

FEDERAL ADVISORY COMMITTEE ACT AMENDMENTS OF  
2008

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MAY 15, 2008.—Committed to the Committee of the Whole House on the State of  
the Union and ordered to be printed

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Mr. WAXMAN, from the Committee on Oversight and Government  
Reform, submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 5687]

[Including cost estimate of the Congressional Budget Office]

The Committee on Oversight and Government Reform, to whom  
was referred the bill (H.R. 5687) to amend the Federal Advisory  
Committee Act to increase the transparency and accountability of  
Federal advisory committees, and for other purposes, having con-  
sidered the same, report favorably thereon with an amendment and  
recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

**SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

(a) **SHORT TITLE.**—This Act may be cited as the “Federal Advisory Committee Act Amendments of 2008”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Ensuring independent advice and expertise.
- Sec. 3. Preventing efforts to circumvent the Federal Advisory Committee Act and public disclosure.
- Sec. 4. Increasing transparency of advisory committees.
- Sec. 5. Comptroller General review and reports.
- Sec. 6. Definitions.
- Sec. 7. Effective date.

**SEC. 2. ENSURING INDEPENDENT ADVICE AND EXPERTISE.**

(a) **BAR ON POLITICAL LITMUS TESTS.**—Section 9 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended—

(1) in the section heading by inserting “MEMBERSHIP;” after “ADVISORY COMMITTEES;”;

(2) by redesignating subsections (b) and (c) as subsections (d) and (e), respectively; and

(3) by inserting after subsection (a) the following:

“(b) **APPOINTMENTS MADE WITHOUT REGARD TO POLITICAL AFFILIATION OR ACTIVITY.**—All appointments to advisory committees shall be made without regard to political affiliation or political activity, unless required by Federal statute.”.

(b) **CONFLICTS OF INTEREST DISCLOSURE.**—Section 9 of the Federal Advisory Committee Act (5 U.S.C. App.) is further amended by inserting after subsection (b) (as added by subsection (a)) the following:

“(c) **CONFLICTS OF INTEREST DISCLOSURE.**—

“(1) The head of each agency shall ensure that no individual appointed to serve on an advisory committee that reports to the agency has a conflict of interest that is relevant to the functions to be performed by the advisory committee, unless the head of the agency determines that the conflict is unavoidable and that the need for the individual’s services outweighs the potential impacts of the conflict of interest. The head of each agency shall require that each individual the agency appoints or intends to appoint to serve on an advisory committee inform the agency official responsible for appointing the individual of any actual or potential conflict of interest the individual has that is relevant to the functions to be performed and that, for an individual appointed to serve on an advisory committee, the conflict is publicly disclosed as described in section 11.

“(2) The head of each agency shall ensure that each report of an advisory committee that reports to the agency is the result of the advisory committee’s judgment, independent from the agency. Each advisory committee shall include in each report of the committee a statement describing the process used by the advisory committee in formulating the recommendations or conclusions contained in the report.”.

(c) **REGULATIONS.**—

(1) **REGULATIONS RELATING TO CONFLICTS OF INTEREST.**—Not later than 180 days after the date of the enactment of this Act, the Director of the Office of Government Ethics, in consultation with the Administrator of General Services, shall promulgate regulations defining conflict of interest and such other regulations as the Director finds necessary to carry out and ensure the enforcement of subsection (c) of section 9 of the Federal Advisory Committee Act, as added by this section.

(2) **REGULATIONS IMPLEMENTING FACIA.**—Section 7(c) of the Federal Advisory Committee Act (5 U.S.C. App.) is amended by inserting after “(c)” the following: “The Administrator shall promulgate regulations as necessary to implement this Act.”.

**SEC. 3. PREVENTING EFFORTS TO CIRCUMVENT THE FEDERAL ADVISORY COMMITTEE ACT AND PUBLIC DISCLOSURE.**

(a) **DE FACTO MEMBERS.**—Section 4 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended by adding at the end the following:

“(d) **TREATMENT OF INDIVIDUAL AS MEMBER.**—An individual who is not a full-time or permanent part-time officer or employee of the Federal Government shall be regarded as a member of a committee if the individual regularly attends and participates in committee meetings as if the individual were a member, even if the indi-

vidual does not have the right to vote or veto the advice or recommendations of the advisory committee.”

(b) INTERAGENCY ADVISORY COMMITTEES.—Section 11 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended by adding at the end the following:

“(f) INTERAGENCY ADVISORY COMMITTEES.—(1) Any communication between—

“(A) an interagency advisory committee established by the President or the Vice President or any member or staff acting on behalf of such an interagency advisory committee, and

“(B) any person who is not an officer or employee of the Federal Government, shall be made available for public inspection and copying. Any portion of a communication that involves a matter described in section 552(b) of title 5, United States Code, or that is subject to a valid constitutionally based privilege against such disclosure, may be withheld from public disclosure.

“(2) In this subsection, the term ‘interagency advisory committee’ means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, established in the interest of obtaining advice or recommendations for the President or the Vice President, that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government and includes officers or employees of at least two separate Federal agencies but does not include an advisory committee as defined in section 3(2) of this Act.

“(3) This subsection is not intended to apply to cabinet meetings, the National Security Council, the Council of Economic Advisors, or any other permanent advisory body established by statute.”

(c) SUBCOMMITTEES.—Section 4 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended by striking subsection (a) and inserting the following:

“(a) APPLICATION.—The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee, including any subcommittee or subgroup thereof, except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise. Any subcommittee or subgroup that reports to a parent committee established under section 9(a) is not required to comply with section 9(e). In this subsection, the term ‘subgroup’ includes any working group, task force, or other entity formed for the purpose of assisting the committee or any subcommittee of the committee in its work.”

(d) COMMITTEES CREATED UNDER CONTRACT.—Section 3(2) of the Federal Advisory Committee Act (5 U.S.C. App.) is amended in the matter following subparagraph (C) by adding at the end the following: “An advisory committee is considered to be established by an agency, agencies, or the President, if it is formed, created, or organized under contract, other transactional authority, cooperative agreement, grant, or otherwise at the request or direction of, an agency, agencies, or the President.”

(e) ADVISORY COMMITTEES CONTAINING SPECIAL GOVERNMENT EMPLOYEES.—Section 4 of the Federal Advisory Committee Act (5 U.S.C. App.) is further amended by adding at the end the following new subsection:

“(e) SPECIAL GOVERNMENT EMPLOYEES.—Committee members appointed as special government employees shall not be considered full-time or part-time officers or employees of the Federal Government for purposes of determining the applicability of this Act under section 3(2).”

#### SEC. 4. INCREASING TRANSPARENCY OF ADVISORY COMMITTEES.

(a) INFORMATION REQUIREMENT.—Section 11 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended—

(1) by striking the section designation and heading and inserting the following:

“SEC. 11. DISCLOSURE OF INFORMATION.”;

(2) by redesignating subsection (a) as subsection (d) and in that subsection—

(A) by inserting the following subsection heading: “AVAILABILITY OF PAPER COPIES OF TRANSCRIPTS.—”; and

(B) by inserting after “duplication,” the following: “paper”;

(3) by striking “(b)” and inserting “(e) AGENCY PROCEEDING DEFINED.—”; and

(4) by inserting before subsection (d), as redesignated by paragraph (2), the following new subsections:

“(a) IN GENERAL.—With respect to each advisory committee, the head of the agency to which the advisory committee reports shall make publicly available in accordance with subsection (b) the following information:

“(1) The charter of the advisory committee.

“(2) A description of the process used to establish and appoint the members of the advisory committee, including the following:

“(A) The process for identifying prospective members.

“(B) The process of selecting members for balance of viewpoints or expertise.

“(C) A justification of the need for representative members, if any.

“(3) A list of all current members, including, for each member, the following:

“(A) The name of any person or entity that nominated the member.

“(B) The reason the member was appointed to the committee.

“(C) Whether the member is designated as a special government employee or a representative.

“(D) In the case of a representative, the individuals or entity whose viewpoint the member represents.

“(E) Any conflict of interest relevant to the functions to be performed by the committee.

“(4) A list of all members designated as special government employees for whom written certifications were made under section 208(b) of title 18, United States Code, a summary description of the conflict necessitating the certification, and the reason for granting the certification.

“(5) A summary of the process used by the advisory committee for making decisions.

“(6) Transcripts or audio or video recordings of all meetings of the committee.

“(7) Any written determination by the President or the head of the agency to which the advisory committee reports, pursuant to section 10(d), to close a meeting or any portion of a meeting and the reasons for such determination.

“(8) Notices of future meetings of the committee.

“(9) Any additional information considered relevant by the head of the agency to which the advisory committee reports.

“(b) MANNER OF DISCLOSURE.—

“(1) Except as provided in paragraph (2), the head of an agency shall make the information required to be disclosed under this section available electronically on the official public internet site of the agency at least 15 calendar days before each meeting of an advisory committee. If the head of the agency determines that such timing is not practicable for any required information, he shall make the information available as soon as practicable but no later than 48 hours before the next meeting of the committee.

“(2) The head of an agency shall make available electronically, on the official public internet site of the agency, a transcript or audio or video recording of each advisory committee meeting not later than 7 calendar days after the meeting.

“(c) PROVISION OF INFORMATION BY ADMINISTRATOR OF GENERAL SERVICES.—The Administrator of General Services shall provide, on the official public internet site of the General Services Administration, electronic access to the information made available by each agency under this section.”.

(b) CHARTER FILING.—Section 9(e) of the Federal Advisory Committee Act (5 U.S.C. App.), as redesignated by section 2, is amended—

(1) by striking “with (1) the Administrator,” and all that follows through “, or” and inserting “(1) with the Administrator and”;

(2) by striking “and” at the end of subparagraph (I);

(3) by striking the period and inserting a semicolon at the end of subparagraph (J); and

(4) by adding at the end the following new subparagraphs:

“(K) the authority under which the committee is established;

“(L) the estimated number of members and a description of the expertise needed to carry out the objectives of the committee;

“(M) a description of whether the committee will be composed of special government employees, representatives, or members from both categories; and

“(N) whether the committee has the authority to create subcommittees and if so, the individual authorized to exercise such authority.”.

#### SEC. 5. COMPTROLLER GENERAL REVIEW AND REPORTS.

(a) REVIEW.—The Comptroller General of the United States shall review compliance by agencies with the Federal Advisory Committee Act, as amended by this Act, including whether agencies are appropriately appointing advisory committee members as either special government employees or representatives.

(b) REPORT.—The Comptroller General shall submit to the committees described in subsection (c) two reports on the results of the review, as follows:

(1) The first report shall be submitted not later than one year after the date of promulgation of regulations under section 2.

(2) The second report shall be submitted not later than five years after such date of promulgation of regulations.

(c) COMMITTEES.—The committees described in this subsection are the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate.

**SEC. 6. DEFINITIONS.**

Section 3 of the Federal Advisory Committee Act (5 U.S.C. App.) is amended by adding at the end the following new paragraphs:

“(5) The term ‘representative’ means an individual who is not a full-time or part-time employee of the Federal Government and who is appointed to an advisory committee to represent the views of an entity or entities outside the Federal Government.

“(6) The term ‘special Government employee’ has the same meaning as in section 202(a) of title 18, United States Code.”.

**SEC. 7. EFFECTIVE DATE.**

This Act shall take effect 30 days after the date of the enactment of this Act, except as otherwise provided in section 2(c)(1).

PURPOSE AND SUMMARY

H.R. 5687, the Federal Advisory Committee Act Amendments of 2008, was introduced on April 3, 2008, by Reps. Wm. Lacy Clay and Henry A. Waxman. H.R. 5687 would strengthen the Federal Advisory Committee Act (FACA) and close loopholes that have developed in the implementation of the Act.

BACKGROUND AND NEED FOR LEGISLATION

FACA was enacted in 1972 in response to concerns that federal advisory committees were becoming increasingly common but had little oversight or accountability. FACA was aimed at making federal advisory committees more accountable, transparent, balanced, and independent from the influence of special interests. Advisory committees play a critical role in giving the president and agencies advice on complex issues such as reducing chemical and biological threats, drinking water standards, and how to reduce infant mortality. According to the General Services Administration (GSA), there were more than 900 advisory committees in 2007 with over 65,000 members.

Agencies have not consistently implemented FACA in a way that ensures that advisory committees are appropriately transparent and balanced. As documented in a staff report, there is evidence that appointments to scientific advisory boards have been based on the political views of a potential appointee rather than the candidate’s scientific expertise.<sup>1</sup> H.R. 5687 prohibits the selection of a committee member based on the member’s political affiliation or activity.

The independence of advisory committees has been impaired by conflicts of interest. To address this issue, the bill requires agencies to obtain disclosures of relevant conflicts of interest from all prospective committee members and prohibits agencies from appointing an individual with a relevant conflict of interest unless the conflict is unavoidable and the need for the individual’s services outweighs the potential impacts of the conflict. The bill also requires agencies to publicly disclose the conflicts of members appointed to advisory committees.

<sup>1</sup> Committee on Government Reform, Special Investigations Division, U.S. House of Representatives, *Politics and Science in the Bush Administration* (Aug. 2003) (online at <http://oversight.house.gov/documents/20080130103545.pdf>).

The courts have created loopholes in FACA that undermine the purposes of the Act. One loophole in FACA created by the courts is a retreat from the de facto membership doctrine. Under FACA, a committee made up exclusively of federal government employees is not considered an “advisory committee” for purposes of the Act. The D.C. Circuit Court of Appeals held in *Ass’n of American Physicians & Surgeons, Inc. v. Clinton* that even if a committee is formally made up only of federal employees, if a private citizen regularly attends and participates in a committee as if he were a member that person is considered a member and the committee must comply with FACA.<sup>2</sup> Then in *In re Cheney*, the D.C. Circuit Court of Appeals moved away from the de facto membership doctrine by holding that an individual can be considered a member of an advisory committee only if the individual has a vote or veto over the committee’s decisions.<sup>3</sup> H.R. 5687 clarifies that a participant who is not a federal government employee is considered a member of a committee if he regularly attends and participates in committee meetings as if he were a member, even if he cannot vote.

In *Food Chemical News v. Young*,<sup>4</sup> the D.C. Circuit Court of Appeals created another loophole in FACA under which the requirements of FACA do not apply to committees set up by contractors. H.R. 5687 closes this loophole by clarifying that an advisory committee is considered to be established by an agency or the president if it is formed under contract at the request or direction of an agency or the president.

The bill also clarifies that subcommittees and task forces set up by advisory committees are required to comply with FACA. In 2001, GSA changed its regulations to say that subcommittees do not have to comply with FACA. Under this 2001 change, an advisory committee can avoid the open meeting and disclosure requirements of FACA by conducting its business through subcommittees.

Another problem addressed by the bill is the lack of transparency in interagency advisory committees. These committees are not subject to FACA if they are composed only of federal employees. This bill addresses concerns with the growth of secrecy in the executive branch by providing that White House task forces must disclose whom they meet with and what recommendations they receive from special interests.

#### LEGISLATIVE HISTORY

H.R. 5687 was introduced on April 3, 2008, and referred to the Committee on Oversight and Government Reform. A draft of the bill was discussed at a meeting of the Subcommittee on Information Policy, Census, and National Archives on April 2, 2008. The Committee considered H.R. 5687 on April 9, 2008, and ordered H.R. 5687 to be reported, as amended, by a voice vote.

<sup>2</sup>*Ass’n of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993).

<sup>3</sup>*In re Cheney*, 406 F.3d 723, 728 (D.C. Cir. 2005).

<sup>4</sup>*Food Chem. News v. Young*, 900 F.2d 328 (D.C. Cir. 1990).

## SECTION-BY-SECTION

*Section 1. Short title*

Subsection (a) provides that the short title of H.R. 5687 is the “Federal Advisory Committee Act Amendments of 2008.”

Subsection (b) provides a table of contents.

*Section 2. Ensuring independent advice and expertise*

Subsection (a) requires that appointments to advisory committees be made without regard to political affiliation or political activity, unless such consideration is required by federal statute.

Subsection (b) requires agencies to obtain disclosures from prospective committee members of actual or potential conflicts of interest that may be relevant to the functions the advisory committee will perform. This subsection prohibits agencies from appointing an advisory committee member who has a relevant conflict unless the head of the agency determines that the conflict is unavoidable and that the need for the individual’s services outweighs the potential impacts of the conflict. The agency must also publicly disclose the conflict of interest if the individual is appointed to a committee. This subsection applies to all committee members, including members appointed as special government employees and members appointed as representatives.

This subsection requires the head of each agency to ensure that any report of an advisory committee is the result of the advisory committee’s independent judgment. Advisory committees are required under this subsection to include a description in any report of the committee of the process used by the committee in formulating the recommendations or conclusions contained in the report.

Subsection (c) requires the Director of the Office of Government Ethics (OGE), in consultation with the Administrator of GSA, to issue regulations within six months of enactment defining conflict of interest and such other regulations as the Director finds necessary to implement and enforce the conflict disclosure requirements added by the bill. Currently, agencies are required to obtain financial disclosures from special government employees but agencies do not have to obtain any information on potential conflicts from representative members. Nothing in this bill is intended to impact existing financial disclosure requirements or the compliance of special government employees with those requirements.

This subsection requires OGE to issue regulations in order to provide guidance to agencies on information agencies should obtain from potential and current committee members in order to elicit potential conflicts, including financial or other interests which could conflict with the ability of an individual to serve objectively. OGE should evaluate whether agencies should obtain information about relevant conflicts from potential committee members for a period longer than the one year period covered by financial disclosure requirements.

Representative members are appointed to represent the views of an outside party. A representative member’s association with the entity the member is appointed to represent should not itself be cause for exclusion from a committee. However, a representative member may have a conflict of interest outside of that association alone that is relevant to the work of the committee and, under this

section, the agency head must weigh the potential impacts of such a conflict before appointing the member and must disclose any such conflict if the member is appointed.

This subsection also amends FACA to provide the Administrator of GSA the authority to promulgate regulations as necessary to implement the Act.

*Section 3. Preventing efforts to circumvent the Federal Advisory Committee Act and public disclosure*

Subsection (a) provides that a participant who is not a federal government employee is considered a member of a committee if he regularly attends and participates in committee meetings as if he were a member, even if he does not have the right to vote. Any person who attends or participates in an advisory committee meeting will not necessarily be considered a member under this subsection. This subsection is aimed at covering individuals who regularly participate in the fact-gathering or deliberative process of an advisory committee. Under this subsection, an advisory committee may not avoid FACA by only giving federal employees the right to vote while having individuals who are not federal employees participate as if they were members. As the D.C. Circuit Court of Appeals articulated in *Ass'n of American Physicians & Surgeons, Inc. v. Clinton*:

When an advisory committee of wholly government officials brings in a “consultant” for a one-time meeting, FACA is not triggered because the consultant is not really a member of the advisory committee. . . . But a consultant may still be properly described as a member of an advisory committee if his involvement and role are functionally indistinguishable from those of other members. Whether they exercise any supervisory or decisionmaking authority is irrelevant. If a “consultant” regularly attends and fully participates in working group meetings as if he were a “member,” he should be regarded as a member. Then his status as a private citizen would disqualify the working group from the *section 3(2)* exemption for meetings of full-time government officials.<sup>5</sup>

Subsection (b) requires public disclosure of any communications between an interagency committee established by the president or vice president, or any member or staff acting on behalf of the committee, and any outside person who is not a government employee. An interagency advisory committee is defined as a committee, task force, or other similar group, or any subcommittee or subgroup thereof, established in the interest of obtaining advice or recommendations for the president or the vice president, that is composed wholly of full-time, or permanent part-time, officers or employees of the federal government and includes officers or employees of at least two separate federal agencies but does not include an advisory committee as defined by FACA. Under this subsection, such communications must be made available for public inspection and copying. This subsection clarifies that any portion of a communication that falls within an exemption under the Freedom of Infor-

<sup>5</sup>*Ass'n of American Physicians and Surgeons, Inc. v. Clinton*, 997 F.2d 898, 915 (D.C. Cir. 1993).



mation Act or that is subject to a valid constitutionally based privilege against such disclosure may be withheld. This subsection also provides that it is not intended to apply to cabinet meetings, the National Security Council, the Council of Economic Advisors, or any other permanent advisory body established by statute.

This subsection is not intended to address the issue of whether executive privilege protects communications between the president and outside parties. This subsection does not subject interagency advisory committees to any of the requirements of FACA besides the requirement that communications with outside parties be made publicly available.

Subsection (c) requires subcommittees and task forces set up by advisory committees to comply with FACA except that a subcommittee that reports to a parent committee does not have to comply with the FACA requirements related to filing a charter.

Subsection (d) provides that an advisory committee is considered to be established by an agency or the president (and therefore is subject to FACA) if it is formed, created, or organized under contract, other transactional authority, or otherwise at the request or direction of an agency or the president.

Subsection (e) clarifies that an advisory committee that includes members appointed as special government employees is subject to the requirements of FACA.

#### *Section 4. Increasing transparency of advisory committees*

Subsection (a) requires the head of each agency to make publicly available, for each advisory committee that reports to the agency, certain information such as: the charter of the committee; the process of selecting members for balance of viewpoints and expertise; a list of all current members; the reason each member was appointed; whether each member is designated as a special government employee or a representative; any conflict of interest relevant to the functions to be performed by the committee; a summary of the process used by the committee to make decisions; and transcripts or audio or video recordings of all meetings of the committee.

Agencies are required under this subsection to make the specified information available on the agency's official Internet site at least 15 days before each committee meeting. If the agency head determines that a particular piece of information cannot be made available within that time, the agency head must make the information available as soon as practicable but at least 48 hours before the next committee meeting. Transcripts or audio or video recordings are required to be made available within 7 days after a meeting. GSA must provide access on its Internet site to the information made available by agencies under this section.

Subsection (b) enhances the disclosure requirements for advisory committee charters by requiring committee charters to include: the authority under which the committee is established; the estimated number of members and a description of the expertise needed to carry out the objectives of the committee; a description of whether the committee will be composed of special government employees, representatives, or members from both categories; and whether the committee has the authority to create subcommittees and if so, the individual authorized to exercise such authority.

*Section 5. Comptroller general review and reports*

Subsection (a) requires the Government Accountability Office (GAO) to review agency compliance with FACA, including whether agencies are appropriately appointing advisory committee members as either special government employees or representatives.

Subsection (b) requires GAO to submit to the committees identified in subsection (c) two reports on the results of GAO's review. GAO must submit one report within one year of the regulations promulgated by OGE under section 2 and must submit a second report within five years of the date OGE promulgates the required regulations.

Subsection (c) identifies the committees GAO must report to as the Committee on Oversight and Government Reform of the House of Representatives and the Committee on Homeland Security and Governmental Affairs of the Senate.

*Section 6. Definitions*

This section includes the following definitions:

The term "representative" means an individual who is not a full-time or part-time federal government employee who is appointed to an advisory committee to represent the views of a non-governmental entity; and

The term "special government employee" has the same meaning as in section 202(a) of title 18 United States Code. That section provides, in part, that a special government employee is an officer or employee of the executive or legislative branch, of any independent agency, or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, temporary duties either on a full-time or intermittent basis for no more than 130 days during any period of 365 consecutive days.

*Section 7. Effective date*

This Act shall take effect 30 days after the date of enactment except as otherwise provided in section 2(c)(1) which requires the Director of OGE to promulgate regulations within 6 months of enactment.

EXPLANATION OF AMENDMENTS

Mr. Waxman offered an amendment in the nature of a substitute, passed by voice vote, to: provide the GSA with the authority to promulgate regulations under FACA; require the Office of Government Ethics, rather than GSA, to issue regulations defining conflict of interest; enhance the disclosure requirements for advisory committee charters; and clarify that the provision in the bill related to interagency advisory committees only applies to committees that are made up wholly of federal employees and that include employees of at least two separate federal agencies and that the provision does not cover cabinet meetings, the National Security Council, the Council of Economic Advisors, or any other permanent authority established by statute.

## COMMITTEE CONSIDERATION

On Wednesday, April 9, 2008, the Committee met in open session and ordered H.R. 5687 to be reported, as amended, to the House by a voice vote.

## ROLL CALL VOTES

No roll call votes were held.

## APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1 requires a description of the application of this bill to the legislative branch where the bill relates to terms and conditions of employment or access to public services and accommodations.

H.R. 5687 strengthens requirements for federal advisory committees in the executive branch under the Federal Advisory Committee Act. This bill does not relate to employment or access to public services and accommodations in the legislative branch.

STATEMENT OF OVERSIGHT FINDINGS AND RECOMMENDATIONS OF  
THE COMMITTEE

In compliance with clause 3(c)(1) of rule XIII and clause (2)(b)(1) of rule X of the Rules of the House of Representatives, the Committee's oversight findings and recommendations are reflected in the descriptive portions of this report, including the need to close loopholes created by the courts in interpreting the Federal Advisory Committee Act and the need to increase accountability and transparency in federal advisory committees.

## STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

In accordance with clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, the Committee's performance goals and objectives are reflected in the descriptive portions of this report, including strengthening the Federal Advisory Committee Act and closing loopholes that have been created in the interpretation of the Act.

## CONSTITUTIONAL AUTHORITY STATEMENT

Under clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee must include a statement citing the specific powers granted to Congress to enact the law proposed by H.R. 5687. Article I, section 8, clause 18 of the Constitution of the United States grants the Congress the power to enact this law.

## FEDERAL ADVISORY COMMITTEE ACT

The Committee finds that the legislation does not establish or authorize the establishment of an advisory committee within the definition of 5 U.S.C. App., section 5(b).

## UNFUNDED MANDATE STATEMENT

Section 423 of the Congressional Budget and Impoundment Control Act (as amended by section 101(a)(2) of the Unfunded Mandates Reform Act, P.L. 104–4) requires a statement on whether the

provisions of the report include unfunded mandates. In compliance with this requirement the Committee has received a letter from the Congressional Budget Office included herein.

#### EARMARK IDENTIFICATION

H.R. 5687 does not include any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(d), 9(e), or 9(f) of rule XXI.

#### COMMITTEE ESTIMATE

Clause 3(d)(2) of rule XIII of the Rules of the House of Representatives requires an estimate and a comparison by the Committee of the costs that would be incurred in carrying out H.R. 5687. However, clause 3(d)(3)(B) of that rule provides that this requirement does not apply when the Committee has included in its report a timely submitted cost estimate of the bill prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act.

#### BUDGET AUTHORITY AND CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

With respect to the requirements of clause 3(c)(2) of rule XIII of the Rules of the House of Representatives and section 308(a) of the Congressional Budget Act of 1974 and with respect to requirements of clause 3(c)(3) of rule XIII of the Rules of the House of Representatives and section 402 of the Congressional Budget Act of 1974, the Committee has received the following cost estimate for H.R. 5687 from the Director of the Congressional Budget Office:

MAY 7, 2008.

Hon. HENRY A. WAXMAN,  
*Chairman, Committee on Oversight and Government Reform, House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5687, the Federal Advisory Committee Act Amendments of 2008.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Matthew Pickford.

Sincerely,

PETER R. ORSZAG.

Enclosure.

#### *H.R. 5687—Federal Advisory Committee Act Amendments of 2008*

Summary: H.R. 5687 would amend the Federal Advisory Committee Act (FACA). The legislation would require that all appointments to advisory committees be made without regard to political affiliation, and it would address the disclosure of conflicts of interest among committee members. In addition, H.R. 5687 would require more information about committee activities to be made available to the public, including transcripts of meetings. Finally, the legislation would require additional reports to the Congress by the Government Accountability Office concerning the appointment of advisory committee members.

CBO estimates that implementing H.R. 5687 would cost \$25 million in 2009 and \$125 million over the 2009–2013 period, assuming appropriation of the necessary amounts. H.R. 5687 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Estimated cost to the Federal Government: The estimated budgetary impact of H.R. 5687 is shown in the following table. The cost of this legislation falls primarily within budget function 800 (general government) but would affect all budget functions that contain federal advisory committees.

	By fiscal year, in millions of dollars—				
	2009	2010	2011	2012	2013
CHANGES IN SPENDING SUBJECT TO APPROPRIATION					
Estimated Authorization Level .....	25	25	25	25	25
Estimated Outlays .....	25	25	25	25	25

Basis of estimate: For this estimate, CBO assumes that the bill will be enacted near the start of fiscal year 2009, that the necessary funds will be provided for each year, and that spending will follow historical patterns for similar activities.

FACA governs the behavior of federal advisory committees. Those committees provide independent advice and recommendations to the federal government. According to the General Services Administration (GSA), there are almost 1,000 advisory committees, composed of about 65,000 members, which provide advice and recommendations to 52 departments and agencies. GSA estimates that the total cost to operate those advisory committees during fiscal year 2007 was about \$350 million.

As currently required by FACA, GSA maintains and administers management guidelines for committees. The Office of Government Ethics (OGE) within GSA is responsible for developing regulations and guidance for advisory committee members, who serve as special government employees and must meet certain requirements pertaining to conflicts of interest. In addition, FACA requires that the advice provided by the committees be objective and available to the public. Meetings of each advisory committee are presumptively open to the public, with certain specified exemptions. Notice of such meetings must be published in advance and all papers, records, and minutes of meetings must be made available for public inspection, subject to the Freedom of Information Act.

According to GSA, OGE, and other agencies, most of the provisions of H.R. 5687 would expand the current practices of the federal government regarding the use of advisory committees. Information from those sources indicates that implementing the bill would require agencies to increase oversight of advisory committees, issue new regulations, prepare additional reports, and make transcripts available to the public. CBO estimates that those activities would increase costs by \$25 million in 2009 and \$125 million over the 2009–2013 period.

Intergovernmental and private-sector impact: H.R. 5687 contains no intergovernmental or private-sector mandates as defined in UMRA and would not affect the budgets of state, local, or tribal governments.

Estimate prepared by: Federal Costs: Matthew Pickford; Impact on State, Local, and Tribal Governments: Elizabeth Cove; Impact on the Private Sector: Paige Piper/Bach.

Estimate approved by: Theresa Gullo, Deputy Assistant Director for Budget Analysis.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

**FEDERAL ADVISORY COMMITTEE ACT**

\* \* \* \* \*

DEFINITIONS

SEC. 3. For the purpose of this Act—

(1) \* \* \*

(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) \* \* \*

\* \* \* \* \*

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration. *An advisory committee is considered to be established by an agency, agencies, or the President, if it is formed, created, or organized under contract, other transactional authority, cooperative agreement, grant, or otherwise at the request or direction of, an agency, agencies, or the President.*

\* \* \* \* \*

(5) *The term “representative” means an individual who is not a full-time or part-time employee of the Federal Government and who is appointed to an advisory committee to represent the views of an entity or entities outside the Federal Government.*

(6) *The term “special Government employee” has the same meaning as in section 202(a) of title 18, United States Code.*

APPLICABILITY; RESTRICTIONS

SEC. 4. [(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.]

(a) *APPLICATION.*—The provisions of this Act or of any rule, order, or regulation promulgated under this Act shall apply to each advisory committee, including any subcommittee or subgroup thereof, except to the extent that any Act of Congress establishing any such advisory committee specifically provides otherwise. Any subcommittee or subgroup that reports to a parent committee established under section 9(a) is not required to comply with section 9(e). In this subsection, the term “subgroup” includes any working group, task force, or other entity formed for the purpose of assisting the committee or any subcommittee of the committee in its work.

\* \* \* \* \*

(d) *TREATMENT OF INDIVIDUAL AS MEMBER.*—An individual who is not a full-time or permanent part-time officer or employee of the Federal Government shall be regarded as a member of a committee if the individual regularly attends and participates in committee meetings as if the individual were a member, even if the individual does not have the right to vote or veto the advice or recommendations of the advisory committee.

(e) *SPECIAL GOVERNMENT EMPLOYEES.*—Committee members appointed as special government employees shall not be considered full-time or part-time officers or employees of the Federal Government for purposes of determining the applicability of this Act under section 3(2).

\* \* \* \* \*

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

SEC. 7. (a) \* \* \*

\* \* \* \* \*

(c) *The Administrator shall promulgate regulations as necessary to implement this Act.* 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.

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ESTABLISHMENT AND PURPOSE OF ADVISORY COMMITTEES; MEMBERSHIP; PUBLICATION IN FEDERAL REGISTER; CHARTER: FILING, CONTENTS, COPY

SEC. 9. (a) \* \* \*

(b) *APPOINTMENTS MADE WITHOUT REGARD TO POLITICAL AFFILIATION OR ACTIVITY.*—All appointments to advisory committees shall be made without regard to political affiliation or political activity, unless required by Federal statute.

(c) *CONFLICTS OF INTEREST DISCLOSURE.*—

*(1) The head of each agency shall ensure that no individual appointed to serve on an advisory committee that reports to the agency has a conflict of interest that is relevant to the functions to be performed by the advisory committee, unless the head of the agency determines that the conflict is unavoidable and that the need for the individual's services outweighs the potential impacts of the conflict of interest. The head of each agency shall require that each individual the agency appoints or intends to appoint to serve on an advisory committee inform the agency of- ficial responsible for appointing the individual of any actual or potential conflict of interest the individual has that is relevant to the functions to be performed and that, for an individual ap- pointed to serve on an advisory committee, the conflict is pub- licly disclosed as described in section 11.*

*(2) The head of each agency shall ensure that each report of an advisory committee that reports to the agency is the result of the advisory committee's judgment, independent from the agency. Each advisory committee shall include in each report of the committee a statement describing the process used by the advisory committee in formulating the recommendations or con- clusions contained in the report.*

**[(b)]** *(d) 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)]** *(e) 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] (1) with the Administrator and (2) with the head of the agency to whom any advisory committee reports and with the standing com- mittees of the Senate and of the House of Representatives having legislative jurisdiction of such agency. Such charter shall contain the following information:*

**(A)** \* \* \*

\* \* \* \* \*

*(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[.];*

*(K) the authority under which the committee is established;*

*(L) the estimated number of members and a description of the expertise needed to carry out the objectives of the committee;*

*(M) a description of whether the committee will be composed of special government employees, representatives, or members from both categories; and*

*(N) whether the committee has the authority to create sub- committees and if so, the individual authorized to exercise such authority.*

\* \* \* \* \*

**[AVAILABILITY OF TRANSCRIPTS; "AGENCY PROCEEDING"]**

**[SEC. 11.]**



**SEC. 11. DISCLOSURE OF INFORMATION.**

(a) *IN GENERAL.*—With respect to each advisory committee, the head of the agency to which the advisory committee reports shall make publicly available in accordance with subsection (b) the following information:

(1) *The charter of the advisory committee.*

(2) *A description of the process used to establish and appoint the members of the advisory committee, including the following:*

(A) *The process for identifying prospective members.*

(B) *The process of selecting members for balance of viewpoints or expertise.*

(C) *A justification of the need for representative members, if any.*

(3) *A list of all current members, including, for each member, the following:*

(A) *The name of any person or entity that nominated the member.*

(B) *The reason the member was appointed to the committee.*

(C) *Whether the member is designated as a special government employee or a representative.*

(D) *In the case of a representative, the individuals or entity whose viewpoint the member represents.*

(E) *Any conflict of interest relevant to the functions to be performed by the committee.*

(4) *A list of all members designated as special government employees for whom written certifications were made under section 208(b) of title 18, United States Code, a summary description of the conflict necessitating the certification, and the reason for granting the certification.*

(5) *A summary of the process used by the advisory committee for making decisions.*

(6) *Transcripts or audio or video recordings of all meetings of the committee.*

(7) *Any written determination by the President or the head of the agency to which the advisory committee reports, pursuant to section 10(d), to close a meeting or any portion of a meeting and the reasons for such determination.*

(8) *Notices of future meetings of the committee.*

(9) *Any additional information considered relevant by the head of the agency to which the advisory committee reports.*

(b) *MANNER OF DISCLOSURE.*—

(1) *Except as provided in paragraph (2), the head of an agency shall make the information required to be disclosed under this section available electronically on the official public internet site of the agency at least 15 calendar days before each meeting of an advisory committee. If the head of the agency determines that such timing is not practicable for any required information, he shall make the information available as soon as practicable but no later than 48 hours before the next meeting of the committee.*

(2) *The head of an agency shall make available electronically, on the official public internet site of the agency, a transcript or audio or video recording of each advisory committee meeting not later than 7 calendar days after the meeting.*

(c) *PROVISION OF INFORMATION BY ADMINISTRATOR OF GENERAL SERVICES.*—The Administrator of General Services shall provide, on the official public internet site of the General Services Administration, electronic access to the information made available by each agency under this section.

[(a)] (d) *AVAILABILITY OF PAPER COPIES OF TRANSCRIPTS.*—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, paper copies of transcripts of agency proceedings or advisory committee meetings.

[(b)] (e) *AGENCY PROCEEDING DEFINED.*—As used in this section “agency proceeding” means any proceeding as defined in section 551(12) of title 5, United States Code.

(f) *INTERAGENCY ADVISORY COMMITTEES.*—(1) Any communication between—

(A) an interagency advisory committee established by the President or the Vice President or any member or staff acting on behalf of such an interagency advisory committee, and

(B) any person who is not an officer or employee of the Federal Government,

shall be made available for public inspection and copying. Any portion of a communication that involves a matter described in section 552(b) of title 5, United States Code, or that is subject to a valid constitutionally based privilege against such disclosure, may be withheld from public disclosure.

(2) In this subsection, the term “interagency advisory committee” means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, established in the interest of obtaining advice or recommendations for the President or the Vice President, that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government and includes officers or employees of at least two separate Federal agencies but does not include an advisory committee as defined in section 3(2) of this Act.

(3) This subsection is not intended to apply to cabinet meetings, the National Security Council, the Council of Economic Advisors, or any other permanent advisory body established by statute.

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#### ADDITIONAL VIEWS OF RANKING MEMBER TOM DAVIS

I concur with the majority's assertion that "the courts have created loopholes in FACA that undermine the purposes of the Act."

In addition to the loopholes highlighted by the majority, the U.S. Court of Appeals for the District of Columbia created another loophole in *Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton*, 997 F.2d 898 (D.C. Cir. 1993), which I believe we should work to close in this legislation.

In that case, the U.S. Court of Appeals ruled that the spouse of a President was a federal employee for purposes of determining whether FACA applied to a committee upon which a presidential spouse was a member. In so finding, the Court determined that a committee chaired by the spouse of a President and composed of federal agency employees was allowed to hold meetings in secret, without being subjected to FACA's public disclosure requirements.

This ruling overturned an earlier decision by the U.S. District Court which determined that the spouse of a President was not a federal employee, and therefore the committee was an advisory body whose business must be open to the public pursuant to FACA.

This bill should be amended to prevent certain high-level advisory committees from evading transparency and accountability by using this presidential spouse loophole. The loophole could be closed by clarifying, in statute, that a spouse of the President is not a federal employee for purposes of determining whether FACA applies to a committee on which a presidential spouse is a member.

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