Reaching consensus and other ways to break the law

Life with the Federal Advisory Committee Act

By Carl Korman
District Counsel

Officially it is 5 U.S.C.A., Public Law Number 92-463, the Federal Advisory Committee Act. Unofficially it is FACA. Passed in 1972, it established the legal framework for "committees, boards, commissions, councils, and similar groups which have been established to advise officers and agencies in the executive branch."

In a 1983 case, Public Citizen v. U.S. Department of Justice, the Supreme Court explained quite clearly that the law was "enacted to cure specific ills, above all the wasteful expenditure of public funds for worthless committee meetings and biased proposals."

Equally, the president in 1993 illustrated his distaste for extensive committees by Executive Order 12838. In it, he ordered each executive department and agency to "terminate not less than one-third of the advisory committees subject to FACA." Further, no such agency may create or sponsor a new advisory committee unless it is required by statute or the agency head receives approval for it from the Office of Management and Budget.

But what is an "advisory committee," and why should Sacramento District be so concerned about a law that's more than 20 years old?

The law, as recently amended by the Unfunded Mandates Reform Act of 1995, defines an "advisory committee" as any committee, board, commission, council, conference, panel, task force or other similar group which is established or utilized by an agency in the interest of obtaining advice or recommendations. It does not apply to meetings held exclusively between federal officials, elected state officers, local and tribal governments or their employees, provided they meet certain conditions.

The meetings must be solely for the purpose of exchanging views, information or advice relating to the management or implementation of federal programs established under law that explicitly or inherently share intergovernmental responsibilities of administration.

More simply put, this means that if a Corps stakeholder calls a meeting which includes private citizens, groups or clubs, and seeks to obtain consensus advice or recommendations from them, the stakeholder has violated FACA.

It does not mean that one may not call a meeting with members of the general public or interested groups in attendance. But it does mean that if nonfederal, state or local representatives also participate, then the federal sponsor may initiate the meeting only for the purpose of obtaining the individual advice or factual statements of each individual attendee.

In other words, the meeting may not be used as a vehicle to gain a uniform consensus of advice from the assembled group, a consensus that the federal decision maker will rely on.

So what can happen if we forget about this law, and get the advice of such a group and then act upon it?

Well, the courts are making it clear that the management decision, and the underlying administrative record upon which that decision is based, will be nullified for failure to comply with FACA. That means the agency would be required to start all over again, beginning from scratch, in developing its information and reaching a final decision.

At present, only about a dozen FACA advisory committees exist in the Army. But, if you need a committee which is subject to FACA, then you must follow the procedures set forth in General Services Administration and Department of the Army regulations for establishing an advisory committee.

Army Regulation 15-1 lists the requisite steps. The basic formula requires a statement of nature and purpose, a proposed charter, a plan to obtain balanced membership and placement of a notice in the Federal Register.

This information goes to the DA Committee Management Officer. If approved, the committee may exist only until either its objectives are met or two years have passed, whichever comes first.

Nonfederal representatives nominated to an advisory committee must be approved by the assistant secretary of the Army.

The person is considered to be a consultant to the federal government, and must comply with the Army's ethics regulations – including filing an annual financial disclosure statement.

Remember, under FACA the old adage that "it never hurts to ask" may not apply if you ask the wrong people the wrong questions. So play it safe. "If you are thinking about calling a meeting with private parties to help in reaching a decision, check with the Office of Counsel – first."