

April 2004

# FEDERAL ADVISORY COMMITTEES

## Additional Guidance Could Help Agencies Better Ensure Independence and Balance



G A O

Accountability \* Integrity \* Reliability



Highlights of [GAO-04-328](#), a report to congressional requesters

## Why GAO Did This Study

Because advisory committees are established to advise federal decision makers on significant national issues, it is essential that their membership be, and be perceived as being, free from conflicts of interest and balanced as a whole. GAO was asked to (1) describe the role of federal advisory committees in the development of national policies, (2) examine the extent to which existing guidance and policies and procedures for evaluating committee members for conflicts of interest and points of view ensure independent members and balanced committees, and (3) identify practices and measures that could help ensure independence and balance.

## What GAO Recommends

GAO recommends that GSA and/or OGE, as appropriate, give direction to agencies on: the proper use of representative appointments; information that would help ensure committees are, and are perceived as, balanced; and practices that would better ensure independence and balance and enhance transparency in the advisory committee process. GSA agreed with GAO's findings and agreed to work with OGE to implement the recommendations. OGE agreed that representative appointments need review but disagreed that its guidance has limitations. GAO continues to believe the guidance could be improved to better ensure that agencies are appropriately appointing committee members.

[www.gao.gov/cgi-bin/getrpt?GAO-04-328](http://www.gao.gov/cgi-bin/getrpt?GAO-04-328).

To view the full product, including the scope and methodology, click on the link above. For more information, contact Robin Nazzaro at (202) 512-3841 or [NazzaroR@gao.gov](mailto:NazzaroR@gao.gov).

# FEDERAL ADVISORY COMMITTEES

## Additional Guidance Could Help Agencies Better Ensure Independence and Balance

### What GAO Found

Federal advisory committees play an important role in shaping public policy by providing advice on a wide array of issues, such as stem cell research, drinking water standards, space exploration, drug approvals, and federal land management. About 950 advisory committees perform peer reviews of scientific research; offer advice on policy issues; identify long-range issues; and evaluate grant proposals, among other functions.

Additional governmentwide guidance could help agencies better ensure the independence of members—that is, that they are free from significant conflicts of interest—and balance of federal advisory committees. For example, current limitations in the Office of Government Ethics' (OGE) guidance are a factor in at least three agencies' continuing a long-standing practice of appointing most or all members as "representatives"—expected to reflect the views of the entity or group they are representing and not subject to conflict-of-interest reviews—even when the agencies call upon the members to provide advice on behalf of the government. Such members would be more appropriately appointed as "special government employees," who are reviewed for conflicts of interest. OGE officials agreed with GAO that these agencies' appointments of some members as representatives of their fields of expertise are not appropriate, and this practice avoids using the special government employee category that was created to help the government hire experts in various fields for such purposes. OGE guidance that representatives may speak for, among others, any recognizable group of persons should be clarified to state that they generally are not to represent an expertise. Also, to be effective, advisory committees must be, and be perceived as being, fairly balanced in terms of points of view and functions to be performed. However, the General Services Administration's (GSA) guidance on advisory committee management does not address what types of information could be helpful to agencies in assessing the points of view of potential committee members, nor do agency procedures identify what information should be collected about potential members to make decisions about committee balance. Consequently, many agencies do not identify and systematically collect and evaluate information pertinent to determining the points of view of potential committee members, such as previous public positions or statements on matters being reviewed.

GAO identified promising practices and measures that can better ensure independence and balance and promote transparency in the federal advisory committee system, such as obtaining nominations from the public and making public information about how members are identified and screened. Wider use of these practices—particularly for committees addressing sensitive or controversial topics—could reduce the likelihood that committees are, or are perceived as being, biased or imbalanced.

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**Abbreviations**

CDC	Centers for Disease Control and Prevention
CODEX	Codex Alimentarius Commission
CV	curricula vitae
EPA	Environmental Protection Agency
FACA	Federal Advisory Committee Act
FAO	Food and Agriculture Organization
FDA	Food and Drug Administration
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act of 1977
FSIS	Food Safety and Inspection Service
GSA	General Services Administration
HACCP	Hazard Analysis and Critical Control Point
HHS	Department of Health and Human Services
ICCVAM	Interagency Coordinating Committee on the Validation of Alternative Methods
NASA	National Aeronautics and Space Administration
NIEHS	National Institute of Environmental Health Sciences
NIH	National Institutes of Health
OGE	Office of Government Ethics
USDA	United States Department of Agriculture
USGS	United States Geological Survey
WHO	World Health Organization

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United States General Accounting Office  
Washington, D.C. 20548

April 16, 2004

The Honorable Eddie Bernice Johnson  
Ranking Minority Member, Subcommittee  
on Research  
Committee on Science  
House of Representatives

The Honorable Brian Baird  
House of Representatives

Federal advisory committees have been called the “fifth arm of government” because of the significant role they play in advising federal agencies, the Congress, and the President on important national issues.<sup>1</sup> To be effective, these advisory committees must be—and, just as importantly, be perceived as being—*independent and balanced*. Specifically, individual committee members who provide advice to the government must be free from significant conflicts of interest—that is, they must be “*independent*.” In addition, while it may be desirable to include experts on committees who have particular viewpoints, federal law requires each committee, as a whole, to be balanced in terms of the points of view and the functions to be performed. Recently, some appointments to scientific and technical advisory committees have generated controversy because of the perception by some scientists and others that these appointments were based on ideology rather than expertise or were weighted to favor one group of stakeholders over others.

In 1962, the Congress established the category of “special government employee” and made the conflict-of-interest rules for such employees less restrictive than for regular federal government employees to overcome obstacles in hiring outside experts for occasional service, such as on federal advisory committees. Members of federal advisory committees are often appointed as special government employees to provide advice on behalf of the government on the basis of their best judgment. In contrast, members may also be appointed to federal advisory committees as “representatives” to provide stakeholder advice—that is, advice reflecting

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<sup>1</sup>In this view, federal advisory committees follow the executive, legislative, judicial, and regulatory “arms” of government. *Hearings on S. 1637, S. 2064, S. 1964 before the Subcommittee on Intergovernmental Relations of the Senate Committee on Government Operations, 92nd Congress, 1st Sess., pt. 1 at 12 (1971).*

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the views of the entity or interest group they are representing, such as industry, labor, or consumers.

Federal advisory committee members who are employees of the federal government must meet federal requirements pertaining to freedom from conflicts of interest—which we refer to in this report as independence—and the committees as a whole must meet requirements pertaining to balance. Federal conflict-of-interest statutes (18 U.S.C. §§ 201), including the principal criminal financial conflict-of-interest statute (18 U.S.C. § 208), apply to regular and, in large part, special government employees. The Office of Government Ethics (OGE) is responsible for developing regulations and guidance for these statutory provisions. The criminal financial conflict-of-interest statute and related OGE regulations prohibit regular and special government employees from participating in a “particular matter”<sup>2</sup> that may have a direct and predictable effect on their financial interest, unless granted a waiver. Members appointed as representatives who are neither regular nor special government employees are not subject to statutes regarding conflicts of interest. The Federal Advisory Committee Act<sup>3</sup> (FACA) requires, among other things, that committee memberships be “fairly balanced in terms of points of view presented and the functions to be performed by the advisory committee.” Courts have interpreted this requirement as providing agencies with broad discretion in balancing their committees. The General Services Administration (GSA) is responsible for developing regulations and guidance regarding the establishment of advisory committees under FACA. In addition to OGE and GSA regulations and guidance, federal agencies have their own policies and procedures to establish and manage advisory committees.

You asked us to examine several issues regarding federal advisory committees. As agreed with your offices, this report (1) describes the role of federal advisory committees in the development of national policies; (2) examines the extent to which governmentwide guidance and agency-specific policies and procedures for evaluating committee members for conflicts of interest and points of view ensure independent members and balanced federal advisory committees; and (3) identifies practices that

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<sup>2</sup>A particular matter is one that involves deliberation, decision, or action that is focused on the interests of specific people or a discrete and identifiable class of people. 5 C.F.R. § 2640.103(a)(1).

<sup>3</sup>Pub. L. No. 92-463, 86 Stat. 770 (1972) (classified at 5 U.S.C. app. 2).



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could better ensure that committees are, and are perceived as being, independent and balanced.

To address these objectives, we reviewed OGE regulations and guidance to federal agencies regarding federal conflict-of-interest provisions and GSA regulations and guidance to federal agencies regarding FACA. We reviewed the policies and procedures at six federal departments and agencies that make extensive use of scientific and technical advisory committees—the Departments of Agriculture (USDA), Energy, Health and Human Services (HHS), and the Interior; the National Aeronautics and Space Administration (NASA); and the Environmental Protection Agency (EPA). Because HHS entities sponsor 26 percent of all federal advisory committees and 36 percent of all scientific and technical advisory committees, we also reviewed the policies and procedures at three HHS agencies that sponsor many advisory committees—the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the National Institutes of Health (NIH). We reviewed the procedures used by these nine departments and agencies to identify, screen, and appoint members for committees so as to ensure that members are free of conflicts of interest (where conflict-of-interest requirements apply) and that committees are balanced. To better understand how agencies implement OGE and GSA governmentwide regulations and guidance as well as their own policies, we examined the management of one committee at each agency.<sup>4</sup> We reviewed the confidential financial disclosure forms of the committee members who were appointed as special government employees, along with other information, and discussed with staff how the committees used this information. We did not, however, make any judgments on whether conflicts of interest existed or whether these panels were properly balanced. To identify practices that promote independence and balance, we examined the relevant policies and procedures of the National Academies;<sup>5</sup> the nine committees and agencies examined in this review; and EPA's Science Advisory Board, which made a number of

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<sup>4</sup>We selected a nonprobability sample of nine committees that address scientific and technical issues using criteria described in appendix I. Results from nonprobability samples cannot be used to make inferences about a population because some elements of the population being studied have no chance or an unknown chance of being selected as part of the sample.

<sup>5</sup>The National Academies consist of four private, nonprofit organizations that advise the federal government on scientific and technical matters: the National Academy of Sciences, the National Academy of Engineering, the Institute of Medicine, and the National Research Council.

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changes to its policies and procedures in response to our June 2001 report.<sup>6</sup> We conducted our review from January 2003 through March 2004 in accordance with generally accepted government auditing standards. For more details on the scope and methodology of our review, see appendix I.

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## Results in Brief

Approximately 950 federal advisory committees with about 62,000 members play an important role in shaping public policy by advising policymakers on a wide array of important and challenging issues. For example, advisory committees provide advice in the form of peer reviews of scientific research that may be used to support health, environmental, and safety regulations; recommendations about specific policy decisions; identification of long-range issues facing the nation; and evaluations of grant proposals, among other functions. Federal advisory committees have been established to work in broad areas of public policy, such as national security, the economy, the environment, and public health. Illustrative of the range of issues addressed by federal advisory committees are the current committees that advise agencies on matters related to AIDS research, food safety, hazardous waste cleanup, trade policy, and homeland security. Advisory committees are sometimes established specifically to address controversial issues about which the government believes it is beneficial to solicit the advice of individuals with the relevant background and/or expertise from outside the government. For example, some of the issues addressed by advisory committees are inherently controversial because they deal with sensitive personal and ideological matters, such as stem cell research and genetic engineering. Other committees address issues that are controversial because of their potential regulatory impact, such as food and drug approvals or environmental regulations.

Additional governmentwide guidance could help agencies better ensure the independence of federal advisory committee members and the balance of federal advisory committees. For example, OGE guidance to federal agencies has shortcomings and does not adequately ensure that agencies appoint individuals selected to provide advice on behalf of the government as special government employees subject to conflict-of-interest regulations. In addition, GSA guidance to federal agencies and agency-specific policies and procedures could be improved to better ensure that

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<sup>6</sup>U.S. General Accounting Office, *EPA's Science Advisory Board Panels: Improved Policies and Procedures Needed to Ensure Independence and Balance*, [GAO-01-536](#) (Washington, D.C.: June 12, 2001).

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agencies collect and evaluate information that could be helpful in determining the viewpoints of potential committee members regarding the subject matters being considered and in ensuring that committees are, and are perceived as being, balanced. Specifically, we found the following:

- OGE guidance on the appropriate use of representative or special government employee appointments to advisory committees has limitations that we believe are a factor in three of the agencies we reviewed continuing the long-standing practice of essentially appointing all members as representatives. That is, we found that USDA, Energy, and Interior have appointed most or all members to their federal advisory committees as representatives—even in cases where the members are called upon to provide advice on behalf of the government and thus would be more appropriately appointed as special government employees. Because conflict-of-interest reviews are only required for federal or special government employees, agencies do not conduct conflict-of-interest reviews for members appointed as representatives. As a result, the agencies cannot be assured that the real or perceived conflicts of interest of their committee members who provide advice on behalf of the government are identified and appropriately mitigated. Further, allegations that the members have conflicts of interest could call into question the independence of the committee and jeopardize the credibility of the committee’s work.
- FACA requires that federal advisory committees be fairly balanced in terms of the points of view and the functions to be performed, and courts have interpreted this requirement as providing agencies with broad discretion in balancing their committees. In addition to the legal requirement for balance, it is important that committees are perceived as balanced in order for their advice to be credible and effective. However, GSA guidance does not address what types of information could be helpful to agencies in assessing the points of view of potential committee members, nor do agency procedures identify what information should be collected about potential members to make decisions about committee balance. Consequently, many agencies do not identify and systematically collect and evaluate information pertinent to determining the points of view of committee members regarding the subject matters being considered. For example, of the nine departments and agencies we reviewed, only EPA consistently (1) collected information on committee members appointed as special government employees that enabled the agency to assess the points of view of the potential members and (2) used this information to help

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achieve balance. Without sufficient information about prospective committee members prior to appointment, agencies cannot ensure that their committees are, and are perceived as being, balanced.

We identified several promising practices for forming and managing federal advisory committees that can better ensure that committees are, and are perceived as being, independent and balanced. These practices include (1) obtaining nominations for committees from the public, (2) using clearly defined processes to obtain and review pertinent information on potential members regarding potential conflicts of interest and points of view, and (3) prescreening prospective members using a structured interview. In our view, these measures reflect the principles of FACA by employing clearly defined procedures to promote systematic, consistent, and transparent efforts to achieve independent and balanced committees. Some of the practices, such as seeking public comment on proposed committees, are particularly relevant to those committees addressing sensitive or controversial topics. In addition, we identified selected measures that could promote greater transparency in the federal advisory committee process and improve the public's ability to evaluate whether agencies have complied with conflict-of-interest requirements and FACA requirements for balance, such as providing information on how the members of the committees are identified and screened and indicating whether the committee members are providing independent or stakeholder advice. Implemented effectively, these practices could help agencies avoid the public criticisms to which some committees have been subjected. That is, if more agencies adopted and effectively implemented these practices, they would have greater assurance that their committees are, and are perceived as being, independent and balanced.

Because the effectiveness of competent federal advisory committees can be undermined if the members are, or are perceived as, lacking in independence or if committees as a whole do not appear to be properly balanced, we are making 12 recommendations to GSA and OGE to provide additional guidance to federal agencies. The broad categories of these recommendations include (1) clarifying the appropriate use of representative appointments; (2) systematically obtaining information that could help ensure committees are, in fact and in perception, balanced; and (3) adopting certain practices that can better ensure independent and balanced committees and increase transparency in the federal advisory process. While our report focuses primarily on scientific and technical federal advisory committees, the limitations in guidance and the promising practices we identified pertaining to independence and balance are

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pertinent to federal advisory committees in general, and thus our recommendations are directed to GSA and OGE because of their responsibilities for providing guidance to federal agencies on these matters.

GSA reviewed a draft of this report and generally agreed with the findings relating to the areas directly under its purview. The agency committed to, among other things, continuing to work in partnership with OGE to address those areas under OGE's jurisdiction relating to FACA. GSA outlined a proactive approach to responding to the report's recommendations, including making changes to its on-line FACA database. OGE reviewed the draft report and also generally agreed with the problems we identified regarding appointments to federal advisory committees, but the agency disagreed that there are any limitations in its guidance that contribute to the problems and also reiterated the measures that OGE has taken to address this issue (most of which were highlighted in the draft report). OGE believes the agencies making inappropriate appointments are disregarding, rather than misinterpreting, the OGE guidance. While we recognize that there may be other reasons as well, we have identified the limitations in OGE's guidance as one factor in some agencies' continuing the long-standing practice of essentially appointing all committee members as representatives. We believe the effectiveness of OGE's and GSA's efforts to ensure that agencies make appropriate appointment decisions for members of their federal advisory committees will not improve until the limitations we identified in OGE's guidance on appointments are addressed. Our view is also that clear, unambiguous guidance would make it more difficult for agencies to misapply the guidance. GSA's and OGE's written comments are discussed further at the end of this report and their letters are provided in appendixes XII and XIII. Overall, the comments from the agencies whose advisory committee management policies and procedures we reviewed—EPA; Energy; HHS (and component agencies CDC, FDA, and NIH); Interior; NASA; and USDA—were generally positive about the draft report, viewing it as providing helpful information on federal advisory committee management. Four of these agencies also cited some specific concerns about, for example, the requirements for independence and assessing prospective members' points of view. We address these issues at the end of this report and provide the pertinent letters from these four agencies in appendixes XIV through XVII.

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## Background

In recent years, controversies regarding the federal advisory committee system have included concerns about the appointment of specific

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individuals to committees and agency decisions to create or terminate some committees. Although a variety of concerns have been raised, the overarching concern was that ideological bias was influencing the selection of experts for scientific and health advisory panels. Publications such as *Science*, *The Lancet*, and *Chemical and Engineering News* have published editorials and articles containing criticisms of decisions seen as injecting ideology into a committee system that should be nonideological. Further, some current and potential federal advisory committee members reported being asked about their political views in the context of decisions regarding their appointment or reappointment to committees.

A number of recent articles and editorials identified specific concerns about HHS committees that address controversial scientific and technical issues. Observers have alleged that some appointees either were unqualified for the position, had extreme views that were outside the mainstream of scientific thinking, or had personal conflicts of interest that should have disqualified them from serving on particular committees. Further, observers alleged that HHS has replaced large portions of the membership of ongoing committees as a way of obtaining committees that shared the administration's viewpoint about particular issues. Finally, concerns were raised that HHS had terminated some advisory committees with which the administration allegedly had ideological differences and replaced them with committees that had different charters and a largely new membership.

In 2003, the National Academy of Sciences issued a report on organizational issues within NIH that included a discussion of the perceived politicization of the advisory committee appointment process. The report noted that these concerns had recently arisen within the scientific and health advocacy communities and were similar to concerns that were raised in the early 1970s. In response to the most recent concerns, the academy recommended, among other things, that appointments to NIH advisory committees be based solely on a person's scientific or clinical expertise or his or her commitment to and involvement in issues of relevance to the mission of the institute.

Also in 2003, the Center for Science in the Public Interest sent a letter to the director of OGE about its concerns that conflicts of interest were introducing biases into the federal advisory committee process at HHS,

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Interior, and other agencies.<sup>7</sup> The center's letter, signed by 21 individuals, including public health advocates and members of academia, made a number of recommendations to OGE aimed at strengthening independence, transparency, and public trust in the federal advisory committee process. Further, the National Academies is examining the selection of scientists, engineers, and health professionals to federal advisory committees addressing science-based policy or reviewing research proposals. This study stems from its regular review of senior scientific technical appointments in the federal government as well as from concerns that scientists and others have raised to the academies about some federal advisory committee appointments and the appointment practices used by some agencies. A report is planned for November 2004.

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## The Federal Advisory Committee Act Sets Broad Requirements and Guidelines for Advisory Committees

The Congress enacted FACA in 1972 in response to two principal concerns: (1) that federal advisory committees were proliferating without adequate review, oversight, or accountability and (2) that certain special interests had too much influence over federal agency decision makers. In this act, the Congress articulated certain principles regarding advisory committees, including broad requirements for balance, independence, and transparency. Specifically, as previously discussed, FACA requires that the membership of committees be fairly balanced in terms of points of view and functions to be performed. Further, FACA requires that any legislation or agency action that creates a committee contain provisions to ensure that the advice and recommendations of the committee will be independent and not inappropriately influenced by the appointing authority (the agency) or any special interest. Finally, FACA generally requires that agencies announce committee meetings ahead of time and give notice to interested parties about such meetings. With some exceptions, the meetings are to be open to the public, and agencies are to prepare meeting minutes and make them available to interested parties.<sup>8</sup>

FACA also set broad guidelines for the creation and management of federal advisory committees, most of which are created or authorized by the

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<sup>7</sup>The Center for Science in the Public Interest is a consumer advocacy organization that conducts research and advocacy programs on health and nutrition.

<sup>8</sup>The President or head of an agency may determine that a meeting be closed if, for example, the meeting will include discussions of classified information, reviews of proprietary data submitted in support of federal grant applications, or deliberations involving considerations of personal privacy.

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Congress. Agencies also establish committees using general statutory authority, and some are created by presidential directives (see app. II). Further, the act requires that all committees have a charter, and that each charter contain specific information, including the committee's scope and objectives, a description of duties, the period of time necessary to carry out its purposes, the estimated operating costs, and the number and frequency of meetings. As required by FACA, the advisory committee charters generally expire at the end of 2 years unless renewed by the agency or by the Congress.<sup>9</sup> The requirement encourages agencies to periodically reexamine their need for committees.

GSA, through its Committee Management Secretariat, is responsible for prescribing administrative guidelines and management controls applicable to advisory committees governmentwide. However, GSA does not have the authority to approve or deny agency decisions regarding the creation or management of advisory committees. To fulfill its responsibilities, GSA has developed regulations and other guidance to assist agencies in implementing FACA requirements, provides training to agency officials, and was instrumental in creating the Interagency Committee on Federal Advisory Committee Management. GSA also has created and maintains an on-line FACA database (available to the public at [www.fido.gov/facadatabase](http://www.fido.gov/facadatabase)) for which the agencies provide and verify the data, including committee charters, membership rosters, budgets, and in many cases links to committee meeting schedules, minutes, and reports. The database also includes information about a committee's classification (i.e., scientific and technical or national policy issue). According to the database, 208 committees with 7,910 members were classified as scientific and technical committees. In addition, 131 committees with over 41,000 members were classified as grant review committees—a category that also often addresses scientific and technical issues. Appendix II provides data on the classifications of the federal advisory committees in fiscal year 2003.

While the GSA's Committee Management Secretariat provides FACA guidance to federal agencies, each agency also develops its own policies and procedures for following FACA requirements. Under FACA, agency heads are responsible for issuing administrative guidelines and management controls applicable to their agency's advisory committees. Generally, federal agencies have a reasonable amount of discretion with

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<sup>9</sup>Several of Interior's committees do not expire because the legislation creating them exempts them from the biennial charter expiration.



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regards to creating committees, drafting their charters, establishing their scope and objectives, classifying the committee type, determining what type of advice they are to provide, and appointing members to serve on committees.<sup>10</sup> However, when the Congress authorizes an agency to establish a particular committee or a President establishes a committee, the agency may have less flexibility in establishing and managing the committee because such things as the committee's objectives, the types of expertise and backgrounds of members, and even the type of advice that is to be provided may be specified by the Congress or the President.

Finally, to assist with the management of their federal advisory committees, agency heads are required to appoint a committee management officer to oversee the agency's compliance with FACA requirements, including recordkeeping. Agency heads must also appoint a designated federal official for each committee to oversee the committee's activities. Among other things, the designated federal official must approve or call the meetings of the committee, approve the agendas (except for presidential advisory committees), and attend the meetings.

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### Criminal Financial Conflict-of-Interest Statute Applies to Some Advisory Committee Members

OGE is responsible for issuing regulations and guidance for agencies to follow in complying with the statutory conflict-of-interest provisions that apply to all federal employees, including special government employees serving on federal advisory committees. A special government employee is statutorily defined as an officer or employee who is retained, designated, appointed, or employed by the government to perform temporary duties, with or without compensation, for not more than 130 days during any period of 365 consecutive days. Many agencies use special government employees, either as advisory committee members or as individual experts or consultants. Special government employees, like regular federal employees, are to provide their own best judgment in a manner that is free from conflicts of interest and without acting as a stakeholder to represent any particular point of view.<sup>11</sup> Accordingly, special government employees appointed to federal advisory committees are hired for their expertise and skills and are expected to provide advice on behalf of the government on

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<sup>10</sup>In response to Executive Order 12838 directing agencies to reduce by at least one-third the number of discretionary committees, the Office of Management and Budget established a maximum number of discretionary advisory committees for each agency.

<sup>11</sup>Office of Government Ethics Letter to the Chairman of a National Commission, June 24, 1993 (93 x 14).

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the basis of their own best judgment. Special government employees are subject to the federal financial conflict-of-interest requirements, although ones that are somewhat less restrictive than those for regular federal government employees.

The criminal financial conflict-of-interest statute (18 U.S.C. § 208) and related OGE regulations prohibit federal employees, including special government employees, from participating in “particular matters” that may have a direct and predictable effect on their financial interests or those interests of a spouse, minor child, or general partner. A particular matter is defined as one involving a deliberation, decision, or action that is focused on the interests of specific people or an identifiable class of people. Special government employees serving on federal advisory committees thus are prohibited from participating when the subjects they consider are particular matters in which the member has a financial interest. However, special government employees serving on federal advisory committees are provided with an exemption that allows them to participate in particular matters that have a direct and predictable effect on their financial interest if the interest arises from their nonfederal employment and the matter will not have a special or distinct effect on the employee or employer other than as part of a class. This exemption does not extend to the committee member’s personal financial and other interests in the matter, such as stock ownership in the employer. If a committee member has a potential financial conflict of interest that is not covered under this or other exemptions, a waiver of the conflict-of-interest provisions may be granted if the appointing official determines that the need for the special government employee’s services outweighs the potential for conflict of interest or that the conflict is not significant. This standard for granting waivers is less stringent than the standard for regular government employees.

The principal tool that agencies use to assess whether nominees or members of advisory committees have conflicts of interest is the OGE Form 450, Executive Branch Confidential Financial Disclosure Report, which special government employees are required to submit annually. The form 450 requests financial information about the committee member and the member’s spouse and dependent children, such as the sources of income and the identification of assets, but it does not request filers to

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provide the related dollar amounts, such as salaries.<sup>12</sup> For committees addressing broad or general issues, rather than particular matters, committee members hired as special government employees are still generally required to complete the confidential financial disclosure form.<sup>13</sup>

Agencies appoint ethics officials who are responsible for ensuring agency compliance with the federal conflict-of-interest statutes. OGE conducts periodic audits of agency ethics programs to evaluate their compliance and, as warranted, makes recommendations to agencies to correct deficiencies in their ethics programs.

Under administrative guidance initially developed in the early 1960s, a number of members of federal advisory committees are not hired as special government employees, but are instead appointed as representatives. Members appointed to advisory committees as representatives are expected to represent the views of relevant stakeholders with an interest in the subject of discussion, such as an industry, a union, an environmental organization, or other such entity. That is, representative members are expected to represent a particular and known bias—it is understood that information, opinions, and advice from representatives are to reflect the bias of the particular group that they are appointed to represent.<sup>14</sup> Because these individuals are to represent outside interests, they do not meet the statutory definition of federal employee or special government employee and are therefore not subject to the criminal financial conflict-of-interest statute. According to GSA and OGE officials, reliable governmentwide data on the number of representative members serving on federal advisory committees are not available. However, data that agencies report to OGE on special government employees serving on federal advisory committees and to GSA on the number of federal advisory committee members indicate

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<sup>12</sup>Some agencies, such as EPA and FDA, have developed alternative confidential financial disclosure forms that request additional information on activities and affiliations, such as expert legal testimony.

<sup>13</sup>Special government employees who serve in excess of 60 days above a certain salary level, however, must file a public disclosure form.

<sup>14</sup>EPA noted in its comments on our draft report that in the case of a small category of advisory committees that EPA uses, known as regulatory negotiation committees, representative members may bind their organization to take a course of action.

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that only about 35 percent of the government's federal advisory committee members are appointed as special government employees.<sup>15</sup>

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## Advisory Committees Play an Important Role in the Development of Federal Policies

Generally composed of individuals from outside of the federal government, federal advisory committees play an important role in the development of public policy and government regulations by providing advice to policymakers on a wide array of issues. In fiscal year 2003, 54 agencies sponsored approximately 950 committees with about 62,000 members to provide advice by performing peer reviews of scientific research; developing recommendations on specific policy decisions; identifying long-range issues facing the nation; and evaluating grant proposals, among other functions. Their advice—on issues such as stem cell research, space exploration, trade policy, drinking water standards, and drug approvals—can enhance the quality and credibility of federal decision making.

Advisory committees have been and continue to be involved in issues of great importance to the advancement of knowledge and the development of national policies and regulations. For example, Energy's decision to undertake the Human Genome Project was based in part on the 1987 recommendation of the department's Health and Environmental Research Advisory Committee.<sup>16</sup> As a result, Energy, working with NIH, successfully coordinated the multibillion-dollar research effort that succeeded in identifying all of the genes on every chromosome in the human body and determining their biochemical nature—leading the way to numerous advances in medical science.

Advisory committees provide agencies with advice in a variety of broad areas of federal policy, such as the environment, public health, and the economy. Committees provide agencies with advice about a wide array of

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<sup>15</sup>The estimate of the percentage of special government employees is based on data that agencies (1) provide to OGE regarding the number of special government employees serving on federal advisory committees and (2) provide on the GSA FACA database on the total number of federal advisory committee members. This estimate does not include advisory committee members serving on NIH "special emphasis panels," which are not standing committees but rather involve one-time reviews of various science and technical funding applications to NIH (grants, cooperative agreement applications, etc.). If these individuals were included in the estimate above, the percentage of advisory committee members appointed as special government employees would be reduced to about 25 percent.

<sup>16</sup>This committee is currently called the Biological and Environmental Research Advisory Committee.

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specific issues, such as the management of federal lands, the development of alternative sources of energy, guidelines for assessing cancer risks, risk assessments of toxic chemicals, hazardous waste cleanup, the establishment of new standards for food safety, the delivery of health care services, and the effectiveness of new prescription drugs and medical devices. Recently, federal advisory committees were established to help agencies marshal the facts and weigh options in response to new national issues, such as information security and terrorist attacks.

Federal advisory committees are sometimes established specifically to address controversial issues about which the government believes it is necessary to solicit the advice of individuals with the relevant background and/or expertise from outside of the government. Some of the issues addressed by advisory committees are controversial because they touch upon inherently sensitive personal, religious, or ideological matters, such as stem cell research and genetic engineering. Other committees address issues that are controversial because of their potential regulatory impact on industries or consumers, such as in the case of food and drug approvals or environmental regulations.

To address controversial and other important matters, scientific and technical advisory committees—which are the primary focus of this report—play a number of different roles on behalf of agencies. One role of science committees is to advise agencies on how to address a set of particular problems. For example, the Advisory Committee on Foreign Animal and Poultry Diseases gives the Secretary of Agriculture information and advice on measures necessary to prevent and combat such threats as foot-and-mouth disease. The charter also charges the committee with providing advice on the prevention or management of other threats from foreign animal or poultry diseases. Recent recommendations from the committee addressed coordination between USDA and the Department of Homeland Security and support for a national food animal identification work plan.

In 1990, the Congress authorized the creation of the Aquatic Nuisance Species Task Force to, among other things, coordinate federal efforts to address the threats posed by nonnative aquatic plants and animals.<sup>17</sup> The task force operates as a federal advisory committee and is composed of 7

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<sup>17</sup>The Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 codified at 16 U.S.C. §§ 4701-4741.

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federal agency representatives and 13 nonfederal members in an ex officio status. It reports to the Departments of the Interior and Commerce. Among the task force's accomplishments are a number of reports and publications on risk assessment, prevention initiatives, and control programs for such nonnative species as the brown tree snake and the green crab.

Some science advisory committees offer advice to agencies on specific regulatory decisions. For example, FDA established science advisory committees that offer advice on the licensing of specific drugs and on the safety and effectiveness of medical devices. These committees play an important role in determining whether drugs and other medical products make it into the marketplace and can therefore have a significant impact on specific manufacturers as well as potential patients and consumers.

Other science advisory committees make recommendations to agencies on strategic planning efforts needed to address long-range issues facing the nation. Existing committees are exploring efforts to chart new directions in research in biology, physics, astronomy, and space exploration, to name just a few. For example, Energy's Basic Energy Sciences Advisory Committee issued a report in February 2003 entitled *Basic Research Needs to Assure a Secure Energy Future*.<sup>18</sup> In that report, the committee stated its belief that a new national energy research program is essential and must be initiated with the intensity and commitment of the Manhattan Project. The report included a lengthy list of proposed research topics.

Advisory committees may be established to provide a peer review function. For example, a peer review group could be asked to review a body of scientific literature and offer its opinion on the adequacy of the scientific data that may be used to support regulatory actions. As an illustration, in 2001, EPA revised its standards for safe levels of arsenic in drinking water using, in part, the analysis and recommendations of two federal advisory committees—the National Drinking Water Advisory Council and the EPA's Science Advisory Board. This revised standard will have a far-reaching effect on both human health and the operation of public drinking water systems. Other peer review groups are asked to judge the merits of proposals submitted to national grant competitions. For example, the

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<sup>18</sup>*Basic Research Needs to Assure a Secure Energy Future: A Report from the Basic Energy Sciences Advisory Committee*, prepared by Oak Ridge National Laboratory (Oak Ridge, TN: February 2003).

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National Science Foundation, NIH, and other agencies use such groups to evaluate proposals submitted for possible funding by academic or clinical researchers covering a wide range of subject matter. After the peer review groups evaluate the proposals, other science advisory committees may make recommendations to the agencies regarding which proposals to fund.

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## Federal Guidance Could Better Ensure Independence and Balance

OGE and GSA governmentwide guidance and the policies and procedures of the nine departments and agencies we reviewed have limitations that reduce their effectiveness in ensuring that advisory committee members are independent and that advisory committees are, and are perceived as being, balanced. First, with respect to independence, OGE guidance on whether to appoint members to advisory committees as special government employees or representatives—a decision that determines whether an agency conducts a conflict-of-interest review—has limitations that we believe are a factor in three agencies’ continuing their long-standing practice of essentially appointing all members as representatives. We found that USDA, Energy, and Interior appoint all or almost all members to their federal advisory committees as representatives, even when the members are called on to provide advice on behalf of the government on the basis of their best judgment.<sup>19</sup> Because such members are not providing stakeholder advice, they would be more appropriately appointed as special government employees, subject to reviews for conflicts of interest. However, because conflict-of-interest reviews are only required for federal or special government employees, agencies do not conduct conflict-of-interest reviews for members appointed as representatives. As a result, the agencies cannot be assured that the real or perceived conflicts of interest of their committee members’ providing advice on behalf of the government are identified and appropriately mitigated. Further, allegations that the members have conflicts of interest could call into question the independence of the committee and jeopardize the credibility of the committee’s work. Second, with respect to balance, GSA guidance does not address what types of information would be helpful in assessing the points of view of potential committee members with regard to the matters the committees will consider, nor do agency procedures

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<sup>19</sup>OGE data indicate that some other agencies, such as the Small Business Administration and the Department of Justice, also rely exclusively on representative appointments to federal advisory committees. OGE staff told us the agency did not examine whether representatives appointed to those agencies’ committees provided independent or stakeholder advice.

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identify what information the agencies believe should be collected about potential members—an important step that can help agencies ensure committees are, and are perceived as being, balanced. We found that many agencies do not consistently request information that would be helpful in assessing the overall balance of committee members' viewpoints—such as previous public positions the members may have taken on the matters being reviewed. Without adequate policies and procedures, agencies are vulnerable to allegations that committee members have conflicts of interest and that committees are imbalanced. Such allegations may call into question a committee's legitimacy and may jeopardize the work of otherwise credible and competent committees.

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## Reviews for Conflicts of Interest Are Not Always Performed

Some agencies appoint most or all members to their advisory committees as representatives, rather than as special government employees. However, some of these committee members appointed as representatives are asked to provide agencies with advice on behalf of the government without representing any particular point of view, and thus it appears that the members would be more appropriately appointed as special government employees. Because only regular and special government employees are subject to the conflict-of-interest statutes, agencies do not conduct conflict-of-interest reviews for members appointed as representatives. Some committees thus have members who had they been appointed as special government employees would have undergone reviews for conflicts of interest, but they have not been reviewed for potential conflicts of interest because they were appointed as representatives.

Representative members and special government employees are supposed to serve different functions on advisory committees. In 1962, the Congress established the category of special government employee and amended the federal conflict-of-interest laws to overcome obstacles in hiring outside experts for occasional service. Special government employees are appointed to federal advisory committees to provide advice on behalf of the government on the basis of their best judgment. Representative members, in contrast, are generally considered as those members of advisory committees who are “chosen for committee membership only to present the views of a private interest.”<sup>20</sup>

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<sup>20</sup>See Office of Legal Counsel, Department of Justice, Applicability of 18 U.S.C. § 219 to Representative Members of Federal Advisory Committees (Sept. 15, 1999).



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In 1982, in response to uncertainties regarding when agencies should appoint members to their advisory committees as special government employees or representatives, OGE developed guidance on the appropriate use of these two appointment categories for federal advisory committees.<sup>21</sup> In this guidance, OGE noted that it disagreed with “an occasional flat assertion” by agencies that advisory committee members are never subject to the federal conflict-of-interest laws. The 1982 guidance, which is still OGE’s principal guidance on this issue,<sup>22</sup> states that a “consultant or advisor whose advice is obtained by a department or agency from time to time because of his individual qualifications and who serves in an independent capacity is an officer or employee of the government”—that is, this person is a regular federal employee or a special government employee. In contrast, a consultant or advisor “who is requested to appear before a government department or agency to present the views of a non-governmental organization or group which he represents, or for which he is in a position to speak, does not act as a servant of the government and is not its officer or employee” but is a representative member. The OGE 1982 guidance concludes by noting that if language used in the enabling legislation, executive order, charter, or other pertinent document does not specify whether the members are functioning as special government employees or representatives, it is fair to conclude that the member is a special government employee because this is the usual status of those appointed by agencies to serve the government.

OGE’s most recent guidance that addresses representative appointments to advisory committees is its February 2000 summary of ethical requirements applicable to special government employees. This summary includes a paragraph discussing representative appointments, highlighting the fact that unlike special government employees and other federal employees, representatives are not expected to render disinterested advice to the government but are expected to “represent a particular bias.” This document explains that representatives are described more fully in OGE’s 1982 guidance and also refers readers to two 1993 advisory letters that (1) conclude that representatives can make policy recommendations to the

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<sup>21</sup>Memorandum 82 x 22, Members of Federal Advisory Committees and the Conflict-of-Interest Statutes, July 9, 1982.

<sup>22</sup>This guidance has been amplified by several other documents in later years including Advisory Letter 93 x 14 to the Chairman of a National Commission, June 24, 1993; Advisory Letter 93 x 30 to the Executive Director of a Federal Commission, October 22, 1993; and Advisory Opinion 00 x 1, Memorandum dated February 15, 2000.

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government and (2) explain the difference between the two types of appointment as follows: representatives are asked to represent a particular bias, while special government employees are asked to provide their own best judgment without representing any particular point of view and in a manner that is free from conflict of interest.

In addition to developing the 2000 guidance on special government employees, OGE has taken steps to educate agencies about special government employee and representative appointments by participating in GSA's FACA management course that includes a session on ethics, conflict-of-interest, and financial disclosure issues. According to GSA, this class is conducted five times each year, reaching about 300 advisory committee staff. According to OGE, the ethics training begins with a discussion of the special government employee/representative designation issue. The course material includes a discussion of representatives and also refers readers to OGE's 1982 guidance. Further, OGE provides training at annual ethics conferences for ethics officials in the executive branch.

Despite these efforts, a recent OGE staff study on agency management of federal advisory committees, summarized in a November 2002 memorandum, indicates that some uncertainties about appointments to federal advisory committees may continue to exist. That is, OGE found that four of the seven agencies it reviewed—Energy, Interior, the Commission on Civil Rights, and the Small Business Administration—appointed all, or nearly all, members as representatives.<sup>23</sup> Further, the OGE memorandum expressed concern that these agencies may be purposely designating their committee members as representatives to avoid subjecting them to the financial disclosure statements required for special government employees and may not be conducting conflict-of-interest reviews for some committee members when they should have been conducted. The OGE memorandum concluded that further scrutiny and education about the proper designation of committee appointments was warranted. As a result, at the next annual conference for agency ethics officials in March 2003, OGE included a session, Ethics Management Tools for Your Federal Advisory Committee, which was principally devoted to “designation” issues involving appointments to federal advisory

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<sup>23</sup>OGE reviewed the management of advisory committees at the Departments of Energy, the Interior, the Army, and Education; the Commission on Civil Rights; the National Endowment for the Arts; and the Small Business Administration.

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committees.<sup>24</sup> In addition, in May 2003, OGE issued new audit guidelines for its periodic reviews of agency ethics programs that provide for additional focus and review of appointment designations for individuals serving on committees, councils, boards, and commissions. Finally, as previously mentioned, OGE officials conduct a segment on ethics that addresses the appointments of representatives and special government employees during GSA's FACA management course.

Nonetheless, three of the agencies we reviewed—USDA, Energy,<sup>25</sup> and Interior—appoint most or all of the members to their federal advisory committees as representatives.<sup>26</sup> Upon examining some of the specific committees at these agencies, we found that these agencies appoint members as representatives even when the members are called on to provide advice on behalf of the government on the basis of their best judgment, rather than to represent views of outside organizations. Specifically, USDA, Energy, and Interior have committees comprised entirely of representative members where, on the basis of the agencies' descriptions of the type of advice that the members are to provide, the use of special government employees seems more appropriate, such as in the following cases:

- *USDA's National Advisory Committee for Microbiological Criteria for Foods.*<sup>27</sup> According to its charter, the purpose of the committee is to provide impartial, scientific advice to federal food safety agencies on the development of an integrated national system to monitor food safety from farm to final consumption in order to ensure the safety of domestic, imported, and exported foods.

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<sup>24</sup>OGE also addressed the designation issue at a session of its 2004 annual conference.

<sup>25</sup>In April 2003, Energy's Acting Assistant General Counsel for General Law told us that all but one of the department's committees use only representative members. The one committee that appointed special government employees was the National Nuclear Security Administration Advisory Committee, which was established in June 2001 and expired in June 2003.

<sup>26</sup>Coincidentally, our review included two of the departments (Energy and Interior) included in OGE's staff study. OGE found that the Small Business Administration and the Commission on Civil Rights also appoint most or all committee members as representatives. OGE data indicate that some other agencies, such as the Departments of Justice and State, also rely primarily on representative appointments to federal advisory committees.

<sup>27</sup>According to USDA, the committee is cosponsored with HHS, the Department of Defense, and Commerce but is managed by USDA.

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- *Energy's Biological and Environmental Research Advisory Committee.* According to the committee's designated federal official, the department uses the committee to obtain independent scientific advice on Energy's Biological and Environmental Research Program. The committee addresses issues such as genomics, the health effects of low-dose radiation, DNA sequencing, medical sciences, environmental remediation, and climate change research. In addition to reviewing scientific issues, the committee provides advice on long-range research plans and priorities and appropriate levels of funding.
  - *Interior's Scientific Earthquake Studies Advisory Committee.* According to the committee's designated federal official, members are selected to provide their independent advice to the U.S. Geological Survey (USGS) on matters relating to the survey's role in the National Earthquake Hazards Reduction Program, which is a multiagency strategic program to reduce risks to lives and property resulting from earthquakes. The committee is to review the USGS National Earthquake Hazards Reduction Program's roles, goals, and objectives; assess its capabilities and research needs; provide guidance on achieving major objectives; and establish and measure performance goals. (As discussed below, in January 2004, Interior officials determined that the members of this committee should be appointed as special government employees, and the officials said that the committee would not meet again until the appointments as special government employees have been made.)

In contrast, we found that EPA, HHS, and NASA appoint members as special government employees to committees that provide advice on behalf of the government about scientific and technical issues similar to those addressed by the committees discussed above. Consequently, these agencies do evaluate committee members who provide advice on behalf of the government for potential conflicts of interest.

USDA, Energy, and Interior have 30 other committees with about 750 members that are classified as scientific and technical committees.<sup>28</sup> In addition, some committees in other categories, such as national policy advisory committees, also address scientific and technology issues—subject matters for which advice on behalf of the government on the basis of members' best judgment, rather than stakeholder advice, is typically

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<sup>28</sup>In total, these agencies have 189 federal advisory committees with 4,517 members.

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sought. In speaking with USDA, Energy, and Interior officials about the basis for their decisions to essentially appoint all advisory committee members as representatives, we learned that this practice is long-standing and firmly rooted in agency cultures—that is, it represents the way these agencies have traditionally staffed their federal advisory committees. The agencies we reviewed generally have not developed sufficient policies, procedures, or guidance for their staff to use when determining which type of appointment is appropriate for individual committees. For example, the guidance of some agencies, such as USDA and Interior, does not address the types of appointments that may be made. Others, such as NASA and Energy, recognize in agency policies and procedures that members can be either special government employees or representatives. However, few of the agencies that have policies identifying the types of appointments specify criteria that should be used when deciding whether the members should be appointed as either special government employees or representatives.

In our view, shortcomings in the OGE 1982 guidance regarding members of federal advisory committees and the conflict-of-interest statutes may (1) contribute to the agencies' overreliance on representative appointments to their advisory committees and (2) limit the effectiveness of OGE's and GSA's education efforts on appointments to advisory committees. Specifically, we found the following shortcomings in the 1982 guidance, which OGE cites as its most complete discussion on the use of representative appointments:

- The OGE guidance is overly broad in describing the groups for which representatives may speak. That is, the guidance indicates that representatives may speak for firms or an industry; for labor or agriculture; or for “any other recognizable group of persons including, on occasion the public at large.” We found that Energy, Interior, and USDA appoint some members to their committees on the basis that they represent various scientific or technical fields, such as biology or toxicology. However, appointing individuals as representatives of a broad category of people, such as a field of expertise, appears to generally be more consistent with providing advice on behalf of the government on the basis of the individual's best judgment, rather than acting as a stakeholder to represent the views of a nongovernment entity or group with an interest in the matter. At our exit conference, OGE officials agreed that, generally, it is not appropriate to appoint committee members as representatives on the basis of their expertise. Further, this approach to classifying members does not recognize and

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essentially avoids using the special government employee category, which was specifically created to facilitate the government's ability to retain the services of experts in various fields for such purposes as temporary service on federal advisory committees.

- The conclusion section of the OGE guidance implies that when the term “representative” is used in authorizing legislation, or other such documents, members should be classified as representatives, despite the fact that this term may be used for more generic purposes, such as to direct the balance of a committee. The guidance states that the decision to make representative appointments to federal advisory committees can be indicated in enabling legislation, executive orders, committee charters, or other pertinent documents by “the use of words to characterize [committee members] as the representatives of individuals or entities outside the government who have an interest in the subject matter assigned to the committee.” However, the use of some form of the terms “represent” or “representative” in these documents does not always clearly indicate that the members are to be appointed to serve as representatives; sometimes these terms are used to define committee composition or balance. For example, some of the documents use the term “representative” to identify fields of expertise or employment background needed—specifying, that is, the expertise and points of view deemed pertinent. Some of the documents do not state that the representatives identified have an interest in the matter (as the guidance quoted above calls for) or that they are to speak for their organizations; thus the documents using the term “representative” are sometimes ambiguous. Unlike the guidance on identifying committee members appointed as special government employees—“by the use of words to command the members to exercise individual and independent judgment”—the guidance on identifying representative members does not specify the nature of the advice to be provided (e.g., stakeholder advice).
- The OGE guidance states that the fact that someone is appointed to a committee on the recommendation of an outside organization tends to support the conclusion that the person has a representative function. However, a number of committees solicit recommendations from outside organizations when appointing special government employees in order to achieve appropriate balance and expertise on their committees. Thus, the guidance does not take into account a common practice that agencies use to identify potential committee members and

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may overemphasize the weight that agencies should give to this factor when determining what constitutes a representative appointment.

Officials at EPA and NASA also said that the OGE guidance on representative appointments is ambiguous in some respects. They believe it would be very helpful for agencies to have clear criteria for representative appointments. Further, the officials said that training on the issue of appointments to advisory committees has limitations. Specifically, the EPA and NASA officials said that, in their view, the FACA management course does not sufficiently clarify when appointments should be made as special government employees and when they should be made as representatives. These officials also noted that the agencies' ethics officials generally are not the ones who make decisions on the appropriate appointment category; rather, appointment type is viewed more as a FACA management issue. Thus, agency officials managing federal advisory committees may look to GSA more than to OGE for clarification on appointment questions. For example, an official at EPA who has served a detail at GSA said that GSA regularly receives calls from agencies with questions about the distinction between the two types of appointments. We believe these circumstances highlight the importance of both the coordination between GSA and OGE to ensure that GSA is prepared to respond to questions about appointments and the GSA FACA management training directed at agency staff who manage federal advisory committees.

Although the FACA management course manual provides useful information on appointments to committees, we identified some limitations in this material as well. For example, the introductory sentence on appointments states that determining the status of an individual serving on a federal advisory committee is "largely a matter of personnel classification and should be coordinated with an agency's personnel office." In our view, this statement minimizes the importance of examining the type of advice that the individual is being asked to provide as a key determinant of the status of an individual (i.e., the type of appointment to be made). In this regard, in December 2003 officials at OGE told us that they have now concluded (1) that agencies should decide at the outset whether the members of each committee are going to be representatives or special government employees and (2) that this decision should be part of the chartering process. In addition, the GSA manual is not clear and unambiguous on the role of representative members, stating that, in general, representative members of advisory committees "serve as representatives of outside entities and *may* [emphasis added] represent the views of a particular industry or group (e.g., labor, agriculture or other

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similar group of interests).” In contrast, OGE guidance states that representatives *are* to represent the views of identified entities or groups. Finally, the GSA manual highlights some OGE criteria from its 1982 guidance document that, as discussed above, we believe need clarification.

The consequences of appointing advisory committee members as representatives when they are in fact asked to provide advice on behalf of the government without representing any particular outside entity’s or group’s point of view exposes the relevant committees to potentially serious problems. Because representative members are not subject to reviews for potential conflicts of interest, allegations of conflicts of interest may call into question the integrity of the committee and jeopardize the credibility of the committee’s work.

Some agencies do address the potential conflicts of interest of their representative members to some extent. For example, Interior’s Bureau of Land Management prohibits its advisory committee members from participating in any matter in which they, a spouse, or dependent child have a direct interest and requires the members to disclose any direct or indirect interest in leases, licenses, permits, contracts, or claims and related litigation that involve lands or resources administered by the bureau. However, this policy does not require the representative members to identify any other financial interests. Interior officials also told us that the department has begun inserting standard language into its committee charters briefly stating the ethics obligations of the members, whether they are special government employees or representatives. The charters for committees with representative members will include a statement that “a member may not participate in matters that will directly affect, or appear to affect, the financial interests of the member or the member’s spouse or minor children, unless authorized by the designated federal official.”<sup>29</sup>

In January 2004, Interior officials also said that the department has begun working with its committee management officers to develop training and distribute materials to heighten committee members’ awareness of applicable ethical obligations and to develop and institute the appropriate screening mechanisms. Similarly, Energy does not require representative

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<sup>29</sup>The charters will also state that compensation from employment does not constitute a financial interest of the member so long as the matter before the committee will not have a special or distinct effect on the member or the member’s employer, other than as part of a class.



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members to provide information on their financial interests and affiliations but does tell representative members in letters appointing them to committees that they “are required to recuse themselves from participating in any meeting, study, recommendation, or other committee activity that could have a direct and predictable effect on the companies, organizations, agencies, or entities with which they are associated or in which they have financial interest.” Interior and Energy policies thus rely on committee members’ correctly identifying and voluntarily disclosing such circumstances. In contrast, USDA requires its representative members to provide information about their employment and sources of income in excess of \$10,000 but does not ask for information about other financial assets that may affect impartiality, such as stock holdings. However, if these members should have been, and actually were, appointed as special government employees, none of these approaches would be adequate to ensure that the members did not have conflicts of interest requiring mitigation.

At the start of our review, Interior officials told us that they had begun to review their appointment classifications for their 115 advisory committees as a result of the November 2002 OGE study. The officials noted that many of their committees addressing federal land management issues are not scientific and technical in content and, in their view, are appropriately staffed with representative members. In January 2004, Interior officials acknowledged that it was appropriate to change the nature of some committee members’ appointments upon reexamination of any underlying legislation and the purpose of the committees. The officials said the department has been reviewing the appointments to committees as their charters expire, and that the department has appointed special government employees to a few advisory committees during the past year.<sup>30</sup> Regarding the earthquake studies committee discussed above, in January 2004 the department examined the appointments while renewing the charter and determined, on the basis of its review of the committee’s authorizing legislation, that the members of this committee should properly serve as special government employees. This committee has been operating for 2 years with members appointed as representatives. Interior officials said the change in appointments will be reflected in the charter and in the

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<sup>30</sup>The department appointed members of the Flight 93 Advisory Commission and the Jimmy Carter National Historic Site Advisory Commission as special government employees in September 2003 and January 2004, respectively.

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pending appointment letters, and the committee will not be active again until these changes are made.

While noting that it now believes the authorizing language for the earthquake committee clearly calls for the appointment of the members as special government employees, the officials said that other committees that address scientific and technical issues specifically call for the appointment of representatives, such as Interior's National Cooperative Geologic Mapping Advisory Committee. This committee, comprised primarily of officials from five federal agencies, is to review and provide advice on a 5-year plan for the geologic mapping program that the Secretary of the Interior is required to prepare. In our view, while the statute calls for the committee to include two representatives from the state geological surveys and one each from "academia" and "the private sector," it does not clearly and unambiguously call for these individuals to be appointed as representative members rather than special government employees. As previously discussed, the term "representative" may be used in a variety of ways and may be used in a more generic manner to describe a committee's composition. The term "representative" does not necessarily indicate that members should be stakeholders speaking for entities with an interest in the matter, nor is it clear in this case that academia or the private sector would have a specific point of view that could be represented. We believe the department could choose to appoint these members as special government employees to obtain their advice, if Interior decided that nonstakeholder advice was appropriate in light of the committee's function. On the other hand, if the department wants to obtain stakeholder advice from the nonfederal committee members regarding the government's 5-year geologic mapping program plan, the representative members should be clearly informed about the specific interest and points of view they are to represent.

On this point, Interior officials acknowledged that their advisory committee members themselves are not always clear on whether they are to provide stakeholder advice or advice on behalf of the government. For example, during our review we learned that this question was raised at the initial meeting of the earthquake committee in 2001, at which point in time the representative members were told that they were charged with providing advice on behalf of the government, guidance indicating that the representative members were to function as special government employees. To be certain that committee members are clear on their roles in the future, Interior officials said that the department has begun to ensure that letters appointing individuals to advisory committees clearly inform

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the member of their status as either a special government employee or a representative. Further, if the members are to serve as representatives, they are to be clearly informed of the constituencies they are to represent before the committee. Clearly, this is an important fact to communicate to the committee members.

GSA officials also told us that appointment information is relevant and important to understanding the work of the various committees. The officials agreed that information on the nature of the advice being provided—and, in the case of representative appointments, of the entities or groups represented—that is not currently available to the public would be useful and informative. They further indicated that the GSA FACA database, which is available to the public and which identifies the members of the advisory committees, could be expanded to include, for each committee member, the type of appointment and the entity or group represented.

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**Information That Can Help  
Agencies Ensure  
Committees Are Balanced Is  
Not Systematically  
Gathered and Evaluated**

Many agencies do not identify and systematically collect and evaluate information that can help them determine the points of view of their potential committee members regarding the subject matters the committees will consider and thus better ensure that committees are, and are perceived as being, balanced. FACA requires that committees be fairly balanced both in terms of the points of view represented and the functions to be performed. Courts have interpreted the FACA requirement for committee balance as providing agencies with broad discretion in balancing their committees. In addition to the legal requirement for balance, it is important that committees are perceived as being balanced in order to be credible and effective. However, GSA guidance does not address what types of information could be helpful to agencies in assessing the points of view of potential committee members, nor do agency procedures identify what information should be collected about potential members to make decisions about committee balance. Many agencies do not identify and systematically collect and evaluate information that would be helpful in determining the points of view of committee members relevant to the subject matters the committees will consider. For example, of the nine departments and agencies we reviewed, only EPA consistently collected information on committee members who were appointed as special government employees in order to assess the points of view of the potential members and used this information to help achieve balance.

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Assessing the points of view of individual members is fundamental to ensuring that committees as a whole are, and are perceived as being, fairly balanced in terms of points of view because agencies must first know whether the members have particular viewpoints or whether they may have—or may reasonably be perceived as having—certain biases. For example, only financial interests and affiliations during the prior year are considered pertinent for conflict-of-interest purposes, but financial and other relevant affiliations—extending beyond the 12-month period—may identify a potential bias or point of view that agencies should consider both in selecting individual members and balancing the committees as a whole. Even when a legal conflict of interest does not exist, a committee member may be so closely aligned with a point of view or an organization that his or her ability to provide objective and impartial advice is impaired or appears to be impaired. Such circumstances in which a person’s impartiality may be called into question, sometimes referred to as an “apparent conflict of interest” and a “perceived conflict of interest,” are important for agencies to be aware of because the perception of bias that can harm the reputation of advisory committees is independent of the legal definition of a conflict of interest.<sup>31</sup> In some cases, however, agencies may find it helpful to include individuals with known biases, perspectives, or affiliations to serve on certain advisory committees in order to ensure that the relevant points of view are considered.<sup>32</sup> In these cases, the issue of the overall balance of viewpoints on the committees is heightened in the sense of an agency’s ability to ensure that the committee is balanced with respect to points of view. When agencies are unaware of the viewpoints and biases of its members, they cannot adequately ensure that the committees are, and are perceived as being, balanced as a whole.

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<sup>31</sup>Under 5 C.F.R. § 2635.502, impartiality is considered in some cases in conjunction with particular matters. For example, a special government employee should not participate in a particular matter involving a specific party where the employee knows the matter will have a direct and predicable effect on the financial interest of a member of their household and where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question their impartiality in the matter, unless the employee has received authorization from an agency designee.

<sup>32</sup>For scientific committees, the relevant points of view may be different scientific perspectives.

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Agencies typically rely on two sources to collect data about committee members who were appointed as special government employees: curricula vitae (CV) or résumés and the OGE form 450, the confidential financial disclosure form. Agencies generally collect CVs<sup>33</sup> or résumés that may provide some information pertinent to assessing points of view, such as professional affiliations and published articles. Some agencies may also perform Internet searches for background information on candidates. However, these sources vary in content and reliability and may not be sufficient to consistently provide the information needed to assess for points of view.<sup>34</sup>

The form 450, which does collect specific information in a systematic manner, was developed specifically for reviews for potential financial conflicts of interest. Some of the information on this form, however, also is relevant to assessing the overall balance of viewpoints on a committee. The form 450 requires potential committee members (and returning members at least annually) to provide information on sources of income and assets, liabilities, and outside positions during the prior year and on existing employment agreements or arrangements, such as promises of future employment and leaves of absence.<sup>35</sup> The information on income sources, honoraria, and outside positions held during the prior year may be important to assessing for points of view.<sup>36</sup> For example, a university professor who is also an official of an environmental advocacy organization may reasonably be viewed by a sponsoring agency and others as representing an environmental rather than an unaligned “academic” perspective. Similarly, a university professor who is also an official of a

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<sup>33</sup>CVs are most pertinent to assessing expertise, generally providing information on education, employment experience, professional memberships, service on boards or journals, and publications and presentations.

<sup>34</sup>Typically, members are rotating off committees periodically and thus issues of overall balance need to be revisited whenever membership changes are made. While special government employees serving on advisory committees are required to provide forms 450 at least annually, CVs and résumés may be collected once and not updated over the years that the members serve on the committees.

<sup>35</sup>Income includes salaries, fees, and honoraria of the individual and his or her spouse and dependent children. Assets producing more than \$200 in income during the prior year also are to be reported, such as rent, interest, dividends, and capital gains. Information is requested on the sources of income and the identification of assets but not on the related dollar amounts.

<sup>36</sup>Some relevant affiliations would not be identified because the form 450 only requests information covering the immediate prior 12 months.

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toxicology institute that receives funding from chemical companies or who provided expert legal testimony for a corporation may reasonably be viewed by a sponsoring agency and others as providing an industry perspective.

Importantly, while the form 450 can provide some pertinent information for assessing points of view, it was neither designed for nor does it provide sufficient information for this purpose. Specifically, as our review of EPA's Science Advisory Board demonstrated,<sup>37</sup> the form 450—designed for financial conflict-of-interest reviews—solicits information covering only the prior year and does not request other information relevant to assessing points of view, such as

- previous public statements or positions on the matter being reviewed, including statements in articles, testimony, or speeches;
- positions taken in various legal forums, particularly in providing expert legal testimony, on the matter;
- research conducted on the matter;
- interests of their employers or clients in the matter; and
- sources of funding for research or other activities.

However, such information is helpful to understand the points of view of potential committee members and therefore to assess how an individual member's participation on the committee would affect overall committee balance. For example, it is helpful for agencies to be aware of public pronouncements that candidates have made on matters relevant to their committees so that they can assess how such individuals may be viewed in terms of impartiality. In those instances where an agency selects a member for their expertise who may have a viewpoint that is aligned with an industry or environmental interest, without the information that would reveal the existing viewpoint, the agency would not be aware of whether including a member with a different viewpoint would be beneficial in terms of the public's perception of committee balance.

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<sup>37</sup>GAO-01-536.

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In addition, the extent to which a committee member's employment is funded by a grant or grants from the sponsoring agency is a reasonable factor to consider in assessing the member's impartiality in terms of independence from the agency. On this point, the Office of Management and Budget recently highlighted in its proposed rule on peer review procedures that the independence of scientists conducting peer reviews for agencies while at the same time receiving funding from these agencies might be called into question. Similarly, the 2003 report by the National Academies on organizational issues within NIH recommended that a substantial portion of a committee's scientific membership should consist of persons whose primary source of research support is derived from a different NIH center or institute or from outside of NIH in order to achieve sufficient independence from the agency.<sup>38</sup> Officials at EPA and FDA told us that they try to avoid appointing to committees members who receive agency grants for work that is related to matters before the committee. In contrast, Energy and NASA officials said it would be difficult for them to find for some committees the scientific and technical experts they need who do not also receive grants from their agencies. We are not suggesting that having grants or contracts with the sponsoring agency should disqualify individuals from serving on federal advisory committees, but rather that agencies should consider the support they provide to potential members since this does present potential issues of independence from the agency.

Agencies generally have even less information to evaluate the viewpoints of their representative members because representatives are not required to complete the form 450. Consequently, agencies generally do not collect information relating to the financial interests of the representative members. Although representatives are not subject to the financial conflict-of-interest rules, their financial interests could affect their viewpoints. An EPA official acknowledged that for some representative committees, it may be important to consider this information, depending on the work of the committees. However, another EPA official expressed a concern that asking representative members—who are not paid for their services—for financial information, such as is obtained from those retained

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<sup>38</sup>National Research Council, Institute of Medicine, the National Academies, *Enhancing the Vitality of the National Institutes of Health: Organizational Change to Meet New Challenges*, 2003.

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as special government employees, could have a chilling effect on the willingness of people to serve on advisory committees as representatives.<sup>39</sup>

Regarding special government employees, we found that although agencies have generally collected forms 450 from these employees, the forms are not always collected in time for them to be of any use in also evaluating the points of view of potential committee members. For example, some agencies, such as NASA and CDC, do not collect the form 450 until the agency has made decisions about appointments. (We recognize that the form 450 was designed to assess for conflicts of interest and that agencies are not required to also use it to assess for points of view; however, as previously discussed, the form nonetheless can provide some valuable information to agencies regarding the viewpoints of an individual.)

Of the nine committees we reviewed, only EPA's Federal Insecticide, Fungicide, and Rodenticide (FIFRA) Scientific Advisory Panel consistently collected information relevant to assessing the points of view of prospective members and considered this information in selecting members for its peer review panels.<sup>40</sup> Agencies with committees served by special government employees generally collected information from CVs and résumés and on the form 450, which, as discussed above, has limitations in terms of assessing the points of view of committee members. Agencies with representative members either collected only CVs or, in the case of USDA, collected some additional information about sources of income. (See table 1.)

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<sup>39</sup>Special government employees may or may not be paid for their services, depending on the policy of the agency that is sponsoring the committee.

<sup>40</sup>In January 2004, FDA officials said the agency uses a standard form to collect information from potential appointees early in the selection process that provides information similar to what EPA collects. We reviewed the form and its instructions and note that this effort is directed at potential conflicts of interest; it is not clear the extent to which the information is used to balance points of view. Further, FDA officials said they could not provide copies of the forms for the FDA committee we reviewed because the designated federal official had left the agency.



**Table 1: Documentation That Agencies Systematically Collected on Potential Members of Selected Committees**

Department/Agency	Committee name	Documentation that agencies systematically collected on potential members of selected committees			
		Curriculum vitae or résumé	Conflict-of-interest financial disclosure form		Other data collection instrument
			OGE form 450	Alternative form approved by OGE	
Agriculture/Food Safety and Inspection Service	National Advisory Committee for Microbiological Criteria for Foods <sup>b</sup>	X			USDA form AD-755 <sup>a</sup>
Energy	Biological and Environmental Research Advisory Committee <sup>b</sup>	X			
Environmental Protection Agency	Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel	X			X <sup>c</sup> Structured telephone interview
Health and Human Services	Secretary's Advisory Committee on Human Research Protection	X	X		
Health and Human Services/Centers for Disease Control and Prevention	Advisory Committee on Childhood Lead Poisoning Prevention	X	X		
Health and Human Services/Food and Drug Administration	Food Advisory Committee	X	X		X <sup>d</sup> Structured telephone interview <sup>e</sup>
Health and Human Services/National Institutes of Health	Scientific Advisory Committee on Alternative Toxicological Methods	X	X		
Interior/U.S. Geological Survey	Scientific Earthquake Studies Advisory Committee <sup>b</sup>	X			
National Aeronautics and Space Administration	Space Science Advisory Committee	X <sup>f</sup>	X <sup>f</sup>		

Sources: Data collected from agencies' committee management offices, designated federal officials, or other agency officials responsible for nominating members of committees.

<sup>a</sup>USDA requires members of its advisory committees to file a USDA form AD-755. This form requests information on the individual's primary employment, sources of income over \$10,000, and other matters related to the individual's background in agriculture.

<sup>b</sup>Members were appointed as representatives not subject to conflict-of-interest reviews.

<sup>c</sup>The EPA FIFRA Scientific Advisory Panel uses the EPA form 3110-48 in lieu of the OGE form 450. The EPA form requests more detailed information from members about their affiliations and association with the work of the committee.

<sup>d</sup>FDA requires members of its Food Advisory Committee to file a form 450 during the appointment process. However, if the Food Advisory Committee, or any other FDA advisory committee, plans to discuss "particular matters" of specific applicability, the agency will require members to file an FDA form 3410 prior to the meeting. The form 3410 requests more specific information about a member's

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affiliation with particular companies identified by FDA that might be affected by the committee's deliberations during a specific meeting.

<sup>e</sup>See footnote 40.

<sup>f</sup>The designated federal official for the NASA Space Science Advisory Committee requests short biographical sketches from prospective members. Agency officials consider these sketches when deciding whom to appoint. After the agency has decided to appoint an individual, it requests a copy of a curriculum vitae and a completed form 450.

Regarding the EPA FIFRA Scientific Advisory Panel, this advisory committee convenes about six panels annually to address scientific and technical issues. For example, we reviewed one such panel that was (1) evaluating the range of developmental effects associated with the exposure of amphibians to the pesticide atrazine and (2) determining the significance of these effects for risk assessment and the likely threshold exposure value for eliciting these effects. The executive director of this committee said that candidates with known positions or biases generally are not selected for the panels—that is, the agency does not select individuals previously associated with the agency, regulated industries, or stakeholder communities. In addition, the agency generally does not select individuals with a stated position on the particular matter being reviewed. The FIFRA Scientific Advisory Panel defines balanced membership as including the necessary areas of technical expertise, different scientific perspectives within each technical discipline, and the collective breadth of experience needed to address the agency's charge. In order to evaluate potential members, the FIFRA Scientific Advisory Panel uses CVs and the EPA alternative disclosure form that asks committee members to provide information needed to assess impartiality, such as information about compensated expert testimony and sources of research and project funding during the prior 2 years. The form also asks candidates to consider all relevant information over the past 5 years and to identify and describe any reason that they may be unable to provide impartial advice on the matter to be considered by the panel.

The executive secretary of the FIFRA Scientific Advisory Panel told us that EPA's alternative financial disclosure form—developed to address the limitations we identified in our report on EPA's Science Advisory Board—has greatly facilitated their ability to consistently obtain relevant information. The FIFRA Scientific Advisory Panel also asks potential members several standard questions that we identified in our prior report as relevant to assessing impartiality, such as whether they have made any

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oral or written public statement on the issue before the panel.<sup>41</sup> As a result of obtaining and reviewing this information in order to select members and ensure appropriate committee balance overall, the FIFRA Scientific Advisory Panel is in a position to make informed choices. By systematically collecting relevant background information on all candidates, the FIFRA Scientific Advisory Panel is in a position to ensure that its panels are balanced in terms of the points of view represented. We also found that FDA often collects similar information on an alternative form that provides some pertinent information for assessing points of view, but the agency does not use this information to assess the overall balance of the committees. That is, FDA generally uses the form 450 in reviewing candidates for appointments to committees and uses the alternative form to review for conflicts of interest for specific meetings that involve particular matters.

In addition, agencies that have collected forms 450 for special government employees for the purpose of conflict-of-interest reviews may not use the information available to them on the forms that—although designed for conflict-of-interest reviews—could also be helpful in evaluating the points of view committee members may have. For example, the Director of the White House Liaison Office at HHS, who developed the committee roster for the Secretary’s Advisory Committee on Human Research Protections that the Secretary of HHS approved, said that she did not review the forms 450 in selecting members.<sup>42</sup> She viewed the task of reviewing the forms 450 as the purview of the agency ethics officials who would determine whether financial conflicts of interest existed. In response to our questions about whether affiliations with law firms, identified by some members on the forms 450, may be relevant to consider in terms of their points of view, she said that she did not need to know the particulars about the legal work since she did not consider such information relevant to selection decisions. Further, she said that she did not consider particular points of view candidates may have in making selections. For example, we asked her if she considered the point of view of one member who had publicly stated disagreement on religious grounds with certain research that is included in the committee’s charter, and she said she did not. The Director stated that

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<sup>41</sup>These questions were not added to EPA’s confidential financial disclosure form, the purpose of which is to support reviews for potential financial conflicts of interest.

<sup>42</sup>This committee replaced a committee established by the prior administration. In this case, HHS did not renew the committee charter when it expired in 2002, instead HHS opted to create a new committee with a revised charter.

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she nominated members to the Secretary for his approval primarily on the basis of their expertise and also considering several demographic factors (gender, race, and geographic location) to the extent these additional factors did not impinge on the department's ability to pick qualified members. She noted that these factors reflect the department's written policies and procedures.<sup>43</sup>

Officials at other agencies said they considered similar factors in balancing the other eight committees we examined. Specifically, officials indicated that they focused on expertise, demographic characteristics, and employment history as factors to assess points of view as it affects balance. (See table 2.) As previously discussed, FACA does not elaborate on how agencies are to ensure that advisory committees are fairly balanced in terms of the expertise and the points of view of the members, nor does it provide criteria for assessing balance.<sup>44</sup> Thus, agencies have considerable discretion in determining how they will meet the requirement for achieving balanced committees.

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<sup>43</sup>The Director of the White House Liaison at HHS also managed the appointments to another committee we reviewed, the CDC Advisory Committee on Childhood Lead Poisoning Prevention. She recommended 10 new members to the Secretary for appointments made in 2002 and 2003 to replace members with expiring terms.

<sup>44</sup>In its July 19, 2001, final rule on advisory committee management, GSA did provide a list of factors to consider in achieving a balanced advisory committee membership, such as the advisory committee's mission and the geographic, ethnic, social, economic, or scientific impact of the advisory committee's recommendations.

**Table 2: Factors Used by Agencies to Balance Selected Committees**

Department/Agency	Name of committee	Expertise	Ethnicity	Gender	Geography	Employment sector
Agriculture/Food Safety and Inspection Service	National Advisory Committee on Microbiological Criteria for Foods	X	X	X	X	X
Energy	Biological and Environmental Research Advisory Committee	X	X	X	X	X
Environmental Protection Agency	Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel	X	X	X		
Health and Human Services	Secretary's Advisory Committee on Human Research Protections	X	X	X	X	
Health and Human Services/Centers for Disease Control and Prevention	Advisory Committee on Childhood Lead Poisoning Prevention	X	X	X	X	
Health and Human Services/Food and Drug Administration	Food Advisory Committee	X	X	X	X	X
Health and Human Services/National Institutes of Health	Scientific Advisory Committee on Alternative Toxicological Methods	X	X	X	X	X
Interior/U.S. Geological Survey	Scientific Earthquake Studies Advisory Committee	X		X	X	X
National Aeronautics and Space Administration	Space Science Advisory Committee	X	X	X	X	X

Sources: Information on the criteria considered to balance committees came from designated federal officials, committee management officials, or other agency officials responsible for nominating or appointing members of committees.

In discussing their selection criteria, most officials reported that in selecting members for these science and technical committees, they focused first and foremost on expertise. Some agency officials said that they do not consider a balance of points of view as relevant to science and technical committees, believing that the appropriate focus for such committees is obtaining the appropriate balance of required expertise. We do not disagree that this focus is appropriate, particularly for committees that address scientific and technical issues. While courts have interpreted FACA as giving agencies broad discretion in how to balance their committees, in our view, the integrity of these committees' advice would be better served if agencies were to consider additional information about potential members' points of view. For example, experts in a given field of expertise may have varying scientific perspectives that agencies could consider for balancing the committee. Along these lines, the FIFRA

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Scientific Advisory Panel defines balance as including different scientific perspectives within each technical discipline.

Second, the officials most commonly related “points of view” to demographic factors, such as race, gender, or geographic locations—that is, defining a balance of points of view in terms of demographic diversity. While important, these criteria alone do not provide a robust understanding of the points of view and potential biases the members may bring to the committee vis-à-vis the specific matters the committees will address. That is, these approaches may achieve demographic diversity, but they cannot ensure an appropriate balance of viewpoints relative to the matters being considered by the committees. Third, some of the officials also identified the primary employment affiliation as a factor relevant to achieving a balance of points of view. For example, a factor in committee balance for one committee is the breakdown of members employed by universities, private industry, and federal and state agencies. We agree the primary employment affiliation may be an important consideration for a number of committees to ensure a balance of points of view. However, as we illustrated in our work at EPA’s Science Advisory Board, the staff director of the board viewed some academics as aligned either with industry or environmental perspectives and some experts affiliated with industry as representing an environmental perspective on the basis of information about their other affiliations. Additional information about the candidates’ viewpoints and potential biases would better ensure that the committees are, and are perceived as being, fairly balanced in terms of points of view—and that no one interest or viewpoint dominates. Along these lines, NIH officials told us that the information EPA collects to evaluate potential committee members would be very helpful to them in selecting members and ensuring that committees are balanced as a whole.

Finally, we note that other practices agencies use in forming new committees and in selecting replacement members for existing committees can help them better ensure that their committees are appropriately balanced. These include steps agencies take to identify potential candidates and to seek feedback on proposed committee membership. Appendixes III through XI provide information on the nine committees we reviewed, including how the agencies identified candidates and whether they requested public comments on the committee membership. These and other practices are discussed in the next section.

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## Promising Practices Could Better Ensure Independence and Balance

Some agencies use practices when forming and managing their committees that can better ensure that federal advisory committee members are independent and that committees are balanced. These practices include (1) obtaining nominations for committee members from the public, (2) using clearly defined processes to obtain and review pertinent information on potential members regarding potential conflicts of interest and impartiality, and (3) prescreening prospective members using a structured interview. In our view, these measures constitute promising practices because they reflect the principles of conflict-of-interest provisions and FACA by employing clearly defined procedures to promote systematic, consistent, and transparent efforts to achieve independent and balanced committees. Although these practices for obtaining and reviewing pertinent information to assess for conflicts of interest and impartiality are broadly applicable, some of the practices, such as seeking public comment on proposed committees, are most particularly relevant to those committees addressing sensitive or controversial topics. If more agencies adopted and effectively implemented these practices, we believe they would have greater assurance that their committees are, and are perceived as being, independent and balanced. In addition, we have identified selected measures that could promote greater transparency in the federal advisory committee system.

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## Obtaining Nominations from the Public

When seeking to appoint members to their federal advisory committees, agencies often use a combination of methods to obtain nominations for potential committee members. Agencies typically rely on relevant program officials in the agency, officials from other agencies, members of professional organizations, and authors of relevant scientific and technical literatures as ways to identify potential committee members. Some agencies also seek nominations from the public by using widely available resources, such as the *Federal Register* and agency Web sites, to broaden the pool of candidates from which committee members may be drawn. The latter approach is a systematic and transparent method of obtaining

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nominations and can provide agencies with greater assurance that a range of relevant experts and/or stakeholders capable of creating impartial and balanced committees are identified.<sup>45</sup>

In addition to their other methods of obtaining nominations from colleagues, professional associations, and the like, we believe agencies should also routinely consider obtaining nominations from the public because this practice can both (1) help agencies identify qualified candidates and (2) alleviate any perception that they are choosing from a narrow pool of candidates that may not provide the appropriate expertise and points of view. It may be particularly relevant to solicit nominations from the public for committees that address sensitive or controversial issues. Obtaining nominations from the public may require more time and effort than less formal approaches to identifying committee members and may also involve a publishing cost. However, by actively engaging the public and all interested parties in the process in an open and transparent manner, the agency's credibility may be enhanced.

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### Using Clearly Defined Processes to Screen for Conflicts of Interest and Points of View

As previously discussed, many agencies do not consistently collect information that could be helpful in determining the viewpoints of potential members and ensuring that committees are, and are perceived as being, balanced. However, the National Academies and EPA have developed clear processes that, if effectively implemented, can provide them with greater assurance that relevant conflicts of interest and biases are identified and addressed, and that committees are appropriately balanced in terms of points of view because they have identified and evaluated the necessary information before committees are finalized.

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<sup>45</sup>Some of the committees and agencies that publish *Federal Register* notices seeking nominations include EPA's Science Advisory Board; EPA's FIFRA Scientific Advisory Panel; all committees managed by FDA, such as the Food Advisory Committee; and a number of committees managed by USDA's Food Safety and Inspection Service, such as the National Advisory Committee on Microbiological Criteria for Foods. USDA also sought nominations using an announcement on the agency and advisory committee Web pages and in a weekly newsletter sent to interested organizations and individuals. EPA's Science Advisory Board also uses its Web site as a vehicle for soliciting nominations to its peer review committees.



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Specifically, the processes used by the National Academies and EPA's Science Advisory Board clearly and consistently

- identify the information they deem necessary to assess candidates for independence and to balance committees,
- explain to the candidates why the required information is important to protect the integrity of the committee's work,
- request public comment on proposed committee membership, and
- require evaluation of the overall balance of committees before committees are finalized.

Overviews of the processes used by the National Academies and the Science Advisory Board are provided below.

## The National Academies

In 2001, we reported that to help balance their committees and safeguard their credibility, the National Academies provide prospective members with a document that offers a succinct, straightforward discussion of what constitutes potential conflicts of interest and biases and explains what information they are required to provide to the National Academies on a standard form.<sup>46</sup> In 2003, the National Academies updated their procedures covering conflicts of interest and bias, issuing their *Policy on Committee Composition and Balance and Conflicts of Interest for Committees Used in the Development of Reports*. In explaining the need for obtaining background information about prospective members, the National Academies emphasize that the work of their committees must be, and must be perceived as being, free of any significant conflict of interest<sup>47</sup> and uncompromised by bias. The National Academies state that allegations of conflict of interest or lack of balance and objectivity can undermine the

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<sup>46</sup>GAO-01-536.

<sup>47</sup>Members of committees of the National Academies are not subject to the same conflict-of-interest provisions as are members of FACA committees sponsored by federal agencies. The National Academy of Science is required to make its best effort to ensure that no committee member has a conflict of interest that is relevant to the functions to be performed, unless the conflict is publicly disclosed and the academy determines that it is unavoidable. The academies define a conflict of interest as any financial or other interest that conflicts with the service of an individual because it (1) could impair the individual's objectivity or (2) could create an unfair competitive advantage for any person or organization.

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conclusions of fully competent committees. The academies continue to request the following information from potential members on a standard form:<sup>48</sup>

- organizational affiliations,
- financial interests,
- research support,
- government service, and
- public statements and positions.

In addition, prospective committee members are asked to identify and describe any other circumstances in their background or present connections that might reasonably be construed as unduly affecting their judgment or that might be reasonably viewed as creating an actual or potential bias or conflict of interest or the appearance of a bias or conflict of interest. Further, the National Academies post information about panel candidates on a Web site for public comment, allowing the public the opportunity to identify any real or perceived conflicts or biases associated with individual members and the ability to raise issues regarding the balance of viewpoints on the proposed committee. Lastly, the National Academies do not finalize their committee selections until officials have reviewed and evaluated information provided by prospective members and comments received from the public regarding the proposed makeup of the committee. As we previously reported, this process has proven beneficial to the academies in selecting balanced peer review panels.<sup>49</sup>

## EPA's Science Advisory Board

EPA's Science Advisory Board staff office has also developed a systematic process to obtain and evaluate the information it needs to assess potential members for potential conflicts of interest and to properly balance the range of expertise and viewpoints on the board. As previously discussed, federal committee members serving as special government employees are

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<sup>48</sup>Potential members complete one of three similar forms covering background information and confidential conflict-of-interest disclosure, depending on the type of study involved: program reviews and evaluations, general scientific and technical studies and assistance, and studies related to government regulations.

<sup>49</sup>[GAO-01-536](#).

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subject to the criminal financial conflict-of-interest statute. The staff office uses the alternative form that EPA developed, form 3110-48, for special government employees serving on advisory committees to collect information that enables the agency to evaluate potential members for legal conflicts of interest and also helps the agency in assessing for impartiality and points of view. The staff office also contacts prospective panelists and asks them five standard questions to help the office assess the panelists' points of view, such as whether they have made any public statements on the issues that the panels will consider. The staff office uses this information to help ensure that any legal conflicts of interest are identified and appropriately mitigated and to help ensure that committees as a whole are balanced in terms of points of view.

EPA's form 3110-48 explains that the information being requested is needed so that EPA ethics officials can make an informed judgment regarding any conflict of interest or appearance of lack of impartiality. The Science Advisory Board staff office further explains how it uses the information that it collects in its brochure entitled *Overview of the Panel Formation Process at the Environmental Protection Agency Science Advisory Board*. As previously discussed, the information that EPA collects on the form 3110-48 includes sources of income and assets, liabilities, outside positions, consulting activities, sources of research support or project funding, and compensated expert testimony. Further, similar to the National Academies, EPA requests potential members to identify and describe on the form any reason they may be unable to provide impartial advice on matters before the committee and any reason their impartiality in the identified matter might be questioned. The Science Advisory Board staff office also searches independently for background information on prospective members to understand their qualifications and points of view. Also, like the National Academies, EPA uses a public notice process to obtain comments on proposed candidates for its Science Advisory Board. That is, the staff office publishes the names and biographical sketches of candidates for its committees on the board's Web site, requesting the public to provide information, analysis, or documentation that it should consider in evaluating the candidates. The staff office does not finalize their committee selections until officials have reviewed and evaluated the information provided by the candidates, any other information the public may have provided, and information gathered by the staff independently on the background of each prospective member. According to a designated federal official for the board, the public comment period is a last check in the screening process that can identify information about prospective candidates, such as publicly stated positions on matters related to the

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committee, that the staff office would want to verify and evaluate prior to making panel selections. He said the staff office has received feedback that the biographical sketches are helpful, and he believes this practice enhances the public's perception of the board's panel formation process.

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### Prescreening Prospective Members Using a Structured Interview

EPA's FIFRA Scientific Advisory Panel has a committee formation process similar to that of the Science Advisory Board that also identifies the specific information the staff will discuss in interviews with prospective members. Although the purposes of the structured interview include assessing the interest, availability, and expertise of the potential member, a primary focus is on evaluating potential financial conflicts of interest and biases. In addition, the interview provides EPA with the opportunity to explain the ethical obligations of committee members and discuss in detail the information that members would have to provide on the EPA form 3110-48 before they could be appointed to the committee. This process is efficient because it enables the panel to quickly identify those individuals who meet its criteria for independence and impartiality.<sup>50</sup> Further, prospective members who subsequently complete the form 3110-48 will be better prepared to complete the form accurately. We note that the panel's interview protocol, including the structured interview itself, is available on its Web site. Thus, prospective members and the public are informed of the processes and the issues that will be discussed with all prospective members. The panel's approach to obtaining relevant information from prospective committee members is systematic, consistent, and transparent. Further, we believe it unlikely that agencies formalizing and publicizing their processes for obtaining information from prospective committee members would approve questions that are generally inappropriate in a professional working environment, such as questions about party affiliation or political viewpoints that some committee members at other agencies have reported being asked.

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<sup>50</sup>FDA also has a form that agency staff may use to conduct a preliminary interview "to identify obvious conflicts of interest that may preclude appointment." This form is called the Prospective Special Government Employee Personal Data Sheet (Preliminary Informal Interview), form FDA 2725a (July 1992).

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## Selected Measures Could Promote Greater Transparency in the Federal Advisory Committee System

In light of recent controversies surrounding the perceived politicization of federal advisory committees, we identified several other measures to improve transparency in the federal advisory committee system. Although none of these measures can ensure that committee members are independent and that committees are balanced, we believe each of these alternatives has the potential to increase public understanding of the process of appointing advisory committee members and make more transparent the operations of federal advisory committees.

In the interest of transparency, agencies could make public the following information about each of their advisory committees:

- The committee formation process: how members are identified and screened, and how committees are assessed for balance.
- Whether members are appointed as special government employees and are speaking as independent experts, or whether members are appointed as representatives and speaking as stakeholders.
- Whether committees arrive at decisions through a voting process or by consensus.

There are several contexts in which agencies could make this information available to the public. Specifically, the information could be

- written in the committee's charter;
- posted on the GSA on-line database;
- posted on the agency or committee's Web site;
- announced at committee meetings; or
- identified on committee work products (reports, studies, or recommendations).

It is in the public interest to disclose such basic information about federal advisory committees. Further, we believe that taking such measures to make information about committees available to the public would help educate interested parties about the formation of committees and better enable them to evaluate whether agencies have complied with conflict-of-interest requirements and the FACA requirements for balance. Given

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recent well-publicized accusations of biases and conflicts of interest, efforts to improve the transparency of the federal advisory committee system can only serve to inspire greater public trust in the process and enhance the credibility of committees' work.

Along these lines, we have identified two additional measures to promote transparency that may warrant consideration: (1) public disclosure of information concerning conflict-of-interest waivers and (2) internal disclosure of potential conflicts of interest and sources of bias among committee members prior to the initiation of committee work.

Agencies may grant waivers to special government employees who have potential conflicts of interest if the agency determines that either (1) the conflict is insignificant or (2) the need for the member's expertise outweighs the conflict. The financial conflict-of-interest statute requires that agencies provide limited information to the public about waivers upon request; namely, that an agency has granted a waiver and the basis on which it was granted. The statute does not require, however, that agencies proactively notify the public about waivers, either during advisory committee meetings, in meeting minutes, or in committee products. Our review of selected committees found that agencies typically did not disclose this information. In contrast, FDA has had a practice of providing at the beginning of meetings a summary disclosure of any waivers granted to members for that meeting. The disclosure identifies which members have received waivers and whether the waivers were granted on the basis that conflict was insignificant or that the need for the expertise outweighed the potential conflict. Because information about the conflicts pertained to information that members provide to agencies on confidential financial disclosure forms that are protected under the Federal Privacy Act, details about the conflicts were not provided. Thus, the public and others could not evaluate the impact of the conflict on a person's ability to provide impartial advice. In February 2002, as a result of a statutory requirement, FDA issued for public comment a draft guidance document describing its policy of disclosing specific information with respect to waivers granted for particular matters of specific applicability—that is, when members have a direct relationship with the products, interests, and issues under the review of the committee. Under this policy, FDA discloses not only the existence of a waiver but also information on the committee member's

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interests that constitute a conflict.<sup>51</sup> To address the constraints imposed by the Federal Privacy Act, FDA requires committee members to sign a consent form giving FDA permission to publicly disclose this information before members receive a waiver. According to FDA officials, committee members have generally been willing to sign the consent forms and to disclose this information. We believe the practice of publicly disclosing the issuance of conflict-of-interest waivers to committee members increases transparency and can also increase the credibility of the committee process by allowing the public to know when a potential conflict exists and why the agency saw fit to grant the member a waiver. Further, the application of this practice could be expanded to include not only particular matters of specific applicability (in which a particular company or individual is likely to be affected by the matter) but also to other particular matters (in which, for example, an industry or group of persons is likely to be affected).

The National Academies have a policy of asking their committees to engage in an internal discussion about members' work experiences, affiliations, and other circumstances that might pose a potential conflict of interest. The academies believe that an internal disclosure of this information promotes transparency and serves to increase the credibility of the committees' work. We agree that a confidential discussion among committee members regarding real or perceived conflicts of interest and biases can provide committee members with important background information that can enable them to better evaluate the perspectives of their fellow committee members. Understandably, extending such a practice to federal advisory committees, and in particular to members appointed as special government employees, raises privacy questions because special government employees are under no obligation to disclose such information to fellow committee members or the public. However, we believe that the possibility of requiring members to disclose background information, affiliations, and other sources of potential conflicts of interest and biases among individual committee members at an internal disclosure session prior to the committee's beginning its work warrants study.

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<sup>51</sup>According to EPA, the staff office for the Science Advisory Board actively avoids granting waivers, preferring to choose another panelist instead. However, in the event that EPA grants a waiver, the designated federal official discloses that information at the start of meetings. EPA would disclose only the name of the individual and the type of waiver granted—not the details of the conflict.

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## Conclusions

For federal advisory committees to be successful, the members must be independent and the committees balanced—that is, they must be able to provide, and be perceived as providing, credible and balanced advice. A spectrum of scientists and other experts perceive recent appointments to some science and technical committees as being influenced more by ideology than expertise. Independent of the facts and specific issues involved, this perception alone is problematic. The perception of the federal advisory committee system as politicized can jeopardize the value of an individual committee’s work; discourage the participation of scientists, experts, and other potential members on future advisory committees; and call into question the integrity of the federal advisory committee system itself. Because allegations of conflict of interest and bias can undermine the work of otherwise credible and competent committees and threaten the integrity of the federal advisory committee system, the best interests of the government are served by governmentwide guidance and agency-level policies and procedures for addressing potential conflicts of interest and ensuring that committees are, and are perceived as being, balanced. However, federal guidance in these key areas has limitations that reduce its effectiveness.

First, OGE guidance on representative appointments can be strengthened to better ensure that agencies are appropriately appointing committee members. Unless certain ambiguities in the guidance are clarified, some agencies may continue to appoint members providing advice on behalf of the government as representatives and not conduct reviews of potential conflicts, thereby leaving the specific committees and the federal advisory committee system itself vulnerable to potential criticism if potential conflicts of interest are identified. Clarifications that are needed to ensure that representative appointments are made only when the individuals are, in fact, asked to provide advice representing the positions of the stakeholders they are representing include specifying that representative appointments generally are not appropriate for individuals who are to provide advice on the basis of their expertise. Justifying representative appointments on this basis avoids using the special government employee category, which was specifically created to facilitate the government’s ability to hire various experts for just such a purpose as serving on federal advisory committees. The guidance should also clarify that the use of the term “representative” in a statute or charter may be used in a generic sense and does not necessarily mean the members are to be appointed as representatives who are to provide stakeholder advice. Again, in considering which type of appointment is appropriate, the focus should be



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on the nature of the advice to be provided. That is, individuals who are appointed to federal advisory committees to provide advice on behalf of the government (i.e., individuals who are not providing stakeholder advice) should be appointed as special government employees. Finally, one of the first steps agency officials should take in establishing new committees is to determine, in consultations with agency ethics officials, the appropriate appointment category for members. These decisions should be reviewed as committee charters are renewed every 2 years.

Second, GSA could provide guidance that would assist agencies in identifying the kinds of information they should systematically collect in order to determine the viewpoints of prospective committee members for the purpose of ensuring that committees are, and are perceived as being, balanced. Although the type of information relevant to each committee might differ in some respects, more systematic information collection and evaluation can support better, and more informed, committee appointments.

Improving existing federal guidance and agency procedures and incorporating the revised guidance into the FACA management course should enable federal agencies to better ensure that (1) potential conflicts of interest of committee members have been identified and appropriately mitigated upfront and (2) committees are appropriately balanced in terms of points of view and functions to be performed. Along these lines, alternative procedures used to create and manage advisory committees at some federal agencies and the National Academies constitute promising practices that can better ensure independence and balance. Procedures such as obtaining nominations for committee members from the public, reviewing more pertinent information regarding members' points of view, and prescreening prospective members using a structured interview would help agencies establish more systematic and consistent methods of achieving independent and balanced committees. Consistent with FACA's principle of transparency, agencies could also adopt selected measures to make public more information regarding how they form and manage their committees. We believe it is in the best interest of both the public and the government to disclose more information about the formation and operation of the advisory committees—for example, how the members are identified and screened, and whether members are serving as representatives of an identified interest or as special government employees to provide independent advice. In light of recent concerns about biases and conflicts of interest, adopting more clearly defined procedures to screen and appoint committee members and to increase

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transparency in the advisory committee process would constitute important steps toward protecting the integrity of the federal advisory committee system and maintaining public confidence in the work of federal advisory committees.

Because this report identifies improvements to guidance and promising management practices that generally apply to all federal agencies that sponsor advisory committees and not just to the nine agencies addressed in this report, we are directing our recommendations to OGE and GSA in their roles as providers of governmentwide guidance on federal ethics and advisory committee management requirements. Our expectation is that all 54 federal agencies that currently sponsor federal advisory committees could benefit from the improved guidance and management practices.

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## Recommendations for Executive Action

To better ensure that federal agencies correctly and consistently comply with federal requirements when appointing federal advisory committee members, we recommend that the Director of the Office of Government Ethics revise its 1982 guidance to federal agencies defining representative appointments to federal advisory committees. The guidance should

- clarify that classes of expertise generally are not a “recognizable group of persons” for purposes of making representative appointments;
- consistently state that appointments as representatives are limited to circumstances in which the members are speaking as stakeholders for the entities or groups they represent; and
- clarify that the term “representative” in statutes and charters may also be used more generically to identify the appropriate balance of points of view or expertise and may not be specifying that representative appointments be used, and revise the directions on specifying representative appointments to focus on the type of advice representatives are to provide—that is, stakeholder advice.

To ensure that agencies’ appointments to federal advisory committees are appropriate, we further recommend that the Director of the Office of Government Ethics and the GSA Committee Management Secretariat

- direct federal agencies to review their representative appointments to federal advisory committees either as the 2-year charters expire or, for those committees with indefinite charters, within 1 year to determine if

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the appointments are appropriate and to reappoint members as special government employees, where appropriate, and

- direct agency committee management officials to consult with agency ethics officials in making decisions about the type of appointments that should be made for each committee.

To better ensure that the agency staff managing federal advisory committees understand when to appoint committee members as representatives and when to appoint them as special government employees, we recommend that GSA and OGE revise the training materials for the FACA management course, incorporating the additional OGE guidance as recommended above, and ensure that the course materials highlight the fact that appointment decisions should be based on the type of advice the committee members are to provide.

To better ensure that federal advisory committee members providing stakeholder advice, and thus serving as representative members exempt from federal financial conflict-of-interest statutes, do not have other unknown points of view or biases, we recommend that OGE and GSA direct agencies to determine, for each relevant committee, the potential for such other biases and to take the appropriate steps to ensure their representative members do not have such biases. At a minimum, representatives should receive ethics training and be asked whether they know of any reason their participation on the committee might reasonably be questioned—for example, because of any personal benefits that could ensue from financial holdings, patents, or other interests.

To better ensure that agencies have robust information to establish committees that are balanced in terms of points of view and the functions to be performed, we recommend that GSA provide guidance to agencies regarding what background information might be relevant in assessing committee members' points of view. Relevant information for these purposes could include previous or ongoing research, public statements or positions on the matter being reviewed, the interest of the employer or clients in the matter, participation in legal proceedings, and work for affected entities. In addition, potential committee members should be asked if there is any reason they might be unable to provide impartial advice on the matter or matters before the committee, or if they know of any reason their impartiality on the matter or matters might be questioned.

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To better ensure that the committee members, agency and congressional officials, and the public understand the nature of the advice provided by federal advisory committees, we recommend that GSA issue guidance that agencies should

- identify the committee formation process used for each committee, particularly how members are identified and screened and how committees are assessed for overall balance;
- state in the appointment letters to committee members whether they are appointed as special government employees or representatives; in cases where appointments are as representatives, the letters should further identify the entity or group that they are to represent;
- identify each member's appointment category on the GSA FACA database; for representative members, the entity or group represented should also be identified; and
- state in the committee products the nature of the advice provided—that is, whether the product is based on independent advice or consensus among the various identified interests or stakeholders.

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## Agency Comments and Our Evaluation

We provided copies of a draft of this report to the two agencies, GSA and OGE, to whom we address our recommendations to provide additional guidance to federal agencies, and to the agencies whose advisory committee management policies and procedures we reviewed: EPA; Energy; HHS (with copies to CDC, FDA, and NIH); Interior; NASA; and USDA.

In commenting on the draft report, GSA agreed with the findings relating to those areas under its purview. Further, GSA generally agreed with our recommendations to OGE and GSA and outlined a proactive approach to addressing those that pertain to GSA, including making changes to its on-line FACA database, and to working with OGE on those that pertain to OGE's responsibilities. GSA stated that it expects to complete all necessary actions directly under its purview and those to be achieved collaboratively with OGE and other agencies during fiscal year 2005. GSA's comments are provided in appendix XII.

In its comments, OGE acknowledged that some agencies may be inappropriately using representative appointments. Further, in responding

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to our finding that several agencies believe representatives may be appointed to represent their fields of expertise, OGE agrees with us that such appointments are inappropriate—but does not agree that any limitations in its guidance are a factor in the misuse of representative appointments. Instead, OGE believes some agencies may be purposely designating their committee members as representatives to avoid subjecting them to the financial disclosure statements required for special government employees—that is, agencies understand the guidance and are simply disregarding it. Thus, OGE disagrees with us that its guidance should directly address this apparent misinterpretation of its guidance by clarifying, for example, that classes of expertise are not a “recognizable group of persons” for purposes of making representative appointments. OGE states that its 1982 guidance accurately represents a decades old, executive branch interpretation of the definition of special government employees, and that our report does not provide adequate support for a recommendation that the guidance be modified. We disagree. Unless OGE clarifies the issues our report has identified, progress will likely continue to be slow or nonexistent—remembering that the 1982 guidance itself was developed to address uncertainties regarding the appropriate uses of representative and special government employee appointments. We believe that clearer guidance would make it more difficult for agencies to misapply the guidance. Further, unambiguous guidance would better assist agency staff managing committees and better support oversight by agency ethics officials, OGE, and others, such as inspectors general and GAO. In addition, OGE’s response that clarifications are not needed does not acknowledge the views of other federal agencies, presented in the draft report, that OGE guidance is ambiguous in some respects. For example, EPA and NASA officials stated that having clear criteria for representative appointments would be helpful to agencies. In addition, we note that Interior states in its comments to us on the report that “GAO’s generalization that representation of fields of expertise is not appropriate ignores the importance of such representation to some committees.” On the basis of this statement, we do not believe Interior appreciates that expert advice can be appropriately obtained by the appointment of special government employees. In addition, NASA’s and Energy’s comments on the report also support the appointment of representatives to represent fields of expertise. We believe these statements illustrate the need for clarifications to OGE guidance on representative and special government employee appointments to federal advisory committees. Finally, in our view, if agencies are continuing to make inappropriate appointments decades after criteria and guidance were developed, it is not unreasonable

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to take another look at the guidance. OGE's comments and our evaluation of them are discussed in more detail in appendix XIII.

In commenting on the draft, officials from EPA and USDA agreed with the substance of the report, providing only technical comments that we incorporated into the draft as appropriate. USDA indicated that the report is a helpful and comprehensive review of issues that can be used as a resource for agencies that rely on the advice of federal advisory committees.

HHS provided consolidated written comments (including its component agencies CDC, FDA, and NIH). HHS said the report will be useful in evaluating current practices for appointing members to serve on federal advisory committees and also noted that the report provides a number of interesting ideas for determining balance in points of view and ensuring transparency in the committee process. HHS said that it finds the report's recommendations of great value and indicated that NIH has volunteered to work with GSA to assist them in implementing the recommendations. At the same time, HHS expressed its belief that members of scientific advisory committees should be selected because of their expertise, background, and personal experience, rather than through a "process seeking out some indefinable range of personal opinion"—characterizing points of view as both undefinable and open to misinterpretation. However, the draft and final reports do not espouse a "process seeking out some indefinable range of personal opinion" but rather identify processes that include an evaluation of potential members' points of view *relevant to the subject matters advisory committees will consider* while focusing on the relevant expertise needed. The examples of agency processes provided in the report include targeted evaluations of points of view by asking potential members a few questions, such as whether they have made public statements or taken public positions on the issue or matters the committee will consider. They also ask potential members to identify and describe any reason they may be unable to provide impartial advice on matters before the committee and any reason their impartiality in the identified matter might be questioned. In our view, agencies that do not proactively and transparently address the relevant points of view of prospective committee members regarding the matters the committees will consider are more likely to be subject to questions about committee balance from the public and potential users of the committees' products than those agencies that use such processes. We continue to believe that the credibility of advisory committees, in particular those that address sensitive and controversial issues, depends in part upon agencies' ability to

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identify and balance points of view held by members and prospective members that are relevant to the work of the committee. HHS's comments and our evaluation of them are discussed in more detail in appendix XIV.

In written comments, Interior agreed with much in the report and indicated that it contains many useful recommendations that can be used to enhance the successful use of advisory committees. Interior identified one overarching concern with the draft report, however. That is, Interior said our report gave the incorrect impression that FACA requires individuals on committees to be free of conflicts of interest, noting that FACA requires that committees, rather than individuals, not be inappropriately influenced by the appointing authority or any special interest. The draft and final reports acknowledge this FACA requirement in the background section. However, the draft and final reports also explicitly state that our focus was on (1) the requirements regarding individual conflicts of interest that are included in federal conflict-of-interest statutes and (2) the FACA requirement for committee balance. Further, in the introduction, we state that “federal advisory committee members who are employees of the federal government must meet federal requirements pertaining to freedom from conflicts of interest—which we refer to in this report as independence—and committees as a whole must meet the requirements pertaining to balance.” We further highlight the key provisions of the federal conflict-of-interest statutes that must be complied with unless granted a waiver in one section of the report and the FACA requirements for balance in another. Interior's comments and our evaluation of them are discussed in more detail in appendix XV.

In commenting on the draft report, NASA said that our conclusion that agencies could benefit from additional guidance to better ensure independence, balance, and transparency is sound. However, NASA supports the appointment of federal advisory committee members as representatives of their fields of expertise on the basis that some experts would not be able to serve as special government employees due to financial conflicts of interest. We believe this perspective provides additional support for our view that OGE needs to provide additional guidance on the appropriate use of representative appointments, including clarifying that fields of expertise generally are not a recognizable group of persons for purposes of making representative appointments. NASA's comments and our evaluation of them are discussed in more detail in appendix XVI.

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In commenting on the draft report, Energy's Office of Science expressed its concern that we were recommending a "one-size-fits-all" approach that would diminish the effectiveness of the office's advisory committees. In addition, the office said that our interpretation of the term "representative" is unpersuasive and would be an unsound basis of guidance for the department. We do not believe that we are recommending a "one-size-fits-all" approach to advisory committee management. We recognize that there are many types of committees that serve different functions. Nevertheless, we believe that there are certain requirements in FACA and the conflict-of-interest statutes that must be met by all committees. With regard to the suggestions we made for selecting committee members, we note that they were described as "promising practices" that could be useful to agencies. They were not recommendations. As for the term "representative," we continue to believe that our interpretation of the OGE guidance is correct and that our interpretation is supported by OGE's comments on our draft report. In particular, we believe that it is inappropriate for agencies to appoint members as "representatives" of a field of expertise, as Energy's Office of Science indicates it will continue to do. Energy's comments and our evaluation of them are discussed in more detail in appendix XVII.

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As agreed with your offices, unless you publicly announce the contents of this report earlier, we will plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to other interested congressional committees; the Secretaries of Agriculture, Energy, Health and Human Services, and the Interior; the Administrators of the U.S. Environmental Protection Agency, the General Services Administration, and the National Aeronautics and Space Administration; and the Director of the Office of Government Ethics. We will make copies



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available to others upon request. In addition, the report will be available at no charge on GAO's Web site at <http://www.gao.gov>.

If you or your staff have any questions, please call me at (202) 512-3841. Key contributors to this report are listed in appendix XVIII.

*Robin M. Nazzaro*

Robin M. Nazzaro  
Director, Natural Resources  
and Environment

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# Objectives, Scope, and Methodology

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This report (1) describes the role of federal advisory committees in the development of national policies; (2) examines the extent to which governmentwide and agency-specific policies and procedures for evaluating committee members for conflicts of interest and points of view ensure independent and balanced federal advisory committees; and (3) identifies practices that could better ensure that committees are, and are perceived as being, independent and balanced.

To describe the role of federal advisory committees in the development of national policies, we reviewed committee charters, reports, and Web pages available through the General Services Administration's (GSA) on-line Federal Advisory Committee Act (FACA) database. We discussed the FACA database with the GSA staff that developed and maintain the database. Our discussion included issues such as data entry access, quality control procedures, and the accuracy and completeness of the data. We determined that the data on the overall universe of advisory committees were reliable for the purposes of this report, including describing the variety of issues the committees address.

To examine the extent to which current policies and procedures for evaluating committee members for conflicts of interest and points of view ensure independent and balanced federal advisory committees, we reviewed the relevant policies and procedures at six federal departments and agencies that make extensive use of federal advisory committees—the Departments of Agriculture (USDA), Energy, Health and Human Services (HHS), and the Interior; the National Aeronautics and Space Administration (NASA); and the Environmental Protection Agency (EPA). These agencies were among the 11 that used the most science and technical committees in 2003.<sup>1</sup> Because HHS entities manage 26 percent of all federal advisory committees and 36 percent of the scientific and technical committees, we also reviewed the policies and procedures at three HHS entities that sponsor many federal advisory committees—the Centers for Disease Control and Prevention (CDC), the Food and Drug Administration (FDA), and the National Institutes of Health (NIH). We reviewed the policies and procedures used by these nine departments and agencies to manage federal advisory committees. These policies, in some cases, address appointments of committee members as special government employees or representatives and address how agencies identify, screen,

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<sup>1</sup>In fiscal year 2003, the six agencies we reviewed sponsored 477 of 948 active federal advisory committees. They sponsored 126 of the 208 scientific and technical committees.

and appoint members so as to ensure that they are free of conflicts of interest and that the committees are balanced. We interviewed committee management officials, designated federal officials, and agency staff on committee management issues.

Further, to better understand how the agencies implement their policies and procedures as well as the Office of Government Ethics's (OGE) and GSA's governmentwide regulations and guidance, we examined the management of one committee at each of the nine departments and agencies. We selected a nonprobability sample<sup>2</sup> of nine committees that address scientific and technical issues using the following criteria: selected committees had to examine issues that are national in scope and scientifically complex, could have regulatory implications, and/or could be potentially controversial either because of the issues that they address or because the committee had been the subject of allegations regarding membership. For these nine committees, we reviewed the confidential financial disclosure forms of the committee members appointed as special government employees and discussed with staff how the committees used this information with respect to conflict-of-interest and/or balance determinations. To learn more about how agencies screen individuals for membership, we also examined other materials that agencies collected about them, such as their curricula vitae (CV) and résumés. The focus of our review was on the adequacy of federal policies and procedures to ensure independence and balance, and we did not make any judgments on whether conflicts of interest existed or whether the committees we examined were properly balanced. The way in which the agencies managed these particular committees cannot be generalized to represent the way in which the agencies manage all of their committees.

To determine if conflict-of-interest evaluations were performed as required by OGE guidance, we reviewed the relevant guidance and discussed with agency officials their use of representative and special government employee appointments. The purpose of the discussions was to determine whether the representative appointments were appropriately used because representative members are not required to undergo conflict-of-interest reviews. For the three departments that used representative appointments almost exclusively, we identified the committees the agencies categorize as

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<sup>2</sup>Results from nonprobability samples cannot be used to make inferences about a population. This is because, in a nonprobability sample, some elements of the population being studied have no chance or an unknown chance of being selected as part of the sample.

addressing scientific and technical matters for which advice on behalf of the government on the basis of best judgment is often sought, rather than stakeholder advice. For the individual committees selected for review at each agency (described above), we examined the committee statutes and charters and interviewed agency officials to determine whether the representative members were asked to provide stakeholder or nonstakeholder advice.

To determine if agencies collect sufficient information to assess the points of view of its committee members appointed as special government employees, we assessed whether agencies systematically collected background information on committee members in addition to the OGE form 450 used to evaluate for potential financial conflicts of interest and CVs or résumés. We identified other information that is helpful in assessing points of view and thus to ensuring that the committees achieve a proper balance of viewpoints.

Further, in examining the extent to which the regulations and guidance on evaluating committee members for conflicts of interest and impartiality ensure independent and balanced federal advisory committees, we reviewed the OGE regulations and guidance to federal agencies regarding federal conflict-of-interest provisions and GSA regulations and guidance to federal agencies regarding FACA. We interviewed OGE staff who are responsible for auditing agencies' ethics programs and who assist agencies in resolving conflict-of-interest issues. These staff members also address issues related to the appointment of special government employees and representative members to federal advisory committees. We interviewed the director and other officials from GSA's Committee Management Secretariat to learn about FACA requirements, GSA regulations, and other GSA guidance documents designed to assist agencies in managing their committees. We also discussed with GSA officials how agencies use the GSA FACA database to provide information to the public about committee membership and activities.

To identify practices that could better ensure that committees are, and are perceived as being, independent and balanced, we examined the relevant policies and procedures of the National Academies;<sup>3</sup> the nine committees and agencies examined in this review; and EPA's Science Advisory Board, which had implemented a number of relevant changes to its policies and procedures in response to our June 2001 report.<sup>4</sup>

We conducted our review from January 2003 through March 2004 in accordance with generally accepted government auditing standards.

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<sup>3</sup>The National Academies consist of four private, nonprofit organizations that advise the federal government on scientific and technical matters: the National Academy of Sciences, the National Academy of Engineering, the Institute of Medicine, and the National Research Council.

<sup>4</sup>U.S. General Accounting Office, *EPA's Science Advisory Board Panels: Improved Policies and Procedures Needed to Ensure Independence and Balance*, [GAO-01-536](#) (Washington, D.C.: June 12, 2001).

# Federal Advisory Committees, by Authorizing Mechanism and Type, in Fiscal Year 2003

This appendix provides information on the ways that advisory committees have been authorized, the functional categories of the committees as reported by agencies to GSA, and the number of federal advisory committee members.

Presidents, the Congress, and federal agencies can create federal advisory committees. As shown in table 3, most of the federal advisory committees operating in fiscal year 2003 were required or authorized by the Congress, some were created by the agencies, while the fewest committees were created by presidential directives.

**Table 3: Authorizing Mechanism for Active Federal Advisory Committees in Fiscal Year 2003**

Authorizing mechanism	Number of committees
<b>Required or authorized by the Congress</b>	
Required by the Congress via statute	421
Specifically authorized by statute but created at the discretion of an agency	213
<b>Subtotal</b>	<b>634</b>
Created by an agency under general statutory authority	271
Presidential directive	43
<b>Total</b>	<b>948</b>

Source: GSA FACA database.

Sponsoring agencies broadly classify their advisory committees according to the types of issues they address, using one of the following seven general categories defined in GSA's federal advisory committee database: scientific and technical program, nonscientific program, national policy issue, grant review, grant review-special emphasis panel,<sup>1</sup> regulatory negotiation, and "other." According to GSA's fiscal year 2003 database (see table 4), 208 of the 948 active committees were categorized as scientific and technical committees. However, in addition to these, committees in other categories also address scientific and technical issues, particularly the grant review committees. There were 131 grant review committees with over 41,000

<sup>1</sup>HHS uses the term "special emphasis panel" for some of its grant review panels at NIH. Of the 29 special emphasis panels in fiscal year 2003, NIH sponsored 24 panels.

**Appendix II**  
**Federal Advisory Committees, by**  
**Authorizing Mechanism and Type, in Fiscal**  
**Year 2003**

members in 2003. Further, some committees placed in the national policy, regulatory negotiation, and “other” categories also address scientific and technical issues.

**Table 4: Active Federal Advisory Committees, by Type, in Fiscal Year 2003**

Type of committee	Number of committees	Number of members
Grant review	102	22,517
Grant review – special emphasis panel <sup>a</sup>	29	19,226
National policy issue advisory board	152	3,834
Nonscientific program advisory board	298	5,470
Other	152	3,323
Regulatory negotiation	7	217
Scientific and technical program advisory board	208	7,910
<b>Total</b>	<b>948</b>	<b>62,497</b>

Source: GSA FACA database.

<sup>a</sup>NIH defines a special emphasis panel as a committee that functions both as an initial review group performing the scientific and technical peer review of applications and cooperative agreement applications and as reviewers of contract proposals and concept reviews. The membership is fluid, and individuals are designated to serve for only the meeting they are requested to attend.

The committees in fiscal year 2003 had more than 62,000 members, the majority of whom were members of grant review and special emphasis panels.<sup>2</sup> Overall, federal advisory committees range in size from under 10 members to over 9,000, with an average of about 48 members.<sup>3</sup> The committees classified as scientific and technical had 7,910 members and an

<sup>2</sup>Although these panels may have several hundred members and may hold dozens or more meetings in a year, the members do not all attend all of the panels’ meetings. Instead, each member might be called upon to attend one meeting per year to review a narrowly focused set of grant proposals. This practice is in contrast to the practice of other categories of committees in which the members are invited to attend each of a generally small number of meetings held each year.

<sup>3</sup>This average was calculated after subtracting the 6 largest committees, including HHS’s Center for Scientific Review Special Emphasis Panel, which in fiscal year 2003 maintained a roster of 9,080 members and held over 1,100 meetings. Five other advisory committees had over 1,000 members. If those committees are counted, the average size of the committees is about 66 members.

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**Appendix II**  
**Federal Advisory Committees, by**  
**Authorizing Mechanism and Type, in Fiscal**  
**Year 2003**

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average committee membership size of about 22 members.<sup>4</sup> Federal advisory committee members come from a wide range of professional backgrounds and include scientists, medical doctors and other health care professionals, academics, lawyers, engineers, corporate executives, state and local government officials, members of nongovernmental organizations, community activists, and representatives from the public at large, among others. Some members are federal employees, often from agencies other than the sponsoring agency.

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<sup>4</sup>This average was calculated after subtracting the membership of the 2 largest science committees, both sponsored by the Department of Transportation—RTCA, Inc. (with 2,718 members) and the Intelligent Transportation Society of America (with 570 members).



# Information on the Department of Agriculture's National Advisory Committee on Microbiological Criteria for Foods

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This appendix contains information about the National Advisory Committee on Microbiological Criteria for Foods. Although this committee is cosponsored by USDA, HHS, and the Departments of Defense and Commerce, USDA is responsible for the overall management of the committee. Within USDA, the Food Safety and Inspection Service (FSIS) manages this committee, and the Secretary of Agriculture appoints the members.

**Purpose of the committee:** According to its charter, the purpose of the committee is to provide impartial, scientific advice to federal food safety agencies for use in the development of an integrated national food safety systems approach from farm to final consumption to ensure the safety of domestic, imported, and exported foods.

**Number of members:** 29 (see table 5).

**Type of appointment:** Representative.

**Conflict-of-interest reviews:** The members are appointed as representatives and are not required to file OGE financial disclosure forms for USDA review for potential conflicts of interest. USDA does, however, require all committee members to submit a USDA form AD-755, which is to provide information about members' current employment and sources of income greater than \$10,000 in the last calendar year, other than their primary employment.

**Conflict-of-interest waivers:** Not applicable.

**Disclosure of waivers to the public:** Not applicable.

**Steps taken to gather nominations for the committee:** According to FSIS officials, the agency solicits nominations through notices in the *Federal Register*, FSIS Constituent Updates (an electronic newsletter sent to over 300 organizations and individuals), the FSIS Web site, and press releases. Officials said these notices serve to reach interested parties and stakeholders—that is, persons from state and federal governments, industry, consumer groups, and academia.

**Criteria used to balance the committee:** According to FSIS officials, the most important factor used to balance the committee is the expertise identified in the charter: microbiology, risk assessment, epidemiology, public health, food science, and other relevant disciplines. Membership is

**Appendix III  
Information on the Department of  
Agriculture's National Advisory Committee  
on Microbiological Criteria for Foods**

also balanced in terms of points of view by the approximately equal proportions of members appointed from government, industry, and academia. Committee staff also tries to balance committee membership in terms of demographic indicators, such as ethnicity and gender, as well as in terms of geographical distribution.

**External feedback on proposed committee membership:** None sought.

**Table 5: Roster of the National Advisory Committee on Microbiological Criteria for Foods with the Primary Employers and Areas of Expertise as of December 2003**

<b>Committee member</b>	<b>Primary employer</b>	<b>Areas of expertise</b>
<b>Academic institutions</b>		
Dr. Larry Beuchat	University of Georgia, Center for Food Safety and Quality Enhancement	Food science
Dr. Catherine Donnelly	University of Vermont, Department of Nutrition and Food Science	Food microbiology and <i>Listeria</i>
Dr. Stephanie Doores	Pennsylvania State University, Department of Food Science	Food science, especially dairy science
Dr. Lee-Ann Jaykus	North Carolina State University	Microbiology and microbial risk assessment
Dr. Carol Maddox	University of Illinois, College of Veterinary Medicine	Veterinary microbiology
Dr. Eli Perencevich	University of Maryland School of Medicine	Public Health
Dr. John Sofos	Colorado State University, Department of Animal Science	Microbiology and <i>E. coli</i>
<b>Companies or industry-affiliated organizations</b>		
Dr. Gary Ades	Most recently employed by Foster Farms	Food safety and quality assurance
Mr. Dane Bernard	Keystone Foods LLC	Food production, food processing, CODEX, <sup>a</sup> and HACCP <sup>b</sup>
Dr. Peggy Cook	Tyson Foods, Inc.	Food microbiology, food chemistry, serology, microbial genetics, and management
Dr. Mahipal Kunduru	Dole Fresh Vegetables, Inc.	Food safety and microbiology
Dr. Roberta Morales	Research Triangle Institute	Microbiology, veterinary medicine, and risk assessment
Ms. Virginia Scott	National Food Processors Association	Foodborne disease bacteria, microbiology, extended shelf life of refrigerated foods, and food safety
Dr. Robert Seward	American Meat Institute	Food microbiology
Dr. Katherine Swanson	Most recently employed by General Mills, Inc.	Food production and food microbiology
Dr. David Theno	Jack in the Box, Inc.	HACCP <sup>b</sup> and animal science

**Appendix III**  
**Information on the Department of**  
**Agriculture's National Advisory Committee**  
**on Microbiological Criteria for Foods**

(Continued From Previous Page)

<b>Committee member</b>	<b>Primary employer</b>	<b>Areas of expertise</b>
Dr. R. Bruce Tompkin	ConAgra Refrigerated Foods (retired)	Microbiology and food safety
<b>Federal, state, and foreign government agencies</b>		
Dr. David Acheson	U.S. Department of Health and Human Services, Food and Drug Administration	<i>E. coli</i> , public health, and medicine
Dr. Frances Downes	Michigan Department of Community Health	Public health and laboratory food testing
Dr. Daniel Engeljohn	U.S. Department of Agriculture Food Safety and Inspection Service	Animal science, meat science, and HACCP <sup>b</sup>
Dr. Jeff Farrar	California Department of Health Services	Public health, epidemiology, and veterinary medicine
Mr. Spencer Garrett	U.S. Department of Commerce National Marine Fisheries Service	Food hygiene, HACCP, <sup>b</sup> and seafood public health
Dr. Patricia Griffin	U.S. Department of Health and Human Services, Centers for Disease Control and Prevention	Epidemiology
Dr. Robin King	U.S. Army Veterinary Corps	Veterinary science and food microbiology
Dr. John Kvenberg	U.S. Department of Health and Human Services, Food and Drug Administration	HACCP, <sup>b</sup> risk management, and <i>Listeria</i> control
Dr. Anna Lammerding	Health Canada	Risk assessment
Dr. John Luchansky	U.S. Department of Agriculture, Agricultural Research Service	Food microbiology and toxicology
Ms. Angela Ruple	U.S. Department of Commerce National Seafood Inspection Laboratory	Food science and microbiology
Dr. Donald Zink	U.S. Department of Health and Human Services, Food and Drug Administration	Food microbiology, food science, food safety, infectious diseases, and epidemiology

Source: USDA.

<sup>a</sup>CODEX: Codex Alimentarius Commission. The Codex Alimentarius Commission was created in 1963 by the Food and Agriculture Organization (FAO) and the World Health Organization (WHO) of the United Nations to develop food standards, guidelines, and related texts, such as codes of practice under the Joint FAO/WHO Food Standards Program. The main purposes of this program are protecting the health of consumers and ensuring fair trade practices in the food trade and promoting coordination of all food standards work undertaken by international governmental and nongovernmental organizations.

<sup>b</sup>HACCP: Hazard Analysis and Critical Control Point. HACCP is a systematic program for preventing hazards that could cause foodborne illnesses by applying science-based controls from raw material to finished products. The program was first developed for the space program and currently is being adopted by FDA and USDA.

# Information on the Department of Energy's Biological and Environmental Research Advisory Committee

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This appendix contains information about the Biological and Environmental Research Advisory Committee, which is managed by Energy staff in the Office of Biological and Environmental Research. The members are appointed by the Secretary of Energy.

**Purpose of the committee:** The advisory committee reviews and makes recommendations on Energy's biological and environmental research program, addressing issues such as genomics, the health effects of low-dose radiation, DNA sequencing, medical sciences, environmental remediation, and climate change research. In addition to reviewing scientific issues, the committee provides advice on long-range plans and priorities and the appropriate levels of funding.

**Number of members:** 23 (see table 6).

**Type of appointment:** Representative.

**Conflict-of-interest reviews:** Because the members are appointed as representatives, they are not required to file OGE financial disclosure forms for Energy review for potential conflicts of interest.

**Conflict-of-interest waivers:** Not applicable.

**Disclosure of waivers to the public:** Not applicable.

**Steps taken to gather nominations for the committee:** According to the committee's designated federal official, the department received nominations from agency staff in the Office of Science.

**Criteria used to balance the committee:** According to the committee's designated federal official, the primary criterion used to balance the committee is expertise. He also considers gender, ethnicity, and geography and tries to achieve a balance of representatives from industry, academia, and the national laboratories.

**External feedback on proposed committee membership:** None sought.

**Appendix IV  
Information on the Department of Energy's  
Biological and Environmental Research  
Advisory Committee**

**Table 6: Roster of the Biological and Environmental Research Advisory Committee with the Primary Employers and Areas of Expertise as of December 30, 2003**

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
<b>Colleges, universities, and medical centers</b>		
Keith Hodgson, Ph.D (chair)	Stanford University	Structural biology
James Adelstein, Ph.D.	Harvard Medical School	Education, health risk, and medicine
Michelle Broido, Ph.D.	University of Pittsburgh	Atmospheric science, ecology, education, environmental remediation, global change, and structural biology
David Burgess, Ph.D.	Boston College	Developmental and molecular biology and education
Carlos Bustamante, Ph.D.	University of California at Berkeley	Bioengineering and molecular and structural biology
Charles DeLisi, Ph.D.	Boston University	Bioengineering, biomedical science, biotechnology, computational and molecular biology, education, genomics, mathematics, and informatics
Raymond Gesteland, Ph.D.	University of Utah	Biotechnology, education, genomics, and molecular biology
Willard Harrison, Ph.D.	University of Florida	Analytical chemistry
Steven Larson, M.D.	Memorial Sloan-Kettering Cancer Center	Biomedical science, education, and medicine
Jill Merisov, Ph.D.	Massachusetts Institute of Technology Center for Genome Research	Computational biology, computer modeling, genomics, mathematics, and informatics
Louis Pitelka, Ph.D.	University of Maryland Center for Environmental Science	Ecology and global change
Janet Smith, Ph.D.	Purdue University	Computational and structural biology
James Tiedje, Ph.D.	Michigan State University	Environmental remediation, biotechnology, microbiology, and molecular biology
Barbara Wold, Ph.D.	California Institute of Technology	Biotechnology, developmental and molecular biology, and genomics
<b>Companies</b>		
Jonathan Greer, Ph.D.	Abbot Laboratories	Biotechnology and computational and structural biology
James Mitchell, Ph.D.	Lucent Technologies	Analytical chemistry
<b>Nonprofit research institution</b>		
Leroy Hood, Ph.D.	Institute for Systems Biology	Bioengineering, biomedical sciences, biotechnology, developmental and molecular biology, and genomics
<b>Professional associations</b>		
Eugene Bierly, Ph.D.	American Geophysical Union	Atmospheric science and global change
Richard Hallgren, Ph.D.	American Meteorological Society	Computer modeling and global change

**Appendix IV  
Information on the Department of Energy's  
Biological and Environmental Research  
Advisory Committee**

*(Continued From Previous Page)*

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
Roger McClellan, D.V.M.	Chemical Industry Institute of Toxicology	Health risk and toxicology
<b>DOE national laboratory</b>		
Lisa Stubbs, Ph.D.	Lawrence Livermore National Laboratory	Biotechnology, genomics, and molecular biology
<b>Federally funded research organization</b>		
Warren Washington, Ph.D.	National Center for Atmospheric Research	Computer modeling and global change
<b>Other</b>		
Robert Fri	Resources for the Future; National Academy of Sciences	Education and global change

Source: Department of Energy.

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# Information on the Environmental Protection Agency's Federal Insecticide, Fungicide, and Rodenticide Act Scientific Advisory Panel

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This appendix contains information about the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) Scientific Advisory Panel. The committee is managed by EPA staff, and the members are appointed by the Deputy Administrator of EPA.

**Purpose of the committee:** The FIFRA Scientific Advisory Panel provides advice, information, and recommendations on pesticides and pesticide-related issues regarding the impact of regulatory actions on health and the environment of regulatory actions. The objectives include providing advice and recommendations on (1) scientific studies and issues in the form of a peer review, (2) methods to ensure that pesticides do not cause “unreasonable adverse effects on the environment,” and (3) guidelines to improve the effectiveness and quality of scientific testing and of data submitted to EPA.

**Number of members:** There are 7 permanent members on the standing committee (see table 7). These members are appointed for 4-year terms and serve on a number of individual peer review panels. The FIFRA Scientific Advisory Panel establishes between 5 and 7 peer review panels each year to address a variety of specific topics.<sup>1</sup> These committees are comprised of permanent members and ad hoc expert consultants. Meeting panels typically consist of approximately 15 members.

**Type of appointment:** Special government employees.

**Conflict-of-interest reviews:** As special government employees, committee members are required to file financial disclosure forms. As discussed in this report, the EPA form 3110-48, an OGE-approved alternative disclosure form, is used. In addition, as also is discussed in this report, FIFRA staff interview potential candidates using a structured interview format to assess the interest, availability, and appropriateness of candidates to serve on individual committees. The structured interview includes a discussion of financial conflicts of interest (statutory conflicts and appearance problems), impartiality, and a review of the information that is requested on the form 3110-48.

**Conflict-of-interest waivers:** No waivers have been granted to current members.

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<sup>1</sup>In this review, we examined the FIFRA Scientific Advisory Panel on atrazine (see table 8).

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**Appendix V  
Information on the Environmental  
Protection Agency's Federal Insecticide,  
Fungicide, and Rodenticide Act Scientific  
Advisory Panel**

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**Disclosure of waivers to the public:** Not applicable.

**Steps taken to gather nominations for the committee:** The Federal Insecticide, Fungicide, and Rodenticide Act of 1977 requires the EPA Deputy Administrator to select the 7 members of the standing Scientific Advisory Panel from nominees provided by NIH and the National Science Foundation. The committee's management also routinely solicits nominations for ad hoc expert consultants on the agency's Web site and through notices in the *Federal Register*.

**Criteria used to balance the committee:** Technical expertise is the primary criterion used to balance the FIFRA Scientific Advisory Panel committees. The FIFRA Scientific Advisory Panel defines balanced membership as including the necessary areas of technical expertise, different scientific perspectives within each technical discipline, and the collective breadth of experience needed to address the agency's charge.

**External feedback on proposed committee membership:** As required by statute, the advisory committee's management posts the names, professional affiliations, and selected biographical data of nominees proposed for appointment as permanent members in the *Federal Register* and on its Web site for public comment, providing instructions on how to submit comments regarding the nominees. Unlike the standing committee, nominees considered for temporary service at particular meetings are not subject to public comment prior to their appointment.



**Appendix V  
Information on the Environmental  
Protection Agency's Federal Insecticide,  
Fungicide, and Rodenticide Act Scientific  
Advisory Panel**

**Table 7: Roster of the Standing FIFRA Scientific Advisory Panel with the Primary Employers and Areas of Expertise as of December 2003**

<b>Committee member</b>	<b>Primary employer</b>	<b>Areas of expertise</b>
<b>Universities and medical centers</b>		
Stuart Handwerger M.D.	Cincinnati Children's Hospital Medical Center	Endocrinology, toxicology, and veterinary medicine
Steven G. Heeringa, Ph.D. <sup>a</sup>	University of Michigan, Institute for Social Research	Biostatistics
Gary E. Isom, Ph.D. <sup>a</sup>	Purdue University, School of Pharmacy and Pharmacal Sciences	Neurotoxicology and clinical pediatric research
Fumio Matsumura, Ph.D. <sup>a</sup>	University of California at Davis, Institute of Toxicology and Environmental Health	Biochemical toxicology
Mary Anna Thrall, D.V.M. <sup>a</sup>	Colorado State University, Department of Microbiology, Immunology and Pathology	Veterinary pathology and veterinary clinical pathology
Stephen Roberts, Ph.D. <sup>a</sup>	University of Florida, Center for Environmental & Human Toxicology	Human toxicology
<b>Federal agency</b>		
Christopher Portier, Ph.D.	National Institutes of Health, National Institute of Environmental Health Sciences	Human health risk assessment

Source: EPA.

<sup>a</sup>Members participated in the June 17 to 20, 2003, meeting on atrazine.

**Appendix V  
Information on the Environmental  
Protection Agency's Federal Insecticide,  
Fungicide, and Rodenticide Act Scientific  
Advisory Panel**

**Table 8: Roster of the Temporary (Ad Hoc) Members Serving on the June 17 to 20, 2003, Meeting on Atrazine**

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
<b>Universities</b>		
Joel Coats, Ph.D.	Iowa State University, Department of Entomology	Environmental toxicology (fate and effects of pesticides in environment)
Robert J. Denver, Ph.D.	The University of Michigan, Department of Ecology and Evolutionary Biology	Amphibian development
James Gibbs, Ph.D.	State University of New York - Syracuse	Amphibian biological monitoring, conservation biology, and herpetology
Sherril L. Green, D.V.M., Ph.D.	Stanford University School of Medicine	<i>Xenopus</i> husbandry <sup>a</sup>
Darcy B. Kelley, Ph.D.	Columbia University	Developmental biology
Gerald A. LeBlanc, Ph.D.	North Carolina State University	Aquatic toxicology
Carl Richards, Ph.D.	University of Minnesota Duluth, Minnesota Sea Grant College Program	Aquatic biology
David Skelly, Ph.D.	Yale University, School of Forestry and Environmental Studies	Field amphibian ecology
<b>Foreign organizations</b>		
Peter Delorme, Ph.D.	Health Canada (Canadian Federal Government)	Environmental toxicology (aquatic) and environmental risk assessment
Werner Kloas, Ph.D.	Department of Inland Fisheries, Leibniz-Institute of Freshwater Ecology and Inland Fisheries, Berlin, Germany	<i>Xenopus</i> <sup>a</sup> development and anuran (frog/toad) endocrinology

Source: EPA.

<sup>a</sup>*Xenopus laevis* is a species of frog that, along with the mouse, rat, fruit fly, and other species of animals and plants, serves as a model organism for biomedical research.

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# Information on the Department of Health and Human Services's Advisory Committee on Human Research Protections

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This appendix contains information about the Secretary's Advisory Committee on Human Research Protections. The committee replaced the National Human Research Protections Advisory Committee, established in 2000, whose charter HHS did not renew when it expired in 2002.<sup>1</sup> HHS officials chose to revise the charter of the initial committee primarily by adding populations potentially affected by human research protections, appointing new members to provide advice to the Secretary. The committee is sponsored and generally managed by the Office of Public Health Service, but the members are appointed by the HHS Secretary.<sup>2</sup> The nominating and selection processes in 2002 and 2003 were managed by the HHS Office of White House Liaison.

**Purpose of the committee:** According to its charter, the committee is to advise the HHS Secretary and the Assistant Secretary for Health on matters pertaining to the continuance and improvement of functions within the authority of HHS directed toward protections for human subjects in research. Specifically, the committee is to provide advice relating to the responsible conduct of research involving human subjects with particular emphasis on

- special populations, such as neonates and children, prisoners, and the decisionally impaired;
- pregnant women, embryos, and fetuses;
- individuals and populations in international studies;
- populations in which there are individually identifiable samples, data, or information; and
- investigator conflicts of interest.

In addition, the committee is responsible for reviewing selected ongoing work and planned activities of the Office of Human Research Protections

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<sup>1</sup>As noted in this report, FACA requires that advisory committee charters expire at the end of 2 years unless renewed by the agency.

<sup>2</sup>HHS and its components, such as CDC, FDA, and NIH, had 247 federal advisory committees in fiscal year 2003. While the heads of the various component agencies generally appoint committee members, according to the Director of the Office of the White House Liaison, the HHS Secretary appoints the members to about 30 percent of the committees.

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**Appendix VI**  
**Information on the Department of Health and**  
**Human Services's Advisory Committee on**  
**Human Research Protections**

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and other offices/agencies within HHS that are responsible for human subjects protection. These evaluations may include but are not limited to a review of assurance systems, the application of minimal research risk standards, the granting of waivers, education programs sponsored by the Office of Human Research Protections, and the ongoing monitoring and oversight of institutional review boards and the institutions that sponsor research.

**Number of members:** 11 (see table 9).

**Type of appointment:** Special government employees.

**Conflict-of-interest reviews:** As special government employees, committee members are required to file OGE financial disclosure forms for HHS's review for potential conflicts of interest. These forms were reviewed by the cognizant committee management officer who consulted with the designated federal official and the Office of General Counsel ethics division. In June 2003, after the members had been appointed to the committee, the committee management officer identified some potential conflicts of interest stemming from investments that she and the Office of General Counsel believed required mitigation, such as waivers. She also requested that the designated federal official determine whether other potential conflicts required waivers if the appointed members work for institutions involved in research activities/studies/projects that may impact human research protections.

**Conflict-of-interest waivers:** Waivers were not issued before the committee's first meeting in July 2003. The nine waivers granted were finalized on January 16, 2004.

**Disclosure of waivers to the public:** HHS policies and procedures do not address the disclosure of waivers to the public. HHS does not proactively disclose the issuance of waivers to the public at committee meetings.

**Steps taken to gather nominations for the committee:** According to the Director of the Office of White House Liaison, she asked a couple of individuals at the Association of American Medical Colleges for nominations for this committee. The Director said that an Office of Public Health Service staff member familiar with the previous committee also assisted in identifying nominees from the previous slate to serve on the new committee. In addition, she said that HHS received self-nominations

**Appendix VI  
Information on the Department of Health and  
Human Services's Advisory Committee on  
Human Research Protections**

and also used names from NIH's database, particularly the group that was solicited for the Secretary's Advisory Committee on Genetics, Health, and Society.

**Criteria used to balance the committee:** According to the agency official responsible for nominating members for the committee, the factors she considered in balancing the committee were expertise along with geographic, gender, and racial diversity. After HHS announced the committee membership in January 2003, the National Organization for Rare Disorders and some members of the predecessor advisory committee expressed concern that the regulated research industry was overrepresented and that there were no consumer or patient advocates on the committee. A week later, HHS added a member with a background in patient advocacy.

**External feedback on proposed committee membership:** None sought.

**Table 9: Roster of the Secretary's Advisory Committee on Human Research Protections with the Primary Employers and Areas of Expertise as of December 2003**

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
<b>Medical and academic institutions</b>		
Dr. Celia B. Fisher	Fordham University	Bioethics
Dr. Nigel Harris	Morehouse School of Medicine	Rheumatology and antiphospholipid research
Dr. Robert G. Hauser	Abbott Northwest Hospital	Cardiology
Dr. Nancy L. Jones	Wake Forest University School of Medicine	Biochemistry and pathology
Ms. Susan Kornetsky	Children's Hospital, Boston, MA	Clinical research compliance and public health
Dr. Mary Lake Polan	Stanford University School of Medicine	Reproductive endocrinology and infertility
Dr. Ernest D. Prentice	University of Nebraska Medical Center	Cell biology, anatomy, and regulatory Compliance
<b>Company, law firm, and professional organization</b>		
Mr. Thomas Adams	Association of Clinical Research Professionals	Medical trade association management
Mr. Mark Barnes	Ropes & Gray Law Firm	Health care law and Health Insurance Portability and Accountability Act of 1996 regulation and compliance
Dr. Felix A Khin-Maung-Gyi	Chesapeake Research Review, Inc.	Human subject protection, bioethics, and pharmacy
<b>Patient advocacy organization</b>		
Dr. Susan L. Weiner	The Children's Cause, Inc.	Developmental psychology

Source: HHS.

# Information on the Centers for Disease Control and Prevention's Advisory Committee on Childhood Lead Poisoning Prevention

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This appendix contains information about the Advisory Committee on Childhood Lead Poisoning Prevention. The committee is sponsored and generally managed by CDC, but the members are appointed by the HHS Secretary.<sup>1</sup> The nominating and selection processes in 2002 and 2003 were managed by the HHS Office of White House Liaison.

**Purpose of the committee:** The Advisory Committee on Childhood Lead Poisoning Prevention provides advice and guidance to the Secretary; the Assistant Secretary for Health; and the CDC Director, regarding new scientific knowledge and technological developments and their practical implications for childhood lead poisoning prevention efforts. The committee also reviews and reports on childhood lead poisoning prevention practices and recommends improvements in national childhood lead poisoning prevention efforts.

**Number of members:** 12 (see table 10).

**Type of appointment:** Special government employees.

**Conflict-of-interest reviews:** As special government employees, committee members are required to file OGE financial disclosure forms for HHS and CDC review for potential conflicts of interest. CDC's designated federal official, a conflict-of-interest specialist in the CDC's Committee Management Office, and the director of CDC's Management Analysis and Services Office reviewed the completed forms for the current members of the committee.

**Conflict-of-interest waivers:** None granted to current members.

**Disclosure of waivers to the public:** Not applicable.

**Steps taken to gather nominations for the committee:** According to the Director of the Office of White House Liaison and the designated federal official for the committee, nominations were generally solicited informally, such as during conversations. According to the Director, HHS received nominations from the Dean of the St. Francis Hospital in Tulsa, Oklahoma; the Chancellor of Columbia University; Senator Thad Cochran; and the Deputy Secretary's office. They also used the Internet to search for

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<sup>1</sup>See appendix 6, footnote 2.

**Appendix VII  
Information on the Centers for Disease  
Control and Prevention's Advisory  
Committee on Childhood Lead Poisoning  
Prevention**

candidates associated with successful lead poison reduction programs in large cities.

**Criteria used to balance the committee:** According to the Office of White House Liaison, the department and agency worked to find potential appointees and balance the committee on the basis of expertise as well as gender, ethnicity, and geography to the extent these additional factors did not impinge on the department's ability to pick qualified members.

**External feedback on proposed committee membership:** None sought.

**Table 10: Roster of the Advisory Committee on Childhood Lead Poisoning Prevention with the Primary Employers and Areas of Expertise as of December 2003**

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
<b>Medical institutions</b>		
William Banner, M.D.	The Children's Hospital at St. Francis in Tulsa OK	Toxicology, critical care medicine, and pediatrics
Helen Binns, M.D., M.P.H.	Feinberg School of Medicine, Northwestern University	Pediatric lead poisoning detection and public health
Carla Campbell, M.D., M.S.	Children's Hospital of Philadelphia	Lead poisoning and toxicology
Ing Kang Ho, Ph.D.	University of Mississippi Medical Center, School of Graduate Studies in the Health Sciences	Pharmacology and toxicology
Sergio Piomelli, M.D.	Columbia University College of Physicians and Surgeons	Pediatrics
<b>State and local health agencies</b>		
Walter S. Handy, Jr., Ph.D.	Cincinnati Health Department	Clinical psychology and public health policy
Jessica Leighton, Ph.D., M.P.H.	New York City Department of Health and Mental Hygiene	Public policy and childhood lead poisoning
Tracey Lynn, D.V.M., M.S.	Alaska Department of Health Services	Environmental public health
Kevin U. Stephens, Sr., M.D., J.D.	Department of Health, City of New Orleans, LA	Obstetrics and gynecology, public health, medicine, and law
<b>Private medical practice</b>		
Catherine M. Slota-Varma, M.D.	Pediatrician in private practice	Pediatrics
<b>Private nonprofit organization</b>		
Richard Hoffman, M.D.	Director, Planned Parenthood of Rocky Mountains	Public health
<b>University</b>		
Kimberly Thompson, Sc.D.	Harvard University School of Public Health	Risk analysis and health policy

Source: HHS.

# Information on the Food and Drug Administration's Food Advisory Committee

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This appendix provides information about the Food Advisory Committee. The committee is managed by FDA. The members are appointed by FDA's Associate Commissioner for External Relations.

**Purpose of the committee:** The committee is to provide advice to the Director, Center for Food Safety and Applied Nutrition, and to the Commissioner of Food and Drugs and other appropriate officials as needed, on emerging food safety, food science, nutrition, and other food-related health issues that FDA considers of primary importance for its food and cosmetics programs. The committee may be charged with reviewing and evaluating available data and making recommendations on matters such as those relating to the following: broad scientific and technical food- or cosmetic-related issues, the safety of new foods and food ingredients, the labeling of foods and cosmetics, nutrient needs and nutritional adequacy, and safe exposure limits for food contaminants. The committee may also be asked to provide advice and make recommendations on ways of communicating to the public the potential risks associated with these issues and on approaches that might be considered for addressing the issues.

**Number of members:** 25 (see table 11).

**Type of appointment:** With the exception of nonvoting industry representatives, all committee members are special government employees.

**Conflict-of-interest reviews:** As special government employees, committee members are required to file the OGE confidential financial disclosure form 450. Members are required to update this form annually. In addition, for meetings that involve particular matters of general or specific applicability, members also complete an FDA form 3410, which requires them to report interests directly related to the topic of discussion. The designated federal official does an initial screening and officials from FDA's Ethics and Integrity Branch clear the members for conflicts of interest.

**Conflict-of-interest waivers:** During the last year, waivers were granted seven times for members to participate in specific meetings. FDA granted the waivers on the basis that the need for these individuals' expertise outweighed the potential conflicts of interest.



**Disclosure of waivers to the public:** The type of waiver and the names of members who have received waivers for particular meetings are read into the record by the designated federal officer at the beginning of the public meeting. Public disclosure of the substance of waivers issued is only required in cases where the meetings deal with particular matters of specific applicability. When such waivers are issued, the members who receive them are asked to sign a consent document authorizing FDA to provide a description of the nature and the magnitude of the financial interests being waived for the public record.

**Steps taken to gather nominations for the committee:** FDA solicits nominations through notices in the *Federal Register*. According to the committee's designated federal official and an agency document identifying the sources of the nominations, the agency obtained nominations from (1) FDA and HHS officials; (2) interest groups and trade associations and other interested parties, including the American Society for Nutritional Services, the Center for Science in the Public Interest, the Association of Food and Drug Officials, and officials at the Center for Health Policy at the University of Oklahoma and the Massachusetts Institute of Technology; and (3) individuals who nominated themselves in response to the *Federal Register* notice.

**Criteria used to balance the committee:** Committee managers reported the following five criteria used to achieve balance: (1) scientific expertise representing a range of scientific interpretation; (2) demographic characteristics, including geographic distribution, gender, and ethnicity; (3) differing levels of experience on advisory committees; (4) stakeholder representation (e.g., consumers, industry, and academicians); and (5) membership on advisory committees that is used to help ensure that the agency has balance by not repeatedly appointing a limited set of people either for a particular committee or for various committees the agency has on related topics. Temporary voting members may be added to enhance balance.

**External feedback on proposed committee membership:** None sought.

**Appendix VIII  
Information on the Food and Drug  
Administration's Food Advisory Committee**

**Table 11: Roster of the Food Advisory Committee with the Primary Employers and Areas of Expertise as of June 3, 2003**

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
<b>Universities and medical centers</b>		
Alex D.W. Acholonu, Ph.D.	Alcorn State University	Microbiology and parasitology
Douglas L. Archer, Ph.D.	University of Florida, Department of Food Science & Human Nutrition	Microbiology, food science, and food law
Jonathan A. Arias, Ph.D.	University of Maryland, Center for Biosystems	Molecular biology
Fred McDaniel Atkins, M.D.	National Jewish Medical and Research Center	Pediatrics and allergies
Jeffrey Blumberg, Ph.D.	Tufts University	Pharmacology and biostatistics
Bob B. Buchanan, Ph.D.	University of California, Berkeley, Department of Plant and Microbial Biology	Molecular plant biology
Francis Fredrick Busta, Ph.D.	University of Minnesota, Department of Food Science and Nutrition	Food science and microbiology
Nancy M. Childs, Ph.D.	Saint Joseph's University	Food marketing
Johanna Dwyer, Ph.D.	Tufts University Schools of Medicine and Nutrition	Public health and nutrition
Lawrence J. Fischer, Ph.D.	Michigan State University, Institute for Environmental Toxicology	Toxicology
George M. Gray, Ph.D.	Harvard University, School of Public Health	Risk analysis and toxicology
Rachel K. Johnson, Ph.D., M.P.H., R.D.	University of Vermont, Department of Nutrition and Food Sciences	Pediatrics and nutrition
Anne R. Kapuscinski, Ph.D.	University of Minnesota, Department of Fisheries and Wildlife	Conservation biology
Ken Lee, Ph.D.	Ohio State University, Department of Food Science	Food science and processing
Harihara Mehendale, Ph.D.	University of Louisiana at Monroe, College of Pharmacy	Toxicology
Sanford A. Miller, Ph.D. (Chair)	Virginia Polytechnic and State University	Chemistry, toxicology, and food science
Abigail A. Salyers, Ph.D.	University of Illinois at Urbana-Champaign	Microbiology and gene transfer
Michael W. Shannon, Ph.D.	Children's Hospital, Boston, MA	Pediatrics and toxicology
J. Antonio Torres, Ph.D.	Oregon State University	Food science and processing
Steven Zeisel, MD, Ph.D.	University of North Carolina, School of Health & Medicine	Pediatrics
<b>Nonprofit associations</b>		
Annette Dickinson, Ph.D. (industry representative)	Council for Responsible Nutrition	Dietary supplements
Goulda Angella Downer, Ph.D. (consumer representative)	Metroplex Health and Nutrition Services	Nutrition and epidemiology
Douglas Gurian-Sherman, Ph.D. (consumer representative)	Center for Science in the Public Interest	Genetic engineering

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**Appendix VIII  
Information on the Food and Drug  
Administration's Food Advisory Committee**

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*(Continued From Previous Page)*

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
<b>State agency</b>		
Marion H. Fuller, D.V.M.	Florida Department of Agriculture, Division of Food Safety	Veterinary medicine federal-state relations
<b>Industry association</b>		
Brandon Scholz	Wisconsin Grocers Association	Industry representative

Source: USDA.

# Information on the National Institutes of Health's Scientific Advisory Committee on Alternative Toxicological Methods

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This appendix contains information about the Scientific Advisory Committee on Alternative Toxicological Methods, which is sponsored and managed by NIH. Members are appointed by the Director of the National Institute of Environmental Health Sciences.

**Purpose of the committee:** The committee provides advice to the Director of the National Institute of Environmental Health Sciences (NIEHS); the Interagency Coordinating Committee on the Validation of Alternative Methods (ICCVAM); and the National Toxicology Program Center regarding statutorily mandated functions, including

- reviewing and evaluating new; revised; or alternative test methods, including batteries of tests and test screens that may be acceptable for specific regulatory uses;
- facilitating appropriate interagency and international harmonization of acute or chronic toxicological test protocols that encourage the reduction, refinement, or replacement of animal test methods;
- facilitating and providing guidance on the development of validation criteria; validation studies; and processes for new, revised, or alternative test methods and helping to facilitate the acceptance of such scientifically valid test methods and awareness of accepted test methods by federal agencies and other stakeholders; and
- submitting ICCVAM test recommendations for the test methods reviewed by ICCVAM, through expeditious transmittal by the HHS Secretary (or the designee of the Secretary), to each appropriate federal agency, along with the identification of specific agency guidelines; recommendations; or regulations for test methods, including batteries of tests and test screens, for chemicals or a class of chemicals within a regulatory framework that may be appropriate for scientific improvement, while seeking to reduce, refine, or replace animal test methods.

The committee also provides advice to the Director of the NIEHS and the National Toxicology Program Center on activities and directives relating to the National Toxicology Program Center, such as on priorities and opportunities for alternative test methods that may provide improved prediction of adverse health effects compared with currently used methods or advantages in terms of reduced expense and time, reduced animal use, and reduced animal pain and distress.

**Number of members:** 15 (see table 12).

**Type of appointment:** Special government employees.

**Conflict-of-interest reviews:** As special government employees, committee members are required to file OGE financial disclosure forms for review for potential conflicts of interest. The NIH committee management officer performed a first-level review of the financial disclosure forms, followed by a second-level review by the designated federal officer. The NIH's Deputy Ethics Counselor performed the final review.

**Conflict-of-interest waivers:** Fourteen of 15 members received waivers because NIH determined that the need for their expertise outweighed the potential conflicts. One of the 15 members received a waiver because the conflict was deemed not significant.

**Disclosure of waivers to the public:** According to the designated federal officer, the issuance of waivers to committee members was not disclosed to the public. For example, the waivers were not discussed at any committee meetings. According to the NIH committee management officer, the agency sends its waivers to the HHS Ethics Counsels assigned to NIH, who then sends them to OGE.

**Steps taken to gather nominations for the committee:** The Director of the Environmental Toxicology Program, NIEHS, asked the members of the ICCVAM for nominations to the advisory committee and also asked for nominations from former members and ad hoc advisors of the committee. The Director also requested nominations from two stakeholder groups that regularly attend committee meetings, the Doris Day Animal League and the People for the Ethical Treatment of Animals.

**Criteria used to balance the committee:** According to the committee management officer and the designated federal officer, the legislation that created the committee gives direction regarding membership that focuses on expertise and work affiliations, and NIH uses these factors to achieve committee balance. Specifically, the legislation calls for members to come from an academic institution; a state government agency; an international regulatory body; or any corporation developing or marketing new, revised, or alternative test methodologies, including contract laboratories. The legislation also specifies that there shall be at least one knowledgeable representative having a history of expertise, development, or evaluation of new, revised, or alternative test methods from each of the following

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**Appendix IX**  
**Information on the National Institutes of**  
**Health's Scientific Advisory Committee on**  
**Alternative Toxicological Methods**

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categories: (1) personal care, pharmaceutical, industrial chemicals, or agricultural industry; (2) any other industry that is regulated by one of the federal agencies on ICCVAM; and (3) a national animal protection organization established under section 501(c)(3) of the Internal Revenue Code of 1986. The committee management officer also told us that NIH considered ethnicity, gender, and geography in balancing the committee membership.

**External feedback on proposed committee membership:** None sought.

**Appendix IX**  
**Information on the National Institutes of**  
**Health's Scientific Advisory Committee on**  
**Alternative Toxicological Methods**

**Table 12: Roster of the Scientific Advisory Committee on Alternative Toxicological Methods with the Primary Employers, and Areas of Expertise as of December 30, 2003**

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
<b>Universities</b>		
Dr. Daniel Acosta, Jr.	University of Cincinnati, College of Pharmacy	<i>In vitro</i> toxicology, pharmacology, and development of <i>in vitro</i> cellular models
Dr. Nancy Flournoy	University of Missouri-Columbia, Department of Statistics	Biostatistics, applied stochastic processes, and statistical theory
Dr. Alan M. Goldberg	Johns Hopkins University, Center for Alternatives to Animal Testing, Bloomberg School of Public Health	Neurotoxicology, <i>in vitro</i> toxicology, and alternative models
Dr. Sidney Green, Jr.	Howard University, Department of Pharmacology, College of Medicine	Pharmacology, genetic toxicology, and regulatory toxicology
Dr. A. Wallace Hayes	Harvard University, School of Public Health	General toxicology, biochemical toxicology, and <i>in vitro</i> models
Dr. Nancy A. Monteiro-Riviere	North Carolina State University, Department of Clinical Sciences, College of Veterinary Medicine	Dermal toxicology, biochemical toxicology, and <i>in vitro</i> models
Dr. Steven H. Safe	Texas A & M University, Departments of Veterinary Physiology and Pharmacology, College of Veterinary Medicine	Environmental estrogens, toxicology, and biochemistry
Dr. Carlos Sonnenschein	Tufts University School of Medicine, Department of Anatomy and Cellular Biology	Environmental toxicology, medicine, environmental estrogens, and reproductive toxicology
<b>Companies</b>		
Dr. Jack H. Dean	Sanofi-Synthelabo, Inc.	Molecular biology, regulatory toxicology, toxicogenomics, and immunotoxicology
Dr. Rodger D. Curren	Institute for In Vitro Sciences, Inc.	<i>In vitro</i> toxicological testing
Dr. Jacqueline H. Smith	Chesapeake Consulting Team	Pharmacology, environmental toxicology, regulatory toxicology, and the petroleum industry
<b>Nonprofit associations</b>		
Dr. Martin L. Stephens	The Humane Society of the United States	Animal welfare and environmental toxicology
Dr. Peter Theran	Massachusetts Society for the Prevention of Cruelty to Animals/American Humane Education Society	Internal medicine, laboratory animal medicine, animal welfare, and comparative medicine
<b>State agency</b>		
Dr. Calvin C. Willhite	State of California, Department of Toxic Substance Control	Reproductive toxicology, pharmacology, risk assessment and management, and regulatory toxicology
<b>Other</b>		
Dr. Katherine A. Stitzel	Veterinarian (Retired)	Acute toxicity, <i>in vitro</i> methods, and regulatory toxicology

Source: HHS.

# Information on the Department of the Interior's U.S. Geological Survey's Scientific Earthquake Studies Advisory Committee

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This appendix provides information about the Scientific Earthquake Studies Advisory Committee. The committee is managed by the U.S. Geological Survey (USGS), and members are appointed by the Secretary of the Interior.

**Purpose of the committee:** The advisory committee was established under the Earthquake Hazards Reduction Authorization Act of 2000 (Pub. L. No. 106-503, Title II) to advise the Director of USGS on matters relating to the USGS's participation in the National Earthquake Hazards Reduction Program, a multiagency strategic program to reduce risks to lives and property resulting from earthquakes. The committee is to provide advice on the USGS Earthquake Hazards Reduction Program's roles, goals, and objectives; capabilities and research needs; guidance on achieving major objectives; and establishing and measuring performance goals.

**Number of members:** 9 (see table 13).

**Type of appointment:** Representative.

**Conflict-of-interest reviews:** In 2001, the committee members were appointed as representatives and were not required to file OGE financial disclosure forms for Interior review for potential conflicts of interest. In January 2004, Interior reevaluated the appointments and determined that the members should be appointed as special government employees. Interior said that the committee would not conduct further meetings until the appointments had been changed.

**Conflict-of-interest waivers:** Not applicable in 2001.

**Disclosure of waivers to the public:** Not applicable.

**Steps taken to gather nominations for the committee:** The Earthquake Hazards Reduction Authorization Act of 2000 requires the Director of USGS to obtain nominations from the National Academy of Sciences, professional societies, and other appropriate organizations. The Director obtained nominations from the academy, the Geological Society of America, the Seismological Society of America, the American Society of Civil Engineers, the American Institute of Professional Geologists, the American Geophysical Union, and the Earthquake Engineering Research Institute.



**Appendix X  
Information on the Department of the  
Interior's U.S. Geological Survey's Scientific  
Earthquake Studies Advisory Committee**

**Criteria used to balance the committee:** According to the statute that established the advisory committee, the selection of individuals for the committee is to be based solely on established records of distinguished service and the USGS Director is required to ensure that “a reasonable cross-section of views and expertise is represented.” According to the designated federal official, the primary factor for selection was expertise in fields such as geology, seismology, engineering, and public safety. In addition, according to department officials, the agency also considered gender, geography, and employment sector.

**External feedback on proposed committee membership:** USGS sought feedback from the National Academies on its slate of proposed members.

**Table 13: Roster of the Scientific Earthquake Studies Advisory Committee with the Primary Employers and Areas of Expertise as of December 2003**

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
<b>Universities</b>		
Dr. Daniel P. Abrams	University of Illinois at Urbana-Champaign	Engineering
Dr. Thomas H. Jordan	University of Southern California, Department of Earth Sciences	Seismology, geodynamics, tectonics, geodesy, and marine geology
Dr. Paul Segall	Stanford University, Department of Geophysics	Earthquake physics
Dr. Robert B. Smith	University of Utah, Department of Geology and Geophysics,	Geology
Dr. Sharon L. Wood	University of Texas, Ferguson Structural Engineering Laboratory	Engineering
<b>Companies</b>		
Dr. Lloyd Cluff	Pacific Gas and Electric Company	Earthquake hazard assessment
Mr. Ronald T. Eguchi	ImageCat, Inc.	Earthquake risk analysis
<b>State agencies</b>		
Ms. Mimi Garstang	Missouri Geological Survey	Earthquake hazard analysis in the eastern United States and state-level mitigation policy
Dr. Jonathan G. Price	Nevada Bureau of Mines and Geology	Seismology and earthquake hazard analysis in the western United States.

Source: Interior.

# Information on the National Aeronautics and Space Administration's Space Science Advisory Committee

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This appendix provides information about the Space Science Advisory Committee. The committee is managed by the Office of Space Science, and members are appointed by NASA's Associate Administrator for Space Science.

**Purpose of the committee:** The NASA Space Science Advisory Committee is to draw on the expertise of its members and other sources to provide advice and make recommendations to the Administrator of NASA on plans, policies, programs, and other matters pertinent to the agency's space science responsibilities.

**Number of members:** 17 (see table 14).

**Type of appointment:** Special government employees.

**Conflict-of-interest reviews:** NASA uses the OGE form 450 to collect financial information from committee members. The forms are collected and reviewed after the Associate Administrator has concurred with the appointment decisions. The forms 450 are reviewed and approved by the committee's designated federal official and the Office of General Counsel. On the basis of these reviews, the Office of General Counsel sometimes sends cautionary letters to members indicating that they may need to recuse themselves if the committees address matters that relate to their financial interests.

**Conflict-of-interest waivers:** No current members have waivers.<sup>1</sup>

**Disclosure of waivers to the public:** Not applicable.

**Steps taken to gather nominations for the committee:** According to the committee's designated federal official, NASA gathered nominations from staff within the agency's Office of Space Science.

**Criteria used to balance the committee:** The committee's designated federal official told us said that in addition to considering the nominees' areas of expertise relative to the four themes of the Office of Space Science, he also considers their gender, ethnicity, geography, and institutional affiliation.

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<sup>1</sup>According to an ethics official in NASA's Office of General Counsel, NASA issues very few (five or fewer) waivers each year.

**Appendix XI  
Information on the National Aeronautics and  
Space Administration's Space Science  
Advisory Committee**

**External feedback on proposed committee membership:** None sought.

**Table 14: Roster of the Space Science Advisory Committee Members with the Primary Employers and Areas of Expertise as of December 30, 2003**

<b>Committee member</b>	<b>Primary employer</b>	<b>Area of expertise</b>
<b>Universities</b>		
Dr. David Deamer	University of California at Santa Cruz	Astrobiology
Dr. Jonathan Grindlay	Harvard-Smithsonian Center for Astrophysics	Astrophysics
Dr. Fiona Harrison	California Institute of Technology	Astrophysics
Dr. Roderick Heelis	University of Texas at Dallas	Solar physics
Dr. Garth Illingworth	University of California at Santa Cruz	Astrophysics
Dr. Andrew Klein	Oregon State University	Nuclear engineering
Dr. Jonathan Lunine	University of Arizona	Planetary exploration
Dr. John Mustard	Brown University	Astrobiology
Dr. David Spergel	Princeton University	Astrophysics
<b>Federal research facilities</b>		
Dr. Judith Karpen	U.S. Naval Research Laboratory	Solar physics
Dr. Edward Kolb	Fermi National Accelerator Laboratory	Astrophysics
Dr. Jeremy Mould	National Optical Astronomy Observatory	Astrophysics
Dr. Michelle Thompson	Los Alamos National Laboratory	Sun-earth connections
<b>For profit company</b>		
Dr. Andrew Christensen (chair)	Northrop Grumman Space Technology	Sun-earth connections
<b>Private, nonprofit research organizations</b>		
Dr. Heidi Hammel	Space Science Institute	Planetary science
Mr. Martin Kress	Battelle Memorial Institute	Space policy
<b>Private museum</b>		
Dr. Paul Knappenberger	Adler Planetarium	Education and public outreach

Source: NASA.

# Comments from the General Services Administration



GSA Administrator

March 24, 2004

The Honorable David M. Walker  
Comptroller General  
United States General  
Accounting Office  
Washington, DC 20548

Dear Mr. Walker:

Enclosed are comments on the draft report entitled "Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance."

GSA agrees that additional guidance and best practices suggestions relating overall to the Federal advisory committee appointment and membership processes could help agencies to ensure that committees are perceived to be independent and have fairly balanced membership. The General Services Administration (GSA) remains committed to these key policy goals of the Federal Advisory Committee Act (FACA) and believes that they should be implemented consistently across the executive branch. GSA also believes that such guidance should be of sufficient detail and clarity to ensure the utmost compliance with FACA and other related or impacted statutes and regulations. GSA is in general accord with the findings in the draft report relating to those areas directly under the purview of GSA.

We are committed to our strong partnership with the Office of Government Ethics (OGE) to address both those areas under OGE's jurisdiction relating to FACA and the appointment and membership processes that are under the decision making authority of individual agencies. GSA will consult frequently with OGE and executive agencies in developing enhanced guidance that will achieve not only the best solutions, but also reflect the consensus of agencies that sponsor a wide variety of advisory committees.

GSA is taking a proactive approach, to include changes to its shared FACA Database management and reporting system, and some activities already are underway. The enclosed comments indicate our overall plan in the major areas of continuing dialogue with

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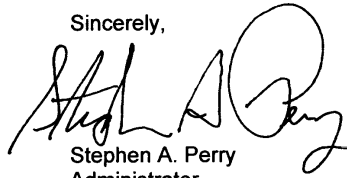
**Appendix XII  
Comments from the General Services  
Administration**

- 2 -

OGE, incorporating changes to current interagency training, issuing more detailed guidance to enhance data collection, and improving the agency consultation process with GSA in the establishment of new discretionary Federal advisory committees.

Thank you for the opportunity to comment on the draft report.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen A. Perry". The signature is stylized with a large, circular flourish at the end.

Stephen A. Perry  
Administrator

Enclosure

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Comments of the General Services Administration on  
The General Accounting Office's Draft Report, "Federal Advisory Committees:  
Additional Guidance Could Help Agencies Better Ensure Independence and Balance"  
(GAO-04-328)

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**Overall GAO Recommendation**

**GAO is recommending that OGE and GSA provide additional guidance to federal agencies with regards to clarifying the appropriate use of representative appointments; systematically obtaining relevant information to ensure committees are, and are perceived as, balanced; and adopting some promising practices and measures that would better ensure independence and balance and make the formation and operation of advisory committees more transparent.**

**General GSA Comments**

As addressed in the report, because Federal advisory committees are established to advise executive agencies on significant issues and play an important role in the development of Federal policies, their membership should be perceived as being free from conflicts of interest and be fairly balanced in terms of the points of view represented and the functions to be performed. Prior to issuing any new guidance, to include best practices suggestions, GSA intends to consult specifically with the Office of Government Ethics (OGE), and executive branch departments and agencies generally, as substantial parts of these processes reside in the area of OGE's regulatory and interpretive jurisdiction, or are within the purview of each individual agency's decisionmaking authority with respect to membership selection and appointments. GSA's ongoing partnership with OGE extends both to ensuring that GSA's Governmentwide issuances relating to the Federal Advisory Committee Act (FACA) are consistent with all statutes and regulations for which OGE is responsible, and also to the use of OGE staff in the delivery of the ethics and conflicts of interest portions of GSA's interagency FACA management training.

Additional comments are provided below relating to specific actions that already are underway or planned to address the findings upon which the GAO's recommendations are based. Several of these actions were discussed in general with GAO's staff during the course of its review, to include proposed changes to GSA's shared FACA Database management and reporting system. We expect to complete all necessary actions directly under the purview of GSA and those achieved collaboratively with OGE and other agencies during fiscal year 2005.

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**GAO Finding**

**Additional government-wide guidance could help agencies better ensure the independence and balance of federal advisory committees.**

**GSA Comments**

GSA generally agrees that additional guidance and best practices suggestions relating overall to the Federal advisory committee appointment and membership processes could help agencies to ensure that committees are perceived to be independent and free from conflicts of interest, and that committee membership, as contemplated by FACA, will be fairly balanced.

**GAO Finding**

**Also, to be effective, advisory committees must be, and be perceived as being, fairly balanced in terms of points of view and functions to be performed. However, GSA's guidance on advisory committee management does not address what types of information could be helpful to agencies in assessing the points of view of potential committee members to make decisions about committee balance.**

**GSA Comments**

GSA proposes to provide additional guidance within the format of a comprehensive template describing the various factors for, and illustrating the various components of what, in GSA's opinion, would comprise a plan for fairly balanced membership consistent with FACA. Secretariat staff work on this template was begun during the course of this GAO review, with baseline information already obtained from selected FACA Committee Management Officers (CMOs) on their agencies' current plans.

**GAO Finding**

**Consequently, many agencies do not identify and systematically collect and evaluate information pertinent to determining the points of view of potential committee members, such as previous public positions or statements on matters being reviewed.**

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GSA Comments

GSA believes that a collaborative approach, sponsored by the Committee Management Secretariat among CMOs in the form of a focus subgroup under the ambit of GSA's standing Interagency Committee on Federal Advisory Committee Management (IAC), would address this issue best initially. It is the Secretariat's opinion that current practices should be shared first, so that all agencies are aware of what options exist that might improve a given agency's membership selection and appointment process, and what new initiatives are feasible and pertinent to a particular agency, given the existing wide variety of types of advisory committees. This effort is planned for discussion at the next scheduled IAC meeting.

Specific GAO Recommendations for GSA Action Contained in the Draft Report

**(The Director of OGE and) the GSA Committee Management Secretariat (should) direct federal agencies to review their representative appointments to federal advisory committees either as the 2-year charters expire or, for those committees with indefinite charters, within one year to determine if the appointments are appropriate, and to reappoint members as special government employees, where appropriate, and direct agency committee management officials to consult with agency ethics officials in making decisions about the type of appointments that should be made for each committee.**

GSA Comments

GSA proposes to address this both in consultation with OGE and in the Secretariat's proposed IAC subgroup. We believe this collaboration will best define the specific method and process by which the executive branch may address this procedure most effectively on a Governmentwide basis, consistent with the specific authorities and responsibilities of OGE, GSA, and individual executive agencies. Further, GSA believes, based on its current guidance and from information provided in its interagency training, that a firm basis already exists for enhancing consultations between CMOs and Designated Agency Ethics Officials (DAEOs).

**We recommend that GSA (and OGE) revise the training materials for the FACA management course, incorporating the additional OGE guidance as recommended above... .**



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GSA Comments

GSA agrees in principle, but if any revisions are to be made in the ethics and conflicts of interest portions, GSA would do so following consultation with OGE. Any appropriate revisions would reflect the decisions made by OGE.

**We recommend that (OGE and) GSA direct agencies to determine, for each relevant committee, the potential for such other biases and take appropriate steps to ensure their representative members do not have such biases.**

GSA Comments

GSA believes that addressing this recommendation initially is principally within the purview of OGE, and intends to consult further with OGE accordingly.

**We recommend that GSA provide guidance to agencies regarding what background information might be relevant in assessing committee members' points of view.**

GSA Comments

GSA intends to provide additional guidance in several ways.

- (1) GSA will coordinate with OGE staff that delivers the ethics and conflicts of interest portions of GSA's interagency FACA management training course. The appropriate content revisions will be made pursuant to OGE's decisions with respect to the recommendations contained in the final version of this GAO report that relate to the subject matter of the course under OGE's regulatory and interpretive jurisdiction. We also expect to obtain with OGE, the necessary input of the affected executive branch agencies under whose purview rests decisionmaking authority for individual membership selection and appointments.
- (2) GSA intends to issue, as an adjunct to its formal guidelines on Federal advisory committee management, at 41 CFR Part 102-3, a suggested best practice guideline in the form of a comprehensive template describing the various factors for, and illustrating the various components of what, in GSA's opinion, would comprise a plan for fairly balanced membership consistent with FACA. Such template likely will include all suggested and recommended factors deriving from the experience of executive agencies, to include agency program needs, the technical qualifications and expertise of individuals, stakeholder, organizational, and interested party viewpoints, congressional and public concerns,

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demographic and diversity factors as appropriate, and others. Such template would be used by agencies to address the fair balance requirement in FACA for an advisory committee's membership that is under the discretion of an agency and not otherwise determined by statute or Presidential directive.

- (3) GSA, through its Committee Management Secretariat staff, intends to review and discuss with selected individual CMOs, their respective agency practices in the areas of membership identification, solicitation, nomination, and selection, and how their agencies interact in this process with both specific stakeholders and the public at large. Best practices will be shared within the FACA management community through the IAC, which is comprised of all executive agency CMOs.

**We recommend that GSA issue guidance that agencies should identify the committee (membership) formation process for each committee...; state in the appointment letters to committee members whether they are appointed as special government employees (SGEs) or representatives (and the latter's organizations)...; identify each member's appointment category in the GSA FACA Database...; (and) state in the committee products the nature of the advice provided (independent or consensus)...**

#### GSA Comments

GSA believes that addressing these several discreet recommendations initially will require further consultation on its part with OGE and the affected executive agencies, and will so do accordingly. GSA does propose at this time to modify its shared FACA Database management and reporting system by the addition of a single field to the Members Table to identify each member's current appointment category (SGE or Representative Member). Also, the system has the capability of incorporating additional membership specificity and appointment information with certain fields and displays, and additional linkages to information posted by individual agencies on the Internet. Furthermore, the Committee Management Secretariat will review its current on-line consultation process for the establishment of new discretionary Federal advisory committees to determine what enhancements may be made to the ability of CMOs to upload certain information to the FACA Database contemporaneously for public view.

# Comments from the Office of Government Ethics

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



March 17, 2004

Robin M. Nazzaro  
Director  
Natural Resources and Environment  
United States General Accounting Office  
Washington, DC 20548

Dear Ms. Nazzaro:

Thank you for the opportunity to comment on the General Accounting Office (GAO) proposed report, Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance (GAO-04-328). The Office of Government Ethics (OGE) shares the concern expressed in the report that members of Federal advisory committees follow all applicable ethical requirements under Federal law. We therefore welcome the contribution made by the proposed report to efforts that OGE is making in this area.

As you know, OGE recently undertook its own "single-issue review" of Federal advisory committee management, which was completed in November 2002. Based on information gathered in that review, we agree with the conclusion of the proposed report that officials in some agencies may be misidentifying certain advisory committee members as "representatives," as opposed to special Government employees (SGEs). OGE believes that it is crucial that agencies correctly apply the criteria for distinguishing between SGEs, who are generally subject to financial disclosure and other ethical requirements applicable to Federal employees, and representatives, who are not Federal employees at all and therefore are not subject to Federal ethics requirements. As described in more detail in section B below, OGE has already undertaken a number of measures to address this issue, such as training, legal guidance, and new guidelines for OGE reviews of agency ethics programs. In addition, OGE has and continues to work with the General Services Administration (GSA) in close coordination and partnership on a variety of matters that concern Federal advisory committees.

OGE does not agree, however, with GAO's conclusion that the problems identified in the proposed report are attributable to inadequacies in the legal guidance provided by OGE with respect to the distinction between SGEs and representatives. As we explain in

United States Office of Government Ethics • 1201 New York Avenue, NW., Suite 500, Washington, DC 20005-3917

See comment 1.

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See comment 1.

section A below, OGE's guidance accurately represents a longstanding executive branch interpretation of the definition of SGE in 18 U.S.C. § 202. Moreover, with respect to GAO's three specific recommendations, OGE does not believe that the proposed report fully describes OGE's guidance or the reasonable inferences that agency officials can fairly draw from this guidance. Indeed, the proposed report itself contains suggestions that the problems experienced at some agencies may be attributable to factors other than a misunderstanding of OGE's guidance.

A. GAO Recommendations Regarding the Adequacy of OGE Guidance

See comment 2.

At the outset, it is important to emphasize that most of the statements in OGE Informal Advisory Opinion 82 x 22 to which GAO takes exception did not originate in the OGE memorandum itself. Rather, as 82 x 22 makes clear, the basic criteria for distinguishing between SGEs and representatives are reproduced verbatim from a memorandum issued by President Kennedy in 1963, shortly after enactment of the legislation creating the SGE category. This Presidential memorandum, which was drafted by the Office of Legal Counsel at the Department of Justice, has long been accorded great weight "as a contemporaneous interpretation of the conflict of interest laws by the Department charged with construing them." 2 Op. O.L.C. 151, 155 n.3 (1978). For over 40 years, the criteria derived from this memorandum have provided guidance to the executive branch in the interpretation of the definition of SGE, and any recommendation to alter the content of that advice bears a significant burden of persuasion, which we do not think is met by the proposed report.

1. Recognizable Group of Persons

GAO's first objection is that the language of the guidance is "overly broad" in indicating that an individual may be considered a representative, as opposed to an SGE, if the individual speaks for a "recognizable group of persons." The proposed report concludes that this language has led some agency officials to believe that this language permits the appointment of non-SGEs "to represent various technical fields, such as biology and toxicology."

See comment 3.

We do not believe that any reasonable interpretation of the phrase "recognizable group of persons" would include "field of expertise." It is simply not logical to say that a field or area of expertise is a "group of persons." Moreover, any such interpretation would require taking a single phrase out of a larger textual context that makes abundantly clear that the thrust is that

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representatives are appointed to speak in a representative capacity for organizations and groups that have a stake in a matter.<sup>1</sup> There is little evidence in the proposed report that any agencies who may have incorrectly appointed experts as representatives did so on the basis of a legitimate interpretation of a particular phrase in 82 x 22. Indeed, the proposed report itself contains evidence that some agencies may not be engaging at all in the analysis described in 82 x 22. The proposed report states that the agencies appointed members as representatives based on longstanding practice and agency culture, without any policies identifying criteria for distinguishing between representatives and SGEs. It is hard therefore to understand how such practices themselves are derived from a misunderstanding or misapplication of the criteria. Furthermore, the report specifically indicated that a recent OGE report on the same subject expressed concern that certain agencies "may be purposely designating their committee members as representatives to avoid subjecting them to the financial disclosure statements required for special government employees." This suggests a possible basis for improper designations other than misunderstanding of the criteria described in 82 x 22.

See comment 1.

2. Ambiguity of "Represent" and its Cognate Forms

The proposed report also states that 82 x 22 "implies that when the term 'representative' is used in authorizing legislation, or other such documents, that members should be classified as representatives, despite the fact that this term may be used for more generic purposes, such as to direct the balance of a committee." The proposed report states that, contrary to this purported implication in the OGE guidance, "the use of some form of the terms represent or representative in these documents does not always clearly indicate that the members are to be appointed to serve as representatives."

See comment 4.

OGE's guidance does not imply that any use of the word "represent" or its cognate forms in a statute or other document means that the members of the committee are not SGEs. To the contrary, 82 x 22 provides specific examples of documents using such terms and concludes that the given committees nevertheless are comprised of SGEs. The OGE guidance discusses one particular committee document that used the term "represent" in a generic sense to describe the required technical expertise for membership,

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<sup>1</sup>GAO itself has relied on the same phrase, without apparent misunderstanding. See Decision of the Comptroller General, B-192734 (1978).

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and OGE expressly concluded that the members of this committee were to be treated as SGEs, "[w]hatever the degree of contradiction produced by the use of 'represent'" (BRAC committee). Memorandum 82 x 22 also includes an example of legislation referring to points of view "represented" on a particular committee and nevertheless concludes that this committee was comprised of SGEs (FPUPAC committee). Yet another example in 82 x 22 concerns a statute that made the members of a particular committee "representatives of their practicing colleagues," and OGE still concluded that these members were SGEs (NPSRC committee). Finally, 82 x 22 discusses the language of the Federal Advisory Committee Act (FACA) itself and states that the statutory phrase "points of view represented" in FACA "asserts a standard of fairness but is short of being a command that every advisory committee must consist of individuals who represent the interests of persons or entities outside the Government." Far from implying that the use of "represent" or "representative" automatically rules out SGE status, 82 x 22 makes clear that careful attention to all relevant factors is required in order to determine whether the committee members are actually intended to serve as representatives of interest groups.

3. Effect of Recommendation by Outside Organization

See comment 5.

The proposed report takes issue with the statement in 82x 22 that "[t]he fact that an individual is appointed by an agency to an advisory committee upon the recommendation of an outside group or organization tends to support the conclusion that he has a representative function." According to GAO, "this guidance does not take into account a common practice that agencies use to identify potential committee members and overemphasizes the weight agencies may give to this factor when determining what constitutes a representative appointment."

OGE does not understand how the statement that outside recommendation "tends to support" the conclusion of representative status can be taken as "overemphasizing" this factor. Indeed, the intentionally moderate phrase "tends to support" would seem to indicate just the opposite. If this factor were intended to be determinative, the guidance would have said so expressly, as it does in the case of two other factors listed. The outside recommendation factor is just one of several enumerated items that must be considered in light of the totality of the circumstances, and we believe nothing in 82 x 22 fairly suggests otherwise.

In sum, while OGE may agree that some agencies are not adequately performing the analysis required by 82 x 22, we do not believe that any such problems reasonably can be attributed to the

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See comment 6.

language used in 82 x 22 and the other official documents that have contained the same criteria ever since the 1962 SGE legislation was first implemented. As discussed below, we agree that measures may be undertaken -- and indeed some already have been undertaken -- to address this matter. We do not believe, however, that the measures should include interference with a set of criteria that represent a contemporaneous construction of a criminal statute that has guided the executive branch for over four decades.

See comment 7.

B. OGE Efforts to Address the Issue

OGE has devoted considerable attention to educating ethics officials and other individuals involved in FACA management on issues related to special Government employees (SGEs) and representatives. While some of OGE's continuing efforts in this area involve collaborative efforts with GSA, OGE has pursued other initiatives to strengthen ethics awareness about this important issue. What follows is a short description of some of OGE's training, awareness, and auditing efforts:

1. Improved OGE Program Audit Guidelines

See comment 8.

As the proposed report notes, OGE formally issued new audit guidelines in 2003 that provided for additional focus and review of advisory committee appointment designations. In particular, these guidelines were immediately implemented and provided for additional focus and inquiry by OGE's agency program reviewers on whether individuals who serve as members of committees, councils, boards, commissions, or other groups were properly being designated as SGEs or representatives. After these guidelines were implemented, at least one of our program reviews in 2003 included a specific recommendation that the agency reassess the status of employees and members serving on one of its advisory committees.

2. Continuing GSA Support and Coordination:

See comment 9.

In September 2003, OGE submitted substantial comments on a proposed GSA template for improving the process of establishing Federal advisory committees in the executive branch. This proposed template, to be provided to executive branch agencies and other offices involved in the formation of advisory committees contained suggested language for legislation creating advisory committees. Some of the comments that OGE made to the template were specifically focused on handling the preliminary determination of whether an advisory committee member will be serving as an employee or non-employee representative. Once completed, the template will better enable executive branch agencies and other persons or

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entities involved in establishing Federal advisory committees to appropriately consider member status issues when creating these committees. The template is still in a draft form and OGE will continue to work with GSA on preparing the final template.

3. GSA FACA Training Support

The proposed report states that changes should be made to the training materials used at GSA's FACA Management Training Course to address concerns about the overall adequacy of OGE guidance on the SGE/representative designation issue. The course provides 20 pages of written materials on ethics, including five pages devoted to issues involving the status of members serving on these committees. For the reasons noted above, we believe the suggested changes to the text arise from an unreasonable interpretation of OGE guidance. Much of the guidance for distinguishing between SGE's and representatives comes from a Presidential memorandum that was issued shortly after enactment of the legislation creating the SGE category. Because much of the course material dealing with the SGE/representative distinction comes from that memorandum, we would not support any changes that would be inconsistent with the weight of that contemporaneous interpretation of the SGE category.

Nevertheless, OGE will continue to work with GSA to modify these materials to make clearer for attendees the SGE/representative distinction. In addition, OGE instructors at the course will continue to ensure that the content of these course materials dealing with this issue are fully discussed with course attendees.

4. OGE Ethics Conferences

Almost every year since 1996, OGE has presented a session on FACA issues at its annual ethics conference. For example, a session at the 2003 conference was principally devoted to "designation" issues involving Federal advisory committees. The session discussed recent reviews conducted by both OGE and GAO involving the management of Federal advisory committees at several agencies and some of the issues raised by those reviews. In particular, during the conference panel session, the Department of Veterans Affairs (VA) Committee Management Officer discussed his agency's process for designating advisory committee members within the VA.

See comment 10.

See comment 11.



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5. Additional SGE Guidance and Training Materials

See comment 12.

Since publishing OGE informal advisory opinion 82 x 22, OGE has issued other advisory opinions that have discussed SGE and/or representative status (e.g., 87 x 12, 88 x 16, 90 x 5, 90 x 22, 92 x 25, 93 x 14, 93 x 30 & 95 x 8). Most recently, in February 2000 OGE issued a summary regarding "Conflict of Interest and the Special Government Employee," which was subsequently issued as OGE Informal Advisory Opinion 00 x 01. A substantial portion of this summary is dedicated to explaining the concept of what is an SGE, and distinguishing SGE's from non-employees such as representatives and independent contractors. Ethics officials were asked to disseminate the summary to other components within their organizations (such as regional offices) who they thought might encounter questions pertaining to SGEs.

6. Continuing Review

See comment 13.

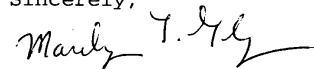
Finally, many of the issues regarding SGE/representative designations can be better addressed when Federal advisory committees are being created. In this regard, OGE monitors and comments on proposals to create advisory committees to ensure that SGE/Representative designation issues are fully considered.

Conclusion

Thank you again for the opportunity to comment on the proposed report. As noted above, OGE recognizes the importance of correctly applying the criteria for distinguishing between advisory committee members who are serving as SGEs and members who are serving as representatives, and has devoted considerable attention to this issue. We therefore welcome your contribution to our continued efforts in this area.

If you need any further assistance regarding any particular item discussed in this letter, please contact OGE Associate General Counsel Vincent Salamone or OGE Associate General Counsel Richard Thomas. Their telephone number is 202-482-9300.

Sincerely,



Marilyn L. Glynn  
Acting Director

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The following are GAO's comments on the Office of Government Ethics letter dated March 17, 2004.

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## GAO Comments

1. We continue to believe that OGE's ongoing efforts to encourage agencies to evaluate whether appointments should be made as special government employees or representatives would prove more effective if clear, unambiguous guidance addressing the limitations we identified were available to agency staff.

The draft and final reports present the OGE guidance as a factor in some agencies' inappropriately appointing some members as representatives and acknowledge OGE's concern that some agencies may be doing so to avoid the conflict-of-interest reviews. Unless OGE clarifies the limitations in the guidance identified in our report, we believe progress in moving agencies toward appropriate appointments will likely continue to be slow or nonexistent—remembering that the 1982 guidance was issued because of confusion over the proper use of representative appointments. Unambiguous guidance would help all agencies implement it; would support more effective oversight by ethics officials, including OGE, and by Inspectors General; and would make it more difficult for any agency to misapply the guidance and misidentify certain advisory committee members as “representatives.”

2. The clarifications we identified do not change the criteria but rather amplify them to address areas where continued confusion or misuse has occurred. The 1982 guidance was developed to address uncertainties regarding when agencies should appoint individuals as either special government employees or representatives. In our view, the findings in our report indicate that additional clarifications are warranted. Along these lines, we note that when OGE's staff determined in 2002 that some agencies use only representative appointments, they suggested that additional training materials may be appropriate. The staff suggested a communication to agency ethics officials to assist them in making the determination for their committee members. Our draft and final reports recommend revisions to the guidance and the training materials.
3. Given that agencies are appointing representatives to represent their individual fields of expertise and that OGE agrees this use of representative appointments is not appropriate, we believe OGE should revise its guidance to clarify that such appointments generally are not

appropriate. (We note that an exception would be if a committee were considering an issue that would impact a particular group, for example, physicists or biologists—a case in which a group of experts would be stakeholders in the matter being considered.) Instead, OGE’s response is to state that it is not logical to say that a field or area of expertise is a “group of persons” and to disagree that clarification to its guidance may be warranted to eliminate this practice. It is possible, as OGE suggests, that some agencies understand the guidance and are simply disregarding it. However, we believe ambiguities in the OGE guidance may provide agencies with some “cover” to support their interpretations. In such cases, clear guidance would make it more difficult for them to continue to misapply it. In addition, we direct OGE’s attention to the responses to this report from Interior, NASA, and Energy (see apps. XV, XVI, and XVII), which suggest that clarifications to the guidance regarding the appointment of representatives to represent fields of expertise may be necessary.

4. On the basis of our work at several agencies and our review of the OGE guidance, we continue to believe some clarification is needed vis-à-vis the use of the term “represent” and its cognate forms. As the draft and final reports state, OGE’s direction to agencies in making decisions regarding representative appointments is to use “words to characterize them as the representatives of individuals or entities outside the government who have an interest in the subject matter assigned to the committee.” Notably missing from OGE’s specific direction to agencies is a focus on the nature of the advice they will be giving—that is, that they are to represent stakeholder views. This is in contrast to OGE’s direction to agencies regarding special government employees that does focus on the fact that they are to exercise individual and independent judgment. Although OGE’s guidance does provide helpful examples to agencies in examining statutory language to determine whether committee members are actually intended to serve as representatives of interest groups, we believe that language in the conclusions section of the guidance that directs agencies how to indicate the type of appointment contradicts the examples that OGE cites. We have clarified the final report to indicate that we were specifically discussing the conclusions section of the OGE guidance. We also note that OGE developed these conclusions in 1982—that is, it is not citing the 1962 guidance the agency is hesitant to revise. Overall, we believe that clarifications, but not departures from the criteria regarding appointments, are needed.

We point OGE also to the comments from the Interior (see app. XV) on the matter of the term representative. Interior stated that “GAO agrees that the statute authorizing the National Cooperative Geologic Mapping Advisory Committee’ calls for the committee to include...representatives,’ but then goes on to say that the statute does not “clearly and unambiguously call for these members to be appointed as representatives rather than special government employees.’” Interior then characterized our statements as a contradiction and said that the Secretary of the Interior “reasonably may interpret such a statute by relying on its plain language....”. In our draft and final reports, we indicate that it is not clear what point of view the private sector and academia members could be called upon to provide if appointed as representatives, and the statute did not appear to clearly mandate that they be appointed as representatives—that is, it may be using the term generically. We continue to believe that the statute does not clearly and unambiguously call for representative appointments and that this example underscores the need for OGE clarification as we recommend.

5. Seeking recommendations for advisory committee members from outside groups or organizations does not tend to support either representative or special government employee status. As noted in the draft and final reports, obtaining outside nominations is a common practice for committees appointing special government employees; thus, it is not used only for representative appointments. We think it would be appropriate for the OGE guidance to reflect current practices regarding nominations to federal advisory committees and avoid the potential of agencies’ giving undue weight to this criterion.
6. We are only recommending clarifications to OGE’s guidance, not changes to the fundamental principles or criteria upon which OGE based its guidance. See also comment 2 above.
7. Our draft and final reports highlight the various efforts OGE discusses below. However, we believe the effectiveness of these efforts will continue to be reduced until OGE’s guidance on appointments is clarified.
8. OGE has subsequently clarified this comment. The program review cited in the comment led to a recommendation that an agency reassess the status of employees serving on a federally chartered corporation and not on a federal advisory committee.

9. We have not evaluated the template that was still in draft form during our review.
10. OGE does not explain its view that the clarifications to the GSA FACA management training course that we identified in the report represent an unreasonable interpretation of OGE guidance. We continue to believe the suggestions our draft and final reports highlight would improve the effectiveness of the training sessions. For example, the GSA materials state that representatives *may* (emphasis added) represent the views of a particular industry or group. It is not clear to us why OGE would object to revising the FACA training materials to be consistent with OGE's guidance that representatives *are* expected to "represent a particular bias."
11. The draft and final reports identify the session at the 2003 OGE Ethics Conference cited in OGE's letter.
12. The draft and final reports cite the most significant and comprehensive OGE guidance documents addressing representative appointments, including OGE Informal Advisory Opinion 00 x 01 highlighted by OGE in its comments. (In the report text, we refer to this guidance as OGE's February 2000 guidance, and we have added a legal citation to it in a footnote.) We note that this opinion includes one paragraph addressing representative appointments and states that representatives are described more fully in OGE Informal Advisory Letter 82 x 22, the guidance document cited in our draft and final reports as OGE's principal guidance on the issue of appointment categories for federal advisory committees.
13. We support OGE's commitment to monitor and comment on appointments to newly created committees. However, in light of evidence that some appointments to existing committees are inappropriate, we believe it is appropriate to also review the appointments for approximately 950 advisory committees that are currently active.

# Comments from the Department of Health and Human Services

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



DEPARTMENT OF HEALTH & HUMAN SERVICES

Office of Inspector General

Washington, D.C. 20201

MAR 19 2004

Ms. Robin M. Nazzaro  
Director  
Natural Resources and Environment  
United States General  
Accounting Office  
Washington, D.C. 20548

Dear Ms. Nazzaro:

Enclosed are the Department's comments on your draft report entitled, "Federal Advisory Committees – Additional Guidance Could Help Agencies Better Ensure Independence and Balance." The comments represent the tentative position of the Department and are subject to reevaluation when the final version of this report is received.

The Department provided several technical comments directly to your staff.

The Department appreciates the opportunity to comment on this draft report before its publication.

Sincerely,

A handwritten signature in black ink, appearing to read "Dara Corrigan".

Dara Corrigan  
Acting Principal Deputy Inspector General

Enclosure

The Office of Inspector General (OIG) is transmitting the Department's response to this draft report in our capacity as the Department's designated focal point and coordinator for General Accounting Office reports. OIG has not conducted an independent assessment of these comments and therefore expresses no opinion on them.

**COMMENTS ON THE DEPARTMENT OF HEALTH AND HUMAN SERVICES ON  
THE U.S. GENERAL ACCOUNTING OFFICE'S DRAFT REPORT, "FEDERAL  
ADVISORY COMMITTEES: ADDITIONAL GUIDANCE COULD HELP AGENCIES  
BETTER ENSURE INDEPENDENCE AND BALANCE" (GAO-04-328)**

The Department of Health and Human Services (HHS) appreciates the opportunity to comment on the GAO's draft report. The Department strives to abide by the General Services Administration's (GSA) guidelines and the General Administration Manual that describes the Department's advisory committee policies.

This report will be useful in evaluating current practices for appointing members to serve on Federal advisory committees. In addition, GAO has provided a number of interesting ideas for determining balance in points of view and ensuring transparency in the advisory committee process.

Although we agree in principle that the information the Environmental Protection Agency (EPA) collects on their potential nominees may be useful in the selection process, we also believe that a few of the practices identified may have unintended consequences. We are concerned about the collection of background information on prospective members to understand their points of view.

We believe both the scientific community and the public at large is more comfortable with a process that seeks to achieve balance through a mix of expertise, background, and personal experience, rather than through a process based on seeking out some indefinable range of personal opinion. In many cases, points of view can be misinterpreted based on the frame of reference of the individual reviewing the nominee, either the public, Federal staff, or both. Also, we feel that this type of activity may make Federal agencies more vulnerable to litigation if potential nominees think that they were not selected because of their points of view rather than their expertise. We think this practice might not be acceptable to our nation's scientific community.

We feel that it is more appropriate to base the selection of members on the scientific expertise needed for each committee. For instance, the National Institutes of Health (NIH) has a vast number of scientific and technical advisory committees. NIH first seeks balance in the area of scientific expertise but also considers several other factors: geographic, ethnic, gender, minority status, bias, and orderly rotation, that helps to ensure that committees are balanced in terms of points of view. For example, when NIH seeks to recruit scientists to serve on a committee looking at human genetics issues, they try to recruit a diverse group of individuals with varied backgrounds to bring balance to this committee. Therefore, NIH might look for experts with specialties in human genetics, ethics, law, psychology, molecular biology, public health, social sciences, bio-terrorism, forensics, healthcare, and other relevant fields. We believe that such diversity in the selection process would invariably ensure diverse points of view and balance.

HHS agrees with GAO's recommendation that advisory committee operations and member appointments should be a transparent process. We believe in the public notification process and feel that the public should be privy to advisory committee activities. We also agree that it is in the best interest of both the public and the Government to disclose information about the

See comment 1.

See comment 1.

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Comments from the Department of Health  
and Human Services

See comment 2.

formation and operation of advisory committees. Although the public notice process to obtain comments on proposed candidates might be feasible for some HHS committees, it would not be workable for all of them. Unlike EPA with 24 committees, HHS had 234 active committees in 2003 and various subcommittee structures within these committees. Some HHS agencies are limited by legislation in terms of the appointment process. For example, most of NIH's national advisory councils are established under Section 406 [284a] (c) of the Public Health Service Act. This law requires that the Secretary, HHS, fill all national advisory council vacancies within 90 days from the date the vacancy occurs. Soliciting public input could gravely delay each committee's ability to meet the requirements of this law, accomplish its charge and appoint its members. It could also seriously increase administrative costs for staff and contract support to handle this function.

See comment 3.

The Federal Advisory Committee Act (FACA) requires that membership be "fairly balanced in terms of the points of view represented and the functions to be performed by the advisory committee." This is reflected in the Food and Drug Administration's (FDA) advisory committee regulations (see 21 CFR 14.40(f)(2)). The FDA has 31 of the HHS advisory committees, all highly technical. The draft report also states that, for science and technical committees, viewpoint balance is appropriately achieved by obtaining a variety of scientific expertise and perspectives. FDA agrees and its advisory committee regulations have adopted this approach. For technical committees, the agency must ensure that prospective members have expertise in the subject matter with which the committee is concerned and that they have diverse professional education, training, and experience (see 21 CFR 14.80(b)(1)(i)). However, the draft report implies that agencies should also screen for policy views, as a way to ensure impartiality. FDA does not screen for policy views on technical committees; rather, its approach follows the National Academy of Sciences' recommendation that appointments to scientific advisory committees be based solely on a person's scientific or clinical expertise or his or her commitment to and involvement in issues of relevance to the agency's mission. While FDA does not screen for policy views on technical committees, prospective members are subject to conflict of interest restrictions, as established by Congress, and the agency may remove a member who demonstrates a bias that interferes with the ability to render objective advice (see 21 CFR 14.80(f)).

See comment 4.

GAO's draft report cites EPA as the benchmark to which all other agencies should aspire. A previous GAO report criticized the advisory committee practices of EPA. It was the FDA that assisted in the remediation of the EPA advisory committees. The draft report does not recognize this effort on the part of FDA.

See comment 5.

In the interest of transparency, GAO's draft report states that agencies could make more information available on the operations of advisory committees. FDA's selection process is clearly spelled out in its regulation as well as in every Federal Register notice calling for nominations. On a product specific meeting, a disclosure form with a scope and type of conflict is disclosed and signed by the member. For a general matters meeting, it is disclosed that waivers are granted and the impact will be minimized by the fact that large segments of industry will be impacted in the same way. FDA regulations also state that if the discussion turns specific, either additional waivers will be issued or the meeting will cease. FDA may be the only



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and Human Services

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agency that posts, on the web, a Conflict of Interest algorithmic document that demonstrates exactly how the agency makes decisions relative to the scope and magnitude of a conflict.

FDA stands behind its work to ensure that the advisory committees are balanced, not only demographically, but by scientific point-of-view. In addition, FDA makes every effort to ensure that all its committees have its stakeholders represented *i.e.*, academics, industry, patient advocates and consumer advocacy groups. FDA is secure in the knowledge that it makes every effort to have an open process of member recruitment, of conflict of interest matters and of balance to achieve the recruitment of the best scientists to provide the most cutting edge scientific advice for its regulatory process.

It is departmental policy to avoid excessively long individual service on advisory committees. The 2002 roster for Childhood Lead Prevention and Poisoning Advisory Committee included twelve individuals serving expired terms, some of them serving on terms overdue since 1998. As noted in the report, the Office of the White House Liaison has enforced that all advisory committee members serve no longer than 180 days beyond the expiration of their terms to ensure a proper turnover of committee members, which the Department believes contributes to maintaining independent and balanced advisory committees.

Again, we appreciate the opportunity to be a part of this review and find the report's recommendations of great value. HHS advisory committees play an integral role in developing health and science policy for the nation and the world and determining the scientific merit of future research. We will continue to review and evaluate each of the ideas presented in the report to identify those that may be implemented for our advisory committees. In addition, since the NIH has 145 of the HHS advisory committees, they have volunteered to work with GSA to assist them in implementing the 12 recommendations noted in the report.

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The following are GAO's comments on the Department of Health and Human Services's letter dated March 19, 2004.

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## GAO Comments

1. The draft and final reports identify processes that include an evaluation of potential members' points of view *relevant to the subject matters advisory committees will consider* while focusing on the relevant expertise needed. Thus, it is not accurate to characterize the report as espousing "a process based on seeking out some indefinable range of personal opinion." The examples in the report of agency processes include targeted evaluations of points of view that ask potential members if they have made public statements or taken positions on the issue or matters the committee will consider, including expert legal testimony on the issue or matters. The processes cited also ask the potential members to identify and describe any reason they may be unable to provide impartial advice *on matters before the committee* and any reason their impartiality *in the identified matter* might be questioned. We have added the phrase "regarding the subject matters being considered" in several other places in the final report in which we discuss determining the viewpoints of potential members for further clarity on this point. The report also points out that if agencies use a systematic, consistent, and transparent approach to obtaining relevant information from prospective committee members, it is unlikely they would approve questions that are generally inappropriate in a professional working environment, such as questions about party affiliations or political viewpoints that some committee members have reported being asked. In our view, agencies that do not proactively and transparently address the relevant points of view of prospective committee members regarding the matters the committees will consider are more likely to be subject to questions about committee balance from the public and users of the committees' products than those agencies that use such processes. That is, even if agencies choose to either not identify or acknowledge relevant public positions its committee members have taken on matters the committees will consider, others are often aware of such positions and are likely to raise questions about them. Such circumstances can have a negative impact on the credibility of the specific committees involved and on federal advisory committees overall. We believe this practice has been the case regarding some HHS federal advisory committees about which scientists and others have expressed concerns. Finally, in terms of HHS's concern that obtaining information on relevant points of view might not be acceptable to the nation's scientific community, our report

shows that both the National Academies and EPA routinely obtain such relevant information from its prospective members.

2. The report identifies the practice of soliciting public input on nominations to advisory committees, used by the National Academies and some federal advisory committees, as one that can be helpful in ensuring an appropriate balance of points of view of committees, particularly those that address sensitive and controversial matters. Agencies can determine whether to use this tool on a case-by-case basis. Thus, we do not disagree with HHS's comment that obtaining comments on proposed candidates might be feasible for some HHS committees but not workable for all of them.
3. Although we agree with HHS that FDA should emphasize technical qualifications when selecting advisory committee members, we also believe that it is important for agencies to assess prospective members for viewpoints that they have that are relevant to the work of the committee (see also comment 1). HHS says that FDA follows the National Academy of Sciences' recommendation that the appointment of members to scientific advisory committees be based primarily on expertise and involvement in relevant issues. This report notes that the academies also seek to determine, through a few simple questions, whether there is any reason to believe that the impartiality of members or prospective members might be questioned.
4. EPA made changes in how it manages the Science Advisory Board in response to the specific recommendations in our 2001 report.<sup>1</sup> We did not attempt to determine any role FDA may have had in assisting EPA, but we note that EPA, unlike FDA, revised its processes for achieving overall balance in terms of points of view, expressly integrating it with its reviews for potential conflicts of interest and obtaining relevant information prior to the appointment of committee members.
5. We agree that FDA provides useful information about its selection process, but we continue to believe that FDA and the other agencies could improve their processes for balancing committees. The draft and final reports highlight FDA policies for public notice of waivers. We note that the selection and waiver processes used by FDA are not used by HHS, CDC, and NIH.

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<sup>1</sup>[GAO-01-536](#).

# Comments from the Department of the Interior

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



## United States Department of the Interior

OFFICE OF THE ASSISTANT SECRETARY  
POLICY, MANAGEMENT AND BUDGET  
Washington, DC 20240



MAR 18 2004

Christine Fishkin  
Assistant Director  
Natural Resources and Environment  
United States General Accounting Office  
Washington, D.C. 20548

Re: DOI Comments on GAO Draft Report on Advisory Committees

Dear Ms. Fishkin:

Thank you for the opportunity to review the GAO's draft report entitled, "Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance."

We agree with much in the report; it contains many useful recommendations that can be used to enhance the successful use of advisory committees. However, the Department has a number of general and specific concerns with the GAO analysis.

Enclosed please find DOI's response. If you have any additional questions, please feel free to contact us.

Sincerely,

P. Lynn Scarlett

**Department of the Interior Comments on GAO Draft Report on Advisory Committees**

Following are the Department's response to the GAO's draft report entitled, "Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance."

See comment 1.

We agree with much in the report; it contains many useful recommendations that can be used to enhance the successful use of advisory committees. However, we note that the GAO's focus on scientific advisory committees ignored the wide ranging purposes and programs for which advisory committees are used in many agencies, such as managing public lands and natural resources. As a result, many of the report's recommendations and observations about independence and balance of committees, while useful, have limited applicability in non-science settings. GAO should clearly identify the purpose and scope of this report as focusing on science committees.

See comment 2.

The Department strongly disagrees with GAO's basic approach to the concept of balance that is required under the Federal Advisory Committee Act (FACA). The GAO's approach reflects neither actual experience nor practical considerations associated with creating, staffing, and managing advisory committees under the FACA. On page one, and throughout the report, GAO repeats the basic point that "Specifically, individual committee members providing advice to the government must be free from significant conflicts of interest – that is, they must be independent." It is not clear exactly where the report's apparent requirement that *individual* committee members be "independent" originates. In Section 5 of the FACA, Congressional committees are directed to "...assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or any special interest, but will instead be the result of the advisory committee's independent judgment." Though this statutory requirement, by its terms, is not applicable to discretionary committees established by agency heads, it is repeated verbatim in the GSA regulations at 41 C.F.R. § 102-3.105(g), as a responsibility of agency heads for committees they establish. An "independent" committee member is simply never discussed.

See comment 2.

The report's focus on "independence" of individual committee members has several practical and conceptual difficulties. First, it does not accurately reflect the FACA's and the regulations' requirement that the *advisory committee* itself remain free from inappropriate influence and that its recommendations result from its independent judgment. There is no guarantee that a committee made of "independent" members will also be a committee that is not inappropriately influenced by the appointing authority, or that the committee is acting on its independent judgment. The more logical way to implement these provisions would focus on the operation of the committee itself, ensuring that the appointing authority does not mandate any particular results from the committee members and that the committee is not structured in such a way as to give any special interest control over its advice. For example, although consensus is often desired on advisory committees, mandating a unanimous vote in support of committee advice would enable a single member to thwart other members of the committee by refusing to support the other member's preferred advice. This would not only be inappropriate influence, but it would also prevent the committee from giving its independent judgment, as it would make the

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See comment 2.

committee potentially beholden to a single member.

The report unnecessarily focuses on a requirement for membership that does not exist, i.e., “independence.” The report therefore detracts from addressing the membership requirement that does exist: that the committee be fairly balanced in its membership in the points of view to be represented and the functions to be performed. Once again, this requirement only goes to the balance of the committee as a whole, though the balance may only be addressed by reference to the “points of view” of individual committee members, i.e., there is balance on a committee when a member with a particular “point of view” is on a committee with others with differing or conflicting points of view. The relevant question is how to determine what “point of view” to attribute to a member and how to distinguish one point of view from another, to reasonably assure balance on the committee as a whole. Using “independence” as a criteria for membership at best does not help this analysis, and at worst it confuses the issue and hinders an agency in seeking the requisite balance on its committees.

See comment 2.

The report defines “independence” as freedom from “significant conflicts of interest,” a definition that appears to conflate the ethics requirements applicable to Federal employees (including SGEs) and some concern over complaints about certain advisory committee members into an entirely new, inappropriate, and unworkable standard. There is nowhere in the ethics rules that states that even full-time Federal employees must be free from “conflicts of interest,” let alone “significant conflicts of interest.” The system instead is set up to identify the financial interests that may lead to conflict (primarily via financial disclosure reports), and then instructs employees: 1) to avoid participating personally and substantially in particular matters that may directly and predictably affect their financial interests (18 U.S.C. § 208); and 2) to avoid “participating” in a particular matter involving specific parties in circumstances where a reasonable person may question their impartiality (5 C.F.R. § 2635.502). In each case, the agency may nonetheless authorize participation. Further, “substantial” conflicts (those materially impairing the employee’s performance of official duties or requiring disqualification too often) are dealt with by divesting the interest. See 5 C.F.R. § 2635.403(b). The report attempts to short-circuit this system by imposing the vague “independence” standard on advisory committee members, as some sort of appointment requirement.

See comment 3.

The report’s emphasis on the “independent” committee member standard ignores the agencies’ ability to work with committee members to ensure that they do not violate the ethics rules. As set forth in the system described above, the question of whether or not a member should participate in a particular committee function is properly resolved on a case-by-case basis, evaluating the nature of the committee action and the nature of the financial interest involved. For example, it is not clear when casting one vote out of a number of committee member votes that results in a committee’s advice to a Federal agency will be “personally and substantially” participating in a matter sufficient to trigger the conflict of interest statute. The question of whether a particular piece of advice will “directly and predictably” affect a financial interest also should be closely considered. Should an actual conflict exist, the agency should be able to determine whether to authorize participation, as it could with other matters in which employees are involved. Accordingly, the report should focus more on how an agency may effectively address ethics-related issues in terms of participation of members in committee activities and in terms of how to articulate, achieve, and publicly support the fair balance of its committees.

See comments 3 and 4.

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See comment 2.

Imposing “independence” as an appointment requirement does not help an agency bring the requisite balance to a committee. It will necessarily be very difficult, and ultimately not worthwhile, to attempt to determine whether a committee member or the committee member’s “point of view” is “independent,” whatever that means. The report recommends that agencies identify and systematically collect and evaluate information pertinent to determining “points of view” of committee members. Scientific advisory committee members are generally chosen for their expertise and objective understanding of the science involved and not on the basis of perceived “points of view.” This is not really the relevant question. The relevant question is whether a committee has balance in terms of the points of view to be represented and the functions to be performed. The report would be more useful if it would focus on suggestions regarding how to help agencies define and achieve such balance in points of view when exercising their discretion in committee appointments.

See comment 5.

See comment 6.

Departmental officials have informed your staff of the many steps we have taken over the past 18 months to improve the way we identify and appoint advisory committee members as special government employees. I understand that this information was shared with you at one of your initial meetings at the Department in June of 2003. The draft report repeatedly states, however, that this information was provided only in January of this year. It is important that GAO properly acknowledge the efforts the Department is undertaking in this area.

Our other specific comments are set forth below.

See comment 7.

P. 4: Last sentence: It is inaccurate to single out three agencies to say they “do not conduct conflict-of-interest reviews for members appointed as representatives.” First, it is unlikely that *any* agency does this for representatives, not just these three. Second, given the differing levels of ethics screening that may be done (such as for BLM Resource Advisory Councils), the more accurate statement is that agencies do not collect and review OGE Form 450s (or other approved form) for representatives. We recommend that this substitution be made throughout the report or else define “conflict-of-interest reviews” as a term of art meaning use of the OGE Form 450 or similar form.

See comment 8.

P. 8: Last paragraph, second sentence: GAO ignores the authority of agency heads to exercise discretion under their organic statutes to create advisory committees that are not expressly authorized by Congress or by a president.

See comment 9.

P. 16: The definitions on this page and on page 17 should be clarified as early as possible in the report to ensure that readers understand the two categories of membership (representatives and special government employees).

See comment 10.

P. 20: Last paragraph: GAO significantly misconstrues DOI’s “agency culture,” not only on this page but throughout the draft report. With the majority of its committees advising the Secretary on the management of public lands, DOI historically has strongly believed that its committees members should represent local stakeholders. Thus the practice of appointing representatives is based on decisions strongly rooted in DOI’s authorities, responsibilities and philosophies. Ignoring the appropriate use of representatives, GAO

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See comment 11.

repeatedly assumes without factual support that most representatives should have been appointed as SGEs.

P. 21: GAO's generalization that representation of fields of expertise is not appropriate ignores the importance of such representation to some committees. However, we agree that agencies have proper guidance in how and when to use such expertise.

See comment 12.

P. 24: First paragraph: Reference to DOI's efforts to add ethics language to all FACA charters misleadingly suggests that DOI began this effort in January 2004. GAO is aware that DOI began this effort in 2003 in response to OGE's 2002 study.

See comment 13.

P. 25: First paragraph: In paraphrasing DOI officials regarding the tendency "to err on the side of continuing with representative appointments," GAO omitted important information that was presented in the same discussion. That is, where the purpose of the committee is to advise the Secretary on the management of public lands or other resources, the Department firmly believes the views of local stakeholders are essential to sound and useful advice. In such cases, DOI is likely to continue to appoint representatives. In doing so, it does not "err," especially if an authorizing statute does not restrict the Secretary's discretion to do so. Rather, GAO errs by invoking OGE's guidance without regard to the stated purpose of the advisory committee.

See comment 14.

Second paragraph: GAO agrees that the statute authorizing the National Cooperative Geologic Mapping Advisory Committee "calls for the committee to include ... representatives," but then goes on to say the statute does not "clearly and unambiguously call for these members to be appointed as representatives rather than special government employees." Notwithstanding this apparent contradiction, the Secretary reasonably may interpret such a statute by relying on its plain language, especially where the Secretary desires representative advice to assist a committee's function.

See comment 15.

P. 27 - 35: The report continually confuses the distinctly separate concerns for balance and avoiding financial conflicts of interest. Additionally, GAO's positions regarding a committee's balance and perceived objectivity when compared to points of view of its members are simply unrealistic and impractical, and unrelated to the actual functioning of advisory committees. The kinds of inquiries into the biases and points of view of potential appointees recommended by GAO is intrusive, of little practical utility, and will turn qualified individuals away from government service. GAO apparently has a single concept of how to achieve balance and seems to ignore the FACA's requirement that committees be balanced based on the function they are called upon to perform. Further, representatives are placed on committees precisely because of their stated representative interests; because they are not subject to the ethics rules, it is illogical to assert that their participation is improper on the basis of bias. GAO's view that agencies cannot properly balance their committees without understanding all perceived biases of all members is simply fallacious. Finally, as the report notes on p. 37, courts have interpreted the FACA as giving agencies broad discretion on how to balance their committees.

See comment 16.

Additionally, the report should note that a committee of representatives may obtain "expert



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advice” from individuals with scientific or technical expertise. For example, a scientific or technical expert may be invited to a meeting of the committee or its working groups to provide expert guidance to assist the representatives in formulating their advice to the federal government. Describing such options might help organizations and others to understand that representative membership can also be effective in providing useful, technically accurate, and unbiased advice to the federal government.

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The following are GAO's comments on the Department of the Interior's letter dated March 18, 2004.

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## GAO Comments

1. This report states, as did the draft, that while our report focuses primarily on scientific and technical federal advisory committees, the limitations in guidance and the promising practices we identified pertaining to independence and balance are pertinent to federal advisory committees in general. This report and the draft also identified the wide range of issues addressed by federal advisory committees, including managing federal lands and natural resources.
2. The background section of the report and the draft acknowledged the FACA requirement that committees not be inappropriately influenced by the appointing authority or any special interest. However, the draft report also clearly stated that in addressing independence, our focus was on the requirements regarding individual conflicts of interest that are included in federal conflict-of-interest statutes, unless specifically noted otherwise. In our introduction, we state that "federal advisory committee members who are employees of the federal government must meet federal requirements pertaining to freedom from conflicts of interest—which we refer to in this report as independence—and committees as a whole must meet the requirements pertaining to balance." Thus, we use the term "independence" as shorthand for the conflict-of-interest requirements to which individual committee members must adhere. We further highlight the key provisions of the federal conflict-of-interest statutes that must be complied with, including a description of the ability of an individual who has a conflict of interest to nonetheless participate on a committee if granted a waiver. Alternatively, an individual may divest the financial interest.

We note that all federal employees are prohibited not only from holding financial interests that conflict with the conscientious performance of duty, as Interior suggests in its comments, but also from engaging in outside employment or activities that conflict with their official duties and responsibilities. See 18 U.S.C. § 208, 5 C.F.R. §§ 2635.101(b)(2), and 2635.101(a)(10). Further, employees are also required to avoid any action that creates the appearance that they are violating the law or ethics standards. 5 C.F.R. § 2635.101(b)(14). It is precisely because these obligations are imposed only on employees that it is crucial to ensure that FACA committee members are appropriately characterized as "representatives" or special government employees. Both special

government employees and representatives should be evaluated for biases to ensure that the FACA committees as a whole are balanced. Special government employees must also be subject to a conflict-of-interest review, including an analysis of whether their nongovernment activities and employment present a conflict or create “the appearance that they are violating...ethics standards.” 5 C.F.R. § 2635.101(b)(14).

3. We agree that the question of whether a member should participate in a particular committee function (or whether they should be appointed to a particular committee) is properly resolved on a case-by-base basis, evaluating the nature of the committee action or work and the nature of the financial interest involved. Further, the draft and final reports recognize that agencies may grant waivers to members to serve on advisory committees upon determining that either (1) the conflict is insignificant or (2) the need for the member’s expertise outweighs the conflict. The draft and final reports also discuss some promising practices regarding the disclosure of such waivers to the public and among committee members.
4. The draft and final reports discuss in considerable detail information that can help agencies ensure committees are balanced and provide examples of promising practices that would better ensure the balance of advisory committees.
5. We agree that a relevant question for federal advisory committees is whether a committee has balance in terms of points of view to be represented and the functions to be performed. Our report provides examples of promising practices used by other agencies and the National Academies that can help agencies define and achieve an appropriate balance of points of view.
6. Our draft and final reports state that at the start of our review, Interior officials told us that they had begun to review their appointment classifications for the 115 advisory committees as a result of the November 2002 OGE study. The draft and final reports also state that the department has been reviewing the appointments to committees as their charters expire. We do indicate that in January 2004, Interior officials acknowledged that it was appropriate to change the nature of some appointments upon reexamination. This was the first time any results of the reviews were communicated to us. Further, Interior notified us of the decision to change the appointments to the

earthquake studies committee on January 16, 2004, subsequent to our meeting on January 12, 2004.

7. We revised the report to indicate that agencies do not conduct conflict-of-interest reviews for members appointed as representatives because conflict-of-interest reviews are only required for federal or special government employees. Thus, we removed any unintended implication that other agencies do more than the three we are reporting on in this report in terms of representative appointments. In our draft and final reports we indicate that the ethics screening vis-à-vis representatives done by one bureau of the department (Bureau of Land Management) is not sufficient to constitute a conflict-of-interest review for those appointed as special government employees. In this section, we are discussing those members who were appointed as representatives but who would be more appropriately appointed as special government employees.
8. We modified the language in the report to more clearly describe the authorities under which committees may be formed.
9. The draft and final reports define the two categories of appointments on page 1.
10. The draft and final reports state on page 1 that members of federal advisory committees may be appointed as (1) special government employees to provide advice on behalf of the government on the basis of their best judgment or (2) representatives to provide stakeholder advice. We do not take issue with representative appointments when the members are, in fact, appointed to represent a particular interest or view of an entity or group with an interest in the matter before the committees, and they are fully informed as to the point of view or interest they are to represent. Further, the reports state that Interior officials noted that many of their committees addressing federal land management issues are not scientific and technical in content and, in their view, are appropriately staffed with representative members. The reports do indicate that committees classified as scientific and technical, as well as others that address scientific and technical issues, are those for which advice on behalf of the government on the basis of members' best judgment is typically sought, rather than stakeholder advice. Interior has 11 committees with 288 members that are classified by the agency as scientific and technical committees in GSA's

FACA database, and some other committees not so classified also address scientific and technical issues.

11. We are not certain what Interior means in stating that “GAO’s generalization that representation of fields of expertise is not appropriate ignores the importance of such representation to some committees.” However, the comment does suggest that Interior continues to believe that it is appropriate to appoint members to represent their field of expertise as representatives, rather than as special government employees. We and OGE disagree with this interpretation of OGE’s guidance on appointments to advisory committees. Representatives are to espouse a particular point of view of a party with an interest in the matter, whereas experts having specific expertise provide advice on behalf of the government on the basis of their best judgment. Thus, experts in various fields are more appropriately appointed as special government employees. (Subsequent to sending its comment letter, Interior clarified that the second sentence of this comment should read “However, we agree that agencies *should* have proper guidance in how and when to use such expertise.”.)
12. We have removed the reference to January 2004 in this instance, reporting that Interior officials told us that they have begun to insert standard language in the charters regarding the ethics obligations of the members. See also comment 6.
13. On the basis of a January 2004 discussion with Interior officials, we understood the officials to say that in reviewing their appointment designations as committee charters expire, the agency was erring on the side of representative appointments when the information relevant to the committee was ambiguous on the issue of appointments. However, in its comments, Interior officials said they disagreed with our characterization of their previous comments, and we have deleted the statement from the report. In its comments, Interior officials said that the agency was likely to continue to appoint representatives to committees whose purpose is to advise the Secretary on the management of public lands or other resources as they are seeking the views of local stakeholders in these instances. As noted above, we do not take issue with representative appointments when the members are, in fact, appointed to represent a particular interest or view of an entity or group with an interest in the matter before the committees,

and they are fully informed as to the point of view or interest they are to represent.

14. Interior states that “GAO agrees that the statute authorizing the National Cooperative Geologic Mapping Advisory Committee ‘calls for the committee to include...representatives,’ but then goes on to state that the statute does not ‘clearly and unambiguously call for these members to be appointed as representatives rather than special government employees.’” Interior then characterizes our statements as a contradiction and said that the Secretary of the Interior “reasonably may interpret such a statute by relying on its plain language....”. In our draft and final reports, we indicate that the statute did not appear to clearly mandate that the members be appointed as representatives—that is, it may be using the term “representative” generically—and we further noted that is not clear what point of view the private-sector and academia members could be called upon to provide if appointed as representatives. We continue to believe this statute does not clearly and unambiguously call for representative appointments and that this example underscores the need for OGE clarification regarding the use of the term representative, as we recommend.
  
15. As the draft and final reports state, FACA requires that all committees be balanced overall in terms of both points of view represented and the function to be performed. In our view, in order for advisory committees to be effective, it is important that they are, and are perceived as being, balanced. The draft and final reports identify processes that include an evaluation of potential members’ points of view *relevant to the subject matters advisory committees will consider* while focusing on the relevant expertise needed. The examples in the reports of agency processes that include such targeted evaluations of points of view ask potential members if they have made public statements or taken positions on the issue or matters the committee will consider, including expert legal testimony on the issue or matters. They also ask the potential members to identify and describe any reason they may be unable to provide impartial advice on matters before the committee and any reason their impartiality in the identified mater might be questioned. We disagree with Interior’s view that these inquiries would be intrusive, of little practical utility, and would turn qualified individuals away from government service. We also disagree with Interior’s view that we are saying that agencies need to understand all perceived biases of advisory committee members. As

shown above, the information identified as relevant to members' points of view is targeted and focuses on their points of view relevant to the subject matter to be considered. We disagree that such inquiries will turn qualified individuals away from government service, evidenced by the fact that the National Academies and EPA routinely obtain such relevant information from its prospective members. Finally, we recognize that representatives are placed on committees because of their stated stakeholder interests and do not assert that participation of representatives is improper.

16. We agree that committees, whether composed of representatives or special government employees, may invite outside experts to provide information or guidance. However, that does not affect the obligation agencies have to make appropriate decisions about appointing members as either representatives or special government employees.

# Comments from the National Aeronautics and Space Administration

Note: GAO comments supplementing those in the report text appear at the end of this appendix.

National Aeronautics and  
Space Administration  
**Office of the Administrator**  
Washington, DC 20546-0001



March 26, 2004

Ms. Robin M. Nazzaro  
Director  
Natural Resources and Environment  
United States General Accounting Office  
Room 2T23  
441 G Street, NW  
Washington, DC 20548

Dear Ms. Nazzaro:

NASA has reviewed the draft GAO report, *Federal Advisory Committees: Additional Guidance Could Help Agencies Better Ensure Independence and Balance (GAO-04-328)*. Advisory committees serve an important role for NASA and the agency appreciates the effort to strengthen the independence and balance of these committees.

The overall conclusion that agencies could benefit from additional guidance to better ensure independence, balance, and transparency is sound. However, NASA is concerned about the implications of the finding that would limit the use of representative appointments for advisory committees to those persons who represent specific organizations, rather than a community at large (e.g., industry, education, or a particular field of scientific research). It is important that NASA retain the flexibility to use representatives who do not represent specific stakeholders. This is because individual stakeholder organizations would not necessarily be in a position to represent the overall interests of a broader community, and neither would their employees. Finally, since each community at large is itself comprised of individual organizations or stakeholders (for example, particular universities or trade groups, in the case of education), advisory committee members appointed as Special Government Employees rather than representatives would be precluded by the conflict of interest laws from participating in any discussion relating to their own organization, and by extension their community at large. This would effectively eliminate the perspective they were appointed to provide.

In conclusion, in order to permit agencies to receive the views of entire communities, not just individual organizations, the draft recommendation should be modified to request that the Office of Government Ethics' guidance allow for the appointment of representatives of stakeholder communities as well as individual stakeholder organizations. Mr. Andrew Falcon, NASA's

See comment 1.

See comment 2.



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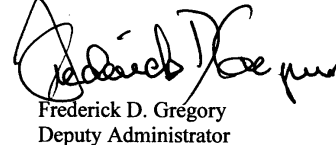
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**and Space Administration**

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Advisory Committee Management Officer, is available to discuss this matter further, and can be reached at (202) 358-2465.

I look forward to receiving a copy of the final report when available.

Cordially,



Frederick D. Gregory  
Deputy Administrator

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The following are GAO's comments on the National Aeronautics and Space Administration's letter dated March 26, 2004.

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## GAO Comments

1. NASA's comments support the appointment of federal advisory committee members as representative of their fields of expertise on the basis that some experts would not be able to serve as special government employees due to financial conflicts of interest. First, this view conflicts with OGE's and our view that representatives are not appropriately appointed to represent fields of expertise (see comment 2 below). Second, this view does not recognize that agencies may grant waivers to members to serve on advisory committees upon determining that either (1) the conflict is insignificant or (2) the need for the member's expertise outweighs the conflict.<sup>1</sup> Our draft and final reports discuss waivers and some promising practices regarding the disclosure of such waivers to the public and among committee members.
2. NASA also recommends that the OGE guidance allow for the appointment of representatives of "stakeholder communities" as well as individual stakeholder organizations. NASA identifies those that may represent a community as industry, education, or a particular field of expertise. We note that OGE guidance on representative appointments states that representatives may speak for stakeholders—that is, firms or an industry, labor or agriculture, or for any other recognizable group of persons with an interest in the matter under consideration. Thus, we believe that NASA can appoint experts as representatives to provide the views of, for example, the aerospace industry—if these experts are to provide stakeholder advice on matters in which the aerospace industry has an interest. If, however, NASA wants such experts to provide advice on behalf of the government on the basis of their individual and expert judgment, the appointments would be appropriately made as special government employees. These individuals would then be reviewed for potential financial conflicts of interest; if conflicts were identified, the conflicts would require mitigation. Regarding NASA's support for representatives providing the views of "stakeholder communities," we continue to believe that fields of expertise generally are not appropriately considered to be

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<sup>1</sup>This view also provides support that OGE clarification on this issue is needed so that agencies can make appropriate decisions regarding representative appointments to federal advisory committees.

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stakeholder communities. Specifically, fields of expertise may be defined as a stakeholder community only in instances where the subject matter a committee is addressing would have a particular impact on a field of expertise—for example, biologists, teachers, or doctors—but not in cases where the experts are called upon to provide expert advice on the basis of their individual judgment.

# Comments from the Department of Energy

Note: GAO comments supplementing those in the report text appear at the end of this appendix.



Department of Energy  
Office of Science  
Washington, DC 20585

Office of the Director

APR 01 2004

Dr. Robin M. Nazzaro  
Director, Natural Resources  
and Environment  
General Accounting Office  
Washington, D.C. 20548

Dear Dr. Nazzaro:

In response to your letter of March 3, 2004 inviting comment on the proposed report *Federal Advisory Committees Additional Guidance Could Help Agencies Better Ensure Independence and Balance* (the Report), the Department of Energy (DOE) is pleased to submit three general sets of comments:

See comment 1.

1. We are concerned about the implications of the “one-size-fits-all” approach that is being advocated in this Report. In particular, the special role that the Office of Science’s six standing Advisory Committees play, within the U.S. scientific enterprise is not recognized and their overall effectiveness could be diminished if GAO recommendations are followed.

See comment 2.

2. The suggestions made by GAO to change the way that DOE selects Advisory Committee members should be implemented only if they would result in clearly defined benefits for DOE programs. Without that clear articulation of benefits, which we believe is absent in this Report, DOE should continue to select members according to our specific needs and circumstances.

See comment 3.

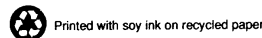
3. GAO’s interpretation of the term “representative” is unpersuasive and would be an unsound basis of guidance for the Department.

See comment 1.

**“One-Size-Fits-All” Approach**

The Report correctly notes that DOE views members of its scientific Advisory Committees as representatives, in contrast to persons who provide individually-centered advice on behalf of the government who should become special government employees and concludes that this practice:

“... exposes the relevant committees to potentially serious problems. Because representative members are not subject to reviews for potential conflicts of interest, allegation of conflicts of interest may call into question the integrity of the committee and jeopardize the credibility of the committee’s work.”



See comment 1.

Report at 23.<sup>1</sup>

While this critique of government-wide Advisory Committees, generally, may be meritorious, applying it to DOE's Office of Science (SC) Advisory Committees appears to stem from a misunderstanding of SC's unique structure and how its scientific advisory committees assist in accomplishing DOE's vital national missions. This critique also fails to note the many self-regulating mechanisms inherent within the SC Advisory Committee structure that greatly diminish, or even eliminate, the potential for conflicts of interest.

DOE's basic research portfolio, which is managed by SC, is organized according to *scientific disciplines* (physics, chemistry, mathematics, etc.). This organizational structure – which is manifested through SC's budget categories, office structures, personnel assignments, etc. – is critical to understanding why SC's Advisory Committee members are inherently representative.

The reason we say this is that SC's Advisory Committees are focused on the health of specific scientific disciplines. It might surprise you to learn that although more than 50% of SC's research dollars go to DOE's national laboratories, only 15% of the total membership of SC's Advisory Committees comes from those laboratories. The majority of representatives come from universities (65%), non-profits and other parts of the U.S. scientific community who have a stronger interest in the overall health of the disciplines that they represent than in the institutions that perform the research. As an example, the Nuclear Science Advisory Committee's charter states:

"Committee members shall be appointed with a view towards achieving balanced representation of the various subfields involved in basic nuclear science research by the Secretary of Energy following nomination by the Director, Office of Science, Department of Energy, with concurrence of the Assistant Director, Mathematical and Physical Sciences Directorate, National Science Foundation."

As a final note on this subject, we would invite you to speak individually with the SC Advisory Committee Chairs and Members and ask them if they believe that a Member's potential conflict of interest would escape the attention of other

See comment 4.

<sup>1</sup> DOE does not uniformly conclude that members of its advisory committees are "representative". When a member is selected for his or her expertise, as contrasted to being a representative, the member is appointed as a special government employee. For example, earlier this year, the Department determined that several individuals who were to be appointed to the Environmental Management Advisory Committee were selected because of their expertise in certain areas. These individuals will be serving on this Committee as special government employees.

See comment 2.

Committee Members or the SC professional program managers for very long. We believe you would find that conflicts of interest are simply not an issue for the reasons cited above.

**Selection of Committee Membership**

The Report urges agencies to obtain Committee members via a public process such as Federal Register notice. Here too, we believe that a one-size-fits-all approach is inappropriate.

In certain areas pertinent to its Advisory Committees, DOE funds and/or directly conducts all or virtually all United States research. This is particularly true for SC's Advisory Committees in Nuclear Physics, Fusion and High Energy Physics. These Committees provide advice to SC programs that support 90-100% of total Federal R&D in these scientific disciplines.

Their knowledge of their fields is such that the SC program managers and Advisory Committee Members know the research areas and credentials of all of the leading scientists in their field. In addition, the program managers are often aware of the personal biases, work ethic and degree of frankness that key players may bring to the Advisory Committee so that they are especially well qualified to select a balanced committee. A public selection process would not result in the selection of more appropriate members nor a more balanced committee. For this reason alone, DOE's current selection practice should be maintained.

But there is another compelling reason that DOE's processes for selection of Advisory Committees should not be changed – neither GAO nor any other study group has ever provided a rationale for change that would result in higher quality advice from the SC Advisory Committees. SC Advisory Committees, for the most part, have been in existence for decades. They perform their functions admirably and it is deemed a great honor within the U.S. scientific community to serve – without compensation – on these Committees. To our knowledge, no one who understands how they truly function has ever asserted that these Committees are anything less than superb and appropriate for the work that they do and the role that they perform within DOE and the U.S. scientific enterprise. Changing them for change's sake (or to force uniformity upon Federal advisory committees with widely ranging purposes) would be a serious error and could have significant (and adverse) consequences for the way that science is conducted in the United States.

**Meaning of the Term "Representative"**

The Report, at 21, states that "Office of Government Ethics guidance is overly-broad in that it states representatives may speak for an industry, or for labor or agriculture, or for any other recognizable group of persons including, on occasion, the public at large. We are concerned about the implications of this statement."

See comment 3.

DOE has certain Advisory Committees that it views as clearly representational in that they do speak for industries such as the National Coal Council and the National Petroleum Council, all of whose members are affiliated with energy companies or entities that have an organizational interest in the matters before the Councils. The Environmental Management Site Specific Advisory Board, which has many members who speak for the local public at large, was established to serve as a channel for communicating advice from the communities impacted by DOE activities. DOE is concerned that the report inadvertently and unnecessarily calls into question the use of representatives on these committees.

The Report, at 22, states that "at times the terms 'represent' or 'representative', when included in legislation or executive orders regarding the membership of advisory committees, does not always clearly indicate that the members are to be appointed to serve as representatives; sometimes these terms are used to define committee composition or balance." The Report does not cite the authority for its statement.

DOE is not persuaded of the soundness of this view as a source of guidance for the Department. Congress or the President use words like "expert" or "expertise" where it is intended for the members to be appointed as special government employees. Agencies should not be called on in this area to violate one of the basic rules of statutory construction and thereby to question the plain meaning of words.

Sincerely,



Raymond L. Orbach  
Director  
Office of Science

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The following are GAO's comments on the Department of Energy's letter dated April 1, 2004.

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## GAO Comments

1. The first issue that Energy identifies as being of concern vis-à-vis its perception of "GAO's advocacy of a 'one-size-fits-all' approach" is, in essence, the governmentwide application of OGE's criteria for representative appointments. That is, while Energy does not disagree that it may be generally inappropriate to appoint advisory committee members to represent various fields of expertise, the department believes it is appropriate for its Office of Science to do so on the basis of the agency's "unique structure." Specifically, Energy says that the Office of Science's advisory committee members are inherently representative because the department's basic research portfolio is managed according to scientific disciplines (physics, chemistry, mathematics) and the related advisory committees are "focused on the health of specific scientific disciplines." In our view, the department's research structure is not unique and does not provide a basis for appointing experts providing advice on the basis of their best judgment as representatives. For example, both the National Science Foundation and NASA manage research portfolios by scientific disciplines, and they generally appoint members to their scientific and technical advisory committees appropriately as special government employees.<sup>1</sup> We believe Energy's comments support our view that OGE needs to clarify its guidance on representative appointments.
2. The second issue that Energy views as our advocacy of a "one-size-fits-all" approach concerns obtaining input on the "selection of committee membership." Energy does not specify whether it is addressing (1) nominations for committee membership from the public, (2) comments on proposed committee membership, or (3) both of these practices. In any event, the draft and final reports identify these as promising practices that are particularly relevant to those committees addressing sensitive or controversial issues, and not as practices that should be applied to all committees.

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<sup>1</sup>NASA's comments in response to this report indicate that NASA does, at least in some cases, appoint members to represent their expertise. Unlike Energy, NASA cites issues related to conflicts of interest as a basis for doing so.



3. Energy states that our interpretation of the term representative is unpersuasive and would be an unsound basis of guidance for the department. In elaborating on this perspective, the department makes two points. First, the department states that it has certain advisory committees, such as the National Coal Council and the National Petroleum Council, that it views as clearly representational in that the members do speak for energy companies or entities that have an organizational interest in the matter. Energy expresses concern that the report inadvertently and unnecessarily calls into question the use of representatives on these committees. We disagree. The draft and final reports state on page 1 that members of federal advisory committees may be appointed as (1) special government employees to provide advice on behalf of the government on the basis of their best judgment or (2) representatives to provide stakeholder advice. We do not take issue with representative appointments when the members are, in fact, appointed to represent a particular interest or view of an entity or group with an interest in the matter before the committees, and they are fully informed as to the point of view or interest they are to represent. Second, Energy questions our view that use of the terms “represent” or “representative” regarding the membership of advisory committees does not always clearly indicate that the members are to be appointed to serve as representatives. In its comments on the draft report, OGE stated that its guidance does not imply that any use of the word “represent” or its cognate forms in a statute or other document means that the members of the committees are not special government employees. Further, OGE stated that its guidance makes clear that careful attention to all relevant factors is required in order to determine whether the committee members are actually intended to serve as representatives of interest groups. While OGE disagreed with our recommendation that its guidance needed to be clarified to state that the term representative in statutes and charters may be used more generically to identify the appropriate balance of points of view or expertise and may not be specifying that representative appointments be made, we believe Energy’s comments on this point provide additional support for our recommendation.
4. The draft and final reports state that USDA, Energy, and Interior appoint most or all of the members to their federal advisory committees as representatives. We believe this statement accurately describes Energy’s appointments. For example, our draft and final reports state that in April 2003, Energy’s Acting Assistant General Counsel for General Law told us that all but one of the department’s

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committees use only representatives members; we indicated that this one committee expired in June 2003. In its comments on the draft report, Energy identifies another committee for which DOE appointed several members in 2004 as special government employees.

# GAO Contacts and Staff Acknowledgments

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## GAO Contacts

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## Staff Acknowledgments

In addition to those individuals named above, Lindsay Bach, Ross Campbell, Bernice Dawson, John Delicath, Judy Pagano, and Amy Webbink made key contributions to this report.

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