

March 6, 2000

MEMORANDUM TO: Chairman Meserve
Commissioner Dicus
Commissioner Diaz
Commissioner McGaffigan
Commissioner Merrifield

FROM: Karen D. Cyr /RA/
General Counsel

SUBJECT: COMMENTS ON GSA PROPOSED FACA REGULATIONS

The General Services Administration (GSA) published a proposed rule on January 14, 2000, which would revisit current regulations implementing the Federal Advisory Committee Act (FACA). Comments are due by March 14, 2000.

The GSA has authority to administer FACA for the Executive Branch under Executive Order 12024. The current FACA regulations do not reflect legislative changes, shifts in Federal policy, and Federal court decisions relating to that statute since the regulations were last amended ten years ago. The proposed rule, which is a complete "plain language" rewrite of the current regulations, reflects these developments.

The most significant changes to the current FACA regulations in the proposed rule are the following:

The proposed rule would provide that subcommittees reporting to a parent advisory committee are not subject to FACA if the parent committee conducts a full review of the subcommittee's advice or recommendations. Currently, such subcommittees are subject to all FACA requirements, except for obtaining a charter.

The proposed rule would exclude from FACA coverage meetings between Federal employees and officials or employees of State, local, and tribal governments on intergovernmental responsibilities or administration, as well as committees created by the National Academy of Sciences and the National Academy of Public Administration. These exclusions were enacted into law after the existing regulations had been promulgated.

The proposed rule would modify the current regulations' definition of "utilized" committees, which are subject to FACA. ⁽¹⁾ Under the proposal, committees are "utilized" under FACA only when the President or the agency to which the committee renders advice exercises actual management and control over their operations. This follows rulings to that effect in several Federal court decisions. However, the meaning of "actual management and control" is not clearly defined in the proposed rule.

The proposed rule would make explicit the exclusion from FACA of individual meetings between Federal employees and contractors or licensees to discuss compliance with the specific requirements of the contract or license.

The proposed rule would de-emphasize the goal of achieving "consensus" during a meeting as the most important factor in determining whether an advisory group is subject to FACA. It had been understood for many years that, to be subject to FACA, a group must have a goal of achieving "consensus" on the advice it would render to the Government. The proposed rule basically adopts a 1993 decision of the United States Court of Appeals for the D.C. Circuit that held that the matter as to whether there is a group deliberative process is a more important consideration than whether the group was seeking to achieve consensus. *Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton, et al.*, 997 F.2d 898, 913 (D.C. Cir. 1993). The proposed rule would also de-emphasize whether advice from the group is the "preferred sources of advice" in determining whether a group is subject to FACA, relying instead on the "actual management and control" test mentioned above.

The proposed rule would require agencies to continually seek feedback from advisory committee members and the public on the effectiveness of the committee's activities. Agencies would be required to communicate to the committee how its advice has affected their programs and decisionmaking. This requirement is not contained in the current regulations. It could result in increased efforts for our advisory committees, the NRC staff, and the Commission itself to provide feedback on the committees' activities and to incorporate such feedback into each committee's work.

We have prepared the attached letter to the GSA with specific comments on the proposed rule based on our review and comments received from EDO offices, the ACRS/ACNW, and SECY.

The General Counsel intends to send the attached comments to GSA on March 14, unless comments from the Commission are provided before then.

Contact: John Szabo
415-1610

Attachments: (1) [Draft Comments](#)
(2) [Proposed rule](#)

cc: EDO RES
ACRS ADM
SECY ASLBP
NMSS OIG
NRR

ATTACHMENT 1

Mr. James L. Dean
Director
Committee Management Secretariat (MC)
General Services Administration
Office of Governmentwide Policy
1800 F Street, N.W.
Room G-230
Washington, D.C. 20405

Dear Mr. Howton:

We appreciate the opportunity to comment on the proposed rule published in the Federal Register of January 14, 2000, which would revise the regulations implementing the Federal Advisory Committee Act (FACA). We commend this effort to update the regulations to reflect pertinent developments over the past decade but believe that further clarification is needed on several issues.

Subcommittees

The preamble states that a subcommittee which reports to a parent advisory committee is not subject to the FACA. 65 FR 2504. This could be read to mean that, no matter what the circumstances, subcommittee meetings are not subject to FACA. However, the guidance in the first key point in the table in section 102-3.200 provides that, while subcommittees need not open their meetings to the public, it also "cautions" agencies against closing subcommittee meetings to the public:

"where a subcommittee develops substantive advice or recommendations which are subject to only nominal review by the parent committee before being submitted to a Federal agency or official. Such exclusions would run counter to FACA's provisions requiring contemporaneous access to the committee deliberative process."

Further clarification is needed as to whether and, if so, when subcommittee meetings are subject to FACA.

In addition, the definition of a subcommittee provides that its members could be drawn "in whole or in part from the parent committee." It has been our understanding that all members of an advisory subcommittee are also members of the full committee. Providing otherwise would create uncertainties about the application of personnel and conflict of interest laws to subcommittee members who are not members of the full committee. We believe that the proposed rule should address the status of subcommittee members who are not members of the parent committee, how they can be appointed, and what restrictions apply to them.

Utilized

The activities of "utilized committees" are subject to FACA. The major change in the definition of a "utilized committee," according to the preamble, would be to emphasize the degree to which the Executive Branch exercises "actual management and control" over a group not directly established by an agency. The definition in the proposed rule provides that a committee not established by the Federal Government is utilized under FACA when the President or a Federal agency exercises actual management and control over its operation. 41 CFR 102-3.30.

Further discussion of this definition of the term "utilized" states, in the first key point and guidance in section 102-3.40, that advice and recommendations from external groups on a one-time or regular basis where the agency does not exercise "actual management and control" over the group would not be subject to FACA. Examples in the table under section 102-3.40 would exclude from FACA a local citizens group meeting with Federal officials regarding improvement of the condition of forest trails and quality of concessions, as well as Federal officials' attending meetings of external groups where advice and recommendations are offered during the discussions.

The preamble and these provisions suggest that, absent "actual management and control" over the meetings by a Federal agency, there would be no FACA implications if Federal employees regularly met with private groups, including those established by agency contractors and licensees, to deliberate on issues that fall under the responsibility of the Federal agency. However, paragraph B of the guidance in section 102-3.40 advises agencies that the group is not automatically excluded from FACA even if the agency did not appoint the group's members, determine its composition, set its agenda, or fund its activities. Furthermore, it states that agencies may need to reconsider the status of the group under FACA if the

relationship in question is essentially indistinguishable from an advisory committee established by an agency.

We find this advice to be internally inconsistent and believe further clarification is needed on this important issue. We, therefore, recommend that the definition and the key points and principles on a "utilized" committee be amended to eliminate this confusion and develop clear criteria. The rule should explain what type and degree of "management and control" by a Federal agency would meet the standard of a "utilized" committee. In particular, we would appreciate a clarification regarding situations where there are meetings between Federal officials and representatives of outside parties. At what point would such a meeting be subject to the FACA? For example, would there be a FACA committee if Federal employees meet and deliberate with a private group on a Federal matter at the invitation of the group at the private group's premises? Would the answer change if the contractor is invited by the agency to meet on the agency's premises and a Federal employee ran the meeting?

Operational committees

"Operational committees" are not subject to FACA. The definition of an operational committee is basically identical to the current regulation. 41 CFR 101-6.1104(g). However, the guidance in section 102-3.40 lists the following characteristics of an operational committee: specific functions and/or authorities provided by Congress by law; an ability to make and implement decisions; a dedicated budget and staff; a legal, authoritative relationship with an agency; and a membership appointed by the President, Congress, and/or agency head. We believe that the result of requiring all these characteristics would be the elimination of almost all operational committees and would thus defeat the original intent of this term. We, therefore, recommend that the guidelines state that an "operational" committee may have some or all of these characteristics, but does not necessarily need all of them.

Seeking feedback

The proposed rule would require agencies to continually seek feedback from advisory committee members and the public regarding the effectiveness of the committee's activities. At regular intervals, agencies should communicate to the committee how its advice has affected their programs and decisionmaking. There is nothing in the proposed rule about how these requirements are to be implemented. They could also result in agencies' devoting substantial resources to implementation of FACA. We note that there is no statutory requirement mandating this provision and recommend reconsideration of the need for this provision.

Additional comments are set forth in an enclosure to this letter.

We again appreciate the opportunity to provide the views of the NRC on the proposed rule. Please contact John Szabo of the Office of the General Counsel if you have any questions at 301/415-1610 or e-mail at jls@nrc.gov.

Sincerely,

Karen D. Cyr
General Counsel

Enclosure: Additional Comments on Proposed Rule

ADDITIONAL COMMENTS ON PROPOSED RULE

Section 102-3.75(b): To satisfy the requirement that agencies must consult with the Secretariat before establishing, reestablishing, or renewing an advisory committee, this provision would provide agencies with the option to develop and submit an annual plan or submit a letter and the proposed charter to the Secretariat. We recommend that this provision explain more fully what is meant by an "annual plan" in this context.

Section 102-3.80: Although the proposed rule would require a public notice in the Federal Register when a discretionary advisory committee is established, reestablished, or renewed, there is no similar requirement for revisions to a committee charter. We recommend that the rule require that a notice be published when there is a major revision to a committee charter.

Section 102-3.140: This provision would require the designation of a Federal employee to serve as the Designated Federal Official (DFO) for each advisory committee and its subcommittees. Because there may be situations where the DFO may not be able to attend committee meetings or carry out other DFO duties, we recommend that this provision be amended to provide for the selection of other employees to serve as "alternate DFO."

Sections 102-3.150(d), (e), and (g): These provisions on determining compensation for advisory committee members, committee staff, and committee consultants would tie the rates of pay for members, staff, and consultants to the General Schedule. Because, as an excepted agency, the NRC is not under the General Schedule pay system, we recommend that these provisions be appropriately amended to add the phrase "or equivalent agency system" to include agencies that are not under the General Schedule.

Section 102-3.150 would also authorize payment of the travel expenses and per diem of advisory committee members and their staff while performing their duties away from their homes or business. However, there is no authorization for any additional expenses that may be required for members to carry out their duties. For example, agencies may wish to provide committee members with certain resources, such as telephones, computers, fax machines, copiers, and office supplies for use in advisory committee business. They may also wish to provide an allowance for these items, as well as for clerical assistance. We recommend that the rule provide for agency authorization of such miscellaneous expenses.

Section 102-3.190(e): This provision would require that committee and subcommittee minutes be "finalized" within 90 calendar days of the meeting. We recommend that this term be changed to "certified," which would be consistent with the first paragraph of this section, which requires that the committee chairperson "certify" to the accuracy of the minutes.

Section 102-3.200: The first key point and guidance in the table in this provision relate to opening all advisory committee and subcommittee activities to the public. Paragraph B of the guidance "cautions" agencies to avoid excluding the public from a subcommittee meeting that develops substantive advice or recommendations which are subject to only nominal review by the parent committee. To prevent inadvertent violations and provide clear guidance, we recommend that the Paragraph B be relettered as Paragraph A and that it read as follows:

"Subcommittee meetings must be open to the public when the meeting develops substantive advice or recommendations which are subject to only nominal review by the parent committee before submission to a Federal agency or official. Closing these types of meetings would run counter to FACA's provisions requiring contemporaneous access to the committee deliberative process."

We also recommend that paragraph A be relettered as paragraph B and that the following clause be added at the end:

if the subcommittee activity will receive a full review by the parent committee, is pre-deliberative, or focuses solely on administrative matters of the committee.

1. In general, the current regulations provide that a "utilized" committee is a group created by a non-governmental entity which provides advice to the Government.