



Date: February 18, 2005

To: IC Directors

From: Director, Office of Federal Advisory Committee Policy, OD, NIH

Subject: OFACP Policy Announcement 2005-01: Membership and Management of Subcommittees of National Advisory Councils, Program Advisory Committees, and Boards of Scientific Counselors

Purpose:

National Institutes of Health (NIH) national advisory councils, program advisory committees, and boards of scientific counselors often need to create subcommittees to divide the workload of committees, to conduct research and gather information, or to draft proposed reports for deliberation by the full chartered advisory committee. This policy has been established to disseminate NIH's revised definition of a subcommittee that reports to a chartered Federal advisory committee.

Background:

Historically, NIH subcommittees have been composed solely of members from a chartered parent Federal advisory committee. However, the Department of Health and Human Services (HHS) has modified its definition of a subcommittee to be consistent with the Federal Advisory Committee Management; Final Rule (41 CFR Parts 101-6 and 102-3). This Rule was revised to reflect outcomes resulting from the many court decisions on the management of Federal advisory committees. Paramount to this revised regulation was defining and providing guidance on subcommittees. HHS now defines a subcommittee as, ***“A group, generally not subject to the Federal Advisory Committee Act (FACA), that reports to a duly established advisory committee and not directly to a Federal officer or agency, whether or not its members are drawn in whole or in part from the parent advisory committee.”*** The guidance further states, ***“If a committee makes recommendations directly to a Federal officer or agency and the parent committee without further deliberation adopts its recommendations, then there must be statutory authority to do so. Absent such rare statutory authority, the subcommittee would be acting as a separate advisory committee and would have to comply with all FACA requirements as a separate advisory committee.”***

Applicability:

This policy is applicable to subcommittees of national advisory councils, program advisory committees, and boards of scientific counselors. Although initial/integrated review groups must operate within the same confines of this subcommittee policy, they are subject to different appointment processes and conflict of interest guidelines. Therefore, a separate policy is being developed for initial/integrated review groups. This policy also does not apply to special emphasis panels, as these panels may not create subcommittees or convene subcommittee meetings.

Policy Statement:

An NIH subcommittee is a group, generally not subject to the FACA, that reports to an established advisory committee and not directly to a Federal officer or agency, whether or not its members are drawn in whole or in part from the parent advisory committee. All subcommittee advice and/or recommendations from national advisory councils, program advisory committees, and boards of scientific counselors must be deliberated by the full committee prior to action by NIH officials unless the subcommittee has statutory authority to report directly to a Federal official.

Discussion:

HHS' policy previously defined a subcommittee as, "***A subgroup that advises an established committee. It must be chartered if some of its members are outside of the parent committee. If its membership is composed entirely of members of the established committee its existence is incorporated within the charter.***" NIH promulgated this definition in its committee charters by including a statement that required standing or ad hoc subcommittees to be composed of members of the parent committee. Some NIH advisory committee charters also stated that with the committee chair's approval, the advice of a subcommittee may be considered the advice of the parent committee. This flexible language allowed a subcommittee, with approval by the committee chair, to provide advice directly to NIH officials. When a subcommittee operated in this manner, it was subject to all the requirements of the FACA, including publication of meetings in the Federal Register, keeping all meetings open to the public, preparing minutes, and other activities.

The current FACA Final Rule advises that a subcommittee reporting to a parent advisory committee generally is not subject to FACA. It further states that a subcommittee whose recommendations are provided directly to a Federal officer or agency is subject to FACA.

It warns that it is not permissible for a parent advisory committee to simply "rubber-stamp" the advice or recommendations of their subcommittee(s), thereby depriving the public of its

opportunity to know about and participate contemporaneously in an advisory committee's deliberations.

Recent legal opinion from the HHS Office of the General Counsel advises us that, "Under the new policy, absent statutory authority allowing a subcommittee to report directly to Federal officials, subcommittee advice must be deliberated by the full committee" Therefore, the language contained in some charters giving the chair sole authority to approve and adopt subcommittee advice as the advice of the parent committee is no longer appropriate. This charter language will be discontinued. Blanket amendments to the structure section for national advisory councils, program advisory committees, and boards of scientific counselors charters have been prepared acknowledging this change in policy.

Guidelines for Subcommittee Membership and Operations:

Based on the new definition for subcommittees, provided below are guidelines for the management and operations of subcommittees at the NIH:

- ! Subcommittee members who are not members of the parent committee must be appointed as Special Government Employees (SGEs) prior to attending a subcommittee meeting. As such, they must complete and have cleared all appointment forms to include a Confidential Financial Disclosure Report (OGE 450) and a Foreign Activities Questionnaire (HHS 697). Like all committee members, SGE subcommittee members must update their OGE 450 prior to each meeting.
- ! Subcommittees may or may not be composed totally of members of the chartered parent committee, but should contain at least one member of the parent committee. All committees have the flexibility of continuing to select subcommittee members solely from the membership of the parent committee.
- ! All subcommittee members may vote on subcommittee actions and count towards the quorum for a subcommittee meeting.
- ! Council members may continue to be selected by the executive secretary or chair to provide en bloc concurrence on behalf of the council. A report of en bloc subcommittee recommendations will continue to be presented to the full council.
- ! Non-member attendees (also referred to as ad hoc consultants) may be invited to subcommittee or parent committee meetings as reviewers, discussants, or presenters. However, they may not vote on subcommittee actions and may not count towards the committee's or subcommittee's quorum.

- ! Subcommittees should adhere to NIH's and HHS' balance in representation guidelines, as appropriate.
- ! Consistent with HHS policies regarding excessive or multiple committee memberships and OFACP Policy Announcement 2000-04, "Streamlining Waiver Requests for Advisory Committee Member Appointments," the same term limits of service apply to individuals appointed to subcommittees.
- ! An appointed subcommittee member may attend a closed session of the parent committee meeting as a reviewer, discussant, or presenter even if that individual is not a member of the parent committee.
- ! Notice of subcommittee meetings must be published in the Federal Register at least 15 days in advance of meetings, and minutes must be prepared and certified by the chair within 90 calendar days after the meeting.

This guidance does not supercede NIH's policy on working groups, "OFACP Policy Announcement 2000 - 01 (Revised): Working Groups at the NIH." This policy was cleared by HHS' OGC prior to release on June 3, 2003. Distinctions between NIH's subcommittees and working groups are highlighted on the following pages.

Questions related to these policies should be referred to the Office of Federal Advisory Committee Policy, OD, at (301) 496-2123.

/s/
LaVerne Stringfield

cc: Director, NIH
Deputy Director, NIH
Scientific Directors
OD Senior Staff
Executive Secretaries
EPMC Members
CMOC Members
RPC Members
OGC Ethics Division
Office of the General Counsel

**Subcommittee vs. Working Group
Comparison Chart**

| Policy | Subcommittee | Working Group |
|---|--|---|
| Required to publish Federal Register Notice to announce meetings | Yes | Not required, but recommended |
| Required to prepare minutes that must be certified by the chair within 90 calendar days after the meeting | Yes | Meeting Summary or Minutes |
| Must include members from the parent committee | At least one parent committee member recommended | May or may not include members from the parent committee, but recommended |
| Must include a Federal official | Yes | Yes |
| Duration | Indefinite | Temporary |
| Quorum | Subcommittee members, including those not appointed to the parent committee, count towards the quorum of the subcommittee. Non-member attendees (ad hoc consultants) may not count towards the quorum. | Not applicable |

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|-----------------------------|---|--|
| <p>Voting</p> | <p>Subcommittee members, including those not appointed to the parent committee, may vote. Non-members attendees (ad hoc consultants) may not vote.</p> | <p>All working group participants may make recommendations only.</p> |
| <p>Appointments</p> | <p>If not already a member of the parent committee, individual must be appointed as an SGE.</p> <p>Non-member attendees (ad hoc consultants) may attend as reviewers, discussants, or presenters.</p> | <p>Participants are not appointed as SGEs.</p> <p>Ad hoc consultants may attend as reviewers, discussants, or presenters.</p> |
| <p>Reporting</p> | <p>A subcommittee must report all findings and recommendations to the parent committee for deliberation.</p> | <p>A working group must report all findings and recommendations to the parent committee for deliberation.</p> |
| <p>Conflict of Interest</p> | <p>Financial Disclosure Report (OGE 450) must be completed and cleared before serving, and updated prior to each meeting.</p> | <p>Working group conflict of interest and confidentiality certification must be completed prior to each meeting. Any potential or actual conflicts are discussed with the Federal official and disclosed at the meeting.</p> |