

The Federal Advisory Committee Act

Overview of Legal Requirements and EPA Policy Positions

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The Law

What is the Federal Advisory Committee Act?

Federal Advisory Committee Act (FACA)

- ▶ Establishes a system governing the creation, operation, and termination of federal advisory committees

Purpose of FACA

- ▶ To ensure that federal advisory committees (FACs) are:
 - ▶ Established only when needed
 - ▶ Terminated when their work is completed
 - ▶ Balanced in points of view represented
 - ▶ Governed by uniform procedures
 - ▶ Asked only to provide advice
 - ▶ Open to public scrutiny

What is a federal advisory committee (FAC)?

FACA § 3 defines “advisory committee” as:

any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as “committee”), which is--

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes (i) 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.

Subcommittee vs. workgroup

- ▶ Subcommittee = standing group made up of some members of the parent committee
- ▶ Workgroup = ad hoc group of a few committee or subcommittee members that is convened as needed to complete discrete tasks

Types of FACs

- ▶ Discretionary
- ▶ Non-discretionary

Important FACA Provisions

- ▶ § 5(b) – Balance
- ▶ § 9(c) – Charter
- ▶ § 10 – Openness & transparency requirements; responsibilities of the Designated Federal Officer (DFO)

FACA § 5(b) - Balance

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

FACA § 9(c) - Charter

- ▶ FACA requires advisory committees to be established by charter.
 - ▶ Objectives & scope of activities
 - ▶ Frequency & number of meetings
 - ▶ Cost estimates
 - ▶ Membership
 - ▶ Other information

FACA § 10 - Openness & Transparency Requirements

- ▶ Committee meetings must be open to the public, with some limited exceptions.
- ▶ Committees must provide opportunity for public comment.
- ▶ Committee meeting notices must be published in the *Federal Register* at least 15 days prior to the meeting.
- ▶ Committee meeting minutes must be prepared for each meeting and made available to the public.

FACA § 10 - Openness & Transparency Requirements

- ▶ FACA § 10(b) requires that committees must make their records available to the public without requiring a FOIA request.
 - ▶ Committee records are any documents made available to or prepared by or for the committee.
- ▶ Requirement is subject to applicable FOIA exemptions (e.g., confidential business information or personally identifiable information such as personal addresses/phones numbers, birthdates, SSNs, etc.)

FACA § 10 - Responsibilities of the DFO

- ▶ EPA must appoint a DFO for each chartered committee.
- ▶ Pursuant to FACA, the DFO:
 - ▶ Approves the agenda
 - ▶ Calls the meetings
 - ▶ Attends each meeting or ensures that another person attends as DFO (referred to as the DFO's proxy)
 - ▶ Stops a meeting when it is in the public interest to do so

The Basics

How do FACs work?

Function

- ▶ The sole function of an EPA advisory committee is to provide advice and recommendations to EPA.
- ▶ The sole function of a subcommittee or workgroup is to provide advice and recommendations to the parent committee; a subcommittee or workgroup may not provide advice directly to EPA.

Meetings

- ▶ Substantive
 - ▶ Includes virtual meetings (*e.g.*, webinars and teleconferences)
- ▶ Administrative
- ▶ Preparatory

Meetings

- ▶ Some meetings are not subject to FACA's openness and transparency requirements.
 - ▶ Administrative meetings
 - ▶ Preparatory meetings
 - ▶ Meetings exempt from public observation by the Government in the Sunshine Act, 6 U.S.C. § 552b(c)

Membership

- ▶ Members can be:
 - ▶ Special government employees (SGEs)
 - ▶ Representatives of non-governmental organizations or other groups, including state, local, or tribal governments
 - ▶ Regular government employees (RGEs)
 - ▶ *Ex officio*

Membership

- ▶ SGEs are appointed for their independent expertise and are expected to provide independent advice.

Membership

- ▶ Representatives are appointed to provide the point of view of a particular organization or group.

Membership

- ▶ The Administrator appoints committee members.
 - ▶ May be delegated to the Deputy Administrator
- ▶ Committee members serve at the discretion of the Administrator.
- ▶ Committee members are usually appointed for a term of 2 or 3 years.
- ▶ EPA policy limits total service to 6 years unless the Administrator (or Deputy Administrator) approves longer service.

Subcommittees

- ▶ Standing groups made up of some members of the parent committee
- ▶ Provide advice and recommendations to the parent committee, not directly to EPA.
 - ▶ But, no rubber stamping
- ▶ Do not need to be independently chartered because they are covered under the parent committee's charter.

Subcommittees

- ▶ The subcommittee may not take action to implement recommendations or to monitor EPA's implementation of the parent committee's recommendations.
- ▶ EPA staff may not use the advice of a subcommittee prior before it is forwarded to EPA as the recommendation of the parent committee.

Subcommittees

- ▶ FACA does not apply to subcommittees.
- ▶ Instead, EPA has a policy that governs subcommittees. Under EPA's policy:
 - ▶ Subcommittees adhere to FACA's recordkeeping, balance, and openness & transparency requirements.
 - ▶ A DFO is appointed for and attends subcommittee meetings.
 - ▶ Subcommittee members are appointed by the Administrator or Deputy Administrator.

Working Groups

- ▶ Made up of a few committee or subcommittee members that are convened as needed to complete discrete tasks
- ▶ Not subject to FACA's openness and transparency requirements
- ▶ EPA encourages working groups to hold open meetings.

Working Groups

- ▶ May not advise EPA directly, but instead work through the parent committee. EPA staff may not use the advice of a working group before the parent committee forwards the advice as the parent committee's recommendation.

Questions?