

Building a Team Oriented Conflict Management System for Advisory Committee Members

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What is FACA?

**Who manages the use of
Federal Advisory
Committees?**

What is the Federal Advisory Committee Act (FACA)?

- **Federal Advisory Committee Act (FACA)**
 - Enacted in 1972; P.L. 92-463 Signed Oct 6, 1972
 - 5 U.S.C. App – Applies to the Executive Branch Only
 - Provides objective and accessible advice
 - Formalizes process for establishing, operating, overseeing & terminating Federal advisory committees
 - Created the Committee Management Secretariat
 - Requires that Federal advisory committees advise and recommend, not decide or implement
- Regulations for implementing FACA first published in 1989; updated by GSA in 2001 at 41 CFR Parts 101-6 and 102-3.

Committee Management Secretariat

- **Sec. 7 (a) of FACA -- The [OMB] Director shall establish and maintain within the Office of Management and Budget a Committee Management Secretariat, which shall be responsible for all matters relating to advisory Committees.**
- **In 1976 Executive Order 12024 delegated all responsibilities of the President for implementing FACA to the GSA Administrator. The Administrator delegated responsibility for these activities to the GSA Committee Management Secretariat.**
- **Under section 7 of FACA, GSA:**
 - **Prepares regulations to implement FACA**
 - **Issues administrative guidelines and management controls**
 - **Assists other agencies in implementing and interpreting the Act**

FACA Footprint (FY2007-2010)

	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>
Total Committees (incl. PACs)	924	922	953	1,046
Total Meetings	6,942	6,701	7,222	7,254
Total Members	65,121	63,813	81,940	74,321
Total Costs	\$350M	\$344M	\$361M	\$387M
Federal Staff Compensation	\$160M	\$166M	\$172M	\$181M
Non-Federal Compensation	\$52M	\$52M	\$58M	\$59M
Travel & per Diem	\$59M	\$58M	\$60M	\$71M
Misc. Costs	\$79M	\$68M	\$71M	\$76M
Federal Staff Support (in FTE)	1,572	1,517	1,537	1,570

Key Agency FACA Players

- **Committee Management Officer (CMO)**: Section 8(b) of FACA requires Agency heads to designate a CMO, who is responsible for exercising control and supervision over that agency's committee management program. [Also see: 41 CFR Sections 102-3.105 (c) and 3.115]
- **Designated Federal Officer (DFO)**: Required by section 10(e) and (f) of FACA. Effectively the liaison between the agency and Federal advisory committee responsible for day-to-day advisory committee management and operations, the DFO must approve all meetings and agendas and attend each committee meeting. [41 CFR Section 102-3.120]
- Agency Program Officials, FACA Attorneys, Ethics Officials, travel/personnel/records staff, public affairs office, FOIA points of contact, and others.

Establishment Authorities

Type	Authority	Discretionary (Y/N)
Required by Statute	Congress established by law, or directs agency or President to establish	Non-Discretionary
Presidential Authority	By Executive Order or other Presidential directive	Non-Discretionary
Authorized by Statute	Congress authorizes, but does not direct agency or President to establish	Discretionary (Ceiling on such committees) – E.O. 12838
Agency Authority	Under general agency authority in 5 U.S. C.	Discretionary (Same)

Establishing a Federal Advisory Committee

- **Advisory Committees are Formally Chartered**
- **GSA Consultation Process**
- **Depends on Establishment Authority**
- **Charter Requirements**
- **Ensuring Independence**
- **Advisory Committees are Advisory Only**
- **What is the Balance Plan?**
- **Membership Requirements and Transparency**

FACA Committee Lifecycle

Committee vs. Membership Lifecycle

- Committee: Need; Authority; Chartering; Consultation, Approval and Filing. Establishment; Renewal; and Termination
- Membership: Authority; Balance; Designation; Selection Process; Ethics Forms; Appointment; Training; Updates; Reappointment (or not)

DFO Duties & Responsibilities

- Oversight of FACA and the committee
- Calls committee meetings; approves agenda
- May chair meetings [cf. § 102-3.105(g)]; must be present
- Is the Government representative
- Maintains records on costs and membership
- Maintains committee records for the public
- May adjourn meeting when in public interest
- Must be either a full-time or permanent part-time Federal employee [see § 102-3.120]

Case Study

- **Name:** Agency for Renewable Energy Sources
- **Mission:** Promote and help expand the use of renewable energy resources
- **Advisory Committees:**
 - Renewable Energy Advisory Panel (REAP)
 - Advisory Committee for Compliance with Energy Efficiency Standards (ACCEES)

ARES

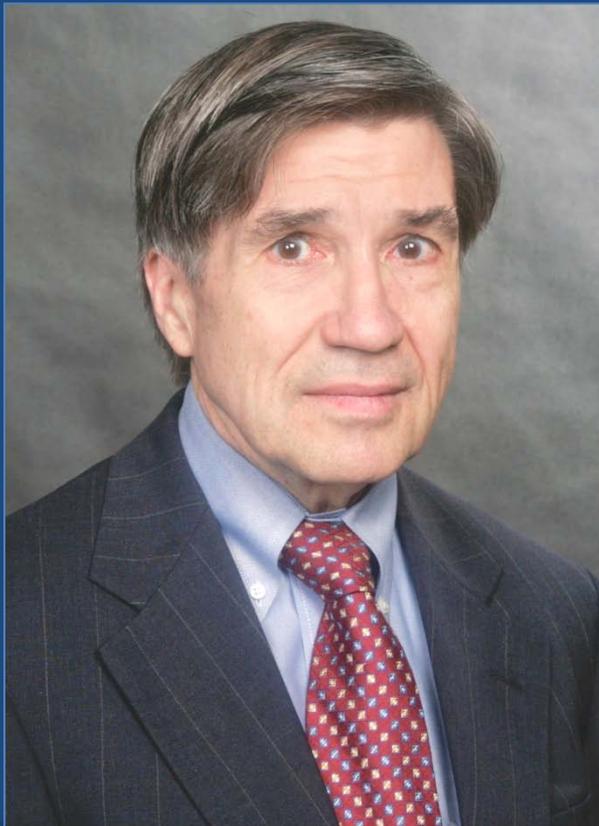
Tomorrow's Energy Today



Ethics Issues in Forming the Advisory Committee

Possible Members

Johnny Solaris



Robert Wendmills



Committee Members

Johnny Solaris	Robert Wendmills
Will be paid for services to the committee	Will be paid for travel expenses only
Has knowledge and expertise about energy exploration, development, and distribution	Has knowledge about how to finance new energy development projects and companies
His name was put on the list of prospective candidates by committee staff	Several recommendations were received from energy groups supporting Bob's nomination
Professor at Univ. of Southern California, founder and board member of the Energy for Tomorrow Institute	Has private sector consulting business and owns stock in several venture capital companies
Great speaker; May be asked to represent agency at U.N. on "Global Energy Needs II Session"	Has served as a spokesperson for "clean" energy groups at energy forums held nationwide

Designation Calls: Enabling Authority

- Legislation/Statute
- Presidential Executive Order; or
- Agency Authority or some other enabling documents



Source: 82 x 22, 05 x 4

What does the FACA rule say about member designations?

- **41 C.F.R. 102-3.105** – Agency ensures that committee members are reviewed for conformance with ethics rules.
- **Appendix A to Subpart C of Part 102-3, Section IV, at 41 C.F.R. Part 102-3** – DAEO should be consulted prior to appointing members

Ethics Official Duties

- Ensure proper designation of a person's status (including that of a member) for ethics purposes
- Have effective system for collecting, filing, and reviewing financial disclosure reports
- Provide ethics training and counseling, etc.
- Source: 5 C.F.R. 2638.203; Program Review Guidelines, section D, items #2 & #4

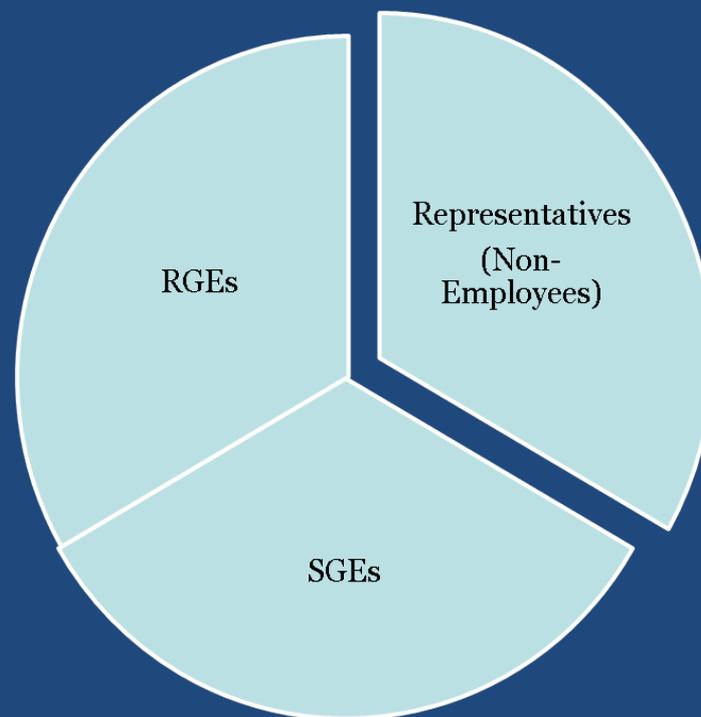
Designation Guidance

- Presidential Memorandum, (February 9, 1962)
- Presidential Memorandum (May 2, 1963)
- Executive Order 11222 (May 8, 1965)
- Federal Personnel Manual (FPM)
- OLC Opinions and OGE Opinions



Member Status

- Regular Government Employees
- Special Government Employees
- Representatives (Non-Employees)



Who is a Special Government Employee?

- An officer or **employee** of the executive or legislative branch of the U.S. Government
- Retained, designated, appointed, or employed to perform, **with or without compensation**,
- **Temporary duties**, either on a full-time or intermittent basis,
- For not more than **130 days** during any period of 365 consecutive days.
- Source: Title 18, United States Code, Section 202.

Special Government Employees

- Created to apply a **limited set of conflict of interest rules** to a group of individuals providing important, but limited services, to the Government.
- SGEs are expected to provide their own **“independent judgment”** or “individual best judgment.”
- Source: 82 x 22, 00 x 1, & 05 x 4

Representatives

A representative is **not** an employee and is therefore not subject to Federal ethics rules.

- “**represent specific interest groups**” e.g., industry, consumers, labor, etc., and typically serve on advisory bodies
- “represent a **particular bias**”
- Source: 93 x 14 ; 00 x 1

Role of “Balance”

FACA Sec. 5(b)(2); 41 CFR 102-3.30(c) & 3.60(b)(3) : Advisory committee memberships are to be **fairly balanced** in terms of **points of view** represented and the functions to be performed.

Representatives



Designation Factors (82 x 22)

- Compensation
- Use of recommendations of outside groups or organizations
- Authority to bind (or otherwise act as a spokesperson for outside entities)
- Spokesperson for the U. S. or a Government agency on committee matters

Committee Members

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Renewable Energy Advisory Panel

1. Statute requires the Director of ARES to create the advisory committee.
2. Statute “says that each member is asked to serve, as an individual, to exercise his or her best judgment in the best interests of the national renewable energy program and not to represent any special or parochial interests.”

Advisory Committee for Compliance with Energy Efficiency Standards

1. Statute provides authorization to pay the travel of committee members but omits authorization for compensating them
2. Statute requires Secretary to ensure that the committee is reasonably representative of the energy industry, and users affected, including residential, commercial, and industrial users, selected after consultation with respective national associations.

Common Designation Missteps

- Concluding that the **sole use of the term “representative”** (or some form of it) automatically ends the status inquiry
- Assuming that the agency’s **use of outside recommendations** in the selection process alone is sufficient to determine a member’s status
- Using representative appointments when members are **providing SGE-type services**

Some Best Practices

- If members are serving as representatives, ensure they are informed of the group they are expected to represent on the committee
- If members serving as SGEs, make sure that members know their status when appointed

DAEOgram Guidance



-- 2000 (SGEs)

-- 2003 (Financial Disclosure)

-- 2004 (Best Practices)

-- 2005 (Appointments)

-- 2007 (Counting of Days)

Managing Your Members' Conflicts of interest

Case Study

New Facts

Financial Disclosure Requirements

- Public report (SF 278): Serve more than 60 days a year and paid at least 120% of GS-15 minimum basic rate
- Confidential report (OGE 450): For all other SGEs

Part I: Assets and Income

Continuation Page

Specific stock, bond, sector mutual fund, type/location of real estate, etc. (Indicate the full name of each specific asset or investment. You may add the ticker symbol to the full name.) Name of Employer or Business; Source of Fees, Commissions, or Honoraria (Include brief description.) You may distinguish any entry for a family member by preceding it with S for spouse, DC for dependent child, or J for jointly held.	No longer held
¹ University of Southern California (USC) - salary	<input type="checkbox"/>
² (S) Americans for Energy Independence (AEI) - salary	<input type="checkbox"/>
³ Vanguard Energy Investment Fund - mutual fund	<input type="checkbox"/>
⁴ Wind Works Power Corp. - stock	<input type="checkbox"/>
⁵ Constellation Energy Corp. - consultant fees	<input checked="" type="checkbox"/>
⁶ Google - stock	<input type="checkbox"/>
⁷ IRA: General Electric, CocaCola, Citigroup, 3M - stocks	<input type="checkbox"/>
⁸ (S) 401k: TRowe Price Telecommunications Fund	<input type="checkbox"/>
⁹ Sierra Club - honorarium (magazine article)	<input type="checkbox"/>

Part III: Outside Positions

Report for Yourself:

- All positions outside the U.S. Government held at any time during the reporting period, whether or not you were compensated and whether or not you currently hold that position. Positions include an officer, director, employee, trustee, general partner, proprietor, representative, executor, or consultant of any of the following:
 - Corporation, partnership, trust, or other business entity
 - Non-profit or volunteer organization
 - Educational institution

Do Not Report:

- Any position with a
 - Religious entity
 - Social entity
 - Fraternal entity
 - Political entity
- Any position held by your spouse or dependent child
- Any position that you hold as part of your official duties

Reportable Information – Go to the last page to see examples of how to report outside positions

Organization <i>(include city and state where organization is located)</i>	Type of organization	Position	No longer held
¹ University of Southern California (USC)	university	professor	<input type="checkbox"/>
² Energy for Tomorrow Institute	non-profit organization	board member	<input type="checkbox"/>
³ American Cancer Society	non-profit organization	vice-president	<input type="checkbox"/>
⁴ Constellation Energy Corporation	energy company	consultant	<input checked="" type="checkbox"/>
⁵			<input type="checkbox"/>
⁶			

JOHNNY SOLARIS – OGE 450

Part I - Assets and Income

- University of Southern California – salary
- (S) Americans for Energy Independence (AEI) – salary
- Vanguard Energy Investment Fund – mutual fund
- Wind Works Power Corporation – stock
- Constellation Energy Corp. – consultant fees (no longer)
- Google – stock
- IRA: GE, Coca Cola, 3M – stock
- (S) 401k: TRowe Price Telecomm Fund – mutual fund
- Sierra Club – fee for one magazine article

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Part III – Outside Positions

- University of Southern California (USC) – professor
- Energy for Tomorrow Institute – board member
- American Cancer Society – vice pres., California Chapter
- Constellation Energy Corp. – consultant fees (no longer held)

Financial Disclosure Best Practices

- Receive and review all reports within required time
- Obtain membership lists from all DFOs
- Receive updates of any changes in membership
- Send advisory memos on conflict issues on reports
- Inform members where where to get assistance on completing the report
- Follow-up on any ethics issues found on the report
- Advise members to inform DFO of any changes of their assets or positions

Ethics Rules for Advisory Committee Members (SGE)

Major Ethics Laws and Regulations

- Criminal statutes (18 USC 201-209)
- Standards of Conduct (5 CFR 2635)
- Financial disclosure (5 CFR 2634)
- Ethics training (5 CFR 2638)
- Others, e.g., Emoluments Clause, Foreign Gifts Act, Foreign Agents Act, Hatch Act

Criminal Conflict Law Restrictions

(18 U.S.C. 201, 203, 205, 209)

- **Prohibited from seeking, accepting, or agreeing to receive anything of value in return for being influenced in the performance of official acts (18 USC 201)**
- **Prohibited from representing--or receiving compensation for representing--a private party before any Federal agency or court on particular matters involving parties in which they personally and substantially participated (Special waiver for grants and contracts)**
 - **(If served more than 60 days, bar extends to such matters pending in agency served) (18 USC 203, 205))**
- **Exempt from prohibition on receiving salary or supplementation of salary for Government services (18 USC 209)**

Other Statutory Restrictions

- No compensation from foreign governments for services, unless committee only provides advice (Emoluments Clause)
- No gifts from foreign governments over \$350 (Foreign Gifts and Decorations Act)
- No service as agent or lobbying for foreign principals (Foreign Agents Act)
- No partisan political activity while on duty or on Federal property (Hatch Act)

Conflict of Interest Restriction (18 USC 208(a))

- Prohibited from participating personally and substantially in particular matters that affect personal financial interests or interests of spouse, minor children, and business associates (such as outside employers) or others with whom they are negotiating for employment
- Members who are SGEs not eligible for Certificate of Divestiture

Individual Written Waivers (18 USC 208(b)(1), (3))

- **For All SGEs:** From appointing official certifying that financial interest is not so substantial as to be deemed likely to affect the integrity of their services (208(b)(1))
- **Only For Advisory Committee SGEs:** From appointing official certifying that need for their services outweighs potential for conflict of interest from financial interest (208(b)(3))
- **Consultation with OGE before granting a waiver, when practicable**

Regulatory Exemptions

(18 USC 208(b)(2), 5 CFR 2640)

Includes the following—

- Securities: Minimal interest (\$15,000/\$50,000)
- Holdings of diversified mutual funds
- Particular matters affecting campus of multi-campus educational institution, medical products, and certain FDA committees
- General particular matters affecting non-Federal current or prospective employers (only FACA committee members)

Standards of Conduct Restrictions

(5 CFR Part 2635)

- No gifts from prohibited sources or because of Government service. Permits gifts for outside business or employment
- No unauthorized use of title or position for private gain
- No unauthorized disclosure of nonpublic information
- No misuse of Government property
- No honorary degrees from prohibited sources without DAEO approval
- No fundraising from persons whose interests they can substantially affect in official duties

Other Conduct Restrictions

- No compensation for outside teaching, speaking, or writing relating to official duties, with limited application to SGEs (5 CFR 2635.807)
 - No restriction on teaching regular courses
- No expert witness (except for US) before Federal court or agency if US is party or has a direct and substantial interest if officially participated in same proceeding or matter that is subject of proceeding, unless DAEO authorizes
 - If serve more than 60 days, no expert witness if employing agency is party or has an interest, unless DAEO authorizes (5 CFR 2635.805)

Impartiality Restriction

(5 CFR 2635.502)

- No participation in particular matters involving parties affecting financial interest of person with a covered relationship
- “Covered relationship” includes members of household, relatives, business relations, former employer during previous year, and organizations in which there is active participation
- Agency Authorization may allow participation

Conflict of Interest Remedies

- **Recusal**
- **Divestiture**
- **Waiver**
- **Exemptions**

BEST PRACTICES

- Discuss options with member and DFO
- Consult OGE before issuing 208(b) waivers
- Document divestitures and waivers
- Provide waiver to committee chair, DFO, and relevant staff

JOHNNY SOLARIS – OGE 450 RESOLUTION OF CONFLICTS

- University of Southern California – 5 CFR 2640.203(g) exemption
- Americans for Energy Independence – 5 CFR 2635.502 disqualification
- Vanguard Energy Fund – de minimis investment
- Wind Works Power Corp. – de minimis investment
- Constellation Energy Corp. – 502 disqualification
- IRA: GE – de minimis investment
- Sierra Club – 502 disqualification
- Energy for Tomorrow Institute – 18 USC 208(b)(3) waiver

Consulting and Training

- Required to receive initial and annual training
- Training can be written materials

BEST PRACTICES

- Provide annual ethics training at committee meetings (meeting can be closed under Sunshine Act exemptions)
- Include representatives in all training sessions
- Review disclosure report before appointment and inform new members of major ethics rules
- Encourage members to seek advice on ethics from counselors, providing their names and contact address
- If applicable, only sign appointment documents after review of financial disclosure report
- Provide members access to agency ethics website

Termination of Membership & Other Ethics Matters

Post-Employment

Prohibited for life from representing non-Federal parties to Government on particular matters involving parties in which they knowingly participated personally and substantially while serving the Government (18 U.S.C. 207)

BEST PRACTICES

- Provide terminating members with post-employment law and materials
- Personally explain major restrictions before termination
- Recommend their contacting ethics counselors on any post-employment legal questions, even after termination
- Post names and addresses of ethics counselors on public website

FACA Subcommittees

- Subcommittees:
 - perform work on behalf of the Chartered or Parent committee.
 - collect data, evaluate information, draft positions, suggest recommendations, do site visits
- What is the relationship between the Subcommittee and its Parent? The Agency?
- How are Subcommittees Established?
- How are Subcommittee members chosen?
- How does FACA Apply to Subcommittees?

Increased Oversight

- Reports (GAO)
- Expanded Program Review Guidelines (OGE)
- FACA Database Requirements (GSA)
- Proposed FACA Amendments Legislation (Congress)
- Membership Restrictions (White House)



To Serve With Honor

A Guide on the Ethics Rules
That Apply to Advisory Committee
Members Serving as Special
Government Employees



U.S. Office of Government Ethics
www.usoge.gov
March 2008

SGE Game Plan for Peak Ethical Performance

- 1 Don't ever begin your committee work until you know what your role or status is on a committee.
- 2 Always get an "ethics checkup" before you begin your committee work.
- 3 Don't work on a committee matter that will affect your financial interests, unless some exception allows you to do so.
- 4 Always check with an ethics official if you have any concerns about an appearance of a conflict of interest.
- 5 Improve "your game" by becoming more familiar with Government ethics rules, especially those that are found in the Standards of Conduct and in the Conflict of Interest laws.
- 6 Talk to your agency ethics official if you anticipate doing some teaching, speaking, or writing as an outside activity for compensation or engaging in representational activity before the Government.
- 7 Understand the post-employment rules either before or after your advisory committee service ends.
- 8 Remember that learning more about the Government's ethics rules will help ensure that you serve your committee honorably.



The End!