Federal Advisory Committee Handbook

Office of Cooperative Environmental Management
U.S. Environmental Protection Agency

October 2003

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: EPA's New Federal Advisory Committee Management Handbook

TO: Designated Federal Officers

It is my pleasure to present EPA's new Federal Advisory Committee Management Handbook – an excellent guide for Designated Federal Officers, their supervisors, and staff.

The Federal Advisory Committee Act requires each agency head to establish uniform administrative guidelines, and this handbook fulfills that requirement. It compares favorably to other agencies' manuals and is written in a reader-friendly style that eliminates bureaucratic language and provides clear guidance on all aspects of managing a committee Some topics covered include deciding whether a proposed committee is subject to FACA; how to establish a committee, DFO roles and responsibilities; recruiting and appointing members; meetings; charter renewals; record keeping; and terminating a committee when it has completed its work..

I would like to thank everyone who helped draft and review this excellent reference, especially the DFOs and Office of General Counsel employees who provided the Office of Cooperative Environmental Management with comments on the Handbook's contents.

Please take some time and read the Handbook carefully. I am confident that you will find its suggestions and tips helpful

Stephen L. Johnson
Acting Deputy Administrator

Attachment

NEPIS

Federal Advisory Committee Handbook

Office of Cooperative Environmental Management
U.S. Environmental Protection Agency

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ACRONYMS

AA	Assistant Administrator
CMO	Committee Management Officer
CPO	Core Program Office
DA	Deputy Administrator
DAA	Deputy Assistant Administrator
DFO	Designated Federal Officer
E.O.	Executive Order
FAC	Federal Advisory Committee
FACA	Federal Advisory Committee Act
FAR	Federal Acquisition Regulations
FOIA	Freedom of Information Act
FR	*Federal Register*
FTE	Full Time Employee
GISA	Government in Sunshine Act
GSA	General Services Administration
LOC	Library of Congress
OCEM	Office of Cooperative Environmental Management
OCIR	Office of Congressional and Intergovernmental Relations
OEX	Office of the Executive Secretariat
OGC	Office of General Counsel
PRA	Public Records Act
RA	Regional Administrator
SGE	Special Government Employee

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Introduction

Purpose

The purpose of this handbook is twofold. First, this document assists Agency staff in determining whether a committee or other working group that is being formed is subject to the Federal Advisory Committee Act, its implementing regulations, and the Agency's advisory committee policies. Second, this document provides guidance for complying with the statutory and regulatory requirements and Agency policies and procedures that apply throughout the life cycle of a federal advisory committee (FAC), from its formation to its termination. This handbook provides Agency staff with an overview and understanding of the entire federal advisory committee process, and serves as a reference guide to ensure compliance with all of the requirements and policies that apply to federal advisory committees. In addition, this document provides examples and suggestions to assist Agency staff in creating and running a Federal advisory committee, as well as reference materials, sample documents, forms, templates, and checklists.

> **Disclaimer:** The statutory provisions described in this handbook are legally binding. EPA's policies do not carry such legal weight and are not legally enforceable as indicated by the use of non-mandatory language, such as "may," "should," and "can." This handbook also outlines EPA's recommended procedures for establishing and managing EPA's federal advisory committees.

Audience

This handbook is directed to Agency officials specifically Designated Federal Officers (DFOs) who have responsibilities for ensuring compliance with the Federal Advisory Committee Act and its implementing regulations. Specifically, this document is directed to those Agency officials charged with making determinations of whether a committee is subject to the federal government's requirements for federal advisory committees. Agency officials involved in the formation and management of a federal advisory committee can also use this handbook to better understand their roles and responsibilities in the federal advisory committee process, better understand Agency policies that relate to advisory committees, and

as a guidance for complying with statutory and regulatory requirements. Please note that the word "you" as used in this document refers to the Designated Federal Officer, unless otherwise noted. The DFO is responsible for the day-to-day operations and management of an advisory committee.

Background

Historically, advisory committees have played an important role in shaping the programs and policies of the federal government. Since President George Washington sought the advice of such a committee during the Whiskey Rebellion of 1794, the contributions made by these groups have been impressive and diverse. Through enactment of the Federal Advisory Committee Act (FACA) in 1972 (last amended in 1997), Congress formally recognized the value of seeking the advice and assistance of the public. Congress also sought to assure that:

- Advisory committees provide advice that is relevant, objective, and developed in a forum that is open to the public;

- Agencies disband advisory committees that have completed their work; and

- Agencies keep records of the work done and funds spent by advisory committees.

FACA establishes a system that governs the creation and operation of advisory committees in the Executive Branch of the federal government. The purpose of FACA is to ensure that: 1) valid needs exist for establishing and continuing advisory committees; 2) commitee proceedings generally are as open to the public as is feasible; and 3) Congress is regularly provided with certain information about advisory committees and their activities. The U.S. General Services Administration (GSA) has overall responsibility for overseeing the implementation of FACA across all federal departments and agencies. Each federal agency that establishes or utilizes advisory committees must adhere to both FACA requirements and GSA regulations. GSA has also developed guidelines to help agencies comply with FACA.

Exhibit 1 identifies the principal legal and programmatic documents that may apply to the management of federal advisory committees.

Not all advisory committees are subject to FACA. Congress has the authority to exempt specific advisory groups from the requirements of FACA through legislation. Meetings that are not meant to provide group advice, such as public meetings, are also not subject to FACA. You can find a list of types of meetings that are not subject to FACA in GSA's regulations.

Advisory committee member expertise provides the federal government access to information and advice on a broad range of issues affecting its policies and programs that it may not have had easy access to otherwise. The FACA process provides the public an opportunity to provide input into the advisory committee's decision and, in turn, into the federal government's decision making process.

Exhibit 1
KEY LAWS, REGULATIONS, AND OTHER DOCUMENTS
THAT GOVERN FEDERAL ADVISORY COMMITTEES

The following legal documents establish the principal FACA requirements:

- The Federal Advisory Committee Act of 1972, as Amended *(5 USC App.2)*
- U.S. GSA, Final Rule on Federal Advisory Committee Management *(41 CFR. Part 102-3)*

Other legal documents that may apply to the management of federal advisory committees include:

- Negotiated Rulemaking Act of 1990 *(5 USC § 581-590)*
- Government in the Sunshine Act *(5 USC § 552(c) 552b(c))*
- Freedom of Information Act *(5 USC §552)*
- Executive Order 12838, Termination and Limitation of Federal Advisory Committees

Policy documents that may apply to the management of EPA advisory committees include:

- EPA Ethics Advisory 97-15, "Annual Ethics Training for Special Government Employees"
- EPA Public Involvement Policy (68 *FR* 33946, June 17, 2003)
- **OMB Circular A-135, Management of Federal Advisory Committees**

Document Organization

Exhibit 2 provides an overview of the federal advisory committee process and the key elements of this process. This handbook is organized according to these key elements, as follows:

Chapter 1 addresses the key question that must be asked at the outset of the process: "Is this committee subject to FACA?" This chapter will help you determine whether FACA requirements apply to the committee under consideration, and whether or not to proceed to the remaining chapters of this handbook.

Chapter 2 provides an overview of the roles of various Agency officials who have responsibilities once it has been determined that a committee is subject to FACA.

Chapter 3 provides guidance on establishing a discretionary federal advisory committee, including how to prepare an establishment package and a committee charter.

Chapter 4 outlines the steps to convene a non-discretionary federal advisory committee and prepare the required documentation.

Chapters 5 addresses the process for selecting and appointing members to the federal advisory committee, including selection criteria and membership guidelines.

Chapters 6 provides an overview on the process of establishing by-laws for the federal advisory committee.

Chapter 7 discusses how to run a federal advisory committee.

Chapter 8 provides guidance on renewing or re-establishing a pre-existing federal advisory committee, and also discusses how and when to amend the committee charter.

Chapter 9 outlines maintaining appropriate and adequate records, as well as how to best document committee activities and decisions.

Chapter 10 provides an overview of the procedures for terminating a federal advisory committee.

Exhibit 2:
OVERVIEW OF THE FEDERAL ADVISORY COMMITTEE (FAC) PROCESS

Chapter 1 — **Determining Whether Your Committee is Subject to FACA**
- Definition of advisory committee
- Different types of advisory committees
- Groups subject to FACA
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Is the Committee Subject to FACA?

Chapter 2 — **Understanding Your Roles and Responsibilities under FACA**
- Congress
- General Services Administration
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Roles and Responsibilities

Chapter 3 — **Establishing a Discretionary FAC and Preparing the Charter**
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Establishing a Discretionary FAC

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- Filing the charter

Establishing a Non-Discretionary FAC

Chapter 5 — **Selecting and Appointing Members**
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- Identifying prospective committee members
- Evaluating committee members
- Appointing committee members
- Committee membership administration
- Tips on committee membership

Selecting and Appointing Members

Chapter 6 — **Establishing the Bylaws**
- Bylaws v. ground rules and operating principles
- Drafting responsibilities
- When bylaws are drafted
- Common bylaw sections
- Other miscellaneous sections

Establishing the Bylaws

Chapter 7 — **Running the FAC**
- Committees and subcommittees
- Establishing the goals, objectives, and budget
- Tasks prior to first meeting
- Public involvement/meeting announcements
- Closed meetings
- Staff roles and responsibilities

Running the FAC

Chapter 8 — **Renewing or Re-establishing a FAC and Amending the Charter**
- Purpose of renewal
- Renewal process for discretionary FACs
- Re-establishment process for discretionary FACs
- Renewal charter elements
- Major and minor charter amendment process

Renewing or Re-Establishing the FAC

Chapter 9 — **Keeping Records and Documenting Committee Activities and Decisions**
- General requirements
- Documentation
- Required reports
- Access to records
- Publication notification requirements

Record keeping and Documentation

Chapter 10 — **Terminating a FAC**
- Basis for terminating a FAC
- Process for terminating a FAC

Terminating the FAC

The **Appendices** to this document provide reference materials, including copies of the Act and GSA's regulation on federal advisory committees. Additional resources may be provided at the end of the chapter in which they are referred.

Chapter 1: Deciding Whether Your Committee is Subject to FACA

1.0 Overview

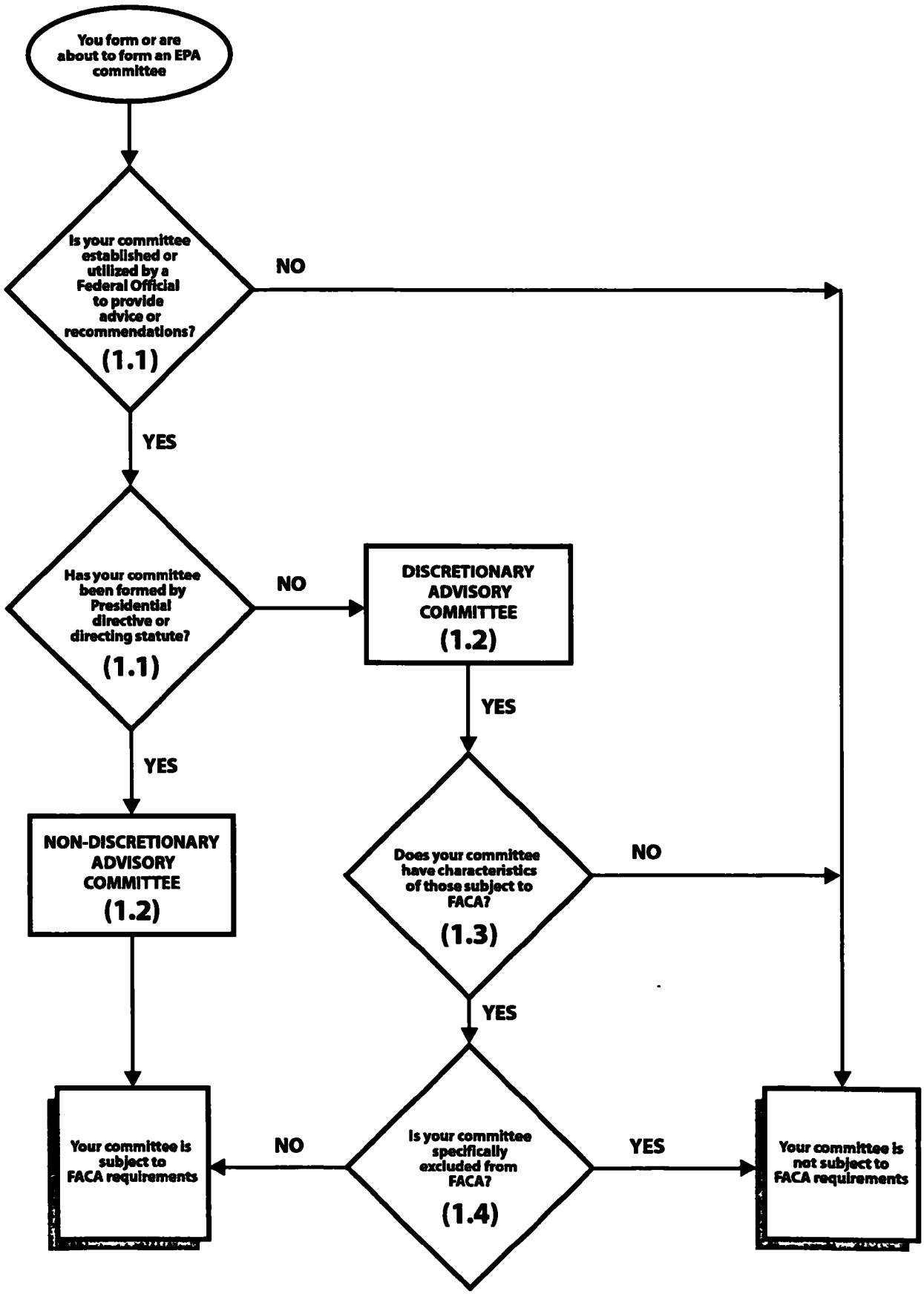
This chapter will help you determine whether your committee is subject to the requirements of the Federal Advisory Committee Act (FACA). First, this chapter provides a definition of an advisory committee according to the FACA. Whether your committee meets this definition is the threshold question in deciding whether it is subject to the Act. If your committee meets this definition, there are several other considerations you will need to evaluate to determine whether your committee will be subject to FACA. To that end, this chapter defines the types of committees that are subject to FACA and outlines the characteristics of groups that are subject to the Act. Finally, this chapter discusses those groups that are exempt from FACA, and provides contact information if you still have questions regarding your committee and FACA. **Exhibit 1-1** provides an overview of the process for making these determinations and identifies the sections within this chapter that elaborate on each step.

1.1 Advisory Committee Defined

An advisory committee is defined by FACA as any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup, that is established or utilized by the federal government to obtain advice or recommendations and is not composed solely of full-time or permanent part-time federal officers or employees.

FACA advisory committees may only provide advice or recommendations and may not establish law or policy, unless specifically provided otherwise by statute or Presidential directive.

Exhibit 1-1:
DECIDING WHETHER YOUR COMMITTEE IS SUBJECT TO FACA



Essentially, if EPA establishes a group that includes individuals who are not federal employees, and the purpose of the group is to provide advice or recommendations, then that group is an advisory committee and might be subject to FACA. Once it is determined that your group is an advisory committee, you should next determine whether it is **a discretionary** or **non-discretionary** advisory committee. These are discussed further in Section 1.2 but you may contact the Committee Management Officer (CMO) for assistance in this area..

Congress can exempt a specific advisory committee from the FACA requirements through legislation. In addition, the General Services Administration (GSA) regulations set out several types of groups that are not subject to FACA (see GSA Final Rule, 41 CFR §102-3.40). These exceptions are discussed later in this chapter.

Benefits of establishing a FAC:

- You receive independent advice from members of the public and individuals that are experts in their fields.
- You are able to obtain diverse points of view about your topic.
- You and EPA are able make better informed decisions due to the vetting of various options by your committee.
- You can facilitate improved buy-in for the decisions being made through the experience the FAC provides and the added value it brings.

1.1.2 Considerations Before Establishing a FAC

Before determining whether you can establish a new discretionary advisory committee, you should answer several key questions. Specifically, you should be able to answer "yes" to all of the following questions before you move forward with the committee establishment process:

- Can any more discretionary committees be established within

the Agency based on the total number of FACs allowed by GSA?

- Will your committee be the only EPA advisory committee providing advice on the issues or topics you have identified? (That is, the advice you are providing is not readily available from another source in the federal government). If a group is only going to provide information to EPA, that group is not subject to the requirements of FACA.

- Will the committee provide an important and unique perspective or viewpoint on EPA programs or operations?

- Will committee deliberations result in recommendations about the creation, change, or elimination of regulations, guidelines, or rules that govern EPA business? Will the deliberations result in recommendations for significant improvements in the services provided by EPA or generate any cost reductions?

> **Note:** The program office should consider the possibility of establishing a subcommittee under an existing federal advisory committee, rather than chartering a new committee.

1.2 Types of Advisory Committees

There are two types of advisory committees: **non-discretionary** and **discretionary**. A non-discretionary advisory committee is one that is specifically required by statute or mandated by the President. A discretionary advisory committee is established at the discretion of the head of a federal agency. An advisory committee that is authorized, but not specifically required by law, is also considered a discretionary committee.

> **Note:** At EPA the primary committee is often referred to as a "Tier 1" committee, and a subcommittee as a "Tier 2" committees

There are two subtypes of committees – **Presidential Advisory Committees** and **Negotiated Rulemaking Advisory Committees.** Some Presidential advisory committees are subject to FACA in addition to other related laws and regulations. Negotiated rulemaking advisory committees are subject to FACA, in addition to other laws and regulations. Details on these two subtypes follow.

> **Negotiated Rulemaking Advisory Committees** are subject to FACA requirements in addition to other laws and regulations.
>
> **Presidential Advisory Committees** are sometimes subject to FACA requirements, in addition to other laws and regulations.

1.2.1 Presidential Advisory Committee

A Presidential advisory committee advises the President. It can be either a discretionary or non-discretionary committee. Such committees are established by the President through an Executive Order or other Presidential directive, and can also be established by Congress. An outside group that is utilized by the President to obtain advice or recommendations may also be subject to FACA. Presidential advisory committees are subject to both FACA and the GSA regulations in the same manner as other advisory committees

The designation "independent Presidential advisory committee" refers to a Presidential advisory committee that has not been assigned to a particular Agency for administrative and other support. GSA provides support for these committees on a reimbursable basis.

1.2.2 Negotiated Rulemaking Advisory Committee

A negotiated rulemaking advisory committee is a type of discretionary federal advisory committee established under the authority of the Negotiated Rulemaking Act and FACA. In a negotiated rulemaking proceeding, a balanced group of stakeholders representing the regulated public, communities, public interest groups, and state and local governments, and representatives of the federal agency negotiate the text, outline, or concept of a rule before it is promulgated. If the committee reaches consensus on the rule, it transmits a committee report containing the recommended text of the rule to the federal agency for

consideration for its proposed rule. The proposed rule is still subject to general rulemaking requirements, including public notice and comment. If consensus is not reached the committee report should outline the areas where consensus was reached, as well as any other information, recommendations or materials the committee considers appropriate.

Negotiated rulemaking advisory committees are subject to the requirements of the Negotiated Rulemaking Act as well as FACA. For information on using negotiated rulemaking, see the "Negotiated Rulemaking Sourcebook" published by the Administrative Conference of the United States, 1995. For a fact sheet on the source book, visit the web: http://www.epa.gov/ogcadr01/factsheetregneg.pdf

1.2.3 Committee Characteristics

Once you assess whether your group is a non-discretionary or discretionary advisory committee, you will need to thoroughly understand the characteristics of groups that require formation under FACA. Then, you need to determine whether your group has all of these characteristics. If so, you may be required to follow the particular formation requirements of either a non-discretionary or discretionary advisory committee, depending on your group's status, unless FACA does not cover your group or specifically exempts it as discussed later in this chapter.

1.3 Groups Subject to FACA

The Federal Advisory Committee Act generally applies to groups that meet the following criteria:

- Are established or "utilized" by a federal official;
- Include at least one member who is not a federal government employee; and
- Provide group advice and recommendations to the Agency.

In addition, groups subject to FACA usually have:

- A fixed membership (i.e., the number and composition of members is set or non-discretionary);

- An organizational structure (e.g., officers and staff); and
- A clearly defined purpose.

It is important to note that at least one court has held that a meeting of individuals that did not meet the criteria listed above was still subject to FACA as that group provided advice to an agency. The purpose of your committee (providing advice, information exchange) is more important than the characteristics when determining whether or not it is subject to FACA.

> **Note:** There is no "one meeting" exception to FACA. A group that meets only once can still be subject to FACA.

If EPA or another federal agency forms a group, it is considered to have been "established" by the federal government. A group that is established by a non-federal entity is considered to be "utilized" by the federal government if the President or a federal agency exerts "actual management or control" over the group. Criteria considered in determining whether the federal government exercises actual management or control include whether a federal agency selects (or controls the selection of) members, sets the agenda, and/or funds the group's work.

You should address questions regarding the application of FACA to a group established by an entity outside of EPA to the Office of General Counsel's (OGC) FACA attorney.

> **Note:** Committees established or utilized by the executive branch in the interest of obtaining advice or recommendations may be subject to FACA.

Each agency is responsible for ensuring that its advisory committees comply with FACA, though GSA remains responsible for the overall management and implementation of FACA throughout the executive branch. GSA guidance and rules have been published to help agencies comply with the requirements of FACA and successfully manage their advisory committees. FACA and the GSA rule provide the requirements for establishing, managing, and terminating a federal advisory committee. In addition there are other laws, executive orders, rules, and policies that should be taken into account. These are provided in the appendices to this document. Understand that EPA policies and orders serve as guidance to EPA staff on the roles and responsibilities under FACA and the GSA rules. A more detailed discussion of the roles and responsibilities for the key players in the federal advisory committee process, including the Designated Federal Officer (DFO) and the Committee Management Officer, are discussed in Chapter Two.

Please note: It is EPA policy that subgroups and/or subcommittees (except "working groups") of a chartered advisory committee are subject to all FACA requirements, including recordkeeping, balanced membership, and openness requirements.

1.4 Groups Not Subject to FACA

Exhibit 1-2 describes the types of groups that are not subject to FACA. If your committee does not fall within these exceptions, please proceed to Chapter Two to gain an understanding of the roles and responsibilities under FACA. If you have questions regarding whether a particular group is subject to FACA or regarding the scope of FACA, contact the OGC FACA attorney.

Exhibit 1-2
GROUPS NOT SUBJECT TO FACA

1. Intragovernmental committees composed wholly of full-time or permanent part-time officers or employees of the federal government.

2. Groups assembled to obtain the advice of individual attendees rather than advice or recommendations from the group as a whole, including public meetings. Such a meeting could become subject to FACA if the group were to provide collective advice, rather than individual advice.

3. Groups assembled to exchange information or facts, including identifying issues that the Agency may wish to address without providing advice or recommendations concerning the priority and approach the Agency should take to resolve those issues. Such a meeting could become subject to FACA if the focus of the group were to move from information exchange to providing collective advice.

4. Local civic groups whose primary function is rendering a public service with respect to a federal program.

5. Groups established to advise state or local officials, such as state or local committees, commissions, boards, councils or similar groups established to make recommendations to state or local officials or agencies;

6. Groups that request a meeting (or a series of meetings) with federal officials in order to present the group's views on a particular subject.

7. People or organizations that have a contractual relationship with the Agency, (e.g., a consulting firm hired by EPA to provide advice).

8. Committees that are established to perform primarily operational functions. Operational functions are those specifically authorized by statute or Presidential directive, such as making or implementing government decisions or policy. These committees generally have:
   1) Specific functions and/or authorities provided by Congress in law or by Presidential directive;
   2) The ability to make and implement traditionally governmental decisions; and
   3) The authority to perform specific tasks to implement a federal program. An operational committee that alters its function to become primarily advisory in nature may be subject to FACA. For additional information on operational committees contact the OGC FACA attorney.

Exhibit 1-2 GROUPS NOT SUBJECT TO FACA, CONTINUED
9. Meetings held exclusively between federal officials and elected officials of state, Tribal, or local governments (or their authorized designated employees) to exchange views, information or advice relating to the management or implementation of federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.
10. Any advisory committee established by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA), provided EPA does not have actual management or control of the committees, and the NAS or NAPA certifies that it has substantially complied with the applicable requirements in 5 U.S.C. App. 2 § 15(b).
11. Advisory committees established or utilized by the Central Intelligence Agency and the Federal Reserve System.
12. Committees specifically exempted from FACA by statute.
13. Committees or groups created by non-federal entities such as contractors or private organizations, provided that these committees are not actually managed or controlled by the federal government.

Chapter 2: Understanding Roles and Responsibilities Under FACA

2.0 Overview

Once you determine that your advisory committee is subject to FACA, you should find out who is involved in the EPA Federal advisory committee (FAC) process and what their responsibilities are. Several entities are involved in the FAC process, including Congress, the GSA, and various offices within the Agency. The roles and responsibilities of these entities are the same for all federal advisory committees established or used by EPA. A FAC must comply with all FACA requirements unless the committee is specifically exempted by statute. In addition, EPA has established policy concerning public access to subcommittee meetings and activities, that is more stringent than is required by the GSA regulations.

To assist you in managing and supporting EPA FACs, this chapter provides an overview of the roles and responsibilities for the key parties involved in the advisory committee process. This chapter also addresses the role of consultants within a FAC.

2.1 Roles and Responsibilities

2.1.1 Congress

Congress has the authority to direct EPA and other federal agencies to establish federal advisory committees. In addition, congressional standing committees in both the Senate and the House monitor each Agency's federal advisory committees through the charter filing process and GSA's annual report to Congress.

2.1.2 GSA

The General Services Administration is responsible for advisory committee management across the federal government. Under Executive Order 12024, the President delegated to the Administrator of GSA all of the functions vested in the President by the Act, with the exception of an annual report to Congress. GSA promulgated 41 CFR Part 102-3, which contains specific rules and guidance for Executive Branch agencies regarding the establishment, operation, and termination of FACs. EPA has adopted the GSA rules for all FACs.

GSA has established the Committee Management Secretariat to oversee the federal government's implementation of FACA. The primary responsibilities of the Committee Management Secretariat include: conducting annual government-wide reviews of advisory committee performance; developing and delivering training on FACA and related statutes, policies, and procedures; maintaining internet systems to facilitate the collection and use of the information required by FACA; identifying measures that can be used to evaluate the performance of advisory committees; recommending improvements on meeting the objectives of FACA to Congress and the President; promulgating regulations implementing FACA; and developing policy applicable to the entire federal advisory committee system.

2.1.3 EPA

The EPA Administrator is responsible for the establishment, management, information sharing, and termination of EPA's federal advisory committees. FACA, the Negotiated Rulemaking Act, and GSA regulations set out the responsibilities of the EPA Administrator. The Administrator has delegated most of these responsibilities to other EPA personnel, though the Administrator remains fully accountable for ensuring compliance with the statutory and regulatory requirements throughout the life of the advisory committee.

Other key players in the process of establishing and managing a FAC include the Assistant Administrator, the Committee Management Officer (CMO), and the Designated Federal Officer (DFO). The following summarizes the responsibilities of these key players.

The Assistant Administrator's responsibilities include requesting and justifying the establishment of proposed advisory committees, ensuring that an appropriate DFO is appointed to each advisory committee, and ensuring that the advisory advice and recommendations are the result of the committee's independent judgment.

The Agency CMO is appointed by the Director of the Office of Cooperative Environmental Management (OCEM) and provides oversight for the establishment and operation of EPA's FACs. The

CMO also serves as a resource for DFOs and ensures proper recordkeeping for advisory committees.

The DFO is responsible for the day-to-day operations and management of the advisory committee. Those responsibilities can consist of drafting and distributing agendas and other materials to the committee, preparing notices relating to the committee for placement in the Federal Register, attending committee meetings, keeping records of committee deliberations, and working closely with other EPA program officials to track responses to advisory committee recommendations. The DFO's responsibilities are further discussed in **Exhibit 2-1**.

The program office establishing the advisory committee has significant responsibility for initiating and managing the FAC process and works closely with the CMO to ensure full compliance with FAC requirements. The program office and the CMO work together to establish, renew, amend, and terminate an advisory committee. Annual reports to GSA, annual plans, and determining whether a meeting can or should be closed to the public is also the responsibility of both the CMO and the program office that created the advisory committee. **Exhibit 2-1** provides the specific roles and responsibilities of these and other EPA officials.

2.1.4 Consultants

Consultants provide expert advice to an advisory committee or subcommittee on an as-needed basis. They are not members of the advisory committee or subcommittee and, therefore, do not participate in committee deliberations or decision-making. Consultants may serve without compensation, with prior agreement in writing, or may be appointed as a Special Government Employee (SGE) and paid at a rate not to exceed the maximum rate of pay authorized by law. Consult with the CMO to determine the current maximum pay rate for consultants.

Exhibit 2-1:
Roles and Responsibilities of EPA Officials under FACA

EPA Official	Responsibility
Administrator [Authority: GSA Final Rule, 41 C.F.R. §102-3.105]	• Approves written determinations for meetings that are closed to the public • Appoints Tier 1 and Tier 2 committee members • Approves members by signing invitation letters and ensures that the committee is fairly balanced • Signs letters of appreciation for those members whose terms have ended - comes more into line with DFO preference and actual practice - more impressive if letter comes from Administrator
Deputy Administrator [Authority: GSA Final Rule, 41 C.F.R. §102-3.105]	• Approves the establishment of new advisory committees and major amendments of FAC charters • Approves the pay rate of advisory committee members • Approves more than 25 members on a Negotiated Rulemaking advisory committee • Approves membership appointments and term extensions for Federal advisory committee and subcommittee members • Grants reappointments of FAC members beyond the six-year term limit based on the program's justification of why an appropriate replacement cannot be found • Ensures that the public has an opportunity for reasonable participation • Ensures that Special Government Employee (SGE) rates of pay are justified and that levels of EPA support are adequate • Approves renewal of existing committees and revised renewal charters • Approves re-establishment of terminated advisory committees
Director, Office of Cooperative Environmental Management (OCEM) or his or her designee	• Initiates policy directives and provides guidance for the management of committees consistent with the FACA and its related laws and policies • Designates a Committee Management Officer (CMO) to oversee the committee • Ensures that advisory committees comply with FACA and the public disclosure requirements of FOIA • Reviews annually the need for each committee • Supervises the establishment, staffing, procedures, renewal, and termination of EPA advisory committees • OCEM has overall responsibility for committee management and is assisted by EPA's CMO
Director, Office of Acquisition Management (OAM)	• Advises the CMO on advisory committee management actions involving any contractual relationships associated with EPA advisory committees

EPA Official	Responsibility

Associate Administrator, Office of Congressional and Intergovernmental Relations (OCIR)	• Ensures that any proposed legislation relating to an existing EPA advisory committee assigns only advisory duties to the advisory committee
	• Provides any proposed legislation relating to an EPA advisory committee to the CMO and OGC for review
	• Ensures that any proposed legislation creating an EPA advisory committee includes:
	  • Committee's intended purpose;
	  • Advisory functions only;
	  • Required membership composition that is fairly balanced;
	  • Provisions to ensure that the resulting advice is the advisory committee's independent judgment;
	  • Committee's duration; and
	  • Adequate funds and staff
	• Transmits advisory committee charters to the appropriate standing committees of Congress and files charters with the Library of Congress when requested by EPA's CMO

EPA Official	Responsibility
Assistant Administrator, Regional Administrator, Associate Administrator (or equivalent)	*Committees* • Initiates, requests and provides a written justification to the Deputy Administrator, through the CMO, to establish proposed advisory committees, renew an existing advisory committee, or to re-establish a terminated advisory committee • Ensures that offices requesting advisory committee advice prepare a response to advisory committee recommendations *Members* • Ensures that EPA reviews the interests and affiliations of advisory committee and subcommittee members as required by the Office of Government Ethics • When proposing appointments of potential members submits a transmittal memorandum to the Deputy Administrator explaining the composition required for a fairly balanced membership as described in the advisory committee charter • Informs both prospective and selected advisory committee members of the Foreign Agents Registration Act and conflict of interest regulations that may be applicable • Initiates requests for and obtains the Administrator's approval of Agency determinations under the Government in the Sunshine Act (5 U.S.C. §552b) before closing an advisory committee meeting to the public *General* • Ensures that appropriate officials are responsible for making final decision resulting from advice on recommendations made by an advisory committee • Prepares prompt response to advisory committee recommendations relating to EPA's proposals for action, or reasons for inaction, or important developments and significant actions, etc. • Recommends termination of a committee to the CMO or DA • Ensures that appropriate DFO are appointed to each advisory committee and subcommittee • Ensures that funds and staffing (full time employee (FTE)) are adequate • Ensures that the advisory committee's advice and recommendations are the result of the advisory committee's independent judgment • Reviews advisory committee activities and accomplishments annually • Recommends termination or merger of advisory committees that have not been staffed for a period of one year or that have not met within a 2-year period • Ascertains whether potential members are available to serve if invited by the Deputy Administrator • Obtains legal interpretations from the Office of General Council (OGC)
Office of General Counsel	• Provides legal advice on the Administrator's delegation of authority under FACA • Provides legal assistance and advice concerning applicability of and compliance with FACA and related statutes, regulations, and Executive Orders 12838 and 12024 • Provides legal advice concerning the organization and operation of advisory committees • Provides legal advice regarding possible conflicts of interest and the restrictions of the Foreign Agent Registration Act as they relate to advisory committee members • Reviews all requests for closed meeting determinations prior to submission of the request to the Administrator for approval • Provides legal advice on advisory committee management matters arising under FOIA and the Government Information Security Act (GISA) • Provides legal assistance relating to FACA and the GSA Rule to Presidential Advisory Committees that involve EPA

EPA Official	Responsibility
Committee Management Officer (CMO) [Authority: GSA Final Rule, 41 C.F.R. §102-3.115]	• Provides oversight relating to the establishment, operating procedures, and accomplishments of EPA's advisory committees • Issues administrative guidelines and management controls that apply to all advisory committees EPA establishes or uses • Provides technical advice to EPA managers, DFOs, and others regarding EPA policies and guidance for its Federal advisory committees and subcommittees • Approves minor charter amendments • Ensures that records are kept, including set of filed charters for each FAC and subcommittee, copies of annual comprehensive reviews, maintains/updates Agency guidelines on committee management/operations/procedures, and keeps copies of closed meetings determinations • Certifies the Agency's completion of the annual report to the GSA Committee Management Secretariat for Congressional review

EPA Official	Responsibility
Designated Federal Officer (DFO) [Authority: GSA Final Rule, 41 C.F.R. § 102-3.120]	*Basic* • Drafts advisory committee bylaws and ensures that draft bylaws are sent to the CMO and OGC for review and approval prior to adoption • Monitors financial resources that support the committee and judiciously expends money • Makes advisory committee documents and minutes available for public inspection and copying until the advisory committee ceases to exist • Provides information in a timely manner when requested by the CMO • Maintains an ongoing interface with the committee members, appropriate EPA staff, and committee Chairperson, and any Tier 2 subcommittee DFOs. • Ensures that Tier 1 advisory committee members and Tier 2 subcommittee members receive appropriate briefings and other information • Coordinates with involved EPA officials in acquiring documents or arranging for EPA presentations for the committee • Continuously maintains up-to-date electronic files on all of his/her active advisory committees as required by GSA for the Annual Comprehensive Review, and all other records that may be made available to the public *Membership* • Ascertains whether potential members are available to serve if invited by the Deputy Administrator • Prepares nomination packages for membership on Tier 1 Federal advisory committees and Tier 2 subcommittees • Provides SGEs with detailed information regarding the applicability of Federal standards of conduct for their service prior to their appointment • Contacts the Deputy Agency Ethics Officer (DAEO) to resolve any questions regarding Special Government Employee conflict-of-interest • Ensures that all Special Government Employee pre-appointment disclosure documentation and personnel appointment papers are completed before they assume their duties • Recommends or secures recommendations for candidates for advisory committee or subcommittee membership before vacancies occur • Arranges for services for advisory committee members with disabilities (such as providing a personal assistant) as required by the Disability Act • Periodically reviews and evaluates each advisory committee member's participation. Replaces members who are not actively participating in the activities and functions of the advisory committee to maintain balance • Coordinates termination of inactive advisory committee members with the appropriate EPA officials

EPA Official	Responsibility
Designated Federal Officer (DFO), Cont'd.	*Meetings* • Schedules or approves all meetings • Obtains OGC and the Administrator's approval through the CMO to hold closed meetings at least 30 calendar days in advance of the meeting date • Ensures that a notice is published in the *Federal Register* at least 15 calendar days prior to an open or closed Tier 1 or Tier 2 advisory committee meeting • Maintains a mailing list of persons and organizations interested in receiving advance meeting notices • Publishes press releases and notices of advisory committee activities in professional journals when appropriate • Works with involved EPA officials to coordinate activities, generate agenda ideas, acquire needed EPA documents, or arrange for EPA briefings or presentations for the Tier 1 committee or Tier 2 subcommittee • Reviews and approves all meeting agendas • Ensures that Tier 1 and Tier 2 subcommittee members will have time to prepare for meetings by sending agendas and other necessary information to the committee members in a timely manner • Holds meetings that are reasonably accessible to the public and ensure that the space is large enough to accommodate the public • Ensures meeting space is readily accessible to and usable by persons with disabilities • Attends all meetings and, when directed to do so by the appropriate Assistant Administrator, Regional Administrator, or Associate Administrator, chairs the Tier 1 advisory committee meeting • Provides an opportunity for appropriate public participation (written or oral) at advisory committee meetings • Adjourns a meeting when it is determined to be in the public interest to do so (such as when someone disrupts the meeting or in the event of an unwarranted departure from the meeting agenda) • Ensures detailed minutes are prepared and made available to the public quickly after each open, closed or partially closed meeting *Presidential* • Submits two copies of each Presidential advisory committee public report through the CMO, to GSA's Committee Management Secretariat, at the same time the report is submitted to the President • Prepares a Presidential advisory committee follow-up report to Congress within one year of the public report • Ensures that when terminating a Presidential advisory committee, the White House Counsel is consulted regarding records preservation for Presidential advisory committees that are governed by the Presidential Records Act

EPA Official	Responsibility
Designated Federal Officer (DFO), Cont'd.	*Records and Reports* • Obtains Chairperson certification of the minutes within 90 calendar days of the meeting • Maintains a complete list of all past and current Tier 2 subcommittees and Tier 3 work groups (if any) and their members as well as copies of Tier 2 subcommittee documents • Ensures that advisory committee records are managed and retained according to the EPA Records Control Schedule for Federal Advisory Committee/Board Records, the Federal Records Act, and the National Archives and Records Administration • Assists with committee preparation of their reports as needed • Files 8 copies of final reports (advice and recommendations) produced by the advisory committee with the Library of Congress as well as provides copies to appropriate Agency staff and interested public, as requested • Files reports issued on closed or partially closed meeting reports with the Library of Congress at least annually • Works closely with the appropriate EPA program official(s) to obtain timely responses to advisory committee recommendations • Ensures that Tier 2 subcommittee reports are deliberated in an open meeting by the chartered (Tier 1) committee before being submitted to a Federal officer or the EPA Administrator • Reports advisory committee and subcommittee information electronically using GSA's Government-wide shared internet-based system for each fiscal year by the due date determined by EPA's CMO *General* • Submits timely notice to *Federal Register* when committees are established • Prepares letter of appreciation for members whose term has ended for DA signature • Discusses with the Committee Management Officer any needed charter revisions for advisory committee charter renewal • Prepares renewal documents including the AA's/RA's transmittal memo to the Deputy Administrator, revised charter, and justification • Publishes timely notice in the *Federal Register* announcing the establishment, renewal, or reestablishment of discretionary advisory committees • Recommends termination of advisory committees to CMO
Chairperson	• Presides at Tier 1 advisory committee meetings and Tier 2 Subcommittee meetings and certifies to the accuracy of the minutes for each meeting • Advises the public at the beginning of each meeting about the committee's rules on public participation • Conducts each meeting in accordance with the previously approved agenda • Maintains a neutral position on an issue unless the membership vote is tied or when the Chair's expertise is needed regarding an issue • Facilitates the discussion to maintain focus on areas relevant to accomplishing the agenda • Determines when comments are not germane, when it's time to end the discussion, when a topic should be assigned to a subgroup for further consideration, or when discussions should be tabled until the next meeting
Committee Members	• Participates in the activities of the advisory committee, including voting on committee recommendations

Chapter 3: Establishing a Discretionary FAC and Preparing the Charter

3.0 Overview

Once the CMO and OGC have helped you determine, or you have learned that your committee is discretionary, you will need to prepare and submit materials to formally establish the federal Advisory Committee (FAC). A FAC is formally established with an establishment package. This chapter walks you through the preparation and submittal of the establishment package, including how to prepare the Charter for your FAC.

> **Definition:** A Discretionary Advisory Committee is a committee that is not required by law that fulfills a vital need within the Agency. The EPA Administrator, and the Deputy Administrator through delegated authority, has the discretion to establish these committees if it is determined that:
>
> - EPA business would be enhanced by such a committee, or
> - Resolution of issues of national interest would be facilitated by creating a committee, or
> - Agency staff, public hearings, or a dependent subgroup could not perform the functions of the proposed discretionary advisory committee.

3.1 Initiating a Discretionary Advisory Committee

Assistant Administrators, Regional Administrators, and heads of staff offices reporting to the Administrator within their functional areas of responsibility may initiate the establishment process. Requests to establish a committee should be sent through EPA's CMO to the Deputy Administrator.

> **Note:** Negotiated rulemakings are discretionary committees, but are *considered* non-discretionary by EPA, and require a justification to be submitted when up for renewal.

3.1.1 Role of a CMO in Establishing the FAC

The CMO provides guidance and consultation on the establishment process and reviews the documents contained in the establishment package. Once the establishment documents are completed, the Committee Management Officer is responsible for overseeing the approval process through the GSA Committee Management Secretariat and ensuring that documents are filed with GSA, the Library of Congress, and Congress, as appropriate.

> **Note:** Consultation with the CMO should begin early as the CMO provides guidance throughout the entire establishment process. Consultations should specifically include:
>
> - Planning the budget
> - Selecting committee members
> - Staffing the committee
> - Selecting a DFO
> - Drafting a Charter

3.1.2 Considerations Before Establishing the FAC

Before determining whether you can establish a new discretionary advisory committee, you should answer several key questions. Specifically, you should be able to answer "yes" to all of the following questions before you move forward with the committee establishment process:

- Can any more discretionary committees be established within the Agency based on the total number of FACs allowed by GSA?

- Will your committee be the only EPA advisory committee providing advice on the issues or topics you have identified? (That is, the advice you are providing is not readily available from another source in the federal government) If a group is only going to provide information to EPA, that group is not subject to the requirements of FACA.

- Will the committee provide an important and unique perspective or viewpoint of EPA programs or operations?

- Will committee deliberations result in recommendations about the creation, change, or elimination of regulations, guidelines, or rules that govern EPA business? Will the deliberations result in recommendations for significant improvements in the services provided by EPA or generate any cost reductions?

> **Note:** The program office should consider the possibility of establishing a subcommittee under an existing federal advisory committee, rather than Chartering a new committee.

3.2 How to Establish a Discretionary Advisory Committee

There are several activities that are part of the establishment process, including: (1) making a formal request to establish the committee; and (2) preparing the "Establishment Request Package" materials. The following provides a step-by-step outline of the establishment process. A checklist to track the progress of establishing a FAC is included at the end of this chapter. The following are the steps involved in the FAC process that program offices should follow:

Step 1. Consult with the Office of General Counsel FACA attorney and the CMO Office regarding legal requirements/implications associated with committee establishment. Consult with the CMO concerning instructions and procedures.

Step 2. Discuss availability of committee spaces under the GSA quota ceiling with the CMO. The CMO will consult with GSA about the intention of forming a FAC in order to find out if there is sufficient reason to convene such a committee.

Step 3. Obtain guidance from the CMO on how best to prepare the Establishment Request Package.

> **Note:** If GSA disagrees with EPA's proposal to establish a committee, the EPA Administrator retains final authority to establish an advisory committee. If the Agency still intends to establish the proposed advisory committee , EPA must notify GSA in writing of this decision.

Step 4. Select a prospective DFO or interim point of contact. The DFO is responsible for submitting the establishment package to the Assistant Administrator (AA).

Step 5. Prepare a draft Establishment Request Package with the assistance and review of the CMO. The specific materials that should be in the package are discussed in detail in Section 3.4 below. The DFO fills out the informational questionnaire that will be reviewed by the CMO.

Step 6. Incorporate the CMO's comments and submit the final Establishment Request Package to the CMO for approvals and GSA Secretariat review.

Step 7. The AA signs and approves the establishment package, including the *Federal Register* notice. The DFO makes sure that the establishment notice is published at least 15 calendar days prior to filing the Charter . Preparing the *Federal Register* notice is discussed more fully in Section 3.3.4 below. (An example of a notice of establishment for the *Federal Register* is provided at the end of this chapter at page 3-13.)

> **Note:** After the CMO notifies the DFO that the GSA process is complete, and the committee is approved, the DFO/requesting office will publish the *Federal Register* notice announcing intent to establish the FAC.

The CMO sends your Charter to the Office of Congressional and Intergovernmental Relations (OCIR) for filing with the appropriate congressional committees and the Library of Congress. Note that OCIR files the Charter at least 15 days after publication of the *Federal Register* notice.

> **Note:** Committee establishment is effective on the date the Charter is filed with Congress.

3.3 The Establishment Request Package

The Establishment Request Package first goes to the CMO, who will review and sign it prior to sending it to the Deputy Administrator. It should include a concurrence and non-concurrence signature and date line for the Deputy Administrator. The Establishment Request Package consists of five documents:

- ❑ 1. A *Transmittal Memo* from the AA, Regional Administrator, or head of a staff office reporting to the Administrator, requesting establishment of a new advisory committee (see Section 3.3.1);
- ❑ 2. A *Justification Statement* for the establishment of the committee (see Section 3.3.3);
- ❑ 3. *Cost Estimates* to run the committee for the current and subsequent fiscal years (see Section 3.3.3);
- ❑ 4. The *Federal Register Notice* signed by an AA, RA, or head of staff offices reporting to the Administrator announcing intent to establish the federal advisory committee (see Section 3.3.4); and
- ❑ 5. *A Charter* that specifies the mission and general operating characteristics the committee (see Section 3.4).

A discussion of the five documents in the Establishment Request Package and guidance on preparing them is provided below. The timely preparation and delivery of these documents to the

appropriate recipients should reduce potential delays in establishing your FAC. **Exhibit 3-1**, provides an overview of the establishment process for discretionary committees and a timeline and checklist to assist you in this process.

3.3.1 Transmittal Memo Components

The Transmittal Memo from the AA, RA, or head of staff office reporting to the Administrator recommends that the Deputy Administrator approve the establishment of the advisory committee.

3.3.2 Establishment Justification Attachment

The establishment justification, which undergoes EPA and GSA review, must contain the following elements:

1. An explanation of why the advisory committee is necessary, its purpose, and how it relates to the Administration's initiatives, priorities, and strategic goals;

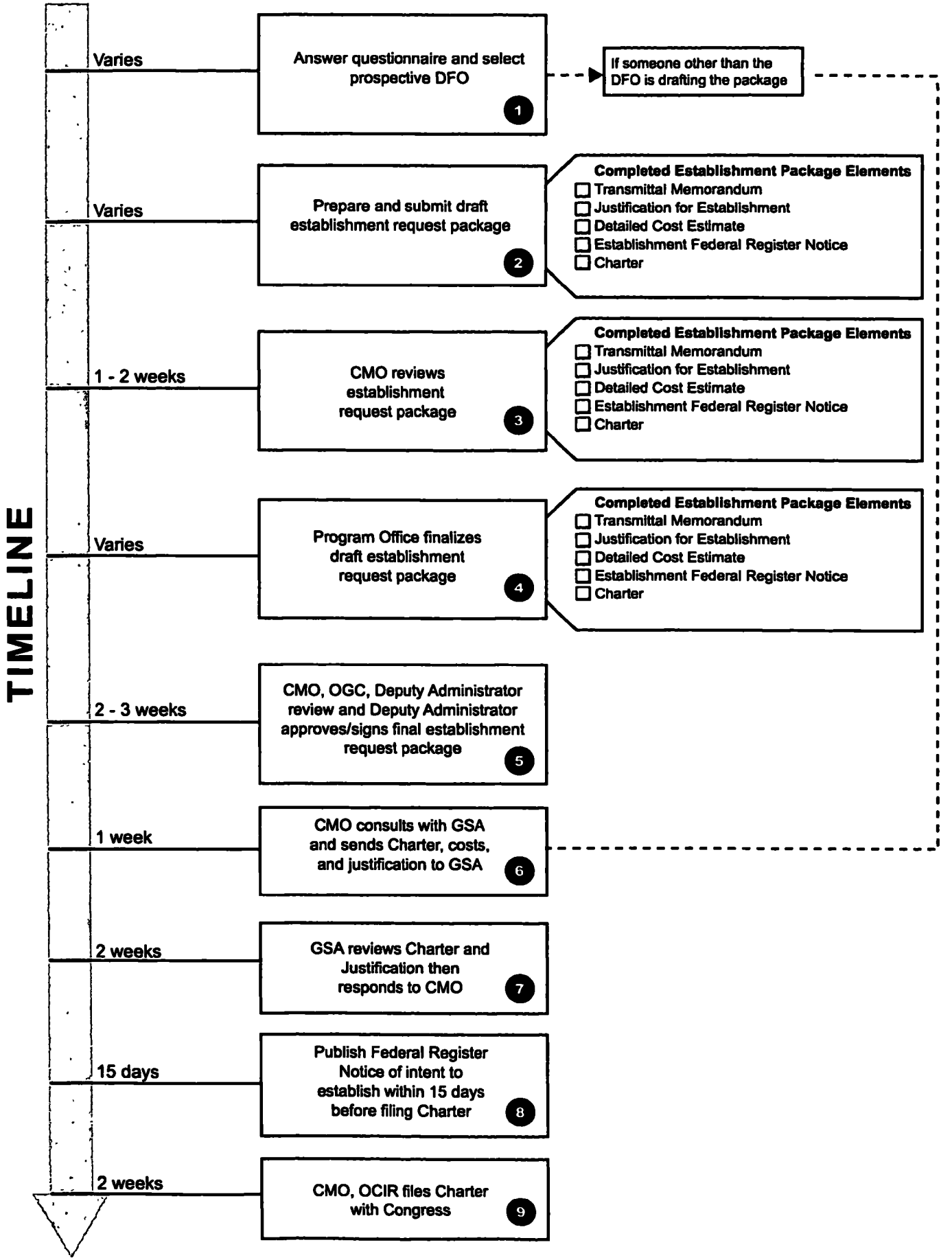
2. A narrative discussion explaining that the advisory committee will address issues of significant national interest or is needed to ensure proper conduct of Agency business;

3. An explanation of why the functions of the advisory committee cannot be successfully performed by EPA staff, another existing EPA advisory committee, or other means such as a public hearing;

4. A description of the Agency's plan to attain fairly balanced membership. The plan should show that EPA plans to consider a cross-section of directly impacted/interested stakeholders and other interested individuals when selecting advisory committee members; and

5. The name, title, and contact information for the appropriate EPA official who has been designated to serve as the contact person in the event that GSA has any substantive questions concerning EPA's need for the proposed advisory committee.

Exhibit 3 - 1
ESTABLISHING A DISCRETIONARY FEDERAL ADVISORY COMMITTEE TIMELINE AND CHECKLIST



3.3.3 Preparing Cost Estimates

Three different types of costs may factor into your preparation of the "Cost and EPA Personnel Work Year Estimates." These are compensation costs, travel and per diem costs, and other costs (e.g., rental costs, and contractor support costs). These costs and guidelines on how to calculate them are discussed below. **Exhibit 3-2** provides worksheets and formulas to use in your calculations. The following sections provide guidance for completing this worksheet and developing the cost estimate for compensation, travel, per diem, and other costs.

Compensation/Personnel Payments

1. Non-Federal Members (Special Government Employees): Special Government Employees (SGE) are compensated; therefore, enter their compensation amount. (If they are not SGE's, they are not compensated.)

2. Non-Federal Members (Representative Members): Representative members are not compensated; therefore, enter zero.

3. Federal Members (Prorated - EPA members only): Estimate the percentage of time each EPA employee committee member is expected to spend on committee matters and multiply it by each individuals annual salary. Representatives of other federal agencies generally are compensated by their employing agency, not EPA. Only include costs for federal members that come out of EPA funds.

4. Federal Staff (Prorated - includes DFO, assisting support staff, etc.): Estimate the percentage of time the Designated Federal Officer (DFO) and other assistants are expected to spend on committee matters and multiply it by their estimated salary. That prorated salary is then multiplied by a benefits percentage of 17% to get the total benefits cost. The prorated salary is added to the benefits costs to get the total federal saff cost. Administrative time and costs should be included in this estimate. Staffing is required to cover these services. Make sure dollar amounts are equal to FTE staffing levels/salaries.

Exhibit 3-2
Cost and EPA Personnel Work Year Estimates
Worksheet 1, Personnel Work Costs

Personnel Work Costs:	
(A) Total Non-Federal Members (Special Government Employees) Costs: **(# of SGE) * (# meeting days per FY) * (Daily Compensation $)**	$ _____
(B) Non-Federal Members (Representative Members): **Representative members are not compensated, therefore, enter zero.**	$ _____
(C) Total Federal Members (Prorated - EPA members only) Costs: **(Percent annual time on committee) * (Annual Salary)**	$ _____
(D) Total Federal Staff (Prorated - includes DFO, support staff, etc.) Costs: **1. (Percent annual time on committee) * (Annual Salary) +** **(17% Benefit Pay) = Prorated Salary**	$ _____
(E) Total Special Expertise Costs: **Estimated Consultant Costs Billed to the Committee**	$ _____
Total Personnel Work Costs :	$ _____

Exhibit 3-2
Cost and EPA Personnel Work Year Estimates
Worksheet 2, Travel, Per Diem Costs, and Other Committee Costs

Travel and Per Diem Costs: The travel cost calculation is the same for each attendee authorized to receive travel and per diem compensation: **(# of meetings * # days per meeting) * (Per Diem for the location of the meeting) + (Travel cost * estimated # of trips)**	
(F) Total Travel and per diem costs for Non-Federal Members: **(Representative Members SGEs)**	$ _____
(G) Total estimated travel and per diem costs for Federal Members:	$ _____
(H) Total estimated travel and per diem costs for Federal Staff: **(DFO and EPA Support Staff)**	$ _____
(I) Total estimated travel and per diem costs for Non-member Consultants:	$ _____
Total estimated travel and per diem costs:	$ _____
Other Costs:	
(J) Total estimated Contractor Support Costs (e.g., logistics, facilitators): (Note: Contractors may pay for rentals, but the DFO should track those costs as rental costs for management tracking purposes after the committee is established)	$ _____
(K) Total estimated Rental Costs (e.g., room rental costs):	$ _____
(L) Other estimated Federal Advisory Committee Costs (e.g., printing):	$ _____
Total Travel, Per Diem, and Other Committee Costs:	$ _____
Total Personnel Work Costs (Worksheet 1):	$ _____
Total Estimated Work Year Costs: **(Total Worksheet 1 Costs + Total Worksheet 2 Costs)**	$

EXAMPLE: A DFO, who is a GS-14,step 5 with a salary level (plus locality pay) of $88,699 per year, will spend 50 percent of his/her duty time on direct support of the committee administrative duties, or $44,349.50, which is rounded-off to $44,350. Then, multiply the prorated salary by the benefit percentage of 17 percent ($7,540). Add the DFO's prorated salary ($44,350) with the 17 percent benefits ($7,540) for a total cost of $51,890.

5. Non-member Consultants:

A consultant is someone hired and paid directly by EPA on a consulting or expert appointment. Enter the costs incurred by the consultants.

Travel & Per Diem

Most advisory committee members are reimbursed for travel and per diem expenses. You should account for the estimated per diem and travel costs that committee members incur when attending committee meetings. These expenses should be estimated for the four types of attendees eligible for travel and per diem compensation under 5 U.S.C. 5703 (Invitational Travel). Note that Invitational travel can only be paid for individuals who are attending the meeting to perform a direct service to EPA. Invitational travel cannot be used for individuals who attend only to observe the meeting.

The four types of attendees are:

1. Non-Federal Members (Representative Members and Special Government Employees)

2. Federal Members (EPA staff are not members)

3. Federal Staff (DFO and other EPA support staff)

4. Non-member Consultants

The travel cost calculation is the same for each type of attendee authorized to receive travel and per diem compensation.

Note: Staff support should be expressed in Full-Time Equivalent (FTE) years, rounding to one decimal place. Include the time of all personnel involved who support the committee, no matter how minimal that time.

Other Committee Costs

Other costs can include contractor support costs, rental costs, and other costs associated with establishing, managing, and terminating a FAC. These costs are described in more detail below.

- Contractor Support Costs:
  Contractor support costs may include, but are not limited to: contractor personnel costs for technical, administrative or facilitation support; contractor personnel travel; personnel and travel costs for experts retained by the contractor to assist the committee; communications costs such as contractor phone, mail, courier, photocopying; court reporters retained by the contractor to record meetings; audio equipment rented by the contractor during meetings; and supplies such as flip charts, notebooks, etc. (Note: Contractors may pay for meeting room costs; however, for management tracking purposes after the committee is established, the DFO should report meeting room rental costs on the cost tracking spreadsheet under Rental Costs.)

  Note: A contractor is an individual or firm procured under a contract or purchase order, such as court reporting services.

- Rental Costs:
  These costs relate primarily to the meeting space; however, other rental costs, such as audio-visual equipment, also may be included here. Meeting rooms may be rented by support contractors as a portion of their support services.

- Other Committee Costs:
  These costs include all other costs not estimated elsewhere, such as equipment, supplies, maintenance, postage, courier, phone, printing, graphics, *Federal Register* notices and meeting announcements, shipping and distribution, and miscellaneous expenses.

Note: Due to restrictions on augmenting of agency funds, advisory committee members and their employers may not pay the rental costs for items such as meeting space or audio-visual equipment rental.

3.3.4 The Establishment Federal Register *Notice*

The DFO should prepare the establishment notice while waiting for GSA to finish its review of the package. The GSA Secretariat notifies the CMO once the GSA review is complete, and the CMO then notifies the Agency DFO. As soon as possible after receiving notification from the CMO, the DFO should submit the establishment notice for publication in the *Federal Register.* This notice lets the public know about EPA's intent to establish a federal advisory committee. Keep in mind that once EPA's CMO has consulted with the GSA Committee Management Secretariat, the establishment process should continue with the prompt publishing of the *Federal Register* establishment notice.

The *Federal Register* notice should include a description of:

- ❑ The nature and purpose of the advisory committee;
- ❑ The Agency's plan to attain fairly balanced membership; and
- ❑ A statement that the advisory committee is necessary and in the public interest.

The DFO should send a copy of the establishment notice to the CMO after it has been published in the *Federal Register.*

If there is an urgent need and good reason for the committee to meet sooner than permitted by normal establishment procedures (e.g., the committee needs to meet immediately in order to comply with a Congressional deadline), the CMO may ask the GSA Secretariat to waive the 15-day waiting period between *Federal Register* publication and Charter filing. A committee cannot meet, under any circumstances, before the Charter is filed.

> **Note:** The *Federal Register* notice must be published at least 15 calendar days before the Charter is filed with Congress. The committee may not meet until after the Charter is filed with Congress.

3.4 The Advisory Committee Charter

The purpose of the advisory committee Charter is to specify the mission and general operational characteristics of a particular committee. The requesting office/DFO should provide the required information to the CMO. The CMO will create a draft Charter including all statutory requirements. There are both mandatory components and other components that improve the overall Charter package, but are not explicitly required. Specifically, EPA advisory committee Charters consist of statutorily-required components set out in FACA, and additional EPA-specific components that are designed to provide additional information to interested parties. These requirements are provided in **Exhibit 3-3** "Required Charter Components Checklist." Additional information the Charter should contain, although not required, can be found in the **Exhibit 3-4** "Other Charter Components Checklist."

3.4.1 The Charter Filing Process

Process

After consultation with GSA, the DFO publishes the *Federal Register* notice announcing the establishment of the FAC, the CMO asks EPA's Office of Congressional and Intergovernmental Relations to file the Charter with the appropriate Congressional committees and the Library of Congress. The date the Charter is filed with Congress is considered the establishment date for discretionary advisory committees. The CMO will then file the dated Charter with the GSA Secretary to complete the establishment process.

Exhibit 3-3
FACA-Required Charter Components Checklist

The required components of an EPA Federal Advisory Committee Charter are:

- ❑ 1. The advisory committee's official title.
- ❑ 2. The advisory committee's objectives and the scope of its activity.
- ❑ 3. The estimated period of time necessary for the advisory committee to carry out its purposes.
- ❑ 4. The federal official to whom the advisory committee reports.
- ❑ 5. EPA's responsibility for providing the necessary support for the advisory committee. (EPA Charters identify the responsible EPA office)
- ❑ 6. A description of the duties for which the advisory committee is responsible, and, if such duties are not solely advisory, the source(s) of authority for non-advisory functions.
- ❑ 7. The estimated annual operating costs in dollars (including compensation, travel and per diem, staff salaries, consultant fees, printing, commercially rented space, etc.) work-years for staff support for the advisory committee.
- ❑ 8. The estimated number and frequency of advisory committee meetings.
- ❑ 9. The advisory committee's termination date, if less than two years from the date of advisory committee establishment.
- ❑ 10. The filing date of the Charter. (The CMO inserts this date after the process is complete)

Exhibit 3-4
Other Charter Components Checklist

In addition to Charter elements required by FACA, the establishment Charter should also contain the following information:

- ❑ 1. A statement indicating that the Charter is establishing the advisory committee.
- ❑ 2. A statement regarding whether the authority to establish the FAC is provided by statute, the President, or the EPA Administrator.
- ❑ 3. The estimated number of advisory committee members and a description of the points of view needed to achieve a fairly balanced membership.
- ❑ 4. A statement regarding whether members will be appointed as Special Government Employees subject to the conflict-of-interest restrictions (paid members), or as representatives of non-federal interests (members are not paid, though they usually receive travel and per diem reimbursement).
- ❑ 5. A statement regarding the requirement for a full-time or permanent part-time employee of the Agency to serve as the Designated Federal Officer.
- ❑ 6. A statement as to whether the advisory committee is authorized to establish subgroups or whether subgroups can only be established by EPA. The Charter also should note that subgroups report back to the parent advisory committee, and do not provide advice directly to EPA.

Timing

Once EPA and GSA have completed their consultation and EPA has published the establishment notice the CMO may determine whether the timing is appropriate for EPA to delay filing the Charter for a short time (e.g., one or two months) until EPA has selected committee members, invited them to serve, and scheduled the first meeting. This prevents the two-year time period for the life of the committee from starting before the advisory committee is organized and ready to function. This will allow the committee to have two full years of activity on which to base a strong justification for renewal, if necessary.

3.5 FAC Management Tips

- ❑ 1. The membership selection process can be started before the committee is established. See Chapter 5 regarding the member selection and appointment process.

- ❑ 2. Sometimes it helps to have a contractor assist the DFO with the administrative work associated with managing and operating the committee. For example, a contractor could prepare the meeting notice, take notes during the meeting and prepare draft minutes, and arrange for a meeting location. See Chapter 7 for information on using contractors to assist with committee operations.

- ❑ 3. Committee costs may be audited by GAO —track expenses quarterly and keep accurate records. A quarterly cost tracking spreadsheet is recommended to ensure accurate and timely submission of cost reporting at the end of the year.

- ❑ 5. It is an EPA best practice to prepare draft bylaws and present them for consideration and discussion at the committee's first meeting. Contact the CMO for more information on drafting by-laws. Members can review, comment on, and shortly afterwards, adopt the bylaws. (Note: have both the CMO and the OGC FACA Attorney review the by-laws before they are adopted by the committee). See Chapter 6 for guidance on preparing the bylaws.

STEPS TO ESTABLISH A DISCRETIONARY FACA COMMITTEE

	STEP	EST. TIME	WHO	COMPLETE?
1	Complete the establishment questionnaire and select a prospective DFO or point of contact. (Questionnaire includes objectives, budget and FTE forecast, number and kinds of members, indication of type and number of meetings, and duration of the committee, etc.)	Varies, Depending on the Program Office	Program Office	❑ **YES** **DATE:** _____
	The CMO drafts the committee's Charter based on your answers to the questionnaire	Two weeks	CMO	
2	Prepare and submit **Draft Establishment Request Package** to the CMO, which includes:	Varies, Depending on the Program Office	Program Office	
	2(a) Transmittal memo from AA to DA		Program Office	❑ **YES** **DATE:** _____
	2(b) Charter		CMO, Program Office	❑ **YES** **DATE:** _____
	2(c) Justification for Establishment		Program Office	❑ **YES** **DATE:** _____
	2(d) Detailed Cost Estimate		Program Office	❑ **YES** **DATE:** _____

	STEP	EST. TIME	WHO	COMPLETE?
2	2(e) Federal Register notice of Establishment	Varies, Depending on the Program Office	Program Office	❑ YES DATE: _____
3	Review Draft Establishment Request Package ❑ Transmittal memo from AA to DA ❑ Charter ❑ Justification for Establishment ❑ Detailed Cost Estimate ❑ Federal Register notice of Establishment	1- 2 weeks	CMO, OGC (OGC reviews Charter)	❑ YES DATE: _____
4	Finalize Draft Establishment Request Package Based on CMO, OGC Review ❑ Transmittal memo from AA to DA ❑ Charter ❑ Justification for Establishment ❑ Detailed Cost Estimate ❑ Federal Register notice of Establishment	Varies, Depending on the Program Office	Program Office	❑ YES DATE: _____
5	Review and Deputy Administrator approval/signature on finalized Establishment Request Package	2-3 weeks	CMO, OGC, Deputy Administra -tor	❑ YES DATE: _____
6	CMO consults with GSA and sends Charter, costs, and justification to GSA	1 week	CMO	❑ YES DATE: _____
7	GSA reviews and then responds to the CMO	2 weeks	GSA	❑ YES DATE: _____
8	The DFO publishes a *Federal Register* Notice of EPA's intent to establish the committee. (FRN must be published 15 days before filing Charter w/Congress)	15 days	Program Office	❑ YES DATE: _____

	STEP	EST. TIME	WHO	COMPLETE?
9	File Charter with Congress	2 weeks	CMO, OCIR	❑ **YES** **DATE:** _____
10	The Committee's establishment is effective on the date the Charter is filed with Congress			

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Chapter 3 Sample Documents

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Example Federal Register Notice of Federal Advisory Committee Establishment

[Federal Register: September 5, 2002 (Volume 67, Number 172)]

[Notices]

[Page 56828]

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

[DOCID:fr05se02-39]

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ENVIRONMENTAL PROTECTION AGENCY

[OPPT-2002-0001; FRL-6830-2]

Establishment of the National Pollution Prevention and Toxics Advisory Committee

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice; establishment of advisory committee.

SUMMARY: As required by section 9(a)(2) of the Federal Advisory Committee Act, we are giving notice that EPA is establishing the National Pollution Prevention and Toxics Advisory Committee (NPPTAC). The purpose of this Committee is to provide a forum for a diverse group of individuals to provide advice, information, and recommendations to EPA's Office of Pollution Prevention and Toxics (OPPT) regarding the overall policy and operations of programs undertaken by the office. EPA has determined that this advisory committee is in the public interest and will assist the Agency in performing its duties as prescribed in the Toxic Substances Control Act, the Pollution Prevention Act, and other applicable statutes. Copies of the Committee Charter will be filed with the appropriate congressional committees and the Library of Congress.

FOR FURTHER INFORMATION CONTACT: For general information contact:

Barbara Cunningham, Acting Director, Environmental Assistance Division (7408M), Office of Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 554-1404; e-mail address: TSCA-Hotline@epa.gov. For technical information contact: Mary Hanley (7401M), Office of

Pollution Prevention and Toxics, Environmental Protection Agency, 1200 Pennsylvania Ave., NW., Washington, DC 20460; telephone number: (202) 564-0316; e-mail address: hanley.mary@epa.gov.

List of Subjects:
Environmental protection.

Dated: August 27, 2002.
Stephen L. Johnson,
Assistant Administrator for Prevention, Pesticides and Toxic Substances.

[FR Doc. 02-22613 Filed 9-4-02; 8:45 am]
BILLING CODE 6560-50-S

Chapter 4: Establishing a Non-Discretionary FAC and Preparing the Charter

4.0 Overview

Once you determine that your committee is non-discretionary, you should prepare and submit materials to formally establish the Federal advisory committee (FAC). This chapter walks you through the preparation and submittal of the establishment package, including how to prepare the Charter for your non-discretionary FAC.

> **Definition:** "Non-discretionary advisory committee" means any advisory committee required either by statute or by Presidential directive, such as an Executive Order. A non-discretionary advisory committee required by statute is typically specified in a statute by name, purpose, or functions, and its establishment and termination are beyond the legal discretion of an agency.

4.1 Initiating a Non-Discretionary Advisory Committee

Assistant Administrators (AAs), Regional Administrators (RAs), and heads of staff offices reporting to the Administrator within their functional areas of responsibility may initiate the establishment process. Requests to establish a committee must come through EPA's CMO to the Deputy Administrator. Charter filing requirements for non-discretionary advisory committees are the same as those for discretionary advisory committees except that the establishment date for a Presidential advisory committee is the date the Charter is filed with the GSA Committee Management Secretariat.

> **Note:** EPA considers negotiated rulemaking committees non-discretionary FACs, but will also require a justification to be submitted when up for renewal. It is recommended that you follow the non-discretionary committee establishment and chartering requirements for non-discretionary advisory committees..

4.1.1 Role of a CMO in Establishing a FAC

The CMO provides guidance and consultation, and reviews the documents contained in the establishment package. Once the establishment documents are completed, the CMO is responsible for consulting with the GSA Committee Management Secretariat and overseeing the approval process. The CMO also ensures that committee documents are filed with GSA, in the appropriate committee file, and Congress.

> **Note:** Consult with the CMO early in the establishment process, specifically in the areas of:
> - Planning the budget
> - Staffing the committee
> - Selecting a DFO
> - Drafting the Charter

4.2 Establishing a Non-Discretionary Advisory Committee

There are several activities that are part of the establishment process, including: (1) making a formal request to establish the committee; and (2) preparing the "Establishment Request Package" materials. A step-by-step outline of the establishment process is discussed in the following sections. A checklist to track the progress of establishing a FAC is included at the end of this chapter.

4.2.1 Steps in the Establishment Process

The following steps are involved in the FAC establishment process:

Step 1. Consult with the Office of the General Counsel FACA attorney and the CMO Office regarding legal requirements/implications associated with committee establishment. Consult with the CMO for instructions and procedures.

Step 2. The CMO provides guidance in preparing the Establishment Request Package.

Step 3. Select a prospective DFO or interim point of contact. The DFO is responsible for submitting the Establishment Request Package to the Assistant Administrator).

Step 4. Prepare a draft Establishment Request Package with the assistance and review of the CMO. The specific materials needed in that package are discussed in detail in Section 4.3. The DFO will complete the informational questionnaire that will be reviewed by the CMO.

Step 5. Incorporate the CMO's comments and submit the final Establishment Request Package to the CMO for approvals and Deputy Administrator signature.

Step 6. The AA signs all required forms and approves the Establishment Request Package, returning it to the DFO so that everything can be signed at once.

> **Note for negotiated rulemaking committees:** After the CMO notifies the DFO that the GSA process is complete and the committee is approved, the DFO/requesting office will publish the *Federal Register* notice announcing intent to establish the negotiated rulemaking FAC.

No notice is required to announce the establishment of a non-discretionary advisory committee. Negotiated rulemaking committees must publish a notice of establishment containing the information required by the Negotiated Rulemaking Act, 5 U.S.C §564. (An example of a *Federal Register* notice of establishment is included at the end of this chapter.) The CMO notifies GSA 10 working days prior to filing the Charter with Congress.

The CMO asks the Office of Congressional and Intergovernmental Relations (OCIR) to file your Charter with the appropriate congressional committees and the Library of Congress. For a negotiated rulemaking committee, the Charter must be filed 15 days after publication of the establishment notice in the *Federal Register*.

> **Note:** Committee establishment is typically effective on the date the Charter is filed with Congress. However, the date of committee establishment for a Presidential advisory committee is the date the Charter is filed with the GSA Committee Management Secretariat.

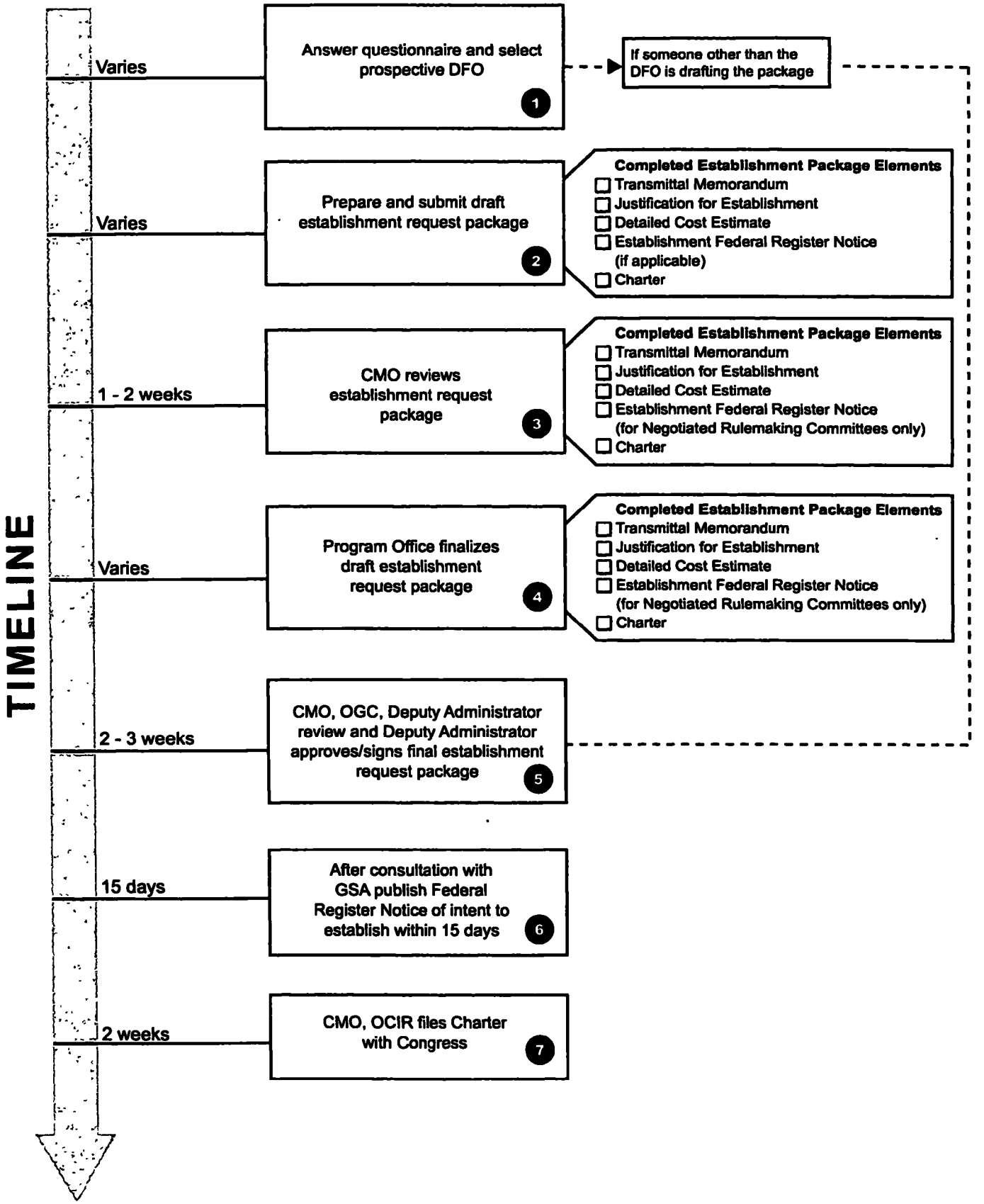
4.3 The Establishment Request Package

The Establishment Request Package is made up of six documents. The timely preparation and delivery of these documents to the appropriate recipients will reduce potential delays in establishing your FAC. The six documents are:

- ❑ 1. A *Transmittal Memo* from an AA, Regional Administrator, or head of a staff office reporting to the Administrator requesting establishment of a new advisory committee (see Section 4.3.1);
- ❑ 2. A *Justification Statement* for the establishment of the committee (see Section 4.3.2);
- ❑ 3. *Cost Estimates* to run the committee for the current and subsequent fiscal years (See Section 4.3.3);
- ❑ 4. For a negotiated rulemaking committee: The *Federal Register Notice* signed by an AA, RA, or head of staff offices reporting to the Administrator announcing intent to establish the federal advisory committee (See Section 4.3.4); and
- ❑ 5. *A Charter* that specifies the mission and general operating characteristics the committee (See Section 4.4).
- ❑ 6. A copy of the statute or Presidential Directive/Executive Order mandating the establishment of the non-discretionary committee, except for negotiated rulemaking committees.

A discussion of these six documents and how best to prepare them is provided in the following section. **Exhibit 4-1**, provides an overview of the establishment process for discretionary committees and a timeline and checklist to assist you in this process.

Exhibit 4 - 1
ESTABLISHING A NON-DISCRETIONARY FEDERAL ADVISORY COMMITTEE TIMELINE AND CHECKLIST



4.3.1 Transmittal Memo Components

The Transmittal Memo from an AA, RA, or head of staff office reporting to the Administrator indicates that he/she recommends that the Deputy Administrator approve the establishment of the advisory committee. It should include a concurrence and non-concurrence signature and date line for the Deputy Administrator.

If members will be appointed as SGEs, the transmittal memo should include a specific rate of pay for those members. Members can be appointed as SGEs if the authorizing statute requires members to be paid or the Deputy Administrator determines that EPA needs members who have a high level of specific scientific or technical knowledge, and it would be appropriate to compensate those members.

4.3.2 Justification Statement

The justification statement, which undergoes EPA and GSA review, should contain the following elements:

1. An explanation that the advisory committee is necessary, its purpose, and how it relates to the Administration's initiatives, priorities, and strategic goals;

2. A narrative that demonstrates the advisory committee will address issues of significant national interest or is needed to ensure proper conduct of Agency business;

3. An authorization statement outlining and citing Executive Order or authorizing legislation that requires the committee be created;

4. A description of the Agency's plan to attain fairly balanced membership. This plan demonstrates that EPA will consider a cross-section of stakeholders directly affected/interested and qualified when selecting advisory committee members; and

5. The name, title, and contact information for the appropriate EPA official who has been designated to serve as the contact person. For negotiated rulemaking committees, this person will serve as the contact in the event that GSA has any substantive questions concerning the proposed advisory committee.

Note: 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.

4.3.3 Preparing Cost Estimates

Three different types of costs factor into your preparation of the "Cost and EPA Personnel Work Year Estimates." These costs include compensation costs, travel and per diem costs, and other costs (e.g., rental costs, and contractor support costs). The following pages discuss each type of cost, how you calculate those costs and provide the worksheets and the specific formulas to use in your calculations.

Worksheets 1 and 2, Personnel Work Costs and Travel, Per Diem, and other Committee costs can be found at **Exhibit 4-2** (Cost and EPA Personnel Work Estimates).

Note: The Program Office makes the final determination whether or not to compensate committee members, unless the authorizing statute states that the committee members will receive compensation.

Compensation/Personnel Payments

A. Non-Federal Members (Special Government Employees): Determine the estimated compensation costs for committee members who are appointed as Special Government Employees (SGE) members of the committee.

B. Non-Federal Members (Representative Members): Representative members are not compensated, therefore, enter zero.

C. Federal Members (Prorated - EPA members only): Estimate the percentage of time each EPA employee committee members is expected to spend on committee matters and multiply it by each individual's annual salary. Representatives of other federal

Exhibit 4-2
Cost and EPA Personnel Work Year Estimates
Worksheet 1, Personnel Work Costs

Personnel Work Costs:	
(A) Total Non-Federal Members (Special Government Employees) Costs: **(# of SGE) * (# meeting days per FY) * (Daily Compensation $)**	$ _____
(B) Non-Federal Members (Representative Members): **Representative members are not compensated, therefore, enter zero.**	$ _____
(C) Total Federal Members (Prorated - EPA members only) Costs: **(Percent annual time on committee) * (Annual Salary and locality Pay)**	$ _____
(D) Total Federal Staff (Prorated - includes DFO, support staff, etc.) Costs: **(Percent annual time on committee) * (Annual Salary) = (Y)** **(Y) + (17% Benefit Pay percentage * (C)) = (D)**	$ _____
(E) Total Non-member Consultant Costs: **Actual Consultant Costs Billed to the Committee**	$ _____
Total Personnel Work Costs:	$ _____

Exhibit 4-2
Cost and EPA Personnel Work Year Estimates
Worksheet 2, Travel, Per Diem, and Other Committee Costs

Travel and Per Diem Costs: The travel cost calculation is the same for each person authorized to receive travel and per diem compensation: **(# of meetings * # days per meeting) * (Per Diem for the location of the meeting) + (Travel cost * estimated # of trips)**	
(F) Total Travel and per diem costs for Non-Federal Members: **(Representative Members or SGEs)**	$ _____
(G) Total estimated travel and per diem costs for Federal Members:	$ _____
(H) Total estimated travel and per diem costs for Federal Staff: **(DFO and EPA Support Staff)**	$ _____
(I) Total estimated travel and per diem costs for Non-member Consultants:	$ _____
Total estimated travel and per diem costs:	$ _____
Other Costs: (J) Total estimated Contractor Support Costs: (Note: Contractors may pay for rentals, but the DFO should track those costs as rental costs for management tracking purposes after the committee is established)	$ _____
(K) Total estimated Rental Costs:	$ _____
(L) Other estimated Federal Advisory Committee Costs:	$ _____
Total Travel, Per Diem, and Other Committee Costs:	$ _____
Total Personnel Work Costs (Worksheet 1):	$ _____
Total Estimated Work Year Costs: **(Total Worksheet 1 Costs + Total Worksheet 2 Costs)**	$

agencies generally are compensated by their employing agency, not EPA. Only include the costs of Federal members paid for by EPA.

D. Federal Staff (Prorated - includes DFO, support staff, etc.): Estimate the percentage of time the Designated Federal Officer (DFO) and other assistants are expected to spend on committee matters and multiply it by their estimated salary. That prorated salary is then multiplied by a benefit percentage of 17% to get the total benefits cost. The prorated salary is added to the benefits costs to get the total Federal Staff cost. Administrative time and costs should be included in this estimate. Staffing is required to cover these services. Make sure dollar amounts are equal to FTE staffing levels and salaries.

E. Nonmember Consultants:
A consultant is someone hired and paid directly by EPA on a consulting or expert appointment and is not a SGE or member of the FAC. These costs are the costs incurred by the consultants.

Note: Express staff support fiscal years in Full-Time Equivalent (FTE) years, rounding to one decimal place. Include the time of all personnel involved in supporting the committee, no matter how minimal that time.

(**EXAMPLE**: A DFO, who is a GS-14-step 5 with a salary level (plus locality pay) of $88,699 per year, will spend 50 percent of his/her duty time on tasks concerning the committee, or $44,349.50, which is rounded-off to $44,350. Then, multiply the prorated salary by the benefit percentage of 17 percent. Add the DFO's prorated salary ($44,350) with the 17 percent benefits ($7,540) for a total cost of $51,890).

Travel & Per Diem

Most advisory committee members are reimbursed for travel and per diem expenses. You should account for the estimated per diem and travel costs that committee members incur when attending committee meetings. These expenses should be estimated for the four types of attendees eligible for travel and per diem compensation under 5 U.S.C. 5703 (Invitation travel). Note that Invitational travel can only be paid for individuals who are attending the meeting to perform a direct service to EPA. Invitational Travel cannot be used for individuals who attend only to observe the meeting.

The four types of attendees that are eligible for travel and per diem compensation are:

1. Non-Federal Members (Representative Members and Special Government Employees)

2. Federal Members (EPA staff are not members)

3. Federal Staff (DFO and other EPA support staff)

4. Non-member Consultants

The travel cost calculation is the same for each type of attendee authorized to receive travel and per diem compensation.

Other Committee Costs

Other costs include contractor support costs, rental costs, and other costs associated with establishing, managing, and terminating a FAC. These costs are described in more detail below.

- ❑ Contractor Support Costs:
  Contractor support costs may include, but are not limited to: contractor personnel costs for technical, administrative or facilitation support; contractor personnel travel; personnel and travel costs for experts retained by the contractor to assist the committee; communications costs such as contractor phone,

mail, courier, photocopying; court reporters retained by the contractor to record meetings; audio equipment rented by the contractor for use during meetings; and supplies such as flip charts, notebooks, etc. (Note: Contractors may pay for meeting room costs; however, for management tracking purposes after the committee is established, the DFO should report meeting room rental costs on the cost tracking spreadsheet under Rental Costs).

- Rental Costs:
  These costs relate primarily to the meeting space; however, other rental costs, such as audio-visual equipment, may also be included. Meeting rooms may be rented by support contractors as a portion of their support services.

> **Note**: Due to restrictions on augmenting of Agency funds, advisory committee members and their employers may not pay the rental costs for items such as meeting space or audio-visual equipment rental.

- Other Committee Costs:
  These costs include all other costs not estimated elsewhere, such as equipment, supplies, maintenance, postage, courier, phone, printing, graphics, *Federal Register* notices and meeting announcements, shipping and distribution, and other miscellaneous expenses.

4.3.4 The Establishment Federal Register Notice for Negotiated Rulemaking Committees

The DFO of a negotiated rulemaking committee should prepare the establishment notice while awaiting completion of the GSA review. Once its review of the negotiated rulemaking committee Establishment Request Package is complete, the GSA Secretariat notifies the CMO. The CMO then notifies the DFO. As soon as possible after receiving notification from the CMO, the DFO should submit the establishment notice for publication in the *Federal Register*. This notice lets the public know about EPA's intent to establish a negotiated rulemaking federal advisory committee. Keep in mind that once EPA's CMO has consulted with the GSA Committee Management Secretariat, the establishment process should continue with the prompt publishing of this *Federal Register* notice.

The negotiated rulemaking act requires the following information to be included in the *Federal Register*:

1. An announcement that the Agency intends to establish a negotiated rulemaking committee to negotiate and develop a proposed rule;

2. A description of the subject and scope of the rule to be developed, and the issues to be considered;

3. A list of the interests which are likely to be significantly affected by the rule;

4. A list of the persons proposed to represent such interests and the person or persons proposed to represent the Agency;

5. A proposed agenda and schedule for completing the work of the committee, including a target date for publication by the Agency of a proposed rule for notice and comment;

6. A description of administrative support of the committee to be provided by the Agency, including technical assistance;

7. A solicitation for comments on the proposal to establish the committee, and the proposed membership of the negotiated rulemaking committee; and

8. An explanation of how a person may apply or nominate another person for membership on the committee. See 5 U.S.C. §564(b).

The DFO should send a copy of the notice to the CMO once it has been published in the *Federal Register*.

For a negotiated rulemaking committee, EPA must allow at least 30 days after the publication of the notice for the public to submit comments on the proposed committee or applications for membership. The *Federal Register* notice must be published at least 15 calender days before the Charter is filed with Congress. The committee may not meet until after the Charter is filed with Congress.

4.4 Preparing the Establishment Charter

The purpose of an advisory committee Charter is to specify the mission and general operational characteristics of a particular committee. The requesting office/DFO should provide the required information to the CMO. The CMO will create a draft Charter including all statutory requirements. There are Charter components that are mandatory and other Charter components that improve the overall package, but are not explicitly required. Specifically, EPA advisory committee Charters consist of the statutorily-required components set out in FACA and additional EPA-specific components that are designed to provide additional information to interested parties. These requirements are provided in **Exhibit 4-3** "Required Charter Components Checklist." Additional information the Charter should contain, but is not required, can be found in **Exhibit 4-4** "Other Charter Components Checklist."

Exhibit 4-3
Required Charter Components Checklist

The required components of an EPA Federal Advisory Committee Charter are:

- ❑ 1. The advisory committee's official title.
- ❑ 2. The advisory committee's objectives and the scope of its activity.
- ❑ 3. The estimated period of time necessary for the advisory committee to carry out its purposes.
- ❑ 4. The Federal official to whom the advisory committee reports.
- ❑ 5. EPA's responsibility for providing the necessary support for the advisory committee. (EPA Charters identify the responsible EPA office)
- ❑ 6. A description of the duties for which the advisory committee is responsible, and, if such duties are not solely advisory, the source(s) of authority for non-advisory functions.
- ❑ 7. The estimated annual operating costs in dollars (including compensation, travel and per diem, staff salaries, consultant fees, printing, commercially rented space, etc.) and work-years for staff support for the advisory committee.
- ❑ 8. The estimated number and frequency of advisory committee meetings.
- ❑ 9. The advisory committee's termination date, if less than two years from the date of advisory committee establishment.
- ❑ 10.The filing date of the Charter. (The CMO inserts this date after the process is complete.)

Exhibit 4-4
Other Charter Components Checklist

In addition to Charter elements required by FACA, the establishment Charter should also contain the following information:

- ❑ 1. A statement indicating that the Charter is establishing the advisory committee.
- ❑ 2. A statement regarding whether the authority to establish the FAC is provided by statute, the President, or by Executive Order.
- ❑ 3. The estimated number of advisory committee members and a description of the types of expertise needed to achieve a fairly balanced membership in terms of the points of views represented and the functions to be performed.
- ❑ 4. A statement regarding whether members will be appointed as Special Government Employees subject to the conflict-of-interest restrictions (paid members), or as representatives of non-federal interests (members are not paid, though they receive travel and per diem reimbursement).
- ❑ 5. A statement regarding the requirement for a full-time or permanent part-time employee of the Agency to serve as the Designated Federal Officer.
- ❑ 6. A statement as to whether the advisory committee is authorized to establish subgroups that report back to the parent advisory committee.

4.4.1 Filing the Charter

Charter filing process for a negotiated rulemaking committee

After EPA consults with GSA and EPA has published the *Federal Register* notice announcing the establishment of the committee, the CMO asks EPA's Office of Congressional and Intergovernmental Relations to file the Charter with the appropriate Congressional committees and the Library of Congress. The date the Charter is filed with Congress is considered the establishment date. The CMO will then file a dated Charter with the GSA Secretariat to complete the establishment process.

Process for non-discretionary committees

Once the Charter for a non-discretionary committee is prepared, the CMO asks EPA's Office of Congressional and Intergovernmental Relations to file the Charter with the appropriate Congressional committees and the Library of Congress. The CMO then files a dated Charter with the GSA Secretariat to complete the establishment process. The date the Charter is filed with Congress is considered the establishment date, unless the committee is a Presidential advisory committee (that is, a committee that advises the President). The establishment date for a Presidential advisory committee is the date the Charter is filed with the GSA Committee Management Secretariat.

4.5 Non-Discretionary Committee Management Tips

- ❑ 1. The membership selection process can be started before the committee is established. See Chapter 5 regarding the member selection and appointment process.
- ❑ 2. Sometimes it helps to have a contractor assist the DFO with the administrative work associated with managing and operating the committee. For example, a contractor could prepare the meeting notice, take notes during the meeting and prepare draft minutes, and arrange for a meeting location. See Chapter 7 for information on how to use a contractor to assist with a committee.
- ❑ 3. See Chapter 7 for information on how to prepare a *Federal Register* notice for advisory committee meetings.

- ❑ 4. Committee costs may be audited—track expenses quarterly and keep accurate records. A quarterly cost tracking spreadsheet may be requested from the EPA CMO.

- ❑ 5. It is an EPA best practice to prepare draft bylaws and present them for consideration and discussion at the committee's first meeting. Contact the CMO for more information on drafting bylaws. Members can review, comment on, and shortly afterwards, adopt the bylaws. (Note: Have both the Committee Management Officer and the OGC FACA Attorney review the bylaws before they are adopted by the committee). See Chapter 6 for guidance on preparing the bylaws.

STEPS TO ESTABLISH A NON -DISCRETIONARY FACA COMMITTEE

	STEP	EST. TIME	WHO	COMPLETE?
1	Complete the establishment questionnaire and select a prospective DFO or point of contact. (Questionnaire includes objectives, budget and FTE forecast, number and kinds of members, indication of type and number of meetings, and duration of the committee, etc.)	Varies, Depending on the Program Office	Program Office	❑ YES DATE: _____
	The CMO drafts the committee's Charter based on your answers to the questionnaire	Two weeks	CMO	
2	Prepare and submit **Draft Establishment Request Package** to the CMO, which includes:	Varies, Depending on the Program Office	Program Office	
	2(a) Transmittal memo from AA to DA		Program Office	❑ YES DATE: _____
	2(b) Charter		CMO, Program Office	❑ YES DATE: _____
	2(c) Justification for Establishment		Program Office	❑ YES DATE: _____
	2(d) Detailed Cost Estimate		Program Office	❑ YES DATE: _____

	STEP	EST. TIME	WHO	COMPLETE?
	2(e) For negotiated rulemaking committees only: *Federal Register* notice of Establishment	Varies, Depending on the Program Office	Program Office	❑ YES DATE: _____
3	Review Draft Establishment Request Package ❑ Transmittal memo from AA to DA ❑ Charter ❑ Justification for Establishment ❑ Detailed Cost Estimate ❑ Federal Register notice of Establishment (if applicable)	1- 2 weeks	CMO (OGC reviews Charter)	❑ YES DATE: _____
4	Finalize Draft Establishment Request Package Based on CMO, OGC Review ❑ Transmittal memo from AA to DA ❑ Charter ❑ Justification for Establishment ❑ Detailed Cost Estimate ❑ For negotiated rulemaking committees only: *Federal Register* notice of Establishment	Varies, Depending on the Program Office	Program Office	❑ YES DATE: _____
5	Review and Deputy Administrator approval/signature on finalized Establishment Request Package	2-3 weeks	CMO, OGC, Deputy Administr-ator	❑ YES DATE: _____
6	For negotiated rulemaikng committees only: after consultation with GSA, publish a *Federal Register* notice of EPA's intent to establish a Committee. (FRN must be published 15 days before filing Charter w/Congress) Allow 30 day comment and application submittal period	15 days 30 days	Program Office	❑ YES DATE: _____

	STEP	EST. TIME	WHO	COMPLETE?
7	File Charter with Congress	2 weeks	CMO, OCIR	❑ YES DATE: _____
8	File Charter with GSA Committee Management Secretariat			❑ YES DATE: _____

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Chapter 4 Sample Documents

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Example Federal Register Notice of Establishment and Meeting of the Negotiated Rulemaking Committee

[Federal Register: April 7, 2003 (Volume 68, Number 66)]

[Proposed Rules]

[Page 16747-16748]

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

[DOCID:fr07ap03-23]

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Chapter I [FRL-7474-6]

Establishment and Meeting of the Negotiated Rulemaking Committee on All Appropriate Inquiry

AGENCY: Environmental Protection Agency (EPA).

ACTION: Establishment of FACA Committee and meeting announcement.

SUMMARY: As required by section 9(a)(2) of the Federal Advisory Committee Act (5 U.S.C. App. 2. section 9(a)(2)), we are giving notice that the Environmental Protection Agency is establishing the Negotiated Rulemaking Committee On All Appropriate Inquiry. We also are announcing the date and location of the first meeting of the Committee. EPA has determined that the regulatory negotiation process will ensure that we obtain a diverse array of input from both private sector stakeholders and state program officials who are familiar with and have experience in implementing processes to conduct all appropriate inquiry. EPA also has determined that this Committee is in the public interest and will assist the Agency in performing its duties as prescribed in the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields law). Negotiations

will begin in April 2003 and conclude by December 2003. Copies of the Committee Charter will be filed with the appropriate committees of Congress and the Library of Congress.

DATES: The first meeting of the Negotiated Rulemaking Committee on All Appropriate Inquiry will be held on April 29 and 30, 2003. The meeting is scheduled for 9 a.m. to 4:30 p.m. on both dates.

ADDRESSES: The first meeting of the Committee will be held in Conference Room 1117A of EPA East, 1201 Constitution Ave. NW., Washington, DC. The meeting is scheduled for 9 a.m. to 4:30 p.m. on April 29 and 30, 2003. FOR FURTHER INFORMATION CONTACT: Persons needing further information should contact Patricia Overmeyer of EPA's Office of Brownfields Cleanup and Redevelopment, 1200 Pennsylvania Ave., NW., Mailcode 5105T, Washington, DC 20460, (202) 566-2774, or overmeyer.patricia@epa.gov.

SUPPLEMENTARY INFORMATION: On March 6, 2003 EPA published a notice in the Federal Register (68 FR 10675) announcing its intent to form a negotiated rulemaking committee under the Negotiated Rulemaking Act of 1996 and the Federal Advisory Committee Act. The purpose of the Committee will be to conduct discussions and reach consensus, if possible, on proposed regulatory language setting standards and practices for conducting all appropriate inquiry, as required by the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields law). That Notice discussed the issues to be negotiated and the interest groups proposed as members of the committee. The notice also discussed the procedures involved in a Negotiated Rulemaking process. The public comment period for that notice closed on April 5, 2003. Issues for Negotiation We anticipate that the issues to be addressed by the Negotiated Rulemaking Committee on All Appropriate Inquiry may include:

Balancing the goals and priorities of state regulatory programs, privately-developed consensus standards, and the Congressional mandate for a federal standard for conducting all appropriate inquiry.

Developing clear and concise standards that address each of the statutory criteria (section 101(35)(B)(iii) of CERCLA).

Balancing the need to put abandoned properties back into productive reuse with concerns for public health and environmental protection.

Balancing a need for clear and comprehensive standards that will ensure a high level of certainty in identifying potential environmental concerns without imposing time consuming and unnecessarily expensive regulatory requirements.

Defining the shelf life of an assessment and the extent to which an assessment, or the results of all appropriate inquiry, may be transferred to subsequent property owners.

Minimizing disruptions to the current real estate market due to the development of a federal standard that is different from current industry protocols while ensuring that the federal standard is protective and in compliance with statutory criteria.

Identifying the extent to which sampling and analysis of potentially contaminated property may be required to document the presence, or the lack of, environmental contamination.

Identifying what information is necessary on the potential contamination of adjacent and adjoining properties, as well as underlying groundwater resources.

Establishing a list of contaminants to include in the investigation when conducting all appropriate inquiry. Participants The Committee will be composed of approximately 25 members representing parties of interest to the rulemaking ensuring a balanced representation from affected and interested stakeholder groups. EPA anticipates that the committee will contain the following types of representatives:

Environmental Interest Groups

Environmental Justice Community

Federal Government

Tribal Government

State Government

Local Government

Real Estate Developers

Bankers and Lenders

Environmental Professionals

EPA has determined that this Committee is in the public interest and will assist the Agency in performing its duties as prescribed in the Small Business Liability Relief and Brownfields Revitalization Act (the Brownfields law). The first meeting of the Committee will be held on April 29, 2003 in Washington, DC. The Committee will address organizational issues such as ground rules, schedules, and prioritization of issues discussions over the next few meetings. There is no requirement for advance registration for members of the public who wish to attend and observe the meeting. Opportunity for the general public to address the Committee will be provided at the end of the Committee meeting agenda. Thomas P. Dunne, Associate Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 03-7504 Filed 4-4-03; 8:45 am]

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Chapter 5: Selecting and Appointing Committee Members

5.0 Overview

An important element in the establishment of a federal advisory committee is the selection and appointment of committee members. This is an activity that can be started while EPA is going through the Charter approval process. Though your committee cannot meet or operate until the Charter is filed with Congress and/or GSA, selecting and appointing members early ensures that your committee can meet soon after the Charter is filed. This chapter discusses how to select and appoint members to your committee. A detailed description of the contents to be included in your membership package and the Agency's process for concurrence and approval of committee members are discussed. This chapter also summarizes additional membership considerations, such as term limits, compensation, and the ethical requirements that apply to members who are appointed as SGEs.

5.1 DFO Responsibilities

The DFO plays a central role in the selection and appointment of committee members, and has responsibility for:

1. Identifying and soliciting candidates for membership on the committee;

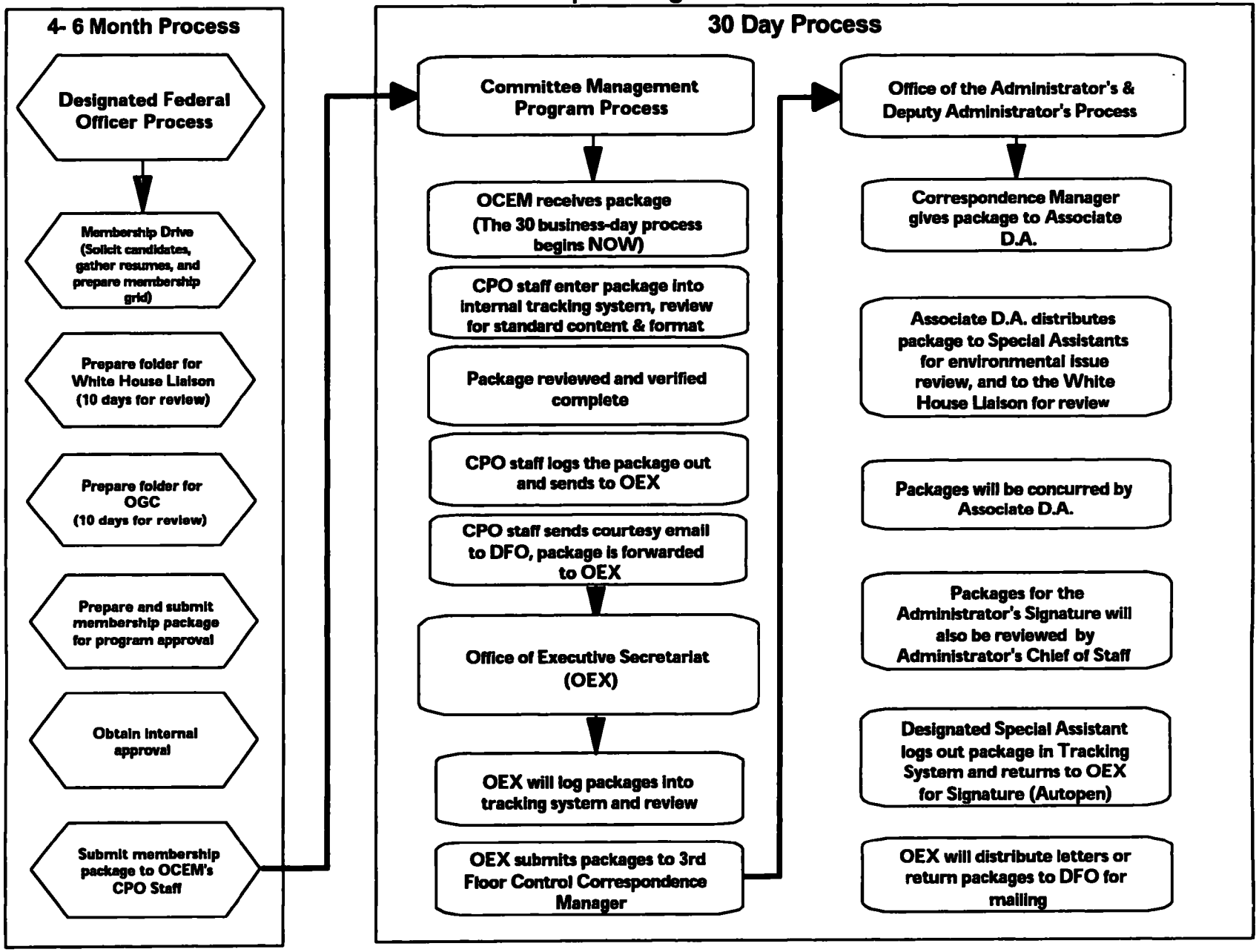
2. Establishing a balanced representation of points of view based on the function of the committee;

3. Coordinating member selection and appointment with the program office, OCEM, OGC, and the Agency's White House Liaison; and

4. Assembling the membership package and obtaining the appropriate Agency approval and concurrence.

Exhibit 5-1 provides an overview of the membership selection and appointment process and, specifically, the column on the left identifies the DFO's responsibilities during this process.

Exhibit 5-1
Membership Package Timeline



5.2 Membership Selection Process

DFOs are responsible for identifying, soliciting, and recommending individuals to serve as committee members. There are several considerations that should be factored into the membership selection process. DFOs should consider the committee's objectives, size, and FACA requirements for balanced membership. In addition, there are specific processes and activities that DFOs should follow when soliciting and evaluating candidate committee members. At key points in the selection process, DFOs should coordinate their activities and recommendations with OCEM, OGC, and the Agency's White House Liaison. These aspects of the committee member selection process are discussed in this section.

5.2.1 Membership Considerations

Before making any recommendations regarding membership composition, thought should be given to the functions, tasks, and needs of your committee. You should have a clear sense of the objectives of your committee, including the issues, concerns, disputes, and relationships that may impact subjects the committee will be addressing. Based on this information, create a list of the expertise, perspectives, and interests that should be represented on your committee. This information will affect two key membership considerations: 1) committee size and 2) composition.

Committee Size

For discretionary committees, there are no requirements regarding the size of the advisory committee. Statutes mandating the establishment of Non-Discretionary committees, however, frequently include membership requirements. For example, the Scientific Advisory Panel is limited to seven members (7 U.S.C. §136w(d), and the Science Advisory Board must have at least nine members (42 U.S.C. §4365(b)). The Negotiated Rulemaking Act limits the number of members of a "Reg-Neg" committee to 25 unless the Administrator determines that additional members are needed to achieve a balanced and/or functional committee (5 U.S.C. §565(b)). However, when you are thinking about the size of your committee, it is important to remember that a large committee can be hard to manage, less effective, and can be more costly. Therefore, you should limit the number of members on your committee to the fewest needed in order to most efficiently and effectively accomplish the objectives set out for your advisory committee in its Charter, while ensuring a balanced membership.

Composition

If you find that the committee may benefit from the assistance of specialized experts, you can bring them into the committee as paid or unpaid consultants who will participate as needed.

A key consideration when selecting committee members is the FACA requirement for *balance*. FACA requires that the membership of an advisory committee be fairly balanced in the points of view represented and the functions to be performed by the committee. Your committee's Charter should include an explanation of how balanced membership will be achieved and maintained. Starting the selection process early (four to six months before you fill any vacancies) can help you find a broader range of candidates for committee membership.

FACA does not mandate how a committee can achieve a balanced membership. This allows agencies the discretion to establish their own selection criteria based on the needs of a particular committee. General guidelines to consider when addressing balanced membership include:

1. The subject matter expertise needed to achieve the advisory committee's objective;

2. The potential geographic, ethnic, social, economic, or scientific impact of the advisory committee's recommendations;

3. The specific perspectives or points of view that should be included such as those of consumers, technical experts, academia, the public at-large, business (large or small), federal, Tribal, state, and local government, or non-governmental organizations;

4. Groups that have been involved or have a particular interest in the subject matter of the committee; and

5. The relevance of local, state, or Tribal governments to the development of the advisory committee's recommendations.

5.2.2 Other Membership Considerations

This section addresses several aspects of committee membership that you should consider during the appointment process, including term limits, use of alternates, compensation and rates of pay, and ethical requirements specific to members appointed as SGEs.

Membership Term Limits

FACA requires balanced membership and fair representation with respect to points of view. EPA's policy is that members be appointed for terms no longer than six years in order to provide fresh perspectives on the committee. Membership terms should be specified clearly in both invitation and reappointment letters.

> **Note:** DFOs may consider assigning new members to a one-year term to determine whether they will participate fully in the committee's demanding work load schedule and its collaborative process.

Under the EPA policy, the Deputy Administrator may grant re-appointments beyond the six-year limit if the program/DFO provides adequate justification as to why an appropriate replacement cannot be found. However, it is EPA policy to appoint committee members to no more than two terms. DFOs are encouraged to rotate individuals onto the committee to ensure the committee reflects differing points of view. Coordinate with the CMO if you are considering extending the term of a member beyond the six-year limit.

> **Note**: You may want to stagger the terms of members so that at any given time, no more than one-third of the committee members are at the end of their terms. This may help you avoid disruptions to committee activities, ensure a smooth succession, and maintain differing points of view.

Backup Nominees

FACA does not address the use of alternates when appointed committee members are unable to attend committee meetings. Under EPA policy, alternates may attend committee meetings on behalf of members, but alternates are not appointed as members to the committee or compensated for travel to any meetings. It is the

Agency's policy that alternates generally should not vote in committee meetings, because the alternates are not official committee members (they have not been invited by the Administrator, and they have not been evaluated in terms of a committee's balance or potential conflict of interest concerns). You should coordinate with the CMO and OGC when considering the roles of alternates in committee activities. You also should include procedures relating to the use of alternates in the committee's bylaws.

Committee Member Compensation

FACA does not require advisory committee members be compensated, unless otherwise provided bylaw. Representative members (those who represent the interests of non-federal groups or organizations) are not eligible for compensation. Alternatively, members appointed as Special Government Employees (SGEs) are eligible for compensation. Generally, members appointed as SGEs provide independent views or advice to the committee. SGEs provide expertise or perspectives that might not be available within the Agency. Unless otherwise set out in the enabling statute, the Administrator makes the final determination on whether compensation is appropriate for FAC members.

FACA requires that agencies establish a uniform and fair rate of pay for services of members, staff, and consultants of advisory committees. The GSA Rule on Federal Advisory Committee Management provides guidance in implementing FACA uniform pay guidelines for members (41 C.F.R. § 102-3.130). The rate of pay should take into consideration the significance, scope, and technical complexity of the matters the committee will address, as well as the qualifications of the committee members. The recommended rate of pay for advisory committee members should be transmitted to the Administrator for final approval.

> **Note:** The GSA Regulation allows an Agency to accept "gratuitous services of an advisory committee member, staff, or consultant who agrees in advance in writing to serve without compensation."

Special Government Employee Considerations

SGEs are temporary EPA employees who are appointed for less than 130 days out of 365 consecutive days, regardless of whether they are compensated. SGEs are subject to all ethics in government and conflict-of-interest laws, unless they are specifically exempted by statute. Note that the Appropriations Act limits our ability to compensate foreign nationals. Contact OGC's FACA attorney if you want to appoint a foreign national as an SGE. In addition, the Emoluments Clause of the US Constitution limits our ability to appoint individuals who are compensated by a foreign government as an SGE. Contact OGC's Ethics Official for advice on appointing such individuals. SGEs also must comply with the Agency's standard of conduct regulations, and complete the Agency's financial disclosure forms. Your program office's personnel team leader can advise you on the forms required from an SGE. The financial disclosure forms must be completed before the individual can be appointed as committee member and an SGE.

When drafting the invitation or reappointment letter for a person who you expect to be appointed as an SGE, you should include the following information:

1. The member's eligibility for compensation and the expected rate of compensation;

2. The member's eligibility for travel and per diem allowances; and

3. The applicability of federal ethics and conflict of interest laws, the Agency's standard of conduct regulations, and financial disclosure requirements.

Contact OCEM for additional advice or guidance on the process for appointing SGEs to your committee.

5.2.3 Solicitation and Evaluation Process

The solicitation and evaluation process should be started six months before you convene your committee. Having the best people who represent key interests and balanced viewpoints enables your committee to provide EPA with recommendations that the Agency can rely on as collective advice representing diverse stakeholder perspectives.

Soliciting Members

You typically begin the solicitation process by compiling a list of people or organizations who have knowledge and/or involvement in the issues that your committee is addressing. The list of potential candidates can be compiled from many sources, including other Agency officials, other federal officials, Tribal governments, Congress, professional associations, current and former advisory committee members, stakeholders, or the general public. It is a best practice to broaden your pool of qualified candidates by soliciting nominations of qualified individuals through a *Federal Register* notice, newspapers, and other forms of public solicitation. You also may contact the CMO or other OCEM staff to discuss approaches that have been successfully employed by other committees to identify member candidates.

> **Note:** Under EPA policy, organizations generally are not appointed as committee members. Individuals, however, may be appointed as members to represent organizations, including associations and other organized interests.

Interviewing Candidates

The candidates should be interviewed in person or by telephone using a pre-developed set of questions. The questions should be designed to determine a candidate's:

- ❑ Background and qualifications;
- ❑ Interest in, current or former involvement in, and current or former positions involving the issues or subject area to be addressed by the committee;
- ❑ Skills and experience in communication and collaboration processes;
- ❑ Views on EPA's goals for this committee process;
- ❑ Availability and willingness to commit the time needed to participate as a member of the committee (provide information

on the anticipated workload and the number and the location of committee meetings);

- ❑ What the person feels he/she could contribute to the committee; and

- ❑ Special concerns that they may have about participating on the committee.

Be sure to review your Charter often throughout this interview process to help ensure that your questions are focused on the goals of the committee as they are established in the committee Charter.

> **Note:** Caution should be taken to advise candidates that this is an initial inquiry of interest and availability and that the Deputy Administrator makes the official selection of committee members based on staff recommendations.

Evaluating Candidates

There are several criteria that could be used to evaluate potential committee members. Use your committee Charter as a basis for establishing criteria you need to fulfill your membership needs. Some examples of criteria that you may use to screen candidates include:

- ❑ The level of knowledge and experience that would help members address the issues facing the committee;

- ❑ The communication skills/style and other attributes or experiences which make individuals good candidates for a collaborative group process;

- ❑ The types of interests that would help members address the issues facing the committee;

- ❑ The number of individuals that should represent each interest, and the overall maximum number of committee members;

- ❑ The variety of perspectives or points of view needed to achieve balance; and

- ❑ Diversity, environmental justice, and geographic considerations.

These and any other criteria that you identify should enable you to best match candidate members with the needs of your advisory committee. It is also a good idea to have a list of several "backup members" to use as alternates, in case any of your potential candidates do not make the final list of members. Based on the interviews and each candidate's ability to meet the criteria that you establish, select your proposed members and prepare a final list of candidates for committee membership. Using this list, you should organize the proposed members into a grid according to their affiliation (e.g., other federal agencies, states, Tribes, local governments, private sector, academia, non-government organizations), and other attributes or interests that they represent, such as their area of expertise or their geographic perspective. This *membership grid* will help you to identify potential gaps as you seek to ensure a balanced advisory committee, and can be used as the basis of discussions with other Agency officials as final decisions about the composition of your committee and the selection of committee members are made. The membership grid is discussed further in the next section.

5.2.4 Obtaining OGC/White House Liaison Approval

You should coordinate closely with OGC and the Agency's White House Liaison as you solicit prospective committee members and select nominees. OGC can work with you to ensure that the committee is fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee. The White House Liaison is concerned with the composition of the committee, the interests represented, and the knowledge and experience of candidate members. OCEM staff members also are available to provide assistance and guidance throughout the member selection and evaluation process.

5.3 Appointing Committee Members

Although new advisory committees cannot meet or operate until the Charter is filed with Congress and/or GSA, you can begin the appointment process at any time during the committee

establishment process. Members can be selected and invited to join the committee prior to completion of the establishment process so that the first meeting can be held shortly after the Charter is filed with Congress. You should begin the appointment process as early as possible to allow sufficient time for the concurrence and approval process so that the entire process is completed on time.

> **Note:** It will take between 4 and 6 months to appoint new committee members, so start the process early.

To formally appoint committee members, you should prepare a membership package for initial review and approval by several Agency offices. First you should get initial approval from the OGC and the White House Liaison. After you prepare the official membership package, your program office should approve it. OCEM should then review and approve the package. Finally, OCEM forwards the approved package to the Office of the Executive Secretariat (OEX), and the Office of the Administrator. If the membership package is complete, this approval process will typically be completed within 30 business days of submitting the package to OCEM. Following approval and concurrence, either you or OEX will send the appropriate invitational, reappointment, and/or thank you letters signed by the Administrator or Deputy Administrator to your committee members. The following provides more detailed information on the contents of the membership package and the Agency's internal membership concurrence and approval process.

5.3.1 Membership Package Approval Process

Exhibit 5-1 at the beginning of this chapter provides a diagram of the membership package assembly, review, and approval process. The diagram also provides the time frame for the membership package preparation and approval process. Keep in mind that when replacing committee members, it is important to have the nomination/appointment procedures completed by the time an actual vacancy occurs. This typically means that you should begin the appointment process for replacements approximately six months prior to the vacancy.

5.3.2 Assembling the Membership Package

The membership package is submitted in an official green folder that contains important documents relating to the selection of members for your committee. **Exhibit 5-2** provides a representation of the contents of a membership package and how it is organized. You are responsible for preparing and organizing the contents of this package, and coordinating the concurrence and approval process within the Agency.

Left Side of Package

On the left side of the membership package, you should attach: (1) a list of names and addresses of identical letters (i.e., invitational, reappointment, thank you letters) that are included in the package (this lets the Office of the Executive Secretariat check spellings, names, etc., and know how many letters need signatures); and (2) a diskette with electronic files of the Action Memorandum and the letters included in the package.

Right Side of Package

The standard contents of the membership package are provided in the right side of the double pocket folder, and include the following elements:

1. **Action Memorandum**. This memorandum is prepared by the program office and identifies and formally requests the approval of the candidate members of the committee. The Action Memo is attached to the right of the double pocket membership folder so that it is the first document facing the reader. Action memos should be consistent and contain, at a minimum, the following elements:

   - A brief sentence listing former members and a simple explanation detailing why these members are coming off the committee (e.g., term has expired, member had conflicts and other engagements).
   - A brief paragraph describing your solicitation process/selection criteria, a listing of proposed new members, and an explanation of why you are nominating these individuals (i.e., expertise in field, recommended by non-governmental organization).

Exhibit 5-2
Contents and Organization of Membership Package Materials Checklist

The membership package should contain the following materials:

❑ 1. **Action Memorandum** containing:
- ___ An explanation of why members are coming off the committee;
- ___ The solicitation process/selection criteria, a listing of new members, and an explanation of why you are nominating these individuals;
- ___ A Membership Grid (Grid may be the same one you prepared to discuss balance;
- ___ A summary or brief biographies of nominees; and
- ___ A sentence acknowledging balance and diversity have been considered.
- ___ (for SGE Committees ONLY) If your committee obtains SGE required information regarding Personnel Documents (i.e., Ethics, Conflict of Interest, etc.) before mailing out the Invitation/Appointment Letter, then a brief sentence re: the screening of the Government Ethics summary and Confidential Financial Disclosure information should be included.

❑ 2. **Invitation Letters** that must include (at a minimum):
- ___ A brief sentence listing purpose of letter, name of committee, and what committee does;
- ___ Membership term START and END dates;
- ___ Reference to enclosed "Federal Advisory Committee Act; and
- ___ Reference to enclosed membership confirmation form.
(for SGE committees ONLY) Reference to enclosed Ethics and Confidential Disclosure Forms, and any applicable Personnel Forms, if such documents have not been provided already.

❑ 3. **Reappointment Letters** that must include (at a minimum):
- ___ A brief sentence stating purpose of letter;
- ___ Membership term START and END dates;
- ___ Reference to enclosed "Federal Advisory Committee Act;" and
- ___ Reference to enclosed membership confirmation form.

❑ 4. **Thank You Letters** that must include (at a minimum):
- ___ A brief sentence stating purpose of letter; and
- ___ Statement thanking members for their service.

- Membership Grid, showing current members, former members, and new nominees, affiliations, and terms. This grid may be the same one you prepared for discussions with OGC to discuss balance.
- A summary or brief biographies of the nominees.
- A sentence acknowledging requirements for balance and diversity have been met.

2. **Invitation Letters** for new members being appointed to the committee. Invitational letters are prepared for each appointed member and are signed by either the Administrator or the Deputy Administrator. Invitational letters should immediately follow your Action Memo. The letters follow a standard template, which should include, at a minimum:

   - A brief sentence stating the purpose of letter, name of the committee, and the scope of the committee.
   - Membership term START and END dates.
   - Reference to enclosed "Federal Advisory Committee Act."
   - Reference to enclosed membership acceptance form.

Hints for Invitation Letters/Reappointment Letters:

- Use Administrator letterhead for any letters to be signed by the Agency Administrator.
- Use Office of the Administrator letterhead for any letters to be signed by the Deputy Administrator.
- Have your Program Correspondence Control Manager review all of your letters for grammar and spelling.

3. **Reappointment Letters** for current members who will serve another term. Reappointment letters are prepared for those committee members who are invited to continue to serve on the committee for another term. Reappointment letters should immediately follow your invitational letters. The letters are signed by either the Administrator or the Deputy Administrator

and follow a standard template, which should include, at a minimum:

- A brief sentence stating the purpose of the letter.
- Membership term START and END dates.
- Reference to enclosed "Federal Advisory Committee Act."
- Reference to enclosed membership confirmation form.

4. **Thank You Letters** for current committee members who have completed their terms and will no longer serve on the committee. These letters are signed by the Administrator or the Deputy Administrator and should, at a minimum, include a statement of the purpose of the letter and an expression of appreciation for their service on the committee. Thank you letters should immediately follow your reappointment letters.

Because these examples may not be accurate templates for all committees (e.g., Reg Neg committees), be sure to contact OCEM to obtain additional examples.

Several attachments also should be included with your external correspondence in this section. Attach a copy of the FACA law and a membership acceptance form. If the committee membership includes SGEs, in addition to the FACA law and membership acceptance form, you will also need to attach the Office of Government Ethics (OGE) Confidentiality Form (EPA Form 3110-48), and a personnel package of forms. Finally, you should include the routing slip and the yellow concurrence sheet with the appropriate signatures from your program office, the OGC, OCEM, and the Office of the Administrator. *If any of these attachments are not included in the package, you should provide an explanation.* This alerts the reviewer and allows the reviewer to contact you directly without returning the package.

Additional Materials

In the expandable folder labeled Additional Documents, you may provide additional supporting documents, such as fact sheets, the previous year report or annual report, the committee Charter, and the committee bylaws. As the DFO, you have flexibility in deciding what important information to include in this section.

Before you submit the completed membership package, you may want to include the following documents and materials to ease the review and approval process:

- A "one-pager" indicating any duplicate letters that need signatures (also serves to tell the reviewer how many letters need to be signed);
- A floppy disk containing backup copies of the Action Memorandum and the letters included in the package (this allows OEX to make small changes without returning the package to the DFO);
- Tabs indicating a need for signature on the letters that need signatures;
- An acceptance form for the prospective members;
- Envelopes if OEX is distributing the package materials (If the DFO will be responsible for mailing, do not include envelopes and only include a single copy of all attachments for review. This will let OEX know the package needs to be returned to the DFO for mailing.);
- A routing slip on the outside of the package that indicates a contact person in case of any questions or early pick-up;
- A copy of FACA; and
- OGE confidential forms and personnel forms, as required (only for SGE committees).

DFO Process

As previously discussed, the membership package process begins with your efforts to identify and solicit candidates. During this process, you will discuss committee composition with the Agency's White House Liaison, and contact the OGC to discuss the balance of your committee. An important document during this part of the process is the membership grid, which you should provide to the OGC. You will forward your routing slip and required information to the White House Liaison and OGC. They will sign it after

reviewing your initial packet, before you begin preparing your membership package folder. The original routing slip will accompany your membership folder to provide verification to the Administrator's Office that you have considered balance and diversity requirements.

> **Note:** If any changes are made to the nominations list after OGC's initial review and approval, you should schedule a follow-up meeting with OGC to again review committee balance and membership.

As the composition of your committee takes shape, you should prepare the membership package and obtain approval from your program office. To verify that your management has signed off on the letters included in the package, you will attach the original concurrence slips in the membership package folder. Once you have your program's approval and then it is submitted to OCEM's Committee Program Office (CPO). At this point, the package is tracked through internal tracking systems and the 30 business day approval process begins.

Committee Management Program Process

Within five days of receiving the membership package, CPO staff will process membership packages by:

- entering the package into an internal tracking system;
- reviewing the contents and format of the package;
- verifying (by signed memorandum) that the package is complete;
- logging the package out of the tracking system and sending it to OEX; and
- Sending a courtesy e-mail to the DFO indicating that the package has been forwarded to OEX.

OEX Process

Within four days of receiving the membership package, OEX will log the package in the Agency's official tracking system and will review the package for format and language. OEX will then submit the package to the Office of the Administrator and Deputy Administrator and update the tracking system. Within 14 days, the Office of the Administrator reviews and, as appropriate, concurs

and obtains the signatures of the Administrator or Deputy Administrator (DA).

Office of Administrator's & Deputy Administrator's Process

The Administrator's Office process begins when the Correspondence Manager receives the package and provides it to the Associate Deputy Administrator. The Associate DA distributes the package to Special Assistants for a review of environmental issues and liaison activities. Packages that are authorized for the Administrator's signature are reviewed and concurred with by the Administrator's Chief of Staff. Packages authorized for the DA's signature will be concurred with by the Deputy Administrator or the Associate DA. The Designated Special Assistant will log the package out of the Tracking System and return it to OEX for signature (autopen). OEX will either distribute the packages to committee members or will return it to the DFO for mailing.

5.5 Membership Pitfalls to Avoid

Some pitfalls to avoid in the selection and appointment process include:

- Informally "inviting" individuals to join the committee before a thorough evaluation of the goals, issues, and key stakeholders has been completed;
- Inviting too many representatives of one faction or interest, and/or too few or none of other key interests – this may result in the committee not being balanced in the viewpoints represented which may skew its recommendations and reduce its effectiveness;
- Failing to develop and apply membership selection criteria to all candidates; and
- Creating a committee that is too large.

Chapter 6: Creating and Amending Federal Advisory Committee Bylaws

6.0 Overview

This chapter addresses bylaws, specifically, their purpose and functionality, and when and how to create them. This chapter also covers the amendment process. Bylaws are the internal, written rules that govern your federal advisory committee. Bylaws perform at least three functions. They determine: 1) how a committee is structured, 2) the rights of the participants within the structure, and 3) the procedures by which the rights can be exercised. Typically, bylaws are adopted or ratified by the committee at the first meeting.

Bylaws are especially useful to new DFOs as they provide the framework and structure in which the committee operates. Bylaws establish parameters by defining the scope and duration of and the procedures governing the advisory committee's work. They clearly define the mission and objectives of the committee as they answer questions related to the committee's membership and organizational structure. In addition, they address procedural issues such as guidelines related to meetings and what constitutes a quorum for voting purposes.

It is important to note that developing bylaws is considered a "Best Practice" and is highly encouraged, though not mandatory under FACA or the GSA rules.

6.1 Bylaws vs. Ground Rules and Operating Principles

Note that some federal advisory committees may opt to develop either operating ground rules or operating principles or, in some cases, both. Some ground rules merely serve as principles of agreement related to the behavior or conduct of committee members. For example, members may agree to conduct themselves in a respectful manner and be open to collaboration. Bylaws, unlike ground rules, do not contain subjective statements about the conduct or behavior of the group. On the other hand, operating principles reflect a group's procedural decisions. These can be very similar to the portion of the bylaws that articulates how workgroups are formed, and sometimes, the decision-making process to be used.

6.2 Drafting Responsibilities

Typically, you, as the DFO, are responsible for drafting and/or amending the bylaws. If a new advisory committee is formed, it is recommended that you consult the CMO who has experience creating bylaws, and the OGC FACA attorney, to assist with drafting them.

6.3 When Bylaws Are Drafted

Before an advisory committee meets for the first time, you should begin working with the CMO and the OGC FACA attorney to develop a framework for the bylaws. This work may happen several months before the first meeting or only weeks before, depending on how quickly the committee meets after the Charter is approved. It is recommended that this work begin as soon as possible.

In some cases, a Bylaws Subcommittee may be formed or an Executive Subcommittee may be tasked with creating draft bylaws after the committee's first meeting. In these situations, these subcommittees meet specifically to develop the bylaws and then bring them to the entire committee for adoption. In either case, the bylaws should be sent to the CMO and OGC for final review and approval. This approval process may simply consist of the CMO sending you an e-mail approving your committee's bylaws.

6.4 Amending Bylaws

The amending process is fairly straightforward as the bylaws may be added to, amended or repealed in its entirety or in part. Any committee member(s) or moving party may propose an amendment at any time and be adopted by a vote of at least two-thirds of the majority either at a regular meeting or in writing through a "send-in"

ballot process. (Note that administrative meetings are not considered to be FACA meetings and do not need to be open to the public.) However, the person proposing the amendment should provide each committee member with a notice of intention to amend the bylaws along with the proposed changes at least 30 days before the vote is to occur. Again, the DFO is responsible for forwarding any and all changes to the CMO and OGC for final review and approval.

6.5 Common Bylaw Sections

These sections use "boilerplate" language that is common to most bylaws. These sections may be easily created following the sample document found at the end of this chapter. Most committee bylaws address the following aspects of the committee and how it will operate:

1. Official name of the committee or board;
2. Authority by which the committee is established;
3. Mission and Scope;
4. Membership-Selection, Appointment and Termination;
5. Organization;
6. Meetings- Compliance w/ FACA, Minutes and Records, Schedule and Quorum;
7. Reports and Recommendations; and
8. Amendments.

The Charter should contain some of the information required in the bylaws. In fact, the language should be consistent in both documents. Understand that some information may be reflected in the bylaws only.

> **Note:** An advisory committee does not have the authority to change the Charter. In the event of a conflict, the Charter takes precedence over bylaws.

6.5.1 Name

This section of the bylaws should contain the organization's or advisory committee's formal name as stated in the Charter.

> **Note:** The name of the organization is the official title of the committee or board.

6.5.2 Authority

This section of the bylaws often has two parts. The first refers to the authority by which the advisory committee was established, with specific references made to the Agency, through the Administrator's Office, Office of Cooperative Environmental Management under a Charter approved by the General Services Administration. For the second part, you should state that your advisory committee provides advice consistent with the committee's current approved Charter and all FACA requirements. A Presidential advisory committee's bylaws should state "...advises the President." If it is discretionary, then the language reads, "...advises the Agency Administrator...."

6.5.3 Mission and Scope

This section of the bylaws identifies the committee's mission and the scope of work to be conducted by the advisory committee. This section may be brief, perhaps only identifying the mission statement and broader objectives and/or activities. Generally, however, it includes background information regarding the committee's history. In addition, this section discusses the mission and objectives in support of the mission, in some detail. This section should mirror the information provided in the Charter document.

6.5.4 Membership

The Membership section of the bylaws is divided into three distinct subsections: 1) Representation; 2) Participant Categories, Appointment Process, and Terms; and 3) Termination of Membership. You will need to address all three parts to some degree. Some bylaws contain single paragraphs for each part, while others are considerably more detailed and include numerous clauses within each subsection.

Representation

This section of the bylaws defines, with specificity, the committee's composition. It serves to satisfy the FACA requirement that the

committee be fairly balanced in its membership in terms of the viewpoints represented and the functions to be performed. It is up to the DFO and the program office to consider diversity within the committee. A meeting with OGC should also be a part of the process of achieving a balanced membership. For example, information in this section may include geographic representation in addition to representation from academia, consumers, technical experts, the public-at-large, business, community groups, regulators, environmental advocacy, and professional organizations. It is also important to identify any representation of local, state or Tribal governments. For more detailed information, refer to Chapter Five.

Participant Categories, Appointment Process, and Terms

This section of the bylaws is often divided into categories of participation. The process for defining these categories may also be found at Chapter Five. Organizationally, you will first define the committee members category (i.e., representative participants and SGEs). The first clause for representative members often states that the members are uncompensated volunteers with equal voting and decision making power. The next clause may state that members are appointed by the Agency's Deputy Administrator in consultation with the committee DFO and the committee Chair. The clauses which follow identify the term of service, which is usually one or two years. Subsequent clauses in this category may include:

1. The right to serve as a member on subcommittees or subgroups formed under the committee's auspices.
2. The limitations of alternates or representatives participating in a member's absence.

You should then provide the same information for each of the subsequent categories of participation. Be certain to address:

1. Compensation
2. Travel expenses and reimbursement (unless covered under a separate section)
3. Appointment process
4. Terms of service
5. Reappointment process

While the following list is not exhaustive, these additional categories may typically include:

1. Committee Advisors
2. Subcommittee members
3. Expert Witnesses and Consultants

Termination of Membership

This section of the bylaws addresses circumstances of committee removal and generally contains boilerplate language. First, this section discusses the Chairperson's ability to recommend termination if two consecutive meetings are missed. Next, it states that the Deputy Administrator (DA) may remove any members who change their professional affiliation in order to maintain balance among the membership sectors. Last, the section identifies when members may be removed for cause as determined by the Agency's Deputy Administrator. These reasons include:

Note: Only the Administrator or the Deputy Administrator (DA) can terminate committee members.

1. He/she is determined to have violated the Ethics in Government Act (SGEs only);
2. Personal/professional circumstances would prove detrimental or disruptive to his/her continued participation in the committee's work; or
3. Other reasons the DA deems appropriate.

6.5.5 Committee Organization

This section of the bylaws describes the committee's organizational structure. It may be divided into three subsections: 1) Officers; 2) Executive Committee; and 3) Committee Structure. This section may only require a couple of paragraphs, depending on the complexity of the committee.

Officers

This section may be further divided into the following smaller subsections:

1. Chair;
2. Vice-Chair;
3. Committee chair and Vice chair/Co-chair;
4. Subcommittee chair; and
5. Designated Federal Officers, as appropriate.

Whether you decide to create many subsections or use the paragraph format, this section provides much of the same type of information found earlier in the Membership sections. In addition, this section may outline the officer's role and responsibilities as well. For more information, refer to Chapter Two.

Executive Committee

This section of the bylaws typically follows the same format as the Officers' section. It begins by stating the composition of the Executive Committee. The roles and responsibilities of the Executive Committee working with the DFO are next defined. Last, it states that this Committee will work with the DFO, CMO, and OGC to ensure that all committees share information and adhere to the bylaws.

Committee Structure

Overall, this section of the bylaws discusses the operating structure of the committee. Again, boilerplate language is used to cover two main provisions:

1. The number, designation, mission, scope, and membership of committees at any time is subject to the approval by the DA,

and subject to agreement between DFOs of the subcommittee and parent committee.

2. Subcommittees and work groups formed under the committee are subject to the rules of the parent committee, and do not function or report recommendations independently.

6.5.6 Meetings

The Meeting section addresses FACA meeting requirements and procedures that a committee adopts as part of its operating procedures. Many committees choose to divide this section into five subsections: 1) Compliance with FACA; 2) Minutes and records; 3) Meeting scheduling; 4) Meeting quorums; and 5) Teleconferences and e-mail.

It is important to note that there is a distinction between teleconferences and the administrative calls made in the successful running of your committee. Administrative calls are limited to discussing non-substantive matters with committee members, such as committee membership, travel, and for committee orientation. Since these meetings are for administrative purposes, they are not subject to the requirements of FACA, including giving notice of administrative teleconferences in the *Federal Register.*

Compliance with FACA

Boilerplate language may also be used to cover more general statements. For example, many committees begin this section of the bylaws by stating that, "The Committee will operate in accordance with all of the applicable requirements of FACA. Such requirements include, but are not limited to: publishing notice of meetings in the *Federal Register*, holding open meetings, and taking and distributing meeting minutes."

You may also address specific practices related to holding open meetings in this section of the bylaws. These practices may be as general or as detailed as is necessary for the optimal functioning of your committee. For example, while the following sample language clearly articulates a Committee's operating practices, it is by no means required language:

1. Unless otherwise determined in advance and authorized by the EPA Administrator, all meetings will be open to the public.

2. All materials brought before, or presented at, the meeting will be made available to the public for review at the time of the scheduled meeting.
3. Members of the public may attend any meeting or portion of a meeting that is not closed to the public and may, at the determination of the Chair and DFO, offer oral comments during the public comment portion of the agenda.
4. Notice of meetings will be published in the *Federal Register* at least 15 days before a meeting.

This section of the bylaws may also address closed meeting procedures. Typically, it includes the following provisions:

1. Meetings will be closed only in limited circumstances, in accordance with FACA policy.
2. Requests for closed meetings need to be approved by the CMO and the OGC at least 30 days in advance of the session.
3. Where the DFO has determined that discussions during a committee meeting will involve matters that fall into one of the Government in the Sunshine Act (GISA) exemptions, the DFO will obtain both OGC approval for the closed meeting and the Administrator's written determination that the meeting will be closed. The DFO will publish an advance notice of a closed meeting citing the applicable GISA exemptions in the *Federal Register* at least 15 days before the meeting.
4. The *Federal Register* notice may announce the closing of all or part of the meeting. If, during the course of an open meeting, matters inappropriate for public disclosure arise during discussions, the DFO or Chair should terminate such discussions. The DFO should then follow the procedure set out in item 3. above to schedule a closed meeting.

Minutes and Records

Some committees also use the Meeting section of the bylaws to clarify practices related to meeting minutes and records. Specific practices regarding meeting agendas may vary, and therefore, if you decide to discuss this topic, you should include language tailored to your committee. For example, who prepares the agenda and the

timing of circulation prior to the meeting may vary from committee to committee. It is clear, however, that under FACA the DFO must approve each agenda prior to convening any meeting. Making the agenda available to the public is considered a "Best Practice" and is encouraged. The following provisions concerning meeting minutes and recordkeeping practices as they relate to public disclosure and availability are fairly consistent among committees:

1. The DFO is responsible for ensuring meeting minutes are prepared, certified by the chairperson, and copies are distributed to each committee member.
2. Minutes of open meetings are available to the public upon request (as required by FACA).
3. Minutes of closed meetings are not available to the public and are kept in a separate file.
4. FACA requires the minutes to include a record of the persons present (including the names of members of the public from whom written or oral presentations were made); a complete and accurate description of the matters discussed; conclusions reached; and copies of all reports received, issued or approved by the Committee.
5. The Chair is required to certify that the prepared meeting minutes are accurate prior to distribution.

Schedule

This section in the bylaws broadly covers the meeting schedule and is important to include. It does not clarify any details regarding the frequency of meetings. Rather, it states that the full Committee should meet in a plenary session at least once annually; the Executive Committee, if one exists, meets as needed, generally at the request of the Chair and the DFO; and the subcommittees meet at the call of the Committee chair and the DFO.

Quorum

This section clarifies what constitutes a quorum, or the number of members needed to conduct any business transactions and should be included in your committee's bylaws. For most committees, the presence of 51 percent of Committee members constitutes a quorum. Quorum also can be defined as having half of the committee members plus one present.

6.5.7 Reports and Recommendations

This section of the bylaws addresses the processes for drafting and forwarding reports and making and approving recommendations. Most committees include this section in the bylaws as it is important for establishing the levels of review and acceptance of committee, subcommittee, and other interim and final reports. You should be certain to discuss the processes and protocols adopted by your committee, with some degree of specificity. For example, some committees elect to define the decision-making process or how the group plans to achieve consensus for the development of recommendations. Often, this section also includes alternatives to these processes for special circumstances. This section should discuss whether minority reports will be permitted and, if so, how those reports will be identified and transmitted to EPA.

Unlike most sections, in this section you walk through not only each step in the process but each level of review, the necessary approvals within each level, the associated time frames for each step in the process, and any other details which will reduce confusion and ambiguity. Generally, this section requires a considerable amount of time to complete because the language should clearly reflect your committee's process agreements. Examples that may assist in developing this section may be found at the end of this chapter.

6.5.8 Amendments

In this final section of the bylaws, boilerplate language is often used. This section often simply states that, "The Bylaws may be added to, amended or repealed in whole or in part by vote of at least two-thirds of the Committee at any regular meeting or by vote in writing, provided that the notice of intention to do so is given to each member at least 30 days preceding the vote."

6.6 Other Miscellaneous Sections

Depending on the size, number of subcommittees and/or workgroups, and complexity of your advisory committee, you may determine that you should include additional sections to fully address your committee's functionality and processes. For example, if your committee routinely uses facilitators, you may wish to include a section which outlines the agreed upon processes and procedures for interacting with them. Additionally, you may create a section which details your decision-making processes. For example, should your committee determine that it wishes to operate by consensus, then this section might define consensus and discuss the process to be used in instances when consensus cannot be reached.

6.7 Tips

Bear in mind, when drafting and amending your committee's bylaws, that the purpose of them is to serve as a governance document. While the document may be prescriptive, it should not be overly constrictive; therefore, too much detail may serve as a barrier to your committee's operational efficiency. However, the bylaws should not be so vague that ambiguity and confusion result. The goal is to reach a balance which clearly articulates your committee's processes and practices. If you are uncertain at any point in the drafting or amending process, please consult either the CMO or OGC's FACA attorney.

Chapter 6 Sample Documents

Example of Bylaws Language Taken From NACEPT

BY LAWS OF THE

U.S. ENVIRONMENTAL PROTECTION AGENCY

NATIONAL ADVISORY COUNCIL

FOR ENVIRONMENTAL POLICY AND TECHNOLOGY

ARTICLE I - NAME

The name of the organization shall be the National Advisory Council for Environmental Policy and Technology.

ARTICLE II - AUTHORITY

The National Advisory Council for Environmental Policy and Technology (hereinafter NACEPT or Council) is established within the U.S. Environmental Protection Agency (EPA), Administrator's Office, Office of Cooperative Environmental Management (OCEM), under a charter approved by the Deputy Administrator and by the U. S. General Services Administration.

NACEPT advises the Administrator of EPA consistent with its current approved charter and the requirements of the Federal Advisory Committee Act.

ARTICLE III - MISSION AND SCOPE

Founded in 1988, NACEPT is EPA's national advisory committee for the formulation of recommendations and advice on environmental policy and technology. NACEPT provides a forum for public discussion and development of independent advice and counsel to the EPA Administrator by taking advantage of the respective strengths and responsibilities of business and industry, government, academia, labor, environmental advocacy organizations, community groups and others involved in environmental management. The Council considers domestic and international environmental matters.

NACEPT's mission is to help EPA improve implementation of environmental programs by fostering more effective use of the resources of all public and private institutions involved in environmental management. NACEPT's activities are designed to: (1) Promote continuing consultation and debate to ensure mutual understanding among the institutions involved in environmental management of the differing perspectives, concern, and needs of each; (2) Maximize the extent to which each institutional participant understands, accepts, and fulfills its environmental management responsibilities, (3) Facilitate broad public sharing of information on environmental problems as well as alternative approaches and implementation strategies for addressing them; and (4) Promote consideration of alternative strategies for leveraging resources to address environmental needs.

ARTICLE IV - MEMBERSHIP

Section 1. Representation of Sectors

The Council shall be comprised of senior-level representatives from a broad range of interests, including government, business and industry, academia, professional associations, and labor, environmental advocacy and community groups.

Section 2: Participant Categories, Appointment Process, and Terms

a)**NACEPT Council Members**

NACEPT Council Members, (hereinafter, Council Members) shall be volunteer officials who have full voting rights in all Council and committee actions.

1) Council Members are appointed by the EPA Deputy Administrator, in consultation with the NACEPT Designated Federal Official/Executive Director and Council Chair, for a term of one or two years. A Council Member may be reappointed by the EPA Deputy Administrator for a second term not to exceed two years.

2) Each Council Member may serve as a member of a single NACEPT Standing Committee, and may serve as a full voting member of any NACEPT subcommittee, working group, etc. (hereinafter), group formed under NACEPT auspices.

b) **NACEPT Committee Members**

NACEPT Committee Members shall be volunteer officials named to serve on a specific Standing Committee or other group formed under NACEPT auspices. Committee Members shall be full participants in the group's deliberations and have voting rights at this level. Committee Members shall not vote on matters under consideration for approval by the full Council.

1) Committee Members are appointed by the EPA Deputy Administrator, in consultation with the Council Executive Director and related Designated Federal Official. The term of a Committee Member shall be set in accordance with the needs of the Council and conveyed to the Committee Member at the time of appointment and are based on the need of the Administrator or Agency. Individuals generally shall be appointed to a one year term and may be reappointed to consecutive one year terms as deemed appropriate by the Deputy Administrator.

c) **Expert Witnesses and Consultants**

Expert witnesses and consultants provide specialized information or assistance to NACEPT. Experts and consultants have no voting rights. Expert witnesses and consultants may be invited by the Chair of either NACEPT or of a Standing Committee, in consultation with the Designated Federal Official.

Section 3. Termination of Membership

a) The Chair will seriously consider removal of a Council member if the member misses two consecutive meetings of the Council.

b) A Council Member who changes his or her professional affiliation may be removed in order to maintain balance among sectors of membership.

c) A Council Member may be removed for cause, as determined by the EPA Deputy Administrator, when he or she is determined to have violated the Ethics in Government Act or when his or her continued participation would reflect unfavorably on the overall actions of the Council.

d) A Committee Member may be removed by the Deputy Administrator in consultation with the Committee Chair and the Designated Federal Official, for the reasons stated in b) and c) above or in accordance with operating guidelines established for the Committee involved.

e) A member may be removed for other reasons the Agency deems appropriate.

ARTICLE V - COUNCIL ORGANIZATION

Section 1. Officers

a) **Council Chair**

The Council shall have a Chair appointed by the Deputy Administrator, in consultation with the NACEPT Designated Federal Official/Executive Director. The Chair shall serve a two-year term of office. The Chair may be reappointed to a second term if the Agency deems it appropriate.

b) **Council Vice Chair**

The Council shall have a Vice Chair appointed by the EPA Deputy Administrator, in consultation with the Council Chair and NACEPT Designated Federal Official/Executive Director. The Vice Chair shall serve in the absence of the Chair and shall undertake ongoing responsibilities as determined by the Council Chair and NACEPT Designated Federal Official/Executive Director.

c) **Standing Committee Chairs and Vice Chairs or Co-Chairs**

Each Standing Committee shall have a Chair and Co-Chair, appointed by the Deputy Administrator and in consultation with the Council Chair and the Designated Federal Official/Executive Director. Each Standing Committee Chair and Co-Chair shall serve a two year term of office. Committee chairs may be reappointed to a second term not to exceed four years in duration.

d) **Chairs of Other Groups Formed Under NACEPT Auspices**

The Chair's of other groups formed under NACEPT auspices shall be appointed by the NACEPT Designated Federal Official/Executive Director in consultation with the NACEPT Chair. The Chair (s) of the group formed under NACEPT's auspices shall be a NACEPT Council Member.

e) **Designated Federal Officials**

The Director of the EPA Office of Cooperative Environmental Management shall be the Designated Federal Official (DFO) for NACEPT and Executive Director for NACEPT. Standing committees formed under NACEPT auspices shall have a federal employee serve as a Designated Federal Official.

Section 2. Committee Structure

a) The number, designation, mission, scope, and membership of Standing Committees at any time will be subject to agreement between the Executive Committee and the NACEPT Designated Federal Official/Executive Director.

b) Other groups formed under NACEPT auspices (e.g., focus group, working group, subcommittee, etc.) may be formed upon agreement of the NACEPT Designated Federal Official/Executive Director and appropriate individuals.

c) The Council shall act principally through the use of its committee structure.

Section 3. Executive Committee

a) There shall be an Executive Committee of the Council consisting of the Chair and Vice Chair of the Council as well as the Chair and Co-Chair of each Standing Committee.

b) The Council Chair, in consultation with the Executive Committee and the NACEPT Designated Federal Official/Executive Director shall be responsible for overall planning for the Council and for coordinating activity among committees.

c) The Executive Committee shall be empowered to act for the Council between meetings of NACEPT.

ARTICLE VI - MEETINGS

Section 1. Compliance with FACA

NACEPT, its Standing Committees, and other groups formed under NACEPT auspices will operate in accordance with all requirements of the Federal Advisory Committee Act (FACA). Such requirements include but are not limited to: publishing notice of meetings in the Federal Register, holding open meetings, and taking and distributing minutes of meetings.

Section 2. Meeting Scheduling

a) The full Council shall meet in plenary session at least annually.

b) The Executive Committee shall meet as needed. These meetings shall be held at the request of the Council Chair and the NACEPT Designated Federal Official/Executive Director.

c) Standing Committees or other groups formed under NACEPT auspices shall meet as needed at the call of the Committee Chair and the Designated Federal Official.

Section 3. Quorum

a) The presence of fifty-one percent of council members attending a Council meeting shall constitute a quorum for transaction of business.

ARTICLE VII - REPORTS AND RECOMMENDATIONS

Section 1. NACEPT Committee Reports and Recommendations

a) A Standing Committee or other group formed under NACEPT auspices may bring a proposed recommendation forward to the full Council for review and approval at any time.

b) A majority vote of the members of a Standing Committee or other group formed under NACEPT auspices shall be sufficient for forwarding a recommendation to the full Council

for review and approval. Voting may take place in a Committee meeting by voice vote or by mail in writing. If a vote is taken at a meeting, a majority of members present shall be considered a quorum.

c) Standing Committees or other groups formed under NACEPT auspices may issue their own draft reports, including draft recommendations, if approved by a majority of the group's members as described in b) above. These reports shall be considered draft NACEPT Committee Reports by the Agency until they have undergone complete Council review.

Section 2. Council Reports and Recommendations

a) A report and/or recommendation shall be accepted for formal review and approved by the full NACEPT Council if it was approved by a majority vote of a Standing Committee or group

formed under NACEPT auspices in accordance with Article VII - Section 1.

b) Each accepted report or recommendation shall be distributed to all NACEPT Council Members for review for a minimum of 30 calendar days. A Council Member shall be assumed to approve the recommendations if no comment is received by the close of the 30-day period.

c) Final Council action on a proposed recommendation shall be completed within a maximum of 90 calendar days from the date the proposed report or recommendation was sent to the full Council for review.

d) The Council Chair shall transmit an approved Council Report or Recommendation directly to the EPA Administrator and Deputy Administrator if a majority of all Council Members approves within 30 working days. Significant minority views may be transmitted with an approved recommendation at the option of the NACEPT Chair.

Section 3. NACEPT Information Reports

All materials prepared by NACEPT , its Standing Committees, and other groups formed

under the NACEPT auspices are available to the public in accordance with the Federal Advisory Committee Act, section 10 (b) and subject to the Freedom of Information Act. Groups formed under NACEPT auspices may issue background documents, issue papers, and other materials as specially prepared NACEPT Information reports. The release of a NACEPT Information Report does not imply that its contents have been approved or agreed to by either the Council or a group formed under NACEPT auspices.

ARTICLE VIII - AMENDMENTS TO BYLAWS

The Bylaws of the Council may be added to, amended, or repealed in whole or in part by vote of at least two-thirds of the Council Members at any regular meeting or by a vote in writing taken by mail, provided that notice of intention to do so shall have been given to each Member at least 30 days preceding the vote.

Chapter 7: Holding Federal Advisory Committee Meetings and Preparing Work Products

7.0 Overview

After you have established a federal advisory committee, you will be responsible for organizing, planning, and running the committee's meetings. This chapter provides an introduction to committee meetings and the types of decisions that occur prior to convening the meetings, including whether meetings should be open or closed and whether specific meetings are subject to FACA. This chapter also gives guidance for complying with FACA requirements for managing a committee, such as providing advance notice to the public, ensuring that the public has access to open meetings, and documenting meetings and committee determinations. Pre-, during-, and post-meeting checklists are provided to assist you in running effective meetings.

7.1 DFO Responsibilities

The DFO plays an integral role in planning and running committee meetings. Specifically, the DFO is responsible for:

1. Approving all committee meetings in advance;

2. Providing public notice in advance of committee meetings, including publication in the *Federal Register*;

3. Approving meeting agendas (unless it is a Presidential advisory committee);

4. Ensuring that meetings are open and accessible to the public, unless properly closed;

5. Ensuring that detailed minutes are kept of all committee meetings and that the chairperson certifies the minutes as accurate and complete;

6. Ensuring that copies of reports are submitted to the Library of Congress;

7. Ensuring that copies of minutes and documents prepared by or

for the committee or presented to the committee are appropriately filed in a committee file accessible to the public;

8. Recommending to the Administrator that a particular meeting or portion of a meeting should be closed to the public, and preparing a letter to the Administrator requesting approval for holding a closed meeting; and

9. Preparing and delivering to the CMO an annual summary of closed meetings.

Categories of EPA Federal Advisory Committees:

Tier 1 Committee refers to a principal chartered federal advisory committee, that provides advice directly to EPA. Tier 1 committees are subject to all the requirements of FACA and the GSA rule on federal advisory committee management. Tier 1 committees are also referred to as a "parent" or "chartered" committee.

Tier 2 Committee refers to a subcommittee that is directly subordinate to a Tier 1 (parent) committee. Subcommittees are established formally and members are appointed by the Administrator. Subcommittees are not chartered. Tier 2 committees cannot function independently of their parent committee or give advice directly to EPA. It is EPA policy that Tier 2 committees comply with the requirements established by FACA and the GSA rule, except the chartering requirements. (Note: the number of Tier 1 and 2 committees will change from year to year.)

Tier 3 Committee refers to a work group that is made up of a few committee or subcommittee members which gathers information or drafts documents for a Tier 1 or Tier 2 committee. Work groups are not subject to either the FACA or GSA requirements.

Make sure you contact OCEM to place your committee meeting dates on the OCEM calendar, which contains the meeting dates of all EPA advisory committees.

7.2 Initial Meeting Considerations

There are several important decisions concerning how your federal advisory committee meetings will be conducted, such as whether the meeting(s) will be administrative or substantive in nature, whether the meetings will be open or closed to the public, whether there will be subcommittees and, if so, how subcommittees should operate, and choosing the location(s) where meetings will be held.

> **Note:** It is important to begin preparing any *Federal Register* notices you might need at least 30 days before the meeting that the notice will be announcing. This will help ensure on-time delivery of the notice and avoid delays or complications at the Federal Register Office. This also applies to other committee activities that will need *Federal Register* notices.

7.2.1 Activities Subject to FACA

All meetings and activities of advisory committees or subcommittees that involve discussion of the substantive work of the committee are subject to FACA's openness requirements, regardless of the form of the meeting (in person, or via teleconference, e-mail or internet). It is important to remember that e-mail exchanges among half or more of the committee members relating to the substantive work of the committee are considered to be "meetings" for FACA purposes and, therefore, must be conducted in a manner that provides the public with access.

7.2.2 Activities That Are Not Subject to FACA

Certain advisory committee activities are not subject to the FACA public notice and open meeting requirements. Specifically, the following activities of an advisory committee are excluded from the procedural requirements set out in the GSA rule:

1. Work group meetings. Meetings of two or more advisory committee or subcommittee members convened solely to conduct preparatory work, such as gathering information, conducting research, or analyzing relevant issues and facts in preparation for a meeting of the advisory committee or subcommittee, or to draft position papers for deliberation by the advisory committee or subcommittee.

2. Administrative work. Meetings of two or more advisory committee or subcommittee members convened solely to discuss administrative matters of the advisory committee or subcommittee (such as committee organization and discussion of bylaws and other procedural issues) or to receive administrative information from a federal officer or agency, such as travel and per diem requirements and orientation). Such meetings do not include discussion of the substantive issues being addressed by the committee or subcommittee.

You should consult with OGC when making determinations of whether a meeting will not be subject to FACA's openness requirements.

7.2.3 Open vs. Closed Meetings

FACA requires all committee meetings to be open to the public, unless the Administrator determines, in writing, that the information to be discussed at the meeting falls under one of the exemptions listed in the Government in the Sunshine Act (GISA). EPA policy also calls for OGC to approve closed meeting determinations. The GISA exemptions cover several situations, such as classified matters of national security, matters relating to internal personnel rules, and other sensitive topics. The criteria and special requirements for closed meetings are discussed in detail in Section 7.7; the exemptions are set out in Exhibit 7-5.

> **Note:** EPA rarely closes advisory committee meetings to the public. Usually only 1-2 EPA committee meetings a year are closed to the public.

7.2.4 Subcommittee Meetings

It is EPA policy that FACA subcommittee (Tier 2 committee) meetings follow all requirements for openness that Tier 1 committees follow. Although the GSA rule allows FACA subcommittees that report to their parent committees to operate outside the FACA openness requirements, the EPA policy promotes openness and transparency for all substantive subcommittee meetings. EPA believes that this approach fosters

public trust and confidence and contributes to achieving EPA's mission of improving the environment. Under the EPA policy, FACA subcommittees follow all the FACA openness requirements, including:

1. Publish a *Federal Register* meeting notice at least 15 days before a subcommittee meeting;

2. Allow the public to attend subcommittee meetings, unless they are closed in accordance with the FACA requirements;

3. Request OGC's approval of, and the Administrator's signature on, determinations that a particular subcommittee meeting or part of a meeting can be closed to the public;

4. Allow the public to submit written comments and to present oral statements when appropriate;

5. Give materials provided to, or prepared by or for, the subcommittee to the public on request (unless the material can be withheld under the Freedom of Information Act); and

6. Have a DFO who both approves subcommittee agendas and attends each subcommittee meeting.

Subcommittees that transmit their advice, recommendations, and reports to the parent committee for discussion, deliberation and final decision are not required to be separately chartered, but pursuant to EPA policy should follow all other FACA requirements. Subcommittees function as subdivisions of the parent committee. Generally, the chairperson of a subcommittee is a member of the parent committee, while the other members may or may not be parent committee members.

Under the GSA rule, subcommittees that function independent of the parent committee by providing recommendations directly to the Agency must not only observe the openness requirements, but also must be chartered.

7.2.5 Meeting Location

Typically, committee and subcommittee meetings are held in the Washington, D.C. area, or in one of the cities where EPA Regional offices are located. Meetings may be held in another location if it is more efficient or cost-effective. For example, if the majority of committee members live in a particular area of the country, it may be more cost-effective to hold the meeting in that area. If the subject of the meeting pertains to a specific location, community, or site, it might be advantageous to meet in a nearby city so that the interested public could attend the meeting. It also may be appropriate to hold a meeting in a location other than Washington, D.C., if the meeting is held in conjunction with a planned field inspection, site visit, or program meeting.

You should prepare a cost comparison to help you decide where to host the committee meetings. The cost comparison will serve to document the decision-making process. Cities that could be considered "resort locations" should be avoided, pursuant to the April 14, 1992, policy directive issued by the EPA Assistant Administrator of the Office of Administration and Resource Management.

7.3Announcing Meetings to the Public

Both FACA and the GSA rule require that EPA publish timely notice of all advisory committee meetings (both open and closed) that are subject to FACA in the *Federal Register*. GSA has defined "timely" as at least 15 days prior to the meeting. The Administrator of GSA has the authority to determine whether, for reasons of national security, a notice of an upcoming FAC meeting should not be published. The DFO is responsible for publishing the meeting notice in the *Federal Register*. Whenever possible, the DFO should consider other types of public notice to ensure that all interested persons are notified prior to the meeting.

> **Note:** Conference calls and e-mail or internet meetings require the same level of notification in the *Federal Register* and access as a face-to-face meeting. For conference calls the call-in number should <u>not</u> be included in the notice. The public can be provided access to a teleconference by providing a location where members of the public can listen to the conference call.

7.3.1 Information to Include in the Federal Register *Notice*

According to the GSA rule, *Federal Register* notices for your committee meetings must contain the following information:

1. The name of your advisory committee or subcommittee;
2. The date, time, and place of the meeting;
3. The purpose of the meeting;
4. A summary of the agenda;
5. The name and telephone number that the public can contact for additional information;
6. A statement that the meeting is open, closed, or partially closed;
7. For closed meetings, the reason for closure, with specific citations to the applicable GSA exemptions at 5 U.S.C. §552b(c); and
8. The name and telephone number of the DFO or other responsible agency official who may be contacted for additional information regarding the meeting.

You also should include in the notice for open meetings information regarding handicap accessibility.

A sample *Federal Register* notice announcing a meeting of a federal advisory committee is provided at the end of this chapter.

7.3.2 Federal Register *Deadlines*

The GSA Rule requires EPA to publish the *Federal Register* notice announcing an advisory committee meeting (both open and closed) at least 15 calendar days prior to the meeting date. To meet the 15-day deadline, the *Federal Register* notice should be submitted to the Office of the Federal Register at least 21 days prior to the meeting date. It is recommended that you begin drafting your *Federal Register* notice at least 30 days before the meeting date. The meeting notice is typically held for four working days at the Office of Federal Register for public display and inspection before it is published. The timeliness for the *Federal Register* notices are

monitored by the CMO to ensure Agency-wide compliance. You should be aware that when the Office of the Federal Register has a heavy work load, such as right before the change of administrations, it may take longer for your notice to be processed and published.

7.3.4 Other Federal Register *Notice Requirements*

In accordance with the guidance set out in the Office of the Federal Register's Document Drafting Handbook, *Federal Register* notices should be double-spaced for easier copy preparation and typesetting. Your notice should be submitted with a Federal Register Typesetting Request (EPA Form 2340-15) approved by the appropriate budget office. If the *Federal Register* notice is prepared using WordPerfect or ASCII, a 20-percent discount is applied if you provide the document on a disk and include the following statement at the bottom of the form:

> "This document was submitted with a disk and is eligible for the 20 percent typesetting discount."

Note: The NARA Federal Register Document Drafting Handbook can be accessed at the following web address: http://www.archives.gov/federal_register/document_drafting_handbook/read.html

7.4 Planning the First Meeting

Many of the decisions concerning committee meetings will be addressed as you plan for the first meeting. These decisions affect meeting logistics, distributing background materials, establishing the committee's operating principles and meeting ground rules, and preparing the meeting agenda. **Exhibit 7-1** provides a checklist of pre-meeting logistics and activities that should be considered when planning and managing your first and subsequent FAC meetings.

7.4.1 Meeting Logistics

Logistics information, including information on the location and accommodations for the meeting, should be prepared and sent to committee members, alternates, and support staff as early as possible before the meeting. This logistics information also should include specific instructions for attendees who qualify for reimbursement or pre-payment of expenses so that they can make their travel plans accordingly.

The logistics for your first meeting, and subsequent meetings, also should include planning and making arrangements for any audio-visual or presentation equipment that may be needed.

Exhibit 7-1: Pre-Meeting Checklist

- ❑ 1. Location. You first need to find and reserve a meeting location. If you cannot locate a meeting facility within EPA, search for or obtain contractor support to identify a meeting location. You can use a Government Credit Card (with pre-authorization), a Government Procurement Request (PR), or contractor support to reserve a location.

- ❑ 2. Accommodations. If the meeting is going to be in a hotel, try to arrange for a reserved block of rooms for your committee members. This helps ensure that all committee members stay on-site, and prevents members from being turned away from a booked hotel if they make their travel arrangements at the last minute. Be sure to check with the hotel to find out whether reservations for the block of rooms have to be made before a certain date.

- ❑ 3. Facility Set-up. You will need to provide the meeting facilities with "Set-up Materials" before your meeting. This includes meeting materials and such items as a table for registration.

- ❑ 4. Audio-visual Equipment. Be sure that any equipment you might need for the meeting (audio-visual, sound system, conference call compatible phones, etc.) is included in your room rental cost. If not, you should obtain a separate government procurement request to rent this kind of equipment for your meeting.

- ❑ 5. Public Notice. Submit your *Federal Register* announcement for the meeting far enough in advance that it is published at least 15 days before the meeting is to be held. (The required contents and time line are discussed in detail in Section 7.3).

- ❑ 6. Meeting Support. Make the appropriate arrangements if you intend to use or hire a facilitator and/or a note taker for your meeting. It is a good practice to have a conference call or meeting with the facilitator and/or note taker to discuss the expectations, goals, and subject matter of the committee meeting, prior to the committee meeting.

- ❑ 7. Agenda. Prepare your meeting agenda (usually in consultation with the committee chairperson). It is a good idea to list the location, date, and time of the committee meeting on the agenda so that committee members can find it easily.

- ❑ 8. Hand-outs. Put together packets of meeting materials that committee members need to review prior to the meeting. These materials usually include a cover letter, agenda items and background documents. It is a best practice for the cover letter to include hotel information, deadlines for room reservations, meeting date(s), location, and time, a list of attached materials, and any other information you think is important.

Exhibit 7-1: Pre-Meeting Checklist (continued)

- ❑ 9. Mail the meeting packet out early enough that the committee members get them in time to prepare for the meeting. **Note:** Under FACA, all materials prepared for or provided to the committee members are part of the FACA record and must be maintained/filed and provided to the public in accordance with the statutory requirements. (More detail on record-keeping can be found in Chapter 8).

- ❑ 10. Meeting Supplies. Gather your meeting supplies together (pens, tablets, name tags, meeting signs, etc.) and, if necessary, have them sent to the meeting location.

- ❑ 11. Extra Copies. Make sure you have extra copies of your information packets and the agenda for the registration table, as well as sign-up sheets and a membership list (with telephone numbers).

7.4.2 Informing Committee Members

Prior to the committee meeting, you should prepare and distribute meeting materials packets. These packets should be sent out to the members of your committee early enough to allow adequate review and consideration before the meeting takes place.

Brief reports summarizing the major issues and background information that the Agency wishes the committee to consider should be prepared and included in the packets. Additional educational materials, workshops, or presentations may be appropriate depending on the level of knowledge members have about the issues that will be addressed at the meeting.

A special orientation meeting before the first official committee meeting may be advisable to educate the committee on how EPA manages FACs and the topics and issues that they will be addressing, and to provide information on travel and per diem procedures. These pre-meetings also can be used to provide training to committee members on how to effectively participate in a collaborative dialogue and on improving communications skills. These kinds of training activities can greatly improve the efficiency of your advisory committee discussions and can increase the ability of committee members to work together effectively and reach agreement more quickly. The portions of orientation meetings that are administrative in nature are not considered to be FAC meetings and, therefore, are not subject to FACA's openness requirements. Portions of the meeting addressing topics and issues that the committee will be addressing are substantive in nature and are subject to all FACA openness requirements.

7.4.3 Establishing Operating Principles and Ground Rules (Bylaws)

Operating principles or "procedural protocols," generally referred to as bylaws, establish how the committee meetings will be carried out in terms of organization and procedures. Such principles should be discussed and agreed to by the committee members, although it may be helpful for you to prepare and distribute "strawman" procedures prior to the first meeting. Chapter 6 provides detailed information on the process for developing and approving committee bylaws. Examples of what could be included in the operating principles include:

- ❑ 1. Member responsibilities, and use of member alternates;
- ❑ 2. Meeting attendance expectations;
- ❑ 3. Travel and reimbursement process (when applicable);
- ❑ 4. Requirements for SGE's (if applicable);
- ❑ 5. Roles and responsibilities of Agency representatives and staff;
- ❑ 6. Role of the facilitator(s) and other contract support staff, if any;
- ❑ 7. Committee decision making process (may be by majority vote or consensus; use of Roberts Rules of Order);
- ❑ 8. Committee recommendations (i.e., how to finalize, transmit to Agency; and Agency responsibilities related to responding to committee recommendations);
- ❑ 9. How the committee will deal with minority views and reports; and
- ❑ 10. Committee termination process.

You also may consider establishing ground rules for the committee meetings. Ground rules describe the rules of conduct for meeting participants and, like the operating principles, can help to ensure that meetings operate smoothly and efficiently, and that committee participation is fair and equal. Examples of some common types of committee ground rules include:

- How meetings are to be run;
- Protocol for speaking or asking questions (committee members, general public, and observers);
- Presentation formats, time frames, and other requirements;
- Document and information sharing;
- Interaction with the media and other outside communications; and
- Confidentiality and attribution of remarks.

If the committee is using a facilitator for the committee meetings, you should consult with that person when preparing draft ground rules and/or operating procedures for committee meetings. These materials are usually prepared jointly by the facilitator and the DFO before the first meeting. It is important to ensure that the facilitator understands the FACA requirements.

7.4.4 Preparing Meeting Agendas

FACA requires the preparation of an agenda for each meeting that identifies the topics that will be discussed at the committee meeting. FACA also requires the DFO approve the agenda prior to convening a meeting. You may want to draft an agenda and distribute it to committee members or the committee chairperson for comment prior to the meeting (often this task falls to the committee DFO). This gives committee members the opportunity to suggest discussion topics. A revised agenda should incorporate member comments, as appropriate, and be sent to the committee one to two weeks prior to the meeting.

The public comment period should be established as a set time in the meeting agenda. The agenda is also the appropriate document to identify any portions of the meeting that will be closed to the public.
The requirements for a closed meeting, or closing portions of the meeting, are discussed in detail in Section 7.7.

7.5 Running Committee Meetings

After preparations for committee meetings are in place, it is time to convene and run the meetings. Detailed explanations of the activities that you should consider for running an advisory committee are discussed in the following sections. In addition, **Exhibits 7-2** and **7-3** provide checklists for activities that can be carried out during and after committee meetings. These checklists contain best practices that can help you in successfully managing and maintaining your advisory committee. These practices are equally useful for the first and subsequent committee meetings.

7.5.1 Establishing Milestones

It is a good idea to discuss the draft work plan at the first meeting of your FAC. The DFO usually drafts an initial work plan for the committee before the first meeting. The draft work plan is helpful in predicting the number and frequency of advisory committee meetings. It also outlines the goals for each meeting. Your advisory committee may not completely agree with the contents of the draft work plan and the meeting schedule. The DFO should work with committee members to develop a committee work plan that reflects the issues, work approach and schedule that works best and is acceptable to all of the parties.

The committee should review and discuss the draft bylaws (approved by the CMO and OGC), during the first committee meeting. It is recommended that the committee further discuss the bylaws and make revisions during the second meeting. You can find more information on creating the bylaws for your committee and the approval process for draft bylaws in Chapter 6.

Exhibit 7-2: Checklist of Activities During Meetings

Use the following best practices as guidelines for basic "housekeeping" activities related to conducting committee meetings:

- ❑ 1. Arrive early to set out your materials, make sure your room is set-up correctly, and make sure all necessary equipment is provided.
- ❑ 2. Set up the registration table.
- ❑ 3. Keep a list of your committee members handy to track attendance. Attendance is part of the official meeting record and, therefore, should be accurate.
- ❑ 4. Have members of the public who attend the meeting sign in. Have those who want to make oral comments sign up so that you have a record of their names. This also is part of the official meeting record. The public comment period should be a set time on the meeting agenda.
- ❑ 5. Do your best to keep the committee meeting moving forward and following the agenda. Frequently this is the job of the committee chairperson, not the DFO.
- ❑ 6. Write down any questions brought up by your committee that remain unanswered by the end of the meeting, noting when an answer will be supplied to the committee members.
- ❑ 7. Work with the committee chairperson before the meeting to establish what information should be included in the minutes. Due to the potential applicability of the Information Quality Guidelines, this is especially important if the person taking notes and drafting the minutes is an EPA employee or EPA contractor. Assign the task of taking meeting minutes to a person who is able to take accurate minutes.
- ❑ 8. Note any recommendations or possible recommendations for further discussion.
- ❑ 9. Track any suggestions that come to mind or are supplied by committee members for future meeting discussion topics, agenda items, future meeting dates, and future meeting formats.
- ❑ 10. Be sure to make a note of any meeting highlights that should be included in any meeting minutes or meeting products.

Exhibit 7-3: Checklist of Post-Meeting Activities

Use the following best practices as guidelines for follow-up activities to help manage and track the deliberations of your FAC:

- ❑ 1. Prepare a one-to-two-page summary of the meeting (separate from the minutes) that includes the reason for the meeting, any decisions made, any future actions agreed upon, those members not in attendance, and the date of the next meeting. This document will help keep the meeting fresh in your mind and serve as a quick reference tool in future meetings and in other FAC management activities.

- ❑ 2. Discuss meeting notes format with the note taker and get a timeline for completion of a draft of the minutes that will be available for committee chairperson and/or members to review. The GSA rules require the committee chairperson to certify the accuracy of the minutes within 90 days after the meeting takes place.

- ❑ 3. Follow-up with your committee members regarding any materials that should send them, any action items they may have been assigned, and the date and time of the next meeting.

- ❑ 4. Update and maintain your files of materials that have been provided to or prepared by or for your committee members. FACA requires this file to be available for public inspection and copying.

- ❑ 5. Record all costs associated with the meeting for future planning and reporting purposes.

Usually the chairperson of the committee leads the discussion of the goals, milestones, schedule and work plan components. For some committees, however, the services of a neutral facilitator may be useful in helping the committee reach agreement on these items. It is a good idea to check the committee's progress against the work plan, milestones and schedule at committee meetings. Update the work plan, milestones and schedule as necessary. These milestones and guidelines will also serve as your benchmark for the periodic evaluation of your FAC.

7.5.2 Ensuring Accessibility

The meeting room should be large enough to accommodate the committee members, EPA staff and a reasonable number of interested members of the public, based on similar meetings in the past. The DFO is responsible for ensuring compliance with the GSA rule requirement that meetings be held at reasonable times and in a manner or place that is reasonably accessible. The meeting location must be accessible to those in wheelchairs and others with special needs. In addition, individuals with hearing impairments may need special accommodations. The *Federal Register* notice for your meeting should address accessibility and accommodations for persons with disabilities.

> **Note:** You should add language to the *Federal Register* meeting notice stating, in effect, that: "Individuals requiring special accommodations at this meeting, including wheelchair access to the conference room, should contact the appropriate contact at least five business days prior to the meeting so that appropriate arrangements can be made to facilitate their participation."

7.5.3 Other Ways to Involve the Public

FACA requires you to publish a *Federal Register* notice of each meeting, but you may want to consider other ways of notifying the public of your committee's activities. Newspapers, associations, and periodicals can all be useful tools for informing the public of the work of your committee. Making any written materials prepared by or for the committee available to the public also facilitates public involvement. To achieve maximum public involvement in your FAC, you may want to consider other ways of announcing public meetings and making committee documents

available to the public. For example, you could create a website for your committee where you post meeting notices, committee documents and background materials. You also could develop a brochure explaining how the public can obtain documents and submit oral and written comments to the committee.

7.5.4 Conference Calls and Meetings

Conference calls are treated in the same manner as in-person meetings with respect to public notice and participation. When arranging a conference call among committee members, you must notify the public by publishing a notice in the *Federal Register* that identifies the date, time, and purpose of the call. You also must provide the public with the ability to listen in on the conference call. This can be accomplished by setting up a conference room for the public with a telephone link to the conference call. In addition, consider the following issues related to managing conference calls:

- ❑ 1. As soon as you have set a date for your call, reserve enough lines for committee members;
- ❑ 2. The *Federal Register* notice should specify that a teleconference, rather than an in-person meeting is taking place;
- ❑ 3. The conference call number should not be published in the *Federal Register* notice;
- ❑ 4. It may be helpful to number the lines of the documents and materials you send out to the committee prior to the call. This will reduce confusion and misunderstanding in the discussion of, and referring to, any documents or materials;
- ❑ 5. Provide some simple ground rules for your committee members to follow when on the call (e.g., always identifying themselves when speaking, and allowing each person time to speak). Include specific rules for teleconferences in your committee's bylaws;
- ❑ 6. Take a roll call at the beginning of the call, to document attendance at the conference call meeting; and

- ❑ 7. Because a conference call is an official meeting of the committee, meeting minutes are kept as they would in a face-to-face meeting.

7.6 Preparing Meeting Products

The recommendations and documents that your advisory committee creates are the most important aspect of your advisory committee process. Those recommendations and documents, in addition to the meeting minutes, serve as a record of your discussions, the decisions that were made, and the ideas that were expressed. Due to the importance of these documents, they should be reviewed carefully. Guidance on developing these meeting products is discussed in detail in the sections that follow.

7.6.1 Keeping Meeting Minutes

It is the responsibility of the DFO to ensure that detailed minutes are kept of each advisory committee or subcommittee meeting. These minutes are not required to be verbatim transcripts. The program office, however, may determine that a verbatim transcript is preferable to minutes. In such cases, the verbatim transcript can be used as the minutes, providing it contains the required information as is certified by the committee chairperson. The GSA rule requires the official minutes to include the following information:

- ❑ 1. The time, date, and place of the meeting;
- ❑ 2. A list of advisory committee members, staff, and Agency employees present;
- ❑ 3. Members of the public who presented oral or written statements;
- ❑ 4. An accurate description of matters discussed and the resolution, if any, made by the committee; and
- ❑ 5. Copies of each report or other documents received, issued, or approved by the advisory committee.

In addition, it is recommended that you include:

- ❑ An estimate of the number of members of the public present; and
- ❑ A description of any recusal by advisory committee members.

Remember, the chairperson must certify to accuracy of the advisory committee minutes within 90 days after the meeting.

7.6.2 Other Types of Meeting Products

Over the years EPA has developed several categories into which FAC meeting products may be organized. All of these meeting products can and do involve advice and recommendations of the committee. You should remember that, regardless of the meeting product category, subcommittees may not provide advice and recommendations to EPA without going through the parent committee. Major meeting product categories include:

- ❑ Consultations, which are an early, low-cost endeavor with your committee to obtain member views on issues for which EPA has not yet developed a plan of action. There is no intent or expectation that a consultation will result in a report or a specific recommendation. Consultation is more of an information exchange between EPA and the committee. Remember that if consultation with a subcommittee results in advice or a recommendation, it must be discussed and deliberated on by the parent committee before being transmitted to EPA. Consultation should not be confused with a Peer Review Report.
- ❑ Commentaries, which are a generation of thoughts from your committee members that the committee believes are important enough to be conveyed to the Administrator and the public, and are often in the form of a letter. Remember, a subcommittee should not be communicating directly with EPA, any letters to the Administrator must come from the parent committee.
- ❑ Peer Review Reports, which are independent reviews of near-

final EPA work products that are the result of several committee meetings where first, EPA presents information, then the public comments, and last, the committee discusses the presented issues.

- ❑ Advisories, which can be similar to Peer Review Reports, but are conducted while EPA still has some flexibility as to how it plans to close-out the discussed project, or it can be a "mid-course" review that provides suggestions on how to proceed with a pre-existing project. A "mid-course" review can result in formal advice from your advisory committee.

- ❑ Committee Recommendation Letters are exactly that, usually in the form of a letter to the Administrator, and relate to whatever segment of a multi-segment project your committee is working on. Committee recommendation letters are appropriate when the subdivided work does not rise to the level of requiring a full formal report.

- ❑ Committee Reports are the formal summary of the findings of your advisory committee. They include the advice your committee gives the Agency, and the findings or decisions made during your committee meetings.

7.6.3 Identification of Committee Products

Because committee reports and other work products are not products of EPA, it is important to ensure that every meeting product or report generated by your advisory committee (and any website you set up for your committee):

- ❑ Includes a disclaimer that the document is a product of the advisory committee, does not reflect the views and policies of EPA, and does not represent information disseminated by EPA (this will help the public understand that the Information Quality Guidelines [IQGs] apply only to information disseminated by EPA and do not apply to the work product); and

- ❑ Does not use the EPA logo.

A sample disclaimer for a FAC meeting product/report is provided below. Remember, similar disclaimers should be posted on the committee's website.

If your advisory committee has any subcommittees (Tier 2), the Tier 1 advisory committee should discuss and deliberate on any work products and advice generated by the subcommittee. "Meaningful discussion of advice" should take place at the parent committee (Tier 1) level, and any products generated by subcommittee or work groups should be used by your advisory committee to spark discussion and to generate their own products.

Sample Disclaimer for an Advisory Committee Work Product

This report was written as a part of the activities of the National Advisory Council for Environmental Policy and Technology (NACEPT), a public advisory committee providing extramural policy information and advice to the Administrator and other officials of the U.S. Environmental Protection Agency (EPA). The Council is structured to provide the balanced, expert assessment of policy matters related to the effectiveness of the environmental programs of the United States. This report has not been reviewed for approval by EPA and hence, the report's contents and recommendations do not represent the views and policies of the EPA, or other agencies in the Executive Branch of the federal government. Further, the content of this report does not represent information approved or disseminated by EPA. Mention of trade names of commercial products does not constitute a recommendation for use.

7.6.4 Filing FAC Documents/ Products with the Library of Congress

The DFO must file eight copies of every report produced by the committee with the Library of Congress (LOC). The Librarian of the LOC will prepare a depository for your reports and any other documents you may wish to file at the LOC where they will be available to the public.

7.7 Holding Closed Meetings

In order for your committee to conduct a meeting that is closed to the public, you must have a closed-meeting determination approved by the Office of General Counsel, and signed by the Administrator. In addition, your meeting topics must fall within the exemptions outlined in the Government in the Sunshine Act (GISA) (5 U.S.C.

552b(c)) that justify closure. The materials and documents provided to or prepared by or for, a closed meeting also may be exempt from public disclosure under the Freedom of Information Act.

Exhibit 7-5 provides the actual statutory language provided in GISA and identifies the specific exemptions that are permitted. For example, meetings concerning classified national defense or foreign policy matters, personal privacy matters, and trade secrets can be closed. Consult OGC when determining whether one of the GISA exemptions covers the subject matter of your meeting.

EPA seldom closes advisory committee meetings. EPA, however, has closed advisory committee meetings where the purpose of the meeting was to recommend awards for EPA employees.

7.7.1 Requirements for Closed and Partially Closed Meetings

Under FACA, the provisions requiring open meetings and public participation do not apply to a meeting or portion of a meeting that the Administrator determines may be closed in accordance with the exemptions set out in GISA (5 U.S.C. §552b).

When all or part of your meeting is to be closed to the public, FACA still requires you to publish a meeting notice in the *Federal Register*. The fact that the meeting or portion of the meeting is closed should be reflected in the notice for that meeting, as well as in the agenda. When only part of a meeting is to be closed, you should arrange the agenda, if possible, to facilitate public attendance during the open portion(s) of the meeting. For example, hold the closed portion of the meeting first or last. When a meeting (or portion of a meeting) is closed, members of the advisory committee should not disclose the matters discussed at that closed meeting, except to other members of the advisory committee, the staff of the advisory committee, or EPA employees. When your meeting (or a portion of a meeting) is closed, only members of your advisory committee, its staff, and specified federal employees are permitted to attend.

Exhibit 7-5: Exemptions for Closed or Partially Closed Meetings

The Government in the Sunshine Act identifies matters that can form the basis for a closed meeting. When the following matters are to be discussed at an advisory committee meeting, the Administrator may close or partially close the meetings. Specifically a meeting may be closed or partially closed when information addressed in the meeting is likely to:

(1) disclose matters that are

(A) specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy; and

(B) in fact properly classified pursuant to such Executive Order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute

(A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would

(A) interfere with enforcement proceedings;

(B) deprive a person of a right to a fair trial or an impartial adjudication;

(C) constitute an unwarranted invasion of personal privacy;

(D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

(E) disclose investigative techniques and procedures, or

(F) endanger the life or physical safety of law enforcement personnel.

Exhibit 7-5: Exemptions for Closed or Partially Closed Meetings (Continued)

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would:

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to:

(i) lead to significant financial speculation in currencies, securities, or commodities, or

(ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of the law or otherwise involving a determination on the record after opportunity for a hearing.

Steps to Holding a Closed Meeting:

1. Make sure your determination to close your committee meeting, or portion of the meeting, to the public complies with the Government in the Sunshine exemptions.

2. Have your CMO and the OGC approve your closed meeting request at least 45 days prior to the meeting date.

3. Have the Administrator approve the closed meeting request (after OGC review) at least 30 days prior to the meeting date.

4. Draft the *Federal Register* notice for the closed meeting so that the reasons for closing the meeting are clear, and that if only a portion of the meeting is closed, it is clear which portion will be closed to the public. The notice should be drafted before going to OGC for approval.

5. You will need to prepare and submit a report to the CMO once a year outlining the activities of any closed meetings you have held.

7.7.2 Procedures for Closing a Meeting

At least 45 days prior to the meeting date, the CMO and OGC should review the request to close all or part of the meeting, the draft determination memorandum, and the draft *Federal Register* notice before they are forwarded to the Administrator for his/her approval.

FACA requires the determination memorandum to contain the reasons for the closure. The determination also should cite the applicable GISA exemption.

The DFO should forward the written request for a closed meeting determination to the Administrator at least 30 days before the scheduled meeting. The Administrator signs the determination if he/she agrees that closing the meeting is consistent with GISA and FACA. This determination is made available to the public upon request, as required by the GSA rule. The closed meeting

determination is judicially reviewable. If a court finds that closure is not justified, it can order the meeting to be opened to the public.

7.7.3 Federal Register *Notices for Closed Meetings*

The *Federal Register* notice for a closed or partially closed meeting should outline the reasons for closing the meeting and, as required by the GSA rule, include the specific GISA exemptions relied on for closing the meeting..

7.7.4 Reports Requirements for Closed Meetings

The DFO, should prepare and submit a report to the CMO at least once a year that summarizes the closed activities of the committee, consistent with the exemptions to the Freedom of Information Act (5 U.S.C. § 552(b). The closed meeting report must be filed with the Library of Congress for public inspection.

You must keep detailed meeting minutes of closed meetings (or portions of meetings that are closed) in the same manner as open meetings. However, the minutes of a closed meeting can be withheld under FOIA.

7.8 Ethics

Ethics requirements are an integral part of federal advisory committees and committee members. All Designated Federal Officers with Special Government Employees (SGEs) should be familiar with EPA Ethics Advisory 97 - 15, which is in Appendix A of this handbook.

Federal Advisory Committee members who are Special Government Employees are subject to criminal conflict of interest statutes and related restrictions. Designated Federal Officers with Special Government Employees should also be familiar with the summary of ethical requirements applicable to SGEs, which is contained in Appendix B.

As stated in EPA Ethics Advisory 97 -15, Special Government Employees are required to have annual training in ethics. The Science Advisory Board's CD ROM disk on ethics training or similar appropriate training can be used for this annual requirement. Consult the Agency's Ethics Official on the appropriateness of similar training.

Chapter 7 Sample Documents

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Sample EPA Federal Advisory Committee Meeting Notice

Federal Register: February 25, 2003 (Volume 68, Number 37)]

[Notices]

[Page 8756-8757]

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

[DOCID:fr25fe03-46]

ENVIRONMENTAL PROTECTION AGENCY

[FRL-7454-6]

Gulf of Mexico Program Management Committee Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of meeting.

SUMMARY: Under the Federal Advisory Committee Act (Pub. L. 92-463), EPA gives notice of a meeting of the Gulf of Mexico Program (GMP) Management Committee (MC).

DATES: The meeting will be held on Wednesday, March 12, 2003, from 10:00 a.m. to 5:30 p.m., and on Thursday, March 13, 2003, from 8:30 a.m. to 1:00 p.m.

ADDRESSES: The meeting will be held at the Double Tree Hotel, 300 Canal Street, New Orleans, Louisiana. (1-888-874-9074)

FOR FURTHER INFORMATION CONTACT: Gloria D. Car, Designated Federal Officer, Gulf of Mexico Program Office, Mail Code EPA/GMPO, Stennis Space Center, MS 39529-6000 at (228) 688-2421.

SUPPLEMENTARY INFORMATION: Proposed agenda items include: Update on Progress of Executive Order, FY 2005 State Project Meetings, Report on Mercury Project Team Meeting, Report on Nutrient Pilot Study in Northern Gulf, Report on Pilot Nitrogen Farming Project, Gulf of Mexico Governor'sAccord Workgroup Coordination, Harte Institute Proposal for Joint Symposium, The Nature Conservancy Migratory Birds Proposal. The meeting is open to the public.

Dated: February 14, 2003.

Gloria D. Car,

Designated Federal Officer.

[FR Doc. 03-4379 Filed 2-24-03; 8:45 am]

BILLING CODE 6560-50

Sample Non-EPA Federal Advisory Committee Meeting Notice Containing Handicap-Access Language

[Federal Register: September 2, 2003 (Volume 68, Number 169)]

[Notices]

[Page 52216]

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

[DOCID:fr02se03-89]

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DEPARTMENT OF HOMELAND SECURITY

Coast Guard [CGD08-03-034]

Houston/Galveston Navigation Safety Advisory Committee Meetings

AGENCY: Coast Guard, DHS.

ACTION: Notice of meetings.

SUMMARY: The Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC) and its working groups will meet to discuss waterway improvements, aids to navigation, area projects impacting safety on the Houston Ship Channel, and various other navigation safety matters in the Galveston Bay area. All meetings will be open to the public. DATES: The next meeting of HOGANSAC will be held on Thursday, October 9, 2003, from 9 a.m. to 12 a.m. (noon). The meeting of the Committee's working groups will be held on Thursday, September 25, 2003, at 9 a.m. to 11 a.m. The meetings may adjourn early if all business is finished. Members of the public may present written or oral statements at either meeting. Requests to make oral presentations or distribute written materials should reach the Coast Guard 5 working days before the meeting at which the presentation will be made. Requests to have written materials distributed to each member of the committee in advance of the meeting should reach the Coast Guard at least 10 working days before the meeting at which the presentation will be made.

ADDRESSES: The full Committee meeting will be held at the Houston Yacht Club, 3620 Miramar Drive, La Porte, Texas (281) 471-1255. The working groups meeting will be held at the Port of Texas City, 2425 Highway 146 North, Texas City, Texas (409) 945-4461. Written materials and requests to make presentations should be sent to Commanding Officer, VTS Houston-Galveston, Attn: LT Tobey, 9640 Clinton Drive, Floor 2, Houston, TX 77029. This notice is available on the Internet at http://dms.dot.gov.

FOR FURTHER INFORMATION CONTACT: Captain Richard Kaser, Executive Director of HOGANSAC, telephone (713) 671-5199, Commander Tom Marian, Executive Secretary of HOGANSAC, telephone (713) 671-5164, or Lieutenant (LT) Kelly Tobey, assistant to the Executive Secretary of HOGANSAC, telephone (713) 671-5155, e-mail katobey@vtshouston.uscg.mil.

SUPPLEMENTARY INFORMATION: Notice of these meetings is given pursuant to the Federal Advisory Committee Act, 5 U.S.C. App. 2. Agendas of the Meetings Houston/Galveston Navigation Safety Advisory Committee (HOGANSAC). The tentative agenda includes the following: (1) Opening remarks by the Committee Sponsor (RADM Duncan) (or the Committee Sponsor's representative), Executive Director (CAPT Kaser) and Chairman (Tim Leitzell). (2) Approval of the June 5, 2003 minutes. (3) Old Business: (a) Dredging projects. (b) Electronic navigation. (c) AtoN (Aids to Navigation) Knockdown Working Group. (d) Mooring subcommittee report. (e) Texas City Container Terminal Update. (f) Education initiative. (g) Port Security Subcommittee report. (h) Bridge Allision Prevention Working Group. (4) New Business. Working Groups Meeting. The tentative agenda for the working groups meeting includes the following: (1) Presentation by each working group of its accomplishments and plans for the future. (2) Review and discuss the work completed by each working group. Procedural Working groups have been formed to examine the following issues: dredging and related issues, electronic navigation systems, AtoN knockdowns, impact of passing vessels on moored ships, boater education issues, and port security. Not all working groups will provide a report at this session. Further, working group reports may not necessarily include discussions on all issues within the particular working group's area of responsibility. All meetings are open to the public. Please note that the meetings may adjourn early if all business is finished. Members of the public may make presentations, oral or written, at either meeting. Requests to make oral or written presentations should reach the Coast Guard 5 working days before the meeting at which the presentation will be made. If you would like to have written materials distributed to each member of the committee in advance of the meeting, you should send your request along with 15 copies of the materials to the Coast Guard at least 10 working days before the meeting at which the presentation will be made.

Information on Services for the Handicapped

For information on facilities or services for the handicapped or to request special assistance at the meetings, contact the Executive Director, Executive Secretary, or assistant to the Executive Secretary as soon as possible.

Dated: August 20, 2003. J.W. Stark, Captain, U.S. Coast Guard, Commander, 8th Coast Guard Dist., Acting.

[FR Doc. 03-22205 Filed 8-29-03; 8:45 am] BILLING CODE 4910-15-P

Chapter 8: Renewing or Re-establishing a Discretionary Advisory Committee and Amending the Charter

8.0 Overview

Under FACA, a chartered discretionary federal advisory committee terminates automatically after two years unless it is renewed prior to the expiration date. If you determine that your advisory committee needs to continue beyond those two years you will need to submit a renewal package. To ensure that your chartered committee is renewed prior to the expiration date, you should begin the renewal process approximately four to five months before the committee is scheduled to end.

If the termination date for your committee passes, you cannot use the renewal process; you will have to go through the entire establishment process. This chapter outlines the process, and assists you in preparing the materials needed to renew or re-establish your advisory committee.

Generally, you should amend the Charter of your federal advisory committee when you renew the committee but a Charter may be amended at other times. The Charter can be amended when the DFO, the CMO or the EPA Deputy Administrator determines that the current provisions of the Charter have become obsolete or the sponsoring program office determines that changes need to be made in the provisions to allow the committee to address additional issues. Charter amendments fall into two categories: major and minor. More detailed descriptions of both types of Charter amendments, and what you need to do in order to file them, also are provided in this chapter. It is important to note that Charter amendments should not substantially change the objectives and scope of the advisory committee.

8.1 Renewal of a Discretionary Advisory Committee

Under FACA, a Chartered discretionary advisory committee is terminated automatically two years after the date it is established unless it is renewed by EPA. Renewal extends the life of an EPA discretionary advisory committee for another two-year period. To be effective, renewal must occur before the date the committee Charter expires. Therefore, it is recommended that you begin the renewal process approximately four to five months before the committee expires.

If an advisory committee is terminated, it must be re-established and a new Charter filed before the committee may meet or take any action. Re-establishment is extremely rare at EPA—there has only been one re-establishment in approximately 25 years.

You should submit all actions to renew or re-establish a discretionary FAC to the Agency's CMO for review.

8.1.1 Initiating a Renewal or Re-tablishment

Assistant Administrators, Associate Administrators, Regional Administrators, and heads of staff offices reporting to the Administrator within their functional areas of responsibility may initiate requests to renew or re-establish federal advisory committees. Send requests through EPA's CMO to the Deputy Administrator.

8.2 Process for Renewing a Discretionary Advisory Committee

The CMO will notify the advisory committee DFO when it is time to begin the renewal process by sending a draft Charter renewal package to the DFO. Because the CMO must consult with GSA on committee renewals, it is important to comply with GSA's time line to prevent automatic Charter termination under the FACA sunset provision. The draft renewal package consists of a:

1. Transmittal memorandum;
2. Charter to be renewed;
3. Justification for renewal; and
4. *Federal Register* notice announcing the renewal.

After receiving the draft renewal package, the DFO reviews the draft documents to determine whether any further changes should be made. **Exhibit 8-1** provides the steps of the renewal process for a discretionary advisory committee.

Exhibit 8-1: Steps for Renewing a Discretionary Committee

❑ **Step 1.**	Four to five months prior to the committee expiration date the CMO sends the Charter renewal package to the DFO.
❑ **Step 2.**	The DFO makes any necessary changes to the documents and returns them to the CMO. The CMO reviews the revised package before sending the Charter to be renewed to the OGC for legal review. After OGC's review, the CMO will discuss with the DFO any changes suggested by OGC.
❑ **Step 3.**	After OGC's review and another CMO review, the DFO updates the remaining package materials and forwards those materials to his/her Assistant, Associate, or Regional Administrator for review and approval. After obtaining AA or RA approval, the DFO formally submits the signed renewal package to the CMO. It is customary for the DFO to keep a copy of these materials.
❑ **Step 4.**	The CMO obtains OGC approval/concurrence on the final version of the Charter, signs off on the package, and forwards the Charter renewal request to the Deputy Administrator's office for review and approval/ signature.
❑ **Step 5.**	The CMO consults with GSA's Committee Management Secretariat. Generally, the CMO receives GSA's comments on the renewal within 15 calendar days. Upon receiving GSA's comments, the CMO inserts the consultation date into the Charter and notifies the DFO that GSA consultation is completed. The DFO submits the *Federal Register* notice announcing renewal of the advisory committee to the Federal Register Office for publication. The DFO forwards a copy of the published *Federal Register* notice to the CMO.
❑ **Step 6.**	The CMO transmits the Charter to EPA's Office of Congressional and Intergovernmental Relations for filing with the appropriate congressional committees and the Library of Congress. A discretionary committee renewal is effective on the date the Charter is filed with Congress.

8.2.1 Renewal Transmittal Memorandum

The renewal Transmittal Memorandum is sent from the appropriate AA, RA, Associate Administrator, or Office Director within the Office of the Administrator to the Deputy Administrator through the CMO. The Transmittal Memorandum indicates support for the renewal of the discretionary committee and recommends that the Deputy Administrator approve the committee renewal. The Transmittal Memorandum also includes a concurrence and non-concurrence signature and date line for the Deputy Administrator. The information contained in the renewal Transmittal Memorandum is almost identical to the establishment Transmittal Memorandum. The primary difference is that the renewal memorandum contains language justifying the renewal of the committee, rather than a justification for establishment.

8.2.2 Elements of the Renewal Charter

The purpose of an advisory committee Charter, regardless of whether it is for a newly established committee or a renewal, is to specify the mission and general operational characteristics of a particular committee. The CMO prepares a draft Charter using the language and format of the current EPA Charter template. (OGC and the CMO design and periodically revise Charter templates to make sure that the Charter complies with legal requirements and is consistent with EPA policy.)

All Charters have the same components whether they are for a committee that is being established initially or a committee that is being renewed. These components include statutorily-mandated components and other components that improve the overall package and provide additional information to interested parties, but are not explicitly required. A description of the Charter components that FACA requires can be found in Chapter 3, Section 3.5, and in **Exhibit 8-2**, "Required Renewal Charter Components Checklist." Be sure to change and update information to reflect the current renewal request.

In addition to the general FACA requirements above for FAC Charters, the Charter to be renewed also should contain additional descriptive information. The additional information that should be included is the same information that was requested when you filed the Charter for your current advisory committee, and is outlined in Chapter 3, Section 3.5, and in **Exhibit 8-3**," Other Charter Renewal Components Checklist."

Exhibit 8-2:
FACA-Required Discretionary Renewal Charter Components Checklist

The required components of an EPA FAC Charter are:

- ❑ 1. The advisory committee's official title;
- ❑ 2. The advisory committee's objectives and the scope of its activity;
- ❑ 3. The estimated period of time necessary for the advisory committee to carry out its purposes;
- ❑ 4. The federal official to whom the advisory committee reports;
- ❑ 5. The Office responsible for providing the necessary support for the advisory committee;
- ❑ 6. A description of the duties for which the advisory committee is responsible, and, if such duties are not solely advisory, the source(s) of authority for such functions;
- ❑ 7. The estimated annual operating costs in dollars (including compensation, travel and per diem, staff salaries, consultant fees, printing, commercially rented space, etc.) and work-years for staff support for the advisory committee;
- ❑ 8. The estimated number and frequency of advisory committee meetings;
- ❑ 9. The advisory committee's termination date, if less than two years from the date of advisory committee establishment; and
- ❑ 10. The filing date of the Charter.

Exhibit 8-3:
Other Charter Renewal Components Checklist

In addition to the FACA requirements, the Charter undergoing renewal also should contain the following information:

- ❑ 1. A statement indicating that the Charter is renewing the advisory committee;
- ❑ 2. A statement regarding whether the authority to establish is provided by statute, the President, or the EPA Administrator;
- ❑ 3. The estimated number of advisory committee members and a description of the types of expertise needed to achieve a fairly balanced membership in terms of the points of views represented and the functions to be performed;
- ❑ 4. A statement regarding whether members will be appointed as SGEs subject to the conflict-of-interest restrictions (paid members), or as representatives of non-federal interests (members are not paid, though they receive travel and per diem reimbursement);
- ❑ 5. A statement regarding the requirement for a full-time or permanent part-time employee of the Agency to serve as the DFO; and
- ❑ 6. A statement as to whether the advisory committee is authorized to establish subgroups that report back to the parent advisory committee.

8.2.3 Questions the DFO Should Ask When Preparing the Charter for Renewal

Throughout the preparation of the Charter for renewal, the DFO should keep in mind several key questions. How those questions are answered determines what information should be updated and changed. These key questions are:

1. Should the committee name be changed?

2. Should I make any changes to the committee's scope and objectives?

3. Have laws/regulations that authorize or support the establishment of the committee changed? If they have, identify them in the Charter and attach a copy of the law/regulation to the Charter.

4. Have there been any organizational changes? For example, should I change the name of the organization that the committee reports through or that is responsible for financial and administrative support? (Note: Tier 1 discretionary committees ultimately report to the Administrator, usually through an AA/RAship).

5. What are the revised annual operating costs and person-years of support for the committee?

6. Is the estimated number and frequency of the meetings still accurate or should the estimate be changed?

7. Is the number of committee members still adequate?

8. Is the committee still balanced in the points of view represented? If members have resigned, been replaced, or if the functions/charge of the committee has changed, the balance of the points of view may have changed.

9. How long will the committee need to exist to complete its function? Estimate when the committee will complete its work. For example, will it be less than one year, less than two years, four years, or ongoing (more than four years)?

8.2.4 The Justification for Renewal Document

The Justification for Renewal is very similar to the Justification document included in the original advisory committee establishment package. Apart from the requirement to supply the "appropriate EPA official's name, title, and contact information" for the GSA contact, all the requirements found in Chapter 3, Section 3.4.2, should be contained in the Justification for Renewal. This information consists of:

1. The DFO's name, title, organization, mail code, telephone number, and supervisor's name and telephone number;

2. The number of Chartered discretionary committee meetings held during the last reported fiscal year;

3. The number of committee meetings planned for the next fiscal year. (If meetings are not planned, you should explain why EPA should not terminate the committee.);

> **Note:** It is EPA policy that the AA, RA, Associate Administrator, or CMO recommend termination or merger of advisory committees that have not met during the fiscal year. Program officials should justify why committees should continue if they have not been staffed for more than a year. GSA's Committee Management Secretariat is responsible for performing Annual Comprehensive Reviews of the activities and responsibilities of the advisory committee to determine, among other things, whether an advisory committee should be abolished.

4. Explanation of why the advisory committee is necessary, its purpose, and how it relates to the Administration's initiatives, priorities, and strategic goals;

5. Narrative that shows renewing the advisory committee serves considerations of significant national interest or is needed to ensure proper conduct of Agency business. This narrative should be included if the committee is not required by statute;

6. Explanation of why the functions of the advisory committee cannot be successfully performed by EPA, another existing advisory committee of the EPA, or other means such as a public hearing; and

7. Description of the Agency's plan to attain fairly balanced membership. That plan should show that EPA considers a cross-section of interested and qualified stakeholders when selecting advisory committee members.

8.2.5 The Federal Register *Notice Announcing Renewal*

The DFO is responsible for publishing a *Federal Register* notice announcing the renewal prior to the advisory committee's termination date. The DFO may choose to have the *Federal Register* notice published at the same time the Charter is filed with Congress.

The DFO should forward a copy of the published *Federal Register* notice to EPA's CMO.

> **Note:** The GSA Rule requires the *Federal Register* notice to be published after GSA has completed its review.

8.3 How to Re-establish a Committee

Under FACA, an advisory committee must be re-established if it is not renewed and a new Charter is not filed before the expiration date. Advisory committees may not resume meetings or conduct any business until the re-establishment Charter is filed with Congress. To re-establish an advisory committee, follow the procedures used for establishments as outlined in Chapter 3. If an advisory committee's Charter is renewed in a timely manner, re-establishment is not necessary. If re-establishment is required for an advisory committee, please seek guidance from EPA's CMO.

8.4 When to Amend the Charter

Charters should be amended, if necessary, with every two-year renewal. However, there are times when it is necessary to amend the Charter before the next scheduled committee renewal date. The Charter of a discretionary advisory committee should be amended when either the CMO or the Program office determines that the provisions of the current Charter have changed or become obsolete. Amendments should not significantly alter the advisory committee's objectives and scope.

The steps you follow for drafting and filing an amended Charter depend on the nature of the changes you are making—whether they fall into the category of major or minor changes. Different levels of approval are required for major and minor changes.

Amending a discretionary advisory committee Charter does not constitute renewal of the committee and does not affect the two-year sunset date for the next scheduled renewal.

8.4.1 Differences Between Major and Minor Charter Amendments

Major amendments encompass substantial changes in objectives, scope, duties, estimated costs, or sector composition of the advisory committee. Under the GSA rule, major amendments require EPA's CMO to consult with GSA's Committee Management Secretariat on the new language and to explain the purpose and necessity of the changes. Under EPA policy, major amendments are subjected to a higher level of review within the Agency. Requests for major amendments should be sent from an Assistant Administrator, Regional Administrator, or Associate Administrator, through the CMO, for formal approval by EPA's Deputy Administrator. The specific process and requirements for making a major amendment to your committee's Charter are discussed in Section 8.5.

Minor amendments involve such matters as changing the name of the advisory committee or modifying the estimated number or frequency of committee meetings. The GSA rule does not require a consultation with GSA's Committee Management Secretariat. Minor amendments may be requested by the DFO of the discretionary advisory committee. Under EPA policy the CMO is authorized to approve minor Charter amendments. The process and requirements for making minor amendments to your committee's Charter are discussed in Section 8.6.

8.5 How to Make Major Amendments to a Charter

Major amendments, such as those dealing with changes in objectives and scope, duties, estimated costs, or the composition of a discretionary advisory committee, may be requested by an Assistant Administrator, Regional Administrator, or Associate Administrator and approved by EPA's Deputy Administrator. After the Deputy Administrator approves the amendment, the CMO will consult with GSA's Committee Management Secretariat as required by the GSA rule.

During the GSA consultation, the CMO will provide a justification for amending the Charter explaining the purpose and reasons for the changes. GSA usually responds to the CMO within 15 calendar days of the consultation. Although GSA usually approves Charter amendments, the EPA Administrator (or designee) retains final authority and can authorize continuing with the Charter amendment process.

Once amended, the GSA rule requires the Charter to be filed with the appropriate Congressional committees, the Library of Congress, and GSA.

An outline of the basic steps for a major Charter amendment for a discretionary advisory committee are discussed in detail in **Exhibit 8-4**.

Exhibit 8-4: Basic Steps to Make Major Amendments to a Discretionary FAC Charter

❑ **Step 1.**	Contact the CMO to discuss your need for a major Charter amendment.
❑ **Step 2.**	Draft the major amendment request package and forward it to the CMO for review. The CMO transmits the amendment to the OGC FACA Attorney for review and comment.
❑ **Step 3.**	Incorporate comments and forward the finalized major Charter amendment request package to your Assistant Administrator, Regional Administrator, or Associate Administrator for signature.
❑ **Step 4.**	Submit the signed package to the Committee Management Officer. The CMO will obtain the OGC FACA Attorney's concurrence, sign their approval, and forward the Charter amendment request package to the Deputy Administrator's office for Special Assistant review and the Deputy Administrator's signature.
❑ **Step 5.**	The CMO consults with GSA's Committee Management Secretariat. After receiving a GSA's response, the CMO requests that the Office of Congressional and Intergovernmental Relations file copies of the amended Charter with the appropriate congressional committees and the Library of Congress. The amendment is effective on the date the Charter is filed with Congress. To complete the process, the CMO files dated copy of the amended Charter with GSA's Committee Management Secretariat and also sends a dated copy to the DFO.

8.5.1 Elements of a Discretionary Committee Major Charter Amendment Request Package

There are three specific documents you should prepare and submit as part of the major amendment request package. These three documents are:

1. Transmittal Memo (requesting that the Charter be amended) from your program office's Assistant Administrator, Regional Administrator, or Associate Administrator;

2. The draft amended Charter; and

3. Justification for Major Amendments attachment.

8.5.2 Elements of the Transmittal Memo for a Major Amendment

The Transmittal Memo from your AA, RA, or Associate Administrator should indicate that he/she supports the major Charter amendment for the discretionary committee and recommends that the Deputy Administrator approve the amendment. The Transmittal Memo should be sent to the CMO, who will review and sign the amendment package prior to sending it to the Deputy Administrator. The Transmittal Memorandum also should include a concurrence and non-concurrence signature and date line for the Deputy Administrator.

8.5.3 Elements of the Amended Charter

The elements of the Charter remain the same whether it is amended or renewed, except that the language in the Purpose and Authority section of the Charter indicates that the Charter is being amended. In addition to the changes you wish to make, the CMO or the OGC FACA attorney may take the opportunity to update the Charter to include the most recent language changes made to EPA's Charter template.

8.5.4 Elements of the Justification for Major Amendments

The Justification for Major Amendments should:

1. Explain the purpose of the changes and why they are necessary; and

2. Include the appropriate EPA DFO's name, title, organization, mail code, telephone number, and e-mail address.

8.6 How to Make Minor Amendments to a Charter

Minor changes, such as revising the name of the committee or modifying the estimated number or frequency of meetings, are usually requested by the DFO and are approved by the CMO. After the minor changes are made to the Charter, the CMO obtains concurrence from the OGC FACA Attorney. The minor changes are documented by the CMO and copies of the dated amended Charter are filed with the appropriate Congressional Committees, the Library of Congress, and GSA.

An outline of the steps for a minor Charter amendment for a discretionary advisory committee are discussed in detail in **Exhibit 8-5**.

8.6.1 Elements of a Discretionary Committee Minor Amendment Request Package

The two elements needed in the minor amendment request package are:

1. Transmittal Memo from the DFO addressed to the CMO. The memo should request that the Charter be amended and include an explanation as to why the change is needed; and

2. The amended Charter.

8.7 Charter Amendment Tips

❑ 1. A Charter amendment does not change the date of the Charter's next two-year scheduled renewal.

❑ 2. Negotiated Rulemaking advisory committees (Reg-Neg committees)are discretionary advisory committees and are treated as such for the purpose of Charter amendments. EPA, however, treats Reg-Neg committees as non-discretionary advisory committees for the purpose of the ceiling imposed on advisory committees by Executive Order 12838, which required agencies to reduce the number of advisory committees by one-third and gave OMB the authority to determine whether an agency could add more advisory committees.

❑ *3. Federal Register* notices are not necessary to announce amendments to the Charter.

Exhibit 8-5: Basic Steps to Make Minor Amendments to a Discretionary FAC Charter	
	The basic steps for making a minor amendment to the Charter of your discretionary FAC are:
❑ **Step 1.**	Contact the CMO to discuss your need for a minor Charter amendment.
❑ **Step 2.**	Prepare a Transmittal Memo from yourself (DFO) to the CMO explaining your need for making a minor amendment to the Charter and attach a draft of the amended Charter.
❑ **Step 3.**	The CMO obtains concurrence from OGC's FACA Attorney.
❑ **Step 4.**	The CMO asks EPA's Office of Congressional and Intergovernmental Relations to file a copy of the amended Charter with the appropriate congressional committees and the Library of Congress. The Charter amendment is effective on the date the Charter is filed with Congress. Finally, to complete the minor amendment process, the Committee Management Officer files a dated copy of the minor amended Charter with GSA's Committee Management Secretariat.

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Chapter 9: Documentation and Record Keeping

9.0 Overview

Throughout the federal advisory committee process, it is important to ensure that committee deliberations and determinations are documented, and that all reports and records are properly filed and maintained. This chapter identifies the minimum requirements for documentation and record keeping, and provides an overview of the types of documents and records that are prepared by federal advisory committees. This chapter also provides a checklist of all documents that should be maintained in the official file of an advisory committee.

9.1 DFO Responsibilities

The DFO has overall responsibility for:

- Documenting the committee's meetings and activities, deliberations, and determinations;
- Maintaining committee records and ensuring compliance with public access requirements;
- Disclosing budget information and the disposition of funds distributed to the advisory committee;
- Filing advisory committee reports with the Library of Congress; and
- Ensuring the proper disposition of committee records.

9.2 Records and Public Access Requirements

One of the primary reasons that Congress passed FACA was to ensure public access to the records and documents of advisory committees. This fosters greater transparency and accountability of agencies' use of advisory committees. The following legal definition of a record applies to FACA records, and explains the different types of records and materials that your advisory committee may produce. This section also explains the legal requirements and EPA guidelines for documenting committee activities, maintaining records, and ensuring public access.

9.2.1 Definition of "Record"

According to §3301 of the Federal Records Act (44 U.S.C. 33), a federal record is, "books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under federal law or in connection with the transaction of public business and preserved or appropriate for preservation by that agency or its legitimate successor as evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the Government or because of the informational value of data in them." This definition serves as a basis for what could be considered a record with regards to your advisory committee. A list of EPA record retention schedules that affect federal advisory committees is listed below.

9.2.2 Types of Federal Records

There are two types of records:

- Permanent Records, which are appraised by the National Archives and Records Administration (NARA) as having sufficient historical or other value to warrant preservation beyond the usual expiration date for legal, fiscal, or administrative purposes; and

- Temporary Records, which are approved by NARA for disposal, either immediately or after a specific retention period.

You should keep permanent records, may include copies of the committee's meeting minutes and reports, in the office of the committee for **four years** after the committee is terminated. After four years, the permanent records should be moved to a records center. After 20 years at the record center, the records are usually moved once again for permanent storage at NARA. If your committee has any technical reference materials that should be preserved, you must reclassify them (e.g., as a handout or background document) if you want them to be preserved after they are no longer useful or have become obsolete. Again, refer to the EPA record retention schedules listed below for more specific information.

Note: Typically, about 50% of your committee records fall under the category of temporary records.

Your temporary records, which include background materials and membership correspondence, should be kept in the office for only **one year** after your committee is terminated. After one year, the temporary records are usually sent to NARA to be held for four more years, after which they are destroyed.

FACA requires you to keep records that fully disclose the disposition of funds allocated to your advisory committee and the nature and extent of the committee's activities regarding those funds.

Exhibit 9-1 identifies the category under which advisory committee documents and usually records fall and the appropriate retention period.

EPA Records Retention Schedules
That Affect Federal Advisory Committees

Series Number	Title
181 -	Federal Advisory Committee Files
186 -	Inter-Agency Committee Records
187 -	Intra-Agency and Internal Committee Records
188 -	EPA Steering Committee Files
309 -	Public Inquiries Rules
356 -	Federal Register Notice Files
518 -	Rulemaking Committee Files

Exhibit 9-1
Committee Record Types and Dispositions
(Per EPA Record Retention Schedules 181, 186, 187, 188, 309, 356, and 518)

Permanent Records	Temporary Records
Maintained for 4 years in office after the end of the committee, then transferred to Records Center. After 20 years transferred to a permanent NARA storage facility. Examples of permanent records include:	Maintained for 1 year in Office after the end of the committee, then forwarded to NARA for four years of storage, then continue to store, or destroy, as needed. Examples of temporary records include:
• Establishment Materials, including charters and renewals • Membership Lists • Pre-meeting Materials • Meeting Agendas • Meeting Minutes/Transcripts • Public Comments and Submitted Materials • Background Materials/Handouts (materials prepared for the committee) • Correspondence • Advice/Response • FACA Administrative Reports • Committee Vote Records • Committee Final Reports	• Draft Reports • Pre-membership Lists • Travel Cost documents • Other Cost documents • Technical Documents • Records of secondary importance • Reference Documents (destroy when no-longer needed) (e.g., library and reference materials, stocks of publications and processed documents maintained for distribution)

9.2.3 Public Access Requirements

FACA requires that advisory committees make their records, reports, and other documents and materials available for public inspection and copying. Your committee's records must be made available for public inspection and copying at a single location – either in the offices of the advisory committee, or in an EPA office to which the advisory committee reports. Under FACA, your advisory committee records must be made available to the public at that one location until the advisory committee ceases to exist. FACA committee documents are the records, reports, transcripts, minutes, appendices, working papers, drafts, studies, agenda, or other documents that were made available to, or prepared for or by, the advisory committee.

9.2.4 FOIA and Committee Records

Under FACA, committee documents are not required to be provided to the public if the documents can be withheld under the Freedom of Information Act (FOIA). Generally, you should make the minutes of open meetings and other non-exempt committee records available to interested parties on request. (The FOIA 10-day period for responding does not apply.) The DFO should provide public access to the records from the open portions of any partially closed meeting upon request. If a person requests documents that you are withholding under a FOIA exemption, you should tell them why you are not releasing the documents, and that they can file a FOIA request for the documents. The request will then be handled by EPA under the agency's FOIA rule. **Exhibit 9-2** identifies the nine exemptions under FOIA that allow records to be withheld from the public.

Exhibit 9-2:
Exemptions from FOIA Public Access Requirements

The Freedom of Information Act provides the following exemptions that allow an agency to withhold records:

- ❑ Exemption 1: Classified documents
- ❑ Exemption 2: Internal personnel rules and practices
- ❑ Exemption 3: Information exempt under other laws
- ❑ Exemption 4: Confidential business information
- ❑ Exemption 5: Internal government communications
- ❑ Exemption 6: Personal privacy
- ❑ Exemption 7: Law enforcement records
- ❑ Exemption 8: Financial institution document
- ❑ Exemption 9: Geologic and geophysical information about wells (rarely used)

9.3 Documenting Meetings and Activities

An important DFO responsibility is to document meetings, deliberations, and decisions of the advisory committee properly. The DFO should assign a staff person to take accurate and comprehensive notes, track committee and subcommittee activities, and file committee materials in the appropriate location. The remainder of this section addresses how you should approach your meeting minutes, and what documents you should maintain in your advisory committee's official file.

> **Note:** Make sure you properly date and provide supporting documentation for any activities your committee completes to ensure proper handling and disposition of committee files.

9.3.1 Meeting Minutes It is the responsibility of the DFO to ensure that detailed minutes are kept of each advisory committee or subcommittee meeting. These minutes are not required to be verbatim transcripts. The program office, however, may determine that a verbatim transcript is preferable to minutes. In such cases, the verbatim transcript can

be used as the minutes, providing it contains the required information as is certified by the committee chairperson. The GSA rule requires the official minutes to include the following information:

- ❑ 1. The time, date, and place of the meeting;
- ❑ 2. A list of advisory committee members, staff, and Agency employees present;
- ❑ 3. Members of the public who presented oral or written statements;
- ❑ 4. A complete and accurate description of matters discussed, the conclusion reached, and the recommendations, if any, made by the committee; and
- ❑ 5. Copies of each report or other documents received, issued, or approved by the advisory committee.

In addition, it is recommended that you include:

- ❑ An estimate of the number of members of the public present; and
- ❑ A description of any recusal by advisory committee members.

Remember, the chairperson must certify to accuracy of the advisory committee minutes within 90 days after the meeting.

9.3.2 Transcripts

FACA does not require you to maintain transcripts of your advisory committee's meetings, just detailed meeting minutes. Even though you are not required to maintain transcripts of your meetings, if you do maintain them, FACA requires you to make copies available for inspection and copying.

9.3.3 Documenting Activity Completion

You need to be sure that you have adequately documented the activities completed by your advisory committee. All reports and other documents prepared by, or for your committee should be placed in the committee file. If you are missing any supporting documentation on a completed committee activity, try to get another copy of the document if possible for your FAC file. If another copy of the document cannot be found, enter a note into the file for your FAC identifying the activity completion date, for future reference and for future reports. To help with the proper handling and maintenance of your committee's files, you should keep track of any important dates for all committee activity documents, and include any needed supporting documentation.

Examples of Activity Completion Documentation

Example 1- Your FAC's Work is Completed: The supporting documentation you need to supply includes the Charter or an extension through your end date, any "disestablishment" documents, a final report and responses, and any final recommendations and responses.

Example 2 - A Contract Agreement is Completed: The documentation to support this completion includes the contract agreement or amendment that indicated the work completed (including dates), a final deliverable, and a final invoice with approval.

9.3.4 Official Committee File

All documents provided to or produced for or by your advisory committee should be placed in the official committee file established in your office at EPA. You should keep two official files, one containing documents that are available to the public, and the other containing any committee documents you plan to withhold under FOIA. You should not wait until someone asks for documents to determine whether they should be withheld. FACA also requires that eight copies of each advisory committee report be filed with the Library of Congress for public inspection and use. The committee DFO should forward to the Library of Congress all committee reports and, where appropriate, background papers prepared by consultants.

All advisory committee documents, including reports and minutes, should contain the following disclaimer:

> "The [insert committee name] is a federal advisory committee chartered by Congress, operating under the Federal Advisory Committee Act (FACA; 5 U.S.C., App.2). The committee provides advice to the Administrator of the U.S. Environmental Protection Agency on [insert subject matter]. The findings and recommendations of the Committee do not represent the views of the Agency, and this document does not represent information approved or disseminated by EPA."

This disclaimer would change slightly for a Presidential Advisory Committee.

Exhibit 9-3 provides a list of the committee documents and materials that should be maintained in the official committee file. Documents that are exempted from public review under FACA still should be filed, but in a non-publicly accessible file specifically created for such materials. Under FACA, advisory committee records must be available to the public in one location until the advisory committee ceases to exist.

Exhibit 9-3:
Required Documents in the Official Committee File

In general, your committee or subcommittee FACA file should include the following documents:

- ❑ 1. The Committee's Charter, including:
  - ❑ 1a. Renewals
  - ❑ 1b. Re-chartering
  - ❑ 1c. Amendments
- ❑ 1A. For a subcommittee:
  - ❑ The mission statement
  - ❑ The charge to the subcommittee
- ❑ 2. The *Federal Register* notices for the committee, including:
  - ❑ 2a. Establishment notices
  - ❑ 2b. Reestablishment notices
  - ❑ 2c. Committee meeting notices
  - ❑ 2d. Renewal notices
  - ❑ 2e. Notices soliciting nominations for committee membership
- ❑ 3. The official certified meeting minutes of each meeting. The verbatum transcript, if one was made, and any electronic recording of the meeting;
- ❑ 4. Reports or draft reports of the committee;
- ❑ 5. Working papers of the committee;
- ❑ 6. Studies prepared for the committee;
- ❑ 7. Agendas of committee meetings;
- ❑ 8. Record of any votes that must be recorded, and how each member voted;
- ❑ 9. Background papers prepared by consultants;
- ❑ 10. Public comments and materials sent to the committee;
- ❑ 11. All EPA documents provided to the committee (privileged or confidential documents should be filed in a separate file to which the public does not have access); and
- ❑ 12. Other documents or material provided to, or prepared for or by the committee.

9.4 Periodic and Annual Reports

The committee's DFO is responsible for ensuring that all reports produced by or for the advisory committee are drafted, delivered, and filed properly. The DFO is also responsible for preparing and filing annual and periodic committee reports, which are discussed in the following subsections.

9.4.1 GSA Annual Review

Under FACA, the GSA Administrator, (through the Committee Management Secretariat) is required to conduct an annual comprehensive review of all advisory committees with filed charters or that has been or was in existence during the fiscal year, which results in an annual report to Congress. The information for this review will be transmitted to GSA in an electronic format specified by GSA for inclusion in the annual report.

9.4.2 Preparing an Annual Report

The annual report is based on your committee's activities and costs of running the committee for the previous fiscal year. Instructions and forms will be provided to you by GSA. The reports are coordinated by the CMO. GSA conducts a comprehensive review based on the information provided in the annual report on fiscal year activities and will advise your CMO if they have any concerns. Reports of closed meetings (or portions of meetings) also need to be issued annually.

9.4.3 Periodic Reports

The GSA Committee Management Secretariat or the Agency Committee Management Officer may, from time to time, ask an advisory committee to submit a report about its operations and activities.

9.4.4 Filing Reports with the Library of Congress

You are required to file eight copies of any reports prepared by or for the advisory committee with the Library of Congress.

If you need more assistance, please contact your CMO or the EPA Records Officer.

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Chapter 10: Terminating a Federal Advisory Committee

10.0 Overview

The last stage of your advisory committee is its termination. This chapter will walk you through the steps you should take to ensure the proper close-out of your committee and the proper disposition of your committee documents.

10.1 Committee Termination

According to the GSA rule, an advisory committee, unless renewed, automatically terminates two years after the date its Charter was filed with Congress or, for a Presidential committee, the date the Charter was filed with the GSA Secretariat. If this happens to your committee, the steps you should take to renew your committee are discussed in-depth in Chapter 8.

In some cases, you may want to close out your advisory committee sooner than two years from the date the Charter was filed with Congress or GSA. An advisory committee should be terminated early if:

- The purpose of the committee has been fulfilled;
- The committee is no longer undertaking the purpose for which it was originally formed;
- The committee has become obsolete in the time that has passed since it was established;
- The purpose of the committee has been assumed by another government entity; or
- The cost to operate the committee is greater than the benefit gained from the committee.

If your committee was required by statute, the termination date of the committee is either explicitly identified in the statute, or implied in the wording of the statute, and cannot be terminated early. Committees required by statute are often mandated to exist for more than two years, but are still required to file new Charters at two-year intervals from the establishment date. For more information on filing a Charter for renewal, please see Chapter 8.

10.1.1 Sunset Terminations

If a discretionary advisory committee Charter is not renewed prior to the Charter expiration date, it is automatically terminated under the sunset provisions of FACA. You should consult with the CMO if you or your management believe a terminated committee should be re-established. This re-establishment process is discussed in detail in Chapter 8.

10.1.2 Non-Discretionary Advisory Committee Expiration Dates

If a non-discretionary advisory committee is established by statute, it automatically de-activates two years after the establishment date, unless the statue clearly provides or implies a different duration. This means that the committee cannot meet until the paperwork for re-establishment is filed with Congress.

If a non-discretionary advisory committee is established by an Executive Order, it automatically terminates two years after it was established unless it is renewed by the Agency prior to the expiration date. It is possible for the Agency to choose to keep this type of committee by renewing it as a new discretionary advisory committee. If the expiration date passes without a renewal, and the Agency still wishes to renew the committee, the normal process of re-establishment must be followed, as outlined in Chapter 8.

> **Note:** If your advisory committee is required by statute and will exist for more than two years, you must file a new Charter at the end of each two-year period after establishment, until the committee is terminated.

10.2 How to Terminate a Committee

A discretionary advisory committee should be terminated as soon as it has completed its work. To terminate the committee, the DFO notifies the CMO in writing either via e-mail or some other method such as a memorandum, that the committee's work is complete and provides the date termination will be effective.

When terminating a non-discretionary advisory committee, the DFO notifies the CMO in writing, either via e-mail or some other method that can be documented. A termination package is then prepared by the DFO and sent through the CMO for OGC and Deputy Administrator concurrence. All actions you take in order to terminate your non-discretionary advisory committee need to be submitted to and cleared by the CMO.

Because all committees are subject to the Federal Records Act (44 U.S.C. Chapter 21, 29-33), you, a designated staff person, or other committee representative should coordinate with EPA's Records Management Officer in submitting records disposition schedules to National Archives and Records Administration (NARA). To make sure that the records are disposed of properly, you should submit the schedules to NARA at least six months before your committee is scheduled to terminate. Once you terminate your committee, keep your records for one year before disposing of them or storing them. Chapter 9 provides details on recordkeeping and disposition requirements.

10.3 Final Disposition of Committee Records

Prior to the date of your committee's termination, make sure that all your records are up to date and are ready to be submitted to records management. Upon termination, all of your committee records should be submitted according to the Federal Records Act (44 U.S.C. Chapter 21, 29–33), National Archives and Records Administration (NARA) regulations, and/or the Public Records Act (PRA).

You also should be aware that the CMO includes information on your committee in the annual "Active Advisory Commitees" report if your committee was at all active during the fiscal year. It is advisable to resolve any "loose-ends" concerning your records prior to termination, and to update your records in the GSA FACA database. A checklist of steps involved in the termination of your committee is provided in **Exhibit 10-1**.

> **Note:** For Presidential advisory committees subject to the Public Records Act (PRA), consult with the White House Counsel on what records need to be preserved under that Act. You may also want to confer with National Archives and Records Administration officials.

Exhibit 10-1: Federal Advisory Committee Termination Checklist

The following steps should be completed when terminating a Federal Advisory Committee:

- ❑ 1. Notify the CMO of the intent to terminate the committee.
- ❑ 2. Prepare your records for proper disposal or storage (See Chapter 9).
- ❑ 3. Make sure the GSA FACA database is up to date concerning your committee.

Be prepared for follow-up questions regarding the committee's performance and overall accomplishments.

Appendix A:

Federal Advisory Committee Act

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Federal Advisory Committee Act

1. § 1. Short title

this Act may be cited as the "Federal Advisory Committee Act."

§ 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, 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) the Advisory Commission on Intergovernmental Relations, (ii) the Commission on Government Procurement, and (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government. (3) The term "agency" has the same meaning as in section 551(1) of Title 5. (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;

(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) The President shall, not later than December 31 of each year, make an annual report to the Congress on the activities, status, and changes in the composition of advisory committees in existence during the preceding fiscal year. The report shall contain the name of every advisory committee, the date of and authority for its creation, its termination date or the date it is to make a report, its functions, a reference to the reports it has submitted, a statement of whether it is an ad hoc or continuing body, the dates of its meetings, the names and occupations of its current members, and the total estimated annual cost to the United States to fund, service, supply, and maintain such committee. Such report shall include a list of those advisory committees abolished by the President, and in the case of advisory committees established by statute, a list of those advisory committees which the President recommends be abolished together with his reasons therefor. The President shall exclude from this report any information which, in his judgment, should be withheld for reasons of national security, and he shall include in such report a statement that such information is excluded.

§ 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 is 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 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, 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.

§ 8. 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--

(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.

§ 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

§ 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; recordkeeping; 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 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.

§ 15. Effective date

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

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Appendix B:

General Services Administration Final Rule

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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]

RIN 3090–AG49

Federal Advisory Committee Management

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Final rule.

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

EFFECTIVE DATE: August 20, 2001.

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

SUPPLEMENTARY INFORMATION:

A. Background

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

In a previous issue of the **Federal Register** (62 FR 31550, June 10, 1997), GSA published an Advance Notice of Proposed Rulemaking (ANPRM) and requested comments. Additional comments were requested from the Interagency Committee on Federal Advisory Committee Management. GSA requested comments on: (1) Suggested issues to address; (2) specific recommendations about changes needed in the current Federal Advisory Committee Management subpart; (3) examples of situations where FACA was either a useful tool or a hindrance to public involvement; and (4) GSA's intent to include illustrative examples and principles. On January 14, 2000, GSA published a proposed rule in the **Federal Register** (65 FR 2504) and requested comments over a 60-day period ending on March 14, 2000. All comments received were considered in drafting this final rule.

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

B. Discussion of Comments

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

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

Several commenters provided suggestions regarding the addition of guidance on issues that, although not addressed by the Act, likely would improve the management of advisory committees. For example, one commenter suggested that the final rule include a provision to encourage agencies to streamline their internal processes and procedures in order to expedite the establishment of advisory committees. Other commenters requested that GSA: (1) Provide more detailed provisions on the compensation of advisory committee members and staff, and experts and consultants; (2) expand the range of information required to be listed in an advisory committee's charter to include the nature and disposition of records; and (3) incorporate new regulatory requirements for increasing access to advisory committee information, such as providing meeting notices, minutes, and reports via the Internet.

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

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

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

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

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

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

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

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

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

Case law supports this conclusion. In *National Anti-Hunger Coalition* v. *Executive Committee*, 557 F.Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983), the question presented was whether the Act applied to task forces reporting to the Executive Committee of the President's Private Sector Survey on Cost Control in the Federal Government. The task forces had no authority to make recommendations to agencies or to the President. Instead, their function was to do the "preliminary work of the survey, including fact-gathering, statistical evaluations, and the formulation of preliminary reports." (557 F.Supp. at 526). Although it was undisputed that the Executive Committee was subject to the Act, the court held that the Act did not apply to the task forces under the following reasoning:

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

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

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

To address these issues more clearly, GSA strengthened language in the final rule by: (1) Adding a new § 102–3.35 that outlines policies relating to subcommittees; (2) clarifying language in § 102–3.145 relating to subcommittee meetings; and (3) clarifying the examples contained in Appendix A to Subpart C.

Correct and Clarify the Definition of "Utilized"

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

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

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

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

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

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

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

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

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

Within this group of comments, GSA noted a consistent theme related to the need for more information regarding public participation tools and techniques that would allow for more collaboration that is not subject to the Act. Although advisory committees support Federal decisions in a variety of situations, GSA believes that the ability of agencies to interact with the public in numerous other ways is particularly important because advisory committees are only one method for agencies to obtain the views of the public for their programs. Federal agencies may engage in continuous collaboration using diverse, but complimentary, tools, techniques, and methods. Whether or not a selected approach includes the use of advisory committees, the potential or perceived applicability of the Act must not prevent constructive collaboration from taking place. Agencies are encouraged to contact GSA concerning not only the use of Federal advisory committees, but also for information about alternative forms of public involvement.

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

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

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

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

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

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

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

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

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

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

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

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

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

Provide Additional Guidance on Balanced Representation and Selection of Members

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

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

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

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

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

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

Provide Additional Guidance on the Management of Federal Records

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

GSA addressed these recommendations by expanding § 102–3.200 of the proposed rule (now Appendix A to Subpart D) to include additional guidance relating to records management and to highlight the applicability and importance of Federal recordkeeping statutes and policies to advisory committee operations. GSA decided to include this guidance within this appendix because the Act generally is silent on records management issues, with the exception of the responsibilities of the CommitteeManagement 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?
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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?
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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)	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" (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. 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.
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)	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 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.

APPENDIX A TO SUBPART A—Continued

Key points and principles	Section(s)	Question(s)	Guidance
III. Meetings between a Federal official(s) and a collection of individuals where advice is sought from the attendees on an individual basis are not subject to the Act.	102–3.40(e)	1. May an agency official meet with a number of persons collectively to obtain their individual views without violating the Act? 2. Does the concept of an "individual" apply only to "natural persons?"	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.
IV. Meetings between Federal, State, local, and tribal elected officials are not subject to the Act.	102–3.40(g)	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?	A. Yes. The scope of activities covered by the exclusion from the Act for intergovernmental activities should be construed broadly to facilitateFederal/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).
V. Advisory committees established under the Act may perform advisory functions only, unless authorized to perform "operational" duties by the Congress or by Presidential directive.	102–3.30(e), 102–3.40(k)	1. Are "operational committees" subject to the Act, even if they may engage in some advisory activities?	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.

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(e), 102–3.130(g).	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
			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. 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.)
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..	102–3.105(h)	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?	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. 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.
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..	102–3.105(c), 102–3.105(i)	1. Must an agency's CMO and each advisory committee DFO be appointed by the agency head?	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.

APPENDIX A TO SUBPART C—Continued

Key points and principles	Section	Question(s)	Guidance
		2. May an agency have more than one CMO?	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 subcomponents, which are subordinate to the CMO's agencywide responsibilities and functions.
VI. FACA is the principal statute pertaining to advisory committees. However, other statutes may impact their use and operations..	102–3.125(c) ...	1. Do other statutes or regulations affect the way an agency carries out its advisory committee management program?	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.

Subpart D—Advisory Committee Meeting and Recordkeeping Procedures

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

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

§ 102–3.140 What policies apply to advisory committee meetings?

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

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

(b) The meeting room or other forum selected is sufficient to accommodate advisory committee members, advisory committee or agency staff, and a reasonable number of interested members of the public;

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

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

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

§ 102–3.145 What policies apply to subcommittee meetings?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(a) *Preparatory work.* Meetings of two or more advisory committee or subcommittee members convened solely to gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting of the advisory committee, or to draft position papers for deliberation by the advisory committee; and

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

§ 102–3.165 How are advisory committee meetings documented?

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

(b) The minutes must include:

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

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

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

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

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

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

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

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

(a) *Presidential advisory committee follow-up report.* Within one year after a Presidential advisory committee has submitted a public report to the President, a follow-up report required by section 6(b) of the Act must be prepared and transmitted to the Congress detailing the disposition of the advisory committee's recommendations. The Secretariat shall assure that these reports are prepared and transmitted to the Congress as directed by the President, either by the President's delegate, by the agency responsible for providing support to a Presidential advisory committee, or by the responsible agency or organization designated in the charter of the Presidential advisory committee pursuant to § 102–3.75(a)(10). In performing this function, GSA may solicit the assistance of the President's delegate, the Office of Management and Budget (OMB), or the responsible agency Committee Management Officer (CMO), as appropriate. Reports shall be consistent with specific guidance provided periodically by the Secretariat.

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

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

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

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

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

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

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

APPENDIX A TO SUBPART D

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

APPENDIX A TO SUBPART D—Continued

Key points and principles	Section(s)	Question(s)	Guidance
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.	102–3.170	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?	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 nonexempt 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.)

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?	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. 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. 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. 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.

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.

[FR Doc. 01–17350 Filed 7–18–01; 8:45 am]
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Appendix C:

Executive Order No. 12024

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Executive Order 12024 applied to the Federal Advisory Committee Act

EXECUTIVE ORDER NO. 12024

TRANSFER OF CERTAIN ADVISORY COMMITTEE FUNCTIONS

By virtue of the authority vested in me by the Constitution and statutes of the United States of America, including the Federal Advisory Committee Act, as amended (5 U.S.C. App. I) [this Appendix], Section 301 of Title 3 of the United States Code [section 301 of Title 3, The President], Section 202 of the Budget and Accounting Procedures Act of 1950 (31 U.S.C. 581c) [section 581c of Title 31, Money and Finance], and Section 7 of Reorganization Plan No. 1 of 1977 (42 FR 56101 (October 21, 1977)) [set out in Appendix II of this title], and as President of the United States of America, in accord with the transfer of advisory committee functions from the Office of Management and Budget to the General Services Administration provided by Reorganization Plan No. 1 of 1977 [set out in Appendix II of this title], it is hereby ordered as follows:

Section 1. The transfer, provided by Section 5F of Reorganization Plan No. 1 of 1977 (42 FR 56101) [set out in Appendix II of this title], of certain functions under the Federal Advisory Committee Act, as amended (5 U.S.C.App. I) [this appendix], from the Office of Management and Budget and its Director to the Administrator of General Services is hereby effective.

Sec. 2. There is hereby delegated to the Administrator of General Services all the functions vested in the President by the Federal Advisory Committee Act, as amended, except that, the annual report to the Congress required by Section 6(c) of that Act [section 6(c) of this Appendix] shall be prepared by the Administrator for the President's consideration and transmittal to the Congress.

Sec. 3. The Director of the Office of Management and Budget shall take all actions necessary or appropriate to effectuate the transfer of functions provided in this Order, including the transfer of funds, personnel and positions, assets, liabilities, contracts, property, records, and other items related to the functions transferred.

Sec. 4. Executive Order No. 11769 of February 21, 1974 is hereby revoked.

Sec. 5. Any rules, regulations, orders, directives, circulars, or other actions taken pursuant to the functions transferred or reassigned as provided in this Order from the Office of Management and Budget to the Administrator of General Services, shall remain in effect as if issued by the Administrator until amended, modified, or revoked.

Sec. 6. This Order shall be effective November 20, 1977.

JIMMY CARTER

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Appendix D:

Executive Order No. 12838

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Executive Order 12838 applied to the Federal Advisory Committee Act

EXECUTIVE ORDER NO. 12838

TERMINATION AND LIMITATION OF FEDERAL ADVISORY COMMITTEES

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Federal Advisory Committee Act ("FACA"), as amended (5 U.S.C.App.), it is hereby ordered as follows:

Section 1. Each executive department and agency shall terminate not less than one-third of the advisory committees subject to FACA (and not required by statute) that are sponsored by the department or agency by no later than the end of fiscal year 1993.

Sec. 2. Within 90 days, the head of each executive department and agency shall submit to the Director of the Office of Management and Budget, for each advisory committee subject to FACA sponsored by that department or agency: (a) a detailed justification for the continued existence, or a brief description in support of the termination, of any advisory committee not required by statute; and (b) a detailed recommendation for submission to the Congress to continue or to terminate any advisory committee required by statute. The Administrator of General Services shall prepare such justifications and recommendations for each advisory committee subject to FACA and not sponsored by a department or agency.

Sec. 3. Effective immediately, executive departments and agencies shall not create or sponsor a new advisory committee subject to FACA unless the committee is required by statute or the agency head (a) finds that compelling considerations necessitate creation of such a committee, and (b) receives the approval of the Director of the Office of Management and Budget. Such approval shall be granted only sparingly and only if compelled by considerations of national security, health or safety, or similar national interests. These requirements shall apply in addition to the notice and other approval requirements of FACA.

Sec. 4. The Director of the Office of Management and Budget shall issue detailed instructions regarding the implementation of this order, including exemptions necessary for the delivery of essential services and compliance with applicable law.

Sec. 5. All independent regulatory commissions and agencies are requested to comply with the provisions of this order.

WILLIAM J. CLINTON

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Appendix E:

EPA Ethics Advisory 97-15

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EPA ETHICS ADVISORY 97-15

October 8, 1997

SUBJECT: Annual Ethics Training for Special Government Employees

FROM: Scott C. Fulton
Principal Deputy General Counsel
Designated Agency Ethics Official

TO: Deputy Ethics Officials

The purpose of this Ethics Advisory is to establish the procedure for providing training to special Government employees (SGEs). This ethics advisory replaces EPA Ethics Advisory 94-18 dated September 30, 1994. As you know, part of the Office of Government Ethics (OGE) Standards of Ethical Conduct for Employees of the Executive Branch require annual ethics training for employees who file public (SF 278) or confidential (SF 450) financial disclosure reports. See Subpart G, 5 C.F.R. Part 2638. All SGEs (SGEs are employees who are appointed to perform services, temporarily or intermittently, for not more than 130 days in any 365 day period. See 18 U.S.C. §202.) are required to file a financial disclosure report and receive annual ethics training.

OGE regulations provide that an agency may fulfill the training requirement for SGEs without the presence of a qualified individual by presenting the information verbally, by distribution of written materials, or by other means at the agency's discretion. 5 C.F.R. §2638.704(d)(2)(ii).

As the Designated Agency Ethics Official for EPA, it is my determination that the Agency may meet its annual training requirement for SGEs by the distribution of written materials by the responsible Deputy Ethics Official (DEO) or his\her designee. This determination is based on the following factors: (1) the large number of SGEs in EPA (approximately 500), (2) the logistical and cost considerations of conducting annual "face-to-face" training for SGEs in view of the limited duration and intermittent nature of most SGEs' services, and (3) the need to devote the limited ethics training resources to regular employees.

Therefore, annual training for SGEs will be accomplished by the distribution of the following written materials:

(1) a copy of the Office of Government Ethics' (OGE's) August 1992 booklet entitled "Standards of Ethical Conduct for Employees of the Executive Branch";

(2) a copy of EPA Ethics Advisory 96-11 of August 29, 1996, "Transmittal of Government Ethics Newsgram" regarding procurement integrity;

(3) a copy of EPA Ethics Advisory 96-18 of January 10, 1997, "Post-Employment Restrictions"; and.

(4) a copy of this Ethics Advisory, including the attachment which compares ethics requirements for SGEs with those of regular employees.

* * *

Please direct any questions you may have to Don Nantkes at (202) 260-4556 or Hale Hawbecker at (202) 260-4555.

Attachment

EFFECT OF SPECIAL GOVERNMENT EMPLOYEE STATUS ON APPLICABILITY OF CRIMINAL CONFLICT OF INTEREST STATUTES AND OTHER ETHICS RELATED PROVISIONS

Definition

As defined by 18 U.S.C. §202(a), a "special Government employee" (SGE) in the Executive Branch is an officer or employee who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for a period not to exceed 130 days during any period of 365 days, either on a full-time or intermittent basis.

Financial Disclosure

An SGE is subject to the financial disclosure provisions of the Ethics in Government Act and 5 C.F.R. Part 2634. If an SGE is expected to serve more than 60 days in any calendar year, and if the SGE is paid at a rate equal to or greater than 120% of the minimum rate of basic pay for GS-15 of the General Schedule, the Public Financial Disclosure Report (SF 278) must be filed. 5 C.F.R. §§2634.202(c) and 2634.204. If the salary rate is less than 120% of the minimum rate of basic pay for GS-15 of the General Schedule; or if the SGE, regardless of pay rate, is expected to work 60 days or less in any calendar year; submission of the Confidential Financial Disclosure Report (SF 450) is required. 5 C.F.R. §2634.904(b).

SUBSTANTIVE RESTRICTIONS

With significant exceptions outlined below, the criminal conflict of interest statutes, Executive Order 12674 (as amended by E.O. 12731), and the executive branch standards of ethical conduct (5 C.F.R. Part 2635) are applicable to SGEs. Other ethics-related provisions concerning outside earned income and employment and political activities are wholly or partially inapplicable. The principal distinctions between the rules applicable to regular government employees and those governing SGEs are as follows:

I. Criminal Conflict of Interest Statutes

a. 18 U.S.C. §203 -- Prohibition of Compensated Representational Activities By Federal Employees Directed Towards the United States

Regular Employee: Section 203 prohibits an employee from seeking, accepting, or agreeing to receive or accept compensation for any representational services, rendered personally or by another, in relation to **any particular matter** in which the United States is a party or has a direct and substantial interest, before **any** department, agency, or other specified entity.

SGE: The bar applies only in relation to **a particular matter involving a specific party or parties --**

(1) in which the SGE has at any time, **participated personally and substantially** as a Government employee; or

(2) if the SGE has served in excess of 60 days during the immediately preceding 365 days, such matter is **pending in the department or agency** in which such employee is serving.

b. 18 U.S.C. §205 -- Prohibition of Uncompensated or Gratuitous Representational Activities By Federal Employees Directed Towards the United States

Regular Employee: Section 205 prohibits an employee, whether or not for compensation, from acting as agent or attorney for anyone in a claim against the United States or from acting as agent or attorney for anyone, before any department, agency, or other specified entity, in **any particular matter** in which the United States is a party or has a direct and substantial interest. It also prohibits receipt of any gratuity, or any share of or interest in a claim against the United States, in consideration for assisting in the prosecution of such claim.

SGE: The broad prohibition is narrowed in the same manner as noted above for section 203.

c. 18 U.S.C. §207 -- Post-Employment Restrictions

Regular Employee: Section 207 imposes bans of varying durations to prevent communications by former employees made with the intent to influence the Government. The lifetime ban covers particular matters involving specific parties in which the former employee was personally and substantially involved. A similar two-year ban deals with such matters that were merely pending under the employee's official responsibility during the final year of government service. A one-year ban applies to employees involved in trade or treaty negotiations. Other rules apply to senior personnel (confirmed Presidential appointees, SES employees at grades ES-5 and ES-6, uniformed service officers at grade 0-7 and above, and anyone paid at or above the basic daily rate for Level V of the Executive Schedule); such senior employees are subject to a one-year "cooling-off" period precluding any contacts with their former agency on any matter for which official action is sought.

(Note: Senior Clinton Administration appointees must sign an agreement increasing the duration of the "cooling-off" period to five years. The 5-year "cooling-off" period prescribed by E.O. 12834 of January 22, 1993, is applicable only to full-time, non-career senior appointees.)

SGE: The one-year "cooling-off" period for senior employees is **not applicable** to an SGE who served less than 60 days in the one-year period prior to termination. The 5-year ban also is not applicable. All other prohibitions are applicable to SGEs.

d. 18 U.S.C. §208 -- Conflict of Interest Provisions

Regular Employee: Section 208 proscribes personal and substantial participation in any "particular matter" which will have a direct and predictable effect on an employee's own financial interests or on the financial interests of the employee's spouse; dependent child; general partner;

organization in which the employee is serving as officer, director, trustee, general partner, or employee; or any person or organization with whom the employee is negotiating or has any arrangement regarding prospective employment. The term "particular matter" can include rulemaking or policy matters as well as "specific party" matters such as contracts and permits. A waiver under section 208(b)(1) permitting official action in such matters may be obtained from the Designated Agency Ethics Official (DAEO) if the financial interest is "not so substantial as to be deemed likely to affect the integrity of the services which the Government may expect." Certain other interests, such as interests in diversified mutual funds, are exempted by general regulation as "too remote or too inconsequential to affect the integrity of the services."

SGE: The same rules apply to SGEs. However, for SGEs who are members of advisory committees, the standard for waiver focuses on whether the need for the SGE' services outweighs the potential for conflict of interest rather than the value of the financial interest. In addition, the Environmental Education Act at 20 U.S.C. §5501 provides that members of the National Environmental Education Advisory Council are permitted to take part in matters which affect their employers' financial interests, even without a waiver. However, 18 U.S.C. §208(a) continues to apply to members' own financial interests.

e. 18 U.S.C. §209 -- Ban on Supplementation of Salary

Regular Employee: Section 209 generally prohibits an employee from receiving any salary or any contribution to or supplementation of salary from any source other than the United States as compensation for services as a government employee.

SGE: This provision **does not apply.**

f. 18 U.S.C. §219 and the "Emoluments Clause" of the Constitution-- Foreign Agents and Receiving Anything of Value From a Foreign Government

Regular Employee: Section 219 bars any "public official" from being or acting as an agent of a foreign government who is required to register under the Foreign Agents Registration Act of 1938 at 22 U.S.C. §611 et seq.. Furthermore, the "Emoluments Clause" of the Constitution provides that no person who holds an office of "profit or trust" under the United States may receive any money, award or other thing of value from a foreign government or hold a position in a foreign government, except where permitted by statute.

SGE: An April 29, 1991 opinion of the Department of Justice Office of Legal Counsel (OLC) concluded that Section 219 applies to members of federal advisory committees-- both SGEs and "representative" members. However this provision can be waived for SGEs if EPA certifies that their employment is "necessary in the national interest" and sends a copy of the certification to the Attorney General for filing with the registration statement. The April 29, 1991 OLC opinion also concluded that the "Emoluments Clause" of the Constitution applies to members of advisory committees-- both SGEs and "representative members."

II. Other Ethics Related Statutes

a. 5 U.S.C. App. 7, §501(a) -- Outside Earned Income Limitation

Regular Employee: Section 501(a), and implementing regulations at 5 C.F.R. §§2636.301 through 2636.304, provide that a non-career employee paid at a rate in excess of a GS-15 may not, in any calendar year, receive outside earned income attributable to that calendar year which exceeds 15 percent of the annual rate of basic pay for level II of the Executive Schedule under 5 U.S.C. 5313, as in effect on January 1 of such calendar year.

SGE: This provision is **not applicable**.

b. 5 U.S.C. App. 7, §502(a) -- Limitations on Outside Professional Employment and Teaching

Regular Employee: Section 502(a), and implementing regulations at 5 C.F.R. §§2636.305 through 2636.307, prohibit a **non-career employee paid at a rate in excess of a GS-15** from receiving any compensation for: (1) practicing a profession which involves a fiduciary relationship; (2) affiliating with or being employed by a firm or other entity which provides professional services involving a fiduciary relationship; (3) serving as an officer or member of the board of any association, corporation or other entity; or (4) teaching without prior approval.

SGE: This provision is **not applicable**.

c. 5 U.S.C. §§7321 - 7328 -- Hatch Act Political Activity Restrictions

Regular Employee: The "Hatch Act Reform Amendments of 1993" permit most EPA employees (i.e, non-career Senior Executive Service employees, Schedule C appointees, and GS/GM-15 level employees and below) to take an active part in political management and campaigns. This is a significant change from earlier provisions, which generally prohibited such activity. However the following activities remain prohibited: (1) running for partisan office, (2) soliciting political contributions from the general public, (3) engaging in political activity (including wearing buttons) while on duty, or in a government office, or while using a government vehicle, and (4) collecting political contributions unless both the donor and the collector are members of the same federal labor organization or employee organization and the person solicited is not a subordinate employee. Career employees in the Senior Executive Service and Administrative Law Judges remain subject to the earlier (and more restrictive) Hatch Act provisions. See EPA Ethics Advisory 96-09 of August 5, 1996 for further Hatch Act information.

SGE: SGEs are covered by the Act only during the 24-hour period of any day in which they are actually performing government business.

III. Executive Branch Standards of Ethical Conduct

The government-wide Standards of Ethical Conduct at 5 C.F.R. Part 2635, are fully

applicable to both regular and special government employees. An SGE is covered by the standards even though the individual does not perform official duties on a given day.

SGEs are subject to the following provision in EXACTLY THE SAME WAY as regular employees:

a. 5 C.F.R. Part 2635, Subpart B, Gifts from Outside Sources

With certain exceptions listed at §2635.204, employees may not accept gifts from "prohibited sources" (generally persons or organizations affected by EPA actions) or given because of the employee's government position.

b. 5 C.F.R. Part 2635, Subpart C, Gifts Between Employees

With certain exceptions listed at §2635.304, employees may not give or contribute toward a gift for an official superior or receive a gift from an employee who receives less pay.

c. 5 C.F.R. Part 2635, Subpart E, Impartiality in Performing Official Duties

Employees may not participate in "specific party" matters where a "reasonable person with knowledge of the relevant facts" would question their impartiality. Consultation with an employee's Deputy Ethics Official (generally Office Director, Staff Office Director, Laboratory Director, or Regional Administrator) is strongly advised where the employee suspects a problem or where the matter will involve any of the following "covered relationships":

(1) persons or organizations with which the employee has business relationships,

(2) members of the employee's household or relatives with whom the employee has a close personal relationship,

(3) employers or prospective employers of spouses, parents, or dependent children,

(4) recent (within one year) former employers or clients, and

(5) organizations in which the employee is an "active participant."

The employee's Deputy Ethics Official may authorize participation if "the interest of the Government in the employee's participation outweighs the concern that a reasonable person may question the integrity of the agency's programs and operations." 5 C.F.R. §2635.502(d).

d. 5 C.F.R. Part 2635, Subpart F, Seeking Other Employment

Employees may not participate in any "particular matter" (including a rulemaking or policy matter) which directly and predictably affects the financial interest of any person or organization with which the employee has had any contact regarding future employment (or relationships

equivalent to employment, such as contracts and consultancies,) unless the employee's Deputy Ethics Official authorizes such participation under the same standards as in the **Impartiality** provisions of Subpart E discussed above. (Note: If the communications amount to "negotiating" for future "employment," the statutory restriction at 18 U.S.C. §208(a) applies, and employees may not participate in such matters unless the DAEO (not the Deputy Ethics Official) has granted a waiver under 18 U.S.C. §208(b)(1).)

SGEs are subject to the following restrictions to A LESSER DEGREE than regular employees:

a. 5 C.F.R. §2635.805 -- Service as an Expert Witness

Regular Employee: An employee shall not serve, other than on behalf of the United States, as an expert witness, with or without compensation, in **any proceeding** before a court or agency of the United States **in which the United States is a party or has a direct and substantial interest**, unless authorized by the DAEO.

SGE: The bar against expert testimony applies only if the individual has participated as a federal employee in the particular proceeding or in the particular matter that is the subject of the proceeding.

If an SGE has been appointed by the President; serves on a commission established by statute; or has served or is expected to serve for more than 60 days in a period of 365 consecutive days, an additional restriction applies. These SGEs cannot serve, other than on behalf of the United States, as an expert witness, with or without compensation, in **any proceeding** before a court or agency of the United States **in which the individual's employing agency is a party or has a direct and substantial interest**, unless authorized by the DAEO.

b. 5 C.F.R. §2635.807 -- Teaching, Speaking, and Writing

Regular Employee: Except for certain teaching activities, an employee shall not receive compensation from any source other than the Government for teaching, speaking, and writing that **relates to the employee's official duties**. The "relatedness" test is met if: (A) the activity is undertaken as an official government duty; (B) the circumstances indicate that the invitation to engage in the activity was extended to the employee primarily because of the employee's official position rather than the employee's expertise on the particular subject matter;

(C) the invitation to engage in the activity or the offer of compensation for the activity was extended to the employee, directly or indirectly, by a person who has interests that may be affected substantially by performance or nonperformance of the employee's official duties; (D) the information conveyed through the activity draws substantially on ideas or official data that are nonpublic information; **or** (E) the subject of the activity deals in significant part with:

(1) Any matter to which the employee presently is assigned or to which the employee had been assigned during the previous one-year period;

(2) Any ongoing or announced policy, program or operation of the agency; or

(3) In the case of certain noncareer employees, the general subject matter area, industry, or economic sector primarily affected by the programs and operations of the employee's agency.
SGE: The restrictions in paragraphs (2) and (3) above do not apply to an SGE. The restriction in paragraph (1) applies only during the current appointment of an SGE; except that if the SGE has not served or is not expected to serve for more than 60 days during the first year or any subsequent one year period of that appointment, **the restriction applies only to "specific party" matters** (such as contracts, licenses, and lawsuits) in which the SGE has participated or is participating personally and substantially.

c. 5 C.F.R. §2635.808 -- Fundraising Activities

Regular Employee: An employee may engage in fundraising in a personal capacity provided that the individual does not personally solicit funds or other support from a subordinate, or from any person known to the employee to be one of the five types of prohibited sources specified in section 2635.203(d) (generally persons or entities affected by **EPA** actions.)

An employee may participate in fundraising activities in an official capacity if authorized to so as part of official duties. Such authorization can come from statutes, Executive Orders, or regulations. 5 C.F.R. §2635.808(b). One example of authorized official fundraising is the Combined Federal Campaign (CFC).

SGE: An SGE may engage in fundraising in a personal capacity provided that the individual does not personally solicit funds or other support from a subordinate, or from any person known to the employee to be a prohibited source whose interests may be substantially affected by the performance or nonperformance of the employee's official duties. An SGE may also participate in authorized official fundraising such as the CFC.

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Appendix F:

"Conflict of Interest and the Special Government Employee"

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CONFLICT OF INTEREST AND THE SPECIAL GOVERNMENT EMPLOYEE
A Summary of Ethical Requirements Applicable to SGEs

The Office of Government Ethics (OGE) frequently receives questions about the ethical requirements applicable to special Government employees (SGE). Many agencies use SGEs, either as advisory committee members or as individual experts or consultants, and OGE knows that these SGEs pose unique challenges for agency ethics officials. SGEs typically are recruited for temporary service to the Government because they provide outside expertise or perspectives that might be unavailable among an agency's regular employees. Frequently, however, these SGEs have substantial outside activities and financial interests that may raise difficult ethics questions. In order to help agencies resolve such questions, OGE is issuing this summary, which attempts to digest, in one place, the various conflict of interest laws and ethics regulations applicable to SGEs.

Definition of SGE

The SGE category was created by Congress as a way to apply an important, but limited, set of conflict of interest requirements to a group of individuals who provide important, but limited, services to the Government. SGEs were originally conceived as a "hybrid" class, in recognition of the fact that the "simple categories of 'employee' and 'non-employee' are no longer adequate to describe the multiplicity of ways in which modern government gets its work done." B. Manning, *Federal Conflict of Interest Law* 30 (1964). It is crucial to distinguish SGEs both from regular employees and from individuals who are not Federal employees at all. These distinctions are important because SGEs are subject to less restrictive conflict of interest requirements than regular employees, but are subject to more restrictive requirements than non-employees, who generally are not covered by the conflict of interest laws at all.

The first and perhaps most important point to emphasize is that SGEs *are* Government employees, for purposes of the conflict of interest laws. Specifically, an SGE is defined, in 18 U.S.C. § 202(a), as "an *officer or employee* . . . who is retained, designated, appointed, or employed" by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days.

The terms "officer" and "employee" are not themselves defined in section 202(a). Nevertheless, the definitions of those terms in Title 5 of the United States Code have long been consulted for general guidance in determining whether a given individual should be considered an SGE or a non-employee. *See* 4B Op. O.L.C. 441, 442 (1980).[1] Three criteria for Government employment are identified in 5 U.S.C. §§ 2104 and 2105: (1) appointment in the civil service; (2) performance of a Federal function; and (3) supervision by a Federal official. With respect to the appointment element, however, it has been held that an appointment or other formal employment paperwork, "while perhaps the norm, is not a condition of special government employment as statutorily defined," *Association of American Physicians and Surgeons v. Clinton*, 187 F.3d 655, 662 (D.C. Cir. 1999); in order for an individual to be "retained, designated, appointed or employed" as an SGE, under section 202(a), it is sufficient that the circumstances indicate "a firm mutual understanding that a relatively formal relationship existed." 1 Op. O.L.C. 20, 21 (1977).[2] Moreover, with the respect to the supervision element, it should be remembered that SGEs, who often work as "specialists for short-term projects," sometimes need not be subject to the same level of "close supervision" as regular employees. *Aluminum Co. of America v. FTC*, 589 F. Supp. 169, 175-76 (S.D.N.Y. 1984).[3] Nevertheless, supervision or operational control remains an important attribute of employee status, and an agency may consider numerous factors when determining whether an individual is subject to the requisite degree of supervision to be deemed an SGE.[4]

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[1] As the Office of Legal Counsel has observed, "'the Title 5 definition is frequently used as a starting point for any analysis of whether the conflict of interest laws apply to a particular individual . . . although the Title [5] definition is not necessarily conclusive for conflicts purposes.'" 17 Op. O.L.C. 150, 154 n.12 (1993)(quoting Memorandum of Assistant Attorney General, Office of Legal Counsel, to Deputy General Counsel, Department of Commerce, at 10 (Dec. 15, 1982)).

[2] *See also* OGE Informal Advisory Letter 95 x 8 (possibility of *de facto* SGEs); Manning at 29-30 (occasional informal advice vs. more formal services).

[3] In a similar vein, it is recognized in various contexts that the "threshold level of control necessary to find employee status is generally lower when applied to professional services than when applied to nonprofessional services." *Weber v. Comm'r of IRS*, 60 F.3d 1104, 1111 (4th Cir. 1995).

[4] *E.g.*, OGE Informal Advisory Letter 82 x 22, at 334-35 (focusing on degree of agency scrutiny and guidance); 17 Op. O.L.C. at 155-56 (looking to limits on power of removal and other aspects of specific legislation creating particular Federal position); *see generally* GAO, *Civilian Personnel Manual*, Title I, Chapter 10, at 14-15 (1990) (discussing six factors indicating supervision for certain Federal personnel purposes); *Juliard v. Comm'r of IRS*, 61 T.C.M. (CCH) 2683 (1991) (various factors indicating sufficient agency control over professional employee for certain tax purposes); *Hospital Resource Personnel, Inc v. United States*, 68 F.3d 421, 427-28 (11th Cir. 1995) (discussing non-exclusive list of twenty common law factors identified by IRS for purpose of determining supervision); *Restatement (Second) of Agency* § 220(2) (1958) (ten factors to determine control).

Two of the more common types of non-employees from which SGEs must be distinguished are "representatives" and independent contractors. Representatives, as described more fully in OGE Informal Advisory Letter 82 x 22, typically serve on advisory bodies, and they represent specific interest groups, such as industry, consumers, labor, etc. Like SGEs, representatives can be appointed by the Government for a specified term on a Federal advisory committee, and they may make policy recommendations to the Government. *See* OGE Informal Advisory Letter 93 x 30. However, representatives can provide only advice. Moreover, unlike SGEs and other Federal employees, representatives are not expected to render disinterested advice to the Government. Rather, they are expected to "represent a particular bias." OGE Informal Advisory Letter 93 x 14. Therefore, representatives are not deemed employees of the Government for purposes of the conflict of interest laws.

Likewise, independent contractors are not deemed Government employees. True independent contractors are not employees because they are not subject to the supervision or operational control, described more fully above, that is necessary to create an "employer-employee relationship" with the Government. OGE Informal Advisory Letter 82 x 21. It should be noted, however, that persons who truly function like Federal employees will not avoid the application of the conflict of interest laws merely because their agency fails to designate them as employees or designates them as contractors. *See* 4B Op. O.L.C. at 441-42; Association of the Bar of New York City, *Conflict of Interest and Federal Service* 239-40 (1960).

Even though SGEs clearly are employees, agencies must be careful to differentiate them from regular Government employees. For most purposes, SGEs are distinguished from regular Government employees on the basis of the number of days of expected service to the Government.[5] Specifically, an SGE is expected to perform temporary duties for no more than 130 days during any period of 365 consecutive days. 18 U.S.C. § 202(a).

The determination of SGE status must be made prospectively, at the time the individual is appointed or retained. Employees should be designated as SGEs only where the agency makes an advance estimate of the number of days the employee is expected to serve during the ensuing 365-day period. This is done so that employees are on notice with respect to the rules that will apply to them. As the Office of Legal

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[5] The full definition of SGE also includes employees and officers in certain miscellaneous positions who are deemed SGEs *per se*, without regard to the number of days of service. 18 U.S.C. § 202(a). *See United States v. Baird*, 29 F.3d 647, 650 (D.C. Cir. 1994). In addition, individuals occupying other positions are specifically designated as SGEs in certain organic legislation. *See, e.g.*, 42 U.S.C. § 12651b(e) (members of Board of Directors, Corporation for National and Community Service).

Counsel has stated, "as a general matter, employees are *presumed to be regular government employees* unless their appointing Department is comfortable with making an estimate that the employee will be needed to serve 130 days or less." 7 Op. O.L.C. 123, 126 (1983)(emphasis added). If an agency designates an employee as an SGE, based on a good faith estimate, but the employee unexpectedly serves more than 130 days during the ensuing 365-day period, the individual still will be deemed an SGE for the remainder of that period. However, upon the commencement of the next 365-day period, the agency should reevaluate whether the employee is correctly designated as an SGE, i.e., expected to serve no more than 130 days. Indeed, any time an SGE serves beyond one year, the agency should perform a new estimate of the expected number of days of service for the next 365-day period; this is true whether the employee is actually reappointed for a new one-year term, which is the ordinary procedure, or is merely completing an indefinite or multiyear term. *See, e.g.*, OGE Informal Advisory Letter 81 x 24.

The executive branch has long observed certain criteria for counting the number of days of expected service, based on a Presidential interpretation of 18 U.S.C. § 202(a) published shortly after enactment. Presidential Memorandum, "Preventing Conflicts of Interest on the Part of Special Government Employees," 28 Federal Register 4539, 4541 (May 2, 1963); *see also* Federal Personnel Manual, Chapter 735, Appendix C (sunset); 3 Op. O.L.C. 78, 81-82 (1979); OGE Informal Advisory Letter 84 x 4.[6] OGE continues to use the same criteria, as follows: A part of a day is counted as an entire day. Work to be performed on weekends or holidays is counted. Where an employee is expected to serve in more than one agency, the expected number of days for both agencies must be aggregated in order for the employee to be considered an SGE for either agency. Where the second position commences at a later date, the number of days already served in the first agency must be added to the number of days expected to be served in both agencies for the remainder of the first 365-day period, in order to determine whether the employee may be considered an SGE for either agency during that remaining period.

A word is in order concerning two fairly common questions pertaining to SGE status and the applicability of the conflict of interest requirements. First, SGEs (and others) sometimes ask whether the ethics restrictions apply to them if they receive no pay

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[6] The Presidential Memorandum was drafted by the Office of Legal Counsel, Department of Justice, and "reflects a contemporaneous interpretation" of the 1962 conflict of interest legislation. 2 Op. O.L.C. 151, 155 n.3 (1978). The history of the Presidential Memorandum, including its rescission and replacement by other documents, is described in OGE Informal Advisory Letter 82 x 22, at 329-32. Much of the substance of the Presidential Memorandum was reproduced in Appendix C, Chapter 735 of the Federal Personnel Manual (FPM), itself now sunset. To the extent that much of the guidance contained in these documents reflects longstanding interpretations of 18 U.S.C. § 202(a) and other provisions of the conflict of interest laws, OGE continues to follow many of the same principles.

from the Government. It is important to remember that the definition of SGE expressly includes those who serve "without compensation." 18 U.S.C. § 202(a). SGEs generally are covered by the ethics laws and regulations without regard to their pay status.[7]

Second, SGEs occasionally may ask whether the restrictions on their outside activities apply on days when they perform no Government services. SGEs must be advised clearly that any restrictions concerning their private activities (representational services, expert witness activities, etc.) apply equally on days when they serve the Government and days when they do not.[8] Where the Government has not used an individual's services for some time, but has not specified a termination date in the appointment or otherwise, the individual might question whether he or she even remains an SGE. In such cases, the individual must seek a formal resolution of the matter before engaging in conduct prohibited for an SGE. As one early commentator observed, "presumably the consultant will remain an employee until the expiration of the designated term," but a "special government employee whose appointment is for a long or indefinite period would be well advised to submit a written resignation as soon as he thinks there may be a substantial hiatus in his services." R. Perkins, *The New Federal Conflict of Interest Law*, 76 Harv. L. Rev. 1113, 1126 (1963).

Criminal Conflict of Interest Statutes and Related Restrictions

Agency ethics officials regularly deal with five conflict of interest statutes found in Chapter 11, Title 18 of the United States Code: 18 U.S.C. §§ 203, 205, 207, 208, 209. Each of these criminal statutes makes at least some special provision for the treatment of SGEs. The application of these statutes is discussed below, in addition to certain related requirements found in other provisions of law.

a. Restrictions on Representation

Two statutes, 18 U.S.C. §§ 203 and 205, impose related restrictions on the outside activities of SGEs, particularly activities involving the representation of others before the Federal Government. Section 203 prohibits an employee from receiving, agreeing to receive, or soliciting compensation for representational services, rendered

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[7] One obvious exception would be certain narrow post-employment restrictions applicable only to employees paid at relatively high levels, as discussed below.

[8] In this respect, the conflict of interest restrictions differ from the restrictions on employee political activity described in 5 C.F.R. part 734 (Hatch Act regulations). *See* 5 C.F.R. § 734.601 (SGE subject to restrictions on political activity only "when he or she is on duty").

either personally or by another, before any court or Federal agency or other specified Federal entity, in connection with any particular matter in which the United States is a party or has a direct and substantial interest. It should be noted that section 203 applies not only to representational services provided by the employee personally, but also to services provided by another person with whom the employee is associated, provided that the employee shares in the compensation for such services, for example, through partnership income or profit-sharing arrangements. See 4B Op. O.L.C. 603 (1980).

Section 205 prohibits an employee from personally representing anyone before any court or Federal agency or other specified Federal entity, in connection with any particular matter in which the United States is a party or has a direct and substantial interest. *See* 18 U.S.C. § 205(a)(2). Unlike section 203, this prohibition in section 205(a)(2) applies whether or not the employee receives any compensation for his or her representational activity. Furthermore, section 205(a)(1) prohibits an employee from representing anyone in the prosecution of a claim against the United States, or from receiving any gratuity, or share or interest in a claim, as consideration for assistance in prosecuting the claim.

Both section 203 and section 205 are limited, however, in their application to SGEs. 18 U.S.C. § 203(c) and 18 U.S.C. § 205(c) contain identical provisions that substantially narrow the prohibitions with respect to SGEs. One of the most significant limitations is that SGEs are restricted by sections 203 and 205 only in connection with "particular matters involving specific parties." Such matters typically involve a specific proceeding affecting the legal rights of parties, or an isolatable transaction or related set of transactions between identified parties; examples would include contracts, grants, applications, requests for rulings, litigation, or investigations. Unlike regular employees, SGEs may represent others or receive compensation for representational services in connection with particular matters of general applicability--such as broadly applicable policies, rulemaking proceedings, and legislation--which do not involve specific parties. *See* 14 Op. O.L.C. 79 (1990); 5 C.F.R. § 2640.102(l)(m); 5 C.F.R. § 2637.201(c)(1).

Furthermore, the restrictions on SGEs are narrowly drawn to focus only on those matters in which the SGE actually participated for the Government, as well as, in some cases, those matters actually pending in the SGE's own agency. More specifically, all SGEs are subject to the prohibitions of sections 203 and 205 with respect to those matters in which the SGE "at any time participated personally and substantially as a Government employee or special Government employee." 18 U.S.C. §§ 203(c)(1), 205(c)(1). Guidance on what constitutes personal and substantial participation may be found in regulations construing the same phrase in related conflict of interest statutes. *See* 5 C.F.R. § 2640.103(a)(2); 5 C.F.R.

§ 2637.201(d). Likewise, guidance on what constitutes participation in the *same particular matter* as the matter with respect to which an SGE seeks to provide representational services may be found in regulations construing the analogous requirement in 18 U.S.C. § 207(a). *See* 5 C.F.R. § 2637.201(c)(4).[9]

SGEs who have served the Government for more than 60 days during the immediately preceding period of 365 consecutive days are subject to an additional restriction. Such SGEs are subject to the prohibitions of sections 203 and 205 in connection with any covered matter that "is pending in the department or agency of the Government in which [the SGE] is serving." 18 U.S.C. §§ 203(c)(2), 205(c)(2). It should be noted that the 60-day standard for determining the application of this additional restriction is a standard of actual past service, as contrasted with the 130-day standard of estimated future service for determining SGE status discussed above.[10] Thus, for example, an SGE may represent another person before the agency in which he or she serves until the point at which the SGE has actually served 60 days in any prior period of 365 days; once the 61st day of service is reached, the SGE must discontinue the representation.

Beyond these basic limitations on the application of sections 203 and 205, SGEs also may be eligible for a special waiver that permits certain representational activity in connection with work under Federal grants and contracts. Identical provisions, in 18 U.S.C. §§ 203(e) and 205(f,) allow an agency head to authorize an SGE to represent another before the Government "in the performance of work under a grant by, or a contract with or for the benefit of, the United States." The legislative history indicates that the purpose of this exception is "to take care of any situations involving the national interest where an intermittent employee's special knowledge or skills may be required by his employer or other private person to effect the proper performance of a Government contract [or grant] but where his services may be unavailable in the absence of a waiver." S. Rep. No. 2213, 87th Cong., 2d Sess. (1962), *reprinted in* 1962 U.S.C.C.A.N. 3852, 3860. Such a waiver may be granted

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[9] The regulatory guidance found in 5 C.F.R. part 2637 was promulgated prior to amendments to section 207 enacted by the Ethics Reform Act of 1989 and thereafter; however, "[e]xcept where the underlying statutory provision has changed, part 2637 remains persuasive concerning the interpretation of the newer version of 18 U.S.C. § 207." OGE Memorandum to Designated Agency Ethics Officials, General Counsels, and Inspectors General (Nov. 5, 1992).

[10] Nevertheless, certain similar rules apply to counting the number of days: a partial day worked should be counted as a full day, and work performed on weekends and holidays should be counted. However, unlike the 130-day standard for determining SGE status, the 60-day standard under sections 203(c) and 205(c) does not require that service at more than one agency be aggregated; in other words, only service at the agency before which the SGE intends to represent someone should be counted in determining whether the 60-day standard has been exceeded with respect to that agency.

only by the agency head and must be based on a written certification, published in the Federal Register, that it is required by the national interest. Such a waiver covers representation only during the "performance of work under" a grant or contract and therefore would not apply to representational activity prior to the awarding and commencement of work on a grant or contract. *See* Presidential Memorandum, 28 Federal Register at 4542 (waiver provision covers "situation which may arise *after* a Government grant or contract has been negotiated").[11]

Finally, even where the narrow restrictions of section 203 and section 205 are inapplicable, agencies should be aware that certain representational activities of SGEs may implicate 5 C.F.R. § 2635.702, which prohibits the use of public office for private gain. The need for administrative action to prevent SGEs from abusing their inside position for the benefit of private persons was addressed in the legislative history of sections 203 and 205, as well as in subsequent issuances and opinions of the executive branch.[12] In some circumstances, private representational activity by SGEs can raise at least the appearance that they are using their official position to gain special access or attention from Government decisionmakers, which would be unavailable to the general public. *Cf.* 91 x 17 (appearance that SGE made certain contacts through Government connections for benefit of outside organization). Such concerns are more likely to arise when the subject matter of the private representation is related to the subject matter of the SGE's official duties and the representational contacts are made to the SGE's own agency, especially to the same agency personnel with whom the SGE works in an official capacity. These issues must be addressed on a case-by-case basis, with adequate consideration of the legitimate interests and demands of an SGE's outside professional life.

b. Post-Employment Restrictions

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[11] SGEs, like regular employees, also may be eligible for other exceptions to sections 203 and 205. *See* 18 U.S.C. §§ 203(d),(f), 205(d), (e), (g), (i).

[12] Discussing proposed sections 203 and 205, the Senate Report stated that, beyond the limited criminal prohibitions, "agency watchfulness and regulation" may be necessary to "make certain that persons serving [an agency] part time who also appear on behalf of outside organizations do not abuse their access to the agency for the benefit of those organizations." S. Rep. No. 2213, 1962 U.S.C.C.A.N. 3859. Similar concerns were voiced in a Presidential Memorandum issued shortly after the legislative enactment: "It is desirable that a consultant or adviser or other individual who is a special Government employee, even when not compelled to do so by sections 203 and 205, should make every effort in his private work to avoid any personal contact with respect to negotiations for contracts or grants with the department or agency which he is serving if the subject matter is related to the subject matter of his consultancy or other service." 28 Federal Register at 4542. The Presidential Memorandum recognized that it may not be practicable for SGEs to avoid all such representational activity, depending on the circumstances, but advised that SGEs at least alert a "responsible government official" when contemplating such activities. *Id.*; *see also* Federal Personnel Manual (sunset), Chapter 735, Appendix C, at 3; 10 Op. O.L.C. at 82-83; 7 Op. O.L.C. at 125 n.3.

The criminal post-employment statute, 18 U.S.C. § 207, imposes a number of different restrictions on the activities of former Government employees. Several of these restrictions provide no special treatment for SGEs. The provisions of section 207 that apply in the same way to both SGEs and regular employees include:

> (1) 18 U.S.C. § 207(a)(1), the lifetime prohibition on representing others in connection with the same particular matter involving specific parties in which the former employee participated personally and substantially;
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> (2) 18 U.S.C. § 207(a)(2), the two-year prohibition on representing others in connection with the same particular matter involving specific parties that was pending under the employee's official responsibility during the last year of Government employment; and
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> (3) 18 U.S.C. § 207(b), the one-year prohibition on representing, aiding, or advising others about certain ongoing trade or treaty negotiations on the basis of certain nonpublic information.[13]

Other parts of section 207 do contain special provisions for SGEs. The most significant provision is found in section 207(c), the so-called "one year cooling off period" for former "senior employees." Section 207(c) prohibits former senior employees from representing anyone before their former agency or department for one year after terminating their senior position, in connection with any matter. This restriction generally applies to: positions for which the rate of pay is fixed according to the Executive Schedule; positions for which the rate of basic pay is equal to or greater than the rate of basic pay for level 5 of the Senior Executive Service;[14] positions with appointment by the President under 3 U.S.C. § 105(a)(2)(B) or by the Vice President under 3 U.S.C. § 106(a)(1)(B); and positions held by an active duty commissioned officer of the uniformed services serving at pay grade 0-7 or above. 18 U.S.C. § 207(c)(2). However, with respect to SGEs, the application of

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[13] Additionally, 18 U.S.C. § 207(d) imposes a one-year prohibition on "very senior employees" against representing others before their former agency or before any official appointed to an Executive Schedule position. On its face, section 207(d) makes no special provision for SGEs; however, it is unclear whether an SGE would occupy a position that falls within the "very senior" category, as described in the statute. *See* 18 U.S.C. § 207(d)(1). Agencies with specific questions concerning the applicability of section 207(d) to a particular SGE or class of SGEs are advised to consult with OGE or the Office of Legal Counsel, Department of Justice.

[14] Because SGEs often are paid on an hourly or daily basis, it may be necessary to prorate the basic pay for level 5 of the SES, either on an hourly or a daily basis, in order to determine whether the SGE's hourly or daily rate is equivalent.

section 207(c) is limited, based on the number of days the individual served during the last year in a senior position. Specifically, the one year cooling off period applies only to former SGEs who served 60 days or more during the one-year period before terminating their services as a senior employee.[15]

Section 207(f), which restricts certain post-employment activities with foreign entities, is similarly limited with respect to SGEs. Section 207(f) generally imposes a one-year prohibition on representing, aiding, or advising certain covered foreign entities in connection with any official decision of an officer or employee of the United States. However, section 207(f) applies only to "senior employees" who are subject to section 207(c) and "very senior employees" who are subject to section 207(d). Therefore, SGEs who are not subject to section 207(c) or section 207(d)--for example, "senior employees" who served fewer than 60 days during the last year before they terminated from their senior position--are likewise exempt from section 207(f).[16]

Apart from 18 U.S.C. § 207, Executive Order 12834 (January 20, 1993) imposes a number of related post-employment restrictions on "senior appointees" and certain trade negotiators. These restrictions include, among other things, certain five-year cooling off requirements that are similar in scope to the one-year restrictions of 18 U.S.C. §§ 207(c) and 207(b), as well as a lifetime ban on certain activities as a foreign agent. The requirements of Executive Order 12834 apply only to "full-time, non-career appointees." Although it is possible for an SGE to provide temporary services on a "full-time" basis, pursuant to 18 U.S.C. § 202(a), and certain SGEs could be considered "non-career" for certain purposes,[17] SGEs are not covered by the requirements of Executive Order 12834. The Executive order was not intended to cover employees who perform only temporary duties. It was not contemplated that the significant contractual obligations imposed by the Executive order would apply to persons who serve in the relatively limited capacity of an SGE.

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[15] The Director of OGE also has authority to waive the prohibition of section 207(c) with respect to certain senior positions, under limited circumstances. *See* 18 U.S.C. § 207(c)(2)(C); 5 C.F.R. § 2641.201(d).

[16] Additionally, SGEs, like all employees, may be eligible for a number of exceptions to the various restrictions of 18 U.S.C. § 207. *See* 18 U.S.C. § 207(h),(j),(k).

[17] *See* OGE Informal Advisory Letter 90 x 22 (Presidentially appointed member of board of directors of agency is noncareer officer or employee and may be SGE depending on estimate of number of days of service); *see generally* OGE Informal Advisory Letter 89 x 16 (indicia of non-career status).

Finally, former SGEs are subject to the provisions of the Procurement Integrity Act, 41 U.S.C. § 423, to the same extent as all former Federal employees. *See* 48 C.F.R. § 3.104-3 (definition of "official" includes SGEs). The act prohibits a former SGE from accepting compensation as an employee, officer, director, or consultant of a contractor within the one-year period after the SGE participated in certain procurement matters pertaining to that contractor. *See* 41 U.S.C. § 423(d). This statute also imposes certain sanctions, including criminal penalties, on former SGEs who disclose certain information pertaining to Federal procurements. *See* 41 U.S.C. § 423(a), (e).

c. Financial Conflicts of Interest

18 U.S.C. § 208 prohibits all employees, including SGEs, from participating personally and substantially in any particular matter that has a direct and predictable effect on their own financial interests or the financial interests of others with whom they have certain relationships. In addition to an employee's own personal financial interests, the financial interests of the following persons or organizations are also disqualifying: spouse; minor child; general partner; organization which the individual serves as officer, director, trustee, general partner or employee; person or organization with which the employee is negotiating or has any arrangement concerning prospective employment.[18] Because SGEs typically have substantial outside employment and other interests, which are often related to the subject areas for which the Government desires their services, issues under section 208 frequently arise.

In certain circumstances, however, SGEs are eligible for special treatment under section 208. SGEs who serve on advisory committees, within the meaning of the Federal Advisory Committee Act (FACA), 5 U.S.C. app., are uniquely eligible for a particular waiver of the prohibitions of section 208(a). Under 18 U.S.C. § 208(b)(3), an SGE serving on a FACA committee may be granted a waiver where the official responsible for his or her appointment certifies in writing that the need for the SGE's services outweighs the potential for a conflict of interest posed by the financial interest involved. 18 U.S.C. § 208(b)(3). The standard for granting such

[18] Related provisions in the Standards of Ethical Conduct for Executive Branch Employees also disqualify an employee, including an SGE, from participating in matters affecting the financial interests of a person or organization with which the employee is "seeking" employment, even if there have been no actual negotiations or arrangements for prospective employment, within the meaning of section 208. *See* 5 C.F.R. part 2635, Subpart F. Furthermore, a provision in the Procurement Integrity Act, which applies equally to SGEs and regular employees, imposes disqualification and reporting requirements on employees who participate in certain agency procurement matters and who receive employment contacts from bidders or offerors in those procurements. *See* 41 U.S.C. § 423(c).

waivers is more liberal than the standard for other employees, under 18 U.S.C. § 208(b)(1), which requires a determination that the financial interest is not so substantial as to be deemed likely to affect the integrity of the employee's services. *Compare* 5 C.F.R. § 2640.301 (requirements for waivers under section 208(b)(1)); 5 C.F.R. § 2640.302 (requirements for waivers under section 208(b)(3)). Agencies should remember that Congress reserved this special waiver authority only for those SGEs who serve on advisory committees; SGEs who do not serve in connection with a FACA committee may be granted a waiver only in accordance with section 208(b)(1). *See* Report of The President's Commission on Federal Ethics Law Reform 30 (1989) (advisory committees warrant different approach under section 208 because FACA provides important safeguards and members only make nonbinding recommendations).

SGEs serving on FACA committees also are covered by certain exemptions from section 208 that have been promulgated by OGE, pursuant to 18 U.S.C. § 208(b)(2). The most significant of these is 5 C.F.R. § 2640.203(g), which pertains to certain financial interests arising from the SGE's outside employment. Specifically, this exemption permits SGEs serving on FACA committees to participate in particular matters of general applicability--such as the development of general regulations, policies, or standards--where the disqualifying interest arises from the SGE's non-Federal employment or prospective employment. Agencies should note, however, that this exemption is subject to several important limitations: (1) the matter cannot have a "special or distinct effect" on either the SGE or the SGE's non-Federal employer, other than as part of a class;[19] (2) the exemption does not cover interests arising from the ownership of stock in the employer; (3) and the non-Federal employment must involve an actual employee/employer relationship, as opposed to an independent contractor relationship (such as certain consulting positions). *See* 61 Federal Register at 66838. Furthermore, it should be emphasized that section 2640.203(g) does not apply to all SGEs, but only to those serving on advisory committees within the meaning of FACA.

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[19] When we promulgated this exemption, we explained the "special or distinct effect" limitation as follows: "[I]t is not OGE's intent that the exemption apply only where the effect of the matter on members within a class is identical. Normally, the matter would have a 'special or distinct effect' when its impact would be unique to the employee or his employer, or where the effect would be clearly out of proportion in comparison to the effect on other members of the class." 61 Federal Register 66829, 66839 (December 18, 1996). Although the examples following section 2640.203(g) do not specifically address the "special or distinct effect" limitation, guidance as to the meaning of that phrase may be found in an example following another exemption that uses the same language. *See* 5 C.F.R. § 2640.203(b) (Example 2) (even though grant announcement open to all universities, employee's university one of just two or three likely to receive grant because very few universities known to have necessary facilities and equipment).

Two other exemptions also specifically cover SGEs serving on FACA committees, although these are much more narrow in scope. One covers certain SGEs participating in matters pertaining to medical products, 5 C.F.R. § 2640.203(i), and the other covers a very limited class of SGEs serving on certain advisory committees of the Food and Drug Administration, 5 C.F.R. § 2640.203(j). Additionally, OGE expects to promulgate other exemptions in the near future, some of which may apply to specific situations involving SGEs serving on certain advisory committees.

Another exemption, 5 C.F.R. § 2640.203(c), is not specifically limited to SGEs but can be helpful in resolving certain issues particularly common among SGEs. Section 2640.203(c) permits any employee to participate in a particular matter affecting one campus of a multi-campus institution of higher education, where the disqualifying interest arises from the individual's employment with a separate campus of the same institution, provided that the individual has no multicampus responsibilities at the institution. SGEs frequently are drawn from universities, including large universities with multiple campuses. These SGEs may be called upon to participate in official matters--such as grants, contracts, applications, and other particular matters--that affect the financial interests of another campus in the same university system where they are employed. Hence, section 2640.203(c) may have particular utility for many SGEs.[20]

Finally, because divestiture of a disqualifying interest is one of the remedies for a potential violation of section 208, it is important to note that SGEs are *not* eligible for a Certificate of Divestiture (CD). A CD is a tax benefit that allows the deferral or nonrecognition of capital gain where an employee divests a financial interest in order to comply with conflict of interest requirements. However, Congress specifically excluded SGEs from the definition of "eligible person," and consequently SGEs may not take advantage of this benefit. 26 U.S.C. § 1043(b)(1)(A).

d. Supplementation of Federal Salary

18 U.S.C. § 209 prohibits Federal employees from receiving "any salary, or any contribution to or supplementation of salary" from an outside source as compensation for their Government services. SGEs, however, are completely exempt from this prohibition. 18 U.S.C. § 209(c). This means, for example, that SGEs may continue to collect their regular salary from an outside employer for days on which they are

[20] Of course, SGEs also may take advantage of the other generally applicable exemptions promulgated by OGE, including the exemptions for certain interests in publicly traded securities. *See* 5 C.F.R. part 2640, Subpart B.

providing services to the Government (whether their Government service is paid or unpaid).

SGEs should be advised, nevertheless, that there may be other restrictions on the receipt of compensation in connection with the performance of their official duties. For example, 5 C.F.R. § 2635.807 prohibits all Federal employees, including SGEs, from receiving outside compensation for teaching, speaking, or writing when "the activity is undertaken as part of the employee's official duties." 5 C.F.R. § 2635.807(a)(2)(i)(A). SGEs also are subject to the criminal bribery and illegal gratuity statute, which prohibits, under certain circumstances, the receipt of anything of value in connection with official acts. 18 U.S.C. § 201(b), (c).

Other Ethics Statutes

Apart from the five major criminal conflict of interest statutes in Chapter 11 of Title 18, there are other ethics statutes, some of which apply to SGEs and some of which do not.

As discussed above, SGEs are subject to the bribery and illegal gratuity statute, 18 U.S.C. § 201. SGEs also are covered by 5 U.S.C. § 7353, which prohibits the acceptance of gifts from certain sources. Likewise, SGEs are subject to 5 U.S.C. § 7351, which prohibits certain gifts to official superiors and gifts from employees receiving less pay. Both section 7353 and section 7351 are specifically implemented by the Standards of Ethical Conduct for Employees of the Executive Branch, discussed more fully below. *See* 5 C.F.R. part 2635, subparts B and C. Similarly, SGEs are covered by the financial disclosure provisions of the Ethics in Government Act of 1978, 5 U.S.C. app. §§ 101-111, as implemented by 5 C.F.R. part 2634, discussed below. The restrictions of the Procurement Integrity Act, 41 U.S.C. § 423, also apply to SGEs, as discussed above.[21]

Agencies also should note that SGEs are subject to 18 U.S.C. § 219, a criminal statute that prohibits employees from acting as an agent of a foreign principal under certain circumstances. Unlike regular employees, however, SGEs may be eligible for a special exemption from the prohibitions of section 219, where the agency head

[21] Also in the procurement area, we note that SGEs are covered by a provision in the Federal Acquisition Regulation that generally prohibits the award of Federal contracts "to a Government employee or to a business concern or other organization owned or substantially owned or controlled by one or more government employees." 48 C.F.R. § 3.601(a). However, unlike regular employees, SGEs are covered by this prohibition only if: (1) the contract arises directly out of the SGE's official activities; (2) the SGE is in a position to influence the award of the contract in his or her official capacity; or (3) some other conflict of interest is determined to exist. 48 C.F.R. § 3.601(b).

certifies that employment of the SGE "is required in the national interest." 18 U.S.C. § 219(b). The Department of Justice also has held that SGEs may be subject to the Emoluments Clause of the United States Constitution, U.S. Const., art. I, § 9, cl. 8, which prohibits persons who "hold offices of profit or trust" in the Federal Government from having any position in or receiving any payment from a foreign government. *See* 15 Op. O.L.C. 65 (1991); 17 Op. O.L.C. 114 (1993). OGE does not render opinions concerning section 219 or the Emoluments Clause, and agencies are advised to consult with Department of Justice if they have any questions about the application of these provisions to SGEs.

SGEs are not, however, subject to 5 U.S.C. app. § 501, which imposes limits on the outside earned income of certain noncareer employees. *See* 5 U.S.C. app. § 505(2)(B).[22] Nor are SGEs covered by 5 U.S.C. app. § 502, which imposes a number of restrictions on the outside activities of certain noncareer employees. *See id.* Moreover, as discussed above, SGEs are not covered by the statutory provision authorizing certificates of divestiture for the nonrecognition of capital gain in cases where employees sell property to comply with ethics requirements. *See* 26 U.S.C. § 1043(b)(A). SGEs also are not subject to 26 U.S.C. § 4941, which imposes tax sanctions on certain Government employees who engage in specified acts of "self-dealing" in connection with a private foundation. *See* 26 U.S.C. § 4946(c).

Standards of Ethical Conduct for Employees of the Executive Branch

Generally, SGEs are treated the same as regular employees under the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. part 2635. *See* 5 C.F.R. § 2635.102(h) ("employee" includes SGEs, and employee status not affected by fact that SGE does not perform official duties on given day). There are, however, a few notable exceptions. Only those exceptions, as well as a few other items of particular relevance to SGEs, will be discussed below.[23]

a. Gifts from Outside Sources

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[22] Similarly, SGEs are not subject to the related prohibition on outside earned income applicable to certain Presidential appointees, under Executive Order 12674, § 102 (1989), as modified by Executive Order 12731 (1990). This provision, which covers certain "full-time non-career" appointees, is inapplicable to SGEs for reasons similar to those discussed above with respect to the applicability of Executive Order 12834.

[23] See also the discussion above of 5 C.F.R. § 2635.702, in connection with the representational activities of SGEs.

SGEs, like all employees, are subject to 5 C.F.R. § 2635.202(a), which prohibits the acceptance of gifts from a "prohibited source" and gifts given because of an employee's official position. The definition of "prohibited source" includes any person seeking official action from the employee's agency, doing or seeking to do business with the employee's agency, conducting activities regulated by the employee's agency, or having interests that may be substantially affected by the employee's official duties; the definition also includes organizations the majority of whose members fall within any of the aforementioned categories. 5 C.F.R. § 2635.203(d). From this definition, it should be immediately apparent that SGEs pose unique issues, because many SGEs are employed by, or have substantial professional and business relationships with, such prohibited sources. For this reason, OGE originally proposed an exception, 5 C.F.R. § 2635.204(e)(2), specifically to permit SGEs to accept various benefits resulting from outside business or employment activities, where it is clear that such benefits are not offered or enhanced because of the employee's official position. *See* 56 Federal Register 33777, 33782 (July 23, 1991). Although the final version of section 2635.204(e)(2) was broadened to cover all employees, not just SGEs, this exception continues to be of particular importance to SGEs.

b. Presidential Appointees and Covered Noncareer Employees

5 C.F.R. § 2635.804 references certain outside earned income restrictions on specified Presidential appointees and other covered noncareer employees. These restrictions are inapplicable to SGEs.[24]

c. Outside Expert Witness Activities

Employees generally may not participate as an expert witness, other than on behalf of the United States, in any proceeding before a Federal court or agency in which the United States is a party or has a direct and substantial interest. 5 C.F.R. § 2635.805(a). This prohibition applies whether or not the employee receives compensation for the activity. The Designated Agency Ethics Official may authorize an employee to serve as an expert witness where such service is determined to be in the interest of the Government or where the subject matter of the testimony is determined to be unrelated to the employee's official duties. 5 C.F.R. § 2635.805(c).

For SGEs, the restrictions of section 2635.805 are substantially narrowed. With respect to most SGEs, section 2635.805 applies only where the SGE actually participated officially in the same proceeding or in the particular matter that is the

[24] See footnote 22 and accompanying text.

subject of the proceeding. 5 C.F.R. § 2635.805(a). A somewhat more restrictive standard applies to a smaller class of SGEs who are deemed to have particularly significant Federal positions, i.e., those either appointed by the President, serving on a commission established by statute, or serving (or expected to serve) for more than 60 days in a period of 365 days. 5 C.F.R. § 2635.805(b). For this class of SGEs, the restriction on expert service also applies to any proceeding in which the SGE's own agency is a party or has a direct and substantial interest.

d. Outside Teaching, Speaking and Writing

5 C.F.R. § 2635.807(a) generally prohibits an employee from receiving outside compensation for speaking, teaching or writing activities that relate to the employee's official duties. Such activities may relate to an employee's official duties in several different ways: if the activity is performed as part of the employee's official duties (discussed above in connection with supplementation of Federal salary); if the invitation to engage in the activity was extended primarily because of the employee's official position rather than expertise in the subject matter; if the invitation or offer of compensation was extended by someone with interests that may be affected substantially by the employee's duties; or if the information conveyed through the activity draws substantially on nonpublic information obtained through the employee's Government service. 5 C.F.R. § 2635.807(a)(2)(i)(A)-(D). SGEs, like all employees, are prohibited from receiving compensation for activities that are related to their official duties in any of these ways.

Additionally, pursuant to paragraph (E) of the definition of relatedness, there are several other ways in which teaching, speaking and writing may relate to an employee's official duties, and SGEs receive special treatment in this connection. *See* 5 C.F.R. § 2635.807(a)(2)(i)(E). Under paragraph (E)(1), an activity is related if it deals, in significant part, with any matter to which the employee is currently assigned or has been assigned during the previous year. Under paragraph (E)(2), an activity is related to an employee's official duties if it deals, in significant part, with any ongoing or announced policy, program or operation of the employee's agency. Moreover, under paragraph (E)(3), with respect to certain noncareer employees, an activity is related to the employee's duties if it deals, in significant part, with "the general subject matter area, industry, or economic sector primarily affected by the programs and operations" of the employee's agency.

The scope of paragraph (E) is substantially narrowed, however, with respect to SGEs. First, SGEs are completely exempt from paragraphs (E)(2) and (E)(3). *See* 5 C.F.R. § 2635.807(a)(2)(i)(E)(4). Thus, for example, nothing in section 2635.807(a)(2)(i)(E) prohibits an SGE from accepting compensation for

speaking, teaching, or writing simply because the activity relates to the programs or the general subject area of the SGE's agency. Second, even with respect to paragraph (E)(1), which covers matters in which the employee has been personally involved during the past year, the restriction is limited. For all SGEs, paragraph (E)(1) is limited only to the matters to which the SGE is currently assigned or had been assigned during his or her current appointment. Moreover, for SGEs who have not served (or are not expected to serve) more than 60 days during the first year of appointment or any subsequent one-year period of appointment, the restriction is even narrower: paragraph (E)(1) applies only to "particular matters involving specific parties" in which the SGE "has participated or is participating personally and substantially." Thus, for example, nothing in section 2635.807(a)(2)(i)(E) prohibits an SGE from accepting compensation simply because the activity pertains to a policy matter that does not involve specific parties, even though the SGE may be assigned to such matter.[25]

Another provision in section 2635.807 has special significance for SGEs, even though it applies equally to regular employees. There is a specific exception to the ban on compensation for activities that are related to an employee's duties under either section 2635.807(a)(2)(i)(B)(invitation primarily because of official position) or section 2635.807(a)(2)(i)(E)(activity deals with personal assignments, etc.). This exception permits employees to accept compensation, otherwise prohibited by these two provisions, for teaching a course requiring multiple presentations offered as part of: (a) the regularly established curriculum of various specified types of educational institutions; or (b) educational or training programs sponsored and funded by Federal, State, or local government. 5 C.F.R. § 2635.807(a)(3). Because SGEs so often are employed by universities and other institutions of higher learning, on a full-time or adjunct basis, this exception may have particular relevance.

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[25] As discussed above (under "Supplementation of Federal Salary"), however, section 2635.807 still prohibits an SGE from receiving compensation for teaching, speaking or writing activities that are undertaken as part of the employee's official duties.

e. Fundraising

All employees, including SGEs, are equally subject to certain restrictions on personal fundraising for nonprofit organizations. These include restrictions on the use of official title, position and authority, and the solicitation of subordinates. 5 C.F.R. § 2635.808(c). Additionally, employees may not personally solicit funds or other support from a person known by the employee to be a "prohibited source." (The definition of prohibited source is discussed in more detail above, under "Gifts from Outside Sources.") With respect to SGEs, however, this restriction is limited to a narrower subset of the definition of prohibited source. SGEs are prohibited only from personally soliciting persons whose interests may be affected substantially by the performance or nonperformance of the SGE's official duties. 5 C.F.R. § 2635.808(c)(1)(ii).

Financial Disclosure

As a general rule, all SGEs must file either a public financial disclosure statement or a confidential financial disclosure statement.

a. Public Reporting

SGEs are required to file a public financial disclosure report if they meet two criteria. First, they must perform the duties of their office, or be expected to perform those duties, for more than 60 days in the calendar year. *See* 5 C.F.R. § 2634.204. Second, they must meet the pay conditions for public filing, i.e., they must be paid at least the equivalent of 120% of the minimum rate of basic pay for GS-15 of the General Schedule (or, if they are members of the uniformed service, they must be at or above pay grade 0-7). *See* 5 C.F.R. § 2634.202(c). SGEs meeting both of these criteria file the same new entrant, incumbent, and termination reports as regular employees. Additionally, any prospective SGE who is nominated by the President to a position requiring Senate confirmation--regardless of pay level or expected number of service days--may be required by the confirming committee to file an initial "nominee" report. *See* 5 U.S.C. app. § 101(b)(1).

Unlike regular employees, certain SGEs may be eligible for a special waiver of the public availability of their financial disclosure reports. In "unusual circumstances," the Director of OGE may grant a waiver of the public availability requirement for a financial disclosure report submitted by an SGE who has neither performed, nor is expected to perform, official duties for more than 130 days in a calendar year. 5 C.F.R. § 2634.205(a). Such a waiver may be granted only if the Director determines that the individual is able to provide services specially needed by the

Government, it is unlikely that the SGE's outside employment or financial interests will create a conflict of interest, and public financial disclosure is not otherwise necessary. *Id.* Requests for such waivers are subject to a number of very specific procedural requirements, including deadlines for submissions, so SGEs and their agencies should consult 5 C.F.R. § 2634.205(b) carefully. Moreover, it should be understood that such waivers are rarely granted.

b. Confidential Reporting

Generally, any SGE not required to file a public financial disclosure report must file a confidential financial disclosure report. 5 C.F.R. § 2634.904(b). The SGE must submit the standardized OGE Form 450 and any OGE-approved supplement, unless the SGE's agency has received approval to use an alternative reporting system. 5 C.F.R. §§ 2634.907(standard form prescribed by OGE); § 2634.905(c) (OGE-approved alternative). However, SGEs may not use the standardized OGE Optional Form 450-A (Confidential Certificate of No New Interests). 5 C.F.R. § 2634.905(d)(1).

SGEs must file a new entrant report no later than 30 days after assuming the position or office. 5 C.F.R. §§ 2634.903(b)(1). However, an SGE serving on an advisory committee may be required to file even earlier, *i.e.*, before any advice is rendered by the individual and prior to the first meeting of the committee. 5 C.F.R. § 2634.903(b)(3).

SGEs do not file incumbent confidential reports. Instead, they are required to file an additional new entrant report each year, upon their "reappointment or redesignation" as an SGE for a new 365-day period. 5 C.F.R. § 2634.903(b)(1). In cases where an SGE is appointed for a term in excess of one year, the agency still must at least "redesignate" the individual as an SGE annually by estimating the number of days the employee is expected to serve in the next 365-day period (as discussed in more detail under "Definition of SGE" above). Ordinarily, this would mean that each SGE with a multiyear term would file an additional new entrant report each year within 30 days of the anniversary of that employee's appointment date. However, OGE recognizes that agencies with many SGEs might have to keep track of multiple filing dates for these "follow-on" reports, corresponding to the multiple appointment anniversaries of different SGEs. Therefore, in order to reduce administrative burden, OGE permits agencies to specify one date each year on which to collect follow-on new entrant reports from all SGEs (or discrete groups of SGEs, such as all members of a given advisory committee) who serve for terms in excess of one year. OGE DAEOgram DO-95-019 (April 11, 1995).

Finally, an SGE may be excluded from any confidential reporting requirement, under appropriate circumstances. An agency may exclude an SGE from such reporting requirements where it determines, based on the duties of the SGE's position, that: (1) the possibility of a real or apparent conflict of interest is remote, or (2) the SGE's level of responsibility is sufficiently low to make reporting unnecessary. 5 C.F.R. § 2634.905(a),(b).

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