



## **Federal Advisory Committee Act Frequently Asked Questions**

### **Question 1. When do the Federal Advisory Committee Act (FACA) and the Frequently Asked Questions (FAQs) below apply?**

**Answer 1.** The FACA and FAQs below apply when an agency has “established or utilized” a workgroup, committee, etc. that contains at least one non-federal member for the purpose of “obtaining advice or recommendations” from that group as a whole.<sup>1</sup> The Federal Advisory Committee Management Final Rule (the Rule), 41 C.F.R. § 102-3.25, defines “utilized” as when “a committee ... is not established by the Federal Government,” but a “Federal office or agency exercises actual management or control over its operation.” 41 C.F.R. § 102-3.25. Appendix A to Subpart A of the Rule also states:

Although there is no precise legal definition of “actual management or control,” the following factors may be used by an agency to determine whether or not a group is “utilized” within the meaning of the Act:  
(a) Does the agency manage or control the group’s membership or otherwise determine its composition? (b) Does the agency manage or control the group’s agenda? (c) Does the agency fund the group’s activities?

41 C.F.R. § 102-3, Sub. A, App. A. No one factor is dispositive, requiring that we look at the totality of the circumstances to determine if the FACA applies. If FACA applies to an advisory committee or workgroup, then a strict set of statutory restrictions apply to the actions of the committee or workgroup unless the committee or workgroup meets an exemption. If the conditions above are not met because, for example, the agency does not establish or control the committee, then FACA does not apply and the workgroup can expand its membership without fear of violating FACA or the limited confines of its exemption.

### **Question 2. What exemptions to FACA may apply to federal agencies with advisory groups for**

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<sup>1</sup> Tribes have often expressed the concern that these Tribal-Federal workgroups should not take the place of tribal consultation. We do not intend to conflate the two here, since there is often a clear separation between Tribal-Federal workgroups created to obtain advice or recommendations and tribal consultation per the Department of Health and Human Services’ Tribal Consultation policy.

the purposes of dealing with Indian issues?

Answer 2. If certain conditions are met, the Unfunded Mandates Reform Act Exemption may apply. The statutory exemption to the FACA found in the Unfunded Mandates Reform Act (UMRA), 2 U.S.C. §1534(b) applies when:

- (1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities; and
- (2) such meetings are solely for the purposes of exchanging information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

2 U.S.C. §1534(b).

Question 3. If the workgroup is comprised of only tribal leaders, does this mean the UMRA exemption has been met?

Answer 3. Not necessarily. The UMRA exemption applies only to “elected officers of... tribal governments” and only when “acting in their official capacities.” Several tribal leaders serve on the boards of national organizations, health boards, health consortiums, and corporations. A tribal leader cannot sit on an UMRA FACA exempt workgroup as a representative of any entity other than his/her Tribe.

Question 4. Can anyone other than an elected officer of a tribal government participate in an advisory committee that meets the UMRA exemption?

Answer 4. Yes. Employees of an elected officer of a tribal government who have authority to act on that officer’s behalf and who are designated in writing may participate in a workgroup in lieu of the elected officer. In addition, a Washington representative of an association representing elected officials may be designated by an elected tribal leader to participate in workgroup meetings. A designated representative should have authority to speak for and bind the tribe he or she is representing in the same manner that the tribal official would.

Federal employees may also attend, speak, and participate in UMRA FACA exempt meetings as needed.

Question 5. Can an advisory committee operating under the UMRA exemption have open

microphone time during its meetings to hear comments from attendees?

Answer 5. No. This would remove the workgroup from the UMRA Exemption, and the FACA would have to be followed for the workgroup. The purpose of FACA is to ensure that advice by advisory committees is objective and accessible to the public. If an agency wants to have an open microphone time during a workgroup meeting, then the workgroup should be chartered as a FACA committee, and the meeting should be advertised and open to the public to ensure that all interests have the opportunity to present.

UMRA FACA exempt workgroups cannot allow non-member attendees at meetings to comment or ask questions during the meetings. To do so could invalidate any action an agency may take pursuant to the advice of the workgroup.

If an agency has a town hall meeting where the attendees provide their individual input rather than their collective advice, such a meeting does not implicate the FACA. 41 C.F.R. § 102-3.40(e). The town hall meeting would need to be completely separate from the UMRA FACA exempt workgroup meeting.

Question 6. Can members of the public attend an advisory committee meeting operating under the UMRA exemption?

Answer 6. Yes, but they must simply watch the meeting and must not participate in any way.

Question 7. Can the advisory committee members of an advisory committee operating under the UMRA exemption invite special guests to present on topics of interest to the workgroup?

Answer 7. If the special guest is an employee with authority to act on behalf of the elected tribal officer and the tribal officer has designated the special guest in writing, the guest can participate in lieu of the elected tribal officer. The tribal officer will not be able to sit on the advisory group at the same time as the guest, and the officer will not be able to actively participate in any discussions while the tribal officer is not seated on the advisory group.

Tribal leaders should be cautioned that the tribal leader is not merely yielding his or her time to speak to someone else; rather, the leader is vesting his authority as an elected leader with someone who is authorized to act on behalf of that leader and can bind the tribal government.

Question 8. What is a “Washington representative?”

Answer 8. Washington representatives are representatives of associations representing elected officials. Federal agencies are encouraged to communicate with these individuals because:

they often know which local elected officials are the most knowledgeable about, interested in, or responsible for, implementing specific issues, regulations or programs, and can ensure that a broad range of government officials learn of and provide valuable insight concerning a proposed intergovernmental mandate.

Memorandum from Alice M. Rivlin, Director, Office of Management and Budget to the Heads of Executive Departments and Agencies, *Guidelines and Instructions for Implementing Section 204, "State, Local, and Tribal Government Input," of Title II of P.L. 104-4* (Sept. 21, 1995), published at 60 Fed. Reg. 50651 (1995).

Question 9. What is the role of a technical advisor?

Answer 9. The role of a technical advisor is to advise the workgroup member that requested the technical advisor's attendance at the workgroup meeting. This advice is to be given in a non-disruptive manner in the form of private counsel whispered to the workgroup member, passed through notes, or communicated away from the workgroup meeting as a whole. Technical advisors are not members of the workgroup and are not allowed to sit at the table with workgroup members or speak to the other workgroup members during the meeting.

Question 10. Can an advisory committee operating under the UMRA exemption form subcommittees?

Answer 10. Yes, but the UMRA FACA exemption must be maintained for the subcommittee as well. This means that technical advisors cannot participate in subcommittees except to advise members on the subcommittee, as described in the Answer to Question 8, above. The members of the subcommittee must be: 1) elected Tribal leaders, 2) their designated employees, or 3) the representative of a Washington association designated by elected tribal leaders to act on their behalf.

Question 11. Other agency advisory councils allow urban Indian Organizations and Indian Health Boards to sit on their councils in their own right. Why will this advisory committee not do the same?

Answer 11. The UMRA only provides a limited exemption to FACA. The UMRA Exemption is clear that the exemption applies only when tribal leaders are "acting in their official capacities." Unless Congress specifically provides otherwise, urban Indian organizations and Indian Health Boards are not authorized to sit on an UMRA FACA exempt advisory council in their own right because they are not tribal leaders acting in their official capacities.

The American Recovery and Reinvestment Act of 2009 (ARRA) specifically expanded the Tribal Technical Advisory Group (TTAG) authority to allow an Urban Indian Organization representative to sit on the council. This is a statutorily created expansion of the UMRA FACA exemption and is not authority for inclusion of such representatives on other agency advisory councils.

Question 12. One of the tribal leaders on the workgroup recently lost his election. May he continue to serve out his term on an advisory committee operating under the UMRA Exemption?

Answer 12. No. Only elected tribal leaders acting in their official elected capacity (or their designated representative) may serve as a member on an advisory committee operating under the UMRA exemption. If an elected leader loses an election or is not reappointed to his/her elected office, then that individual is no longer eligible to serve on the workgroup. If the former workgroup member is also an employee of the newly elected officer of the tribal government who has authority to act on that officer's behalf, the newly elected officer may designate, in writing, the former member to server on the workgroup in lieu of the newly elected officer.

Question 13. Why is compliance with FACA so important?

Answer 13. Actions taken by advisory committees that do not comply with FACA or that do not meet the UMRA Exemption to FACA may be invalidated by the courts. In addition, any action that an agency takes based on the recommendation of a non-compliant advisory committee may also be invalidated. For example, in *Idaho Wool Growers Ass'n v. Schafer*, 637 F. Supp.2d 868 (D. Idaho 2009), the Idaho Wool Growers Association challenged the Forest Service's use of two advisory committees. The court found that the two committees did not fit the FACA exemption for intergovernmental committees, because there was no proof that the state government members were either elected state officials or their designated employees with authority to act on their behalf. Because the committees were not FACA-exempt and did not follow the FACA requirements, the court barred the Forest Service from using any of the committees' recommendations.