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Memorandum dated August 18, 2005,  
from Marilyn L. Glynn, General Counsel,  
to Designated Agency Ethics Officials  
Regarding Federal Advisory Committee Appointments

There has been much attention focused recently on Federal advisory committees. As you may be aware, the Government Accountability Office (GAO) issued a report (GAO-04-328) last year raising concerns about how some agencies were appointing members to serve on their advisory committees. In response to that GAO report, the Office of Government Ethics (OGE) issued a DAEOgram that identified several steps that agencies should take to address certain ethics-related concerns about committee appointments (see OGE July DAEOgram, DO-04-022 dated July 19, 2004 [OGE Informal Advisory Memorandum 04 x 9]). Moreover, we informed ethics officials that OGE would focus increased attention on committee appointment matters in upcoming program reviews.<sup>1</sup>

Since issuing the July DAEOgram, some of the agencies we reviewed have changed the designations of members serving on their advisory committees, from non-employee "representatives" to special Government employees (SGEs). The purpose of this memorandum is to further assist agencies in distinguishing between SGEs and representatives. In addition, this memorandum highlights some aspects of the committee formation and appointment process that may help ethics officials better understand that process.

#### **BACKGROUND**

In 1972, Congress passed the Federal Advisory Committee Act (FACA) to provide an orderly procedure for Federal agencies to

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<sup>1</sup> In October 2004, OGE amended its ethics program review guidelines pertaining to advisory committees. The new review guidelines are located on OGE's website and can be accessed at [http://www.usoge.gov/pages/forms\\_pubs\\_otherdocs/fpo\\_files/prd\\_mats/prdrevguide.pdf](http://www.usoge.gov/pages/forms_pubs_otherdocs/fpo_files/prd_mats/prdrevguide.pdf).

use in seeking the advice, assistance, and input of persons outside the Government.<sup>2</sup> FACA governs how advisory committees are established, operated, and terminated. There are now over 960 Federal advisory committees, with about 62,000 members, established in the executive branch. These committees play a role in shaping important public policy on difficult issues facing Government decisionmakers. The General Services Administration (GSA) provides a procedural framework for agencies to follow in using advisory committees.<sup>3</sup> GSA's FACA rule requires agency heads to ensure that the interests and affiliations of members serving on these committees are in conformance with applicable Federal ethics rules.<sup>4</sup>

### **APPLYING GOVERNMENT ETHICS RULES TO COMMITTEE MEMBERS**

Individuals appointed to serve as members of advisory committees come from both the public and private sectors. These individuals provide the Government with needed expert advice and diverse views. Some members are regular Government employees.<sup>5</sup> Other members may be appointed to serve as special Government employees, *i.e.*, "an officer or employee . . . who is retained, designated, appointed, or employed" by the Government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days. See 18 U.S.C. § 202(a); DAEOgram DO-00-003 [OGE Informal Advisory Memorandum 00 x 1], entitled "Summary of Ethical Requirements Applicable to Special Government Employees."

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<sup>2</sup> See 5 U.S.C. app. II, § 2.

<sup>3</sup> See 41 C.F.R. part 102-3.

<sup>4</sup> See 41 C.F.R. § 102-3.105(h).

<sup>5</sup> Employees may sometimes serve in an "ex officio" capacity on some advisory committees. These members are selected and appointed to serve on an advisory committee because the individual holds a particular Government position. These members remain subject to the ethics rules arising from that member's position with the Government. See OGE Informal Advisory Letter 93 x 14 ("Individuals . . . who already hold a Federal office, continue to be subject to ethics laws and regulations applicable to them because of that Federal office held prior to their appointment.")

However, many advisory committee members will not have any Government employee status. Most of these members will provide services in a non-employee "representative" status. These representative members are specifically appointed to a committee to provide the committee with the points of views of nongovernmental entities or of a recognizable group of persons (e.g., an industry sector, labor unions, or environmental groups, etc.) that have interests in the subject matter under a committee's charge. Unlike employee members, representative members are not being appointed on committees to exercise their own individual best judgment on behalf of the Government.<sup>6</sup> Instead, representatives serve as the voice of groups or entities with a financial or other stake in a particular matter before an advisory committee.<sup>7</sup>

Government employees and representatives on advisory committees are not treated the same for purposes of applying Federal ethics rules.<sup>8</sup> Regular Government employee and SGE members are expected to provide their own independent judgment in committee deliberations. Therefore, they are expected to discuss and deliberate in a manner that is free from conflicts of interest. Consequently, they must comply with applicable conflict of interest laws, standards of conduct rules, and

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<sup>6</sup> See OGE 93 x 14 at p. 49 (non-employee representatives expected to "represent a particular bias," and not to use independent judgment) & 1999 OLC LEXIS 11, (September 15, 1999), memorandum entitled "Applicability of 18 U.S.C. § 219 to Representative Members of Federal Advisory Committees" (representative members are generally those members 'chosen for committee membership only to present the views of a private interest.')

<sup>7</sup> While not the primary focus of this memorandum, there is another non-employee status that may cover some committee members. In certain circumstances, members may serve as independent contractors. In general, independent contractors are not Government employees because they lack the requisite supervision or operational control necessary to create an employee-employer relationship. See OGE Informal Advisory Letter 82 x 21, OGE 00 x 1, and OGE Informal Advisory Memorandum 82 x 22 (alluding to the creation of a committee fully staffed by independent contractors).

<sup>8</sup> See OGE 93 x 14, at p. 50, ("Representatives are not covered by [conflict of interest laws]; otherwise the purpose of their services would be thwarted.")

financial disclosure requirements (although, given their limited service as employees, SGEs are subject to Federal ethics rules in a somewhat less rigorous manner).<sup>9</sup> In contrast, Federal ethics rules do not apply to those members serving as representatives.<sup>10</sup>

**DESIGNATING THE STATUS OF COMMITTEE MEMBERS --  
SOME BASIC CRITERIA**

Because the extent to which committee members are subject to Federal ethics rules will depend on their status as employees or non-employees, agency officials must be familiar with some of the basic criteria that the executive branch has long used in making this distinction. In past guidance, OGE has identified several factors that agencies should look to in designating the status of advisory committee members. See, for example, OGE 82 x 22. These factors were taken verbatim from a Presidential memorandum issued shortly after the enactment of legislation creating the SGE category.

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<sup>9</sup> See 7 Op. O.L.C. 123, 125 (1983) ("conflict of interest statutes impose fewer and less rigorous restrictions on certain short-term or intermittent employees called 'special government employees'"). OGE 00 x 1 provides a comprehensive discussion of how Federal ethics rules apply to committee members who serve as SGEs.

<sup>10</sup> See OGE 93 x 14, at p. 50, ("In the absence of applicable statutes or regulations governing their conduct, representative members should comport themselves with integrity so as not to trade upon their positions . . . for their own personal benefit." Note, however, that some agencies do address potential conflicts of interest of their representative members to some extent. For example, the Bureau of Land Management in the Department of the Interior (DOI) "prohibits its advisory committee members from participating in any matter in which they, a spouse, or dependent child have a direct financial interest." DOI also "requires the members to disclose any direct or indirect interest in leases, licenses, permits, contracts, or claims, and related litigation that involve lands or resources administered by the bureau." See GAO Report (cited earlier on page 1) at p. 26. These ethics-related rules are oftentimes a result of specific requirements set forth in laws and rules outside of OGE's purview.

Whether or not these factors (some of which were most recently clarified in OGE DAEOgram DO-04-022 [OGE 04 x 9]) will need to be used to determine a committee member's status will depend on whether the member's status has been clearly stated in a committee's enabling authority. While Congress may sometimes specify in legislation the status of members serving on an advisory committee, it may not always do so or do so clearly. Where a committee's enabling authority does not contain any language sufficiently identifying a member's status or that language is itself ambiguous, agency officials must determine the status of members serving on a committee.

In general, the determination of a member's status should be made by the responsible agency official at the time of the individual member's retention, designation or appointment.<sup>11</sup> The agency should make the status of an individual known at the time of the member's selection so that the individual may know his or her obligations under the criminal conflict of interest laws and other ethics rules. In making designations, agencies should never designate committee members as representatives to avoid subjecting them to Federal ethics rules.

Among the factors to be considered in designating an advisory committee member's status are the following:

- 1. Receipt of Compensation*

One factor that may be conclusive of employee status is compensation (other than travel or per diem expenses) for providing services to an advisory committee.<sup>12</sup> However, the fact

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<sup>11</sup> See 41 C.F.R. part 102-3, Subpart C (Appendix A) which highlights the importance of determining a member's status for purposes of applying Federal ethics rules. In addition, GSA recently amended its reporting requirements so that agencies must now report the individual status of each member serving on an advisory committee in GSA's FACA database. To access the current FACA database, the web link is <http://www.fido.gov/facadatabase>.

<sup>12</sup> See OGE 82 x 22, at p. 330 ("A person who receives compensation from the Government for his services . . . is its employee and not a representative of an outside group."); OGE Informal Advisory Letter 93 x 30 at 141 ("we would ordinarily view Federal compensation as automatically creating a status of Government employment").

that a member is not paid any compensation for committee work would not necessarily mean a member is serving in a representative status. Many advisory committee members, who serve as SGEs, are not compensated for their committee service.<sup>13</sup> Often, whether an SGE is compensated will depend on the policy of the agency that is sponsoring a particular committee.<sup>14</sup>

Nonetheless, there are some situations where representatives have been compensated for committee services. For example, Congress may specifically provide "clear statutory language" in a committee's enabling statute that allows an agency to compensate representative members for their services.<sup>15</sup> The Negotiated Rulemaking Act of 1990, for example, provides that members serving on a negotiated rulemaking advisory committee shall be responsible for their own expenses for participating on a committee. The law, however, also includes a provision that specifically allows an agency to pay for such expenses and a "reasonable rate of compensation" if the "member certifies a lack of adequate financial resources to participate in the committee" and "such member's participation in the committee is necessary to assure adequate representation of the member's interest."<sup>16</sup>

## *2. Using Outside Recommendations*

Another important factor for an agency to consider in designating a committee member's status concerns the agency's use of outside recommendations in their member appointment

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<sup>13</sup> Under 18 U.S.C. § 202(a), individuals can be deemed SGEs even if they serve without compensation.

<sup>14</sup> See GAO Report (cited earlier on page 1) at p. 34. Moreover, GSA's FACA rule allows an agency to accept gratuitous services from advisory committee members under certain circumstances. See 41 C.F.R. § 102-3.130 which discusses the policies that apply to the compensation or reimbursement of advisory committee members.

<sup>15</sup> See OGE 93 x 30, at p. 141.

<sup>16</sup> See 5 U.S.C. § 568(c). The law also provides that "a member's receipt of funds under [§ 568] . . . shall not conclusively determine for purposes of sections 202 through 209 of title 18 whether that member is an employee of the United States Government." See 5 U.S.C. § 568(d).

process. It is not uncommon for an agency to obtain recommendations from outside persons or entities that have a stake or interest in committee matters. These outside recommendations can serve several important purposes. For example, they can aid an agency in finding qualified candidates with the appropriate levels of subject matter expertise and experience. They can also help to expand the candidate pool for positions on a committee.

In its May 2004 report, GAO expressed a concern that some agencies may overemphasize this factor in designating a committee member's status.<sup>17</sup> As stated in our previous guidance in OGE 82 x 22, the use of outside recommendations "tends to support" a conclusion that a member's service is in a representative capacity.<sup>18</sup> In subsequent guidance, we have stated that an agency's use of outside recommendations is only one of several factors that can be useful in properly designating a member's status on a committee.<sup>19</sup> In general, the weight that outside recommendations should be given as a factor will vary depending upon how the recommendations were obtained, their overall use in the appointment process, and how much of a role outside entities are given in selecting members.

Agencies generally have different practices and methods for obtaining recommendations for positions on advisory committees. Some agencies publish notices in the *Federal Register*. Other agencies issue press releases allowing interested groups and individuals an opportunity to recommend prospective candidates for committee service. In some cases, Congress may require an agency to obtain recommendations from outside groups for prospective committee members.<sup>20</sup>

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<sup>17</sup> See GAO Report at pp. 24-25.

<sup>18</sup> See OGE 82 x 22 at p. 331.

<sup>19</sup> See OGE 04 x 9.

<sup>20</sup> See 21 U.S.C. § 360c(b)(2), ("Scientific, trade, and consumer organizations shall be afforded an opportunity to nominate individuals for appointment to the panels.") See also, 21 C.F.R. § 14.82 (publication of "one or more notices in the *Federal Register* each year requesting nominations for voting members of all existing standing advisory committees.") The Department of Agriculture's Forest Service routinely seeks recommendations for the names of prospective nominees for its Resource Advisory Committees (RACs) established under

The manner in which an agency solicits outside entities for recommendations for committee member positions should be considered in determining whether an individual is serving in a representative status on an agency's committee. A representative status would be more likely in situations where outside entities have a greater role in the selection and nomination process. For example, a representative status would be more likely if an agency: compiled a list of potential candidates (based on recommendations it received from outside entities), subsequently distributed that list to outside entities, and then asked them to select a person the agency would then appoint to represent their interests or views. A selection process in which outside entities are to a large extent responsible for recommending and selecting the members that would represent its views would strongly support a non-employee representative designation.

### *3. Acting as a Spokesperson*

Another important factor for agency officials to consider in determining the status of an advisory committee member is the function a member is expected to play on the committee. If a committee member is expected to function as a spokesperson for nongovernmental groups or stakeholders, the committee member would be serving as a representative member. In this role, the member would be expected to represent and speak on behalf of the interests, views, or biases of a recognizable group of persons or class of stakeholders.

There are different indicia that an agency official may look to in determining whether a committee member is expected to function as a spokesperson for the interests of outside groups or stakeholders. For example, a spokesperson relationship would be present or more likely to be present in situations where a committee member:

- (1) is expected to have the authority to bind certain outside groups or stakeholders to particular positions on issues that will likely be presented to a committee for deliberation or discussion (although this authority may be rare because of the difficulty a member would have in reaching consensus or agreement

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Section 205 of the Secure Rural Schools and Community Self Determination Act of 2000 (Public Law 106-393).



among the various interested stakeholders or groups on issues before a committee, its presence is strongly indicative that the member is serving in a representative capacity);

(2) is being selected to serve on a committee based upon that member's past affiliations or dealings with certain interested outside groups or stakeholders and the member's substantial knowledge of the views or positions of these entities (e.g., a member may have in the past served as a spokesperson for the same outside groups or stakeholder on non-committee matters);

(3) is expected to engage in regular consultations with outside groups or stakeholders regarding the substance of committee discussions and deliberations during the member's term of service (e.g., the member may be required by the committee's enabling authority to consult with outside groups or stakeholders on pending matters coming before the committee); or

(4) is expected to be given access to privileged or confidential information about and from outside groups and stakeholders that may not be necessarily shared with other members of the committee but which will assist a member in representing these entities.

Of course, whether a member is expected to function as a spokesperson for an advisory committee will depend upon the facts and circumstances in each case. A committee's mandate or purpose, as determined by the law, Presidential directive or other authority creating the committee, will have a large impact in determining what role a member is expected to have on a committee. Agency officials may also want to look at a committee's selection and appointment process as well as its current policies, practices, and committee rules regarding representative members in determining whether a member will be serving as a spokesperson on a committee.

**USE OF THE TERM "REPRESENT" AND ITS COGNATE FORMS IN  
AUTHORIZING LEGISLATION OR OTHER ENABLING DOCUMENTS**

A common misstep, in determining the status of a member serving on an advisory committee, is for an agency official to conclude that a member is serving in a "representative" status solely because a committee's authorizing legislation or other enabling document uses the word "represent" (or any of its cognate forms) in describing the committee's membership. In the GAO report cited earlier, GAO recognized that some of this confusion may have derived from language in OGE 82 x 22. GAO concluded that the last section in that memorandum implies that, when the term "representative" is used in an advisory committee's authorizing legislation or other enabling documents, members of that committee should be classified as representatives.<sup>21</sup>

In subsequent guidance, OGE has said that using the term "represent" in an advisory committee's authorizing legislation or in its enabling documents does not necessarily mean that the members of that committee are to be appointed as representative members. Oftentimes, the term "represent" may be used in a more generic sense (e.g., to describe the kinds of expertise, knowledge, or employment background that should be included in a committee's membership) rather than for the express purpose of classifying a member's role on the committee.

For example, a committee's enabling authority may require that its membership include a representative with expertise in natural sciences to be selected from a college or university. The use of the word "representative" in this case would not, by itself, require an agency to appoint a representative member to the committee. Absent more compelling language about the member's role on the committee, the use of representative in this case could merely convey that this particular committee member should have a background in the natural sciences and that the member should come from academia.

However, if the same enabling authority contained additional language, different conclusions about status might be made. If the enabling authority also said that the member shall be nominated by outside stakeholders and that the member is to provide the views and perspectives of those stakeholders, the member should be appropriately appointed as a representative member. Conversely, if the enabling authority stated instead

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<sup>21</sup> See GAO Report (cited earlier on page 1) at p. 24.

that the member should serve in the member's individual capacity and exercise independent judgment, the member should not be considered to be serving in a representative status on the committee.

Accordingly, in reviewing a statute, Presidential directive or other documentation establishing an advisory committee, the use of the term "represent" or any of its cognates should not end an agency's inquiry on whether a member will be serving as a representative or an SGE. Rather, agency officials should carefully scrutinize the language in a committee's enabling authority and in light of all relevant factors determine whether committee members are actually intended to serve as a representative of outside interests groups or as an SGE.

#### **USING CHARTER INFORMATION IN STATUS DESIGNATIONS**

As discussed in OGE 82 x 22, a committee's enabling law is an essential document in determining the status of persons serving on an advisory committee. Among the other documents that may be helpful in identifying a member's status for purposes of applying conflicts rules is a committee's FACA charter. All committees must file charters before meeting or taking any action as a committee whether a committee is discretionary (i.e., created by agencies or authorized by Congress or the President but not directed to be established) or nondiscretionary (i.e., required by statute or Presidential authority to be established).<sup>22</sup> Agencies must file these charters with GSA, the respective agency heads, appropriate committees in Congress, and the Library of Congress.<sup>23</sup>

In general, FACA requires advisory committee charters to contain a description of a committee's mission, goals, and objectives and other basic information about the advisory committee.<sup>24</sup> Charter information may be useful to ethics officials in understanding how a committee will operate and the role committee members will have on a committee, especially where details are otherwise lacking in the committee's enabling

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<sup>22</sup> See 5 U.S.C. app. II, § 9(c).

<sup>23</sup> See 41 C.F.R. § 102-3.70.

<sup>24</sup> See 5 U.S.C. app. II § 9. In all, FACA identifies ten types of information required in committee charters.

authority. For example, a charter may provide information on subcommittee establishment and whether members will be compensated by the agency. The charter may also alert ethics officials to any additional conduct rules that may apply to their committee members.<sup>25</sup> These rules may, for example, emanate from authority conferred to an agency under its organic statute. Ethics officials should cover these rules in ethics training provided for committee members.

#### **ETHICS ISSUES REGARDING SUBCOMMITTEES**

In general, when permitted by the agency or other enabling authority, an advisory committee can establish subcommittees to perform specified tasks for the "parent" committee.<sup>26</sup> These subcommittees perform time-consuming tasks that would be difficult for the parent committee to do during regular meetings. For example, a subcommittee may be established to screen complex proposals for a parent committee's later consideration. In general, subcommittees enable the advisory committee to function more effectively and efficiently.

Members of the parent committee may be chosen to serve on one of its subcommittees, or other individuals who are not already members of the parent committee may be appointed to serve as subcommittee members. These other individuals may be appointed to provide the committee with needed subject matter and technical expertise.

Subcommittee members, like parent committee members, may be subject to Government ethics rules depending upon their role and the type of advice they are providing to the subcommittee. It is important that subcommittee members are properly designated for ethics purposes, using the same criteria discussed above.

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<sup>25</sup> For example, the National Wild Horse and Burro Advisory Board Charter, filed on July 21, 2004, elaborates on the duties of the board, ethics responsibilities of members, and the creation of subcommittees.

<sup>26</sup> See 41 C.F.R. § 102-3.35.

## **TERMINATING, REVIEWING, AND REESTABLISHING ADVISORY COMMITTEES**

Subject to certain exceptions, an advisory committee will normally terminate two years from the date it was first established.<sup>27</sup> However, some committees continue to exist beyond the normal two-year cutoff period, if the President or an agency head renews or reestablishes the committee or if the committee's enabling authority does not provide any termination provisions. A new charter must be filed for a renewed or reestablished committee; for ongoing committees, charters must be filed every two years.<sup>28</sup> Agencies should consider using the periodic filing of these charters by a committee as an opportunity to ensure that status designations of members are being properly made by agency officials.

However, Congress may exempt committees, which do not have termination provisions, from these chartering requirements. These "standing committees" may pose some special challenges. For instance, an agency may have only designated the status of the committee's members once, when the committee was first established by Congress. If the enabling law has since been amended substantially, these initial status designations may no longer be appropriate for certain committee members.

Accordingly, the status designations of members serving on all committees, including those that may be exempt from having to renew or reestablish their committees or from the general chartering requirements, should be periodically reviewed by agency officials. Any such review should ensure that these designation decisions have appropriately considered changes that may have occurred in a committee's enabling authority.

### **CONCLUSION**

We appreciate the efforts of ethics officials in addressing advisory committee ethics issues in the past year. Your continued involvement and support of your agency's committee appointment process will help ensure that committee members

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<sup>27</sup> See 41 C.F.R. § 102-3.55.

<sup>28</sup> Certain subcommittees that report directly to a Federal officer or agency are also required to file charters. See 41 C.F.R. § 102-3.70(c).

comply with applicable ethics rules. This guidance is meant to further assist agency ethics officials in supporting those agency officials who are responsible for appointing members to serve on advisory committees. It is important that agencies have appropriate policies and procedures in place for designating the status of advisory committee members and for addressing ethics concerns arising from committee appointments. We encourage ethics officials to share this memorandum with committee management officials that have appointment responsibilities, and let them know of the continued availability of ethics officials to assist with the designation process.