



Federal Housing Finance Board

February 2, 1994

MEMORANDUM

TO: Lawrence U. Costiglio
Director

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SUBJECT: Federal Advisory Committee Act

We have been asked to research and provide advice on the Federal Advisory Committee Act, 5 U.S.C. App. §§ 1 - 15, ("FACA"). This memorandum is intended to present the current state of the law, as it has been interpreted by the courts, without at this point attempting to apply the law to any particular scenario or set of facts involving the Federal Housing Finance Board.

I. Summary

The analysis of whether a particular group is subject to FACA is a very fact-specific analysis which is not without some uncertainty. Section II below addresses Congressional findings contained in FACA, the provisions of the statute, and the regulations promulgated by the General Services Administration ("GSA") pursuant to FACA. As discussed in section II, the courts have not seemed to rely on GSA's regulations for an authoritative interpretation of FACA. Section III discusses the facts and holdings of many of the cases that have interpreted FACA's operative definition of "advisory committee." The Conclusion, at section IV, summarizes the analysis that we believe a court would use to determine a group's status under FACA, and whether a court would be likely to determine that a group with particular features is subject to FACA.

II. Statutory and Regulatory Provisions

A. Purpose and Findings of the Statute

FACA was enacted by Congress in 1972 out of a desire to promote the effective use of advisory committees in the executive branch of the government. H. Rep. No. 1017, 92d Cong., 2d Sess. 1 (1972). ("House Report") (Since there was no Senate report on FACA, the House Report constitutes the most

authoritative legislative history on FACA.) The House Report stated that "[t]he Congress should spell out in public law the philosophy behind and need for advisory bodies and definitely establish policy and administrative criteria for their use at all levels of government." *Id.* at 2.

In FACA, Congress specifically made findings that:

(1) the need for many existing advisory committees has not been adequately reviewed;

(2) new advisory committees should be established only when they are determined to be essential and their number should be kept to the minimum necessary;

(3) advisory committees should be terminated when they are no longer carrying out the purposes for which they were established;

(4) standards and uniform procedures should govern the establishment, operation, administration, and duration of advisory committees;

(5) the Congress and the public should be kept informed with respect to the number, purpose, membership, activities, and cost of advisory committees; and

(6) the function of advisory committees should be advisory only, and that all matters under their consideration should be determined, in accordance with law, by the official, agency, or officer involved.

5 U.S.C. App. § 2(b).

B. General Requirements of the Statute and Regulations

In order to attain the objectives listed above, FACA imposes a number of requirements on advisory committees. For example, FACA requires that each advisory committee file a charter, *Id.* at § 9(c), and keep detailed minutes of its meetings, *Id.* at § 10(c). Those meetings must be chaired or attended by an officer or employee of the federal government who is authorized to adjourn any meeting when he or she deems its adjournment in the public interest. *Id.* at § 10(e). FACA also requires advisory committees to provide advance notice of their meetings and to open them to the public, *Id.* at § 10(a), unless the President or the agency head to which an advisory committee reports determines that it may be closed to the public in accordance with the Government in the Sunshine Act, 5 U.S.C. § 552b(c), 5 U.S.C. App. § 10(d).

In addition, FACA stipulates that an advisory committee's minutes, records, and reports be made available to the public, unless they come within one of the Freedom of Information Act's exemptions, see 5 U.S.C. § 552, and the Government chooses to withhold them. 5 U.S.C. App. § 10(b). Advisory committees established by legislation or created by the President or other federal officials also must be "fairly balanced in terms of the points of view represented and the functions" they perform. *Id.* at §§ 5(b)(2), (c). The existence of an advisory committee is limited to two years, unless its charter is renewed for an additional two years or it is specifically exempted from the two-year limitation by statute. *Id.* at § 14(a)(1).

FACA empowers the Administrator of General Services to adopt administrative guidelines and regulations to carry out portions of FACA. *Id.* at §§ 7, 10. FACA also makes the head of every agency that has an advisory committee or committees responsible for a number of facets of the operation of the advisory committee(s). *Id.* at § 8. GSA's regulations are found at 41 C.F.R. §§ 101-6.1001 through 101-6.1035. GSA's regulations generally interpret FACA, primarily detailing how it is to be administered, and provide definitions for many of the terms used in FACA, including the term "advisory committee."

Although it would be useful to be able to rely on GSA's regulations, in particular the definition of "advisory committee," recent case law makes it clear that GSA's regulations should not be looked to for definitive interpretation of FACA. In Public Citizen v. Department of Justice, 491 U.S. 440 (1989), the Supreme Court gave two reasons for not deferring to GSA's regulatory definition of "advisory committee." *Id.* at 464-65, n.12. First, FACA did not specifically empower GSA to issue a regulatory definition of "advisory committee." *Id.* Second, GSA's regulations are not a contemporaneous interpretation of the statute, as they did not go into effect until 1987, a full 15 years after FACA's enactment. *Id.* See, also, Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton, 997 F.2d 898, 913 (D.C. 1993) (declining to defer to GSA's construction of FACA because FACA is interpreted by all agencies).

Due to the lack of deference by the courts to GSA's regulations, this memorandum does not rely on the regulation's definitions. Instead, the memorandum merely notes whether an interpretation by a court is consistent with the interpretation contained in GSA's regulations.

C. Statutory Definition of "Advisory Committee"

Section 3(2) of FACA, as set forth in 5 U.S.C. App. § 3(2), defines "advisory committee" as follows:

For the purposes of this Act -

(2) 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 . . . (iii) any committee which is composed wholly of full-time officers or employees of the Federal Government.

The definition of an "advisory committee" in section 3(2) of FACA was not carefully worded by Congress with judicial interpretation in mind. It could be interpreted to be very broad in its reach. This lack of precision on the part of Congress has given rise to litigation regarding the meaning of "advisory committee." These cases are summarized and discussed below.

III. Caselaw Construing FACA

The discussion of cases construing FACA that follows is in five sections: A) the meaning of the phrase "established or utilized;" B) the distinction between groups that provide collective advice and groups in which the members provide individual advice; C) the treatment of subgroups and subcommittees of groups; D) the distinction between advisory groups and operational groups; and E) the exemption for groups composed wholly of full-time federal employees.

A. "Established or Utilized"

Based on the plain meaning of the statutory language, it might seem that a group would constitute an advisory committee under FACA if either of two things were true. First, if the group were "established . . . by the President . . . or . . . one or more agencies, in the interest of obtaining advice or recommendations . . .," or, in the alternative, if the group were "utilized by the President . . . or . . . one or more agencies, in the interest of obtaining advice or recommendations . . ." FACA § 3(2) (emphasis added). However, based on the interpretation of FACA adopted by the Supreme Court in Public

Citizen, supra, the term "utilized" does not have its commonly accepted meaning. Instead, according to the Supreme Court, it was added by Congress "simply to clarify that FACA applies to advisory committees established by the Federal Government in a generous sense of that term, encompassing groups formed indirectly by quasi-public organizations . . . "for" public agencies as well as "by" such agencies themselves." 491 U.S. at 462. Public Citizen is more fully discussed below, at III.A.2. The discussion that follows details how courts have interpreted the terms "established" and "utilized."

1. "Established"

No case that was reviewed for this memorandum turned solely on the issue of whether a group was "established" by the President or by an agency. One case, however, concluded that a group in question was not "established" within the terms of FACA, and identified four factors as being dispositive of this issue. Center for Auto Safety v. Federal Highway Administration, No. 89-1045, 1990 U.S. Dist. LEXIS 13733, at *6 (D.C., October 12, 1990). First, the group was not funded by the government. Second, the group's agenda was not set by the government. Third, the government did not appoint its members. And fourth, the group was not an "offspring of a quasi-public entity subject to FACA." *Id.*

It is not clear from Center for Auto Safety whether the court concluded that all four, or a majority of, these factors must be satisfied in order to conclude that a group was not "established." However, if all four factors are satisfied, then it is likely that a court would determine that a group was not "established," and therefore was not an advisory committee. In other cases, that both preceded and followed Center for Auto Safety, all four of these factors were satisfied by other groups and the courts found them not to be "advisory committees" subject to FACA. However, no other court discussed the factors as explicitly as did the court in Center for Auto Safety. See, e.g., Public Citizen, supra, Nader v. Barooy 396 F. Supp. 1231 (D.C. 1975), Natural Resources Defense Council v. Environmental Protection Agency, 806 F. Supp. 275 (D.C. 1992).

In Center for Auto Safety Judge Royce C. Lamberth of the U.S. District Court for the District of Columbia found that a Task Force of the American Association of State Highway and Transportation Officials ("AASHTO Task Force") was not an advisory committee subject to FACA. 1990 U.S. Dist. LEXIS 13733

1. AASHTO, as described by the court, is a non-profit privately incorporated association comprised of state government transportation agencies. 1990 U.S. Dist. LEXIS 13733 at *2. AASHTO's mandate is to foster the development, operation and maintenance of a nationwide integrated transportation system. AASHTO pursues those goals by developing policy recommendations,

at *7. This was despite the fact that two different employees of the Federal Highway Administration ("FHWA") had served as secretary of the MSHTO Task Force on Geometric Design, and that the FHWA had adopted a report of the AASHTO Task Force as the federal standard for geometric highway design through a rulemaking in 1985. Id. at *2, *3.

In addition to the four factors cited above which were determinative of whether the MSHTO Task Force was "established" by the FHWA, the court noted two other factors in finding that the MSHTO Task Force was not subject to FACA. First, the court found no evidence that any FHWA employee, as MSHTO Task Force member or secretary, solicited or received advice for the FHWA. Second, the court pointed out that procedural safeguards such as public rulemaking proceedings pursuant to the Administrative Procedures Act prior to federal adoption of findings of the MSHTO Task Force would ensure that the findings were not simply rubber-stamped by the FHWA. Id. at *7.

2. "Utilized"

"Utilize" is a woolly verb, its contours left undefined by the statute itself. Read unqualifiedly, it would extend FACA's requirements to any group of two or more persons, or at least any formal organization, from which the President or an executive agency seeks advice." So stated the Supreme Court in Public Citizen, supra, 491 U.S. at 452. Indeed, it is clear from the caselaw that a group is not an advisory committee, subject to FACA, just because the President or an agency receives and uses its advice. See, e.g., Public Citizen, supra, Nader v. Baroody, supra, Center for Auto Safety, supra.

In Public Citizen, the Supreme Court affirmed the holding of the U.S. District Court for the District of Columbia that FACA did not apply to the Standing Committee on Federal Judiciary of the American Bar Association ("ABA Committee"). Public Citizen, 491 U.S. at 467. As described in the Court's opinion, the ABA Committee provides evaluations and ratings of nominees and potential nominees for federal judgeships to the President, the Department of Justice ("DOJ"), and the Senate Judiciary Committee, upon request. The ABA Committee has provided such evaluations and ratings since 1952. Id. at 443-45.

All parties to the litigation agreed that the ABA Committee was not "established" by the President or the DOJ. The Court stated that it was equally plain that the ABA Committee was a committee that furnished "advice or recommendations" to the President via the DOJ. Id. at 452. Therefore, whether the ABA

(Footnote 1 continued from previous page)
sponsoring research activities, and collecting technical information on highways. Id.

Committee constituted an "advisory committee" for purposes of FACA depended on whether it was "utilized" by the President or the DOJ as Congress intended that term to be understood. The Court stated that "[t]here is no doubt that the Executive makes use of the ABA committee, and thus "utilizes" it in one common sense of the term." Id. However, the Court concluded that the ABA Committee was not an advisory committee subject to FACA. Id. at 467.

The Court concluded that the ABA Committee was not an advisory committee after an extensive discussion of the legislative history of FACA. The Court concluded that the phrase "or utilized" had been added by Congress to clarify that FACA applies not only to advisory committees established by the federal government directly, but also to those established indirectly through quasi-public, semiprivate organizations created or permeated by the government. Id. at 462 - 63. The holding of Public Citizen was later described by then - Judge Ginsburg: "Public Citizen . . . focused on the term "utilized," but the Court defined that term in relation to the preceding term "established" in the statutory formulation: a group "established or utilized by" an agency. In the Court's delineation, as we understand it, "established" indicates a government-formed advisory committee, while "utilized" encompasses a group organized by a nongovernmental entity but nonetheless so closely tied to an agency as to be amenable to strict management by agency officials." Food Chemical News v. Young, 900 F.2d 328, 332 - 33 (D.C. 1990) (Judge Ruth Bader Ginsburg) (citations omitted).

Even prior to the Supreme Court's Public Citizen decision in 1989, it was already well established that FACA did not apply to a group just because its advice or recommendations were "utilized" by the President or an agency. In Nader v. Baroody, Judge Gesell of the U.S. District Court for the District of Columbia held that groups of leading citizens from different fields did not constitute advisory committees under FACA merely because they met with the President and senior White House staff and might provide advice as part of their meetings. 396 F. Supp. at 1235. The groups in question had no connection with each other prior to being invited to the White House as part of a regular program of meetings and any advice offered was not specifically solicited in advance. Judge Gesell stated that Congress intended FACA to cover formally organized advisory committees which were directed to provide recommendations on an identified governmental policy for which specified advice was being sought, and did not intend for it to cover casual, informal contact by the President with ad hoc groups of interested segments of the population. Id. at 1234. In other words, although the Executive may have received and used the advice of the groups, they were not subject to FACA because they were not "established" by the Executive, as discussed above.

Similarly, in Center for Auto Safety, discussed above, MSHTO's Task Force was not an advisory committee because it was not "established" by or for the Executive, even though the advice and recommendations of the Task Force were used by the FHWA since its report was adopted by the FHWA as the federal standards for highway design through the rulemaking process.

B. Collective versus Individual Advice

A group may be "established" by an agency that appears to be an advisory committee yet may not constitute an advisory committee because it is not providing collective advice and recommendations to the government. The group is instead a collection of experts whose individual advice is being sought by the government. In Natural Resources Defense Council, Inc. v. Herrington, a panel which was convened by the Secretary of the Department of Energy to study the operation of one nuclear reactor was determined not to be an advisory committee. 637 F. Supp. 116 (D.C. 1986). The panel was funded by DOE, the members of the panel were selected by DOE, and the specific task of the panel was determined by DOE. *Id.* In holding that the panel was not subject to FACA, the court relied solely on the fact that the members of the panel were to work independently and report to DOE individually. *Id.* at 119 - 20. The only meetings of the panel as a group were to permit the DOE to brief the members of the panel, not for the members to confer with each other. *Id.*

Similarly, in Association of American Physicians and Surgeons, Inc. v. Hillary Rodham Clinton, supra, the Court of Appeals for the D.C. Circuit stated that "a group is a FACA advisory committee when it is asked to render advice or recommendations, as a group, and not as a collection of individuals." Clinton, 997 F.2d at 913-14. The court continued "[t]he whole, in other words, must be greater than the sum of the parts." In Clinton, the Court of Appeals overturned the district court's decision that working groups that advised and gathered information on behalf of a Task Force were not subject to FACA and ordered that additional discovery be permitted because there was not enough evidence on the record to determine whether the working groups deliberated together and produced collective advice or whether they merely gathered information and passed on the individual advice and conclusions of the members. *Id.* at 916.

C. Subgroups and Subcommittees

FACA defines an advisory committee to include subgroups and subcommittees, as follows: "[t]he term 'advisory committee' means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof . . ." 5 U.S.C. § 3(2). This phrase was interpreted in a recent FACA decision of the Court of Appeals for the D.C. Circuit. In Clinton, the Court of Appeals held that a subgroup or subcommittee of a parent group must

independently meet the requirements of FACA in order to be subject to FACA, regardless of whether or not the parent group is subject to FACA. 997 F.2d at 913. The Court of Appeals remanded the case to the district court for additional discovery regarding the actual operation of the working groups in question, and the status of the members of the working groups, in order to permit the district court to determine whether the working groups were subject to FACA. Id. at 916. At this time, discovery is still proceeding at the district court level.

The Court of Appeal's holding in Clinton reversed the district court's decision on the issue of whether the working groups were subject to FACA. The district court had concluded that the working groups, the subgroups or subcommittees in this case, were not subject to FACA. 813 F. Supp. 82, 89 (D.C. 1993). In doing so the district court relied on National Anti-Hunger Coalition v. Executive Committee, 557 F. Supp. 524 (D.D.C.), aff'd 711 F.2d 1071 (D.C. Cir. 1983); (task forces that performed staff-like functions were not subject to FACA even though they supported a committee that was itself subject to FACA) and on the regulations promulgated by GSA pursuant to FACA. The regulations provide as an example of a group not covered by FACA "meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee." 41 CFR § 101-6.1004(k). See, also, Washington Post v. National Council on the Arts, No. 92-0955, 1992 U.S. Dist. LEXIS 5885 (D.D.C 1992) (informal, information-gathering working groups not subject to FACA).

D. Operational v. Advisory

The House Report on FACA makes clear that the definition of "advisory committee" included in the statute does not cover those committees or commissions which have "operational" responsibilities, giving the examples of the Interstate Commerce Commission or the Civil Aeronautics Board. House Report at 4. Instead, FACA applies only to those committees established for the purpose of obtaining advice. Id.

2. GSA's FACA regulations also contain an exemption for "operational" committees. The regulations define operational functions as "those specifically provided by law, such as making or implementing government decisions or policy." 41 CFR § 101-6.1004(g). The regulations further state that "an operational committee may be covered by [FACA] if it becomes primarily advisory in nature." Id.

The caselaw provides little assistance as to what constitutes an "operational" group in contrast to an advisory group. In one recent case that turned on the distinction between an operational group and an advisory one, the U.S. District Court for the District of Columbia, Judge Joyce Hens Green, determined that the Governor's Forum on Environmental Management ("Forum") was not subject to FACA because it was an operational, not an advisory, group. Natural Resources Defense Council v. Environmental Protection Agency, 806 F. Supp. 275 (D.C. 1992) ("NRDC").

In NRDC, the court found that the Forum was an independent, non-advisory, operational group. *Id.* at 278. The Forum, which had been established at the suggestion of EPA Administrator Reilly to assist the EPA by coordinating the federal and state administration of the Safe Drinking Water Act, consisted of nine state governors selected by the EPA with one designated by the EPA to act as chair. The court found that the Forum was not an advisory committee. Specifically, the court relied on the fact that the Forum's proposals could not be implemented solely by the EPA, but would require legislative action on both the state and federal levels. *Id.* The court also emphasized that the chair of the Forum was responsible for convening meetings, setting the agenda, and drafting proposals. Further, neither the Forum nor the governors that comprised it received any federal funds, and the membership of the Forum was not fixed. *Id.*

The distinction between operational and advisory groups was also dispositive in another case in federal district court in the District of Columbia. In Public Citizen v. Commission on the Bicentennial of the United States Constitution, Judge Oberdorfer held that the Commission on the Bicentennial of the United States Constitution ("Commission") was not an advisory committee subject, to FACA. 622 F. Supp. 753, 758 (D.C. 1985). The court relied on the fact that the Commission was empowered to make plans regarding the public celebration of the bicentennial of the Constitution, and to carry out those plans. Although the Commission was required to provide an annual report to Congress and to the President regarding the plans and its efforts to carry them out, the Commission's primary function was not to provide "advice" to the executive, but rather to be an operational group. *Id.*

E. Full-time Federal Employees

The definition of an advisory committee in section 3(2)(iii) of FACA specifically exempts "any committee which is composed wholly of full-time officers or employees of the

3. These last two factors seem to have more to do with whether the Forum was "established" by the government, as discussed above. However, the court does not address this topic directly.

Federal Government." This provision would not normally be the source of much litigation regarding its meaning, but a recent case turned on the definition of "officers or employees of the Federal Government." In Clinton, supra, the district court determined that a Task Force established by the President to provide advice regarding the health care system was subject to FACA due to the presence of the President's spouse on the Task Force. 813 F. Supp. at 88. The district court determined that the President's spouse is not, and cannot be, a full-time officer or employee of the federal government. The district court concluded that the definitions of "officer" and "employee" found in Title 5 apply to FACA and that the President's spouse does not meet either of those definitions.

4. Although the district court determined that the Task Force was subject to FACA, it then went on to conclude that FACA was unconstitutional as applied to the Task Force based on the separation of powers due to the possible effect that the open meetings and open records requirements of FACA might have on the ability of the President to obtain the candid advice of his or her advisors. *Id.* at 93.

5. Section 2104 of Title 5 defines an officer of the federal government as follows:

- (a) For the purpose of this title [Title 51, "officer," except as otherwise provided by this section or when specifically modified, means a justice or judge of the United States and an individual who is -
- (1) required by law to be appointed in the civil service by one of the following acting in an official capacity -
 - (A) the President;
 - (B) a court of the United States;
 - (C) the head of an Executive agency; or
 - (D) the Secretary of a military department;
 - (2) engaged in the performance of a Federal function under authority of law or an Executive act; and
 - (3) subject to the supervision of an authority named by paragraph (1) of this section, or the Judicial Conference of the United States, while engaged in the performance of the duties of his office

Section 2105 of Title 5 defines an employee of the federal government as follows:

- (a) For the purpose of this title [Title 51, "employee," except as otherwise provided by this section or when specifically modified, means an officer and an individual who is -
- (1) appointed in the civil service by one of the following acting in an official capacity -
 - (A) the President;
 - (B) a Member or Members of Congress, or the Congress;
 - (C) a member of a uniformed service;
 - (D) an individual who is an employee under this section;
 - (E) the head of a Government controlled corporation; or

The Court of Appeals for the D.C. Circuit overturned the district court's decision, holding that the phrase "full-time officer or employee of the government" in FACA could include the spouse of the President. 997 F.2d at 911. Therefore, it necessarily held that the definitions of "officer" and "employee" at sections 2104 and 2105 of Title 5 do not control FACA, at least when applied to the spouse of the President. *Id.* at 903 - 05. It is unclear how useful the decision in Clinton is to the analysis of whether a group that advises an agency is subject to FACA, due to the strained attempts by both the district court and the Court of Appeals to balance the statutory requirements of FACA with the separation of powers issue raised by the application of FACA to any group that advises the President.

IV. Conclusion

Based on the cases discussed above that interpret what constitutes an advisory committee under FACA, the following conclusions can be drawn regarding how a court might analyze whether a group is subject to FACA.

First, a group must be established by the government, or for the government by a quasi-public organization. A court will likely find a group not to have been "established" by the government if (1) the group is not funded by the government; (2) the group's agenda is not set by the government; and (3) the government does not appoint the members of the group. If fewer than all three of these factors are satisfied, it is not clear whether a court would find the group to have been established by or for the government. It apparently does not affect the analysis if officers or employees of the federal government

(Footnote 5 continued from previous page)

(F) an adjutant general designated by the Secretary concerned under section 709(c) of title 32;

(2) engaged in the performance of a Federal function under authority of law or an Executive act; and

(3) subject to the supervision of an individual named by paragraph (1) of this section while engaged in the performance of the duties of his position. . . .

5 U.S.C. §§ 2104, 2105.

6. The plaintiffs also pointed out that the provisions of the "Anti-nepotism Act," 5 U.S.C. § 3110, preclude the President from appointing or hiring member? of his or her family to positions as officers or employees of the federal government. Because the court had already determined that the plain language of the definitions of "officer" and "employee" at sections 2104 and 2105 did not include the spouse of the President, the court did not address the Anti-nepotism Act. 813 F. Supp. at 87, n.8.

attend the meetings of the group, or even if they are members of the group. If a group is established by a private organization, even at the request of the government, in order to provide advice to the government, it appears that a court might find that the group was not established by or for the government, and therefore was not subject to FACA.

If a court determines that a group was established by or for the government, an analysis of the caselaw indicates that a court would consider whether the group is expected to provide and/or in fact provides the collective advice of the group in order for the court to find that the group is subject to FACA. If the members of the group merely provide their individual advice to the government, the group will likely not be found to be subject to FACA.

Other circumstances can result in a group not being subject to FACA. If the group is found to be operational rather than advisory, it is not subject to FACA. If a group is composed wholly of full-time federal employees, it is not subject to FACA. If a group is a sub-group of a parent group, it is not subject to FACA merely because the parent group is subject to FACA. Instead, the sub-group itself must be analyzed, against the same standards as the parent group, to determine if it is subject to FACA.

To summarize very generally, if a group is established by or for the government, provides its collective advice to the government, has at least one member who is not a full-time officer or employee of the government, and is not primarily operational, a court would be expected to conclude that it is subject to FACA. If a group is established by or for the government, but the members of the group merely provide their individual opinions and advice, a court likely would conclude that the group is not subject to FACA. If a group is not established by or for the government, but the group provides its collective advice to the government, a court likely would conclude that the group is not subject to FACA. Lastly, if a group is not established by or for the government and the members of the group merely provide their individual advice to the government, a court would be expected to conclude that the group is not subject to FACA.

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