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STATEMENT OF

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BEFORE THE

SUBCOMMITTEE ON INFORMATION MANAGEMENT
AND REGULATORY AFFAIRS
COMMITTEE ON GOVERNMENTAL AFFAIRS

UNITED STATES SENATE

ON

THE FEDERAL ADVISORY COMMITTEE ACT

029307

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the review that you and Senator Roth requested on the administration and implementation of the Federal Advisory Committee Act (FACA) of 1972. In doing so, I will comment on Senate bill 2127 as it relates to the issues raised in your request. I must caution that we are now preparing our draft report so my remarks represent the preliminary results of our work.

In considering and passing the Federal Advisory Committee Act 12 years ago, the Congress endorsed the value of using committees made up of private citizens to advise federal officials in the exercise of their responsibility, recognizing that this mechanism could make available information, perspective, and insight to the formulation of public policy at relatively modest cost.

In response to your request, we have reviewed the functions of the Committee Management Secretariat at the General Services Administration (GSA) and the operations of 68 advisory committees located in the National Science Foundation (NSF), the National Endowment for the Humanities (NEH), the Department of Education, and three components of the Department of Health and Human Services--the Office of Human Development Services, the Food and Drug Administration (FDA), and the National Institutes of Health (NIH). In general, we found a conscientious effort in

all of these agencies to adhere to both the spirit and requirements of the act. While we identified some problems, as I will explain, they can be resolved through administrative adjustments. We believe none of them is intrinsically serious enough to warrant a major overhaul of the act.

Allow me now to respond to the five specific questions raised in your request.

GSA'S OVERSIGHT ROLE

First, you asked us to review GSA's performance in guiding and managing federal agencies' compliance with the act. This responsibility has been carried out by GSA's Committee Management Secretariat (CMS) since the function was transferred from the Office of Management and Budget (OMB) in 1977.

We found that GSA has been only partially effective in meeting the many statutory responsibilities assigned to it by the act. For the last several years, only two and a fraction full-time professional staff members have been allocated to the committee management function.

The limitation on its staff resources has required the CMS to set priorities among its various responsibilities. CMS has been fairly successful in carrying out its top priorities, less so in others, and at least one responsibility has received no attention at all. CMS has placed primary emphasis on developing governmentwide guidelines to promote effective advisory committee management and preparing an expanded annual report to the

Congress, which covers advisory committee numbers, costs, and activities. Its interim regulation published in April 1983 addressed a number of problems in interpreting the act's requirements. Another responsibility, evaluating agency charter requests, is a secondary order of priority. Other assigned functions, such as monitoring agency efforts to comply with requirements for balanced committee memberships and for adequate notice and minutes of meetings and providing guidance and assistance to individual committees, received less attention and are done only sporadically. One function, submitting follow-up reports on Presidential committee recommendations, received no attention at all, and the statutory requirement has not been met.

It should be noted that CMS does not have the necessary knowledge of agency programs to review all advisory committee charters thoroughly. CMS depends on an assessment by OMB to determine whether a committee proposed for renewal, establishment, or reestablishment is necessary, or whether it duplicates the function of an existing committee. Of 192 chartering requests GSA received in FY 1983, CMS sent 118 to OMB for their review. Most of the remainder were relatively routine renewal requests.

Given the limited resources allocated to committee management and oversight in the GSA budget, we have no reason to criticize CMS for setting priorities on its responsibilities or for the priorities it has chosen. It should be noted, however,

that if the administration and the Congress expect CMS to manage the advisory committee system as thoroughly as the act envisions, by carrying out all of its assigned responsibilities, this is unlikely to occur unless the CMS function is upgraded and given more resources. Moreover, if the Congress decides to add new management requirements through legislation, this will place an even greater strain on the Secretariat's resources.

RESPONSE TO ADVISORY COMMITTEE RECOMMENDATIONS

The second question you asked us to consider was whether the act should be amended to require agency heads to respond formally to the recommendations made by their subordinate program and policy advisory committees. Section 6(b) of the act already requires the President to report to the Congress within 1 year on what action has been taken on the recommendations of committees reporting directly to him.

Our review found that the Section 6(b) requirement has not been observed by Presidents in recent years. While GSA is delegated responsibility to prepare a report on the official reaction to Presidential advisory committee recommendations, GSA has not done so. We were told by a CMS official that this function is a low priority for CMS' limited staff and that the requirement is viewed internally as a needless formality, notably when it involves one administration responding to the committees set up by a previous administration.

Our review of the responses given by agency leadership to the eleven agency-level policy and program advisory committees in our sample that issued formal recommendations, showed that a formal, written response to the recommendations was not the most common or necessarily the most effective form. Only two committees received a written response. Three of the committees received no response or feedback at all. But in the other six cases, we found that a structured oral response was given to the committees, often allowing for dialogue. Based on our observations during several of these meetings and the review of documents relating to other meetings we believe the oral responses were an effective means of communication.

We also learned in the course of our review that the White House has an initiative under way to improve the quality of consideration given to the recommendations of agency advisory committees. The interim GSA regulations also recommend more direct communication between agency heads and their advisory committees. Based on these initiatives, we believe enough attention is being devoted to ensuring that agency advisory committee views are given appropriate consideration, and additional legislation requiring documentation is not likely to improve the situation.

NONCOMPENSATION POLICY

You also asked us to evaluate the actual and potential effects of GSA's interim regulation that instructs agencies not to compensate advisory committee members, except when required

by law or when essential to provide qualified and balanced committee membership. Although GSA's noncompensation policy has been issued only on an interim basis, early indications cause us to believe that the policy is inequitable and should not be issued in final form. The policy seems to diminish the value to the government of the hard and often unglamorous work involved in much advisory committee activity. Grant and peer review committee meetings, for example, are generally preceded by careful reading and evaluation of proposal documents. Most members of these committees are members of the academic community who do such work for a living, and who customarily supplement their academic salaries with outside consulting. For this reason, we were told, nearly all agencies have offered some remuneration to members of peer and grant review committees.

Furthermore, specific statutory provisions authorize agency heads to compensate many committee members. Therefore, these members will be able to continue receiving compensation under the noncompensation policy while other members might not. Of some 19,000 individuals serving on advisory committees in 1982, about 40 percent or 7,700 were compensated for their services. Five agencies account for 6,617, or slightly over 85 percent of the compensated advisory committee members. Because four of the five agencies are required or authorized by law to compensate committee members, 5,641 of the 6,617 would not be affected by GSA's noncompensation policy.

Finally, compensation for advisory committee members amounts to only 7 percent of advisory committee costs. In part, this is because compensation rates are usually set by agency heads at the level of $100 per day, rather than the maximum of $245 allowed by law. They are thus more an honorarium than a fee. Since compensation is required or authorized by separate statutory provision for most compensated advisory committee members, not all of the $5.5 million the government paid for member compensation in 1982 would be saved by implementation of the policy.

In our opinion, since advisory committees vary so greatly in nature, scope, and technical complexity, agency heads are in the best position to know when the compensation of advisory committees is needed to fulfill their agencies' missions.

COVERAGE OF SUBCOMMITTEES

You also asked us to assess the effect of a 1983 court ruling in the case of National Anti-Hunger Coalition v. Executive Committee of the President's Private Sector Survey on Cost Control that exempts certain advisory committee subgroups from public accountability. The court held that FACA covers only those advisory committee subcommittees or subgroups that provide advice and recommendations directly to a federal official. Since most subcommittees or subgroups do in fact report to their parent committee, rather than bypassing the parent committee and reporting directly to a federal official, this does appear to us

to be a major potential loophole in the act. Eight of the 17 policy and program advisory committees we examined held a total of 52 subgroup meetings in 1982, all of which could have been exempt from the act's requirements if the agencies had wished to press the point made by the court in the Private Sector Survey decision. The Navy Department, partly based on the court decision, believes that panels of the Naval Research Advisory Committee are not covered by the act. Our survey of nine agencies on this point did not, however, reveal any that have changed their practices in response to the court decision. Thus the ambiguity in the act regarding its application to subgroups remains a potential loophole. Given the potential implications of the Private Sector Survey decision the Congress may want to consider amending the FACA to make clear that all subcommittees, not just those few that provide advice directly to a federal official, are subject to the FACA.

CONFLICT OF INTEREST CONTROLS

The final question you asked us to review was whether significant conflicts of interest are arising in the operations of advisory committees that evaluate grant applications or requests for regulatory approvals. The Advisory Committee Act itself does not have conflict of interest provisions, but agencies are required by the Ethics in Government Act and Executive Order 11222 to develop guidelines and procedures to prevent the appearance of conflicts of interest among special government em-

ployees. We reported to the House Committee on Government Operations in September 1983 that scientific advisory committees at the Defense Department failed to resolve potential conflicts of interest for 32 of 117 panel members whose interests we reviewed. We recommended a number of improvements in DOD's procedures and DOD agreed to implement them.

The five domestic agencies that we reviewed for conflicts of interest at your request did not have comparable inadequacies. All five--NSF, NEH, NIH, and FDA, and the Department of Education--had sufficient guidelines and procedures in place to prevent conflicts and the appearance of conflicts in their peer, grant, and technical review committees. At two agencies--Education and FDA--not only were the procedures effective, but also they were followed with such consistency that we did not find a single instance where the appearance of a conflict of interest had not been identified and resolved in advance of an advisory committee meeting. The minutes of advisory committee meetings at these two agencies documented each case where a disqualification or waiver was exercised, even though including this notation in the minutes is not specifically required by law.

Altogether, we reviewed the financial disclosure and biographical statements for 528 individual committee members, and we compared them to the affiliations and relationships of several thousand grant applicants that came before their committees. We found only 32 instances, involving 27 advisory

committee members, where apparent conflicts had not been identified, resolved, and documented according to applicable law and procedure. Most of these apparent conflicts involved committee members evaluating grant or project applications from the same institution with which they were affiliated, or at a different campus of the same overall university system. These instances were neither large in number nor egregious in nature, but they could have been prevented if the agencies involved--NIH, NSF, and the National Endowment for the Humanities--had adhered strictly to their procedures and to guidelines issued by the Office of Government Ethics. Based on informal discussions, I expect that the agencies will agree and make these adjustments. In our opinion, this situation is not so serious as to justify recommending a statutory remedy.

PROPOSED LEGISLATION

In inviting us to testify at this hearing, you requested that we comment on the provisions of S. 2127, which provides for several amendments to the Federal Advisory Committee Act. In general, this bill puts into statutory form many of the requirements or guidelines that GSA has provided agencies through its interim rule on advisory committee management.

As should be clear from my testimony on the compensation issue, we do not believe that GSA's policy on compensation should be enacted into law. In fact, the bill's provision requiring that where voluntary service cannot meet a committee's

need, an individual should be appointed as a consultant, may actually result in higher compensation for some individuals because consultant pay often exceeds the level of an honorarium.

In addition, it is not clear whether the bill's provision prohibiting compensation of committee members "unless specifically required by law" is intended to override the specific statutory provisions that authorize agency heads to compensate committee members.

Section 104 of the bill deals with the coverage of subcommittees. However, it does not resolve the problem of coverage raised by the Private Sector Survey case. As discussed earlier, the Private Sector Survey case held that the act applies only to those subcommittees that provide advice directly to a federal official, not to those subcommittees reporting to their parent committees. The bill does not explicity bring under the act subcommittees that report directly to their parent committees and thus are not now subject to the act under the Private Sector Survey decision. Specifically, because the bill does not define which subcommittees are covered, the court's interpretation in the Private Sector Survey case limiting the act to subcommittees reporting directly to a federal official would remain unchanged. The intent of the bill could be clarified by adding language specifying all subcommittees--those that report to parent committees as well as those that report directly to a federal official--are intended to be covered to the same extent as parent committees.

We might add that if the bill were amended to encompass such subcommittees and to create a corresponding expanded monitoring and oversight role for GSA, this is unlikely to be effective unless GSA is given more resources for this task. As we pointed out earlier, at present staffing levels it is unlikely GSA would be able to monitor carefully the composition and activities of parent committees, much less a new complement of subcommittee submissions.

That concludes my prepared statement, Mr. Chairman. I would be pleased to respond to any questions that you or other members of the subcommittee may have.