



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

April 4, 2014

OFFICE OF THE
ADMINISTRATOR

MEMORANDUM

SUBJECT: EPA Policy Regarding Communication Between Members of Federal Advisory Committee Act Committees and Parties Outside of the EPA

FROM: Gwendolyn Keyes Fleming /Signed/
Chief of Staff

TO: Christopher Zarba, Director
Office of the Science Advisory Board

Dr. David Allen, Chairman
Science Advisory Board

Thank you for your request for clarity on policies relating to communications from outside parties that have been directed to members of the United States Environmental Protection Agency's (the EPA's) Federal Advisory Committee Act (FACA) committees, in particular the Science Advisory Board (SAB). These communications have asked questions about FACA committee work, to invited members to Congressional hearings, and provided input into the scope of on-going SAB efforts. While your inquiry may have been the result of recent events, we also recognize that explaining the agency's existing guidance on this issue (which is attached to this memorandum) will benefit other FACA committee members who may be faced with similar challenges in the future. I have asked several members of our team to look into this matter. After an internal review of how such communications were historically addressed and analysis of the relevant legal provisions, the Agency will be re-affirming existing policy on such communications for FACA members and other Agency employees.

To maintain the scientific integrity of SAB and other FACA committees, and to ensure compliance with relevant laws, regulations and ethical obligations, it is important that unsolicited contacts from outside entities be appropriately managed by referring them to the Designated Federal Official (DFO) for the FACA committees who will then forward the information to the appropriate agency representatives for response. Committee members themselves and the FACA Committees as a whole, should refrain from directly responding to these external requests related to their efforts to advise the agency and should adhere to the policies governing formal and informal outside communications. This is consistent not only with the policies currently utilized by other programs, offices, and committees across the Agency, but also is consistent with previous policies issued under previous Administrations.

The Agency places tremendous value on the work of the SAB and other FACA committees, and we want to ensure that we provide the necessary information and guidance to enable the most efficient continuation of that work. In furtherance of that mutual goal and in response to your request, I am attaching to this memorandum a document that outlines the appropriate processes for communications that may be received by FACA committee members. We look forward to continuing to have open lines of communication with all of our committees, their members and the public in order to provide the best product for the citizens we serve. If you have any questions regarding this policy, please do not hesitate to contact me.

Attachment

EPA Policy Regarding Communication Between Members of Federal Advisory Committee Act Committees and Parties Outside of the EPA

Background

Federal Advisory Committee Act Committees

Section 8 of FACA requires EPA to establish management controls that are applicable to all EPA federal advisory committees. These management controls include the following requirements:

- The Administrator is required to provide uniform administrative guidelines and management control for EPA's advisory committees, FACA §8(a); and
- The Administrator is required to appoint a Committee Management Officer, whose duties include exercising control and supervision over the Agency's advisory committees, FACA §8(b).

As part of EPA's responsibility to provide administrative guidelines to members of EPA's FACA committees, the attached guidance sets out EPA's policy regarding communication between members of FACA committees and parties outside of the EPA.

In addition to FACA, the operations of certain committees are subject to additional provisions of law specific to those committees. For example, EPA's Science Advisory Board (SAB) is subject to the Environmental Research, Development, and Demonstration Act, 42 U.S.C. § 4365, which, among other things, specifies the SAB's function, its number of members and the members' compensation. Like any FACA Committee, however, the SAB is established by the EPA Administrator for the purpose of obtaining collective advice for the Agency. (The EPA has been working with the relevant Congressional committees to address some of the novel provisions of that law, and looks forward to continuing that work. As those discussions yield a suggested path or resolution, EPA will be sure to update staff, the Chair and other members of the SAB.)

Federal Advisory Committee Act Committee Members

Members of FACA committees are appointed as representatives, Special Government Employees (SGEs), or Regular Government Employees (RGEs). The type of appointment has implications for the application of ethics rules and interactions with outside parties. Representatives are not subject to federal ethics rules and are expected and encouraged to discuss their work on the committee with, and get input from, the group they represent. SGEs, on the other hand, are subject to federal ethics rules and are expected to provide advice following group discussion based on their own individual expertise. RGEs are also subject to federal ethics rules and provide the views of their agency.

As stated above, some members of chartered FACA committees, subcommittees, ad hoc committees, panels, and work groups, serve as Special Government Employees. It is important to understand that SGEs are government employees. As defined in 18 U.S.C. § 202, an SGE is "an officer or employee . . .

who is retained, designated, appointed, or employed to perform temporary duties, with or without compensation,” for not more than 130 days during any period of 365 consecutive days.

The Office of Government Ethics, which establishes the standards of conduct for interactions between SGEs and federal agencies throughout the Executive Branch, has determined that SGEs are subject to the agency’s supervision and operational control when carrying out the duties they are retained, designated, appointed, or employed to perform. As government employees, SGEs are subject to important federal ethics laws and regulations. For example, when acting in a personal capacity, FACA committee SGE members need to be careful not to use nonpublic information or represent their views as that of the committee, panel, or group in which they participate. To do so could violate ethics laws and regulations.

Independence of Federal Advisory Committee Act Committees

A key requirement of FACA is that each federal advisory committee is to provide “independent” advice. As stated in the Act, agencies are to “assure that the advice and recommendations of the advisory committee 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” (FACA § 5(b)(3)). Thus, under FACA, while the advice a FACA committee develops is independent of the agency, the committee itself is still subject to the management and control of the agency. In addition, SGE members of EPA’s FACA committees are covered by the EPA’s Scientific Integrity Policy. That policy, among other things, reaffirms the expectation that all Agency employees, including scientists, managers, and political appointees, regardless of grade level, position, or duties, will ensure that the Agency’s scientific work is of the highest quality, free from political interference or personal motivations. While this policy guidance explains that EPA bears the management responsibility for communicating with outside entities regarding the work of its FACA committees, the EPA is committed to fulfilling that responsibility in a manner that preserves the independence and scientific integrity of its FACA committee members.

Policy Guidance

EPA Policy Regarding Communication Between Members of Federal Advisory Committee Act Committees and Parties Outside of the EPA

A FACA committee member’s external communications are guided by EPA policies and procedures, including procedures for intergovernmental and Congressional contacts. Very often, these policies require the committee member to refrain from responding in an individual capacity and instead consult and collaborate with their committee members or others before providing an official response on behalf of the committee.

Formal Communications

Each FACA committee should have policies and practices in place for communicating the formal findings and actions of the committee to the Administrator. These policies and practices vary by FACA committee and are not the subject of this memorandum.

Informal Communications

Occasionally, an outside party may attempt to directly contact committees or committee members. As discussed above, a representative member may obtain input from the group the person represents. If a representative member receives a request from a source that they do not represent or if an SGE receives a request relating to the SGE's employment from a non-EPA source (such as a member of the press, a trade association or other non-governmental organization, or members of Congress or their staff), the FACA member should refer that request to the committee's Designated Federal Official (DFO). The DFO will consult with the appropriate office(s) within the agency and then, depending on the nature of the inquiry, the DFO will either respond to the request or will forward it to the appropriate office within the Agency for response. Specifically, if a FACA committee member receives a request relating to the committee's work from members of Congress or their staff, or Congressional Committees, the member should notify the DFO, who will refer the request to the EPA Office of Congressional and Intergovernmental Relations (OCIR). OCIR will determine the agency's response to the inquiry, after consulting with the relevant program office and the DFO. Similarly, the DFO would refer press inquiries to the Office of External Affairs, who will determine the agency's response to that type of inquiry.

Conclusion

Given the number of currently operating FACAs and varied work they are undertaking on behalf of the Agency, EPA is clarifying these procedures in an attempt to best respond the outside inquiries while also allowing committee members to focus on the important work at hand.