

2004 ANNUAL GOVERNMENT ETHICS CONFERENCE

New York City, New York

Panel Session

ENHANCING YOUR FEDERAL ADVISORY COMMITTEE PRACTICES

March 3, 2004



Panel Members

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Other Materials:

- **41 C.F.R. Parts 101-6 and 102-3**, Federal Advisory Committee Management; Final Rule (July 19, 2001), also available on GSA Website, http://www.gsa.gov/Portal/gsa/ep/contentView.do?contentId=8890&contentType=GSA_DOCUMENT (to be provided to attendees)
- **EPA Confidential Financial Disclosure Form for Special Government Employees** (EPA Form 3110-48 (5-02)), available at: <http://www.epa.gov/sab/pdf/epaform3110-48.pdf> (not to be provided to attendees)

- **“Summary of Ethical Requirements Applicable to Special Government Employees”** - February 15, 2000, DO-00-003, available on OGE Website at www.usoge.gov (not to be provided to attendees)

- **GSA Brochure entitled “The Federal Advisory Committee Act: An Overview”** (to be provided to attendees)

- **“Suggested Administrative Provisions for Inclusion in Legislation Which Establishes Commissions, Councils, Committees, Boards, Etc.”** - produced by GSA’s Agency Liaison Division, updated February 2004, (to be provided to attendees)

PANEL DISCUSSION OUTLINE
New York City, New York

I. Panel Overview

1. Ethics Issues

2. Advisory Committee Status

- A. Special Government Employee
- B. Representative

3. Application of Ethics Rules

II. FACA Background and Appointment Related Issues

1. Basic Facts

- A. Purpose
- B. Advisory Committee Definition
- C. Sources of Authority

2. Major Requirements

- A. Agency Responsibilities
- B. Role of the DFO
- C. Charters
- D. Committee Records
- E. Termination

3. Other Requirements

- A. Balance Issues
- B. Application of Ethics Rules

4. EPA: Handling of Certain FACA Issues

III. GSA Role: Federal Advisory Committees

1. GSA Role in FACA

- A. Committee Management Secretariat
- B. Administrative support for Small Boards and Commissions

2. Establishment of Small Boards and Commissions

- A. Are they FACA Boards?
- B. What branch of government?
- C. What Ethics rules apply?

3. GSA Legislative Template

IV. Financial Disclosure: SGE Advisory Committee Members

1. Using the OGE Form 450\SF 278

A. OGE DAEOgram DO-03-021 (October 23, 2003) (Handout)

2. Alternative Financial Disclosure

A. Authority

B. Requirements

C. Types of Alternative Disclosure

1. Substitute Form

2. Self-certification Form

3. Supplemental Instructions

D. Advantages of an Alternative System

E. Disadvantages of an Alternative System

What is an Advisory Committee?

The term "Advisory Committee" means:

any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof (hereafter in this paragraph referred to as "committee") which is --

- (A) established by **statute** or reorganization plan, or
- (B) established or utilized by **the President** or
- (C) established or utilized by one or more **agencies**,

in the interest of obtaining

advice or recommendations

for the President or one or more agencies or officers of the Federal Government,

except that such term **excludes**

- (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and
- (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

FEDERAL ADVISORY COMMITTEE ACT **(Background and Major Provisions)**

The Federal Advisory Committee Act (Public Law 92-463) was enacted in 1972 and was effective January 5, 1973. The Act was designed to enhance public accountability of advisory committees and to reduce wasteful expenditures on advisory committees. The Act defines an advisory committee as 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.

The Federal Advisory Committee Act, in meeting its principal purposes, was intended to authorize the establishment of a system governing the creation and operation of advisory committees in the Executive Branch of the Federal Government. Its major requirements are listed below.

- Agencies must establish uniform administrative guidelines and management controls that are consistent with the Act and the GSA Rule.
- Agencies must maintain systematic information on the nature, functions and operations of their advisory committees.
- Agency heads must designate Committee Management Officers who are responsible for exercising controls and supervision over the committee management program.
- Committees must be chartered before they can meet or conduct any business.
- Committee charters must be renewed every two years or they will be terminated under the sunset provisions of Sec. 14 of the Act, unless otherwise provided by law.
- Advisory committee memberships are to be fairly balanced in terms of the point of view represented and the functions to be performed.
- Advisory committee meetings are required to be open to the public, with limited exceptions. Meeting notices and agendas must be published in the Federal Register to accommodate public participation.
- Designated Federal Officers must approve all meetings and agendas, and attend meetings.
- Detailed committee meeting minutes will be kept and must contain date and location of the meeting, a record of the persons present, a complete and accurate description of matters discussed and conclusions reached, and a record of recommendations made by the committee.

- All advisory committee documents must be available for public inspection and copying until the committee ceases to exist.
- Committee records must fully disclose costs for the purpose of GAO audits and the annual report.
- Advisory committees will be terminated as soon as the stated objectives have been completed or the committee's work has become obsolete, or the cost of the operations is excessive in relation to the benefits.

Definition of Special Government Employee

TITLE 18--CRIMES AND CRIMINAL PROCEDURE PART I--CRIMES CHAPTER 11--
BRIBERY, GRAFT, AND CONFLICTS OF INTEREST Sec. 202.

Definitions (a) For the purpose of sections 203, 205, 207, 208, and 209 of this title the term ``**special Government employee**'' shall mean an officer or employee of the executive or legislative branch of the United States Government, of any independent agency of the United States or of the District of Columbia, who is retained, designated, appointed, or employed to perform, with or without compensation, for **not to exceed one hundred and thirty days** during any period of three hundred and sixty-five consecutive days, **temporary duties** either on a full-time or intermittent basis, a part-time United States commissioner, a part-time United States magistrate judge, or, regardless of the number of days of appointment, an independent counsel appointed under chapter 40 of title 28 and any person appointed by that independent counsel under section 594(c) of title 28. Notwithstanding the next preceding sentence, every person serving as a part-time local representative of a Member of Congress in the Member's home district or State shall be classified as a special Government employee. Notwithstanding section 29(c) and (d) \1\ of the Act of August 10, 1956 (70A Stat. 632; 5 U.S.C. 30r(c) and (d)), a Reserve officer of the Armed Forces, or an officer of the National Guard of the United States, unless otherwise an officer or employee of the United States, shall be classified as a special Government employee while on active duty solely for training. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is voluntarily serving a period of extended active duty in excess of one hundred and thirty days shall be classified as an officer of the United States within the meaning of section 203 and sections 205 through 209 and 218. A Reserve officer of the Armed Forces or an officer of the National Guard of the United States who is serving involuntarily shall be classified as a special Government employee. The terms ``officer or employee'' and ``special Government employee'' as used in sections 203, 205, 207 through 209, and 218, shall not include enlisted members of the Armed Forces. (underscoring added)

FACA Background and Appointment Related Issues (slides)
Not Available in Electronic Format
Pages 11-14

Employment and Compensation of Employees (5 U.S.C. 3161).
Not Available in Electronic Format
Pages 15-17

Financial Disclosure (slides)
Not Available in Electronic Format
Pages 18-19

**ETHICS RULES FOR ADVISORY COMMITTEE MEMBERS WHO ARE
SPECIAL GOVERNMENT EMPLOYEES**

Which Members are Special Government Employees (SGE)?

SGEs are those members who have been appointed to an advisory committee for duties expected to cover a period of not to exceed 130 days during any period of 365 consecutive days. Even a person so appointed, however, does not become an SGE if he or she serves on the committee as a representative of an outside organization or is already an employee of some other federal entity. Members whose role is to represent outside entities are accountable to those entities but are not subject to the rules discussed in this paper. Most advisory committee members are SGEs. For example, members of the Capital Asset Realignment for Enhanced Services (CARES) Committee are SGEs. As indicated below, advice on a member's status is readily available.

How to Get Ethics Advice

The purpose of this paper is to alert SGEs to potential ethics issues that may arise during their service on an advisory committee so that they have the option of seeking advice. For advice, contact VA's Assistant General Counsel (023) and Designated Agency Ethics Official (DAEO), Walter Hall, or an ethics official in his office. Contact information is located at the conclusion of this paper. Most VA ethics questions can be answered in a telephone call. More than half of ethics questions get **resolved on the same day** they are raised. Seeking ethics advice from an ethics official before acting, and complying with that advice, will, virtually in all cases, protect an SGE from criminal prosecution.

Financial Disclosure

SGEs are required under the Ethics in Government Act to file financial disclosure reports when first appointed and annually thereafter. The agency ethics official has the authority to exclude committee members from the filing requirement based on the particular duties and responsibilities of each committee and has done so with respect to many committees. Committee managers, who help administer the disclosure program, know whether committee members are required to file. If you are uncertain whether you must file a financial disclosure report, please contact Roberto D. DiBella of the ethics officer's staff at (202) 273-6334.

Conflicts of Interest in Committee Deliberations

The main criminal conflict of interest statute prohibits an SGE from participating personally and substantially in any particular matter, such as a grant review, that directly and predictably affects the financial interests of the SGE, his or her spouse, minor child, general partner, an organization in which the SGE serves as an officer, director, trustee, general partner, or employee, or an organization with which the SGE is negotiating, or with which the SGE has an arrangement, for prospective employment. See 18 U.S.C. § 208.

A particular matter is a matter that is narrowly focused upon the financial interests of specific persons, or a discrete and identifiable class of persons. A particular matter does not cover consideration or adoption of broad policy options directed to the interests of a large and diverse group of persons. For example, pharmaceutical manufacturers are an identifiable class of persons while all U.S. businesses are a large and diverse group. Particular matters may include, but are not limited to, reviews of grant proposals or contract applications, other funding decisions, studies or approvals of scientific studies or projects, and other actions which involve deliberation, decision or action such as making recommendations regarding the realignment and allocation of capital assets.

Under this statute, for example, an SGE would be prohibited from reviewing a grant application submitted by a university that employs him or her. Consistent with the well established practice in the community, the statute would require that the SGE “recuse” - disqualify - himself or herself from participation in the review.

The conflict of interest law would also prohibit an SGE, for example, from participating in setting standards for grantees or contractors in general, to the extent that a university employing the SGE (or any organization with which the SGE is affiliated as an officer or board member) would be directly and predictably affected by those standards.

There may be other circumstances in which an SGE’s participation in committee business would raise a question regarding the member’s impartiality in the matter. For example, an SGE asked to review a grant application submitted by the SGE’s mentor, or someone with whom the SGE has a close personal or professional relationship, may raise a concern about the SGE’s impartiality in the review. In such circumstances, the SGE should discuss the relationship with the DAEO before participating.

Other Applicable Criminal Statutes

Acting on Someone's Else's Behalf Before the Government

18 U.S.C. § 203 - Section 203 prohibits an SGE from receiving compensation for representational services rendered by the employee or another person before VA or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the SGE has participated personally and substantially as a Government employee. By their nature, policy matters generally do not involve specific parties.

Representational services include communications (written or oral) and appearances made in connection with a covered matter on behalf of someone else, generally with the intent to influence or persuade the Government.

Where an individual or entity with which the SGE is associated provides representational services to third parties in any particular matter involving a specific party in which the SGE has participated personally and substantially as a Government employee, any compensation derived by the SGE from his or her association must not be tied to those representational services. For example, an SGE is employed with a law firm that is lobbying the VA on behalf of a Veterans organization against a particular proposal to remove inpatient treatment at a medical center affecting 15 veterans. If the SGE participated in any deliberations or made any recommendations regarding this proposal as a Government employee, the SGE should structure his or her compensation with the law firm so that he or she does not share in any profits derived from these representational services.

Exempted from the above prohibition are representations required in the performance of work under (as opposed to the negotiation or solicitation of) a grant, contract or other agreement with or for the benefit of the Government.

18 U.S.C. § 205 - Section 205 prohibits an SGE from representing a party, with or without compensation, before VA or another Federal agency or other specified entity (such as a court or commission) in any particular matter involving a specific party in which the United States is a party or has a direct and substantial interest that the SGE participated in personally and substantially as a Government employee.

Post-Employment Restrictions

18 U.S.C. § 207 - Section 207, the "post-employment" statute, imposes a lifetime ban on a former SGE from representing another person or entity to VA or another Federal agency or other specified entity (such as a court or commission) in any particular matter

involving a specific party in which the former SGE participated personally and substantially while serving in the Government.

Bribery

18 U.S.C. § 201 - Section 201, commonly known as the “bribery” statute, prohibits Federal employees, including SGEs, from seeking, accepting, or agreeing to receive anything of value in return for being influenced in the performance of an official act.

Standards of Ethical Conduct

The following paragraphs generally characterize some of the administrative Standards of Ethical Conduct regulations (5 C.F.R. Part 2635) that pertain to VA SGEs.

Teaching, Speaking and Writing in a Personal Capacity

One administrative rule limits the circumstances where SGEs may receive compensation for some teaching, and for certain speaking and writing. The rule provides that for most non-curriculum teaching and most speaking and writing, SGEs may not be paid if the activity “relates to the employee’s official duties.” The “relatedness” test is met for such activities if the invitation was extended to the SGE either primarily because of the member’s committee position rather than his or her expertise or by someone whose interests may be affected substantially by the member’s government duties; or if the information conveyed draws substantially on ideas not publicly available. See 5 C.F.R. § 2635.807.

Additionally, any SGE that is to work no more than 60 days a year is prohibited from accepting compensation if the subject matter deals significantly with *any specific party matter* to which the SGE is assigned or was assigned within the past year of his or her current SGE appointment. If the SGE is to work more than 60 days a year, he or she is prohibited from accepting compensation if the subject deals significantly with *any particular matter* to which the SGE is assigned or was assigned within the past year of his or her current SGE appointment. 5 C.F.R. § 2635.807(a)(2)(i)(E)(4).

NOTE: subsection (a)(3) contains limited exceptions for teaching certain courses.

Examples: Teaching, Speaking and Writing in a Personal Capacity

Example 1: *An employee of a university has been given a one year appointment as a special Government employee to serve on an advisory committee convened for the purpose of making specific recommendations regarding the realignment and allocation of capital assets necessary to meet the demands of health care services. Because his service under that appointment is not expected to exceed 60 days, the employee may accept compensation for an article about the hardships a community may endure with the loss of VA Medical Center even though he is reviewing proposals to move several VA Medical Centers. The proposals which are the focus of the advisory committee deliberations are not a particular matter involving specific parties.*

Example 2: *A physician of a large health care firm, who is an expert in cardiology, is employed for more than 60 days in a year as a special Government employee on the Capital Asset Realignment for Enhanced Services (CARES) Advisory Committee. The physician may continue to receive compensation for speaking, teaching and writing about cardiology generally. However, during the term of her appointment as a special Government employee, she may not receive compensation for an article about allocation of cardiology assets that is currently under discussion on the CARES Committee. The latter would concern a matter to which the special Government employee is assigned.*

Example 3: *An employee of a Veterans Service Organization (VSO), who has been appointed to serve fewer than 60 days on the CARES Advisory Committee as a special Government Employee (SGE), is offered compensation to give a speech to the local chamber of commerce regarding the status of the Committee deliberations to include the processes being used to formulate recommendations. The VSO employee may not accept compensation for this speech.*

Gifts

Any gift given to an SGE because of his or her service on a VA advisory committee or given by an entity with a grant application pending would obviously raise concerns. Please consult with the DAEO should this situation arise. Gifts given to the SGE because of his or her position or achievements generally are not problematic in the private sector.

A primary exception invoked for SGEs:

An employee may accept meals, lodgings, transportation and other benefits resulting from his or her outside business or employment activities when it is clear that such benefits have not been offered or enhanced because of his or her official status.

Example: The members of the Capital Asset Realignment for Enhanced Services (CARES) Advisory Committee that meets 4 times per year are SGEs. A member who has a consulting business may accept an invitation to a \$50 dinner from her client, a Veterans Service Organization, unless, for example, the invitation was extended in order to discuss the activities of the committee.

Charitable Fundraising

An SGE may engage in fundraising in a personal capacity, if he or she does not personally solicit from anyone known to have interests that may be substantially affected by the performance [or nonperformance] of the SGE's official duties.

5 C.F.R. § 2635.808. If you have questions concerning particular fundraising events or activities, please consult with the DAEO.

Expert Testimony

An SGE may not serve as an expert witness, except for the United States, in any proceeding in which the United States is a party or has a direct and substantial interest, if:

(1) He or she has participated as an employee or special Government employee in the particular subject matter of the proceeding; or

(2) His or her employing agency is a party or has a direct and substantial interest and he or she:

i) Is appointed by the President;

(ii) Serves on a commission established by statute; or

(iii) Has served or is expected to serve for more than 60 days in a period of 365 consecutive days. 5 C.F.R. § 2635.805.

Emoluments Clause

This clause of the Constitution prohibits SGEs from accepting any employment with a foreign government or the political subdivision of a foreign government, including a public university or commercial enterprise owned or operated by a foreign government. The ban does not apply to a foreign privately owned corporation or an international organization. U.S. Constitution, Art. 1 § 9, cl. 8.

Foreign Gifts and Decorations Act

This law prohibits SGEs from accepting a gift exceeding \$285 in value from a foreign government or an international organization. A prohibited gift even includes travel expenses exceeding \$285 in value unless the travel takes place entirely outside the United States. The restriction extends to the spouse and dependents of the SGE. SGEs can accept travel and related expenses from a foreign government as part of U.S. Government duties. 5 U.S.C. § 7342.

Foreign Agents

This law prohibits SGEs from acting as an agent of a foreign principal registered under the Foreign Agents Registration Act unless the head of the agency certifies that employment of the SGE is in the national interest. 18 U.S.C. § 219.

Hatch Act

The Hatch Act rules on political activities apply to SGE's only while conducting Government business. 5 U.S.C. §§ 7321-7326.

How to Get Ethics Advice

(Information Omitted.)

BIOGRAPHIES

Dale A. Christopher
Senior Ethics Program Specialist
Program Review Division
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Dale has worked at OGE since October 1991. As a senior member of the Program Review Division, he leads teams of management analysts in the review of executive branch department and agency ethics programs to ensure compliance with regulatory standards of conduct and statutory conflict of interest rules. Additionally, he has conducted numerous single issue reviews of ethics-related topics, including agency procedures for granting conflict of interest waivers, issuing certificates of divestiture, administering alternative and supplemental financial disclosure systems, and managing Federal advisory committees. He also evaluates and recommends approval or disapproval of agency requests to implement alternative or supplemental financial disclosure systems.

Dale attended West Virginia University. He graduated in 1991 with a degree of Bachelor in Science in Business Administration.

A. Robert Flaak
Senior Environmental Scientist
EPA Science Advisory Board
U.S. Environmental Protection Agency

Bob is a Senior Environmental Scientist and Special Assistant to the Director of the EPA Science Advisory Board, a 600+ member/consultant extramural scientific and technical advisory group that provides advice to the EPA Administrator on the scientific basis for EPA's regulatory decisions and research programs. He has over 20 years of operational and policy development experience with Federal advisory committees, staffing over 175 scientific peer reviews on a broad range of topics including global climate change, dioxin health effects, environmental tobacco smoke, particulate matter and ozone air quality, cancer risk assessments, and health effects of diesel emissions.

He has developed national environmental policy for bridge construction, highway modification, and wetland restoration with the US Coast Guard/Department of Transportation; designed oceanographic surveys, coordinated field sampling, designed protocols for laboratory analysis, and performed data analysis and interpretation as Marine Biologist with an engineering consulting firm; and as a Research Fellow in

academia, conducted original research on phytoplankton biochemistry, bivalve nutrition, and marine aquaculture.

He has graduate degrees from the University of Delaware's Graduate College of Marine Studies (M.S., Marine Studies – Biology & Chemistry) and Central Michigan University (M.A., Public Administration), and has taken other graduate level environmental and management courses. He has over 25 years of experience as a trainer including over twelve years teaching the implementation of the Federal Advisory Committee Act (FACA) in regularly scheduled courses in Washington DC, and as an invited instructor for FACA courses given to EPA and other Federal agencies (NIH, CDC, USDOJ-FWS & BLM, USDA-FS). He has served as Acting Director, GSA Committee Management Secretariat, and Chair, Interagency Committee on Federal Advisory Committee Management.

Bob is a retired US Army Reserve Lieutenant Colonel with 29 years of service as a signal officer, trainer, logistician, and civil affairs operator. He served on active duty in South Vietnam in 1968-69, and in Saudi Arabia, Kuwait and Iraq in 1991 during Operation Desert Storm.

Lesly P. Wilson

Senior Assistant General Counsel
General Services Administration

Lesly is a Senior Assistant General Counsel at the General Services Administration. She has been at GSA since 1976. A graduate of Harvard Law School, she received her B.A. in Political Studies from Pitzer College in Claremont, California.

Currently a member of the General Law Division serving as the Counsel to the Chief Financial Officer on appropriation and fiscal law matters, she also advises the Agency Liaison Division which provides administrative support services to the small boards and commissions for whom GSA provides support; the PBS Office of Child Care that is responsible for 114 Child Care Centers located in Federal space; the Office of Performance Improvement that is responsible for agency competitive sourcing initiatives; and the Innovative Workplace Division that is responsible for telework initiatives.

As GSA becomes involved in special external events, she frequently provides the legal support for those events, including the Presidential Inaugural, Presidential Transition, the Olympics, Special Olympics, and G-8 Conferences. Since she has been at GSA, she has also served as counsel to the Federal Supply Service and Public Buildings Service.

Vincent J. Salamone
Associate General Counsel
Office of General Counsel & Legal Policy
U.S. Office of Government Ethics

Before coming to OGE in July 1992, Vince served in the U.S. Army as a captain in the Judge Advocate General Corps and was stationed at the U.S. Army Communications-Electronics Command (CECOM), Fort Monmouth, New Jersey. From April 1988 to June 1992, Vince served as an Administrative Law Attorney at CECOM. During his time at CECOM, Vince was appointed to serve as the Command Procurement Fraud Advisor, a CECOM Ethics Counselor and a Special Assistant U.S. Attorney. He has served as an Associate General Counsel at OGE since November 2000.

Vince is a graduate of Assumption College where he received his Bachelor of Arts degree (Magna Cum Laude) in History. He received his Juris Doctor degree from Western New England College School of Law in 1987. He is a member of the Massachusetts Bar.

OGE DAEOgram DO-03-021 (October 23, 2003)
Not Available in Electronic Format
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