

# FACA for Facilitators

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# Overcoming Fear of FACA



# What Are YOUR FACA Questions?

- ◆ Introduce yourself (name, organization)
- ◆ What is one question that you'd like this session to answer about FACA?

# FACA and Facilitators

- ◆ FACA or Not? - Exploring whether a FAC is the right process
- ◆ Chartering issues
- ◆ Meeting management issues

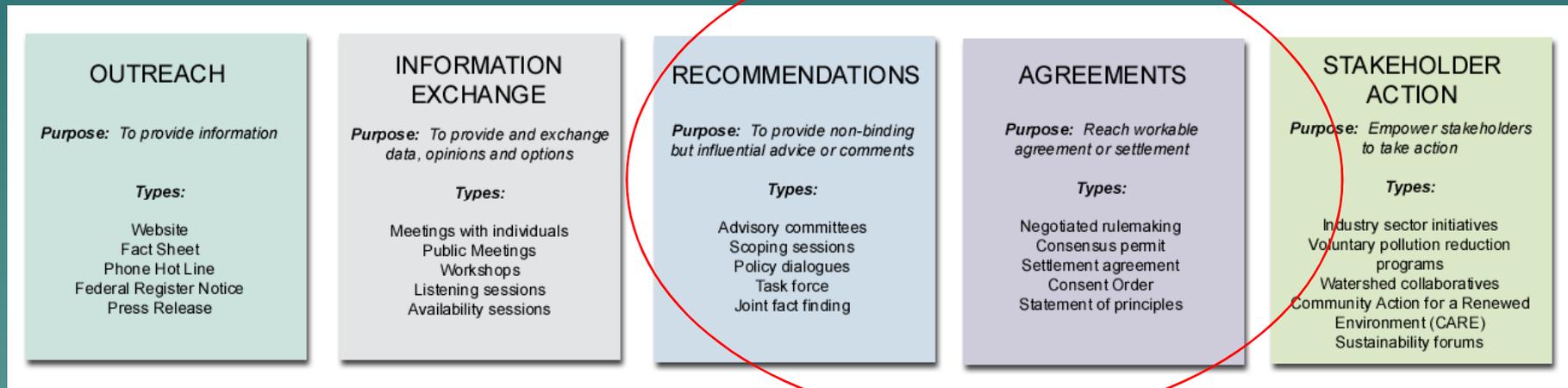
# What are GSA's Roles?

- ◆ Consultation (Charters)
- ◆ Tracking and reporting (FIDO)
- ◆ Training
- ◆ Policy and Guidance
- ◆ Regulatory leadership
- ◆ Coordination within Executive Branch

# Identifying the Right Process

- ◆ Fear of FACA
- ◆ Is collective advice needed or will information exchange suffice?
- ◆ Is there time?
  - Time to charter a committee
  - Time to complete the deliberations
- ◆ Are there enough resources?
- ◆ Are the stakeholders willing?
- ◆ Is the Agency committed?

# Public Involvement and Collaboration Processes



Less Public Involvement

More Public Involvement

# FACA

## Federal Advisory Committee Act

- ◆ Public Law 92-463, effective January 5, 1973.
- ◆ Establishes a framework covering the creation, management, operation, and termination of all advisory committees reporting to the Executive Branch.

# What Is An Advisory Committee?

The term "**advisory committee**" means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof which is—

- (A) established by statute or reorganization plan, or
- (B) established or utilized by the President, or
- (C) established or utilized by one or more agencies,

in the interest of obtaining advice or recommendations for the President or one or more agencies or officers of the Federal Government, except that such term excludes:

- (i) any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government, and
- (ii) any committee that is created by the National Academy of Sciences or the National Academy of Public Administration.

# What's In A Name?

The term "advisory committee" means any:

committee,

board,

commission,

council,

conference,

panel,

task force, or other similar group,

any subcommittee or other subgroup

# Does It Matter Who Forms The Committee?

- (A) established by statute or reorganization plan;
- (B) established or utilized by the President; or
- (C) established or utilized by one or more federal agencies



# Does It Matter Who Gets the Advice?

“...in the interest of obtaining advice or recommendations for the **President** or one or more **agencies or officers of the Federal Government**”

Providing advice is the sole function of a FAC

# What Groups Are Not Subject To FACA?

1. Composed wholly of full-time or permanent part-time officers or employees of the Federal Government
2. In which each person provides individual advice; there is no collective advice
3. Information exchange/gathering
4. Meetings initiated by a group to express their views

# What Groups Are Not Subject To FACA?

## 5. UMRA (Unfunded Mandates Reform Act) Exception

Intergovernmental communications providing:

- Meetings are held **exclusively** between Federal officials and elected officers of State, local, and tribal governments; **and**
- Meetings are **solely** for the purposes of exchanging views, information, or advice relating to intergovernmental responsibilities or administration.

# What Groups Are Not Subject To FACA?

6. Established, managed, and controlled by a non-federal entity
7. Exempt by statute
8. Operational committees
  - Any committee established to perform primarily operational as opposed to advisory functions
  - Making or implementing government decisions or policy

# What Does “Established Or Utilized” Mean?

## Established

- Actually formed

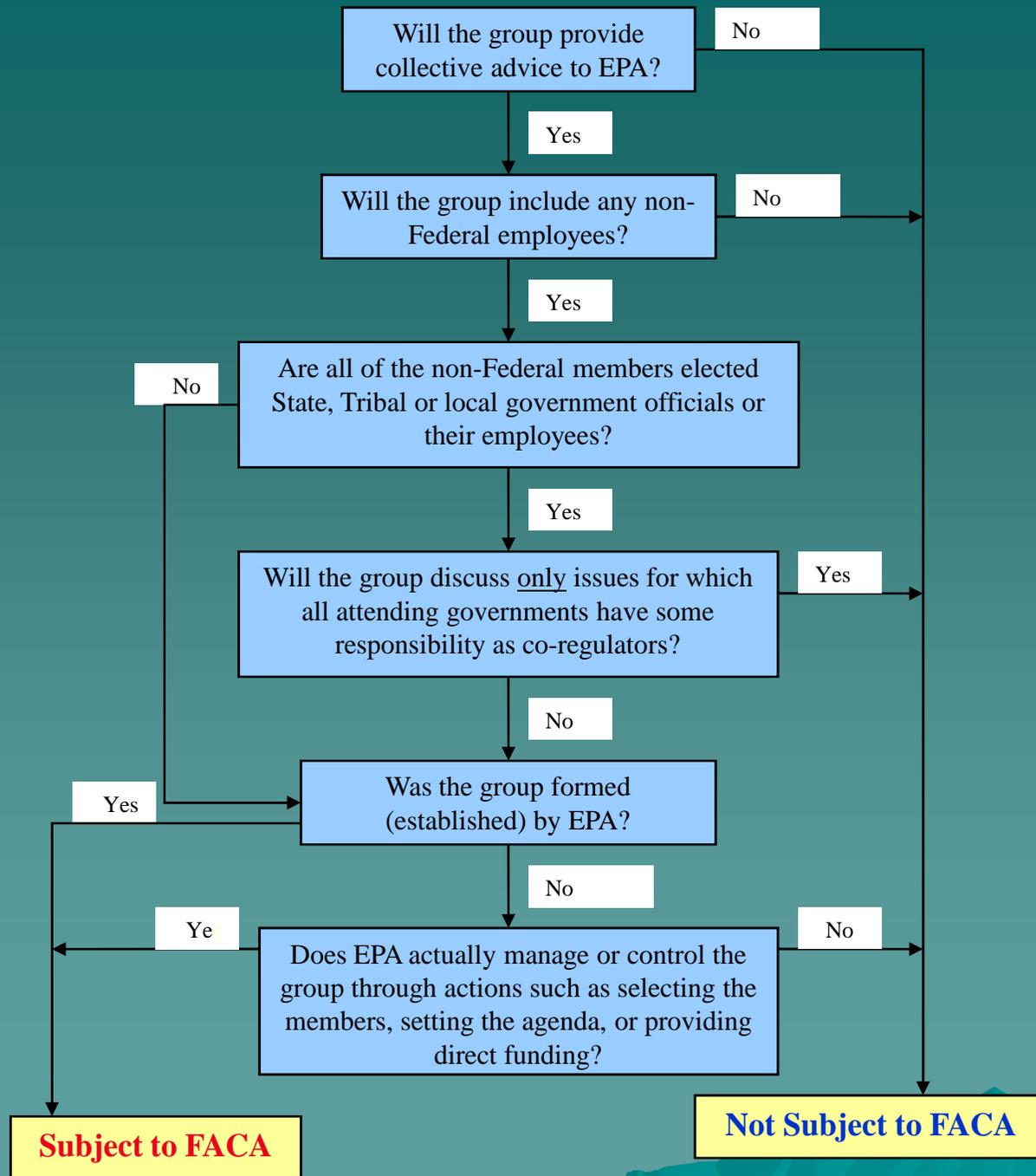
## Utilized

- Subject to strict management and control by the federal government, for example:
  - selection of members,
  - setting of agenda,
  - providing direct funding

# Summary

## **When Does FACA Apply? Questions to Ask:**

1. Does the group provide collective advice?
2. Who does the group advise?
3. Who are the group's members?
4. Who established the group?
5. Who manages and controls the group's activities?



# If a FAC is the “Right” Process: General Requirements

- Develop and file a **charter**
- Appoint members, maintain a **balanced membership**
- Hold **open public meetings**; may close only in limited circumstances
- **Allow the public input** - to file written statements and have an equal opportunity to speak
- **Announce all meetings** in the Federal Register (timely)
- Maintain all committee **documents for public inspection**
- **Renew** prior to expiration of 2 year period

# Committee Chartering Steps

- ◆ Agency/Departmental Internal Procedures
  - Determination of need/justification for discretionary committee by program level managers, consultation with agency Committee Management Officer and attorneys, signature of agency/departmental head
  - Development of Charter
  - Identification, selection and appointment of members by agency head/departmental secretary
- ◆ Consultation with GSA
- ◆ Notice of Establishment in Federal Register
- ◆ Filing of Charter with Congress

# Chartering Issues

- ◆ Scope and goal – clear, achievable, agreed upon in Agency and with participants
- ◆ Timing of the need for action or advice vs needs of the bureaucratic process
- ◆ Membership issues
- ◆ Inexperienced agency staff, unclear direction and procedures.
- ◆ Putting off getting legal guidance on issues or procedures

# Facilitator Roles in Chartering

- ◆ Situation Assessment may provide
  - Information on scope and goals
  - Issues for discussion and advice
  - Potential members
  - Potential timeframes
  - Potential costs and support issues
  - Advice on whether a FACA committee is feasible

# Balanced Membership - FACA § 5(c)

- ◆ Points of view for the function to be performed
- ◆ Numerical parity of holders of various points of view not required
- ◆ Separate from considerations of race, gender, geographic region, etc.
- ◆ No individual or group has the right to be on a committee

# Problems in the Membership Process

- ◆ Questions legal interpretation of “balance”
- ◆ Internal agency guidance about issues such as diversity
- ◆ Questions regarding type of members (SGE vs Representative)
- ◆ Members CV, clearances, disclosures
- ◆ Issues regarding what “representation or representative” mean

# Facilitator Roles in Membership

- ◆ Assistance in identifying all points of view on the issues
- ◆ Assistance in identifying and reaching out to organizations or individuals – particularly the “rare” interest group
- ◆ Assistance in providing information for membership packages

# Committee Management Issues

- ◆ Meetings of committee members
  - Full committee meetings
  - “Meetings” via teleconference or email
  - Subgroup meetings
- ◆ Committee documents
- ◆ Operational rules
- ◆ Decision rules

# Open Public Meetings FACA § 10(a)(1)

- ◆ Reasonably accessible to the public, including the disabled (41 CFR § 102-3.140(a))
- ◆ Includes meetings held by teleconference, videoconference, the Internet, or other electronic medium (41 CFR § 102-3.140(e))

# Activities Not Required to be Open

## ➤ **Administrative meetings**

Meetings solely to discuss administrative matters or to receive administrative information from a federal officer or agency (41 CFR § 102-3.160(a))

## ➤ **Preparatory work**

Meetings solely to gather information, conduct research, or analyze relevant issues and facts in preparation for a meeting of the FAC or draft position papers for deliberation by the FAC (work groups) (41 CFR § 102-3.160(b))

# Facilitator Roles in Open Meetings

- ◆ Logistics in identifying and setting up meetings
- ◆ Coordination of committee meeting dates
- ◆ Drafting agendas with Agency and members
- ◆ Gathering public comment
- ◆ Managing public comment
- ◆ Writing meeting summaries for committee and Chair approval

# Subcommittees

- Groups that report to a chartered FAC for discussion and deliberation
- Do not directly advise the agency
- Chartered committee may not merely rubber stamp the recommendation of the subcommittee
- Some agencies may as a policy decision have subcommittees follow FACA openness requirements
- Workgroups, task groups, other ad hoc subgroups of the committee.....
  - Size of group
  - Open, announced meetings?

# Committee Documents

- Privilege generally does not apply to committee documents.
- The agency does not lose the deliberative process privilege by sharing privileged documents with the FAC.
- ADR confidential documents -

# Decision Rules

- ◆ Roberts Rules vs Committee Groundrules
- ◆ Voting vs consensus
- ◆ Quorum
  - Effect on decision rules
  - Effect on whether a workgroup meeting is a committee meeting

<b>Best Practices for Public Involvement</b>	<b>FACA Requirements</b>
Involves all affected parties	Requires balanced membership
Charge states goals, schedule, resources, members	Charter states objective, scope, schedule, resources, members
Meetings held in public whenever feasible	Open meetings generally required
Provisions made for public input	Requires opportunity for public comment
Meetings planned and announced in advance	Meetings must be announced 15 days in advance in Fed Reg
Meeting summaries open to public scrutiny	Meeting minutes are required and are publicly available
Convening a group involves early contact & assessment with parties	Establishment of committee requires analysis of need & membership
Operating rules are common	Charter may be supplemented with ground rules
Potential conflicts of interest are discussed	Potential conflicts of interest are documented

# Consequences of a FACA Violation

## Good News:

- 😊 No criminal penalties
- 😊 No civil money penalties

## Bad News:

- 💣 Litigation
  - Time-consuming
  - Meetings could be prohibited
  - Use of group's past advice and/or supporting documents could be prohibited

# Facilitator Roles in FACA

- ◆ Situation Assessment – what kind of consultation is useful on an issue
- ◆ Identification of potential members
- ◆ Assisting with thinking through issues of balance of membership
- ◆ Research into the issues to be addressed
- ◆ Advice on best methods of organizing conversations and decision making
- ◆ Advice on best ways to provide for “chair” role

# Facilitator Roles in FACA

- ◆ Facilitation of agenda planning
- ◆ Facilitation of meeting
- ◆ Assisting with committee activities management
- ◆ Meeting summaries, documentation
- ◆ Logistics (meeting rooms)
- ◆ Managing interaction with the public
- ◆ Holding the pen – single text decision documents
- ◆ Helping to overcome impasse
- ◆ Access to neutral experts to advise members

# Facilitator Confidentiality

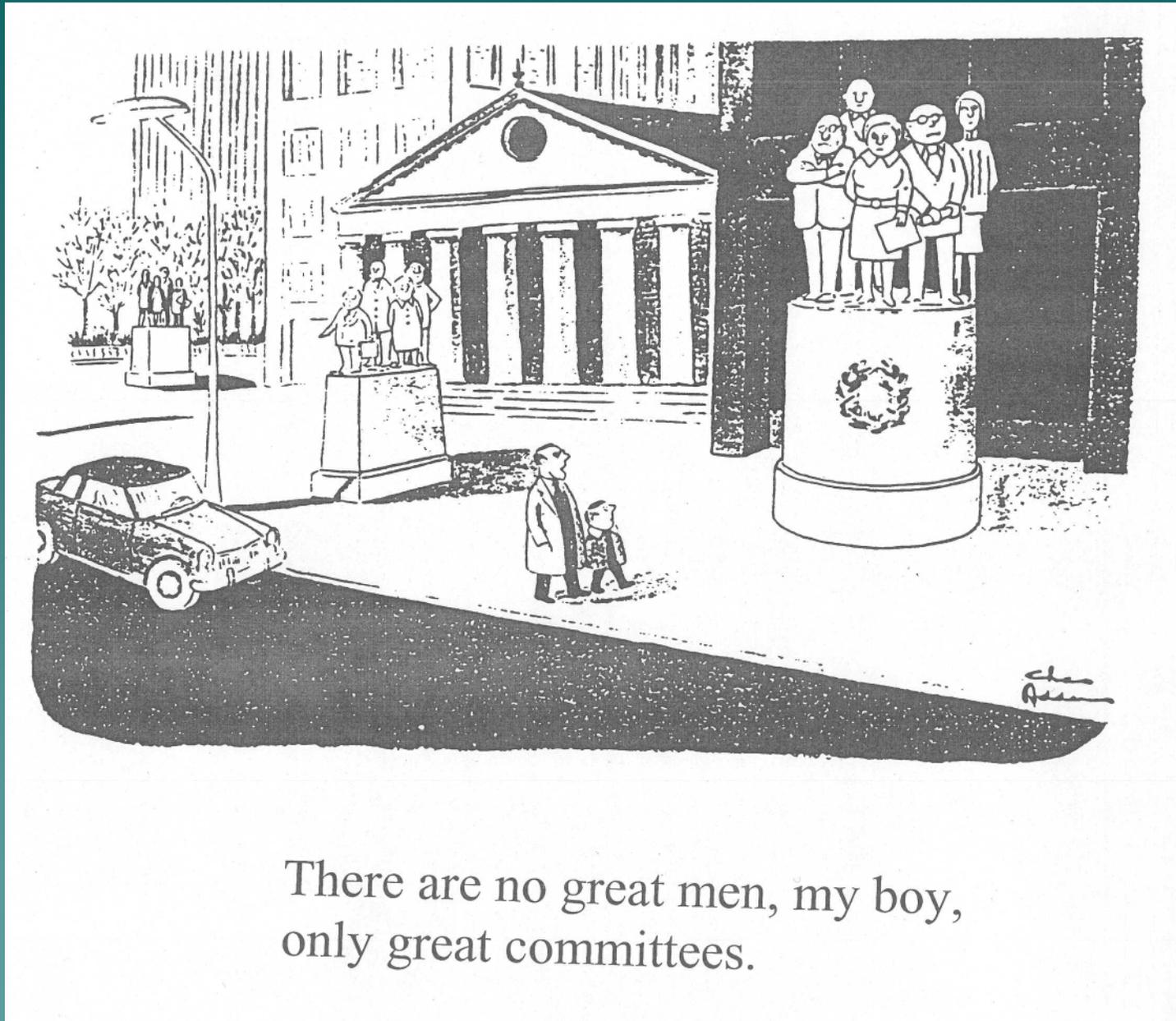
- ◆ Not every communication with a facilitator is confidential
- ◆ Both the Agency and the facilitator need to clarify the facilitator's role at the beginning of the relationship

# Facilitator Confidentiality

- ◆ Where the facilitator is coordinating information flow among the FACA members, communications may not be confidential
- ◆ Where the facilitator is acting as a mediator to help members overcome an impasse, communications likely to be confidential

# Top Ten FACA Mistakes

- ◆ Asking “are we all in agreement?” at a meeting intended to obtain individual input
- ◆ Drafting documents related to non-FACA meetings that make them sound like they were/are subject to FACA
- ◆ Failing to consult with the agency’s FACA attorney when planning a meeting that may not be subject to FACA
- ◆ Not making the agency’s needs clear to the FAC
- ◆ Not communicating the agency’s expectations to the facilitator
- ◆ Thinking that FACA is harder, more time consuming, and more expensive than other public involvement processes
- ◆ Having the parent FAC rubber stamp a subcommittee recommendation



There are no great men, my boy,  
only great committees.