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**MEMORANDUM**

**SUBJECT:** Legal Requirements for Representative Members of EPA Advisory Committees

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**TO:** Representative Members of EPA Advisory Committees

The purpose of this document is to set forth some of the formal legal requirements for representative members serving on Environmental Protection Agency's (EPA) advisory committees. These requirements apply to members of EPA parent committees, subcommittees and committee workgroups.

**I. FEDERAL ADVISORY COMMITTEE ACT**

- EPA advisory committees are established under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. Therefore, advisory committees must follow a number of procedures for meetings as required by the Act.
- Advisory committees are established to provide advice to the Administrator of EPA. In most cases, subcommittees may be formed to facilitate the conduct of advisory committee business and report back to the full parent advisory committee.

**A. FACA REQUIREMENTS FOR PARENT COMMITTEE AND SUBCOMMITTEE MEETINGS AND RECORDS**

- Both the parent committee and its subcommittees are subject to all of the FACA requirements for balanced membership, open meetings, and availability of records. These requirements include:
  - Advisory committees must be "fairly balanced" in the points of view represented.

Whether an advisory committee's membership is balanced depends on whether it represents a fair balance of viewpoints given the functions to be performed. It does not mean that there will necessarily be numerical parity among the various represented constituencies.

-- Timely notice of each advisory committee meeting must be published in the Federal Register. Except under exceptional circumstances, which must be stated in the notice, the notice of the meeting must be published 15 days prior to the meeting. The notice must include 1) the name of the committee; 2) the time, place, and purpose of the meeting; 3) a summary of the agenda; and 4) a statement indicating whether all or part of the meeting is open to the public or closed, and if the meeting is closed, the justification for closure, including citations to the Government in the Sunshine Act. All closed meetings must be approved by the General Counsel.

-- Minutes must be kept of all advisory committee meetings.

-- Interested persons may 1) file written statements with any advisory committee, 2) attend any advisory committee meeting (unless closed) or 3) appear before an advisory committee subject to such reasonable rules or regulations as the sponsoring agency prescribes.

-- Each meeting must be attended by a Designated Federal Officer (DFO) who is a full time EPA employee. This person calls and approves the meetings, approves the agenda, and adjourns any meeting upon a determination that to do so is in the public interest.

-- Draft reports, working papers and other documents prepared by or for an advisory committee shall be available for public inspection and copying. This does not necessarily include drafts prepared by individual members alone or in a workgroup setting before they are presented to the advisory committee as a whole.

NOTE: Exemption 5 of the Freedom of Information Act (FOIA) permits EPA to withhold from disclosure inter-agency or intra-agency memoranda or letters which fall under a number of privileges including, among others, the deliberative process privilege, the attorney work-product privilege, and the attorney-client privilege. While Section 10 of FACA seems to allow use of Exemption 5 of FOIA for committee records, courts have had trouble reconciling its use with FACA's mandate that committee documents be made available to the public. It is not clear that Exemption 5 is applicable to documents produced by the committee (an advisory committee is not an "agency" for purposes of the inter/intra-agency threshold test of Exemption 5) though it appears applicable at least to exempt otherwise privileged agency documents shared with the committee.

## **B. WORKING GROUP MEETINGS AND RECORDS**

- Exempt from FACA openness requirements (including the Federal Register notice, public availability of records, DFO attendance and monitoring, etc.) are meetings of two or more advisory committee members for the purpose of analyzing relevant issues and facts, drafting proposed position papers, or conducting research for a chartered advisory committee or subcommittee. (41 C.F.R. §101-6.1004(k)). While a recent court opinion made it clear that the issue is not yet resolved, we believe that subordinate working

groups that are under the control of the parent committee are not themselves subject to FACA openness and balanced membership requirements since they will not themselves give advice to EPA.

- Thus, if necessary, working groups of the parent committee and subcommittees can meet in closed session to develop work plans to guide activities of the advisory committee, gather facts and information for later review by a chartered EPA advisory committee or subcommittee, formulate possible recommendations for later review by the chartered advisory committee or subcommittee, perform studies for later review by the chartered advisory committee or subcommittee, draft reports for later review by a chartered advisory committee or subcommittee, and discuss preliminary findings with EPA officials. These working groups may also find it beneficial to invite consultants and advisors (including EPA and other Federal employees) that are not necessarily members of the parent committee or subcommittee. **These working groups CANNOT give advice and recommendations directly to EPA; they must work through the parent committee.** Moreover, EPA staff may not use the advice and recommendations prior to its being forwarded to EPA as a recommendation of the chartered advisory committee. EPA encourages workgroups to allow interested members of the public to attend workgroup meetings when practicable.

## **II. INVITATIONAL TRAVEL EXPENSES AND CONSULTANTS**

- Travel and per diem expenses of advisory committee members may only be paid under 5 U.S.C. §5703 through the issuance of invitational travel orders. These invitational travel and per diem expenses must be charged to an appropriate EPA travel account.
- Invitational travel orders may be issued **only** when an individual is requested to confer on a matter of official business, to make a presentation, or otherwise to provide some direct service face to face with an Agency official. An individual who is simply attending a meeting to observe is not providing a direct service to the Agency and is not entitled to the benefits of 5 U.S.C. §5703.
- Invitational travel orders may be issued to workgroup participants, advisory committee consultants (duly appointed as special Government employees), or others who are not members of a subcommittee or the parent committee to provide a participatory service to EPA at an advisory committee meeting. However, as discussed above, they may not receive invitational travel orders to attend an advisory committee meeting merely to observe. Also, invitational travel may not be used to allow a group of interested stakeholders to convene and discuss issues if EPA is not present at the meeting.
- EPA can also appoint special Government employees (SGEs) to serve as staff members or consultants to an advisory committee and its subcommittees. Such individuals serve by providing technical, scientific, or other assistance. SGEs are subject to applicable conflict of interest and other ethical requirements. See EPA Ethics Advisory 97-15.

## **III. APPOINTMENT AND REMOVAL OF ADVISORY COMMITTEE MEMBERS**

- A basic rule of appointment permits a federal officer who has the power to appoint an individual also to remove that individual. This principle has been consistently followed

by the courts. Even if the advisory committee member was given a term of appointment, it is clear that any such provision merely means that an appointee cannot serve beyond the assigned term. Any term of office serves as an act of limitation, and not of a grant.

- Most EPA Advisory Committee members are appointed by the Administrator of EPA or her designee. EPA also has a few advisory committees whose members are appointed by the President. While the appointing official may consult interested parties regarding these appointments (for instance, by soliciting comments through a Federal Register notice or discussing potential nominees with current advisory committee members), the appointing official is the ultimate decision maker concerning all membership matters. All advisory committee members serve at the discretion of the appointing official. This should be reflected in the Operating Principles for each EPA advisory committee.

#### IV. ANTI-LOBBYING RESTRICTIONS

- Legislation affecting EPA is routinely pending in Congress. It is therefore important to remember the restrictions against "grass roots" lobbying. These restrictions are based on a criminal statute, 18 U.S.C. §1913.
- The only "official" function of advisory committee members is to provide advice and assistance to EPA. Members may not lobby Congress in their capacity as advisory committee members. Members should not identify themselves as such in oral or written communications to Congress. Of course, this in no way restricts advisory committee members from communicating with Congress on any matter (including those that concern EPA) in their **personal** capacities without reference to their affiliation with the advisory committee. EPA employees may not direct or encourage members to contact Congress concerning pending legislation.
- Advisory committee funds or official advisory committee meetings may not be used to develop a strategy for lobbying Congress.
- To avoid the appearance of impropriety, if a committee member receives travel and per diem funds from EPA to travel to Washington for a meeting, that member should not contact Congress on the days he/she is performing duties as a member.

#### V. CONFLICTS OF INTEREST

- Most EPA Advisory committee members serve as representatives to present the views of a non-governmental organization or group to which they belong. Representative Members are not officers or employees of the Federal Government. Therefore, representative members are not subject to the conflict of interest laws. Advisory committee members appointed as SGEs are subject to conflict of interest requirements.
- However, EPA may impose certain case by case restrictions for advisory committee members. For instance, even representative advisory committee members should not participate personally and substantially as members in particular matters involving specific parties (i.e, grants, contracts, licenses, permits, or litigation) to which they or their employers are a party.

- 18 U.S.C. §219 bars any "public official" from being or acting as an agent of a foreign government who is required to register under the Foreign Agents Registration Act of 1938 at 22 U.S.C. §611 et seq. (FARA) The Department of Justice Office of Legal Counsel has concluded that Section 219 applies to members of federal advisory committees-- both SGEs and **certain representative members**. These restrictions cannot be waived for representative members. Members should inform the DFO immediately if required to register as an agent under FARA.

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If you have any questions, please contact Hale Hawbecker at (202) 260-4555.