

OFFICE OF GOVERNMENT ETHICS

04 x 9

**Memorandum to Designated Agency Ethics Officials
dated July 19, 2004**

In April 2004, the General Accounting Office (GAO) issued a report entitled, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Committees' Independence and Balance* (GAO-04-328). The report discussed several issues about advisory committees that should be of particular interest to agency ethics officials who provide ethics support to advisory committees.

Among the issues discussed, the report looked at how members are appointed to serve on advisory committees and how effective Governmentwide guidance and agency-specific policies and procedures are in evaluating committee members for conflicts of interest. The report also examined how committee members are designated as special Government employees (SGEs) or as representatives. While acknowledging some of the efforts of the Office of Government Ethics (OGE) in providing agencies with guidance and training in this area, the report also identified what it believed to be several "limitations" in that guidance. The report stated that these perceived limitations could affect the overall effectiveness of OGE's education and training efforts in this area and was a factor in some agencies misidentifying member status in the committees that GAO reviewed.

Whether or not OGE agrees with GAO's views on the adequacy of our guidance, we do agree with GAO's overall concern that some agencies may be inappropriately using representative appointments for members who are providing services as SGEs.¹ GAO's report contains evidence that certain agencies are not utilizing any policies identifying criteria for distinguishing between representatives and SGEs. Also, we are concerned that some agencies may be designating their committee members as representatives primarily to avoid subjecting them to the financial disclosure statements required for SGEs. Of course, any such representative

¹ This concern was raised in a single-issue review OGE did in 2002, that looked into how agencies manage their Federal advisory committees. The results of that review were shared with ethics officials during a panel session at OGE's annual ethics conference in 2003.

designations would be improper and should be corrected immediately by the agency to ensure that ethics rules are being properly applied to advisory committee members.

This memorandum addresses the specific concerns that GAO reported regarding the clarity of some of the criteria used for designating the status of advisory committee members for ethics purposes, as that criteria is set forth in the primary source of OGE guidance on this topic, OGE Informal Advisory Opinion 82 x 22 (hereinafter "82 x 22").² In addition, this memorandum addresses the role that ethics officials have in helping to ensure that agencies have proper policies and procedures in place for making appropriate SGE or representative designations for their agencies' advisory committee members.

A. OGE's Guidance in 82 x 22

Recognizable Group of Persons

In its report, GAO stated that some agencies have interpreted guidance in 82 x 22 regarding a representative's role in speaking for a "recognizable group of persons" as permitting the appointment of advisory committee members as representatives of various technical fields of expertise, such as biology and toxicology.

The phrase "recognizable group of persons" is used in 82 x 22 in reference to a non-Government entity or group with a stake in the matter under consideration by an advisory committee. This phrase should not be interpreted to mean that a member of an advisory committee could be designated a representative because the member is an expert in a field of expertise. Agencies should not appoint members of advisory committees as representatives purely on the basis of their expertise. In such cases the SGE appointment category--which was specifically created to facilitate the Government's ability to retain the services of experts in various fields--should be used.

Use of "Represent" and its Cognate Forms in Authorizing Legislation or Other Enabling Documents

In its report, GAO stated that the conclusion section in 82 x 22 implies that when the term "representative" is used in an

² This discussion of the criteria in 82 x 22, however, is not intended to change OGE's guidance in this area. We continue to believe that 82 x 22 provides accurate and helpful guidance for agencies to use in designating advisory committee members as SGEs or representatives.

advisory committee's authorizing legislation or other enabling documents, members of the committee should be classified as representatives.

The use of the term "representative" or similar terms in an advisory committee's authorizing legislation or other enabling documents does not necessarily mean that members are to be appointed as representatives. To illustrate this point, 82 x 22 provides specific examples of documents using "representative" terms and concludes that the given committees nevertheless are comprised of SGEs. One example in 82 x 22 is a committee document that used the term "represent" in a generic sense to describe the required technical expertise for membership; OGE expressly concluded that the members of this committee were to be treated as SGEs, "[w]hatever the degree of contradiction produced by the use of 'represent'" (See BRAC committee discussion). Another example in 82 x 22 refers to points of view "represented" on a particular committee, but nevertheless concluded that this committee was comprised of SGEs (see FPUPAC committee discussion). A third example in 82 x 22 concerns a statute that made the members of a particular committee "representatives of their practicing colleagues," and OGE still concluded that these members were SGEs (see NPSRC committee discussion).

Accordingly, in reviewing a statute, Presidential directive or other documentation establishing an advisory committee, the use of term "represent" or "representative" should not end the inquiry to determine if a person is serving as a representative and not as an SGE. Careful consideration of all relevant factors, as set forth in 82 x 22, is required in order to determine whether a committee member is intended to serve as a representative or as an SGE.

Effect of Recommendation by Outside Organization

In its report, GAO expressed concern that when determining whether a committee member is or is not a representative, some agencies were overemphasizing the weight that should be given to outside recommendations leading to the member's appointment.

The fact that an individual is appointed by an agency to an advisory committee upon the recommendation of an outside group or organization is one of several factors that are useful in arriving at a determination whether the individual may be appointed to act in a representative capacity. This factor by itself is not conclusive; it only tends to support a representative function for

the member. If this factor were intended to be conclusive for purposes of distinguishing between SGEs and representatives, OGE's guidance would have said so expressly.³

B. Ensuring that Agencies Have Policies and Procedures for Designating SGE's and Representatives

As a separate matter, GAO's report was concerned that the agencies it reviewed generally had not developed sufficient policies, procedures, or guidance for their staff to use when determining which type of appointment was appropriate for individual committee members. Moreover, it noted that some agency guidance did not address the types of appointments that may be made for an advisory committee member.

Role of the Ethics Official

Historically, the administrative process that agencies use in designating the status of an advisory committee member has been left to the discretion of individual agencies, with consideration given to the role the member is expected to perform for the committee. In some cases, the status of committee members is specifically made in a statute or other enabling authority establishing the committee. In other cases, agency officials must analyze a statute or other enabling documentation and apply established legal criteria to determine a member's appointment status for ethics purposes.

Ethics officials therefore have an important role in working with committee management officials and others involved in the committee formation and management process to ensure that the proper guidance is being used and appropriate member status designations are being made. The involvement of ethics officials in these matters will help ensure that advisory committee members are being designated properly for ethics purposes and that committee members are subject to ethics rules, if applicable, during their terms of service on the committee. In this regard,

³ For example, the guidance in 82 x 22 does state conclusively that a person who receives compensation (other than travel expenses and per diem) from the Government for his services as an adviser or consultant is its employees and not a representative of an outside group.

the General Services Administration's Federal Advisory Committee Management Rule informs committee management officials and other users of the rule that the "Designated Agency Ethics Official (DAEO) . . . should be consulted prior to appointing members to an advisory committee in order to apply Federal ethics rules properly." See Appendix A to Subpart C of Part 102-3, at 41 C.F.R. Part 102-3.

Support of Committee Management Practices

Agency ethics officials should take appropriate steps, in collaboration with their agencies' committee management officials, to ensure that practices within their agencies for designating the status of advisory committee members for ethics purposes are adequate to "determine whether individuals who serve as members of committees, councils, boards, commissions, etc. . . . are properly designated as SGEs, since certain [ethics requirements] apply to SGEs that do not apply to non-SGEs."⁴ In general, we recommend that agency ethics officials, should:

- establish appropriate or improve existing lines of communication with agency committee management officials or other persons who have a role in managing or running advisory committees within their agencies;
- help ensure that their agency has a systematic approach or process for making status designations for ethics purposes of their agencies' advisory committee members and that the designation of a member's status is made prospectively at the time of an individual's appointment or retention by the committee;
- be involved, as appropriate, in the final clearance process for appointing members that are to serve on advisory committees, especially for those committees that are newly

⁴ See OGE's *Ethics Program Review Guidelines*, Section IX, dated March 2004 at p. 40, available on OGE's website at http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/prd_mats/prdrevguide.pdf

created, or are being renewed or reestablished by the agency;

- periodically review status designations that are made by the agency to ensure that members are being properly designated by committee management officials, especially for those advisory committees the enabling authority of which may have been amended or the mission or purpose of which may have changed in recent years, or which are standing advisory committees of the agency with indefinite charters.
- ensure that relevant committee management officials are aware of OGE's and their individual agency's guidance and procedures on SGE and representative status designations and are provided or made aware of appropriate ethics points of contact to discuss issues involving the designation of committee members or other related ethics matters;
- provide advice and legal counsel to agency committee management officials as appropriate on matters concerning the status designation of advisory committee members for ethics purposes;
- review periodically their agencies' practices, procedures, policy, and guidance for advisory committees, to ensure that appropriate mechanisms exist for properly receiving ethics official input on designation issues;
- ensure, if appropriate, that appointment letters or other committee documentation of appointment state clearly whether members are serving as SGEs or representatives and that committee members are properly informed of their member status and of the application of Government ethics rules to them if they serve as SGEs;
- and finally, in cases where members are serving as representatives, recommend to committee management officials that committee members are informed about the group of persons that the respective member is expected to represent on the committee.

As you know, OGE has always looked at ethics issues involving the use of advisory committees as part of its regular program review of an agency's ethics program. OGE will be paying particular attention to these issues in future program reviews to ensure that agency ethics officials are appropriately engaged in ensuring that agency officials are properly designating the status

of advisory committee members for purposes of applying Federal ethics rules.

C. Conclusion

We welcome GAO's contributions to OGE's and the wider ethics community's continuing efforts to ensure that advisory committee members are being properly designated as either SGEs or representatives for purposes of applying the Federal ethics rules.

The guidance contained in this memorandum should be shared with appropriate committee management officials within your agencies that are involved in the designation of persons serving on Federal Advisory committees hosted by your agencies.