be adopted by the parent advisory committee without further 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 before 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 a 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) 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 the closure 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 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 of the Government in the Sunshine Act, 5 U.S.C. 552b(c), that justifies the closure. The request must provide the agency head or the Secretariat sufficient time (generally, 30 calendar days) to consider the matter in order to make a determination before publication of the meeting notice under 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 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 openness 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 in preparation for a meeting of the advisory committee, or to draft position papers for 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, one that is closed or partially closed to the public, are kept. The chairperson of each 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 statements;

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

(4) Copies of each report or other document received, issued, or approved by the 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 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 advisory 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 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, they do 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 pursuant to section 6(b) of the Act must be prepared and transmitted to the Congress detailing the results of the advisory committee's recommendations. The Secretariat shall assure that the 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, the Secretariat 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 a comprehensive review of each advisory committee as specified in section 7(b) of the Act requires Federal agencies to report information on each advisory committee for which 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 electronically with GSA on a fiscal year basis, using a Governmentwide shared information system that GSA maintains. This information shall be consistent with specific guidance issued 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 7(b) of the Act, advisory committees holding closed or partially-closed meetings must issue a report at least annually, setting forth a summary of activities and such related matters as would be most 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 of an advisory committee, including any report of closed or partially-closed meetings as required by paragraph (c) of this section and, where appropriate, background papers prepared by the committee 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 in 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 committee, the records must be processed in accordance with the Federal Records Act, 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 discussed elsewhere in this subpart. The guidance follows:

Appendix A to Subpart D

Key Points and Principles	Section (s)	Question(s)	Guidance
With some exceptions, advisory committee meetings are open to the public.	102-3.140, 102-3.150 (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 provisions of the Government Sunshine Act, 5 U.S.C. 552b(c). i) Subcommittees that report to a parent committee, and not directly to a Federal agency, are not required to open their meetings to the public or comply with the procedures for announcing meetings. ii) However, agencies are cautioned to not restrict the public from attending any meeting if a subcommittee develops advice or recommendations that are not expected to be reviewed by the parent advisory committee before being submitted to a Federal officer or agency. Such exclusions may run counter to the provisions of the Act requiring contemporaneous access to advisory committee deliberative proceedings.
Notices must be published in the <i>Federal Register</i> announcing advisory committee meetings.	102-3.150	1) Can agencies publish a single <i>Federal Register</i> notice announcing multiple advisory committee meetings?	A) Yes, agencies may publish a single notice announcing multiple meetings so long as the notices contain all of the information required by 102-3.150. i) "Blanket notices" should not announce meetings far in advance as to prevent the public from adequately being informed of an advisory committee's schedule.

<p>I. 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><u>102-3.170</u></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>ii) An agency's Office of General Counsel consulted where these notices include are either closed or partially closed to</p> <p>A) No. Section 10(b) of FACA provides that section 552 of title 5, United States Code records, reports, transcripts, minutes, working papers, drafts, studies, agency documents which were made available prepared for or by each advisory committee available for public inspection and copy single location in the offices of the advisory committee or the agency to which the committee reports until the advisory committee ceases to exist.</p> <p>i) The purpose of section 10(b) of the Act for the contemporaneous availability of committee records that, when taken in with the ability to attend advisory committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee.</p> <p>ii) Although advisory committee records withheld under the provisions of FOIA reasonable expectation that the records within the exemptions contained in section 552(a)(3) of FOIA, agencies may not require members of the public or other interested parties to file a request and review process established under section 552(a)(3) of FOIA.</p> <p>iii) Records covered by the exemptions under section 552(b) of FOIA may be withheld from the Office of Legal Counsel (OLC), Department of Justice concludes that disclosure of written advisory committee materials including predecisional materials such as working papers, and studies. The disclosure exemption available to agencies under FOIA for predecisional documents is narrowly limited to privileged materials is narrowly limited of FACA to privileged "inter-agency or documents prepared by an agency or to an advisory committee. The language of FACA statute and its legislative history support a restrictive application of exemption 5 to public access to advisory committee records. Moreover, since an advisory committee is an agency, this construction is supported by the express language of exemption 5 which applies to inter-agency or intra-agency materials.</p> <p>iv) Agencies first should determine, however, or not records being sought by the public under the scope of FACA in general, and then the Act in particular, prior to applying the exemptions under FOIA. (See OLC O.L.C. 73, dated April 29, 1988, which was issued from the Committee Management Section, General Services Administration, 1800 M Street, NW., Washington, DC 20405-0002.)</p>
<p>V. 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) (36 CFR parts 1220, 1222, 1228, and 1234), or the Presidential Records Act (PRA), 44 U.S.C. Chapter 22.</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), Federal Officer (DFO), or other representative of the advisory committee, in coordination with the agency's Records Management Office, 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 agencies are encouraged to contact their agent</p>

Management Officer or NARA as soon as the establishment of the advisory committee receive guidance on how to establish records management practices. Upon the advisory committee, the records are processed in accordance with the FR regulations issued by NARA, or in accordance with the PRA.

C) The CMO, DFO, or other representative of the advisory committee governed by the FR, in coordination with the agency's Records Management Officer, must contact NARA sufficient time to review the process for any necessary disposition schedules. The advisory committee's records upon termination must ensure the proper disposition of the committee's records, disposition schedules must be submitted to NARA no later than 60 days after the termination of the advisory committee.

D) For Presidential advisory committees, the PRA, the CMO, DFO, or other representative of the advisory committee should consult the White House Counsel on the preservation of records subject to the PRA, and may coordinate with NARA officials.

Subpart E—How Does This Subpart Apply to Advice and 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 agreement involving an agency's use of advice or recommendations provided to 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 of 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 for NAS committees that were the subject of judicial actions filed before December 17, 2001, 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 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 the advice or recommendation was developed by use of a committee created by either academy and:

(1) The committee was not subject to any actual management or control by any 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 section 15(b)(1), (2), and (5) of the Act.

(b) *No agency management or control.* Agencies must not manage or control the 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 at

academy in the development of any advice or recommendation to be provided by to an agency must be subject to both actual management and control by that academy 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 subchapter. Advice or recommendations from such academy. These funding agreements require 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 requirements of section 15 of the Act; and

(2) To the best of the authorized representative's knowledge and belief, these 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 elsewhere in this subpart. The guidance follows:

Appendix A to Subpart E

Key Points and Principles	Section (s)	Question(s)	Guidance
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 separate organizations. Each is independently chartered by Congress for different purposes. Congress has recognized that these organizations are structured to operate differently. Agencies should defer to the discretion of the academy to adopt policies and procedures that will enable it to comply with the provisions of section 15 of the Act that apply to that academy.
Section 15 of the Act allows agencies to enter into funding agreements with NAS and NAPA without the academy 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, the academy committee's meetings, decisions, and the preparation of reports are controlled by the academy under the circumstances, neither the funding agreement nor the statute it contemplates use by the academy committee to constitute actual management or control of the committee.



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Last Reviewed 4/29/2005

Sarkar, Rumu, CIV, WSO-BRAC

From: Hague, David, CIV, WSO-BRAC
Sent: Wednesday, May 25, 2005 6:12 PM
To: Sarkar, Rumu, CIV, WSO-BRAC
Subject: RE: Applicability of FACA to the BRAC Commission

Thanks Rumu. This is very helpful. David

From: Sarkar, Rumu, CIV, WSO-BRAC
Sent: Wednesday, May 25, 2005 6:10 PM
To: Hague, David, CIV, WSO-BRAC
Cc: Cowhig, Dan, CIV, WSO-BRAC
Subject: Applicability of FACA to the BRAC Commission

I have consulted with Madelyn Creedon, GC to the Senate Armed Forces Committee, and former GC of the 1995 BRAC Commission, and she advised me that the applicability of FACA to the BRAC '95 was never an issue before. BRAC '95 did not file a charter or formally comply with FACA rules. She argued that since BRAC 2005's recommendations, if not disapproved in whole by the President and/or Congress have the force of law, the BRAC's function is, therefore, not advisory in nature. (I realize that the past record may not completely support this position since past BRACs may have filed charters.)

Section 9(b) of FACA , 5 U.S.C. app. 2, specifies that, "advisory committees shall be utilized solely for advisory functions." The GAO, the U.S. Department of Justice and GSA all make a distinction between "advisory" and "operational." GSA's Final Rule provides the following guidance:

Non-advisory, or "operational" committees generally have the following characteristics: (i) [s]pecific functions and/or authorities provided by the Congress in law or by Presidential directive; (i) [t]he ability to make and implement traditionally Governmental decisions; and (iii) [t]he authority to perform specific tasks to implement a Federal program. (See 41 CFR parts 101-6 and 102-3, App. A to Subpart 102-3, Sec. VI (A)(Guidance)(July 19, 2001)).

Thus, it may be (successfully) argued that the 2005 BRAC Commission has been delegated by law certain government functions to implement U.S. military closures and realignments, consistent with BRAC's authorizing statute, and that both the executive and the legislative branches have relinquished their authority, in part, to the BRAC Commission, but reserving, in effect, veto power to reject the totality of the BRAC's recommendations.

Sec. 102-3.40(k) of GSA's Final Rule specifically exempts operational committees from the provisions of FACA, and states:

Any committee established to perform primarily operational as opposed to advisory functions [are exempt]. 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 [FACA] 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.

Finally, DOJ' s Office of Legal Counsel has stated that:

The key question . . . is whether a committee's functions are "operational" instead of advisory. Although that term may not be susceptible to precise definition, it has been employed by this Office to refer generally to the making or implementation of concrete decisions by the members of the committee or subcommittee, as opposed to offering advice to officials who will make the decisions themselves. *Applicability of the Federal Advisory Committee Act to Law Enforcement Coordinating Committees*, 5 Op. O.L.C. 283 (Sept. 10, 1981).

Thus, it may be posited that the 2005 BRAC is NOT an advisory commission but an operational one making concrete decisions that will have the force of law unless disapproved in full by the President or Congress. Further, that the BRAC is following FACA rules as a matter of policy (or good governance), and not as a matter of law.

hope this helps, and please let me know if you have questions or would like me to pursue this further.

Rumu Sarkar

Sarkar, Rumu, CIV, WSO-BRAC

From: Freeman, James, CTR, WHS/APSD
Sent: Thursday, May 26, 2005 11:12 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Wilson, Frank, CIV, WHS/APSD; Hague, David, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC
Subject: RE: Update of GSA FACA Committees Web Page

Dan,

The only BRAC Commission that reported to the SecDef that I am aware of was the first one ... All the others submitted their Reports to the President, who in turn submitted his recommendations to Congress. And like your Commission the DoD supported their efforts whether it was through the use of DoD-lease facilities or filing Federal Register Notices.

I am well aware of the perception issue ... Perhaps your public affairs officer should develop a fact sheet to explain the issue; we would be more than happy to help explain the FACA statute and program to him or her so that they can address any queries that might be addressed, but as you know we can't write the language for you.

The rules pertaining to Federal advisory committees are developed by the Executive Branch -- Executive Order 12024 delegates all Presidential authority in the FACA statute to the Administrator of General Services, and the Committee Management Secretariat (GSA) writes the rules and policies that the entire Executive Branch has to follow. It is extremely doubtful that the Committee Management Secretariat (CMS) would exempt your Commission from the rules and policies especially since it wasn't done for the earlier BRAC efforts.

I am not sure I understand your point about not being attached to the White House or Congress ... All Federal advisory committees are part of the Executive Branch. You were not supposed to receive DoD support because the CMS's Final Rule says that all advisory committees, except Independent Presidential Advisory Committees, are supported by an agency of the Executive Branch. Yours happens to be DoD.

As for making binding decisions ... I know of no Federal advisory committees that make binding decisions on the Executive Branch. Advisory committees make "independent advice and recommendations" to the Executive Branch and only the Agency Head involved or the President of the United States determines whether to implement an advisory committee's advice or recommendations.

I will discuss your concerns about the Database and the Federal Register Notices with Frank when he returns and he can get back to you in his capacity as the CMO. But what you are in essence asking for is that the entire Federal Advisory Committee Management Program for the entire Executive Branch be changed to accommodate one, and only one, advisory committee.

If you want to change the "establishment authority" have at it, but I don't think you want to go back and change the Charter because that will only highlight the issue with the exact people you seem to be concerned about.

I am not sure I share your opinion of the FIDO database ... This database is what OMB and Congress uses when it evaluates the Federal Advisory Committee Management Program in the Executive Branch. So if this is where OMB and Congress goes then it would seem reasonable that it carries some weight. Also, this is the public's access to information on Federal advisory committees. And for these reasons the GSA worries about the validity of the information contained therein.

I will have Frank get back to you as soon as he returns ...

Jim

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Thursday, May 26, 2005 10:38 AM
To: Freeman, James, CTR, WHS/APSD
Cc: Wilson, Frank, CIV, WHS/APSD; Hague, David, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC
Subject: RE: Update of GSA FACA Committees Web Page

Jim -

I appreciate the run-down and the insights, but here's our problem - one I hope you can help us with.

We are receiving concrete criticisms from Congress, public and press that we appear to be too cozy with the Department of Defense. That is a matter of perception, but it is the perception of the public and Congress that will carry the BRAC process through to completion. Or stop it in its tracks. Accordingly, the Commission is taking great pains to ensure that the perception given matches the reality, that the BRAC is independent of DoD.

A very public part of the process is the announcement of the Commission's public meetings through the FR. Placing a Department of Defense heading over a BRAC Commission announcement can only indicate that the BRAC Commission is a subordinate component of the Department of Defense, reporting to the SECDEF. That is exactly the message we don't want to send. This BRAC Commission, unlike the past commissions, does not report back to the SECDEF.

The fact that the BRAC Commission receives highly valued and vital support from DoD, both from WHS and many other components of DoD, does not render the BRAC Commission a part of DoD. That's why the detailees, including me, don't wear uniforms (and why it's important that we have orders that clearly establish our rating and disciplinary chain runs to Chairman Principi, not a DoD element).

The 2005 BRAC Commission is a different animal from the Commissions of prior BRAC rounds. We're not, as you say, a Presidential Advisory Commission, precisely because we're located between the White House and Congress. We can't be attached directly to either. The decision to posture the Commission to receive DoD support wasn't calculated to render the Commission responsive to DoD. It was to place distance between the White House and the Commission, so that the Commission could serve as an honest broker between the Executive and Legislative. We're also, arguably, not advisory at all, since the Commission will make binding decisions that will become law unless overturned by subsequent action by the President or Congress.

We need to find a way to ensure that our FR notices are not characterized as DoD announcements, and our FIDO database entry doesn't indicate that we're part-and-parcel of DoD. Can you assist us with that? If the "perception" problem we're experiencing cannot be solved at WHS, who can solve it for us?

Other topic. The reason for using PL 107-107 in the context I described below, the "specific establishment authority" in the FIDO database, is that it was the 107-107 language that established the 2005 BRAC process. Yes, it amended The Defense Base Closure and Realignment Act of 1990, which was first set out in PL 101-510, but 101-510 did not establish the 2005 BRAC. PL 107-107 is the "specific establishment authority" that set us up. Referring to PL 101-510 as amended doesn't direct folks to the specific session law concerned. The "effective date" of 107-107 is December 28, 2001, whereas the effective date of 101-510 is December 5, 1991.

The use of The Defense Base Closure and Realignment Act of 1990, PL 101-510, as amended, in the Charter is appropriate because it pulls in the totality of the statutory provisions. In the Charter we're talking about

the overall authority (and requirement), not the legislative start-point for the 2005 BRAC Commission.

don't think we need to worry about the FIDO database providing a basis for a suit against the BRAC Commission since it's not the official conduit for announcements or release of information under the BRAC statute, the Sunshine Act, the FACA, or the Final Rule.

None of this is intended to indicate that we don't plan to comply fully with the pertinent laws and regulations. That we absolutely intend to do. We will continue to need your advice and counsel to smooth that process.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
Suite 600 Room 600-20
Arlington Virginia 22202-3920
Voice 703 699-2974
Fax 703 699-2735
dan.cowhig@wso.whs.mil

-----Original Message-----

From: Freeman, James, CTR, WHS/APSD
Sent: Thursday, May 26, 2005 9:00 AM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Wilson, Frank, CIV, WHS/APSD
Subject: RE: Update of GSA FACA Committees Web Page
Importance: High

an,

Once again we are addressing an issue that everyone on your advisory committee seems to misinterpreted.

First off the legal name of the advisory committee is the Defense Base Closure and Realignment Commission, and not the 2005 Defense Base Closure and Realignment Commission. If you have any question about this perhaps you should review the documentation from the White House. Secondly, the Commission is not independent of the DoD in the sense that some on your Commission seem to feel.

There are, in the FACA statute, only two categories of advisory committees -- Discretionary and Non-Discretionary advisory committees. With regard to Discretionary advisory committees, they are established by the Agency Head (in our case the SecDef) at his suggestion or that of Congress. Non-Discretionary advisory committees are directed by the Congress or the President, and within this broad category there is what is known as Independent Presidential Advisory Committees (directed by Congress or the President).

With the exception of Independent Presidential Advisory Committees, all advisory committees in the Executive Branch are attached to an Executive Branch agency for support (the support level is determined by the Agency Head and not the advisory committee). Independent Presidential Advisory Committees operate independent of any Executive Branch agency and only receive support from the General Services Administration (GSA), and whenever they are established the Committee Management Secretariat (GSA) appoints a Committee Management Officer (CMO) for the advisory committee. The appointment of the CMO for an Independent Presidential Advisory Committee signifies the special category these committees hold in the Executive Branch since the only other CMOs in the Government are those appointed for each Executive Branch Agency.

The Defense Base Closure and Realignment Commission does not fall into the "Independent Presidential Advisory Committee" category since neither the White House or the U.S. Congress directed that the Commission would be an Independent Presidential Advisory Committee." To further enforce the fact that the Commission is not an "Independent Presidential Advisory Committee" Congress directed that the \$10M appropriated for the Commission's operations would be held by the DoD for use by the Commission instead of GSA or OMB, which is where the monies for "Independent Presidential Advisory Committees" are held and dispersed. Another factor reinforces the fact that the Commission is "supported" by the DoD is that the statute states that if funds are not appropriated for the Commission then the Secretary (the SecDef) may transfer what funds are necessary.

If the Commission was an "Independent Presidential Advisory Committee" you would not be in DoD-leased office space or receiving any support whatsoever from the DoD; everything would be coming from the GSA. The most recent Independent Presidential Advisory Committee was the Commission on the Intelligence Capabilities of the United States Regarding Weapons of Mass Destruction chaired by Senator Robb and Judge Silberman.

Notwithstanding, I believe the disconnect centers around the fact that all advisory committees regardless of their designation (Discretionary or Non-Discretionary) are independent entities of the Executive Branch called upon to provide "independent advice and recommendations" to the Federal Government. Being an independent entity providing "independent advice and recommendations" does not mean that you are an "Independent Presidential Advisory Committee." The DoD is required by law to provide "adequate support" to all advisory committees supported or sponsored by the Department. The Department is well aware of the fact that all advisory committees we support are not part of the DoD's organizational structure nor are we supposed to interfere in the Membership's deliberate process.

However, that does not mean that the Commission or any other advisory committee supported or sponsored by the DoD has the option to do anything it wants to. The Commission, like all other advisory committees, must comply with the rules and regulations that apply to the Executive Branch, to include those of the sponsoring Agency. So far the Commission has been less than forthright in abiding by all the laws and regulations governing the DoD and other agencies in the Executive Branch, to include the Federal Acquisition Regulations, the Federal Travel Regulations, and the rules governing the handling of National Security Information.

With regard to the CMS's Federal Advisory Committee Management Database, you are and you will remain listed under the Department of Defense. The only way that this can change is if the Congress or the White House directs that your status changes to an "Independent Presidential Advisory Committee", which would mean that the DoD, by law, would have to cut off all support to the Commission. The same goes for your Federal Register Notices you will continue to file them through the DoD without exception.

Being listed under the DoD in the GSA's Database or having to file your Federal Register Notices through the DoD does not mean that you are part of the DoD or subordinate to the SecDef. Nor does it mean that the Department is managing the Commission. It has to do with complying with the Federal statutes governing Federal advisory committees ... To put it in simpler terms, OSD does not tell the Army who to pick to be a company commander in the 101st Airborne Division, but the Department, through DoD Directive 1315.7, has the prerogative to require the Army to comply with certain rules governing the assignments of military personnel (e.g., time-on-station requirements).

Regarding your statutory authority, I would like to point out two items:
a) Mr. Battaglia personally approved the Charter as written, which reads in part "The Commission, in accordance with Public Law 101-510, as amended, ..."; and (b) that portion of P.L. 107-107 that pertains to the Commission says, "The Defense Base Closure and Realignment Act of 1990 (part A of title XXIX of Public Law 101-510; 10 U.S.C. 2687 note) is

amended by adding at the end the following new section: ..."

Regardless of whether we are talking about the Sunshine Act or the Federal Advisory Committee Act, if the Commission fails to comply with the rules laid down by the GSA and promulgated by the DoD it does so at its own peril. There are interested people and groups just waiting for the Commission to violate the Sunshine Act or the FACA statute so they can slow down or stop the Commission's deliberation with legal action. It has happened before and is happening in our areas of the Executive Branch.

If you are having trouble updating your data then please contact Jackie Sellers for some assistance ... The concern from the CMS Office is that they are getting queries and they (CMS) are concerned about someone having something to complain about.

Jim

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Wednesday, May 25, 2005 6:59 PM
To: Wilson, Frank, CIV, WHS/APSD
Cc: Sellers, Jacquelyn, CIV, WHS/APSD; Freeman, James, CTR, WHS/APSD; Hague, David, CIV, WSO-BRAC; Carnevale, Diane, CIV, WSO-BRAC; Battaglia, Charles, CIV, WSO-BRAC; Barlow, Larry, CIV, WHS/APSD
Subject: RE: Update of GSA FACA Committees Web Page

Frank -

Thanks for your reminder. Most of the information called for in the GSA website is already available on our website, <http://www.brac.gov/default.asp>, but we'll populate this as well. My understanding of the GSA website from our conversations was that it was primarily for internal government use, not a necessarily a conduit for public release of information.

A few issues with the BRAC "General Information" entry for the GSA website. I don't seem to be able to edit these items directly.

The "Department or Agency" is not DOD. The Department or Agency entry should read 2005 Defense Base Closure and Realignment Commission. The BRAC Commission was established independent of DOD to review the DOD recommendations. Here, as with the FR notices, we should not be listed in a manner that indicates that the BRAC Commission is a part of DOD or subordinate to the Secretary of Defense.

Our "Specific Establishment Authority" is Pub. L. 107-107 (there is no language in Pub. L. 101-510 authorizing the 2005 BRAC)

The "Effective Date" of 107-107 is December 28, 2001

Our "Committee URL" is <http://www.brac.gov/default.asp>.

Thanks for your help with this. BTW, any progress on my detailing orders, or those of the other service members supplied to the Commission from DOD?

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
2521 South Clark Street
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Arlington Virginia 22202-3920

Voice 703 699-2974
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dan.cowhig@wso.whs.mil

From: Wilson, Frank, CIV, WHS/APSD
Sent: Wednesday, May 25, 2005 1:22 PM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Sellers, Jacquelyn, CIV, WHS/APSD; Freeman, James, CTR, WHS/APSD;
Hague, David, CIV, WSO-BRAC; Carnevale, Diane, CIV, WSO-BRAC; Battaglia,
Charles, CIV, WSO-BRAC; Barlow, Larry, CIV, WHS/APSD
Subject: Update of GSA FACA Committees Web Page

Maj. Cowhig,

I just received a telephone call from the DoD desk officer at GSA FACA Committee Management Secretariat. He asked why the data concerning the Defense Base Closure and Realignment Commission had not been updated. He is attempting to field questions from citizens that are unable to find information on the web page. On May 4th Jim Freeman and I briefed you on all the duties required of the DFO, one of which is to update the official GSA web page which is the official records data repository for FACA Committee information. On May 12th Jackie Sellers provided you with a password with which you could access the web site and update information. Both the Committee Secretariat and my office would appreciate it if you would log on and update the BRAC 05 web page. As we briefed you, given the high visibility of the BRAC 05 Commission it is paramount that all FACA processes and procedures be followed in a timely manner. If you have any questions please call either me or Jackie.

Thank you for your attention to this vital issue.

Frank

Frank Wilson, Civ., WHS/APSD

Chief, Administrative Services Division

Suite 940, CG1

(703) 601-2554 ext. 113

Sarkar, Rumu, CIV, WSO-BRAC

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Wednesday, June 01, 2005 7:05 PM
To: Sarkar, Rumu, CIV, WSO-BRAC
Subject: FW: Applicability of FOIA to Information provided to the Commission

Rumu -

FYI.

V/R

Dan Cowhig
Deputy General Counsel and Designated Federal Officer
2005 Defense Base Closure and Realignment Commission
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-----Original Message-----

From: Hague, David, CIV, WSO-BRAC
Sent: Wednesday, June 01, 2005 6:53 PM
To: Cowhig, Dan, CIV, WSO-BRAC
Subject: Re: Applicability of FOIA to Information provided to the Commission

Dan. Pls set it up for late morning. Thks. DH.

-----Original Message-----

From: Cowhig, Dan, CIV, WSO-BRAC <Dan.Cowhig@wso.whs.mil>
To: Hague, David, CIV, WSO-BRAC <David.Hague@wso.whs.mil>
Sent: Wed Jun 01 18:49:16 2005
Subject: RE: Applicability of FOIA to Information provided to the Commission

Sir -

Just got off the phone from a long conversation with Grace Becker and Stew Aly regarding the FACA, the FR notices and the FIDO database. We also discussed this topic. Stew wants to meet with us on this topic this Friday - I suggested late morning or early afternoon. He is unclear on precisely what data might be involved and so will bring in the data handlers as well.

Frank Cirillo and I went up to see what we could see in the classified reading room on the 7th floor. It's still very much a work in progress. We were told, however, that the clearinghouse was busy applying PA and FOIA exemptions and exclusions to the pending data. Frank and I both told them that (1) we are part of the government, so there shouldn't be any thinking that DoD will withhold data on the basis of PA or FOIA, and (2) the only continuing basis for protection that should apply to BRAC data provided to us by DoD is "national security." There is no other legitimate exemption or exception that that should apply to data that was used by DoD to make their recommendations. I asked the folks upstairs to have their legal advisors contact us so we could figure out what is going on. Apparently that was translated to "the DFO says FOIA doesn't apply to BRAC." At least the "have the legal folks get in touch with us" part worked.

Stew suggests the law enforcement vulnerabilities exemption, but that would be subsumed by the national security exemption in this context. We discussed the fact that our records are open, by policy and practice, for public inspection and use - and that they will be used heavily by the public to counter the DoD proposals.

The provisions of the BRAC statute implicated are 2902(e)(2)(a) ("Each meeting of the Commission, other than meetings in which classified information is to be discussed, shall

be open to the public."), 2903(c), requiring that all data used by DoD be transmitted to certain members of Congress, and 2914(d)(2). These do not state that we can't handle PA and FOIA protected material. What they do, combined with the rest of the statute, is indicate that whatever data is used by the Commission to arrive at our decisions (the Commissioners' decisions, that is) will be shared with all members of Congress, and will therefore almost inevitably be made a matter of public record. We also have the practical process of making the DoD supporting data available to the congressional delegations and communities for analysis and rebuttal. If we get into using data that should be protected under other exceptions or exemptions, we're going to have big problems with our processes.

As I understand the Chairman's guidance on openness, we won't be asserting any exemption unless it is non-discretionary. We need to nail down what DoD thinks they're going to give us that should receive any protection on any basis other than national security.

V/R

Dan Cowhig
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-----Original Message-----

From: Hague, David, CIV, WSO-BRAC
Sent: Wednesday, June 01, 2005 4:09 PM
To: Cowhig, Dan, CIV, WSO-BRAC
Subject: Fw: Applicability of FOIA to Information provided to the Commission
Importance: High

Dan.

What can you tell me about this

DH

-----Original Message-----

From: Bayert, Nicole, Ms, DoD OGC <bayertn@dodgc.osd.mil>
To: Hague, David, CIV, WSO-BRAC <David.Hague@wso.whs.mil>
CC: Aly, Stewart, Mr, DoD OGC <alys@dodgc.osd.mil>; Van Ness, James, Mr, DoD OGC <vannessj@dodgc.osd.mil>; Potochney, Peter, Mr, OSD-ATL <Peter.Potochney@osd.mil>; McAndrew, Michael, Mr, OSD-ATL <Michael.Mcandrew@osd.mil>; Easton, Robert, Mr, DoD OGC <eastonr@dodgc.osd.mil>; Becker, Grace, Ms, DoD OGC <beckerg@dodgc.osd.mil>; Dell'Orto, Dan, Mr, DoD OGC <dellordj@dodgc.osd.mil>
Sent: Wed Jun 01 16:01:39 2005
Subject: Applicability of FOIA to Information provided to the Commission

David-

I just got word from the OSD BRAC office that your DFO has asserted that FOIA exemptions do not apply to material that the Department turns over to the Commission. Is there any specific authority that you think supports this assertion? My office's FACA/FOIA lawyer would like us to get together to discuss. Are you and your DFO available tomorrow or Friday? As I am sure you are aware, we need to act quickly.

Stu, Grace, Bob, & Jim - when are you available over the next two days? We can meet in my office - 3C962.

Nicole D. Bayert
Department of Defense
Associate General Counsel
(Environment & Installations)
Pentagon Room 3C962
703-693-4842; fax 693-4507

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Sarkar, Rumu, CIV, WSO-BRAC

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Wednesday, June 01, 2005 8:50 PM
To: Bayert, Nicole, Ms, DoD OGC
Cc: Aly, Stewart, Mr, DoD OGC; Van Ness, James, Mr, DoD OGC; Potochney, Peter, Mr, OSD-ATL; McAndrew, Michael, Mr, OSD-ATL; Easton, Robert, Mr, DoD OGC; Becker, Grace, Ms, DoD OGC; Dell'Orto, Dan, Mr, DoD OGC; Hague, David, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC; Cirillo, Frank, CIV, WSO-BRAC; Cook, Robert, CIV, WSO-BRAC
Subject: BRAC data concerns

Nicole -

Thank you for contacting us so quickly. General Hague asked me to arrange a meeting for Friday at 11:00 so that he can attend after his return from the New England site visits. It might be better to hold the meeting somewhere where we can look at the data we'll be talking about, with the data handlers present to work through the "for examples" - either the reading room set up on the 7th floor here at NC2 or at a comparable location in the Pentagon. The practical aspects are needed to define the legal.

I talked with Stu and Grace on this and other issues earlier. "FOIA exemptions do not apply to the material that the Department turns over to the Commission" could have been the translation, but it isn't the law or the primary concern. The genesis of this is that Frank Cirillo and I went up to see what we could see in the classified reading room on the 7th floor. It's still a work in progress, despite what has obviously been a tremendous effort by Mike McAndrew and his crew up there. At one point in our exploration, however, we were told by Mike and several other folks that the clearinghouse was busy applying PA and FOIA exemptions and exclusions to some of the still-pending data. Our concern is that the only continuing basis for protection that should be applied to the BRAC-substantiating data provided to us by DoD is "national security." Neither Frank nor I could conceive of any other exemption or exception that that should be applied to the kind of data that was used by DoD to formulate the recommendations. Mike and the other folks we were talking with weren't sure what exceptions or exemptions were being considered, so we asked them to ask the legal advisor working with them to contact us - which you did.

Stu has suggested the law enforcement vulnerabilities exemption, but that would be subsumed by the national security exemption in this context. As Frank and Mike and I were, Stu was working without all the pieces at hand. We need to get together to review this in detail. If it fits law enforcement vulnerabilities, it should fit national security (terrorists can be considered criminals in that context). What else would apply to data that would be relevant to the 8 BRAC criteria? Stu and Grace and I discussed the fact that our records are open, by policy and practice, for public inspection and use - and that they will be used heavily by the public to counter the DoD proposals. Fragmenting the aggregate doesn't appear to be a solution, because it could easily be reaggregated.

There is no provision of the BRAC statute that says "FOIA doesn't apply." The segments of the statute that are most directly implicated are 2902(e)(2)(a) ("Each meeting of the Commission, other than meetings in which classified information is to be discussed, shall be open to the public."), 2903(c), requiring that all data used by DoD be transmitted to certain members of Congress, and 2914(d)(2), requiring the Commission to give all supporting data to any member of Congress who asks at the end of the process (and they've asked, many times over). These do not state that we can't handle PA and FOIA protected material. What they do, combined with the rest of the statute, is indicate that whatever data is used by the Commissioners to arrive at their decisions will be shared with all members of Congress, and will therefore almost inevitably be made a matter of public record. It will also potentially be discussed in detail at an open meeting, a meeting that can only be closed on the basis of national security. We also have the practice established by prior BRAC rounds of making the DoD supporting data available to the congressional delegations and communities for analysis and rebuttal. If we get into using data that should be protected under other exceptions or exemptions, we're going to have big problems with our processes.

As I understand Chairman Principi's guidance on openness, we won't be asserting any exemption to withhold DoD-provided BRAC-substantiating data other than national security unless it is non-discretionary. We need to nail down what you (DoD) think you might give us that must receive (as opposed to could or should receive) any protection on any basis other than national security, because that's a sharp change in direction from the initial expectations (as was the classification in the aggregate issue).

Please keep in mind two things. First, the Commission must review in four months (reduced to three by the lack of access to data) what DoD did over a period of years. We also have to do it in full public view, soliciting and incorporating public (and political) participation. Our staff has their hands full with the basic mission. Second, we're heavily engaged with both

the consequences of the late delivery of data and increasing assertions of manipulation. There are many who have a stake in the outcome of this process who are asserting that the classification issue is a canard, an excuse for slow-rolling the data. Unfortunately, that assertion is supported by the fact that classification in the aggregate wasn't brought to the fore in prior BRAC rounds. The Commission does not subscribe to that view - we are very much aware of the security concerns - but we hear that view voiced incessantly and as a practical matter we are have to respond to it. The late arrival of the data has already caused the Chairman to have to postpone regional hearings, which as you know must be conducted within a certain timeframe in order for the process to go forward. If we can't meet the suspenses set out in the statute, the whole thing falls apart. There are those who would like to see that happen because they see it as a solution to their particular concerns with the overall BRAC recommendation.

The process is already complicated by late data and classification issues. If either DoD or the Commission now suddenly asserts another reason for not sharing out the DoD supporting data, we're going throw things further off track. We need your help to shake this wrinkle out.

V/R

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Sarkar, Rumu, CIV, WSO-BRAC

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Wednesday, June 01, 2005 7:04 PM
To: Hague, David, CIV, WSO-BRAC
Cc: Sarkar, Rumu, CIV, WSO-BRAC
Subject: The rest of the story

Sir -

That was the forwardable response. The gist of the conversation with Stew, who apparently enjoys being an ass for the sake of being an ass, was that the Commission is an entity of the Department of Defense and that we would violate the law if we were to publish in the FR under anything other than the DoD heading. His assertion is that we were put under DoD for support, and therefore our public notices must read DoD. He demanded a statute that authorized publication of BRAC notices under BRAC. I asked him for the opposite - an authority that requires them to be published under anything other than BRAC. Grace was a little more conversational and allowed that she wasn't aware of any law or regulation that required the notices to be published under the DoD heading. We'll probably want to revisit this on Friday. I tend to think there may have been an opinion rendered out of OGC off the cuff that there is a legal requirement, and Stew is now trying to hold the line without the legal authority to back it up. BTW, I'm the DFO and I'm violating the law. Repeat 12 times.

Grace is unsure of the requirement, concedes that it would be best to create distance between DoD and the BRAC, and views the notices headings as categorization, not responsibility. Don't know that I agree. Still back to "how does support translate into supervision?" Grace is going to research and get back to us. She seems more of a mind to actually listen.

I'll forward the other email to Rumu - just realized I didn't cc her.

V/R

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Sarkar, Rumu, CIV, WSO-BRAC

From: Cowhig, Dan, CIV, WSO-BRAC
Sent: Wednesday, June 01, 2005 4:46 PM
To: Becker, Grace, Ms, DoD OGC
Cc: Aly, Stewart, Mr, DoD OGC; Bayert, Nicole, Ms, DoD OGC; Green, Jeffrey, Mr, DoD OGC; Hughto, Karen, Ms, DoD OGC; Hague, David, CIV, WSO-BRAC; Sarkar, Rumu, CIV, WSO-BRAC; Perkal, Don, Mr, DoD OGC
Subject: RE: BRAC, FACA and DoD Support

Grace -

Thanks for your email. We appreciate your valuable support. You asked several questions/raised several points.

Don't get hung up on the "department/agency" label used for the data field in the FIDO database. That's not the issue. As you mentioned, the issue is the perception created by placing database data or FR announcements under DoD/OSD. That's poison. If you're having trouble reconciling BRAC "Commission" with the "department/agency" data label, look at the "department/agency" listing for the FCC, SEC, AEC, etc. Listing a "commission" as an "agency/department" is consistent with general practice in the FIDO database and the FR.

My question is why are we still talking about this two weeks after we told WHS to make the change? Isn't that a bit silly? The FR announcements and FIDO database entries will be posted under the agency heading "2005 Defense Base Closure and Realignment Commission." Period. That's the Commission's call, not DoD's call, not WHS's call. Best as I can tell, that's what every DoD attorney they've sought an opinion from has advised WHS.

DoD is on the hook for providing administrative support to the Commission. That's clear from the statute. But support is not supervision. Where we ask for something like the above, a two-week long debate should not ensue, with WHS refusing to implement the decision of the BRAC Commission and emailing every attorney in DoD to find an opinion that will justify their refusal to implement the decision. We are flat baffled by the blow-back we get from WHS on matters like this.

On the BRAC Commission's status vis-à-vis FACA, do you have a position paper? If so, please share. We'll let you know if the Commission believes it necessary to broach that topic with DoD OGC. As a practical matter, the BRAC statute requires a greater degree of openness than FACA. Our intention is to comply with the requirements of FACA.

Please feel free to call me or any of the other attorneys in the GC office if you have questions. Phone calls eat up less time than emails and are better for resolving issues. General Hague, the General Counsel, is in New England on site visits until Friday, but is available by Blackberry. Rumu and I are here in town.

Thanks!

V/R

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From: Becker, Grace, Ms, DoD OGC
Sent: Wednesday, June 01, 2005 2:58 PM
To: Cowhig, Dan, CIV, WSO-BRAC
Cc: Aly, Stewart, Mr, DoD OGC; Bayert, Nicole, Ms, DoD OGC; Green, Jeffrey, Mr, DoD OGC; Hughto, Karen, Ms, DoD OGC
Subject: BRAC, FACA and DoD Support

Dan,

I handle issues relating to the Federal Advisory Committee Act. As you know, the Defense Base Closure and Realignment Commission (BRAC) is a federal advisory committee and must comply with FACA and other federal legislation. I understand that BRAC, like all federal advisory committees, is an "independent commission" in that it provides recommendations for closures and realignments of U.S. military installations that are "independent" of SECDEF's recommendations. I also appreciate your concern that the public might misconstrue the administrative support DoD provides to BRAC as suggesting that BRAC is too cozy with DoD (e.g., "DoD" being listed under the column "Department/Agency" in the FIDO database and the publication of Federal Register Notices that include a DoD heading).

However, I was a bit confused as to your proposed solution. Listing "2005 Defense Base Closure and Realignment Commission" under "Department/Agency" seemed a little odd, as BRAC is not a "department" or "agency." Do you believe it is? Do you think DoD should not provide any administrative support for BRAC? It would be helpful to have a position paper on what the legal status of BRAC is, the statutory authority you are relying on, and how you propose to go forward. I understand that DoD has provided similar administrative support to prior BRACs in the 1990's without issue, but would like to have your input on any statutory changes that might dictate a change in procedures.

Many thanks.

Best regards,
Grace

Grace Chung Becker
Associate Deputy General Counsel
DoD Office of the General Counsel (Legal Counsel)
Pentagon 3B688
(703) 571-9354

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Cowhig, Dan, CIV, WSO-BRAC

From: Freeman, James, CTR, WHS/APSD
Sent: Wednesday, June 01, 2005 8:18 AM
To: Green, Jeffrey, Mr, DoD OGC; Hague, David, CIV, WSO-BRAC; Roper, Linda, , WHS/HRD; Perkal, Don, Mr, DoD OGC; Becker, Grace, Ms, DoD OGC; Cowhig, Dan, CIV, WSO-BRAC
Cc: Wilson, Frank, CIV, WHS/APSD
Subject: RE: Meeting with CMO
Signed By: jim.freeman@whs.mil

Jeff,

Creative but I believe the CMO and probably the DA&M would prefer you discuss policy with them prior to making such an opinion.

Advisory committees are independent by the vary nature that they provide "independent advice and recommendations" to the Executive Branch and Congress. Notwithstanding, we know of no Executive Order or congressional language that stipulates that the Defense Base Closure and Realignment Commission is an Independent Presidential Advisory Committee ... a non-discretionary presidential advisory committee but not an Independent Presidential Advisory Committee ... the latter involves separate provisions of the policies that govern Federal advisory committees.

Since they are not an Independent Presidential Advisory Committee policy dictates that they must be attached to an agency of the Executive Branch for "adequate support." In addition, the same policy rulings allows the Agency Head to issue administrative guidelines and management controls that apply to all of the agency's advisory committees subject to the FACA statute.

As for the Commission having the option to determine that they are not a Federal advisory committee subject to the FACA statute, we do not believe they have the statutory authority to make such a determination.

Please remember all previous Commissions dealing with base closures were subject to the FACA statute and none of them were considered Independent Presidential Advisory Commissions.

Jim

-----Original Message-----

From: Green, Jeffrey, Mr, DoD OGC
Sent: Tuesday, May 31, 2005 6:43 PM
To: Freeman, James, CTR, WHS/APSD; Hague, David, CIV, WSO-BRAC; Roper, Linda, , WHS/HRD; Perkal, Don, Mr, DoD OGC; Becker, Grace, Ms, DoD OGC; Cowhig, Dan, CIV, WSO-BRAC
Subject: RE: Meeting with CMO

(703) 571-9445

Jim,

Here's what I propose as an alternative.

BRAC is independent of DoD.

The members are Special Government Employees (SGEs). If the issue you are concerned with is the 130 day rule, you need to have a meeting with Linda Roper about that issue.

6/1/2005

Neither Grace nor I have anything to contribute to the meeting.

If the BRAC folks believe they are not an advisory committee, that is their determination. But the Commissioners are SGEs.

Jeff

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-----Original Message-----

From: Freeman, James, CTR, WHS/APSD

Sent: Tuesday, May 31, 2005 13:11

To: Hague, David, CIV, WSO-BRAC; Roper, Linda, , WHS/HRD; Perkal, Don, Mr, DoD OGC; Green, Jeffrey, Mr, DoD OGC; Becker, Grace, Ms, DoD OGC; Cowhig, Dan, CIV, WSO-BRAC

Subject: Meeting with CMO

Importance: High

Frank Wilson would like to have a meeting tomorrow afternoon in our facility (Crystal Gateway 1, Suite 940) from 1:00 to 2:00 p.m. to discuss several personnel and legal issues that seem to be causing some confusion and concern with the Defense Base Closure and Realignment Commission.

Mr. Wilson would like a representative from each of the following to attend:

Commission General Counsel
Commission's DFO
WHS Executive Personnel (Linda Roper's office)
WHS General Counsel (Mr. Perkal's office)
DoD General Counsel (Ethics)
DoD General Counsel (FACA Attorney)

We apologize for the short notice but believe it is essential that we resolve these issues at the earliest possible point for the benefit of the Commission and the Department of Defense.

VR,

Jim Freeman