25th Anniversary 1978-2003

July 19, 2004

The Honorable Susan M. Collins
Chair
Committee on Governmental Affairs
United States Senate
Washington, DC 20510-6250

Dear Madam Chair:

Pursuant to 31 U.S.C. § 720, I am pleased to provide, on behalf of the Office of Government Ethics (OGE), our statement of the actions taken and plans in response to the recommendations made by the General Accounting Office (GAO) in its report entitled "Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Committees' Independence and Balance" (GAO-04-328).

We welcome GAO's contribution to OGE's efforts to provide ethics guidance on issues involving the designation of members serving on Federal advisory committees. OGE has also maintained a vigorous partnership with the General Services Administration (GSA) in our efforts to ensure that ethics matters are properly considered in advisory committee management practices and guidance.

If you have any questions regarding our written statement in response to GAO's report, please contact me at 202-482-9292, or have a member of your staff contact Vince Salamone, at 202-482-9274.

Sincerely,

Marilyn L. Glynn
Acting Director

Enclosure

Office of Government Ethics
Statement of Actions and Comments

on Recommendations made in a
General Accounting Office (GAO) Report
entitled

"Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Committees Independence and Balance" (GAO-04-328)

Recommendation 1

GAO recommended that OGE revise its 1982 guidance to Federal agencies defining representative appointments to federal advisory committees. Specifically, GAO said the guidance should:

(A) clarify that classes of expertise generally are not a "recognizable group of persons" for purposes of making representative appointments;

OGE Response:

OGE is committed to ensuring that its ethics guidance is clear and consistent. OGE has taken steps to alert ethics officials who provide support to Federal advisory committees of what GAO perceives as an ambiguity in OGE ethics guidance for SGE/Representative designations. Since the services of OGE are primarily directed to Designated Agency Ethics Officials (DAEOs) and their staffs who actually run ethics program at the agency level, OGE has issued in July 2004 a comprehensive memorandum to all DAEOs (see Attachment). The memorandum reemphasizes for ethics officials how OGE has interpreted certain components of its guidance on SGE/Representative appointments as reflected in OGE's advisory opinions and other related guidance. The DAEOgram points out that the phrase "recognizable group of persons" would not include a person who is appointed to a committee solely because the individual has a particular "field of expertise."

Second, OGE is working with the staff at the Committee Management Secretariat at the General Services

Administration (hereinafter, "the GSA Secretariat") to ensure that information contained in the Federal Advisory Committee Act Management Course Manual (hereinafter, "FACA Course Manual"), discussing the specific criteria used for making SGE/Representative appointments, addresses GAO's concerns regarding possible misinterpretation. More specifically, the section of the FACA Course Manual that discusses how advisory committee members are designated will be amended to stress that a representative's role on an advisory committee is to represent the views of a nongovernment entity or group that has an interest in the subject matter before an advisory committee and that a "field of expertise" does not constitute a "recognizable group of persons" for these purposes. OGE will be also working with the GSA Secretariat to help ensure that any issuances relating to appointments on advisory committees are consistent with OGE guidance for designating the status of members for ethics purposes.

Finally, OGE will highlight the designation issue, as it has done in the last two years in response to its own review of advisory committees, at its annual ethics conference. Specifically, OGE will host a panel session on this topic that will focus on the process for making SGE/Representative appointments and other related issues involving Federal advisory committees, including a specific presentation on the concerns that were raised by the GAO report.

(B) consistently state that appointments as representatives are limited to circumstances in which the members are speaking as stakeholders for the entities or groups that they represent; and

OGE Response:

This concern was principally directed at the language contained in the FACA Course Manual that GAO believed was not clear and unambiguous, on the role of representative members serving on advisory committees. The specific language cited in the report was a statement contained in the FACA manual which said that certain members on advisory committees "serve as representatives of outside entities and may represent the views of a particular industry or group (e.g., labor, agriculture, or other similar group of interests) [emphasis added]."

To eliminate any perceived ambiguity on the role of representatives, OGE is working with the GSA Secretariat to ensure that the FACA Course Manual is modified to reflect unequivocally OGE's guidance on this issue that representative members represent the views of identified entities or groups having an interest in the subject matter of an advisory committee. Second, as noted above, OGE has issued a memorandum to DAEOs that discusses the criteria used in OGE's guidance for distinguishing between SGEs and representatives.

(C) clarify that that the term "representative" in statutes and charters may also be used more generically to identify the appropriate balance of points of view or expertise and may not be specifying that representative appointments be used, and revise the directions on specifying representative appointments to focus on the type of advice representatives are to provide -- that is, stakeholder advice.

OGE Response:

OGE has taken and will take several steps to address GAO's concerns about the inferences that agencies may be drawing from OGE's guidance on the significance of the use of the term "representative" in statutes and other enabling documentation. As noted above, OGE has incorporated in a memorandum to DAEOs, a discussion of what effect the use of the term "representative" and any of its cognates can have in determining the status of an advisory committee member. The guidance makes clear that the term's use in authorizing legislation or in any other such committee enabling documentation does not necessarily confer representative status on a member. Specifically, the above referenced memorandum to DAEOs directs them to pertinent examples discussed in the 1982 guidance where the use of some form of the term "representative" did not result in an automatic determination that a member was serving on an advisory committee under a representative appointment.

In addition, we are working with the GSA Secretariat to make clearer, in GSA's FACA Course Manual, OGE's guidance on the SGE/Representative distinction. This will include inserting additional language in the FACA Course Manual, that will emphasize that the use of the term "representative" does not necessarily confer a

representative appointment to an individual serving on an advisory committee and that a representative must serve to provide stakeholder advice only.

Recommendation 2

GAO recommended that OGE and GSA direct Federal agencies to review their representative appointments to Federal advisory committees either as the 2-year charters expire or, for those committees with indefinite charters, within 1 year to determine if the appointments are appropriate and to reappoint members as SGEs, where appropriate.

OGE Response:

In light of the administrative framework for appointing advisory committee members and the de-centralized nature of the executive branch ethics program, OGE has taken appropriate steps to alert ethics officials, in the above referenced memorandum to DAEOs, of ethics issues raised by GAO's report including GAO's concern about the adequacy of committee management practices and procedures for designating the status of advisory committee members for ethics purposes. That memorandum includes several recommendations for better ethics program management and advises ethics officials of the need to:

(1) help ensure that their agency has a systematic approach or process for making status designations for ethics purposes of their agencies' advisory committee members and that the designation of a member's status is made prospectively at the time of an individual's appointment or retention by the committee,

(2) be involved, as appropriate, in the final clearance process for appointing members that are to serve on advisory committees, especially for those committees that are newly created or are being renewed by the agency; and

(3) periodically review status designations that are made by the agency to ensure that members are being properly designated by committee management officials, especially for those advisory committees the enabling authority of which may have been amended or the mission or purpose of which may have changed in recent years, or which

are standing advisory committees of the agency with indefinite charters.

Second, as part of OGE's continuing efforts to monitor the compliance of agencies with Federal ethics program requirements, OGE will pay particular attention to ensure that agencies are taking appropriate steps to review the processes, policies, and practices used in their agencies for designating the status of advisory committee members for purposes of applying executive branch ethics rules. This will include, as noted above, inquiry into whether agency advisory committee designations are being properly reviewed at some point by agency ethics officials. Moreover, as provided under OGE's statutory and regulatory authority, OGE will vigorously follow up on any recommendations in this area and issue notice of deficiencies, where appropriate, to ensure compliance with OGE recommendations.

Finally, OGE is working with the GSA Secretariat to amend its FACA Course Manual to highlight in both the manual and in course instruction the importance of agencies reviewing on a regular basis the designation status given to advisory committee members who serve on committees hosted by agencies.

Recommendation 3

GAO recommended that OGE and GSA direct agency committee management officials to consult with agency ethics officials in making decisions about the type of appointments that should be made for each committee.

OGE Response:

OGE does not itself have the authority to direct how advisory committee officials manage their Federal advisory committees. However, OGE has worked with the GSA Secretariat, to incorporate a provision in GSA's 2001 rewrite of its Federal Advisory Committee Management rule, that not only discusses general matters relating to designating advisory committee members for ethics purposes but also specifically states that DAEOs should be consulted "prior to appointing members to an advisory committee in

order to apply Federal ethics rules properly." See Appendix A to Subpart C, item IV, in 41 C.F.R. Part 102-3.

In addition, OGE has issued a memorandum to DAEOs (discussed above) that, among other things, recommends that DAEOs take actions to:

(1) establish appropriate or improve existing lines of communication with agency committee management officials or other persons who have a role in managing or running advisory committees within their agencies so that appropriate designation decisions of advisory committee members are made,

(2) ensure that committee management officials are made aware of OGE's and their agency's guidance on SGE and representative status designations and are provided or made aware of appropriate ethics points of contact to discuss issues involving the designation of committee members or other related ethics matters; and

(3) review periodically their agencies' own practices and procedures for utilizing advisory committees and work with committee management officials, to ensure that appropriate mechanisms exist for properly receiving ethics official input on designation issues.

OGE also is working with the GSA Secretariat to revise the FACA Course Manual to highlight the need for such consultation with ethics officials. Moreover, OGE will check, as part of its auditing efforts, that ethics officials have an appropriate level of involvement and that open lines of communication with committee management officials exist in the designation processes established by agencies for determining the status of members serving on Federal advisory committees.

Recommendation 4

GAO recommended that OGE and GSA revise the training materials for the FACA management course by incorporating the additional guidance discussed in previous recommendations made above and ensure that the course materials highlight the fact that decisions should be based on the type of advice the committee members are to provide.

OGE Response:

As discussed in our responses above to several previous recommendations, OGE is consulting with the Secretariat to revise the FACA Course Manual to address GAO's concerns. In addition, as noted above, the FACA management rule currently contains a specific provision that provides general guidance on the designation of advisory committee members. Specifically, that guidance states that the designation of a member will depend upon what role the member will play on the committee. OGE will work with the Secretariat to make appropriate changes to the FACA Course Manual to highlight this important point and to otherwise reinforce the notion that designation decisions should be based on the type of advice the committee member is expected to provide to the Committee.

Recommendation 5

GAO recommended that OGE and GSA direct agencies to determine, for each relevant committee, the potential for such other biases and to take the appropriate steps to ensure that their representative members do not have such biases. At a minimum, GAO stated that representatives should receive ethics training and be asked whether they know of any reason their participation on the committee might reasonably be questioned -- for example, because of any personal benefits that could ensue from financial holdings, patents, or other interests.

OGE Response:

OGE does not have the authority to prescribe rules of conduct for persons who are not employees or officers of the executive branch of the Federal Government. Unless otherwise provided by statute, Presidential directive, or other authority establishing advisory committees, members of advisory committees serve at the pleasure of the appointing or inviting authority. That authority has discretion over the terms of their committee membership, provided such discretion is exercised in accordance with applicable law and regulations. Accordingly, OGE cannot prescribe ethics rules for representative members serving on Federal advisory committees; such rules are clearly outside the purview of OGE's authority and are within the agency's sphere of decisionmaking authority.

Additionally, on the general issue of identifying biases for representative members, we note that representatives are expected to represent a particular bias on an advisory committee and are not expected to render disinterested advice to the Government. See OGE Informal Advisory Opinion 93 x 14. With respect to applying the Federal ethics rules, representative members are not employees subject to any of the Federal ethics rules and are not required to complete financial disclosure reports that are subsequently reviewed by agency ethics officials.

However, the Federal Advisory Committee Act (FACA) requires that committee membership be balanced in terms of points of view represented and functions to be performed by committee members. In this regard, we understand that the GSA Secretariat has proposed providing additional guidance to agencies consisting of a comprehensive template describing the various factors agencies should look to and what the components of an agency plan should be for ensuring that a committee has fairly balanced membership consistent with FACA. To the extent that issues exist about representative biases affecting the balance of viewpoints among committee members, these membership matters are clearly outside of OGE's limited purview and expertise and relate specifically to how members are identified, solicited, and selected for service on advisory committees in order to comply with a FACA requirement.

July 19, 2004
DO-04-022

MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Marilyn L. Glynn
Acting Director

SUBJECT: SGEs and Representatives on Federal Advisory Committees

In April 2004, the General Accounting Office (GAO) issued a report entitled, Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Committees' Independence and Balance (GAO-04-328). The report discussed several issues about advisory committees that should be of particular interest to agency ethics officials who provide ethics support to advisory committees.

Among the issues discussed, the report looked at how members are appointed to serve on advisory committees and how effective Governmentwide guidance and agency-specific policies and procedures are in evaluating committee members for conflicts of interest. The report also examined how committee members are designated as special Government employees (SGEs) or as representatives. While acknowledging some of the efforts of the Office of Government Ethics (OGE) in providing agencies with guidance and training in this area, the report also identified what it believed to be several "limitations" in that guidance. The report stated that these perceived limitations could affect the overall effectiveness of OGE's education and training efforts in this area and was a factor in some agencies misidentifying member status in the committees that GAO reviewed.

Whether or not OGE agrees with GAO's views on the adequacy of our guidance, we do agree with GAO's overall concern that some agencies may be inappropriately using representative appointments for members who are providing services as SGEs.[1] GAO's report contains evidence that certain agencies are not utilizing any policies identifying criteria for distinguishing between representatives and SGEs. Also, we are concerned that some agencies may be designating their committee members as representatives primarily to avoid subjecting them to the financial disclosure statements required for SGEs. Of course, any such representative designations would be improper and should be corrected immediately by the agency to ensure that ethics rules are being properly applied to advisory committee members.

This memorandum addresses the specific concerns that GAO reported regarding the clarity of some of the criteria used for designating the status of advisory committee members for ethics purposes, as that criteria is set forth in the primary source of OGE guidance on this topic, OGE Informal Advisory Opinion 82 x 22 (hereinafter "82 x 22").[2] In addition, this memorandum addresses the role that ethics officials have in helping to ensure that agencies have proper policies and procedures in place for making appropriate SGE or representative designations for their agencies' advisory committee members.

---

[1] This concern was raised in a single-issue review OGE did in 2002, that looked into how agencies manage their Federal advisory committees. The results of that review were shared with ethics officials during a panel session at OGE's annual ethics conference in 2003.

[2] This discussion of the criteria in 82 x 22, however, is not intended to change OGE's guidance in this area. We continue to believe that 82 x 22 provides accurate and helpful guidance for agencies to use in designating advisory committee members as SGEs or representatives.

A. OGE's Guidance in 82 x 22

Recognizable Group of Persons

In its report, GAO stated that some agencies have interpreted guidance in 82 x 22 regarding a representative's role in speaking for a "recognizable group of persons" as permitting the appointment of advisory committee members as representatives of various technical fields of expertise, such as biology and toxicology.

The phrase "recognizable group of persons" is used in 82 x 22 in reference to a non-Government entity or group with a stake in the matter under consideration by an advisory committee. This phrase should not be interpreted to mean that a member of an advisory committee could be designated a representative because the member is an expert in a field of expertise. Agencies should not appoint members of advisory committees as representatives purely on the basis of their expertise. In such cases the SGE appointment category - which was specifically created to facilitate the Government's ability to retain the services of experts in various fields - should be used.

Use of "Represent" and its Cognate Forms in Authorizing Legislation or Other Enabling Documents

In its report, GAO stated that the conclusion section in 82 x 22 implies that when the term "representative" is used in an advisory committee's authorizing legislation or other enabling documents, members of the committee should be classified as representatives.

The use of the term "representative" or similar terms in an advisory committee's authorizing legislation or other enabling documents does not necessarily mean that members are to be appointed as representatives. To illustrate this point, 82 x 22 provides specific examples of documents using "representative" terms and concludes that the given committees nevertheless are comprised of SGEs. One example in 82 x 22 is a committee document that used the term "represent" in a generic sense to describe the required technical expertise for membership; OGE expressly concluded that the members of this committee were to be treated as

SGEs, "[w]hatever the degree of contradiction produced by the use of 'represent'" (See BRAC committee discussion). Another example in 82 x 22 refers to points of view "represented" on a particular committee, but nevertheless concluded that this committee was comprised of SGEs (see FPUPAC committee discussion). A third example in 82 x 22 concerns a statute that made the members of a particular committee "representatives of their practicing colleagues," and OGE still concluded that these members were SGEs (see NPSRC committee discussion).

Accordingly, in reviewing a statute, Presidential directive or other documentation establishing an advisory committee, the use of term "represent" or "representative" should not end the inquiry to determine if a person is serving as a representative and not as an SGE. Careful consideration of all relevant factors, as set forth in 82 x 22, is required in order to determine whether a committee member is intended to serve as a representative or as an SGE.

Effect of Recommendation by Outside Organization

In its report, GAO expressed concern that when determining whether a committee member is or is not a representative, some agencies were overemphasizing the weight that should be given to outside recommendations leading to the member's appointment.

The fact that an individual is appointed by an agency to an advisory committee upon the recommendation of an outside group or organization is one of several factors that are useful in arriving at a determination whether the individual may be appointed to act in a representative capacity. This factor by itself is not conclusive; it only tends to support a representative function for the member. If this factor were intended to be conclusive for purposes

of distinguishing between SGEs and representatives, OGE's guidance would have said so expressly.[3]

B. Ensuring that Agencies Have Policies and Procedures for Designating SGE's and Representatives

As a separate matter, GAO's report was concerned that the agencies it reviewed generally had not developed sufficient policies, procedures, or guidance for their staff to use when determining which type of appointment was appropriate for individual committee members. Moreover, it noted that some agency guidance did not address the types of appointments that may be made for an advisory committee member.

Role of the Ethics Official

Historically, the administrative process that agencies use in designating the status of an advisory committee member has been left to the discretion of individual agencies, with consideration given to the role the member is expected to perform for the committee. In some cases, the status of committee members is specifically made in a statute or other enabling authority establishing the committee. In other cases, agency officials must analyze a statute or other enabling documentation and apply established legal criteria to determine a member's appointment status for ethics purposes.

Ethics officials therefore have an important role in working with committee management officials and others involved in the committee formation and management process to ensure that the proper guidance is being used and appropriate member status designations are being made. The involvement of ethics officials in these matters will help ensure that advisory committee members are being designated properly for ethics purposes and that committee members are subject to ethics rules, if applicable, during their terms

[3] For example, the guidance in 82 x 22 does state conclusively that a person who receives compensation (other than travel expenses and per diem) from the Government for his services as an adviser or consultant is its employees and not a representative of an outside group.

of service on the committee. In this regard, the General Services Administration's Federal Advisory Committee Management Rule informs committee management officials and other users of the rule that the "Designated Agency Ethics Official (DAEO) . . . should be consulted prior to appointing members to an advisory committee in order to apply Federal ethics rules properly." See Appendix A to Subpart C of Part 102-3, at 41 C.F.R. Part 102-3.

Support of Committee Management Practices

Agency ethics officials should take appropriate steps, in collaboration with their agencies' committee management officials, to ensure that practices within their agencies for designating the status of advisory committee members for ethics purposes are adequate to "determine whether individuals who serve as members of committees, councils, boards, commissions, etc. . . . are properly designated as SGEs, since certain [ethics requirements] apply to SGEs that do not apply to non-SGEs."[4] In general, we recommend that agency ethics officials, should:

- establish appropriate or improve existing lines of communication with agency committee management officials or other persons who have a role in managing or running advisory committees within their agencies;

- help ensure that their agency has a systematic approach or process for making status designations for ethics purposes of their agencies' advisory committee members and that the designation of a member's status is made prospectively at the time of an individual's appointment or retention by the committee;

[4] See OGE's Ethics Program Review Guidelines, Section IX, dated March 2004 at p. 40, available on OGE's website at http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/prd_mats/prdrevguide.pdf

- be involved, as appropriate, in the final clearance process for appointing members that are to serve on advisory committees, especially for those committees that are newly created, or are being renewed or reestablished by the agency;

- periodically review status designations that are made by the agency to ensure that members are being properly designated by committee management officials, especially for those advisory committees the enabling authority of which may have been amended or the mission or purpose of which may have changed in recent years, or which are standing advisory committees of the agency with indefinite charters.

- ensure that relevant committee management officials are aware of OGE's and their individual agency's guidance and procedures on SGE and representative status designations and are provided or made aware of appropriate ethics points of contact to discuss issues involving the designation of committee members or other related ethics matters;

- provide advice and legal counsel to agency committee management officials as appropriate on matters concerning the status designation of advisory committee members for ethics purposes;

- review periodically their agencies' practices, procedures, policy, and guidance for advisory committees, to ensure that appropriate mechanisms exist for properly receiving ethics official input on designation issues;

- ensure, if appropriate, that appointment letters or other committee documentation of appointment state clearly whether members are serving as SGEs or representatives and that committee members are properly informed of their member status and of the application of Government ethics rules to them if they serve as SGEs;

- and finally, in cases where members are serving as representatives, recommend to committee management officials that committee members are informed about the group of persons that the respective member is expected to represent on the committee.

As you know, OGE has always looked at ethics issues involving the use of advisory committees as part of its regular program review of an agency's ethics program. OGE will be paying particular attention to these issues in future program reviews to ensure that agency ethics officials are appropriately engaged in ensuring that agency officials are properly designating the status of advisory committee members for purposes of applying Federal ethics rules.

C. Conclusion

We welcome GAO's contributions to OGE's and the wider ethics community's continuing efforts to ensure that advisory committee members are being properly designated as either SGEs or representatives for purposes of applying the Federal ethics rules. The guidance contained in this memorandum should be shared with appropriate committee management officials within your agencies that are involved in the designation of persons serving on Federal Advisory committees hosted by your agencies.