Creating a Federal Advisory Committee in the Executive Branch

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Summary

Federal advisory committees provide a formal forum for members of the public to provide advice and recommendations to the federal government on issues ranging from how to support trade goals of small and minority-owned businesses to which drugs best treat arthritis pain. Many of the roughly 1,000 federal advisory committees that operate at any given time are required to operate pursuant to the open meetings, records access, and reporting requirements of the Federal Advisory Committee Act (FACA).

Advisory committees are established for a number of reasons. These reasons often include acquiring new ideas from non-governmental experts, removing certain controversial topics from politically charged arenas, and reducing the workload of executive branch employees and Members of Congress.

Historically, Congress has established the majority of federal advisory committees. Of more than 1,000 federal advisory committees operating pursuant to FACA (FACA committees) in FY2015, for example, 722 (71.6%) were mandated or authorized by Congress—539 (53.4%) of which were required by statute while 183 (18.1%) were authorized, but not required, by statute. Other FACA committees were established by executive branch agencies or the President.

In FY2015, 20 *new* FACA committees that were required to be created by statute began operations. Five of these 20 *new* FACA committees were required to be established within the Department of the Interior—more than any other federal agency. Legislative provisions seeking to establish 11 additional FACA committees have been introduced but not enacted in the 114th Congress.

Should Congress want to authorize a new federal advisory committee, there are several statutory choices that might be considered. These considerations include a committee's mandate, membership requirements, powers, funding, and termination. This report provides a brief overview on how Congress can establish federal advisory committees, and provides some considerations as to why a federal advisory committee may or may not be an appropriate mechanism to assist a particular policy or funding question. The report also explores why FACA may or may not be appropriate for application to particular advisory committees. It presents data on the number of active FACA committees established by Congress with special emphasis on the committees established in FY2015. This report concludes by presenting a list of the federal advisory committees currently proposed for statutory establishment in the 114th Congress.

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Introduction

Congress, the President, and executive branch agencies use federal advisory committees to gain expertise and policy advice from individuals within and outside the federal government. Federal advisory committees are created to bring together various experts—often with divergent opinions and political backgrounds—to examine an issue and recommend statutory, regulatory, grantmaking, or other policy actions. Federal advisory committees are one of only a few formalized mechanisms for private-sector citizens to participate in the federal policymaking process. Federal advisory committees, however, are prohibited from creating policy or issuing regulations. Their role is to remain strictly advisory.

Federal advisory committees can be called task forces, panels, commissions, working groups, boards, councils, conferences, or other titles.[1] As noted above, federal advisory committees can be established either by Congress, the President, or an agency head. Congress has the power to establish a committee in two ways. First, Congress can specifically *mandate* that the committee be established by law. Second, Congress can *authorize* the establishment of a committee, but leaves the decision on whether to actually create the entity to a designated agency. Congress may decide to establish a federal advisory committee for a variety of reasons, among them

- to allow the federal government to collect the experts on a particularly technical or scientific topic in one location to debate the potential policy outcomes;
- to ensure that appropriate stakeholders of a particular policy arena have the opportunity to voice their opinions to policymakers;
- to attempt to remove a controversial policy option or funding decision from a highly charged political arena; or
- to reduce congressional or executive branch workloads.

When Congress chooses to establish an advisory committee, it may also determine whether the committee should be governed by or be exempted from the transparency, access, and reporting requirements of the Federal Advisory Committee Act (FACA).[2] For example, FACA requires all applicable advisory committees to file a charter prior to operation. The charter is required to include the committee's objectives, the committee's affiliated agency, the committee's duties, the estimated operating costs, the estimated number of committee meetings, and the anticipated termination date, among other information. Additionally, all advisory committee meetings that are subject to FACA are presumed to be open to the public, with certain specified exceptions.[3] Adequate notice of advisory committee meetings must therefore be published in advance in the *Federal Register*. Subject to certain records protections provided in the Freedom of Information Act,[4] all papers, records, and minutes of meetings must be made available for public inspection. Membership must be "fairly balanced in terms of the points of view represented and the functions

[1] U.S. President, "Prescribing Regulations for the Formation and use of Advisory Committees," 27 *Federal Register* 1875, February 26, 1962.

[2] 5 U.S.C. (FACA) Appendix. For more information on FACA and the operations of federal advisory committees, see CRS Report R40520, *Federal Advisory Committees: An Overview*, by (name redacted) . See also the General Services Administration Committee Management Secretariat, "FACA Brochure," at http://www.gsa.gov/portal/content/101010.

[3] Pursuant to 5 U.S.C. (FACA) Appendix §10(d), the President or the head of the affiliated agency may determine that certain meetings may be closed to the public. National security, personal privacy, and trade secrets are among the reasons a FACA committee meeting might be closed to the public.

[4] 5 U.S.C. §552.

to be performed," and the committee should "not be inappropriately influenced by the appointing authority or by any special interest."[5]

This report assists Members and staff when they are deciding whether a federal advisory committee is the appropriate mechanism to assist policymaking, grantmaking, or other questions. This report provides analysis of some primary components of federal advisory committee design, including examples of federal advisory committee structure and operations. The report examines some reasons Congress may choose to establish an advisory committee, and provides context to understand when applying the provisions of FACA to a committee could assist or hinder a committee's operations.

This report uses the provisions of FACA and information within the FACA Database[6] to shape its analysis of federal advisory committee creation. As part of FACA's statutory and regulatory requirements, agency officials report operating practices and committee costs into the FACA Database, an online data collection tool the General Services Administration (GSA) created and manages. The database is the only publicly available source that includes aggregated and historical information on FACA committee membership, operations, and costs. The collection of data on federal advisory committees and their operations provides around 1,000 examples of operating advisory committees in any year, more than half of which were created by statute.

Why Establish a Federal Advisory Committee?

Federal advisory committees can be established for a variety of reasons. According to a 1972 Senate Government Operations Committee report, advisory committees were intended to provide an "opportunity for the public to learn either about [advisory committee] deliberations and recommendations or about the information on which [advisory committees] base those recommendations."[7] Federal advisory committees, therefore, can be especially helpful in policy arenas where public access to and participation in debates and discussions are as important as (or, possibly more important than) the policy recommendations that emerge from those discussions.

In an examination of advisory commissions established by presidential directive, one scholar stated that these advisory commissions have traditionally allowed a President to

> deflect blame, buy time, and give the appearance of action on issues that are too politically charged, too difficult, to solve.[8]

The same study noted that commissions

> are used by presidents to garner greater public support for a policy to which the president is already committed; show symbolic concern over a situation at the highest level of

[5] 5 U.S.C. (FACA) Appendix §5(2).

[6] See http://facadatabase.gov/.

[7] U.S. Congress, Senate Committee on Government Operations, *The Federal Advisory Committee Act*, report to accompany S. 3529, 92nd Cong., 2nd sess., September 7, 1972, S.Rept. 92-1098 (Washington: GPO, 1972), p. 6. The report continued: "The lack of public scrutiny of the activities of advisory committees was found to pose the danger that subjective influence not in the public interest could be exerted on the Federal decisionmakers."

[8] Amy B. Zegart, "Blue Ribbons, Black Boxes: Toward a Better Understanding of Presidential Commissions," *Political Studies Quarterly*, vol. 34, no. 2 (June 2004), p. 372. Zegart specifically refers to commissions established by Congress or presidential directive that include at least one member of the general public. Generally, these commissions appear to qualify as FACA committees, but some commissions in her analysis were established and operated prior to FACA's enactment. Nonetheless, Zegart's findings appear to apply to FACA committees established by presidential directive, as well as those established by agency heads and Members of Congress.

> government; establish a fact base for others to use; respond to crises; deflect political heat from the president and allow passions to cool when issues become explosive; overcome the "stovepipes" and parochial thinking of the permanent bureaucracy; gather more information about a problem and its policy alternatives; forge consensus among the interests represented on the commission itself; and change the hearts and minds of men.[9]

The study attempted to group commissions into three categories:

- agenda commissions, which aim to attract support and attention to presidential policy initiatives;
- information commissions, which are designed to give "new ideas, new facts, and new analysis to policymakers"; and
- political constellation commissions, which seek to "foster consensus, compromise, and cooperation in a policy domain."[10]

Another researcher who examined the impetus for committee creation found that some committees are created to acquire new ideas from outside experts.[11] He added, however, that committees may be created to allow politicians to avoid blame for issues that are too cumbersome or too politically charged. Moreover, he stated that Members of Congress may create committees because of the immense workload of legislators. Creating an advisory committee can "pare down Congress's workload to more manageable dimensions or to handle and manage a problem in a timely manner."[12]

Scholars and practitioners of government have debated whether advisory bodies, in fact, increase public interaction with the federal government.[13] Other debates continue over whether advisory committees have a positive effect on the federal government,[14] or if they are a symptom of a federal government that is not performing properly.[15]

In 2011, two scholars found evidence that advisory committees can be useful to federal agencies, especially those that have a technical or scientific focus. Agencies like the Food and Drug Administration (FDA) consult "advisory committees when in-house information processing is relatively costly and the political stakes of its decisions are high." The highly valued information and expertise from advisory committees can be influential when agencies decide whether to approve a drug, device, or other committee recommendation.[16]

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[9] Ibid.

[10] Ibid.

[11] (name redacted), "Creating an Angel: Congressional Delegation to Ad Hoc Commissions," *Congress & The Presidency*, vol. 25, no. 2 (Autumn 1998), pp. 161-182.

[12] Ibid.

[13] Brian C. Murphy, "Implementation of the Federal Advisory Committee Act: An Overview," *Government Publications Review*, vol. 9 (January-February 1982), pp. 3-27; Jerry Mitchell, "Representation in Government Boards and Commissions," *Public Administration Review*, vol. 57, no. 2 (March - April 1997), pp. 160-167.

[14] William H. Miller, "Advisory Committee: The Invisible Branch of Government," *Industry Week*, February 23, 1976, pp. 30-40, 40-45, 47-48; Gary J. Schmitt, "Why Commissions Don't Work," *The National Interest*, vol. 15 (Spring 1989), pp. 58-66.

[15] Francis E. Rourke and Paul R. Schulman, "Adhocracy in Policy Development," *The Social Science Journal*, vol. 26, no. 2 (April 1989), pp. 131-142.

[16] Stéphane Lavertu and David L. Weimer, "Federal Advisory Committees, Policy Expertise, and the Approval of Drugs and Medical Devices at the FDA," *Journal of Public Administration Research and Theory*, vol. 21, no. 2 (April 2011), pp. 211-237.

Also in 2011, another scholar examining the utility of advisory committees in a national security context found that "national security commissions are much more likely to influence policy when they are formed in response to a crisis, established by the executive branch, or given a narrow mandate."[17] According to the author, Congress's fragmented decisionmaking

> makes it relatively hard for Congress to act with alacrity. ... The president or an agency head can form a commission and appoint its members quite quickly—often within weeks. But when members of Congress seek to establish a commission, the slow pace of the legislative process frequently allows the passage of many months, or even years, before its authorizing statute is enacted, and additional months typically go by before its members are appointed.[18]

In 2012, the Government Accountability Office (GAO) released a report that noted four practices that may influence the utility of an advisory body.[19] The four practices are

1. securing clear agency commitment;[20]
2. finding a balance between responsiveness to the agency and independence;[21]
3. leveraging resources through collaboration with similar groups;[22] and
4. evaluating the group's usefulness to identify future directions or improvements.[23]

Building on this examination of the FDA drug approval process, another scholar found that the FDA is less likely to require warning labels on pharmaceutical drugs and is less likely to withdraw a drug from the market if the drug was reviewed and recommended for approval by an advisory committee.[24] This finding may demonstrate that decisions that rely on the recommendations or advice of an advisory committee are more reliable or scientifically sound than those that are not.

A Congressional Research Service (CRS) review of FY2014 committee-reported information in the FACA Database found that statutorily established FACA committees[25] tended to report lower percentages of their recommendations being fully implemented by their affiliated agencies when compared to the recommendation implementation rates reported by committees established by the

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[17] Jordan Tama, *Terrorism and National Security Reform* (New York: Cambridge University Press, 2011), p. 71.

[18] Ibid. p. 23.

[19] U.S. Government Accountability Office, *Federal Advisory Groups: DOT and DOE Can Take Steps to Better Assess Duplication Risk and Enhance Usefulness*, GAO-12-472, March 2012, at http://www.gao.gov/products/GAO-12-472.

[20] According to GAO, "[a]gency commitment to advisory groups can be demonstrated by active participation in meetings, open communication with group members, and allocation of resources to the group." Ibid., p. 14.

[21] Ibid., p. 16. According to GAO, "responding to agencies' needs may help advisory groups produce useful recommendation[s] or reports. But … the advice and recommendations of federal advisory groups should be independent of influence by the entity that created the advisory group."

[22] Ibid., p. 17. According to GAO, "[c]ollaboration with groups focusing on similar topics may help ensure that groups are not duplicating activities but are instead focusing on the most useful tasks. Similarly, it may help advisory groups leverage existing resources to more quickly obtain information or expertise already possessed by other groups, thereby enhancing the usefulness and efficiency."

[23] Ibid., pp. 18-19. Agency heads are already required by law to evaluate the utility of each FACA committee on an annual basis. This final practice, therefore, is directed to non-FACA committees.

[24] Susan L. Moffitt, *Making Policy Public* (New York: Cambridge University Press, 2014).

[25] A FACA committee is a federal advisory committee that is required to operate pursuant to the requirements of the Federal Advisory Committee Act. As noted earlier, Congress may establish committees that operate outside of FACA's transparency requirements. Committees that are not FACA committees may be more difficult to track and are not included in the General Services Administration's FACA Database, which provides aggregated information about the operations and costs of all FACA committees.

agencies.[26] In the analysis, 123 advisory committees established by agency authority reported an average of 65.6% of their recommendations were fully implemented by their affiliated agencies. The median reported percentage of full recommendation implementation was 76%. By contrast, the 250 advisory committees required to be established by statute that reported implementation data had an average of 45.9% of their recommendations fully implemented, and a median of 50% full recommendation implementation. The finding suggests that agencies' officials may be more likely to implement recommendations from advisory bodies that they established, rather than the advisory bodies that Congress established within the agency.

CRS's analysis also found that scientific technical program advisory board committees[27] and national policy issue advisory board committees[28] reported higher rates of full implementation of their recommendations than committees that were non-scientific program advisory board committees[29] or were committees involved in grantmaking. For example, the 136 scientific technical program advisory boards that provided data on the implementation of their recommendations found, on average, that 60.2% of their recommendations were fully implemented. The median percentage of full implementation of recommendations was 77%. The 66 national policy issue advisory board committees that reported on their full recommendation implementation had, on average, 52.0% of their recommendations fully implemented. The median percentage of full implementation was 58%. In contrast, the 75 grant review committees reported, on average 41.9%, of their recommendations were fully implemented, but the median reported full implementation of recommendations was 0%.[30]

Overall, the literature on federal advisory committees has shown that they can have influence on an agency's decisionmaking process. The range and depth of that influence, however, is unclear because the scope of scholarly research on federal advisory committees is limited and the design and purposes of the 1,000 federal advisory committees are vast. Scholars have tended to focus analyses on national security-related or FDA drug approval-related advisory committees, making it more difficult to understand the utility of advisory committees governmentwide. More recent research indicates that establishing advisory committees that focus on scientific technical programs or national policy issues might lead to higher percentages of full implementation of advisory committee recommendations than creating advisory committees that focus on non-scientific programs or grantmaking issues.

[26] CRS examined the self-reported utility of federal advisory committees that were active in FY2014. Agencies may report the percentage of FACA committee recommendations that they fully implement into the FACA Database. CRS examined the implementation data for the 547 committees that reported it, out of the 990 active FACA committees in FY2014.

[27] Committees in this category give agencies like the Food and Drug Administration recommendations on drug products. This category includes the Endocrinologic and Metabolic Drugs Advisory Committee (http://www.fda.gov/AdvisoryCommittees/CommitteesMeetingMaterials/Drugs/EndocrinologicandMetabolicDrugsAdvisoryCommittee/default.htm).

[28] Committees in this category advise agencies on a specific policy issue. For example the National Petroleum Council advises the Department of Energy on oil and natural gas issues and their respective industries (http://www.npc.org/).

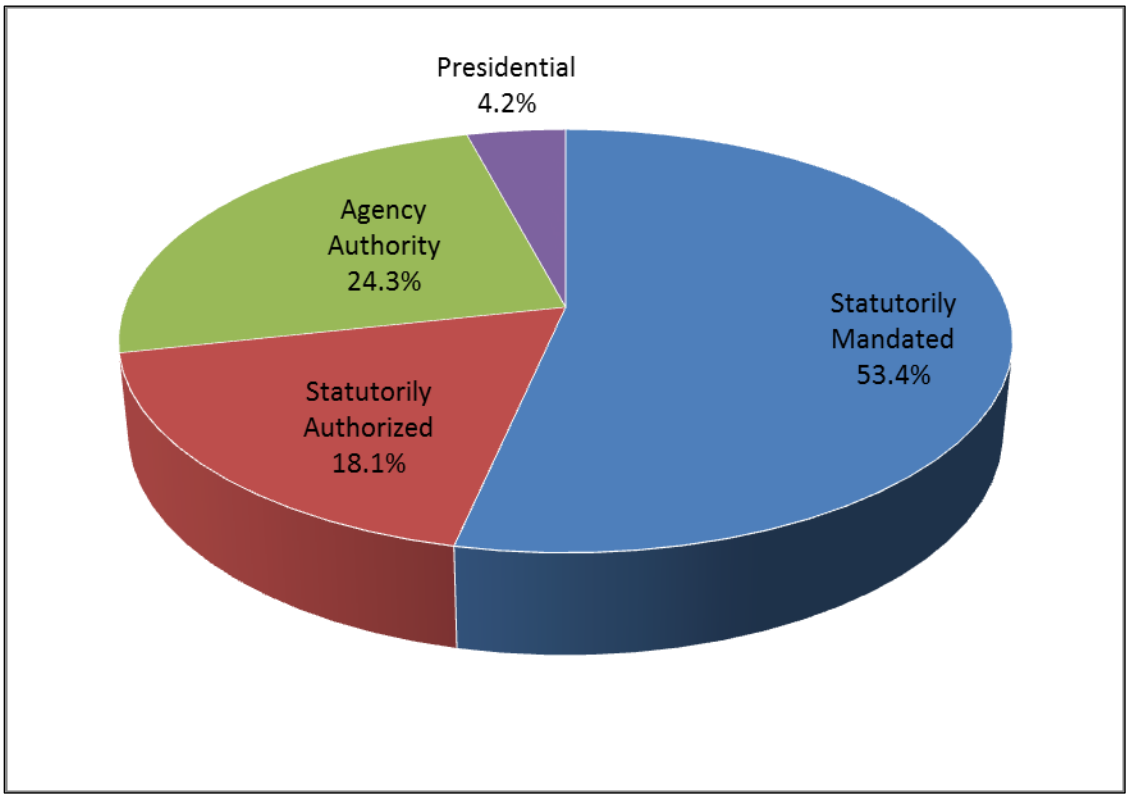
[29] Committees in this category focus on giving agencies advice on how to better improve their programs. For example the Criminal Justice Information Services Advisory Policy Board advises the Federal Bureau of Investigation on issues related to programs within the Criminal Justice Information Services Division (https://www.fbi.gov/about-us/cjis/advisory-policy-board).

[30] In the case of grantmaking advisory committees, a majority of the committees reported 0% of their recommendations were fully implemented. Of the remaining committees that reported on the full implementation of their recommendations, most reported that 100% of their recommendations were fully implemented, creating a wide variance between average and median.

Congress's Role in Establishing FACA Committees

This section explores available data on the creation of advisory committees, using data from the FACA Database. Advisory committees that are exempted from FACA, therefore, are not included in this analysis. In any given fiscal year, Congress establishes a majority of FACA committees. Of the 1,009 active federal advisory committees in FY2015, Congress statutorily *required* the establishment of 539 (53.4%). Additionally, 183 (18.1%) of the active FACA committees were *authorized*, but not required, by statute.[31] **Figure 1** shows the percentage of total active committees in FY2015 by establishment authority.

Figure 1. Percentages of Active Federal Advisory Committees by Establishment Authority, FY2015



Source: CRS analysis of the FACA Database, at http://facadatabase.gov/.

Of the 1,009 active advisory committees, 42 were *newly* established in FY2015. Twenty (47.6%) of the 42 *new* committees were required by statute.[32] Members and staff contemplating the establishment of a new advisory committee may seek examples of statutory language establishing advisory committees. **Table 1** below includes the statutory authority for each of the 20 *new* statutorily required committees established in FY2015.

[31] Of the remaining active federal advisory committees in FY2015, 245 were established by agency heads and 42 were established by presidential directive. See the FACA Database, at http://facadatabase.gov/.

[32] The remaining 22 new FACA committees were established either by agency authority (17) presidential directive (4), or authorization (not requirement) by Congress (1).

Table 1 includes the name of the committee, its affiliated federal agency or department, and its statutory authority. In most cases, the table includes the authorizing language's *U.S. Code* citation. In some cases, when an advisory body's authority isn't codified, the most recent statutory authority for the committee is provided.

Table 1. Federal Advisory Committees Required by Statute, FY2015

Committee Name	Statutory Authority[a]
Department of Defense	
Lake Eufaula Advisory Committee[b]	Water Resources Development Act of 2007, P.L. 110-114, §3133(b)(1)
National Commission on the Future of the Army	Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113-291, §1702
Department of the Interior	
Coastal Oregon Resource Advisory Council	43 U.S.C. §1739
Northern California District Resource Advisory Council[c]	43 U.S.C. §1739
Northwest Oregon Resource Advisory Committee	43 U.S.C. §1739
Southwest Oregon Resource Advisory Council	43 U.S.C. §1739
Tule Springs Fossil Beds National Monument Advisory Council	Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113-291, §3092(a)(6)
Department of Labor	
Advisory Board on Toxic Substances and Worker Health	Carl Levin and Howard P. "Buck" McKeon National Defense Authorization Act for Fiscal Year 2015, P.L. 113-291, §3141, with authority to administer the committee delegated to the Secretary of Labor from the President pursuant to Executive Order 13699
Workforce Information Advisory Council	29 U.S.C. §49l-2
Environmental Protection Agency	
Hazardous Waste Electronic Manifest System Advisory Board	42 U.S.C. §6939g
Department of Health and Human Services	
Advisory Committee on Heritable Disorders in Newborns and Children	42 U.S.C. §300b-10
Disability, Independent Living and Rehabilitation Research Advisory Council	29 U.S.C. §765
Medicare Advisory Panel on Clinical Diagnostic Laboratory Tests	42 U.S.C. §1395m-1

Committee Name	Statutory Authority[a]
National Asthma Education Prevention Program Coordinating Committee[d]	42 U.S.C. §285b-7b
Department of the Treasury	
Advisory Committee on Risk-Sharing Mechanisms	15 U.S.C. §6701 note
Treasury Tribal Advisory Committee	26 U.S.C. §139E note
Department of Agriculture	
Alabama Resource Advisory Committee	16 U.S.C. §7125
Black Hills Resource Advisory Committee	16 U.S.C. §7125
National Agricultural Research, Extension, Education, and Economics Advisory Board	7 U.S.C. §3123
Department of Veterans Affairs	
Commission on Care	38 U.S.C. §1701 note

Source: Congressional Research Service analysis of the Federal Advisory Committee Act Database, at http://facadatabase.gov/.

Notes:

a. Codification does not affect advisory committee operations.

b. According to Department of Defense (DOD) officials, the eight-year gap between enactment of the committee's establishing authority and its operations was caused by a department freeze on the implementation of new advisory committees as well as internal DOD disagreements over the ethics designations of the committee's membership.

c. According to Bureau of Labor Management officials, in FY2015, the Northeast California and Northwest California resource advisory councils (originally established in 1995) merged to become the Northern California District Resource Advisory Council.

d. According to National Institutes of Health officials, the committee had been statutorily required since 2000, and had been operating outside of FACA's requirements. A restructuring of the committee's membership in FY2015 prompted institute officials to determine the committee should operate pursuant to FACA.

As shown above, Congress plays an important role in the establishment of FACA committees. Currently, 71.5% of all active committees were required to be or authorized to be established by Congress.[33] Of the 20 *new* statutorily required committees that began operations in FY2015, the Department of the Interior houses the most (5). Three of the committees were required by statute eight or more years before their operations began. In one case, the affiliated department's policies and operations led to operational delays. In another case, two previously operating committees were merged to form a single, new committee. In the final case, the affiliated agency determined that a committee that previously operated outside of FACA's provisions should being operating pursuant to FACA.

[33] In some cases, a committee may finish its work and remain inactive for much of the fiscal year. In other cases, a committee may have been established by statute without a sunset date, but have completed its statutory mission. In these cases, a committee may exist in name only in the FACA Database, and be listed as an inactive committee. When a committee reports as inactive, its members no longer meet nor can it expend funds.

Considerations When Creating an Advisory Committee

As Congress deliberates the establishment of an advisory committee, Members and staff may take into consideration its goals and potential structure. Among the considerations pertinent to the establishment of an advisory committee and to its composition, operation, and effectiveness are the following:

- defining the committee's mandate;
- whether FACA's transparency and access provisions should apply;
- establishing committee membership;
- defining committee duties;
- setting the committee's mission;
- allocating proper funding, support staff, and office space;
- mandating the committee's reporting requirements; and
- determining a committee sunset date.

Below are a series of possible considerations of the various elements of advisory committees for Members or staff who seek to establish an advisory committee by statute.

Establishment and Charter

For committees created by statute, the legislative language provides the building blocks, and sometimes the details, that the agency administering the advisory committee must put in the committee's charter.[34]

Statutory language establishing an advisory committee can detail the name, purpose, authorities, and membership of an advisory committee—and these requirements likely would be placed in the committee's charter. In contrast, statutory language can direct an agency to establish a committee that examines a particular area of interest, and provide few details on operations and bylaws—all of which need to be detailed in the charter. Statutory language may be included in the charter, but the statute itself would not qualify as the charter.[35]

Committee Duties: A Statute to Charter Comparison

Among the topics that federal agencies must include in their advisory committee charters is a description of the committee's duties. The National Drinking Water Advisory Council (originally established by statute in 1975), for example, has statutorily required "Functions" requiring it to "advise, consult with, and make recommendations to the Administrator on matters relating to activities, functions, and policies of the Agency."

In the committee's most recent charter, its "Duties" section appears to include language similar to, but streamlined from, the language used in the "Functions" section of the statute. The charter's "Duties" section states that the committee is to "provide advice to the EPA."

[34] An advisory committee's charter is the official document that serves to articulate its name and purpose—among other items. Advisory committees are prohibited from operating until the affiliated agency files its charter with the affiliated agency's oversight committees in Congress, the GSA Committee Management Secretariat, the Library of Congress, and the agency head. 41 C.F.R. §102-3.70 and "Preparing Federal Advisory Committee Charters," at http://www.gsa.gov/portal/mediaId/165487/fileName/Preparing_FAC_Charters_%28F%29-110211.action.

[35] 5 U.S.C. (FACA) Appendix, §9(c).The charter is often drafted by the committee's designated federal officer (DFO) (continued...)

Federal advisory committee charters must contain at least 15 elements, including the federal advisory committee's name, its establishment authority, information on its objectives and scope, and a list of its duties.[36] Statutes establishing committees have no such requirements. Establishing statutes and charters may include language that highlights agency, presidential, or congressional findings that prompted the committee's creation—but such findings are not required.

Once committee authority is established, the charter includes a section on "duties" and objectives and scope, specifying the committee's mandate or responsibilities. A committee's objectives may be stated in specific terms—in statutory language or in the charter—to guide the federal advisory committee's members and staff in carrying out their responsibilities. Pursuant to FACA, charters should authorize enough autonomy to ensure that the advisory body provides independent advice that is not "inappropriately influenced by the appointing authority or by any special interest."[37]

FACA's Application

Congress may choose to require an advisory committee to operate pursuant to FACA's transparency, access, and reporting provisions. On the other hand, Congress may choose to exempt the advisory committee from these provisions. Congress also has the option to select particular provisions from FACA and apply them to an advisory committee without requiring the advisory committee to follow all of FACA's requirements (see "Applying Selected FACA Provisions" text box for an example).

As noted above, FACA established the first statutory requirements for management of, access to, and oversight of federal committees. FACA places certain requirements on the formation and oversight of federal advisory committees. For example, FACA requires advisory committee meetings to be open to the public and requires agencies to publish advance notice of their meetings so the public may attend.[38] Additionally, all advisory committee records are to be made available to the public, unless such release is otherwise protected by law.[39] Congress is also to determine if the committees are "fairly balanced in terms of the points of view represented and the functions to be performed."[40] FACA committees established legislatively are to be created with enough autonomy from the appointing power (Congress, the President, or an agency head) so as to not be unduly influenced.[41] Each committee's reporting requirements are to be clearly stipulated, and proper funding and staffing are to be provided.[42]

(...continued)

and filed with Congress by the committee management officer (CMO) within the advisory committee's host agency. The CMO, among other duties assigned by the agency head provides for appropriate advisory committee recordkeeping. 41 C.F.R. §102-3.115. The agency head can authorize an official other than the CMO to file an advisory committee charter..

[36] For more information on what 15 elements are required in a federal advisory committee charter, see the General Services Administration, "Preparing Federal Advisory Committee Charters," at http://www.gsa.gov/portal/mediaId/165487/fileName/Preparing_FAC_Charters_%28F%29-110211.action.

[37] 5 U.S.C. (FACA) Appendix, §5(b)(3). See also 41 C.F.R. §102-3.105(g).

[38] 5 U.S.C. (FACA) Appendix, §10(a)(1)-(3).

[39] 5 U.S.C. (FACA) Appendix, §10(b). Possible reasons an agency would withhold advisory committee records from public release would be if they contained trade secrets, national security information, or personally identifiable information.

[40] 5 U.S.C. (FACA) Appendix, §5(b)(3), 86 Stat. 771 (1972).

[41] 5 U.S.C. (FACA) Appendix, §5(b)(3).

[42] Ibid, §5(b)(4)-(5).

While FACA may improve both the reality and perception of transparent governmental operation and accessibility, its requirements may also place a number of additional chartering, record-keeping, notification, and oversight requirements on the entity. In particular, agencies have claimed that compliance with the various FACA requirements are cumbersome and resource intensive, thereby reducing the ability of committees to focus on substantive issues in a spontaneous and timely fashion.[46] Moreover, some scholars have argued that the scope of the openness requirements could have the practical effect of stifling candid advice and discussion within a committee.[47]

Congress may choose to exempt a statutorily established advisory committee from FACA to allow it potentially to operate more quickly and less expensively than FACA might permit. For example, the requirement that all meetings be posted "with timely notice" in the *Federal Register*[48] may slow down the daily operations of an advisory committee, which will typically not hold meetings until 15 days after the notice is published. On the other hand, exempting an advisory committee from FACA's requirements could make congressional and public oversight of the entity more difficult.

Applying Selected FACA Provisions

The eight regional fishery management council advisory bodies established pursuant to 16 U.S.C. §1852 are explicitly exempted from FACA's requirements.[43] The law establishing the councils, however, contains certain FACA-inspired transparency provisions, including a requirement for "[t]imely public notice of each regular meeting and each emergency meeting, including the time, place, and agenda of the meeting ..."[44] This language permits the fishery management councils to hold "emergency" meetings without two weeks prior public notice, as required by FACA.

Like FACA, 16 U.S.C. §1852 requires meeting notice publication in the *Federal Register*. Unlike FACA, 16 U.S.C. §1852 requires additional meeting notice "provided by any means that will result in wide publicity in the major fishing ports of the region (and in other major fishing ports having direct interest in the affected fishery), except that e-mail notification and website postings alone are not sufficient."[45]

Other FACA-like operating requirements for the fishery management councils include requirements allowing the public to speak and write comments to the councils, requirements for detailed minutes of each meeting to be kept, and requirements granting access to the councils' records.

As noted above, when Congress is creating an advisory committee in statute it may choose to select certain provisions of FACA and apply them. For example, Congress may choose to exempt an advisory committee from FACA, yet require it to hold open meetings and advertise those meetings online or in the *Federal Register* at least 15 days prior to any meeting. Congress may also choose to exempt an advisory committee from FACA, yet require it to report annually on its membership, operations, recommendations, and operating costs—putting such information online or providing the information in a report to Congress. The North American Wetlands Conservation Council, within the U.S. Fish and Wildlife Service, is exempted from FACA, but required by statute to "be open to the public."[49] Additionally, the chairman of the council is required to "take appropriate steps to provide adequate notice to the pubic of the time and place of ... meetings."[50]

[43] 16 U.S.C. §1852(i)(1).

[44] 16 U.S.C. §1852(i)(2).

[45] Ibid.

[46] Stephen P. Croley and William F. Funk, "The Federal Advisory Committee Act and Good Government," *Yale Journal on Regulation*, vol. 14, no. 2 (Spring 1997), pp. 503-504.

[47] Dover A. Norris-York, "The Federal Advisory Committee Act: Barrier Or Boon to Effective Natural Resource Management," *Environmental Law*, vol. 26 (1996), pp. 419, 425-426.

[48] 5 U.S.C. (FACA) Appendix, §9(2).

[49] 16 U.S.C. §4403(f).

[50] Ibid.

Exempting a committee from FACA, however, can affect congressional and public oversight efforts of a federal advisory committee. When FACA's reporting requirements are removed from an advisory committee's operations, it may be more difficult for Congress and the public to track a committee's operations and costs. Applying FACA's provisions, on the other hand, requires agency officials to report operations and costs into the FACA Database, providing a one-stop online text-searchable portal for information on FACA committee operations governmentwide.

Membership

There are few restrictions on the membership of advisory committees. Pursuant to the FACA, each federal advisory committee must have at least one member who is not a "full-time, or permanent part-time" officer or employee of the federal government.[51] Membership must also "be fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee."[52] Federal ethics statutes and regulations also may affect committee membership.[53]

FACA committee charters must address membership structure. A statute establishing a federal advisory committee, however, may or may not address the committee's membership. If Congress determined it would like greater control over the membership structure of an advisory committee, Congress may want to provide guidelines for membership appointments to executive branch officials in advisory committee establishing language. Congress may also choose to provide direct membership appointments to particular officials or organizations. **Table 2** includes selected statutory examples of FACA committee membership design.

[51] 5 U.S.C. (FACA) Appendix, §3.

[52] 5 U.S.C. (FACA) Appendix, §5.

[53] Federal ethics rules may prevent federal employees with a real or perceived conflict of interest from serving on certain advisory committees. Conflict of interest statutes and regulations from the U.S. Office of Government Ethics would apply to the members who serve on advisory bodies when the members are full-time federal employees or special government employees (SGEs), pursuant to 18 U.S.C. §202(a). SGEs must adhere to all federal ethics requirements in 18 U.S.C. §§201, 203, 205, 207, and 208. Advisory committee members who are designated as representatives (instead of SGEs) are not subject to all the ethics requirements placed on federal employees.

Table 2. Selected Examples of Statutory Establishment of Federal Advisory Membership Structure

Committee Name/Agency	Authority	Statutory Language Related to Membership Structure
Dominguez-Escalante National Conservation Area Advisory Council Department of the Interior	16 U.S.C. §460zzz-6	The Council shall include 10 members to be appointed by the Secretary, of whom, to the extent practicable— (1) 1 member shall be appointed after considering the recommendations of the Mesa County Commission; (2) 1 member shall be appointed after considering the recommendations of the Montrose County Commission; (3) 1 member shall be appointed after considering the recommendations of the Delta County Commission; (4) 1 member shall be appointed after considering the recommendations of the permittees holding grazing allotments within the Conservation Area or the Wilderness; and (5) 5 members shall reside in, or within reasonable proximity to, Mesa County, Delta County, or Montrose County, Colorado, with backgrounds that reflect— (A) the purposes for which the Conservation Area or Wilderness was established; and (B) the interests of the stakeholders that are affected by the planning and management of the Conservation Area and Wilderness.
Medal of Valor Review Board Department of Justice	42 U.S.C. §15202	The members of the Board shall be individuals with knowledge or expertise, whether by experience or training, in the field of public safety, of which— (A) two shall be appointed by the majority leader of the Senate; (B) two shall be appointed by the minority leader of the Senate; (C) two shall be appointed by the Speaker of the House of Representatives; (D) two shall be appointed by the minority leader of the House of Representatives; and (E) three shall be appointed by the President, including one with experience in firefighting, one with experience in law enforcement, and one with experience in emergency services.
Aerospace Advisory Panel National Aeronautics and Space Administration	51 U.S.C. §31101	There is established an Aerospace Safety Advisory Panel consisting of a maximum of nine members who shall be appointed by the Administrator for terms of six years each. Not more than four such members shall be chosen from among the officers and employees of the Administration.

In many cases, the statutory language used to establish the committee membership requirements will be similar or identical to the language the agency uses in the charter. The text box "Membership: An Example of Statutory Language" provides one example of statutory language that is nearly identical to the language then written into the charter establishing the membership requirements of the Advisory Committee for Trade Policy and Negotiations.

Membership: An Example of Statutory Language

The Advisory Committee for Trade Policy and Negotiations (originally established by statute in 1975), is required by statute to have a membership

- composed of not more than 45 individuals and shall include representatives of non-Federal governments, labor, industry, agriculture, small business, service industries, retailers, nongovernmental environmental and conservation organizations, and consumer interests.
- broadly representative of the key sectors and groups of the economy, particularly with respect to those sectors and groups which are affected by trade.
- recommended by the United States Trade Representative and appointed by the President for a term of 4 years or until the committee is scheduled to expire.
- reappointed to committee for any number of terms. Appointments to the Committee shall be made without regard to political affiliation.[54]

The language in the committee's charter is identical to the statute, except for one additional sentence stating that the committee is to "elect a chair from among its members."[55]

The size and structure of an advisory committee can affect the intended mission. For example, the size of the committee may be small enough to allow all members a chance to communicate their expertise and opinion, but large enough to include the appropriate stakeholders and maintain a quorum even when members are absent. Size and member appointment, therefore, largely depend on the committee's functions and mission. Additionally, members can be appointed on a staggered schedule to ensure that there are always a few continuing committee members serving at any given time—allowing for greater continuity in operations over time. Some committees are designed to include specific members of the federal government or their designees.

Compensation and Travel

Advisory committee members who are not employees or officers of the federal government may or may not receive compensation for their work on a committee. The authority that establishes the committee determines whether committee members are to receive pay, and—if they are paid—their pay level. Pursuant to FACA, neither committee members nor staff may be paid more than the equivalent of Executive Level IV pay ($160,300 for 2016), unless otherwise directed by statute. In addition to compensation for their service, committee members and staff may also be provided compensation to cover travel expenses as well as a per diem.[56] Congress may choose to maintain the pay caps set by FACA or establish unique pay rates for a particular advisory committee. Congress may also choose to prohibit advisory committee members from receiving a salary for their service. These members could still receive payment for travel expenses and a per diem.

Committee Staff

Generally speaking, committees are comprised of members and staff, and may also include consultants.[57] Pursuant to FACA, agencies must assign a committee management officer (CMO)

[54] 19 U.S.C. §2155(b).

[55] The committee's charter is available from the FACA Database, at http://facadatabase.gov/committee/charters.aspx?cid=1138&aid=173.

[56] Per diem rates vary by time of year and geographic location. According to GSA, the lowest per diem is currently $51 for meals and incidental expenses and $89 for lodging, at http://www.gsa.gov/portal/category/100120.

[57] FACA entities may use the services of outside consultants in accordance with 5 U.S.C. §3109(b). Federal employees may also be detailed to staff an advisory committee.

to "oversee the administration" of FACA and a designated federal officer (DFO), whose duties are as follows:

- ensure compliance with FACA, and any other applicable laws and regulations;
- call, attend, and adjourn committee meetings;
- approve agendas;
- maintain required records on costs and membership;
- ensure efficient operations;
- maintain records for availability to the public; and
- provide copies of committee report to the CMO for forwarding to the Library of Congress.[58]

Staff may include additional agency support staff and an executive director (who may also serve as the DFO).

Committee Reports and Recommendations

Most committees are required to generate a report or recommendations to the President, Congress, or an agency head. Some committees may also be required to make interim or annual reports. FACA includes no provisions that control or direct the creation or dissemination of a report or recommendations. Statutory language, however, often articulates an advisory committee's reporting requirements, and these reporting requirements must be included in the committee's charter. For example, the Founding Fathers Advisory Committee within the National Archives and Records Administration is statutorily required to "report to the Archivist on the progress of the various projects" it is required to review.[59] Statutory language establishing an advisory committee may require various reporting requirements. The statutorily required Nanotechnology Advisory Panel, for example, is required to report its "assessments" and "recommendations" to the President once every two years. The statute then requires the Director of the Office of Science and Technology Policy to transmit copies of the panel's reports to the Senate Committee on Commerce, Science and Technology Policy and the House Committee on Science—as well as any other appropriate committees of jurisdiction.[60]

A statute that establishes an advisory committee may include additional provisions or requirements for executive branch action or response to those recommendations. For example, the National Agricultural Research, Extension, Education, and Economic Advisory Board requires the Secretary of Agriculture to "solicit the written opinions and recommendations of the Advisory Board" and "provide a written response to the Advisory Board regarding the manner and extent to which the Secretary will implement recommendations submitted by the Advisory Board."[61] The effort the Secretary of Agriculture might put into creation of that response, however, may largely correspond to the Administration's interest in the advisory board and its findings.

[58] The responsibilities of the CMO are codified at 5 U.S.C. (FACA) Appendix §8(b), and the responsibilities of the DFO are codified at 5 U.S.C. (FACA) Appendix §10(e)-(f) and further detailed in 41 C.F.R. §102-3.120. The language cited in the report comes from the General Services Administration, "The Federal Advisory Committee Act (FACA) Brochure," at http://www.gsa.gov/portal/content/101010.

[59] 44 U.S.C. §2505.

[60] 15 U.S.C. §7503(d).

[61] 7 U.S.C. §3123(d)(2).

A federal advisory committee's recommendations are strictly advisory and cannot mandate policy action by recipients of the report. In the case of a presidential advisory committee,[62] however, the President must submit to Congress—within a year of receiving a committee's public report—proposals for action or reasons for inaction on the recommendations in the public report.[63] Advisory committees established by agency heads do not appear to have similar requirements to report their actions or inactions to Congress.

Committee Authorities

Explicit authority may be needed to accomplish certain special duties for which an advisory committee may be responsible. For example, committees would need specific statutory authority to hold hearings, use the franking privilege,[64] accept certain donations, and permit volunteers to work on the staff.

If a committee is created by statute and exempted from FACA, Congress may also choose to vest the committee with hiring and pay authorities. Without such authorities, a federal advisory committee would work with the affiliated agency to hire staff and appoint members to the committee, which could lead to delays in starting committee operations.

Vesting a committee with subpoena power is done on a very selective basis—and is largely dependent upon the mission of the panel. In the late 1990s, for example, Congress vested the National Gambling Impact Study Commission, a FACA committee, with subpoena authority.[65] One advisory committee's statutory authority and charter, in contrast, explicitly denied the entity subpoena authority.[66] No FACA committees currently appear to have subpoena authority.

Bylaws and Procedures

Specific procedural requirements—like quorum qualifications—can often be found in committee charters. Other bylaws, including election procedures to determine a chairperson, vote tallying, filling membership vacancies, and reporting procedures also may be included in the charter. In other cases, committee procedures may be included in the legislation that establishes an advisory body. If committee procedures are provided by statute, Congress may have greater control over the body's operations, procedures, and outcomes. On the other hand, if procedures are in statute, the advisory body may not have the autonomy to conduct meetings that provide the optimal opportunity to share candid advice and present new ideas.

For FACA committees, the DFO from the sponsoring agency is responsible for approving or calling the meeting of the committee, approving the committee agenda (except for presidential advisory committees), adjourning meetings when it is determined to be in the public interest, and certifying minutes.[67]

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[62] A presidential advisory committee advises the President. See 5 U.S.C. (FACA) Appendix §3.

[63] 5 U.S.C. (FACA) Appendix §6.

[64] The franking privilege allows Members of Congress to transmit mail matter under their signature without postage. For more information on the franking privilege, see CRS Report RL34274, *Franking Privilege: Historical Development and Options for Change*, by (name redacted) .

[65] P.L. 104-169 §5(b).

[66] See the Cedar Creek & Bell Grove National Historical Park Advisory Commission Charter, available at the FACA Database, at http://facadatabase.gov/. The Cedar Creek & Bell Grove National Historical Park Advisory Commission is authorized by Congress to operate until December 8, 2020.

[67] 41 C.F.R. §§102-3.120 and 102-3.165.

Funding[68]

FACA includes no provisions related to the funding of the federal advisory committee. Congress may directly fund a committee through the appropriations process, or it may instruct an agency to use its existing annual appropriation. If provided the authority to do so in statute, an advisory committee may also be funded through private donations. A committee charter may include a determination, within a committee's provided authorities and requirements, as to whether an entity may accept such private financial gifts. If a committee is permitted to accept donations or other, in kind, gifts, the authority that created the advisory body may require detailed recordkeeping of such donations to maintain transparency and to avoid the perception of undue influence.

Committee Termination

Unless statutorily mandated or otherwise extended by the President or a federal officer,[69] a FACA committee will automatically terminate two years after its establishment. Consequently, most advisory committees must renew their charters every two years. Some committees that are created by statute include provisions to terminate on specific dates or a particular number of years after their establishment.[70]

When establishing a committee by statute, a Member or staff may take into account the time and costs for administrative actions. The agency, for example, will need time to assign staff, find suitable office space, and address other logistical concerns. Upon completion of these objectives, the committee also will need additional time to create a final report, file any required records, and vacate the office space.

Advisory Committee Establishment in the 114th Congress

Table 3 provides a selected list of the advisory committees proposed for establishment by statute in the 114th Congress. These federal advisory committees are proposed in a variety of subjects and substantive policy arenas. For Members and staff interested in establishing an advisory body, these bills may provide ideas or context for how to design draft language.

[68] For more information and detail on the costs associated with administering a federal advisory committee, see CRS Report R44248, *The Federal Advisory Committee Act: Analysis of Operations and Costs*, by (name redacted) and (name redacted)

[69] The federal officer must be the agency head who established the advisory body. 5 U.S.C. (FACA) Appendix §14(A).

[70] See, for example, the National Maritime Heritage Grants Advisory Committee (16 U.S.C. §5404), which was required by law to terminate on September 30, 2000.The National Advisory Committee on the Sex Trafficking of Children and Youth in the United States (42 U.S.C. §1314b) is required by law to terminate "five years after the date of its establishment [September 29, 2014]." Similarly, the Advisory Committee on Energy Efficiency Finance (42 U.S.C. §17124) is required by law to "terminate on the date that is 10 years after December 19, 2007."

Table 3. Selected Legislation Seeking to Establish Advisory Committees, 114th Congress.

Presented in reverse chronological order of their introduction in Congress

Advisory Committee Name	Legislation
Public Online Information Advisory Committee	H.R. 5839—Public Online Information Act of 2016
Plymouth 400th Commemoration Commission	H.R. 5599—Plymouth 400th Commemoration Commission Act of 2016
Research Policy Board	H.R. 5583—University Regulation Streamlining and Harmonization Act of 2016
Advance Care Planning Advisory Council	H.R. 5555—Personalize Your Care Act 2.0
Manufacturing Extension Partnership Advisory Board	S. 3084—American Innovation and Competitiveness Act
Public and Consumer Advocacy Advisory Committee	H.R. 5348/S. 3012—Public Engagement at FERC Act
Water Resources Advisory Committee	S. 2848—Water Resources Development Act of 2016
Water Resources Advisory Committee	S. 2579—Drinking Water Safety and Infrastructure Act
Center of Excellence on lead Exposure Advisory Committee	H.R. 4479—Families of Flint Act
National Multimodal Freight Advisory Committee	H.R. 3398/S. 1680—National Multimodal Freight Policy and Investment Act
Advisory Panel on Supervision of Therapeutic Hospital Outpatient Services	H.R. 3225—Save Rural Hospitals Act
Expert Advisory Panel Regarding Relative Value Scale Process Used in Medicare Physician Fee Schedule	H.R. 2614—Accuracy in Medicare Physician Payment Act of 2015
Advisory Council on Sustainable Chemistry	S. 1447—Sustainable Chemistry Research and Development Act of 2015
Advisory Panel on Supervision of Therapeutic Hospital Outpatient Services	S. 257/H.R. 1611—Protecting Access to Rural Therapy Services Act; H.R. 3225—Save Rural Hospitals Act
Expert Advisory Panel Regarding Relative Value Scale Process Used in Medicare Physician Fee Schedule	S. 257/H.R. 1611—Protecting Access to Rural Therapy Services Act
Interagency Lyme and Tick-Borne Disease Working Group	H.R. 789—Tick-Borne Disease Research Accountability and Transparency Act of 2015
National Geospatial Advisory Committee	S. 740—Geospatial Data Act of 2015
Preventive Services Advisory Board	H.R. 1151/S. 1151—USPSTF Transparency and Accountability Act of 2015
Tick-Borne Diseases Advisory Committee	H.R. 665—To provide for the establishment of the Tick-Borne Diseases Advisory Committee; H.R. 789—Tick-Borne Disease Research Accountability and Transparency Act of 2015

Source: https://www.congress.gov/.

Notes: Search up-to-date as of December 5, 2016. CRS searched https://www.congress.gov/ for the term "FACA." This table includes all committees that populated that search that stated FACA would apply to their operations. This search does not ensure that all bills attempting to establish a FACA committee are identified.

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