Federal Register

Thursday,
July 19, 2001

Part II

General Services Administration

41 CFR Parts 101–6 and 102–3
Federal Advisory Committee Management; Final Rule

GENERAL SERVICES ADMINISTRATION

41 CFR Parts 101–6 and 102–3

[FPMR Amendment A–57]

RIN 3090–AG49

Federal Advisory Committee Management

AGENCY: Office of Governmentwide Policy, GSA.

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is revising Federal Property Management Regulations (FPMR) coverage on Federal advisory committee management and moving it into the Federal Management Regulation (FMR). A cross-reference is added to the FPMR to direct readers to the coverage in the FMR. The FMR coverage is written in plain language to provide agencies with updated regulatory material that is easy to read and understand. This action is necessary due to legislative and policy changes that have occurred, and judicial decisions that have been issued since the regulation was last updated. It is based also on suggestions for improvement from other Federal agencies and interested parties, and clarifies how the regulation applies or does not apply to certain situations.

EFFECTIVE DATE: August 20, 2001.

FOR FURTHER INFORMATION CONTACT: Charles F. Howton, Deputy Director, Committee Management Secretariat (202) 273–3561, or electronically at the following Internet address: *charles.howton@gsa.gov.*

SUPPLEMENTARY INFORMATION:

A. Background

GSA's authority for administering the Federal Advisory Committee Act (FACA), as amended, 5 U.S.C., App. (also referred to as "the Act"), is contained in section 7 of the Act and Executive Order 12024 (42 FR 61445; 3 CFR 1977 Comp., p. 158). Under Executive Order 12024, the President delegated to the Administrator of General Services all of the functions vested in the President by the Act. GSA's responsibilities for administering the Act have been delegated to the Associate Administrator for Governmentwide Policy and to the Director of the Committee Management Secretariat.

In a previous issue of the **Federal Register** (62 FR 31550, June 10, 1997), GSA published an Advance Notice of Proposed Rulemaking (ANPRM) and requested comments. Additional comments were requested from the Interagency Committee on Federal Advisory Committee Management. GSA requested comments on: (1) Suggested issues to address; (2) specific recommendations about changes needed in the current Federal Advisory Committee Management subpart; (3) examples of situations where FACA was either a useful tool or a hindrance to public involvement; and (4) GSA's intent to include illustrative examples and principles. On January 14, 2000, GSA published a proposed rule in the **Federal Register** (65 FR 2504) and requested comments over a 60-day period ending on March 14, 2000. All comments received were considered in drafting this final rule.

This final rule provides administrative and interpretive guidelines and management controls for Federal agencies to implement the provisions of the Act, and is intended to improve the management and operation of Federal advisory committees in the executive branch.

B. Discussion of Comments

Twenty-six commenters responded to the invitation for comments, including twenty commenters from the executive branch and six commenters from non-Federal sources. Of the twenty comments received from executive branch sources, three comments were submitted by subcomponents of a Federal department or agency. A total of fifty-nine specific issues or recommendations were identified, of which seven were either fully supportive of the proposed rule or concerned typographical errors. GSA addressed the disposition of the remaining fifty-two issues or recommendations as follows:

The Final Rule Should Include More Guidance Relating to the Management of Advisory Committees, Including the Impact of Other Statutes and Issues on Day-to-Day Operations

Several commenters provided suggestions regarding the addition of guidance on issues that, although not addressed by the Act, likely would improve the management of advisory committees. For example, one commenter suggested that the final rule include a provision to encourage agencies to streamline their internal processes and procedures in order to expedite the establishment of advisory committees. Other commenters requested that GSA: (1) Provide more detailed provisions on the compensation of advisory committee members and staff, and experts and consultants; (2) expand the range of information required to be listed in an advisory committee's charter to include the nature and disposition of records; and (3) incorporate new regulatory requirements for increasing access to advisory committee information, such as providing meeting notices, minutes, and reports via the Internet.

In response to these recommendations, GSA expanded the number of examples included within the final rule to illustrate how other statutes or issues potentially could affect the effective management of advisory committees.

In addition, GSA reorganized the examples and other guidance into appendices to avoid any ambiguity between actions required by the Act and the final rule, and actions that are suggested only within an implementing framework of "best practices." In the final rule, a "Key Points and Principles" appendix appears at the end of each subpart to which it relates.

In applying the "best practices" offered in the appendices, users of the final rule should continue to examine the extent to which other factors, including agency-specific statutory provisions and internal agency procedures, may affect a specific advisory committee or program. Although GSA believes that the examples contained in the appendices to the final rule represent the circumstances most commonly encountered during the day-to-day management of advisory committees, the listing is not exhaustive and must be supplemented based upon the unique requirements of the user.

Provide Additional Guidance Regarding What Advisory Committees and Their Subcommittees Must Do To Comply With the Act

Many commenters expressed concern over language contained in the preamble to the proposed rule relating to coverage of subcommittees under the Act. The preamble to the proposed rule noted that:

> The applicability of the procedural requirements contained in FACA and this proposed rule to subcommittees of advisory committees has been clarified. GSA's current FACA regulation does not make clear that subcommittees reporting to a parent committee are not subject to FACA. Indeed, the regulation states just the opposite, providing that "[s]ubcommittees that do not function independently of the full or parent advisory committee" are subject to all requirements of FACA except the requirement for a charter. (See 41 CFR 101–6.1007(b)(3).) This provision is problematic for two reasons. First, it applies FACA more broadly than the statute itself requires. Second, it essentially creates a special type

of advisory committee that is subject to some, but not all of FACA's requirements, which has no foundation in the statute. Under FACA, a group is either an advisory committee subject to all of the statutory requirements, or it is not an advisory committee, and therefore not subject to any of its requirements. Because a subcommittee which reports to a parent committee is not an "advisory committee" under FACA, there is no legal basis for applying any of FACA's requirements to such a subcommittee.

In evaluating the comments received, GSA notes that there were no objections to the exclusions contained in § 102–3.185 of the proposed rule (now § 102–3.160 of the final rule), relating to "What activities of an advisory committee are not subject to the notice and open meeting requirements of the Act?" The exclusions in § 102–3.160 of the final rule continue to cover the types of activities routinely performed by subcommittees. By this reasoning GSA sought to bring into harmony these activities with those provisions in the proposed rule differentiating subcommittees reporting to a parent advisory committee from those reporting directly to a Federal officer or agency.

However, the preamble to the proposed rule did not explain and describe adequately the legal framework for GSA's decision to differentiate subcommittees that report only to a parent advisory committee more clearly from advisory committees that report directly to a Federal officer or agency. The Act defines the term "advisory committee" as "any committee, * * * or any subcommittee or other subgroup thereof which is established or utilized by the President or an agency in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government". Under this definition, a subcommittee is an "advisory committee" subject to the Act if it provides advice to the President or a Federal officer or agency. Most subcommittees, however, report only to a parent advisory committee and it is the parent committee that is normally responsible for providing advice or recommendations to the Government. In this conventional scenario, the subcommittee is not subject to the Act because it is not providing advice to the Government.

Case law supports this conclusion. In *National Anti-Hunger Coalition* v. *Executive Committee*, 557 F.Supp. 524 (D.D.C.), *aff'd*, 711 F.2d 1071 (D.C. Cir. 1983), the question presented was whether the Act applied to task forces reporting to the Executive Committee of the President's Private Sector Survey on Cost Control in the Federal Government. The task forces had no authority to make recommendations to agencies or to the President. Instead, their function was to do the "preliminary work of the survey, including fact-gathering, statistical evaluations, and the formulation of preliminary reports." (557 F.Supp. at 526). Although it was undisputed that the Executive Committee was subject to the Act, the court held that the Act did not apply to the task forces under the following reasoning:

> There is no question that the task forces are intimately involved in the gathering of information about federal programs and the formulation of possible recommendations for consideration of the Committee. That is not enough to render them subject to the FACA. The Act itself applies only to committees "established or utilized by" the President or an agency "in the interest of obtaining advice or recommendations for the President or one or more agencies." The Act does not cover groups performing staff functions such as those performed by the so-called task forces. (557 F.Supp. at 529). (See also *Association of American Physicians and Surgeons* v. *Clinton*, 997 F.2d 898, 911–913 (D.C. Cir. 1993).)

GSA believes that as a result of this decision, subcommittees that report to a parent advisory committee generally are not subject to the Act. GSA also believes that subcommittees whose advice or recommendations are provided directly to a Federal officer or agency are subject to the Act. However, GSA further believes that this decision does not shield those subcommittees from coverage under the Act whose advice or recommendations are not subject to deliberation by their parent advisory committees.

From this reasoning, it is not permissible for parent advisory committees simply to "rubber-stamp" the advice or recommendations of their subcommittees, thereby depriving the public of its opportunity to know about, and participate contemporaneously in, an advisory committee's deliberations. Agencies are cautioned to avoid excluding the public from attending any meeting where a subcommittee develops advice or recommendations that are not expected to be reviewed and considered by the parent advisory committee before being submitted to a Federal officer or agency. These exclusions may run counter to the provisions of the Act that require contemporaneous access to the advisory committee deliberative process.

To address these issues more clearly, GSA strengthened language in the final rule by: (1) Adding a new § 102–3.35 that outlines policies relating to subcommittees; (2) clarifying language in § 102–3.145 relating to subcommittee meetings; and (3) clarifying the examples contained in Appendix A to Subpart C.

Correct and Clarify the Definition of "Utilized"

Nine commenters recommended that GSA revise its definition of the term, "utilized" to conform to governing case law.

As noted by some of the commenters, the definition of the term "utilized" in § 102–3.30 of the proposed rule inadvertently misstated the applicable legal test. The proposed rule stated that a committee is "utilized within the meaning of the Act when the President or a Federal agency exercises actual management and control over its operation." This construction would require an agency both to have management of the committee and to exercise control over the committee before the committee can be deemed "utilized." The proper statement of the "utilized" test is whether an agency either has management of the committee *or*, in some fashion other than management, exercises control over the committee.

The controlling legal authority is *Washington Legal Foundation* v. *U. . Sentencing Commission*, 17 F.3d 1446 (D.C. Cir. 1994). In that case, the appeals court gave structure to the U.S. Supreme Court's prior decision interpreting the term "utilized." (See *Public Citizen* v. *Department of Justice*, 491 U.S. 440 (1989).) The appeals court ruled that the word "*utilized*" indicates "*something along the lines of actual management or control of the advisory committee.*" (17 F.3d at 1450). The operative criterion for determining whether a committee has sufficiently close ties to an agency in order to render it "utilized" is whether the agency has either *management* of the committee or exerts some other type of *control*, but not necessarily both.

Similarly, § 102–3.50(b) of the proposed rule (now § 102–3.185(b) of the final rule) used the phrase "actual management and control" with regard to section 15 of the Act. In explaining the relationship between Federal agencies and the National Academy of Sciences (NAS) and the National Academy of Public Administration (NAPA) covered by section 15 of the Act, § 102–3.50(b) of the proposed rule states that "[a]gencies must not manage or control the specific procedures adopted by each academy." However, committees covered by section 15 of the Act must be under *both* the actual management *and* the control of the academies, not that of a Federal agency. In this instance, the use of the conjunctive

word "and" is appropriate and indicates that the academies cannot relinquish *either* management or control of their committees to Federal agencies.

Accordingly, GSA revised the language contained in the final rule by changing *management and control* to *management or control* in the definition of the term "utilized," now in § 102–3.25 of the final rule, and in those instances in which it appears in the "Key Points and Principles" guidance in the appendices to the final rule.

Clarify the Application of the Act to Agency Interactions With the Public

Several commenters noted that Federal agencies are increasingly reliant on local communities, individual citizens, and interested parties to obtain information, advice, or recommendations on which to base decisions. They expressed concerns that: (1) Uncertainty about the scope of the Act creates a disincentive for Federal officers and agencies wishing to engage in public outreach; (2) the requirements of the Act are being interpreted differently within and among agencies; and (3) GSA's current regulations do not adequately differentiate between those groups and activities covered by the Act and others that are not. (See 41 CFR 101–6.10.)

GSA recognizes that the broad definition in the Act of an "advisory committee" might be interpreted to extend coverage by the Act to any gathering or two or more persons from whom the President or other Federal officers or agencies seek advice or recommendations. However, in the cases discussed above, the courts have rejected such a broad reading of "advisory committee." GSA believes that the sections in the final rule on definitions and on groups not covered by the Act, §§ 102–3.25 and 102–3.40, respectively, clarify the limits of the coverage by, or scope of, the Act when applied together.

Within this group of comments, GSA noted a consistent theme related to the need for more information regarding public participation tools and techniques that would allow for more collaboration that is not subject to the Act. Although advisory committees support Federal decisions in a variety of situations, GSA believes that the ability of agencies to interact with the public in numerous other ways is particularly important because advisory committees are only one method for agencies to obtain the views of the public for their programs. Federal agencies may engage in continuous collaboration using diverse, but complimentary, tools, techniques, and methods. Whether or not a selected approach includes the use of advisory committees, the potential or perceived applicability of the Act must not prevent constructive collaboration from taking place. Agencies are encouraged to contact GSA concerning not only the use of Federal advisory committees, but also for information about alternative forms of public involvement.

In GSA's view, agencies have broad latitude to consult with the public using many different approaches that are not subject to the Act. Public consultation formats that generally fall outside of the scope of the Act include public meetings, information exchange forums, meetings initiated with or by non-governmental organizations, Federal participation on groups that are not established or utilized by the Government, and certain work products generated by contractors as a result of consultation with the public.

While FACA is not a public participation statute, it directly affects how the executive branch is held accountable for the use and management of Federal advisory committees as a major means of obtaining public involvement. Within this context, agencies wishing to consult with private individuals, non-governmental organizations, or with the public at large through other assemblages often must consider whether or not the Act applies to a given situation.

The number and range of scenarios presented by the commenters underscore the importance of presenting a clearer understanding of how advisory committees are established by Federal agencies or how the Government's relationship with groups not established within the meaning of the Act may nevertheless become subject to the Act if they are *utilized*. Based upon the comments received, the circumstances under which advisory committees are *established* within the executive branch appear to be well understood. Accordingly, GSA retained the language contained in § 102–3.30 of the proposed rule in § 102–3.25 of the final rule and throughout subpart B.

However, as noted in the above discussion of the proposed rule's treatment of the term "utilized," agencies must determine whether or not their relationship with a group created by non-Federal entities constitutes *actual management or control* within the meaning of the Act. To help agencies make this determination, GSA has included within the final rule several new examples illustrating the application of the *actual management or control* test to different situations. These additions are contained in the "Key Points and Principles" guidance in Appendix A to Subpart A.

Explain the Relationship Between Committees Established by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA) and the Act

The Federal Advisory Committee Act Amendments of 1997, Public Law 105–153, December 17, 1997, established separate procedures for committees that are managed and controlled by NAS or NAPA. Subpart E of the final rule contains implementing instructions for the new section 15 of FACA.

Clarify the Distinction Between Advisory Committees Subject to the Act and Operational Committees Not Covered by the Act

Five commenters suggested that further guidance in the final rule is necessary to assist agencies in differentiating an operational committee not covered by the Act from one that performs primarily advisory functions and is, therefore, subject to the Act. GSA added guidance within Appendix A to Subpart A listing those characteristics generally associated with committees having primarily operational, as opposed to advisory, functions.

Clarify the Applicability of the Act to Advisory Committee Meetings Conducted Through Electronic Means

Four commenters supported GSA's language contained in the proposed rule extending the definition of "committee meeting" to meetings conducted in whole or part through electronic means. However, two commenters suggested additional clarifications, which GSA has adopted.

First, GSA slightly modified the definition of "committee meeting" contained in § 102–3.25 of the final rule to include a "gathering" of advisory committee members whether in person or through electronic means. This change was made to highlight coverage by the Act of both physical and "virtual" meetings conducted by such means as a teleconference, videoconference, the Internet, or other electronic medium.

Second, GSA amended the language contained in § 102–3.140 of the final rule to provide for adequate public access to advisory committee meetings that are conducted in whole or part through electronic means. This change complements existing policy covering advisory committee meetings that are held within a physical setting, such as a conference room, by ensuring that agencies adequately plan for public

participation by adding additional capability (such as a designated number of public call-in lines for a teleconference) to ensure access to committee deliberations.

Provide Additional Guidance on Balanced Representation and Selection of Members

One commenter expressed concern that the proposed rule did not contain sufficient guidance on balanced representation and the selection of members. GSA recognizes that the guidance contained in the proposed rule is limited to the language of the Act, but believes that the provisions of section 5(c) of the Act are broad enough to allow for agency discretion in determining advisory committee representation and membership relative to applicable statutes, Executive orders, and the needs of the agency responsible for the advisory committee.

However, GSA added a list of possible considerations within Appendix A to Subpart B that, while not comprehensive or universally applicable, may help in developing a plan for balancing an advisory committee's membership.

Emphasize the Importance of Maximizing an Advisory Committee's Independent Judgment

Five commenters offered various suggestions to address the requirement contained in section 5(b)(3) of the Act, which is intended to ensure that the work products of an advisory committee reflect the group's independent judgment.

Included among these suggestions were recommendations from the U.S. Office of Government Ethics (OGE) that GSA modify the language contained in § 102–3.155 of the proposed rule (now contained in Appendix A to Subpart C of the final rule) to clarify the applicability of conflict of interest statutes and other Federal ethics rules to advisory committee members. GSA adopted all of OGE's suggestions.

The remaining suggestions received concerned the appointment of advisory committee members, including a recommended change to § 102–3.155 of the proposed rule (now Appendix A to Subpart C) to clarify that: (1) An agency may appoint a member to an advisory committee based upon the recommendation of an organization to be represented; and (2) recommendations from an advisory committee may be a part of an agency's process to nominate new members. GSA adopted these changes and suggestions.

Provide Additional Guidance on the Management of Federal Records

GSA received suggestions from the National Archives and Records Administration (NARA) regarding three areas where additional guidance on records management issues could be useful. Specifically, NARA recommended that § 102–3.190 of the proposed rule: (1) Be expanded to include all recordkeeping requirements specified by the Act, not just those relating to advisory committee minutes; (2) include a statement that records should be scheduled for disposition before actual termination of the advisory committee; and (3) with regard to information that must be included within an advisory committee's charter, include a determination as to whether its records fall within the Presidential Records Act, 44 U.S.C. Chap 22.

GSA addressed these recommendations by expanding § 102–3.200 of the proposed rule (now Appendix A to Subpart D) to include additional guidance relating to records management and to highlight the applicability and importance of Federal recordkeeping statutes and policies to advisory committee operations. GSA decided to include this guidance within this appendix because the Act generally is silent on records management issues, with the exception of the responsibilities of the CommitteeManagement Officer (CMO) in section 8(b)(2) of the Act.

Pursuant to the National Archives and Records Administration Act, 44 U.S.C.Chap. 21, the Archivist of the United States is responsible for records management in the Federal Government, including the issuance of regulations and guidance for records retention and disposition. The Archivist, working in conjunction with the agencies" Records Management Officers, also is responsible for identifying records that are appropriate for transfer to the permanent Archives of the United States and those that must be processed in accordance with the Presidential Records Act.

Strengthen Provisions Relating to the Public's Access to Advisory Committee Records

Two commenters suggested that the final rule contain more explicit guidance regarding the public's access to committee records under section 10(b) of the Act. In particular, the commenters recommended adding language describing the circumstances under which records may be withheld pursuant to the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552.

GSA believes that timely access to advisory committee records is an important element of the public access provisions of the Act and, therefore, agrees with these suggestions. GSA further believes that there are two separate, but equally important issues related to the availability of advisory committee records under section 10(b) of FACA: (1) The extent to which records may be protected from disclosure under FOIA; and (2) the extent to which agencies may require that requests for non-exempt records be processed under the request and review process established by section 552(a)(3) of FOIA.

Section 10(b) of the Act provides that:

> Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist.

The purpose of section 10(b) of the Act is to provide for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend advisory committee meetings, ensures that interested parties have a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. Records covered by the exemptions set forth in section 552(b) of FOIA generally may be withheld. However, it should be noted that FOIA Exemption 5 generally cannot be used to withhold documents reflecting an advisory committee's internal deliberations.

An opinion of the Office of Legal Counsel, U.S. Department of Justice, 12 Op. O.L.C. 73, April 29, 1988, entitled "Disclosure of Advisory Committee Deliberative Materials," concludes that FOIA Exemption 5 "is not generally applicable to materials prepared by or for an advisory committee, but that it does extend to protect privileged documents delivered from the agency to an advisory committee." The opinion further states that:

> This construction gives meaning to exemption 5 without vitiating Congress' enumeration of deliberative documents such as working papers and drafts as subject to disclosure. It is also supported by a close reading of exemption 5 itself. Because by its terms exemption 5 protects only inter-agency and intra-agency documents and because an advisory committee is not an agency, documents do not receive the protection of exemption 5 by virtue of the fact that they are prepared by an advisory committee. On

the other hand, documents prepared by an agency do not lose the protection of exemption 5 by virtue of the fact that they are delivered to an advisory committee.

In determining whether or not such records fall within these narrow exclusions, the OLC opinion provides that consideration should be given to determining whether or not section 10(b) of FACA is applicable in the first instance. As noted in the OLC opinion:

Section 10(b) itself applies only to materials made available to or prepared for or by an advisory committee established by statute or reorganization plan or established or utilized by the President or an agency. 5 U.S.C. app. I, 3(2), 10(b). Accordingly, in determining whether a document is to be disclosed the first issue is not whether it is subject to an exemption under 5 U.S.C. 552 but whether it meets this threshold definition.

In explaining this threshold determination of whether particular records are subject to the section 10(b) disclosure requirement, the OLC opinion states that:

The courts and this Office have construed the concept of advisory committees established or utilized by the President or an agency to preclude section 10(b)'s application to the work prepared by a staff member of an advisory committee or a staffing entity within an advisory committee, such as an independent task force limited to gathering information, or a subcommittee of the advisory committee that is not itself established or utilized by the President or agency, so long as the material was not used by the committee as a whole.

Although advisory committee records may be withheld under the provisions of FOIA if there is a *reasonable expectation* that the records sought fall within the exemptions contained in section 552(b) of FOIA, agencies may not require members of the public or other interested parties to file requests for non-exempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA.

In *Food Chemical News* v. *Department of Health and Human Services*, 980 F.2d 1468, 299 U.S. App. DC 25, the appeals court held that:

Under section 10(b) of FACA an agency is generally obligated to make available for public inspection and copying all materials that were made available to or prepared for or by an advisory committee. Except with respect to those materials that the agency reasonably claims to be exempt from disclosure pursuant to FOIA, a member of the public need not request disclosure in order for FACA 10(b) materials to be made available. Thus, whenever practicable, all 10(b) materials must be available for public inspection and copying before or on the date of the advisory committee meeting to which they apply.

Accordingly, GSA included language within § 102–3.170 of the final rule describing the policy to be followed in implementing section 10(b) of the Act, and included additional guidance in Appendix A to Subpart D concerning the applicability of FOIA to records covered by section 10(b) of FACA.

Improve the Organization of the Final Rule

During the course of evaluating comments received from all sources, GSA conducted a review of the proposed rule's general organization and structure for the purpose of achieving greater clarity and consistency in presentation. This effort led to a number of changes, such as redesignating the "Key Points and Principles" sections following each subpart as appendices. Other changes were made throughout the final rule to improve alignment between section headings and the material that follows. Similar changes were made within the appendices in order to improve the linkage between the examples or questions and the corresponding guidance.

In addition, GSA reorganized the final rule to redesignate subpart B as subpart E to improve the flow of information distinguishing Federal advisory committees subject to the Act from those committees created by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA) which, if not *utilized* by the executive branch, are not subject to the Act's provisions. Section numbers previously assigned in the proposed rule affected by the redesignation of subpart B as subpart E, subpart C as subpart B, subpart D as subpart C, and subpart E as subpart D have been changed accordingly.

C. Technical and Procedural Comments

The final rule incorporates several technical and procedural recommendations made by a range of commenters, particularly in the following sections or appendices:

Section/Appendix	Modification
102–3.60	Specific procedures for consulting with the Secretariat have been eliminated. GSA will issue separate guidance to agencies covering the administration of the consultation requirement.
Appendix A to Subpart B	Addition of guidance relating to the achievement of "balanced" advisory committee membership.
Appendix A to Subpart B	Addition of guidance covering the legal duration of the charter of an advisory committee required by statute where Congress authorizes the advisory committee for a period exceeding two years.
Appendix A to Subpart C	Addition of guidance addressing the designation of an alternate Designated Federal Officer (DFO).
102–3.130	All references to compensation limits imposed by the Act have been updated, and references to alternative similar agency compensation systems other than the General Schedule have been included.
102–3.130	All references to the word, "handicapped," have been replaced with the phrase, "with disabilities."
Appendix A to Subpart D	Addition of guidance regarding activities that are not subject to the notice and open meeting requirements of the Act.
102–3.165	The requirement for the completion of advisory committee meeting minutes now requires the DFO to ensure certification within the time limit specified.

D. Consultation With Other Federal Agencies

Pursuant to section 7(d) of the Act, the guidelines contained in this final rule with respect to uniform fair rates of compensation for comparable services of members and staff of, and experts and consultants to advisory committees have been established after consultation with the U.S. Office of Personnel Management (OPM).

Although not required by the Act, the guidelines contained in this final rule that refer to the applicability of conflict of interest statutes and other Federal ethics rules to advisory committee members have been established after consultation with the U.S. Office of Government Ethics (OGE).

Although not required by the Act, the guidelines contained in this final rule that relate to the management of advisory committee records have been established after consultation with the National Archives and Records Administration (NARA).

E. Executive Order 12866

GSA has determined that this final rule is a significant rule for the purposes of Executive Order 12866 of September 30, 1993.

F. Regulatory Flexibility Act

GSA has determined that this final rule will not have a significant economic impact on a substantial number of small entities (including small businesses, small organizational units, and small governmental jurisdictions) within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.* The rule does not impact small entities and applies only to Federal officers and agencies.

G. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

H. Small Business Regulatory Enforcement Fairness Act

This final rule is being submitted for Congressional review as prescribed under 5 U.S.C. 801.

List of Subjects in 41 CFR Parts 101–6 and 102–3

Advisory committees, Government property management.

Dated: July 5, 2001.

Stephen A. Perry,

Administrator of General Services.

For the reasons set forth in the preamble, GSA amends 41 CFR chapters 101 and 102 as follows:

CHAPTER 101—[AMENDED]

PART 101–6—MISCELLANEOUS REGULATIONS

1. Subpart 101–6.10 is revised to read as follows:

Subpart 101–6.10—Federal Advisory Committee Management

Authority: Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)); sec. 7, 5 U.S.C., App.; and E.O. 12024, 3 CFR, 1977 Comp., p. 158.

§ 101–6.1001 Cross-reference to the Federal Management Regulation (FMR) (41 CFR chapter 102, parts 102–1 through 102–220).

For Federal advisory committee management information previously contained in this subpart, see FMR part 102–3 (41 CFR part 102–3).

CHAPTER 102—[AMENDED]

2. Part 102–3 is added to subchapter A of chapter 102 to read as follows:

PART 102–3—FEDERAL ADVISORY COMMITTEE MANAGEMENT

Subpart A—What Policies Apply To Advisory Committees Established Within the Executive Branch?

Sec.
102–3.5 What does this subpart cover and how does it apply?
102–3.10 What is the purpose of the Federal Advisory Committee Act?
102–3.15 Who are the intended users of this part?
102–3.20 How does this part meet the needs of its audience?
102–3.25 What definitions apply to this part?
102–3.30 What policies govern the use of advisory committees?
102–3.35 What policies govern the use of subcommittees?
102–3.40 What types of committees or groups are not covered by the Act and this part?
Appendix A to Subpart A of Part 102–3—Key Points and Principles

Subpart B—How Are Advisory Committees Established, Renewed, Reestablished, and Terminated?

102–3.45 What does this subpart cover and how does it apply?
102–3.50 What are the authorities for establishing advisory committees?
102–3.55 What rules apply to the duration of an advisory committee?
102–3.60 What procedures are required to establish, renew, or reestablish a discretionary advisory committee?
102–3.65 What are the public notification requirements for discretionary advisory committees?
102–3.70 What are the charter filing requirements?
102–3.75 What information must be included in the charter of an advisory committee?
102–3.80 How are minor charter amendments accomplished?
102–3.85 How are major charter amendments accomplished?
Appendix A to Subpart B of Part 102–3—Key Points and Principles

Subpart C—How Are Advisory Committees Managed?

102–3.90 What does this subpart cover and how does it apply?
102–3.95 What principles apply to the management of advisory committees?
102–3.100 What are the responsibilities and functions of GSA?
102–3.105 What are the responsibilities of an agency head?
102–3.110 What are the responsibilities of a chairperson of an independent Presidential advisory committee?
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Subpart E—How Does This Subpart Apply to Advice or Recommendations Provided to Agencies by the National Academy of Sciences or the National Academy of Public Administration?

102–3.180 What does this subpart cover and how does it apply?
102–3.185 What does this subpart require agencies to do?
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Authority: Sec. 205(c), 63 Stat. 390 (40 U.S.C. 486(c)); sec. 7, 5 U.S.C., App.; and E.O. 12024, 3 CFR, 1977 Comp., p. 158.

Subpart A—What Policies Apply to Advisory Committees Established Within the Executive Branch?

§ 102–3.5 What does this subpart cover and how does it apply?

This subpart provides the policy framework that must be used by agency heads in applying the Federal Advisory Committee Act (FACA), as amended (or "the Act"), 5 U.S.C., App., to advisory committees they establish and operate. In addition to listing key definitions underlying the interpretation of the Act, this subpart establishes the scope and applicability of the Act, and outlines specific exclusions from its coverage.

§ 102–3.10 What is the purpose of the Federal Advisory Committee Act?

FACA governs the establishment, operation, and termination of advisory committees within the executive branch of the Federal Government. The Act defines what constitutes a Federal advisory committee and provides general procedures for the executive branch to follow for the operation of these advisory committees. In addition, the Act is designed to assure that the Congress and the public are kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees.

§ 102–3.15 Who are the intended users of this part?

(a) The primary users of this Federal Advisory Committee Management part are:

(1) Executive branch officials and others outside Government currently involved with an established advisory committee;

(2) Executive branch officials who seek to establish or utilize an advisory committee;

(3) Executive branch officials and others outside Government who have decided to pursue, or who are already engaged in, a form of public involvement or consultation and want to avoid inadvertently violating the Act; and

(4) Field personnel of Federal agencies who are increasingly involved with the public as part of their efforts to increase collaboration and improve customer service.

(b) Other types of end-users of this part include individuals and organizations outside of the executive branch who seek to understand and interpret the Act, or are seeking additional guidance.

§ 102–3.20 How does this part meet the needs of its audience?

This Federal Advisory Committee Management part meets the general and specific needs of its audience by addressing the following issues and related topics:

(a) *Scope and applicability.* This part provides guidance on the threshold issue of what constitutes an advisory committee and clarifies the limits of coverage by the Act for the benefit of the intended users of this part.

(b) *Policies and guidelines.* This part defines the policies, establishes minimum requirements, and provides guidance to Federal officers and agencies for the establishment, operation, administration, and duration of advisory committees subject to the Act. This includes reporting requirements that keep Congress and the public informed of the number, purpose, membership, activities, benefits, and costs of these advisory committees. These requirements form the basis for implementing the Act at both the agency and Governmentwide levels.

(c) *Examples and principles.* This part provides summary-level key points and principles at the end of each subpart that provide more clarification on the role of Federal advisory committees in the larger context of public involvement in Federal decisions and activities. This includes a discussion of the applicability of the Act to different decisionmaking scenarios.

§ 102–3.25 What definitions apply to this part?

The following definitions apply to this Federal Advisory Committee Management part:

Act means the Federal Advisory Committee Act, as amended, 5 U.S.C., App.

Administrator means the Administrator of General Services.

Advisory committee subject to the Act, except as specifically exempted by the Act or by other statutes, or as not covered by this part, means any committee, board, commission, council, conference, panel, task force, or other similar group, which is established by statute, or established or utilized by the President or by an agency official, for the purpose of obtaining advice or recommendations for the President or on issues or policies within the scope of an agency official's responsibilities.

Agency has the same meaning as in 5 U.S.C. 551(1).

Committee Management Officer ("CMO"), means the individual designated by the agency head to implement the provisions of section 8(b) of the Act and any delegated responsibilities of the agency head under the Act.

Committee Management Secretariat ("Secretariat"), means the organization established pursuant to section 7(a) of the Act, which is responsible for all matters relating to advisory committees, and carries out the responsibilities of the Administrator under the Act and Executive Order 12024 (3 CFR, 1977 Comp., p. 158).

Committee meeting means any gathering of advisory committee members (whether in person or through electronic means) held with the approval of an agency for the purpose of deliberating on the substantive matters upon which the advisory committee provides advice or recommendations.

Committee member means an individual who serves by appointment or invitation on an advisory committee or subcommittee.

Committee staff means any Federal employee, private individual, or other party (whether under contract or not) who is not a committee member, and who serves in a support capacity to an advisory committee or subcommittee.

Designated Federal Officer ("DFO"), means an individual designated by the agency head, for each advisory committee for which the agency head is responsible, to implement the provisions of sections 10(e) and (f) of the Act and any advisory committee procedures of the agency under the control and supervision of the CMO.

Discretionary advisory committee means any advisory committee that is established under the authority of an agency head or authorized by statute. An advisory committee referenced in general (non-specific) authorizing language or Congressional committee report language is discretionary, and its establishment or termination is within the legal discretion of an agency head.

Independent Presidential advisory committee means any Presidential advisory committee not assigned by the Congress in law, or by President or the President's delegate, to an agency for administrative and other support.

Non-discretionary advisory committee means any advisory committee either required by statute or by Presidential directive. A *non-discretionary advisory committee* required by statute generally is identified specifically in a statute by name, purpose, or functions, and its establishment or termination is beyond the legal discretion of an agency head.

Presidential advisory committee means any advisory committee authorized by the Congress or directed by the President to advise the President.

Subcommittee means a group, generally not subject to the Act, that reports to an advisory committee and not directly to a Federal officer or

agency, whether or not its members are drawn in whole or in part from the parent advisory committee.

Utilized for the purposes of the Act, does not have its ordinary meaning. A committee that is not established by the Federal Government is *utilized* within the meaning of the Act when the President or a Federal office or agency exercises actual management or control over its operation.

§ 102–3.30 What policies govern the use of advisory committees?

The policies to be followed by Federal departments and agencies in establishing and operating advisory committees consistent with the Act are as follows:

(a) *Determination of need in the public interest.* A discretionary advisory committee may be established only when it is essential to the conduct of agency business and when the information to be obtained is not already available through another advisory committee or source within the Federal Government. Reasons for deciding that an advisory committee is needed may include whether:

(1) Advisory committee deliberations will result in the creation or elimination of (or change in) regulations, policies, or guidelines affecting agency business;

(2) The advisory committee will make recommendations resulting in significant improvements in service or reductions in cost; or

(3) The advisory committee's recommendations will provide an important additional perspective or viewpoint affecting agency operations.

(b) *Termination.* An advisory committee must be terminated when:

(1) The stated objectives of the committee have been accomplished;

(2) The subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's functions by another entity;

(3) The agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government;

(4) In the case of a discretionary advisory committee, upon the expiration of a period not to exceed two years, unless renewed;

(5) In the case of a non-discretionary advisory committee required by Presidential directive, upon the expiration of a period not to exceed two years, unless renewed by authority of the President; or

(6) In the case of a non-discretionary advisory committee required by statute, upon the expiration of the time explicitly specified in the statute, or implied by operation of the statute.

(c) *Balanced membership.* An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.

(d) *Open meetings.* Advisory committee meetings must be open to the public except where a closed or partially-closed meeting has been determined proper and consistent with the exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), as the basis for closure.

(e) *Advisory functions only.* The function of advisory committees is advisory only, unless specifically provided by statute or Presidential directive.

§ 102–3.35 What policies govern the use of subcommittees?

(a) In general, the requirements of the Act and the policies of this Federal Advisory Committee Management part do not apply to subcommittees of advisory committees that report to a parent advisory committee and not directly to a Federal officer or agency. However, this section does not preclude an agency from applying any provision of the Act and this part to any subcommittee of an advisory committee in any particular instance.

(b) The creation and operation of subcommittees must be approved by the agency establishing the parent advisory committee.

§ 102–3.40 What types of committees or groups are not covered by the Act and this part?

The following are examples of committees or groups that are not covered by the Act or this Federal Advisory Committee Management part:

(a) *Committees created by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA).* Any committee created by NAS or NAPA in accordance with section 15 of the Act, except as otherwise covered by subpart E of this part;

(b) *Advisory committees of the Central Intelligence Agency and the Federal Reserve System.* Any advisory committee established or utilized by the Central Intelligence Agency or the Federal Reserve System;

(c) *Committees exempted by statute.* Any committee specifically exempted from the Act by law;

(d) *Committees not actually managed or controlled by the executive branch.* Any committee or group created by non-Federal entities (such as a contractor or private organization), provided that these committees or groups are not actually managed or controlled by the executive branch;

(e) *Groups assembled to provide individual advice.* Any group that meets with a Federal official(s), including a public meeting, where advice is sought from the attendees on an individual basis and not from the group as a whole;

(f) *Groups assembled to exchange facts or information.* Any group that meets with a Federal official(s) for the purpose of exchanging facts or information;

(g) *Intergovernmental committees.* Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government and elected officers of State, local and tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities. However, 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 (see guidelines issued by the Office of Management and Budget (OMB) on section 204(b) of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1534(b), OMB Memorandum M–95–20, dated September 21, 1995, available from the Committee Management Secretariat (MC), General Services Administration, 1800 F Street, NW., Washington, DC 20405–0002);

(h) *Intragovernmental committees.* Any committee composed wholly of full-time or permanent part-time officers or employees of the Federal Government;

(i) *Local civic groups.* Any local civic group whose primary function is that of rendering a public service with respect to a Federal program;

(j) *Groups established to advise State or local officials.* Any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies; and

(k) *Operational committees.* Any committee established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically authorized by statute or Presidential directive, such as making or implementing Government decisions or policy. A committee designated operational may be covered by the Act if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether a committee is primarily operational. If so, it does not fall under

the requirements of the Act and this part.

Appendix A to Subpart A of Part 102–3—Key Points and Principles

This appendix provides additional guidance in the form of answers to frequently asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

APPENDIX A TO SUBPART A

Key points and principles	Section(s)	Question(s)	Guidance
I. FACA applies to advisory committees that are either "established" or "utilized" by an agency.	102–3.25, 102–3.40(d), 102–3.40(f)	1. A local citizens group wants to meet with a Federal official(s) to help improve the condition of a forest's trails and quality of concessions. May the Government meet with the group without chartering the group under the Act? 2. May an agency official attend meetings of external groups where advice may be offered to the Government during the course of discussions? 3. May an agency official participate in meetings of groups or organizations as a member without chartering the group under the Act? 4. Is the Act applicable to meetings between agency officials and their contractors, licensees, or other "private sector program partners?"	A. The answer to questions 1, 2, and 3 is yes, if the agency does not either "establish" or "utilize" (exercise "actual management or control" over) the group. (i) Although there is no precise legal definition of "actual management or control," the following factors may be used by an agency to determine whether or not a group is "utilized" within the meaning of the Act: (a) Does the agency manage or control the group's membership or otherwise determine its composition? (b) Does the agency manage or control the group's agenda? (c) Does the agency fund the group's activities? (ii) Answering "yes" to any or all of questions 1, 2, or 3 does not automatically mean the group is "utilized" within the meaning of the Act. However, an agency may need to reconsider the status of the group under the Act if the relationship in question essentially is indistinguishable from an advisory committee established by the agency. B. The answer to question 4 is no. Agencies often meet with contractors and licensees, individually and as a group, to discuss specific matters involving a contract's solicitation, issuance, and implementation, or an agency's efforts to ensure compliance with its regulations. Such interactions are not subject to the Act because these groups are not "established" or "utilized" for the purpose of obtaining advice or recommendations.
II. The development of consensus among all or some of the attendees at a public meeting or similar forum does not automatically invoke FACA.	102–3.25, 102–3.40(d), 102–3.40(f)	1. If, during a public meeting of the "town hall" type called by an agency, it appears that the audience is achieving consensus, or a common point of view, is this an indication that the meeting is subject to the Act and must be stopped?	A. No, the public meeting need not be stopped. (i) A group must either be "established" or "utilized" by the executive branch in order for the Act to apply. (ii) Public meetings represent a chance for individuals to voice their opinions and/or share information. In that sense, agencies do not either "establish" the assemblage of individuals as an advisory committee or "utilize" the attendees as an advisory committee because there are no elements of either "management" or "control" present or intended.

APPENDIX A TO SUBPART A—Continued

Key points and principles	Section(s)	Question(s)	Guidance
III. Meetings between a Federal official(s) and a collection of individuals where advice is sought from the attendees on an individual basis are not subject to the Act.	102–3.40(e)	1. May an agency official meet with a number of persons collectively to obtain their individual views without violating the Act? 2. Does the concept of an "individual" apply only to "natural persons?"	A. The answer to questions 1 and 2 is yes. The Act applies only where a group is established or utilized to provide advice or recommendations "as a group." (i) A mere assemblage or collection of individuals where the attendees are providing individual advice is not acting "as a group" under the Act. (ii) In this respect, "individual" is not limited to "natural persons." Where the group consists of representatives of various existing organizations, each representative individually may provide advice on behalf of that person's organization without violating the Act, if those organizations themselves are not "managed or controlled" by the agency.
IV. Meetings between Federal, State, local, and tribal elected officials are not subject to the Act.	102–3.40(g)	1. Is the exclusion from the Act covering elected officials of State, local, and tribal governments acting in their official capacities also applicable to associations of State officials?	A. Yes. The scope of activities covered by the exclusion from the Act for intergovernmental activities should be construed broadly to facilitateFederal/State/local/tribal discussions on shared intergovernmental program responsibilities or administration. Pursuant to a Presidential delegation, the Office of Management and Budget (OMB) issued guidelines for this exemption, authorized by section 204(b) of the Unfunded Mandates Reform Act of 1995, 2U.S.C. 1534(b). (See OMB Memorandum M–95–20, dated September 21, 1995, published at 60 FR 50651 (September 29, 1995), and which is available from the Committee Management Secretariat (MC), General Services Administration, 1800 F Street, NW, Washington, DC 20405–0002).
V. Advisory committees established under the Act may perform advisory functions only, unless authorized to perform "operational" duties by the Congress or by Presidential directive.	102–3.30(e), 102–3.40(k)	1. Are "operational committees" subject to the Act, even if they may engage in some advisory activities?	A. No, so long as the operational functions performed by the committee constitute the "primary" mission of the committee. Only committees established or utilized by the executive branch in the interest of obtaining advice or recommendations are subject to the Act. However, without specific authorization by the Congress or direction by the President, Federal functions (decisionmaking or operations) cannot be delegated to, or assumed by, non-Federal individuals or entities.

APPENDIX A TO SUBPART A—Continued

Key points and principles	Section(s)	Question(s)	Guidance
VI. Committees authorized by the Congress in law or by Presidential directive to perform primarily "operational" functions are not subject to the Act.	102–3.40(k)	1. What characteristics are common to "operational committees?" 2. A committee created by the Congress by statute is responsible, for example, for developing plans and events to commemorate the contributions of wildlife to the enjoyment of the Nation's parks. Part of the committee's role includes providing advice to certain Federal agencies as may be necessary to coordinate these events. Is this committee subject to FACA?	A. In answer to question 1, non-advisory, or "operational" committees generally have the following characteristics: (i) Specific functions and/or authorities provided by the Congress in law or by Presidential directive; (ii) The ability to make and implement traditionally Governmental decisions; and (iii) The authority to perform specific tasks to implement a Federal program. B. Agencies are responsible for determining whether or not a committee primarily provides advice or recommendations and is, therefore, subject to the Act, or is primarily "operational" and not covered by FACA. C. The answer to question 2 is no. The committee is not subject to the Act because: (i) Its functions are to plan and implement specific tasks; (ii) The committee has been granted the express authority by the Congress to perform its statutorily required functions; and (iii) Its incidental role of providing advice to other Federal agencies is secondary to its primarily operational role of planning and implementing specific tasks and performing statutory functions.

Subpart B—How Are Advisory Committees Established, Renewed, Reestablished, and Terminated?

§ 102–3.45 What does this subpart cover and how does it apply?

Requirements for establishing and terminating advisory committees vary depending on the establishing entity and the source of authority for the advisory committee. This subpart covers the procedures associated with the establishment, renewal, reestablishment, and termination of advisory committees. These procedures include consulting with the Secretariat, preparing and filing an advisory committee charter, publishing notice in the **Federal Register**, and amending an advisory committee charter.

§ 102–3.50 What are the authorities for establishing advisory committees?

FACA identifies four sources of authority for establishing an advisory committee:

(a) *Required by statute.* By law where the Congress establishes an advisory committee, or specifically directs the President or an agency to establish it (*non-discretionary*);

(b) *Presidential authority.* By Executive order of the President or other Presidential directive (*non-discretionary*);

(c) *Authorized by statute.* By law where the Congress authorizes, but does not direct the President or an agency to establish it (*discretionary*); or

(d) *Agency authority.* By an agency under general authority in title 5 of the United States Code or under other general agency-authorizing statutes (*discretionary*).

§ 102–3.55 What rules apply to the duration of an advisory committee?

(a) An advisory committee automatically terminates two years after its date of establishment unless:

(1) The statutory authority used to establish the advisory committee provides a different duration;

(2) The President or agency head determines that the advisory committee has fulfilled the purpose for which it was established and terminates the advisory committee earlier;

(3) The President or agency head determines that the advisory committee is no longer carrying out the purpose for which it was established and terminates the advisory committee earlier; or

(4) The President or agency head renews the committee not later than two years after its date of establishment in accordance with § 102–3.60. If an advisory committee needed by the President or an agency terminates because it was not renewed in a timely manner, or if the advisory committee has been terminated under the provisions of § 102–3.30(b), it can be reestablished in accordance with § 102–3.60.

(b) When an advisory committee terminates, the agency shall notify the Secretariat of the effective date of the termination.

§ 102–3.60 What procedures are required to establish, renew, or reestablish a discretionary advisory committee?

(a) *Consult with the Secretariat.* Before establishing, renewing, or reestablishing a discretionary advisory committee and filing the charter as addressed later in § 102–3.70, the agency head must consult with the Secretariat. As part of this consultation, agency heads are encouraged to engage in constructive dialogue with the Secretariat. With a full understanding of the background and purpose behind the proposed advisory committee, the Secretariat may share its knowledge and experience with the agency on how best to make use of the proposed advisory committee, suggest alternate methods of attaining its purpose that the agency may wish to consider, or inform the agency of a pre-existing advisory committee performing similar functions.

(b) *Include required information in the consultation.* Consultations covering the establishment, renewal, and reestablishment of advisory committees must, as a minimum, contain the following information:

(1) *Explanation of need.* An explanation stating why the advisory committee is essential to the conduct of agency business and in the public interest;

(2) *Lack of duplication of resources.* An explanation stating why the advisory committee's functions cannot be performed by the agency, another existing committee, or other means such as a public hearing; and

(3) *Fairly balanced membership.* A description of the agency's plan to attain fairly balanced membership. The plan will ensure that, in the selection of members for the advisory committee, the agency will consider a cross-section of those directly affected, interested, and qualified, as appropriate to the nature and functions of the advisory committee. Advisory committees requiring technical expertise should include persons with demonstrated professional or personal qualifications and experience relevant to the functions and tasks to be performed.

§ 102–3.65 What are the public notification requirements for discretionary advisory committees?

A notice to the public in the **Federal Register** is required when a discretionary advisory committee is established, renewed, or reestablished.

(a) *Procedure.* Upon receiving notice from the Secretariat that its review is complete in accordance with § 102–3.60(a), the agency must publish a notice in the **Federal Register** announcing that the advisory committee is being established, renewed, or reestablished. For the establishment of a new advisory committee, the notice also must describe the nature and purpose of the advisory committee and affirm that the advisory committee is necessary and in the public interest.

(b) *Time required for notices.* Notices of establishment and reestablishment of advisory committees must appear at least 15 calendar days before the charter is filed, except that the Secretariat may approve less than 15 calendar days when requested by the agency for good cause. This requirement for advance notice does not apply to advisory committee renewals, notices of which may be published concurrently with the filing of the charter.

§ 102–3.70 What are the charter filing requirements?

No advisory committee may meet or take any action until a charter has been filed by the Committee Management Officer (CMO) designated in accordance with section 8(b) of the Act, or by another agency official designated by the agency head.

(a) *Requirement for discretionary advisory committees.* To establish, renew, or reestablish a discretionary advisory committee, a charter must be filed with:

(1) The agency head;

(2) The standing committees of the Senate and the House of Representatives having legislative jurisdiction of the agency, the date of filing with which constitutes the official date of establishment for the advisory committee;

(3) The Library of Congress, Anglo-American Acquisitions Division, Government Documents Section, Federal Advisory Committee Desk, 101 Independence Avenue, SE., Washington, DC 20540–4172; and

(4) The Secretariat, indicating the date the charter was filed in accordance with paragraph (a)(2) of this section.

(b) *Requirement for non-discretionary advisory committees.* Charter filing requirements for non-discretionary advisory committees are the same as those in paragraph (a) of this section, except the date of establishment for a Presidential advisory committee is the date the charter is filed with the Secretariat.

(c) *Requirement for subcommittees that report directly to the Government.* Subcommittees that report directly to a Federal officer or agency must comply with this subpart and include in a charter the information required by § 102–3.75.

§ 102–3.75 What information must be included in the charter of an advisory committee?

(a) *Purpose and contents of an advisory committee charter.* An advisory committee charter is intended to provide a description of an advisory committee's mission, goals, and objectives. It also provides a basis for evaluating an advisory committee's progress and effectiveness. The charter must contain the following information:

(1) The advisory committee's official designation;

(2) The objectives and the scope of the advisory committee's activity;

(3) The period of time necessary to carry out the advisory committee's purpose(s);

(4) The agency or Federal officer to whom the advisory committee reports;

(5) The agency responsible for providing the necessary support to the advisory committee;

(6) A description of the duties for which the advisory committee is responsible and specification of the authority for any non-advisory functions;

(7) The estimated annual costs to operate the advisory committee in dollars and person years;

(8) The estimated number and frequency of the advisory committee's meetings;

(9) The planned termination date, if less than two years from the date of establishment of the advisory committee;

(10) The name of the President's delegate, agency, or organization responsible for fulfilling the reporting requirements of section 6(b) of the Act, if appropriate; and

(11) The date the charter is filed in accordance with § 102–3.70.

(b) The provisions of paragraphs (a)(1) through (11) of this section apply to all subcommittees that report directly to a Federal officer or agency.

§ 102–3.80 How are minor charter amendments accomplished?

(a) *Responsibility and limitation.* The agency head is responsible for amending the charter of an advisory committee. Amendments may be either minor or major. The procedures for making changes and filing amended charters will depend upon the authority basis for the advisory committee. Amending any existing advisory committee charter does not constitute renewal of the advisory committee under § 102–3.60.

(b) *Procedures for minor amendments.* To make a minor amendment to an advisory committee charter, such as changing the name of the advisory committee or modifying the estimated number or frequency of meetings, the following procedures must be followed:

(1) *Non-discretionary advisory committees.* The agency head must ensure that any minor technical changes made to current charters are consistent with the relevant authority. When the Congress by law, or the President by Executive order, changes the authorizing language that has been the basis for establishing an advisory committee, the agency head or the chairperson of an independent Presidential advisory committee must amend those sections of the current charter affected by the new statute or Executive order, and file the amended charter as specified in § 102–3.70.

(2) *Discretionary advisory committees.* The charter of a discretionary advisory committee may be amended when an agency head determines that technical provisions of a filed charter are inaccurate, or specific provisions have changed or become obsolete with the passing of time, and that these amendments will not alter the advisory committee's objectives and scope

substantially. The agency must amend the charter language as necessary and file the amended charter as specified in § 102–3.70.

§ 102–3.85 How are major charter amendments accomplished?

Procedures for making major amendments to advisory committee charters, such as substantial changes in objectives and scope, duties, and estimated costs, are the same as in § 102–3.80, except that for discretionary advisory committees an agency must:

(a) Consult with the Secretariat on the amended language, and explain the purpose of the changes and why they are necessary; and

(b) File the amended charter as specified in § 102–3.70.

Appendix A to Subpart B of Part 102–3—Key Points and Principles

This appendix provides additional guidance in the form of answers to frequently asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

APPENDIX A TO SUBPART B

Key points and principles	Section(s)	Question(s)	Guidance
I. Agency heads must consult with the Secretariat prior to establishing a discretionary advisory committee.	102–3.60, 102–3.115	1. Can an agency head delegate to the Committee Management Officer (CMO) responsibility for consulting with the Secretariat regarding the establishment, renewal, or reestablishment of discretionary advisory committees?	A. Yes. Many administrative functions performed to implement the Act may be delegated. However, those functions related to approving the final establishment, renewal, or reestablishment of discretionary advisory committees are reserved for the agency head. Each agency CMO should assure that their internal processes for managing advisory committees include appropriate certifications by the agency head.
II. Agency heads are responsible for complying with the Act, including determining which discretionary advisory committees should be established and renewed.	102–3.60(a), 102–3.105	1. Who retains final authority for establishing or renewing a discretionary advisory committee?	A. Although agency heads retain final authority for establishing or renewing discretionary advisory committees, these decisions should be consistent with § 102–3.105(e) and reflect consultation with the Secretariat under § 102–3.60(a).
III. An advisory committee must be fairly balanced in its membership in terms of the points of view represented and the functions to be performed.	102–3.30(c), 102–3.60(b)(3)	1. What factors should be considered in achieving a "balanced" advisory committee membership?	A. The composition of an advisory committee's membership will depend upon several factors, including: (i) The advisory committee's mission; (ii) The geographic, ethnic, social, economic, or scientific impact of the advisory committee's recommendations; (iii) The types of specific perspectives required, for example, such as those of consumers, technical experts, the public at-large, academia, business, or other sectors; (iv) The need to obtain divergent points of view on the issues before the advisory committee; and (v) The relevance of State, local, or tribal governments to the development of the advisory committee's recommendations.
IV. Charters for advisory committees required by statute must be filed every two years regardless of the duration provided in the statute.	102–3.70(b)	1. If an advisory committee's duration exceeds two years, must a charter be filed with the Congress and GSA every two years?	A. Yes. Section 14(b)(2) of the Act provides that: Any advisory committee established by an Act of Congress shall file a charter upon the expiration of each successive two-year period following the date of enactment of the Act establishing such advisory committee.

Subpart C—How Are Advisory Committees Managed?

§ 102–3.90 What does this subpart cover and how does it apply?

This subpart outlines specific responsibilities and functions to be carried out by the General Services Administration (GSA), the agency head, the Committee Management Officer (CMO), and the Designated Federal Officer (DFO) under the Act.

§ 102–3.95 What principles apply to the management of advisory committees?

Agencies are encouraged to apply the following principles to the management of their advisory committees:

(a) *Provide adequate support.* Before establishing an advisory committee, agencies should identify requirements and assure that adequate resources are available to support anticipated activities. Considerations related to support include office space, necessary supplies and equipment, Federal staff support, and access to key decisionmakers.

(b) *Focus on mission.* Advisory committee members and staff should be fully aware of the advisory committee's mission, limitations, if any, on its duties, and the agency's goals and objectives. In general, the more specific an advisory committee's tasks and the more focused its activities are, the higher the likelihood will be that the advisory committee will fulfill its mission.

(c) *Follow plans and procedures.* Advisory committee members and their agency sponsors should work together to assure that a plan and necessary procedures covering implementation are in place to support an advisory committee's mission. In particular, agencies should be clear regarding what functions an advisory committee can perform legally and those that it cannot perform.

(d) *Practice openness.* In addition to achieving the minimum standards of public access established by the Act and this part, agencies should seek to be as inclusive as possible. For example, agencies may wish to explore the use of the Internet to post advisory committee information and seek broader input from the public.

(e) *Seek feedback.* Agencies continually should seek feedback from advisory committee members and the public regarding the effectiveness of the advisory committee's activities. At regular intervals, agencies should communicate to the members how their advice has affected agency programs and decisionmaking.

§ 102–3.100 What are the responsibilities and functions of GSA?

(a) Under section 7 of the Act, the General Services Administration (GSA) prepares regulations on Federal advisory committees to be prescribed by the Administrator of General Services, issues other administrative guidelines and management controls for advisory committees, and assists other agencies in implementing and interpreting the Act. Responsibility for these activities has been delegated by the Administrator to the GSA Committee Management Secretariat.

(b) The Secretariat carries out its responsibilities by:

(1) Conducting an annual comprehensive review of Governmentwide advisory committee accomplishments, costs, benefits, and other indicators to measure performance;

(2) Developing and distributing Governmentwide training regarding the Act and related statutes and principles;

(3) Supporting the Interagency Committee on Federal Advisory Committee Management in its efforts to improve compliance with the Act;

(4) Designing and maintaining a Governmentwide shared Internet-based system to facilitate collection and use of information required by the Act;

(5) Identifying performance measures that may be used to evaluate advisory committee accomplishments; and

(6) Providing recommendations for transmittal by the Administrator to the Congress and the President regarding proposals to improve accomplishment of the objectives of the Act.

§ 102–3.105 What are the responsibilities of an agency head?

The head of each agency that establishes or utilizes one or more advisory committees must:

(a) Comply with the Act and this Federal Advisory Committee Management part;

(b) Issue administrative guidelines and management controls that apply to all of the agency's advisory committees subject to the Act;

(c) Designate a Committee Management Officer (CMO);

(d) Provide a written determination stating the reasons for closing any advisory committee meeting to the public, in whole or in part, in accordance with the exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), as the basis for closure;

(e) Review, at least annually, the need to continue each existing advisory committee, consistent with the public interest and the purpose or functions of each advisory committee;

(f) Determine that rates of compensation for members (if they are paid for their services) and staff of, and experts and consultants to advisory committees are justified and that levels of agency support are adequate;

(g) Develop procedures to assure that the advice or recommendations of advisory committees will not be inappropriately influenced by the appointing authority or by any special interest, but will instead be the result of the advisory committee's independent judgment;

(h) Assure that the interests and affiliations of advisory committee members are reviewed for conformance with applicable conflict of interest statutes, regulations issued by the U.S. Office of Government Ethics (OGE) including any supplemental agency requirements, and other Federal ethics rules;

(i) Designate a Designated Federal Officer (DFO) for each advisory committee and its subcommittees; and

(j) Provide the opportunity for reasonable participation by the public in advisory committee activities, subject to § 102–3.140 and the agency's guidelines.

§ 102–3.110 What are the responsibilities of a chairperson of an independent Presidential advisory committee?

The chairperson of an independent Presidential advisory committee must:

(a) Comply with the Act and this Federal Advisory Committee Management part;

(b) Consult with the Secretariat concerning the designation of a Committee Management Officer (CMO) and Designated Federal Officer (DFO); and

(c) Consult with the Secretariat in advance regarding any proposal to close any meeting in whole or in part.

§ 102–3.115 What are the responsibilities and functions of an agency Committee Management Officer (CMO)?

In addition to implementing the provisions of section 8(b) of the Act, the CMO will carry out all responsibilities delegated by the agency head. The CMO also should ensure that sections 10(b), 12(a), and 13 of the Act are implemented by the agency to provide for appropriate recordkeeping. Records to be kept by the CMO include, but are not limited to:

(a) *Charter and membership documentation.* A set of filed charters for each advisory committee and membership lists for each advisory committee and subcommittee;

(b) *Annual comprehensive review.* Copies of the information provided as the agency's portion of the annual comprehensive review of Federal advisory committees, prepared according to § 102–3.175(b);

(c) *Agency guidelines.* Agency guidelines maintained and updated on committee management operations and procedures; and

(d) *Closed meeting determinations.* Agency determinations to close or partially close advisory committee meetings required by § 102–3.105.

§ 102–3.120 What are the responsibilities and functions of a Designated Federal Officer (DFO)?

The agency head or, in the case of an independent Presidential advisory committee, the Secretariat, must designate a Federal officer or employee who must be either full-time or permanent part-time, to be the DFO for each advisory committee and its subcommittees, who must:

(a) Approve or call the meeting of the advisory committee or subcommittee;

(b) Approve the agenda, except that this requirement does not apply to a Presidential advisory committee;

(c) Attend the meetings;

(d) Adjourn any meeting when he or she determines it to be in the public interest; and

(e) Chair the meeting when so directed by the agency head.

§ 102–3.125 How should agencies consider the roles of advisory committee members and staff?

FACA does not assign any specific responsibilities to members of advisory

committees and staff, although both perform critical roles in achieving the goals and objectives assigned to advisory committees. Agency heads, Committee Management Officers (CMOs), and Designated Federal Officers (DFOs) should consider the distinctions between these roles and how they relate to each other in the development of agency guidelines implementing the Act and this Federal Advisory Committee Management part. In general, these guidelines should reflect:

(a) *Clear operating procedures.* Clear operating procedures should provide for the conduct of advisory committee meetings and other activities, and specify the relationship among the advisory committee members, the DFO, and advisory committee or agency staff;

(b) *Agency operating policies.* In addition to compliance with the Act, advisory committee members and staff may be required to adhere to additional agency operating policies; and

(c) *Other applicable statutes.* Other agency-specific statutes and regulations may affect the agency's advisory committees directly or indirectly. Agencies should ensure that advisory committee members and staff understand these requirements.

§ 102–3.130 What policies apply to the appointment, and compensation or reimbursement of advisory committee members, staff, and experts and consultants?

In developing guidelines to implement the Act and this Federal Advisory Committee Management part at the agency level, agency heads must address the following issues concerning advisory committee member and staff appointments, and considerations with respect to uniform fair rates of compensation for comparable services, or expense reimbursement of members, staff, and experts and consultants:

(a) *Appointment and terms of advisory committee members.* Unless otherwise provided by statute, Presidential directive, or other establishment authority, advisory committee members serve at the pleasure of the appointing or inviting authority. Membership terms are at the sole discretion of the appointing or inviting authority.

(b) *Compensation guidelines.* Each agency head must establish uniform compensation guidelines for members and staff of, and experts and consultants to an advisory committee.

(c) *Compensation of advisory committee members not required.* Nothing in this subpart requires an agency head to provide compensation to any member of an advisory committee, unless otherwise required by a specific statute.

(d) *Compensation of advisory committee members.* When an agency has authority to set pay administratively for advisory committee members, it may establish appropriate rates of pay (including any applicable locality pay authorized by the President's Pay Agent under 5 U.S.C. 5304(h)), not to exceed the rate for level IV of the Executive Schedule under 5 U.S.C. 5315, unless a higher rate expressly is allowed by another statute. However, the agency head personally must authorize a rate of basic pay in excess of the maximum rate of basic pay established for the General Schedule under 5 U.S.C. 5332, or alternative similar agency compensation system. This maximum rate includes any applicable locality payment under 5 U.S.C. 5304. The agency may pay advisory committee members on either an hourly or a daily rate basis. The agency may not provide additional compensation in any form, such as bonuses or premium pay.

(e) *Compensation of staff.* When an agency has authority to set pay administratively for advisory committee staff, it may establish appropriate rates of pay (including any applicable locality pay authorized by the President's Pay Agent under 5 U.S.C. 5304(h)), not to exceed the rate for level IV of the Executive Schedule under 5 U.S.C. 5315, unless a higher rate expressly is allowed by another statute. However, the agency head personally must authorize a rate of basic pay in excess of the maximum rate of basic pay established for the General Schedule under 5 U.S.C. 5332, or alternative similar agency compensation system. This maximum rate includes any applicable locality payment under 5 U.S.C. 5304. The agency must pay advisory committee staff on an hourly rate basis. The agency may provide additional compensation, such as bonuses or premium pay, so long as aggregate compensation paid in a calendar year does not exceed the rate for level IV of the Executive Schedule, with appropriate proration for a partial calendar year.

(f) *Other compensation considerations.* In establishing rates of pay for advisory committee members and staff, the agency must comply with any applicable statutes, Executive orders, regulations, or administrative guidelines. In determining an appropriate rate of basic pay for advisory committee members and staff, an agency must give consideration to the significance, scope, and technical complexity of the matters with which the advisory committee is concerned, and the qualifications required for the work involved. The agency also should take into account the rates of pay applicable to Federal employees who have duties that are similar in terms of difficulty and responsibility. An agency may establish rates of pay for advisory committee staff based on the pay these persons would receive if they were covered by the General Schedule in 5 U.S.C. Chapter 51 and Chapter 53, subchapter III, or by an alternative similar agency compensation system.

(g) *Compensation of experts and consultants.* Whether or not an agency has other authority to appoint and compensate advisory committee members or staff, it also may employ experts and consultants under 5 U.S.C. 3109 to perform work for an advisory committee. Compensation of experts and consultants may not exceed the maximum rate of basic pay established for the General Schedule under 5 U.S.C. 5332 (that is, the GS–15, step 10 rate, excluding locality pay or any other supplement), unless a higher rate expressly is allowed by another statute. The appointment and compensation of experts and consultants by an agency must be in conformance with applicable regulations issued by the U. S. Office of Personnel Management (OPM) (See 5 CFR part 304.).

(h) *Federal employees assigned to an advisory committee.* Any advisory committee member or staff person who is a Federal employee when assigned duties to an advisory committee remains covered during the assignment by the compensation system that currently applies to that employee, unless that person's current Federal appointment is terminated. Any staff person who is a Federal employee must serve with the knowledge of the Designated Federal Officer (DFO) for the advisory committee to which that person is assigned duties, and the approval of the employee's direct supervisor.

(i) *Other appointment considerations.* An individual who is appointed as an advisory committee member or staff person immediately following termination of another Federal appointment with a full-time work schedule may receive compensation at the rate applicable to the former appointment, if otherwise allowed by applicable law (without regard to the limitations on pay established in paragraphs (d) and (e) of this section). Any advisory committee staff person who is not a current Federal employee serving under an assignment must be appointed in accordance with applicable agency procedures, and in consultation with the DFO and the

members of the advisory committee involved.

(j) *Gratuitous services.* In the absence of any special limitations applicable to a specific agency, nothing in this subpart prevents an agency from accepting the gratuitous services of an advisory committee member or staff person who is not a Federal employee, or expert or consultant, who agrees in advance and in writing to serve without compensation.

(k) *Travel expenses.* Advisory committee members and staff, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed reimbursement for travel expenses, including per diem in lieu of subsistence, as authorized by 5 U.S.C. 5703, for persons employed intermittently in the Government service.

(l) Services for advisory committee members with disabilities. While performing advisory committee duties, an advisory committee member with disabilities may be provided services by a personal assistant for employees with disabilities, if the member qualifies as an individual with disabilities as provided in section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 791, and does not otherwise qualify for assistance under 5 U.S.C. 3102 by reason of being a Federal employee.

Appendix A to Subpart C of Part 102–3—Key Points and Principles

This appendix provides additional guidance in the form of answers to frequently asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

APPENDIX A TO SUBPART C

Key points and principles	Section	Question(s)	Guidance
I. FACA does not specify the manner in which advisory committee members and staff must be appointed.	102–3.105, 102–3.130(a)	1. Does the appointment of an advisory committee member necessarily result in a lengthy process?	A. No. Each agency head may specify those policies and procedures, consistent with the Act and this part, or other specific authorizing statute, governing the appointment of advisory committee members and staff. B. Some factors that affect how long the appointment process takes include: (i) Solicitation of nominations; (ii) Conflict of interest clearances; (iii) Security or background evaluations; (iv) Availability of candidates; and (v) Other statutory or administrative requirements. C. In addition, the extent to which agency heads have delegated responsibility for selecting members varies from agency to agency and may become an important factor in the time it takes to finalize the advisory committee's membership.
II. Agency heads retain the final authority for selecting advisory committee members, unless otherwise provided for by a specific statute or Presidential directive.	102–3.130(a)	1. Can an agency head select for membership on an advisory committee from among nominations submitted by an organization? 2. If so, can different persons represent the organization at different meetings?	A. The answer to question 1 is yes. Organizations may propose for membership individuals to represent them on an advisory committee. However, the agency head establishing the advisory committee, or other appointing authority, retains the final authority for selecting all members. B. The answer to question 2 also is yes. Alternates may represent an appointed member with the approval of the establishing agency, where the agency head is the appointing authority.
III. An agency may compensate advisory committee members and staff, and also employ experts and consultants.	102–3.130(d), 102–3.130(e), 102–3.130(g).	1. May members and staff be compensated for their service or duties on an advisory committee? 2. Are the guidelines the same for compensating both members and staff? 3. May experts and consultants be employed to perform other advisory committee work?	A. The answer to question 1 is yes. (i) However, FACA limits compensation for advisory committee members and staff to the rate for level IV of the Executive Schedule, unless higher rates expressly are allowed by other statutes. (ii) Although FACA provides for compensation guidelines, the Act does not require an agency to compensate its advisory committee members.

APPENDIX A TO SUBPART C—Continued

Key points and principles	Section	Question(s)	Guidance
			B. The answer to question 2 is no. The guidelines for compensating members and staff are similar, but not identical. For example, the differences are that: (i) An agency "may" pay members on either an hourly or a daily rate basis, and "may not" provide additional compensation in any form, such as bonuses or premium pay; while (ii) An agency "must" pay staff on an hourly rate basis only, and "may" provide additional compensation, so long as aggregate compensation paid in a calendar year does not exceed the rate for level IV of the Executive Schedule, with appropriate proration for a partial calendar year. C. The answer to question 3 is yes. Other work not part of the duties of advisory committee members or staff may be performed by experts and consultants. For additional guidance on the employment of experts and consultants, agencies should consult the applicable regulations issued by the U. S. Office of Personnel Management (OPM). (See 5 CFR part 304.)
IV. Agency heads are responsible for ensuring that the interests and affiliations of advisory committee members are reviewed for conformance with applicable conflict of interest statutes and other Federal ethics rules..	102–3.105(h)	1. Are all advisory committee members subject to conflict of interest statutes and other Federal ethics rules? 2. Who should be consulted for guidance on the proper application of Federal ethics rules to advisory committee members?	A. The answer to question 1 is no. Whether an advisory committee member is subject to Federal ethics rules is dependent on the member's status. The determination of a member's status on an advisory committee is largely a personnel classification matter for the appointing agency. Most advisory committee members will serve either as a "representative" or a "special Government employee" (SGE), based on the role the member will play. In general, SGEs are covered by regulations issued by the U. S. Office of Government Ethics (OGE) and certain conflict of interest statutes,while representatives are not subject to these ethics requirements. B. The answer to question 2 is the agency's Designated Agency Ethics Official (DAEO), who should be consulted prior to appointing members to an advisory committee in order to apply Federal ethics rules properly.
V. An agency head may delegate responsibility for appointing a Committee Management Officer (CMO) or Designated Federal Officer (DFO); however, there may be only one CMO for each agency..	102–3.105(c), 102–3.105(i)	1. Must an agency's CMO and each advisory committee DFO be appointed by the agency head?	A. The answer to question 1 is no. The agency head may delegate responsibility for appointing the CMO and DFOs. However, these appointments, including alternate selections, should be documented consistent with the agency's policies and procedures.

APPENDIX A TO SUBPART C—Continued

Key points and principles	Section	Question(s)	Guidance
		2. May an agency have more than one CMO?	B. The answer to question 2 also is no. The functions of the CMO are specified in the Act and include oversight responsibility for all advisory committees within the agency. Accordingly, only one CMO may be appointed to perform these functions. The agency may, however, create additional positions, including those in its subcomponents, which are subordinate to the CMO's agencywide responsibilities and functions.
VI. FACA is the principal statute pertaining to advisory committees. However, other statutes may impact their use and operations..	102–3.125(c)	1. Do other statutes or regulations affect the way an agency carries out its advisory committee management program?	A. Yes. While the Act provides a general framework for managing advisory committees Governmentwide, other factors may affect how advisory committees are managed. These include: (i) The statutory or Presidential authority used to establish an advisory committee; (ii) A statutory limitation placed on an agency regarding its annual expenditures for advisory committees; (iii) Presidential or agency management directives; (iv) The applicability of conflict of interest statutes and other Federal ethics rules; (v) Agency regulations affecting advisory committees; and (vi) Other requirements imposed by statute or regulation on an agency or its programs, such as those governing the employment of experts and consultants or the management of Federal records.

Subpart D—Advisory Committee Meeting and Recordkeeping Procedures

§ 102–3.135 What does this subpart cover and how does it apply?

This subpart establishes policies and procedures relating to meetings and other activities undertaken by advisory committees and their subcommittees. This subpart also outlines what records must be kept by Federal agencies and what other documentation, including advisory committee minutes and reports, must be prepared and made available to the public.

§ 102–3.140 What policies apply to advisory committee meetings?

The agency head, or the chairperson of an independent Presidential advisory committee, must ensure that:

(a) Each advisory committee meeting is held at a reasonable time and in a manner or place reasonably accessible to the public, to include facilities that are readily accessible to and usable by persons with disabilities, consistent with the goals of section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. 794;

(b) The meeting room or other forum selected is sufficient to accommodate advisory committee members, advisory committee or agency staff, and a reasonable number of interested members of the public;

(c) Any member of the public is permitted to file a written statement with the advisory committee;

(d) Any member of the public may speak to or otherwise address the advisory committee if the agency's guidelines so permit; and

(e) Any advisory committee meeting conducted in whole or part by a teleconference, videoconference, the Internet, or other electronic medium meets the requirements of this subpart.

§ 102–3.145 What policies apply to subcommittee meetings?

If a subcommittee makes recommendations directly to a Federal officer or agency, or if its recommendations will be adopted by the parent advisory committee without further deliberations by the parent advisory committee, then the subcommittee's meetings must be conducted in accordance with all openness requirements of this subpart.

§ 102–3.150 How are advisory committee meetings announced to the public?

(a) A notice in the **Federal Register** must be published at least 15 calendar days prior to an advisory committee meeting, which includes:

(1) The name of the advisory committee (or subcommittee, if applicable);

(2) The time, date, place, and purpose of the meeting;

(3) A summary of the agenda, and/or topics to be discussed;

(4) A statement whether all or part of the meeting is open to the public or closed; if the meeting is closed state the reasons why, citing the specific exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), as the basis for closure; and

(5) The name and telephone number of the Designated Federal Officer (DFO) or other responsible agency official who may be contacted for additional information concerning the meeting.

(b) In exceptional circumstances, the agency or an independent Presidential advisory committee may give less than 15 calendar days notice, provided that the reasons for doing so are included in the advisory committee meeting notice published in the **Federal Register**.

§ 102–3.155 How are advisory committee meetings closed to the public?

To close all or part of an advisory committee meeting, the Designated Federal Officer (DFO) must:

(a) *Obtain prior approval.* Submit a request to the agency head, or in the case of an independent Presidential

advisory committee, the Secretariat, citing the specific exemption(s) of the Government in the Sunshine Act, 5 U.S.C. 552b(c), that justify the closure. The request must provide the agency head or the Secretariat sufficient time (generally, 30 calendar days) to review the matter in order to make a determination before publication of the meeting notice required by § 102–3.150.

(b) *Seek General Counsel review.* The General Counsel of the agency or, in the case of an independent Presidential advisory committee, the General Counsel of GSA should review all requests to close meetings.

(c) *Obtain agency determination.* If the agency head, or in the case of an independent Presidential advisory committee, the Secretariat, finds that the request is consistent with the provisions in the Government in the Sunshine Act and FACA, the appropriate agency official must issue a determination that all or part of the meeting be closed.

(d) *Assure public access to determination.* The agency head or the chairperson of an independent Presidential advisory committee must make a copy of the determination available to the public upon request.

§ 102–3.160 What activities of an advisory committee are not subject to the notice and open meeting requirements of the Act?

The following activities of an advisory committee are excluded from the procedural requirements contained in this subpart:

(a) *Preparatory work.* Meetings of two or more advisory committee or subcommittee members convened solely to gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting of the advisory committee, or to draft position papers for deliberation by the advisory committee; and

(b) *Administrative work.* Meetings of two or more advisory committee or subcommittee members convened solely to discuss administrative matters of the advisory committee or to receive administrative information from a Federal officer or agency.

§ 102–3.165 How are advisory committee meetings documented?

(a) The agency head or, in the case of an independent Presidential advisory committee, the chairperson must ensure that detailed minutes of each advisory committee meeting, including one that is closed or partially closed to the public, are kept. The chairperson of each advisory committee must certify the accuracy of all minutes of advisory committee meetings.

(b) The minutes must include:

(1) The time, date, and place of the advisory committee meeting;

(2) A list of the persons who were present at the meeting, including advisory committee members and staff, agency employees, and members of the public who presented oral or written statements;

(3) An accurate description of each matter discussed and the resolution, if any, made by the advisory committee regarding such matter; and

(4) Copies of each report or other document received, issued, or approved by the advisory committee at the meeting.

(c) The Designated Federal Officer (DFO) must ensure that minutes are certified within 90 calendar days of the meeting to which they relate.

§ 102–3.170 How does an interested party obtain access to advisory committee records?

Timely access to advisory committee records is an important element of the public access requirements of the Act. Section 10(b) of the Act provides for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. Although advisory committee records may be withheld under the provisions of the Freedom of Information Act (FOIA), as amended, if there is a *reasonable expectation* that the records sought fall within the exemptions contained in section 552(b) of FOIA, agencies may not require members of the public or other interested parties to file requests for non-exempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA.

§ 102–3.175 What are the reporting and recordkeeping requirements for an advisory committee?

(a) *Presidential advisory committee follow-up report.* Within one year after a Presidential advisory committee has submitted a public report to the President, a follow-up report required by section 6(b) of the Act must be prepared and transmitted to the Congress detailing the disposition of the advisory committee's recommendations. The Secretariat shall assure that these reports are prepared and transmitted to the Congress as directed by the President, either by the President's delegate, by the agency responsible for providing support to a Presidential advisory committee, or by the responsible agency or organization designated in the charter of the Presidential advisory committee pursuant to § 102–3.75(a)(10). In performing this function, GSA may solicit the assistance of the President's delegate, the Office of Management and Budget (OMB), or the responsible agency Committee Management Officer (CMO), as appropriate. Reports shall be consistent with specific guidance provided periodically by the Secretariat.

(b) *Annual comprehensive review of Federal advisory committees.* To conduct an annual comprehensive review of each advisory committee as specified in section 7(b) of the Act, GSA requires Federal agencies to report information on each advisory committee for which a charter has been filed in accordance with § 102–3.70, and which is in existence during any part of a Federal fiscal year. Committee Management Officers (CMOs), Designated Federal Officers (DFOs), and other responsible agency officials will provide this information by data filed electronically with GSA on a fiscal year basis, using a Governmentwide shared Internet-based system that GSA maintains. This information shall be consistent with specific guidance provided periodically by the Secretariat. The preparation of these electronic submissions by agencies has been assigned interagency report control number (IRCN) 0304–GSA–AN.

(c) *Annual report of closed or partially-closed meetings.* In accordance with section 10(d) of the Act, advisory committees holding closed or partially-closed meetings must issue reports at least annually, setting forth a summary of activities and such related matters as would be informative to the public consistent with the policy of 5 U.S.C. 552(b).

(d) *Advisory committee reports.* Subject to 5 U.S.C. 552, 8 copies of each report made by an advisory committee, including any report of closed or partially-closed meetings as specified in paragraph (c) of this section and, where appropriate, background papers prepared by experts or consultants, must be filed with the Library of Congress as required by section 13 of the Act for public inspection and use at the location specified § 102–3.70(a)(3).

(e) *Advisory committee records.* Official records generated by or for an advisory committee must be retained for the duration of the advisory committee. Upon termination of the advisory committee, the records must be processed in accordance with the Federal Records Act (FRA), 44 U.S.C. Chapters 21, 29–33, and regulations issued by the National Archives and Records Administration (NARA) (see 36 CFR parts 1220, 1222, 1228, and 1234),

or in accordance with the Presidential Records Act (PRA), 44 U.S.C. Chapter 22.

Appendix A to Subpart D of Part 102–3—Key Points and Principles

This appendix provides additional guidance in the form of answers to frequently asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

APPENDIX A TO SUBPART D

Key points and principles	Section(s)	Question(s)	Guidance
I. With some exceptions, advisory committee meetings are open to the public.	102–3.140, 102–3.145(a), 102–3.155.	1. Must all advisory committee and subcommittee meetings be open to the public?	A. No. Advisory committee meetings may be closed when appropriate, in accordance with the exemption(s) for closure contained in the Government in the Sunshine Act, 5 U.S.C. 552b(c). (i) Subcommittees that report to a parent advisory committee, and not directly to a Federal officer or agency, are not required to open their meetings to the public or comply with the procedures in the Act for announcing meetings. (ii) However, agencies are cautioned to avoid excluding the public from attending any meeting where a subcommittee develops advice or recommendations that are not expected to be reviewed and considered by the parent advisory committee before being submitted to a Federal officer or agency. These exclusions may run counter to the provisions of the Act requiring contemporaneous access to the advisory committee deliberative process.
II. Notices must be published in the **Federal Register** announcing advisory committee meetings.	102–3.150	1. Can agencies publish a single **Federal Register** notice announcing multiple advisory committee meetings?	A. Yes, agencies may publish a single notice announcing multiple meetings so long as these notices contain all of the information required by § 102–3.150. (i) "Blanket notices" should not announce meetings so far in advance as to prevent the public from adequately being informed of an advisory committee's schedule. (ii) An agency's Office of General Counsel should be consulted where these notices include meetings that are either closed or partially closed to the public.

APPENDIX A TO SUBPART D—Continued

Key points and principles	Section(s)	Question(s)	Guidance
III. Although certain advisory committee records may be withheld under the Freedom of Information Act (FOIA), as amended, 5 U.S.C. 552, agencies may not require the use of FOIA procedures for records available under section 10(b) of FACA.	102–3.170	1. May an agency require the use of its internal FOIA procedures for access to advisory committee records that are not exempt from release under FOIA?	A. No. Section 10(b) of FACA provides that: Subject to section 552 of title 5, United States Code, the records, reports, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying at a single location in the offices of the advisory committee or the agency to which the advisory committee reports until the advisory committee ceases to exist. (i) The purpose of section 10(b) of the Act is to provide for the contemporaneous availability of advisory committee records that, when taken in conjunction with the ability to attend advisory committee meetings, provide a meaningful opportunity to comprehend fully the work undertaken by the advisory committee. (ii) Although advisory committee records may be withheld under the provisions of FOIA if there is a reasonable expectation that the records sought fall within the exemptions contained in section 552(b) of FOIA, agencies may not require members of the public or other interested parties to file requests for nonexempt advisory committee records under the request and review process established by section 552(a)(3) of FOIA. (iii) Records covered by the exemptions set forth in section 552(b) of FOIA may be withheld. An opinion of the Office of Legal Counsel (OLC), U.S. Department of Justice concludes that: FACA requires disclosure of written advisory committee documents, including predecisional materials such as drafts, working papers, and studies. The disclosure exemption available to agencies under exemption 5 of FOIA for predecisional documents and other privileged materials is narrowly limited in the context of FACA to privileged "inter-agency or intra-agency" documents prepared by an agency and transmitted to an advisory committee. The language of the FACA statute and its legislative history support this restrictive application of exemption 5 to requests for public access to advisory committee documents. Moreover, since an advisory committee is not itself an agency, this construction is supported by the express language of exemption 5 which applies only to inter-agency or intra-agency materials. (iv) Agencies first should determine, however, whether or not records being sought by the public fall within the scope of FACA in general, and section 10(b) of the Act in particular, prior to applying the available exemptions under FOIA. (See OLC Opinion 12 Op. O.L.C. 73, dated April 29, 1988, which is available from the Committee Management Secretariat (MC), General Services Administration, 1800 F Street, NW., Washington, DC 20405–0002.)

APPENDIX A TO SUBPART D—Continued

Key points and principles	Section(s)	Question(s)	Guidance
IV. Advisory committee records must be managed in accordance with the Federal Records Act (FRA), 44 U.S.C. Chapters 21, 29–33, and regulations issued by the National Archives and Records Administration (NARA) (see 36 CFR parts 1220, 1222, 1228, and 1234), or the Presidential Records Act (PRA), 44 U.S.C. Chapter 22.	102–175(e)	1. How must advisory committee records be treated and preserved?	A. In order to ensure proper records management, the Committee Management Officer (CMO), Designated Federal Officer (DFO), or other representative of the advisory committee, in coordination with the agency's Records Management Officer, should clarify upon the establishment of the advisory committee whether its records will be managed in accordance with the FRA or the PRA. B. Official records generated by or for an advisory committee must be retained for the duration of the advisory committee. Responsible agency officials are encouraged to contact their agency's Records Management Officer or NARA as soon as possible after the establishment of the advisory committee to receive guidance on how to establish effective records management practices. Upon termination of the advisory committee, the records must be processed in accordance with the FRA and regulations issued by NARA, or in accordance with the PRA. C. The CMO, DFO, or other representative of an advisory committee governed by the FRA, in coordination with the agency's Records Management Officer, must contact NARA in sufficient time to review the process for submitting any necessary disposition schedules of the advisory committee's records upon termination. In order to ensure the proper disposition of the advisory committee's records, disposition schedules need to be submitted to NARA no later than 6 months before the termination of the advisory committee. D. For Presidential advisory committees governed by the PRA, the CMO, DFO, or other representative of the advisory committee should consult with the White House Counsel on the preservation of any records subject to the PRA, and may also confer with NARA officials.

Subpart E—How Does This Subpart Apply to Advice or Recommendations Provided to Agencies by the National Academy of Sciences or the National Academy of Public Administration?

§ 102–3.180 What does this subpart cover and how does it apply?

This subpart provides guidance to agencies on compliance with section 15 of the Act. Section 15 establishes requirements that apply only in connection with a funding or other written agreement involving an agency's use of advice or recommendations provided to the agency by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA), if such advice or recommendations were developed by use of a committee created by either academy. For purposes of this subpart, NAS also includes the National Academy of Engineering, the Institute of Medicine, and the National Research Council. Except with respect to NAS committees that were the subject of judicial actions filed before December 17, 1997, no part of the Act other than section 15 applies to any committee created by NAS or NAPA.

§ 102–3.185 What does this subpart require agencies to do?

(a) *Section 15 requirements.* An agency may not use any advice or recommendation provided to an agency by the National Academy of Sciences (NAS) or the National Academy of Public Administration (NAPA) under an agreement between the agency and an academy, if such advice or recommendation was developed by use of a committee created by either academy, unless:

(1) The committee was not subject to any actual management or control by an agency or officer of the Federal Government; and

(2) In the case of NAS, the academy certifies that it has complied substantially with the requirements of section 15(b) of the Act; or

(3) In the case of NAPA, the academy certifies that it has complied substantially with the requirements of sections 15(b) (1), (2), and (5) of the Act.

(b) *No agency management or control.* Agencies must not manage or control the specific procedures adopted by each academy to comply with the requirements of section 15 of the Act that are applicable to that academy. In addition, however, any committee created and used by an academy in the development of any advice or recommendation to be provided by the

academy to an agency must be subject to both actual management and control by that academy and not by the agency.

(c) *Funding agreements.* Agencies may enter into contracts, grants, and cooperative agreements with NAS or NAPA that are consistent with the requirements of this subpart to obtain advice or recommendations from such academy. These funding agreements require, and agencies may rely upon, a written certification by an authorized representative of the academy provided to the agency upon delivery to the agency of each report containing advice or recommendations required under the agreement that:

(1) The academy has adopted policies and procedures that comply with the applicable requirements of section 15 of the Act; and

(2) To the best of the authorized representative's knowledge and belief, these policies and procedures substantially have been complied with in performing the work required under the agreement.

Appendix A to Subpart E of Part 102–3—Key Points and Principles

This appendix provides additional guidance in the form of answers to frequently asked questions and identifies key points and principles that may be applied to situations not covered elsewhere in this subpart. The guidance follows:

APPENDIX A TO SUBPART E

Key points and principles	Section(s)	Question(s)	Guidance
I. Section 15 of the Act allows the National Academy of Sciences (NAS) and the National Academy of Public Administration (NAPA) to adopt separate procedures for complying with FACA.	102–3.185(a)	1. May agencies rely upon an academy certification regarding compliance with section 15 of the Act if different policies and procedures are adopted by NAS and NAPA?	A. Yes. NAS and NAPA are completely separate organizations. Each is independently chartered by the Congress for different purposes, and Congress has recognized that the two organizations are structured and operate differently. Agencies should defer to the discretion of each academy to adopt policies and procedures that will enable it to comply substantially with the provisions of section 15 of the Act that apply to that academy.
II. Section 15 of the Act allows agencies to enter into funding agreements with NAS and NAPA without the academies' committees being "managed" or "controlled".	102–3.185(c)	1. Can an agency enter into a funding agreement with an academy which provides for the preparation of one or more academy reports containing advice or recommendations to the agency, to be developed by the academy by use of a committee created by the academy, without subjecting an academy to "actual management or control" by the agency?	A. Yes, if the members of the committee are selected by the academy and if the committee's meetings, deliberations, and the preparation of reports are all controlled by the academy. Under these circumstances, neither the existence of the funding agreement nor the fact that it contemplates use by the academy of an academy committee would constitute actual management or control of the committee by the agency.

[FR Doc. 01–17350 Filed 7–18–01; 8:45 am]
BILLING CODE 6820–34–U