

**THE FEDERAL ADVISORY COMMITTEE ACT, RULES
AND EXECUTIVE ORDERS: JUDICIAL INTERPRETATIONS
AND SUGGESTED REVISIONS**

**Elizabeth Ann Rieke
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**Natural Resources Law Center
University of Colorado School of Law
Boulder, Colorado 80309-0401**

INTRODUCTION

The Federal Advisory Committee Act (FACA)¹ was enacted in 1972 both to minimize the number of committees advisory to federal executive branch officers and agencies and to open up the activities of the advisory committees. (FACA, § 2). FACA imposes requirements for the establishment and termination of advisory committees and a set of open government procedures for the conduct of all such committees.

Despite its purposes, FACA is perceived by many community-based, collaborative groups and some federal agencies as an obstacle to 1) efforts by the groups to meet regularly with agency representatives and to have a voice in agency decisions and 2) efforts by federal agencies to seek advice from groups outside the agency. The Natural Resources Law Center is examining the possibility of modifying FACA or the FACA rules with the twin goals of making the law more workable and maintaining its core protections.

REQUIREMENTS OF THE FEDERAL ADVISORY COMMITTEE ACT

FACA applies to advisory committees established by federal statute or reorganization plan, established or utilized by the President, or established or utilized by one or more federal agencies. In this article, only advisory committees established or utilized by federal agencies will be discussed. It is important to note that FACA applies to advisory committees whether they are “established by” a federal agency *or* established by someone else but “utilized by” the federal agency to obtain advice or recommendations. There are various statutory exemptions, including one for meetings held exclusively between federal officials and elected state, local and tribal officers or their designated employees. (2 U.S.C.A. § 1534(b) (West Supp. 1996)).

To comply with FACA an advisory committee must:

- “[B]e fairly balanced in its membership in terms of the points of view represented and the functions to be performed....” (FACA, § 5(b)(2), (c)).
- Have a charter specifying the advisory committee’s official designation, objectives, scope, duties, costs, estimated number and frequency of meetings and termination date. (FACA, § 9(c)).
- Have a designated federal officer or employee who is authorized to adjourn a meeting and required to approve the call of and agenda for each meeting and to attend each meeting. (FACA, § 10(e), (f)).
- Publish notice of meetings in the Federal Register. (FACA, § 10(a)(2)).

¹ FACA is found in 5 U.S.C.A. Appendix 2 (1996).

- Hold open meetings. (FACA, § 10(a)(1)).
- Permit interested persons to attend, appear before or file statements with the committee. (FACA, § 10(a)(3)).
- Make committee records available for public inspection and copying. (FACA, § 10(b)).
- Keep detailed minutes of each meeting. (FACA, § 10(c)).

This comprehensive set of requirements applies to advisory committees “established by” or “utilized by” a federal agency. In addition, an advisory committee that falls in the “established by” category may be established by the agency head only after consultation with the head of the General Services Administration and determination by notice published in the Federal Register that the committee is in the public interest in connection with the lawful duties of the agency. (FACA, § 9(b)). Executive Order No. 12838, issued February 10, 1993, provides that new advisory committees shall not be created unless the agency head “finds that compelling circumstances necessitate creation of ...a committee” and approval is received from the Director of the Office of Management and Budget. The order further provides that “[s]uch approval shall be granted only sparingly and only if compelled by considerations of national security, health or safety, or similar national interests.” (Executive Order 12838, 58 Fed Reg. 8207 (1993), *reprinted in* 5 U.S.C.A. app. 2 § 14 (1996)).

ADVISORY COMMITTEES “UTILIZED BY” FEDERAL AGENCIES: UNINTENDED CONSEQUENCES?

The application of FACA to advisory committees “utilized by” a federal agency is extremely problematic. FACA has been interpreted to apply to watershed and forestry community-based, collaborative groups. In other words, in some cases such groups have been considered to be advisory groups “utilized by” a federal agency.

The classification of community-based, collaborative groups as groups “utilized by” a federal agency and therefore subject to FACA requirements stems from the definition of “utilized” in the FACA rules. The definition in the rules is necessary because the statute neither defines “utilized” nor sheds any other light on the meaning of the term. Under the FACA rules, a committee is “utilized” if it is a “committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the ... agency official(s) adopts, such as through institutional arrangements, as a *preferred source* from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.” (41 C.F.R. § 101-6.1003 (1996)(emphasis added)).

It is important to note that the definition centers on the amount of influence a group must have over a federal agency to make it subject to FACA under the “utilized by” category. As construed

in the definition, FACA's intent is to assure that no outside group becomes a preferred source of advice for a federal agency unless the group is in effect federalized by complying with FACA and therefore having a charter filed with the agency head, a designated federal official, notices of the meetings filed in the federal register, and so forth. That interpretation creates a major dilemma for community-based collaborative groups. As independent groups, they have no interest in complying with all of FACA's procedural requirements. They want to maintain their independence and flexibility. On the other hand, community-based groups often seek a close relationship with the federal agencies they are trying to influence. Such groups generally have a broad membership representing various interest groups in the community and typically operate on a consensus basis. Naturally, such groups seek to gather the views of their members, forge a consensus where possible and strongly influence a federal agency's decision on a given matter. Such groups may want federal representatives to participate in their meetings either as full-fledged members or in an advisory capacity. In effect, the community-based, collaborative group may seek to become a preferred source of advice on a given set of issues.

The definition's emphasis on the amount of influence a group may have over a federal agency before becoming subject to FACA is reflected in federal agency guidance on complying with FACA. For example, Forest Service guidance urges employees to assure there is sufficient separation between the Forest Service and outside groups seeking to influence the Forest Service. That guidance repeats the stricture not to "let any group become a preferred source for advice." (Memo from Jack Ward Thomas, Chief, Forest Service, to All Employees, October 2, 1995).

For fear of violating FACA, some federal personnel have been reticent to participate in community-based, collaborative groups. They are concerned that participation in such a group may make an agency decision subject to a legal challenge under FACA. Thus, FACA is generally seen by those groups as a substantial obstacle to their attempts to collaborate with federal officials. Some community representatives go so far as to suggest that FACA has become an excuse for federal agencies to refrain from participating in community-based groups. Many federal officials share the view that FACA is an obstacle to collaborative efforts. Some are simply ignoring FACA guidance and continuing to participate in community-based, collaborative groups. In general, FACA has created an atmosphere of uncertainty about collaboration among federal officials and community-based groups.

There is a pathway out of the dilemma created by the FACA rules and agency guidance. For unknown reasons, many discussions of FACA, the FACA rules and agency guidance fail to give full recognition to a series of court decisions addressing the meaning of "utilized." Since the seminal opinion is a Supreme Court decision, it supersedes any other interpretations of "utilized," including the definition in the FACA rules. In the Supreme Court decision, *Public Citizen v. United States Department of Justice*, (491 U.S. 440, 109 S.Ct. 2558 (1989)), issued after the adoption of the FACA rules, the Supreme Court expressly rejected a literal reading of the term "utilized" because "[a] literalistic reading...would catch far more groups and consulting arrangements than Congress could conceivably have intended." (491 U.S. at 464, 109 S.Ct. at 2572). After reviewing the legislative history of FACA, the Court concluded that Congress

intended to encompass within the phrase “utilized by” only groups “organized by, or closely tied to, the Federal Government, and thus enjoying quasi-public status.” (491 U.S. at 461, 109 S.Ct. at 2570). The National Academy of Sciences is cited as an example of the type of group intended to be covered by “utilized by.” (491 U.S. at 462, 109 S.Ct. at 2571).

Three decisions of the Court of Appeals for the District of Columbia interpreting *Public Citizen* provide further guidance. In *Washington Legal Foundation v. United States Sentencing Commission*, (17 F.3d 1446 (D.C. Cir. 1994)), the court explained that “utilized” is “a stringent standard, denoting something along the lines of actual management or control of the advisory committee.” (17 F.3d at 1450). And the court expressly noted that “influence [by an agency over an advisory group] is not control.” (17 F.3d at 1451). Thus, in determining whether a group is subject to FACA, this decision looks not to the amount of influence the group has over the agency but rather to the “quantum of control an agency ...[has] over an advisory committee....” (17 F.3d at 1450). Before it can be said that an agency utilizes a group as an advisory group, that quantum of control must make the group “so ‘closely tied’ to an agency as to be ‘amenable to strict management by agency officials’.” (*Food Chemical News v. Young*, 900 F.2d 328, 333 (quoting *Public Citizen*, 491 U.S. at 457, 458, 461 109 S.Ct. at 2568, 2570)). In the most recent of the three D.C. Court of Appeals decisions, *Animal Legal Defense Fund v. Shalala*, 104 F.3d 424 (1997), the court explained that its two preceding opinions “extended slightly ...the meaning of a ‘utilized advisory committee’” provided by the Supreme Court in *Public Citizen*. The Supreme Court’s opinion could be construed to hold that an advisory committee must have a quasi-public character in order to fall within the ambit of a “utilized by” committee. The D.C. Circuit cases recognize that if “a government agency actually took over the management of [a purely private committee], it would be brought under FACA.” (104 F.3d at 430). Thus, those cases establish a second test, a strict management or control test, for whether an advisory committee utilized by a federal agency is subject to FACA.

Public Citizen and its progeny indicate the courts will determine that advice from an independently established group triggers FACA only if a federal agency exercises extensive control over the group. In determining whether the quantum of control an agency has over a group is sufficient to implicate FACA, courts will look to “such factors as whether: (i) the agency appoints members to the group; (ii) the group receives agency funding; (iii) the agency sets the group’s agenda; and (iv) the group answers directly to the agency.” (Steven P. Croley, Practical Guidance on the Applicability of the Federal Advisory Committee Act, 10 Admin. L.J. 111, 156 (1996)). Just which combinations of the listed elements will provide sufficient indicia of control to trigger FACA remains to be litigated. However, it is clear from *Washington Legal Foundation v. United States Sentencing Commission* that agency membership on an advisory group, leading to “significant influence on ...[the] deliberations and on the ensuing recommendations” is not sufficient control to bring FACA into play. (17 F.3d 1447, 1451). In that case, the advisory group at issue included two members of a federal agency, but that federal membership was deemed insufficient to trigger FACA.

The narrow definition of “utilized” provided by the courts clearly excludes most, if not all,

collaborative, community-based groups from the “utilized by” category. Such groups are under the management and control of their own boards, not under the management and control of a federal agency, even if the agency is a full participant in the group. What if the group also receives part of its funding from one or more agencies? The courts have not yet dealt with that exact set of facts but since *Public Citizen* they seem predisposed to find that the “utilized by” branch of FACA does not apply to independent groups. Only if the funding guarantees a significant quantum of control over the group would the courts be likely to find that FACA applies.

The court decisions open various avenues for trying to clarify for agencies, and those seeking to influence them, the narrow scope of the “utilized by” category. One approach would be to seek to insert into the FACA statute a definition of “utilized” that is based on the court decisions. Another would be to approach the General Services Administration, the agency responsible for administration of FACA, with the suggestion that the definition of “utilized” in the FACA rules be modified to comport with the court decisions. Interested groups could also work with agency personnel to explain the narrow scope of the “utilized by” category of advisory groups.

The conclusion that community-based, collaborative groups are not subject to FACA will be unsettling to some groups. National interest groups who do not have the resources to participate in all such groups may be among those who dispute the conclusion. Some national environmental groups have expressed concern that community-based, collaborative groups reach lowest common denominator decisions and provide an avenue for industry to evade federal environmental laws. Thus, some national interest groups have a strong interest in seeing that meetings of community-based, collaborative groups that involve federal officials at a minimum, are properly noticed, are open to the public, include a period for public comment and are regularly reported in minutes. In order to address this concern, it may be appropriate to require federal agencies, before agreeing to participate in community-based, collaborative groups, to ascertain that such requirements are met.

ADVISORY COMMITTEES “ESTABLISHED BY” FEDERAL AGENCIES: BETWEEN A ROCK AND A HARD PLACE

The application of FACA to advisory committees “established by” a federal agency is also problematic. FACA, Executive Order No. 12838 and agency guidance from the Clinton Administration put federal executive agencies between a rock and a hard place. On the one hand, the Clinton Administration has mandated enhanced collaboration with stakeholders. On the other, FACA and Executive Order No. 12838 establish cumbersome procedures and strict standards for the establishment of advisory committees. They centralize the decision whether to establish an advisory committee in the agency head and the head of OMB. Executive Order No. 12838, requiring compelling considerations of national security, health or safety, or similar national interests before a new advisory committee may be created, sets the bar extraordinarily high for the establishment of new committees.

Given the conflicting and cumbersome mandates of FACA, Executive Order No. 12838 and the guidance from the Clinton Administration, it should come as no surprise that many agency advisory committees are established without complying with FACA and Executive Order No. 12838. National, regional and local offices simply establish the committees, utilize their advice in decision making and disband them when the decision making process is complete. No charter, no OMB approval, no federal register notices, no designated federal officers. And they may or may not comply with the long list of additional procedural requirements.

In an era when we recognize that centralized decision making tends to increase the length of time a decision takes without necessarily enhancing the wisdom of the decision, it seems appropriate to modify both FACA and Executive Order No. 12838 to foster decentralization of the decision whether to establish an advisory committee to the appropriate level of government. Agency heads should be able to establish national advisory committees without approval of the head of GSA or the head of OMB. Agency regional directors should be able to establish regional and local advisory committees. Notice of establishment of the committees should be in the Federal Register with a provision for getting on a mailing list for notices of meetings. Individual meeting notices should not be required to be published in the Federal Register. Rather, they should be sent to a list of potentially interested parties established by the agency and to all parties requesting notices of the meetings. This notice mechanism, rather than reliance on the Federal Register, should increase the likelihood that affected parties will actually receive timely notice of advisory committee meetings.

The extraordinarily high standard in Executive Order No. 12838 for establishment of advisory committees should be removed. The FACA standard, requiring advisory committees to be in the public interest in connection with lawful duties of the agency, appropriately leaves to agency personnel the decision whether an advisory committee is needed.

This set of modifications would make it easier for agencies to comply with FACA and, therefore, enhance the likelihood of compliance. However, the modifications retain the core protections for open decision making established by FACA.

SUMMARY

With respect to community-based, collaborative groups, this article concludes that they are generally not subject to FACA. Only if such a group were so closely tied to a federal agency as to be subject to strict management or control by the agency would it fall within the "utilized by" category of advisory groups and, therefore, be required to comply with FACA's procedural strictures. With respect to advisory groups established by federal agencies, this article recommends that the authority to establish the groups be decentralized. Additionally, the article recommends that the extraordinarily high standard for establishing advisory groups set forth in Executive Order No. 12838 ("only if compelled by considerations of national security, health or

safety, or similar national interests") be removed. Decentralization and removal of the high standard would return to the appropriate level of government flexibility to establish advisory groups when they are needed to carry out the duties of the agency.