

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 101–6 and 102–3

[FPMR Amendment A-]

RIN 3090–AG49

Federal Advisory Committee Management

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Proposed 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 will be added to the FPMR to direct readers to the coverage in the FMR. The FMR coverage is written in plain language and will provide agencies with updated regulatory material that is easy to read and understand.

DATES: Comments on this proposed rule must be received by March 14, 2000.

ADDRESSES: General Services Administration, Office of Governmentwide Policy, Committee Management Secretariat (MC), 1800 F Street NW (Room G–230), Washington, DC 20405. Copies of all documents received are available for public inspection at the same location.

In addition to providing written comments at the address listed above, interested parties may file comments electronically at the following Internet address: charles.howton@gsa.gov, or by facsimile to (202) 273–3559.

FOR FURTHER INFORMATION CONTACT: Charles F. Howton, Deputy Director, Committee Management Secretariat (202) 273–3561.

SUPPLEMENTARY INFORMATION:

Background

GSA's authority for administering the Federal Advisory Committee Act as amended, (5 U.S.C. App. 2) also referred to as the "Act" or "FACA" 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, as amended, except that the Annual Report to the Congress required by section 6(c) is prepared by the Administrator for the President's consideration and transmittal to the Congress. 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.

Why Is the Rule Being Revised?

GSA's regulations implementing the Act are being revised for the following reasons:

Ten years have elapsed since the regulation was last updated. Revisions are needed due to legislative changes, shifts in Federal policy, and decisions issued by the Supreme Court and other Federal Courts.

Growing reliance on public involvement in Federal decisionmaking has surfaced the need to differentiate advisory committees covered by FACA from alternate, but related sources of advice and recommendations. There is also a need to promote Governmentwide consistency in applying the Act within a variety of decisionmaking and public outreach situations.

GSA has determined that there is a need to simplify the way it works with Federal agencies to implement the Act. Consequently, the rule is being revised, in part, to emphasize GSA's customer focus.

How Did GSA Determine What Changes to Make?

The Committee Management Secretariat conducted an internal management review of the current regulation that resulted in a list of recommended changes and a plan for revising the rule. Then, following the plan, the Secretariat:

Published an Advance Notice of Proposed rulemaking (ANPRM) in the **Federal Register** with a request for comments (62 FR 31550, June 10, 1997).

Conducted outreach to end-users of the regulation, including notification of 4,000 Federal and state officials nationwide of its plan to issue a new rule. Stakeholders contacted were asked at the beginning to provide input into the rulemaking process. The Secretariat also invited them to provide any information (such as case studies, best practices, or articles) that would be useful in developing a comprehensive regulation.

Requested comments from the Interagency Committee on Federal Advisory Committee Management.

Established a Core Regulatory Revision Team of Secretariat staff and FACA experts from the Departments of Agriculture, Defense, the Interior, Justice, and Transportation; the Environmental Protection Agency; and the National Science Foundation to analyze issues and recommendations resulting from the comments and feedback from other outreach efforts.

What Significant Revisions Are Being Made?

The proposed rule includes the following significant revisions:

The definition of an advisory committee that is "utilized" subject to FACA has been updated to reflect judicial opinions issued since the rule was last revised. This revision emphasizes the degree to which the Executive Branch exercises "actual management and control" over a group not directly established by an agency official. Factors used in the current rule to determine whether a group is "utilized," such as the desire for group consensus or the establishment of "preferred sources of advice," have been de-emphasized. Instead, the proposed rule applies an "actual management and control" test that is consistent with current case law construing FACA's scope. (See *Washington Legal Found. v. United States Sentencing Commission*, 17 F. 3d (D.C. Cir. 1994), *Food Chemical News v. Young*, (900 F. 2d 328 (D.C. Cir.), cert. denied, 498 U.S. 846 (1990)).

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 102–3.35(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.

The process used by GSA to consult with agency heads regarding the establishment, re-establishment, and renewal of advisory committees has been revised to offer more options. These changes are intended to eliminate the need for agencies to consult with GSA on a committee-by-committee

basis; instead, a new annual planning and approval process will be implemented. Accordingly, GSA and agency staffs will be able to devote more time to reviewing the substantive activities of advisory committees.

The provisions of amendments to FACA and other legislation enacted since the current rule was last revised have been incorporated. These changes include exclusions from the Act's coverage for elected officials of state, local, and tribal governments, as well as for committees created by the National Academy of Sciences (NAS) and the National Academy of Public Administration (NAPA).

The format of the proposed rule reflects the use of "plain language" concepts and includes "key points and principles" to illustrate how the Act applies to given situations. In addition, GSA reorganized the rule so the end-user could find needed information more quickly.

To Whom Does This Regulation Apply?

This part solely applies to Departments and agencies within the Executive Branch. It does not apply to committees that advise only the Legislative and Judicial Branches of the U.S. Government, or state, local or tribal governments.

Discussion of Comments

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 suggested issues to address, specific recommendations about changes needed in the current part, examples of situations where FACA was either a useful tool or a hindrance to public involvement, and GSA's intent to include illustrative examples and principles.

All comments received were considered in drafting this proposed rule, which is intended to improve the management and operation of Federal advisory committees in the Executive Branch.

Twenty-nine commenters submitted formal written comments. Other commenters contacted GSA verbally to offer support for revising the part and to state that they had no formal comments to make at that time.

Most of the comments received related to four general recommendations discussed below. Other comments are summarized by topic in the table at the end of this section.

Provide Clear Explanations of FACA's Scope and Applicability

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

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 without creating a conflict with FACA. GSA believes this requirement to be particularly important because advisory committees support Federal decisions in a variety of situations. GSA concurs with the need for Federal agencies to engage in continuous collaboration using diverse, but complementary, tools, techniques, and methods. Whether or not the selected approaches include the use of advisory committees, the potential or perceived applicability of FACA must not prevent collaboration from taking place. Agencies are encouraged to contact GSA concerning not only the use of advisory committees but of other alternative forms of public involvement.

While FACA is not a public participation statute, it directly affects how the Executive Branch is held accountable for the use and management of advisory committees as a major means of obtaining public involvement. GSA agrees that the proposed rule needs to provide clearer guidance for comparing and reconciling the Act's requirements with other Federal statutes that affect how and when the Government must consult the public during the decisionmaking process. Accordingly, it is especially important for the end-users of this rule to have access to clear policies and principles that can be used to appropriately employ advisory committees to satisfy public consultation requirements mandated either generally or specifically by law.

Provide Additional Guidance Regarding What Advisory Committees and Their Subcommittees Must Do to Comply With FACA

Suggestions received from both Federal and non-Federal commenters reflected a need to define more specifically both the requirements of FACA and the procedures contained in GSA's regulations that apply to subcommittees of chartered advisory committees. Commenters expressed concerns that chartered committees may in some instances merely "rubber stamp" recommendations produced by their subcommittees without adequate public disclosure. Other commenters stressed the need to provide flexibility to subcommittees whose recommendations are subject to meaningful public disclosure through deliberations by the parent committee.

Subcommittees perform essential tasks and are an efficient means for accomplishing the work of chartered advisory committees. GSA agrees that agencies should assure that subcommittees are appropriately reporting to agency officials through their parent committees and that there is reasonable opportunity for the public to have access to the deliberative process. Accordingly, this proposed rule includes language further clarifying the relationship between a parent committee and its subcommittees.

The Format of GSA's Regulations Should be Improved to Better Communicate FACA's Requirements

To communicate FACA's requirements more clearly, some commenters requested that GSA's new part be written to include illustrative examples of how FACA policies and guidelines should be applied. In addition, several suggestions were made that GSA should use a "plain language" approach in drafting the rule.

GSA's ANPRM noted that the rule's format would reflect "plain language" principles and make use of more examples to demonstrate important policies and principles. By adopting this approach, GSA seeks to make it easier for users of the rule to apply FACA's requirements at the many decisionmaking levels where advisory committees are used to support public participation and consultation.

GSA Should Streamline Its Processes Related to the Establishment, Renewal, Reestablishment, and Termination of Federal Advisory Committees

Several Federal agency commenters suggested that GSA's new regulations incorporate steps to streamline the

process of creating and managing advisory committees. In particular, these commenters suggested that information collected by GSA as part of its efforts to prepare the *Annual Report of the President on Federal Advisory Committees* could eliminate GSA's need to collect what appeared to be the same or similar information as part of the justification for continuing advisory committees.

This proposed rule reflects GSA's efforts to reengineer its process for consulting with Federal agencies on the establishment, renewal, reestablishment, and termination of advisory committees. In addition, the

proposed rule provides agencies with more options regarding the way they choose to interact with GSA on these issues.

Since this rule was last revised, many factors have influenced GSA's business processes in this area. For example, there have been several initiatives to reduce the number and costs of advisory committees directly created by the Executive Branch. The current means to accomplish these outcomes are based on Executive Order 12838 of February 10, 1993, and its implementing policy document, OMB Circular A-135 of October 5, 1994. These policies and practices are reflected in the way this

proposed rule governs committee life-cycle issues. Other changes outlined in the proposed rule reflect GSA's desire to streamline the processes associated with managing advisory committees by leveraging advances in telecommunications and computer technologies, including the Internet.

Miscellaneous Comments and Suggestions

In addition to the comments addressed in the four general recommendations above, the following miscellaneous comments and suggestions were received.

| Subject | Comment/suggestion |
|--------------------------|--|
| Definitions | Clarify the definition of "Agency" to indicate how it applies within the context of the Act. |
| | Interpret the role of "consensus" in defining "advisory committee." |
| | Describe the characteristics of an "operational committee." |
| | Revise the definition of "utilize" in light of prevailing judicial opinions. |
| | Clarify FACA's applicability or non-applicability to meetings between Federal officials and contractors or licensees. |
| | Incorporate legislative changes including exclusions from the Act's coverage under the Unfunded Mandates Reform Act of 1995. |
| Committee Meetings | Provide examples of non-deliberative committee activities that are excluded from FACA's procedural requirements. |
| | Outline what flexibility agencies have in providing notice to the public regarding committee meetings, including clarification on whether it is acceptable to run multiple Federal Register notices for a committee's meeting events. |
| Committee Members | Explain whether an agency head can appoint members without a lengthy process. |
| | Describe the status of consultants as it relates to committee roles and responsibilities. |
| | Provide guidance regarding whether appointed members may be offices or organizations (rather than individual appointments) so that individual delegates would participate at a given meeting. |
| | Update the part's guidance regarding pay guidelines for advisory committee members and staff. |
| Committee Records | Clarify how long an agency must keep committee files once the committee has been terminated. |
| | Identify the committee documents that need to be sent to the Library of Congress. |

Executive Order 12866

GSA has determined that this proposed rule is not a significant regulatory action for purposes of Executive Order 12866 of September 30, 1993.

Regulatory Flexibility Act

The proposed rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq.

Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed rule

does not impose recordkeeping or information collection requirements, or the collection of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 501, et seq.

Small Business Regulatory Enforcement Fairness Act

This proposed rule is considered a major rule under 5 U.S.C. 804.

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

Advisory committees.

Dated: January 10, 2000.

G. Martin Wagner,

Associate Administrator for Governmentwide Policy.

For the reasons set forth in the preamble, it is proposed to amend 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: 5 U.S.C. App.; 40 U.S.C. 486(c); Sec. 205(c), 63 Stat. 390; and EO 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 3 (41 CFR 102–3).

CHAPTER 102—[AMENDED]

2. Part 102–3 is added to subchapter A 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 What policies govern the use of Federal advisory committees?
- 102–3.20 Who should use this part?
- 102–3.25 How does this part meet the needs of its audience?
- 102–3.30 What definitions apply to this part?
- 102–3.35 What types of advisory committees or groups are specifically excluded from FACA and this part?
- 102–3.40 Key points and principles.

Subpart B—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?

- 102–3.45 What does this subpart cover and how does it apply?
- 102–3.50 What does this subpart require agencies to do?
- 102–3.55 Key points and principles.

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

- 102–3.60 What does this subpart cover and how does it apply?
- 102–3.65 Who can establish advisory committees?
- 102–3.70 What rules apply to the duration of an advisory committee?
- 102–3.75 What actions are required to establish, reestablish, or renew an advisory committee?
- 102–3.80 What are the public notification requirements for discretionary advisory committees?
- 102–3.85 What charter filing requirements must be addressed by agencies?
- 102–3.90 What information must be included in a committee's charter?
- 102–3.95 How are minor charter amendments accomplished?

- 102–3.100 How are major charter amendments accomplished?
- 102–3.105 Key points and principles.

Subpart D—How Are Advisory Committees Managed?

- 102–3.110 What does this subpart cover and how does it apply?
- 102–3.115 What oversight functions are assigned by FACA to the Congress?
- 102–3.120 What responsibilities and functions are assigned by FACA to GSA?
- 102–3.125 What roles and responsibilities for managing advisory committees are assigned by FACA to agency heads?
- 102–3.130 What roles and responsibilities for managing advisory committees are assigned by FACA to the Chairperson of an independent presidential advisory committee?
- 102–3.135 What roles and responsibilities for managing advisory committees are assigned by FACA to an agency Committee Management Officer (CMO)?
- 102–3.140 What roles and responsibilities for managing advisory committees are assigned by FACA to the Designated Federal Officer (DFO)?
- 102–3.145 What is the role of committee members and staff?
- 102–3.150 What other policies or requirements must be addressed by the agency head and included in the agency's guidelines implementing the Act?
- 102–3.155 Key points and principles.

Subpart E—Advisory Committee Meeting and Recordkeeping Procedures

- 102–3.160 What does this subpart cover and how does it apply?
- 102–3.165 What basic policies apply to advisory committee meetings?
- 102–3.170 What basic policies apply to subcommittee meetings?
- 102–3.175 How are committee meetings announced to the public?
- 102–3.180 How are advisory committee meetings closed to the public?
- 102–3.185 What activities of an advisory committee are not subject to the notice and open meeting requirements of the Act?
- 102–3.190 How are advisory committee meetings documented?
- 102–3.195 What reports must be prepared by an agency covering the activities of each advisory committee it establishes or utilizes?
- 102–3.200 Key points and principles.

Authority: 5 U.S.C. App.; 40 U.S.C. 486(c); Sec. 205(c), 63 Stat. 390; and EO 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 Act to advisory committees they establish. In addition to listing key definitions underlying the

interpretation of the Act, this subpart establishes the Act's scope and applicability and outlines specific exclusions from its coverage.

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

The Federal Advisory Committee Act as amended (5 U.S.C. App. 2), governs the establishment, operation, and termination of advisory committees within the Executive Branch of the Federal Government. The Federal Advisory Committee Act, also referred to as the "Act" or "FACA", defines what constitutes a Federal advisory committee and provides general procedures for the Executive Branch to follow for the operation of these 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 What policies govern the use of Federal advisory committees?

The policy to be followed by Federal Departments, agencies, and commissions, consistent with the Federal Advisory Committee Act, as amended, is as follows:

(a) *Determination of need in the public interest.* An advisory committee may be established only when it is essential to the conduct of agency business. Decision criteria may include whether committee deliberations will result in the creation or elimination of (or change in) regulations, guidelines, or rules affecting agency business; whether the information to be obtained is already available through another advisory committee or source within the Federal Government; whether the committee will make recommendations resulting in significant improvements in service or reductions in cost; or whether the committee's recommendations will provide an important additional perspective or viewpoint affecting agency operations.

(b) *Termination.* An advisory committee must be terminated whenever the stated objectives of the committee have been accomplished; the subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's main functions by another entity; or the agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government.

(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 bases for closure in the Government in the Sunshine Act, 5 U.S.C. 552b(c).

(e) *Advisory functions only.* The function of advisory committees is advisory only, unless specifically authorized by law.

§ 102-3.20 Who should use this part?

The primary users of this 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 who have decided to pursue, or who are already engaged in, a form of public involvement or consultation and want to avoid inadvertently violating FACA; 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 interpret the Act, or are seeking additional guidance.

§ 102-3.25 How does this part meet the needs of its audience?

This part meets the general and specific needs of its audience by addressing the following issues and related topics:

(a) *Policies and guidelines.* This part defines the policies, establishes minimum requirements, and provides guidance to agency management for the establishment, operation, administration, and duration of advisory committees subject to the Act, as amended. This includes reporting standards 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 the agency and Governmentwide levels.

(b) *Examples and principles.* Each subpart of this part provides summary-level key points and principles to 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.

(c) *Scope and applicability.* This subpart provides guidance on the threshold issue of what constitutes an advisory committee. The Act's broad definition of an "advisory committee," as noted many times by the judiciary, could be interpreted to extend the Act's coverage to any gathering of two or more persons from whom the President or other Federal official seeks advice and/or information. Accordingly, this subpart clarifies the Act's limits for the benefit of those Federal officials responsible for interacting with the public.

§ 102-3.30 What definitions apply to this part?

The following definitions apply to this 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 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 any agency official for the purpose of obtaining advice or recommendations on issues or policies which are within the scope of his or her official responsibilities.

Agency has the same meaning as in section 551(i) of Title 5 of the United States Code.

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

Committee meeting means any gathering of committee members or subcommittee members (whether in person or through electronic means) authorized by an agency for the purpose of deliberating on the substantive matters upon which the committee provides advice and recommendations.

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

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

Discretionary advisory committee means any advisory committee that is

established under an agency head's authority or authorized by law. Advisory committees referenced by general (non-specific) authorizing language or committee report language are discretionary.

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

Non-discretionary advisory committee means any advisory committee either mandated by Presidential directive or by statute. A non-discretionary advisory committee mandated by statute is:

(1) Specifically identified in statute by name, specific purpose or functions; and

(2) A committee whose creation or termination is beyond an agency's legal discretion.

Presidential advisory committee means any advisory committee authorized by the President or the Congress which directly advises the President.

Subcommittee means a group that reports to a chartered advisory committee and not directly to the agency, whether or not its members are drawn in whole or in part from the parent 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 agency exercises actual management and control over its operation.

§ 102-3.35 What types of advisory committees or groups are specifically excluded from FACA and this part?

The following are examples of advisory committees or groups that are not covered by the Act or this part:

(a) *Committees established by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA).* Any committee created by NAS or NAPA;

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

(c) *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 such committees or groups are not actually managed or controlled by the Executive Branch;

(d) *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;

(e) *Groups assembled to provide individual advice.* Any meeting initiated by the President or Federal official(s) with more than one individual to obtain the advice of individual attendees.

However, agencies should be aware that such a group would be covered by the Act if it is utilized within the meaning of this part;

(f) *Intergovernmental committees.* Any committee composed wholly of Federal officials 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 committee must be solely 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. (See the Office of Management and Budget's (OMB's) guidelines on section 204(b) of the

Unfunded Mandates Reform Act of 1995, 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);

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

(h) *Local civic groups.* 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;

(i) *Meetings with an individual.* Any meeting initiated by the President or Federal official(s) for the purpose of obtaining advice and/or recommendations from one individual;

(j) *Meetings with non-utilized groups.* Any meeting initiated by a group that is

not utilized by the executive branch with the President or Federal official(s) to express the group's views; and

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

§ 102-3.40 Key points and principles.

The following table provides additional guidance in the form of answers to frequently asked questions and the identification of Key Points and Principles that may be applied to situations not covered elsewhere in this subpart:

| Key points and principles | Section | Question(s) | Guidance |
|------------------------------------|----------|---|---|
| I. Definition of "utilized" | 102-3.30 | <ol style="list-style-type: none"> Can an agency accept advice and recommendations from external groups on a one-time or regular basis without violating FACA? Can an agency meet on a one-time or regular basis with local citizen groups seeking to provide advice and recommendations on environmental or other issues without violating FACA? A local citizens group would like to meet with local Federal Officials to help improve the condition of the forest's trails and quality of concessions. May the Government meet with the group without a committee chartered under FACA? May an agency official attend meetings of external groups where advice and recommendations are offered to the Government during the course of discussions? | <p>Yes, if the agency does not exercise "actual management and control" over the group.</p> <p>A. Although there is no precise legal definition of "actual management and control," the following factors may be used by an agency in determining whether or not a group is utilized within the meaning of the Act:</p> <ul style="list-style-type: none"> Does the agency appoint the group's members or otherwise determine its composition? Does the agency set the group's agenda? Does the agency fund the group's activities? <p>B. Answering "yes" to any or all of these questions 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 FACA if the relationship in question is essentially indistinguishable from an advisory committee established by an agency.</p> |
| II. Is the group "utilized"? | 102-3.30 | <ol style="list-style-type: none"> If, during the course of a public hearing, "Town Meeting," or similar event, advice and recommendations are offered to a Federal official by virtue of perceived group consensus or cohesion, must the meeting be adjourned until the group is chartered under FACA? | <p>No, such public activities are often used by the Government to obtain information from the public at-large. Since the Government does not "manage or control" (utilize) the assembled group, FACA does not apply.</p> |

| Key points and principles | Section | Question(s) | Guidance |
|--|-------------|--|---|
| III. Definition of an "advisory committee". | 102-3.30 | <ol style="list-style-type: none"> 1. If, during a public meeting called by an agency, it appears that the audience is achieving consensus, must the meeting be stopped? 2. Is the presence of "consensus" during a meeting the most important factor in defining an "advisory committee" subject to FACA? | <p>No, the public meeting need not be stopped.</p> <p>A. A group must either be established or utilized by the Executive Branch, or, in the case of an advisory committee mandated by statute, have a substantive reporting relationship to the President or another Federal official.</p> <p>B. Although all advisory committees strive toward achieving consensus on the issues before them, this goal is not always attainable. In some cases, it is known in advance that consensus is not possible given the subject matter being addressed. Accordingly, the desire to achieve consensus, or its development during public meetings, does not have a direct bearing upon the applicability of the Act to a given group.</p> |
| IV. Exclusions from FACA's coverage. | 102-3.35(f) | <ol style="list-style-type: none"> 1. Is the exclusion from FACA covering elected officials of state, local, and tribal governments acting in their official capacities also applicable to associations of state officials or similar groups? | <p>Yes. The scope of activities covered by the exclusion from FACA for intergovernmental activities should be construed broadly to facilitate Federal-State discussions on intergovernmental responsibilities or administration.</p> <p>A. Excluded activities include those related to:</p> <ul style="list-style-type: none"> • Seeking consensus. • Exchanging views, information, advice, and/or recommendations. • Facilitating any other interaction relating to intergovernmental responsibilities or administration. <p>B. Pursuant to a Presidential delegation, the Office of Management and Budget issued guidelines for this exemption, found in section 204(b) of the Unfunded Mandates Reform Act of 1995, 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.</p> |
| V. Advisory committees established under FACA may perform advisory functions only. | 102-3.15(e) | <ol style="list-style-type: none"> 1. Are "operational committees" subject to FACA? 2. What are the characteristics of an "operational committee"? | <p>Only committees established or utilized by the Executive Branch in the interest of obtaining advice or recommendations are subject to FACA. Agencies are responsible for determining whether or not a committee is "operational" and therefore, not subject to FACA.</p> <p>A. Committees that are not advisory in nature are not subject to the Act. However, without specific authorization by the Congress, Federal functions (decisionmaking or operations) cannot be delegated to, or assumed by, non-Federal individuals or entities.</p> <p>B. Non-advisory, or "operational" committees have the following characteristics:</p> <ul style="list-style-type: none"> • Specific functions and/or authorities provided by the Congress by law. • An ability to make and implement decisions. • A dedicated budget and staff. • A legal, authoritative relationship with an agency. • A membership which is appointed by the President, the Congress and/or an agency head. |

| Key points and principles | Section | Question(s) | Guidance |
|--|----------|---|--|
| VI. Definition of an "advisory committee." | 102-3.30 | 1. Is FACA applicable to meetings between Federal officials and contractors or licensees? | 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 FACA. |
| VII. Definition of "Agency" | 102-3.30 | 1. What definition of "Agency" is used to interpret FACA's application? | "Agency" has the same meaning as in section 551(i) of Title 5 of the United States Code. |

Subpart B—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?

§ 102-3.45 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 use by agencies 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 recommendation was developed by use of a committee created by that academy. For purposes of this section, 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.

§ 102-3.50 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 NAS or NAPA under an agreement between the agency and an academy if such advice or recommendation was developed by use of a committee created by that academy unless:

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

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

(3) In the case of the NAPA, the academy has certified that it has substantially complied with the requirements of subsections (b)(1), (2), and (5) of section 15 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, 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 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 the NAS or NAPA that are consistent with the requirements of this subpart to obtain advice or recommendations from such academy. Such funding agreements must 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 have been substantially complied with in performing the work required under the agreement.

§ 102-3.55 Key points and principles.

The following table provides additional guidance in the form of answers to frequently asked questions and the identification of Key Points and Principles that can be applied to questions and situations not covered elsewhere in this subpart:

| Key points and principles | Section | Question(s) | Guidance |
|--|-------------|--|--|
| I. Section 15 of FACA provides that NAS and NAPA may adopt separate procedures for complying with the Act. | 102-3.50(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? | Yes. NAS and NAPA are completely separate organizations, each 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 Section 15 provisions that apply to that academy. |

| Key points and principles | Section | Question(s) | Guidance |
|---|-------------|---|--|
| II. Section 15 of FACA provides that agencies may enter into funding agreements with NAS and NAPA without the academies' advisory committees being "utilized" as defined in § 102-3.30. | 102-3.50(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 violating the prohibition against agency management and control of academy committees? | 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 and control of the committee by the agency. |

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

§ 102-3.60 What does this subpart cover and how does it apply?

Requirements for establishing and terminating advisory committees vary depending on the establishing entity (President or agency) and the source of authority for the committee. This subpart covers the procedures associated with establishing, renewing, reestablishing, and terminating committees. These procedures include consulting with the Secretariat, preparing and filing a committee charter, publishing notice in the **Federal Register**, and amending a committee charter.

§ 102-3.65 Who can establish advisory committees?

Only the President and the heads of agencies can establish advisory committees under the Act. FACA identifies four sources of authority for establishing an advisory committee:

(a) *Directed by law.* By law where the Congress specifically directs the President or an agency to establish it (*non-discretionary*);

(b) *Authorized by law.* By law where the Congress authorizes but does not direct the President or an agency to establish it (*discretionary*);

(c) *Presidential authority.* By executive order of the President or other Presidential directive (*non-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 law (*discretionary*).

§ 102-3.70 What rules apply to the duration of an advisory committee?

An advisory committee automatically terminates 2 years after its date of establishment unless:

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

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

(c) 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 committee earlier; or

(d) The President or agency head, following appropriate procedures, renews the committee. If an advisory committee needed by the President or agency terminates because it was not renewed in a timely manner, it can be reestablished in accordance with § 102-3.75.

§ 102-3.75 What procedures are required to establish, reestablish, or renew an advisory committee?

(a) *Consult with the Secretariat.* Before establishing, renewing, or reestablishing a discretionary advisory committee and filing the committee Charter as outlined in this section, the agency head must consult with the Secretariat regarding its plans. Although the consultation must follow the procedures outlined in this section, agency heads are encouraged to go beyond the minimum and 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 committee or suggest alternate methods of attaining its purpose that the agency may wish to consider.

(b) *Consultation options.* Agency heads have the following options in satisfying the requirement for consulting with the Secretariat:

(1) *Develop and submit an annual plan.* Agency heads may develop and submit an annual plan identifying those committees they intend to establish, reestablish, renew, and terminate during the fiscal year; or

(2) *Submit a letter and the proposed charter.* Agency heads may submit a

letter and a proposed charter for each type of committee transaction to the Secretariat. The letter must include the information contained in paragraph (c) of this section.

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

(1) *Explanation of need.* An explanation stating why the 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 committee's functions cannot be performed by the agency, another existing advisory committee of the agency, 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. For purposes of attaining fair balance, agencies will consider for membership interested persons and groups with professional or personal qualifications or experience directly relating to the functions and tasks to be performed. This should be construed neither to limit the participation nor compel the selection of any particular individual or group to obtain divergent points of view that are relevant to the business of the advisory committee.

§ 102-3.80 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, reestablished, or renewed.

(a) *Procedure.* Upon receiving notification of the completed review from the Secretariat in accordance with § 102-3.75(a) or (b), the agency must publish a notice in the **Federal Register** announcing that the committee is being established, reestablished, or renewed. For a new committee, such notice must also include statements describing the nature and purpose of the committee

and affirming that the 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 committee charter is filed, except that the Secretariat may approve less than 15 days when requested by the agency for good cause. This requirement for advance notice does not apply to committee renewals, notices of which may be published concurrently with the filing of the charter.

§ 102–3.85 What charter filing requirements must be addressed by agencies?

No advisory committee may meet or take any action until a charter has been filed.

(a) *Basic requirement for discretionary advisory committees.* To establish, reestablish, or renew 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 under this section constitutes the official date of establishment for the committee);
- (3) The Library of Congress, Anglo-American Acquisition Division, Government Documents Section, Federal Advisory Committee Desk, Washington, DC 20540; and
- (4) The Secretariat, indicating the date the charter was filed in accordance with paragraph (a)(2) of this section.

(b) *Basic 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 Presidential advisory committees is the date the charter is filed with the Secretariat.

(c) *Basic requirement for subcommittees that report directly to an agency official.* Subcommittees that report directly to an agency official must comply with this subpart and develop a charter in accordance with § 102–3.90.

§ 102–3.90 What information must be included in a committee's charter?

(a) *Purpose and contents of committee charter.* An advisory committee charter is intended to provide a description of

a committee's mission, goals and objectives. It also provides a basis for evaluating a committee's progress and its effectiveness. The advisory committee charter must contain the following information:

- (1) The committee's official designation;
 - (2) The objectives and the scope of the committee's activity;
 - (3) The period of time necessary to carry out the committee's purpose(s);
 - (4) The agency or official to whom the committee reports;
 - (5) The agency responsible for providing the necessary support to the committee;
 - (6) A description of the duties for which the committee is responsible and specification of the authority for any non-advisory functions;
 - (7) The estimated annual operation costs to operate the committee in dollars and person years;
 - (8) The estimated number and frequency of committee meetings;
 - (9) The planned termination date, if less than 2 years from the date of establishment of the committee;
 - (10) The name of the individual and/or organization responsible for fulfilling the provisions of section 6(b) of FACA, which requires a report to the Congress 1 year after a Presidential advisory committee provides public recommendations to the President; and
 - (11) The date the committee charter is filed in accordance with § 102–3.85.
- (b) The provisions of paragraphs (a)(1) through (a)(11) of this section apply to all subcommittees that report directly to an agency.

§ 102–3.95 How are minor charter amendments accomplished?

(a) *Responsibility and limitation.* The agency head is responsible for amending the charter of an advisory committee. Such amendments may be either minor or major. The procedures for making amendments and filing revised charters will depend upon the authority basis for the committee. However, agencies are reminded that amending any existing advisory committee charter does not constitute renewal of the committee under § 102–3.75.

(b) *Amendment procedures.* To make a minor amendment to a committee charter, such as revising 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 authorizing 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 law or Executive Order, and file the amended charter as specified in § 102–3.85.

(2) *Discretionary advisory committees.* The charter of a discretionary advisory committee may be amended when an agency head determines that the existing charter no longer accurately reflects the objectives or functions of the committee. The agency must amend the charter language as necessary and file the amended charter as specified in § 102–3.85.

§ 102–3.100 How are major charter amendments accomplished?

Procedures for making major amendments to advisory committee charters, such as substantial changes in a committee's scope and objectives and related funding, are the same as in § 102–3.95, except that for discretionary advisory committees an agency must:

(a) Submit the proposed amended charter with a letter to the Secretariat requesting GSA's views on the amended language, along with an explanation of the purpose of the changes and why they are necessary. The Secretariat will review the proposed changes and notify the agency of GSA's views within 15 calendar days of the request, if possible; and

(b) Following review by the Secretariat, file the amended charter as specified in § 102–3.85.

§ 102–3.105 Key points and principles.

The following table provides additional guidance in the form of answers to frequently asked questions and the identification of Key Points and Principles that can be applied to questions and situations not covered elsewhere in this subpart:

| Key points and principles | Section | Question(s) | Guidance |
|--|-----------------------------|--|---|
| I. Only the President and the heads of agencies can establish advisory committees under the Act. | 102–3.65 | 1. Can an agency head delegate responsibility for consulting with the Secretariat regarding the establishment, reestablishment, or renewal of advisory committees? | Yes. Many administrative functions performed to implement the Act may be delegated. However, those functions related to approving the final establishment, reestablishment, or renewal of committees are reserved for the agency head. Each agency Committee Management Officer (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 FACA, including determining which advisory committees should be established. | 102–3.125(e) 102–3.75(a) | 1. Who retains the final authority for establishing an advisory committee? | Agency heads retain final authority for establishing, reestablishing, or renewing a particular committee. Such decisions should be consistent with § 102–3.125(e) and reflect consultation with the Secretariat under § 102–3.75(a). |

Subpart D—How Are Advisory Committees Managed?

§ 102–3.110 What does this subpart cover and how does it apply?

This subpart provides the framework for maximizing the contributions of advisory committees to the Government by establishing specific responsibilities. FACA provides for specific functions to be carried out by the Congress, the agency head and the CMO, the DFO, and GSA. In general, the following principles are emphasized:

(a) *Provide committee support.* Before establishing an advisory committee, agencies should identify requirements and assure that adequate resources are available to support related to committee activities. Considerations related to support include office space, 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, desired outcomes, and limitations, if any. In general, the more specific a committee's task and the more focused its activities, the higher the likelihood of success.

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

(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 committee information.

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

§ 102–3.115 What responsibilities are assigned by FACA to the Congress?

In the exercise of its legislative review function, each standing committee of the Senate and the House of Representatives is responsible for 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.

§ 102–3.120 What responsibilities and functions are assigned by FACA to GSA?

(a) The functions under Section 7 of the Act are performed for the Administrator by the Secretariat. The Secretariat prescribes regulations, administrative guidelines and management controls for advisory committees, and assists other agencies in implementing and interpreting the Act.

(b) The Secretariat carries out its responsibilities by:

- (1) Carrying out an annual comprehensive review of Governmentwide committee accomplishments, costs, benefits, and other efforts to measure performance;
- (2) Developing and distributing Governmentwide training regarding the Act and related principles and statutes;

(3) Supporting the Interagency Committee on Federal Advisory Committee Management in its efforts to improve compliance with FACA;

(4) Designing and maintaining a Governmentwide shared data system to facilitate collection of information required by the Act;

(5) Identifying performance measures that may be used to evaluate committee accomplishments; and

(6) Providing recommendations to the President and the Congress regarding proposals to improve the accomplishment of the Act's objectives.

§ 102–3.125 What roles and responsibilities for managing advisory committees are assigned by FACA to agency heads?

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

(a) Comply with the Act and this part;

(b) Issue administrative guidelines and management controls that apply to all advisory committees subject to the Act;

(c) Designate a CMO;

(d) Provide a written determination stating the reasons for closing any advisory committee meeting, in whole or in part, to the public in accordance with the bases for closure in the Government in the Sunshine Act, 5 U.S.C. 552b(c);

(e) Review, at least annually, the need to continue each existing advisory committee, consistent with the public interest and the purpose of functions of each committee;

(f) Determine that rates of pay for advisory committee members and/or staff are justified and levels of agency support are adequate;

(g) Appoint a DFO for each advisory committee and its subcommittees; and

(h) Provide the opportunity for reasonable participation by the public in

advisory committee activities, subject to the agency's guidelines and § 102-3.165.

§ 102-3.130 What roles and responsibilities for managing advisory committees are assigned by FACA to the Chairperson of an independent presidential advisory committee?

The Chairperson of an independent Presidential advisory committee must comply with the Act and this part and must:

- (a) Consult with the Secretariat concerning the role of the DFO and CMO;
- (b) Fulfill the responsibilities of an agency head as specified in this subpart; and
- (c) Consult with the Secretariat at least 30 days in advance regarding any proposal to close any meeting in whole or in part.

§ 102-3.135 What roles and responsibilities for managing advisory committees are assigned by FACA to 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 should also 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 approved charters for each advisory committee and membership lists for each advisory committee and subcommittee;
- (b) *Annual report.* Copies of the agency's portion of the *Annual Report of the President on Federal Advisory Committees* required by § 102-3.195(b);
- (c) *Agency guidelines.* Agency guidelines on committee management operations and procedures as maintained and updated; and
- (d) *Closed meeting determinations.* Agency determinations to close advisory committee meetings as required by § 102-3.125.

§ 102-3.140 What roles and responsibilities for managing advisory committees are assigned by FACA to the 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 may 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.

§ 102-3.145 What is the role of committee members and staff?

The Act does not assign any specific responsibilities to members of advisory committees and staff. However, both members and staff perform critical roles in achieving the goals and objectives assigned to advisory committees. Agency heads, CMOs, and DFOs should consider these roles in the development of agency guidelines implementing the Act and this part. In general, such guidelines should reflect:

- (a) *Clear operating procedures.* Clear operating procedures for the conduct of advisory committee meetings, including the relationship between the advisory committee and its DFO;
- (b) *Agency operating policies.* In addition to the compliance with the Act, committee members and staff may be required to adhere to additional agency operating policies; and
- (c) *Other applicable statutes.* Other agency-specific laws and regulations may affect the agency's advisory committees directly or indirectly. Committee members and staff must understand these requirements.

§ 102-3.150 What other policies or requirements must be addressed by the agency head and included in the agency's guidelines implementing the Act?

In developing guidelines implementing the Act and this part at the agency level, agency heads must address the following issues related to committee members and staff:

- (a) *Duration of appointment.* Unless otherwise provided by statute, Presidential Directive, or the establishing authority, advisory committee members serve at the pleasure of the appointing authority. Membership terms are at the sole discretion of the appointing authority, unless otherwise provided for by the committee's establishment authority.
- (b) *Pay and compensation guidelines.* Each agency head must establish uniform pay and compensation guidelines for members and staff of an advisory committee.
- (c) *Compensation not required.* Nothing in this subpart requires an agency head to provide compensation, unless otherwise provided by law, to a member of an advisory committee.

(d) *Determination of need to provide compensation.* When compensation is deemed appropriate by an agency, it must fix the pay of the members of an advisory committee to the daily equivalent of a rate of the General Schedule in 5 U.S.C. 5332 unless the members are appointed as consultants and compensated under 5 U.S.C. 3109. In determining an appropriate rate of pay for the members, 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 of the members of the advisory committee. An agency may not fix the pay of the members of an advisory committee at a rate higher than the daily equivalent of the maximum rate for a GS-15 under the General Schedule, unless a higher rate is mandated by statute, or the head of the agency has personally determined that a higher rate of pay under the General Schedule is justified and necessary. The head of the agency must review such a determination annually. An agency may not fix the pay of the members of an advisory committee at a rate of pay higher than the daily equivalent of a rate for level IV of the Executive Schedule, as provided in 5 U.S.C. 5332.

(e) *Compensation of staff members.* An agency may set the pay of each advisory committee staff member at a rate of the General Schedule in which the Staff member's position would appropriately be placed (5 U.S.C. Chapter 51). An agency may not set the pay of a staff member at a rate higher than the daily equivalent of the maximum rate for GS-15, unless the agency head has determined that under the General Schedule the staff member's position would appropriately be placed at a grade higher than GS-15. This determination must be reviewed annually by the agency head. A staff member who is a Federal employee must serve with the knowledge of the DFO and the approval of the employee's direct supervisor. Staff members who are not Federal employees must be appointed in accordance with applicable agency procedures following consultation with the advisory committee.

(f) *Other pay considerations.* In establishing rates of compensation, the agency head must comply with any applicable statutes, regulations, Executive Orders, and administrative guidelines.

(g) *Pay for consultants to an advisory committee.* An agency must set the pay of a consultant to an advisory committee after giving consideration to the

qualifications required of the consultant and the significance, scope, and technical complexity of the work performed. The compensation may not exceed the maximum rate of pay authorized by 5 U.S.C. 3109, and must be in accordance with any applicable statutes, regulations, Executive Orders, and administrative guidelines.

(h) *Gratuitous services.* In the absence of any special limitations applicable to a specific agency, nothing in this part prevents an agency from accepting the gratuitous services of an advisory committee member, staff member, or consultant who agrees in advance to serve without compensation.

(i) *Travel expenses.* Advisory committee members and staff 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.

(j) *Services for committee members with physical disabilities.* While performing advisory committee duties, an advisory committee member with a physical disability may be provided services by a personal assistant for handicapped employees if the member qualifies as a handicapped individual as defined by section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 794) and does not otherwise qualify for assistance under 5 U.S.C. 3102 by reason of being an employee of an agency.

(k) *Exclusions for Federal employees.* Nothing in this subpart prevents any person who (without regard to his or her service with an advisory committee) is

a full-time Federal employee from receiving compensation at a rate at which he or she otherwise would be compensated as a full-time Federal employee.

(l) *Exclusions for former Federal employees.* Nothing in this subpart prevents any person who immediately before his or her service with an advisory committee was a full-time Federal employee from receiving compensation at the rate at which he or she was compensated as a full-time Federal employee.

§ 102-3.155 Key points and principles.

The following table provides additional guidance in the form of answers to frequently asked questions and the identification of Key Points and Principles that can be applied to questions and situations not covered elsewhere in this subpart:

| Key points and principles | Section | Question(s) | Guidance |
|---|-------------|---|--|
| I. FACA does not specify the manner in which committee members must be appointed by an agency head. However, advisory committees must be fairly balanced. | 102-3.15(c) | 1. Does the appointment of an advisory committee member necessarily result in a lengthy process? | No. Each agency head may specify those policies and procedures, consistent with the Act and this rule, governing the appointment of advisory committee members and staff. Some factors that affect how long the appointment process takes include: <ul style="list-style-type: none"> • Solicitation of nominations. • Conflict of interest clearances. • Security/background evaluations. • Availability of candidates. • Other statutory or administrative requirements. |
| II. Agencies may provide support to an advisory committee in the form of staff or consultants, as appropriate. | 102-3.145 | 1. Can advisory committee members be appointed as consultants? 2. What is the status of consultants as it relates to committee roles and responsibilities? | A. In some agencies, advisory committee members are appointed as consultants in order to compensate them for their services. Compensation is normally required only in those instances where it is necessary to achieve a balanced membership. B. Consultants may also be appointed as staff to an advisory committee. In such cases, consultants serve to provide the committee with needed information and support, and not as committee members. The appointment of consultants is not governed by FACA, but is subject to other statutes, policies, and internal agency procedures. |

| Key points and principles | Section | Question(s) | Guidance |
|---|-----------|--|---|
| III. Responsibilities of agency heads. | 102–3.125 | 1. Can an organization, as opposed to an individual, be appointed as a committee member? 2. If so, can different persons represent the organization at different meetings? | A. No; organizations cannot be committee members. However, individuals may be appointed as members to represent organizations, including associations and other organized interests. B. Alternates may represent the appointed member with the approval of the sponsoring agency. The appointment of committee members as representatives or Special Government Employees (SGEs) must be determined by the appointing agency based upon the role to be played by the member. Depending upon the method of appointment, members may be covered by regulations issued by the U.S. Office of Government Ethics (OGE) and related statutes. |
| IV. Responsibilities of agency heads. | 102–3.125 | 1. Must an agency's Committee Management Officer (CMO) and each committee Designated Federal Official (DFO) be appointed by the agency head? 2. May an agency have more than one CMO? | The agency head may delegate responsibility for appointing the CMO and DFOs. However, such appointments, including alternate selections, should be documented consistent with the agency's policies and procedures. A. The role of the agency's CMO is specified in the Act and includes oversight responsibilities for all committees within the agency. Accordingly, only one CMO may be appointed to perform these functions. B. The agency may, however, create additional positions which are subordinate to the CMO's agencywide roles and responsibilities. |
| V. The Federal Advisory Committee Act is the principal statute pertaining to advisory committees. However, other statutes may impact their use. | 102–3.150 | 1. Do other statutes or regulations affect the way an agency manages its advisory committee management program? | Yes. While FACA provides a general framework for managing committees Governmentwide, other factors may affect how advisory committees are used and managed. These include: • The statutory or Presidential authority used to establish an advisory committee. • A Congressional limitation placed on an agency regarding its annual expenditures for advisory committees. • Presidential or agency management directives. • The applicability of conflict-of-interest statutes. • Agency regulations affecting advisory committees. • Other requirements imposed by law or regulation on an agency or its programs, such as those governing the disposition of Federal records. |

Subpart E—Advisory Committee Meeting and Recordkeeping Procedures

§ 102–3.160 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 committee minutes and reports, must be prepared and made available to the public.

§ 102–3.165 What basic 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;
- (b) The meeting room size is sufficient to accommodate advisory committee members, 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; and

(d) Any member of the public may speak at the advisory committee meeting if the agency's guidelines so permit.

§ 102–3.170 What basic policies apply to subcommittee meetings?

(a) Deliberations of subcommittees may lead to decisions that are adopted by a parent committee without further deliberation or discussion by the parent committee. If subcommittees conduct deliberations that lead to advice or

recommendations that could later be adopted by their parent committee without further deliberations, such meetings should be subject to all openness and recordkeeping policies of this subpart.

(b) Certain subcommittee activities, however, are wholly devoted to providing a full review of recommendations by the parent committee and may be carried out under the provisions of § 102-3.185.

§ 102-3.175 How are committee meetings announced to the public?

The agency or the Chairperson of an independent Presidential advisory committee must publish at least 15 calendar days prior to an advisory committee meeting a notice in the **Federal Register**, which includes:

- (a) The name of the advisory committee or subcommittee;
- (b) The time, date, place, and purpose of the meeting;
- (c) A summary of the agenda;
- (d) A statement whether all or part of the meeting is open to the public or closed, and if closed, the reasons why, citing the bases for closure contained in the Government in the Sunshine Act, 5 U.S.C. 552b(c); and
- (e) The name and telephone number of the DFO or other individual who may be contacted for additional information concerning the meeting.

§ 102-3.180 How are advisory committee meetings closed to the public?

To close all or part of a committee meeting, the 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 bases for closure in 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 at least 30 days to review the matter in order to make a determination before publication of the meeting notice required by § 102-3.170.
- (b) *Seek General Counsel review.* The General Counsel of the agency 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, he or she 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.

§ 102-3.185 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) *Committee pre-deliberative work.* Meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee.
- (b) *Committee administrative work.* Meetings of two or more advisory committee or subcommittee members convened solely to discuss administrative matters of the committee not related to deliberation concerning the committee's functions, scope, and advice or recommendations to the Executive Branch.

§ 102-3.190 How are advisory committee meetings documented?

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 are kept. The chairperson of each advisory committee must certify to the accuracy of all minutes of advisory committee meetings. The minutes must include:

- (a) The time, date, and place of the committee meeting;
- (b) A list of the persons who were present at the meeting, including committee members and staff, agency employees, and members of the public who presented oral or written statements;
- (c) An accurate description of each matter discussed and the resolution, if any, made by the committee regarding such matter;
- (d) Copies of each report or other document received, issued, or approved by the committee; and
- (e) Minutes of advisory committee and subcommittee meetings must be finalized within 90 calendar days of the meeting(s) covered.

§ 102-3.195 What reports must be prepared by an agency covering the activities of each advisory committee it establishes or utilizes?

(a) *Presidential committee follow-up report.* Within one year after a Presidential advisory committee has submitted a public report to the President, a follow-up report will be prepared and transmitted to the

Congress detailing the disposition of the committee's recommendations in accordance with section 6(b) of the Act. The Secretariat shall assure that such reports are prepared and transmitted to the Congress as directed by the President; either by his 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 § 102-3.90(j). In performing this function, GSA may solicit the assistance of the Office of Management and Budget and other appropriate organizations. Reports shall be consistent with specific instructions issued periodically by the Secretariat.

(b) *Annual Report of the President on Federal Advisory Committees.* The President's annual report to the Congress must be prepared by GSA consistent with the information specified in section 6(c) of the Act. The report will be based on data filed electronically on a fiscal year basis by each agency, using a shared Internet-based system maintained by GSA and furnished in accordance with instructions provided annually 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 meetings.* In accordance with section 10(d) of the Act, advisory committees holding closed meetings must issue reports at least annually, setting forth a summary of activities consistent with the policy of section 552(b) of Title 5, United States Code.

(d) *Disposition of all committee reports.* Subject to section 552 of Title 5, United States Code, eight copies of each report made by an advisory committee, including any report on closed meetings as specified in paragraph (c) of this section, and, where appropriate, background papers prepared by 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 § 102-3.85(a)(3).

(e) *Disposition of committee records.* Official records generated by or for an advisory committee must be retained for the life of the committee and, upon termination, handled in accordance with regulations issued by the National Archives and Records Administration (NARA).

§ 102-3.200 Key points and principles.

The following table provides additional guidance in the form of answers to frequently asked questions

and the identification of Key Points and Principles that can be applied to questions and situations not covered elsewhere in this subpart:

| Key points and principles | Section | Question(s) | Guidance |
|---|-------------|---|---|
| I. With some exceptions, advisory committee meetings are open to the public. | 102–3.15(d) | 1. Must all advisory committee and subcommittee activities be open to the public? | No. Advisory committee meetings, when appropriate, may be closed in accordance with the bases for closure under the Government in the Sunshine Act. A. Subcommittees that report to a parent committee, and not directly to a Federal official, need not open their sessions to the public or comply with the Act's procedures for announcing meetings. B. However, Agencies are cautioned to avoid excluding the public from attending any meeting where a subcommittee develops substantive advice or recommendations which are subject to only nominal review by the parent committee before being submitted to a Federal agency or official. Such exclusions would run counter to FACA's provisions requiring contemporaneous access to the committee deliberative process. |
| II. Notices must be published in the Federal Register announcing committee meetings. | 102–3.175 | 1. Can agencies publish a single Federal Register notice announcing multiple committee meetings? | Yes, agencies may publish a single notice announcing multiple meetings as long as such notices contain all of the information contained in § 102–3.175. Such "blanket notices" should not announce meetings so far in advance as to prevent the public from being adequately informed of a committee's schedule. The bases for closure for each session still must be reviewed on a contemporaneous basis. |
| III. Advisory committee records must be managed in accordance with regulations issued by the National Archives and Records Administration (NARA). | 102–195(e) | 1. How long must an agency keep committee files once the committee has been terminated? | Following a committee's termination, its records should be scheduled for disposition in accordance with NARA regulations. The agency's records management officer should be consulted for further details. |

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