

FACA Background

- In the early 1970s, Congress found that numerous committees, boards, commissions, councils and other similar groups were established to advise executive branch agencies.
- While this format was a useful and beneficial means for the federal government to acquire expert advice and diverse opinions, it had some problems.
- Congress found:
 - Duplicative and unnecessary committees.
 - No uniform standards or procedures.
 - Inadequate access or accountability to the public and Congress.

Federal Advisory Committee Act (FACA)

- Congress took action to address these inefficiencies and passed FACA.
- Became Law in 1972 - P.L. 92-463.
- Codified at 5 U.S.C. App. 2; 41 C.F.R. Part 102-3
- It is a procedural statute that governs how Federal Advisory Committees operate.
- Purpose - increases access and accountability and manages the costs of advisory committees by requiring:
 - Open meetings
 - Chartering
 - Public access and involvement
 - Reporting

Characteristics of a FACA Committee

- Any group that is established or utilized by the Executive Branch/Federal Agency that:
 - Provides advice or recommendations to the agency, and
 - Has at least one person that is not a full time Federal or state/local government employee.
- FACA does not apply to:
 - Individual advice
 - Operational committees
 - Inter/intra-government committees
 - Exchanges of facts or information

FACA Requirements

- A FACA Committee is for *advisory* functions only.
- Establish by law, Presidential authority, or discretionary.
- File a Charter containing authority, mission, goals, objectives, and other procedural logistics.
- Must maintain a balanced membership.
- Must maintain all committee documents for public inspection.
- Terminate according to statute, when purpose is completed or after 2 years (unless renewed).

FACA Meeting Requirements

- Must provide 15 days advance notice of meetings in the Federal Register.
- Must be open to the public unless there is a limited statutory basis for it to be a closed meeting.
- Must have a Designated Federal Officer (DFO) in attendance who:
 - Approves and calls meetings
 - Approves agenda
 - Attends and adjourns meetings if it is in the interest of the public.
- Must have minutes which are available for public inspection (except for the portions of a meeting which are closed).
- Note about informal gatherings of Council members:
 - No gathering of Council members which may be construed as an impromptu or informal meeting of the Council.
 - Such informal meetings are prohibited under FACA.

Status of FACA Committee Members

- Special Government Employees (SGEs): individuals hired by the Federal government to perform temporary duties either on a full time or intermittent basis, with or without compensation, for a period not to exceed 130 days during any consecutive 365-day period.
 - Ethics statutes and regulations apply to all SGEs.
- Representatives: individuals used by Federal agencies to obtain the views of non-government groups or organizations.
 - They usually have specific expertise.
 - They serve as representatives or voice of groups with possible financial interests or other stake in the matter.
 - Ethics statutes and regulations do not apply to Representatives.

Status of FACA Committee Members

- Council members are “Representative” members.
- Council members are not subject to Federal ethics laws.
- HOWEVER:
 - Council members are subject to the ethics language in the Council Charter.

Charter Ethics Language

“No Council or subcommittee member will participate in any Council or subcommittee deliberations or votes relating to a specific party matter before the Department or its bureaus and offices including a lease, license, permit, contract, grant, claim, agreement, or litigation in which the member or entity the member represents has a direct financial interest.”

Specific Party Matter

- What is “a specific party matter?”
 - This is a government matter that involves a specific proceeding affecting the legal rights of identifiable parties, or an isolatable transaction or related set of transactions between identified parties.
- What is an “identifiable party?”
 - Contract – between XYZ contractor and USFWS
 - Litigation – ABC vs. Secretary of the Interior
- Examples:
 - Contract, Agreements or Grants
 - Enforcement Action
 - Request for a ruling or other determination
 - Controversy, Claim or Litigation
 - Lease
 - Permit

What is NOT a Specific Party Matter.

- Matters of general applicability are matters that involve "deliberation, decision, or action that is focused upon the interests of a discrete and identifiable class of persons."
- Matters of general applicability are not specific party matters.
- Examples:
 - Rule making
 - Legislation
 - Formulation of general policy, standards or objectives
- Representatives may not act, as part of their advisory duties on specific party matters.
- Representatives may act, outside of their advisory duties, on behalf of themselves or others in specific party matters before the DOI or USFWS.

Direct Financial Interest

- Personal Financial Interest – Yours.
 - BUT consider the financial interest of your spouse and minor children
- Financial Interest
 - Stocks, bonds, real estate, certain mutual funds
 - Salary, job offer
 - Potential for gain or loss as a result of Governmental action on the matter

Conflicts of Interest

- How will the Council and USFWS resolve conflicts of interest?
 - Minor conflicts may require only notice to the Committee, DFO and Ethics Counselor.
 - Significant conflicts may require further action.

Example 1

- Carrie, a Representative, has been asked to provide a recommendation concerning a proposed land use in Colorado Springs, Colorado. She owns a 15% partnership interest in the company that possesses a right-of-way interest on the land in question.
- Can Carrie provide a recommendation to the FACA committee she serves?

Analysis

- Is this a “specific party matter”?
 - Yes because the company described above is an identifiable party and the matter is concerning proposed land use.
- Is there a direct financial interest?
 - Yes because she has ownership interests in the company involved in the specific party matter.
- Therefore, Carrie cannot provide a recommendation to the FACA committee she serves because she has a direct financial interest in the matter.

Example 2

- Doug serves on the FACA council as a Representative and works for a multi-national corporation. The corporation is a large concessionaire with revenue in excess of \$4 million annually. The corporation has a large contract with USFWS.
- Is it permissible for Doug to participate in discussions regarding proposed policy for handicap access on refuge property?

Analysis

- Is this a “specific party matter”?
 - No because the discussion is regarding USFWS policy. There are no identifiable parties in regards to that discussion. As such, this is not a specific party matter.
- Is there a direct financial interest?
 - No. There is no potential for gain or loss to Doug or his employer as a result of Governmental action. As such, there is no direct financial interest in the policy discussion.
- Therefore, Doug can freely participate in the discussion regarding proposed policy for handicap access on refuge property.

Example 3

- Vanessa, a Representative on a FACA committee, owns recreational property that borders a USFWS Refuge. The committee duties include providing recommendations on potential annexations to the Refuge. Said annexation will impact her property.
- May she provide a recommendation to the FACA committee regarding annexations?

Analysis

- Is this a “specific party matter”?
 - Yes because there are identifiable parties involved. As such, this is a specific party matter.
- Is there a direct financial interest?
 - Yes. There is a potential for loss or gain to Vanessa as a result of this Governmental action based on her ownership interest in the land.
- Therefore, Vanessa may not provide a recommendation to the committee regarding annexations.

What to do if there is a Conflict of Interest

- Representatives are not likely to participate in specific party matters as part of advisory duties.
- If you encounter a specific party matter during in your capacity as a Council member, take no action on the matter.
- Notify your DFO and/or contact me if you have any questions.
- Recuse from any deliberations or the provision of advice regarding that specific party manner.

Contact Information

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For additional ethics information - <https://www.fws.gov/ethics/index.html>

Questions?

