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Federal Advisory Committee Act (FACA): Membership

Federal advisory committees are created by Congress, Presidents, and executive branch agencies to gain expertise and policy advice from individuals outside the federal government. Establishing an advisory committee may allow the federal government to provide a forum for discussion of potentially controversial topics, and reporting of recommendations by experts outside the federal government. Federal advisory committees may also reduce the workload of executive branch employees and Congress.

Many federal advisory committees are subject to the Federal Advisory Committee Act (FACA; 5 U.S.C. Chapter 10), which allows advisory committee members to offer perspectives, advice, and ideas on the implementation of federal policy. In administering FACA, the General Services Administration (GSA) has issued guidance in the form of a rule on membership procedures (hereinafter “Final Rule”; see “Federal Advisory Committee Management; Final Rule,” 66 *Federal Register* 37728-37750, 2001).

This In Focus provides an overview of FACA’s membership requirements, including committee composition, the nomination process, membership balance requirements, types of members, and compensation. For more information on FACA, see CRS Report R44232, *Creating a Federal Advisory Committee in the Executive Branch*, by Meghan M. Stuessy.

FACA’s Scope and Membership Composition

FACA applies to advisory committees where at least one nonfederal person—such as members of the public, business leaders, or state, local, or tribal officials—is included in the committee’s membership. Committees “composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government” are outside of FACA’s coverage (5 U.S.C. §1001).

The Final Rule further clarifies which membership compositions and purposes are outside FACA’s scope. For example, intergovernmental committees where the members are acting in their official capacities may be outside of FACA’s coverage. GSA explains that in order to be excluded from FACA “the purpose of such a committee must be solely to exchange views, information, or advice relating to the management or implementation of Federal programs established pursuant to statute, that explicitly or inherently share intergovernmental responsibilities or administration” (41 C.F.R. §102-3.40(g)).

Nomination Process and Appointments

FACA does not specify the manner in which committee members must be appointed. Statute, agency guidance, or executive order language, however, may stipulate the

nomination process for a particular advisory committee (66 *Federal Register* 37743). For committees without explicit direction, the appointment process is often described in a membership balance plan (see discussion below). Absent these requirements, each agency head may specify an agency’s own nomination policy and procedure (see also GAO-19-280).

For example, certain agencies solicit nominations through a notice published in the *Federal Register*; however, there is no requirement in FACA to do so. Relatedly, GSA notes that Members of Congress, agency officials, the general public, professional societies, or current and former committee members may nominate potential candidates for membership on a committee.

Appointing Official

The Final Rule explains that agency heads “retain the final authority for selecting advisory committee members, unless otherwise provided for by a specific statute or Presidential directive.” In certain cases, the appointing official may be the President, or the agency head may have designated this responsibility to another agency official, such as the agency committee management officer (CMO) who oversees the agency’s implementation of FACA.

Membership Balance Requirement

5 U.S. Code §1004(b)(2)

FACA requires the membership of an advisory committee “be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee.”

Membership Balance

FACA requires that committees have a balanced membership. The method for ensuring a committee’s balance varies based on its establishment authority, and whether it is a nondiscretionary committee (e.g., those mandated by presidential directive or statute) or discretionary committee (e.g., those authorized by law or established under agency authority). For more information about committee establishment, see CRS In Focus IF12102, *Federal Advisory Committee Act (FACA): Committee Establishment and Termination*, by Meghan M. Stuessy.

For nondiscretionary advisory committees, the membership balance is incorporated and assessed when Congress or the President drafts the establishment authority. Similarly, the establishment authority could require the membership to hold certain levels of education, geographic diversity, professional expertise, or interests to be represented on the committee. For discretionary advisory committees, the Final Rule requires agencies to submit a membership

balance plan when establishing or renewing an advisory committee (41 C.F.R. §102-3.60(b)(3)).

Membership Balance Plan

GSA notes that while the membership balance plan requirement only applies to discretionary committees, it recommends this process to nondiscretionary committees as a good practice.

In November 2011 supplementary guidance, GSA directs agencies to include nine elements in its membership balance plans. Among other balance factors, such as the geographic location of candidates, the importance of including members from other levels of government, and diversity in work sector, a plan must also consider the candidate identification process and points of view to be represented.

Candidate identification process. The membership balance plan must summarize the agency's process to identify candidates for the committee, resources the agency will use to identify candidates (such as recommendations from current and former members of the committee, publication of nomination notices in the *Federal Register*, and search of relevant professional organizations), and key agency officeholders who will evaluate the committee for balance.

Points of view. GSA directs an agency to describe its process for ascertaining balance among an advisory committee's membership by identifying categories (such as individual expertise or represented interests) from which candidates for membership will be considered. In addition, the plan may identify the anticipated relative distribution of membership across these categories, and should discuss how members will be appointed as special government employees (SGEs) or representative members.

Types of Members

FACA allows for many types of individuals to serve on advisory committees. Committee members may have different types of expertise or interactions with the federal government, and therefore may be appointed in one of three categories: ex officio, special government employee, and representative. These different types of members may have different ethical requirements. Executive branch ethics regulations are set by the Office of Government Ethics (OGE); individual implementation of ethics requirements occurs at the agency level.

Furthermore, "agencies do not conduct conflict-of-interest reviews for members appointed as representatives" because only regular and special government employees are subject to the conflict-of-interest statutes (GAO-04-328, p. 18).

Ex Officio

An ex officio member holds membership on an advisory committee by virtue of his or her federal office, and serves only while an incumbent of such a position. For example, if an advisory committee's establishing statute or directive requires an agency Deputy or Assistant Secretary to be a member of a particular advisory committee, they would serve in an ex officio capacity.

Special Government Employees (SGEs)

An SGE is a category of federal employment reserved for an officer or employee who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 days (18 U.S.C. §202). Unlike representatives who, as discussed more below, may be selected to represent a particular point of view, SGEs are expected to exercise their own individual best judgment on behalf of the government and are expected to discuss and deliberate in a manner that is free from conflicts of interest.

Representatives

A representative is not a government employee. The appointing authority could designate a committee member as a representative if the member is expected to provide the point of view of a nongovernmental entity or of a recognizable group of persons (e.g., an industry sector, labor unions, or environmental groups). Generally, under the guidance, it is expected that representatives will represent a particular bias (OGE Advisory Letter 93 x 14).

Membership Designation and Ethics Responsibilities

If the relevant legislation or other establishment authority does not clearly identify how a committee's members should be designated, agency officials are generally expected to determine each member's status. OGE provides legal advisories on what factors agency officials should use to determine a member's designation. These include whether the member is to be paid and if the member is speaking on behalf of the federal government (OGE Memorandum 82 x 22).

Depending on employment classification, FACA committee members may be subject to the Ethics in Government Act (EIGA). For example, SGEs who serve as committee members are required to file financial disclosure statements with their agencies and to negotiate conflict-of-interest remediation, if necessary. SGEs, however, are not generally subject to outside employment and income restrictions that apply to "regular" government employees (5 C.F.R. §2636). "Representatives," since they are not government employees, are not subject to EIGA requirements. For more information on the EIGA and financial disclosure, see CRS Report R47320, *Financial Disclosure in the U.S. Government: Frequently Asked Questions*, by Jacob R. Straus.

Compensation

FACA does not require that committee members be compensated. The statute, however, permits agencies to compensate members, including salaries, reimbursement of travel expenses, and per diem in lieu of subsistence (5 U.S.C. §1006). In implementing FACA, the GSA Administrator established uniform fair rates of pay for committee members, staff, and consultants (41 C.F.R. §102-3.130).

Meghan M. Stuessy, Analyst in Government Organization and Management

Jacob R. Straus, Specialist on the Congress

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