PART II - BUDGET INFORMATION

FY ________

Section A - Detailed Budget by Categories

1. Salary and Wages	$
2. Fringe Benefits	
3. Travel	
4. Equipment	
5. Supplies	
6. Contractual Services	
7. Other (itemize)	
8. Total Direct Costs (lines 1 to 7 totaled)	
9. Total Indirect Costs	
10. Total Project Costs (lines 8 + 9)	

Section B - Cost Sharing

1. Project Income	$
2. Non-Federal Funds (state, local, etc.)	
3. In-Kind Contributions	

Section C - Estimate of Funding Needs

1. Second Fiscal Year	$
2. Third Fiscal Year	
3. Fourth Fiscal Year	

Section D - Estimated Unobligated Funds

1. Unobligated Federal Funds from Preceding Fiscal Year	$
2. Unobligated Non-Federal Funds from Preceding Fiscal Year	
3. Total Unobligated Funds From Preceding Fiscal Year (lines 2 + 3)	

[FR Doc. 87-27637 Filed 12-1-87; 8:45 am]

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federal register

Wednesday
December 2, 1987

Part V

Department of the Interior

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 784 and 817

Permanent Regulatory Program Performance Standards for Underground Coal Mining Activities; Hydrologic-Balance Protection Recharge Capacity; Final Rule

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 784 and 817

Permanent Regulatory Program Performance Standards for Underground Coal Mining Activities; Hydrologic-Balance Protection Recharge Capacity

AGENCY: Office of Surface Mining Reclamation and Enforcement, Interior.

ACTION: Final rule.

SUMMARY: The Office of Surface Mining Reclamation and Enforcement (OSMRE) is amending its regulations with respect to restoration of recharge capacity for underground mines. This final rule will modify paragraph 30 CFR 784.14(g) by removing the requirement for underground mine operators to handle earth materials and runoff in a manner which will restore approximate premining groundwater recharge capacity when reclaiming the mine face-up area at the conclusion of mining. The final rule will also remove a similar requirement from the performance standards at 30 CFR 817.41(b)(2).

EFFECTIVE DATE: January 4, 1988.

FOR FURTHER INFORMATION CONTACT: Raymond E. Aufmuth, Division of Technical Services, OSMRE, Department of the Interior, 1951 Constitution Avenue, NW., Washington, DC 20240; Telephone: (202) 343-7952.

SUPPLEMENTARY INFORMATION:

I. Background

The Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201 *et seq.*, (the Act) sets forth general regulatory requirements governing surface coal mining operations and the surface impacts of underground coal mining. OSMRE has by regulation implemented or clarified many of the requirements of the Act and set performance standards to be achieved by surface coal mining and underground mining activities. See 30 CFR Parts 816 and 817.

In proposed permanent program regulations at 43 FR 41780 (September 18, 1978), OSMRE explained why it did not believe it appropriate to propose a regulation concerning the restoration of recharge capacity for underground mines and solicited comments on this topic. A single comment was received which supported OSMRE's position. Consequently, no such requirement was promulgated in the final permanent program regulations. However, a different requirement to replace the water supply of an owner of real property affected as a result of underground mining activities was promulgated at 44 FR 15430 (March 13, 1979).

The Court in *In Re: Permanent Surface Mining Regulation Litigation* No. 79-1144 (D.D.C. May 1980) *(In Re: Permanent (I))*, held that there was no statutory jurisdiction for this water replacement requirement as applied to underground mining operations. This ruling was reaffirmed in the court's subsequent opinion in *In Re: Permanent Surface Mining Regulation Litigation (II)*, No. 79-1144, Slip Op. At 20-23 (D.D.C. July 15, 1985) *(In Re: Permanent (II))*.

On June 25, 1982, OSMRE proposed revised regulations on hydrology at 47 FR 27712. On September 26, 1983 (48 FR 43956) OSMRE published final rules on hydrologic-balance protection, taking into consideration comments received on the proposed rule. The rule at 30 CFR 784.14(g), which was applicable to underground mine operators, required that a permit application include a hydrologic reclamation plan indicating how the relevant requirements of 30 CFR Part 817, including §§ 817.41 to 817.43, would be met. The rule further required the plan, among other provisions, to include the measures to be taken to restore approximate premining recharge capacity.

Similarly, the performance standards for underground mining activities in 30 CFR 817.41(b)(2) provided that ground-waterquantity had to be protected by handling earth materials and runoff in a manner that would restore approximate premining recharge capacity of the reclaimed area as a whole, excluding coal mine waste disposal areas and fills, so as to allow the movement of water to the ground-water system.

In *In Re: Permanent (II)*, Slip Op. at 3-4, the requirement to restore approximate premining recharge capacity was challenged on the basis that it was inconsistent with the Act and violated the District Court's May 1980 ruling in *In Re: Permanent (I)* that underground mine operators are not required to replace water supplies.

In response to this challenge, the Secretary in a brief filed December 21, 1984, indicated that he would suspend 30 CFR 817.41(b)(2) pending a new rulemaking that would develop a more complete administrative record concerning the complex legal and policy issues associated with the requirement for underground mines to restore hydrologic recharge capacity. On February 21, 1985, OSMRE published a notice suspending § 817.41(b)(2) in its entirety. (50 FR 7274).

OSMRE published a proposed rule on December 11, 1986 (51 FR 44742) concerning the restoration of recharge capacity for underground mines. The proposed rule was available for public comment until February 19, 1987. In the notice of proposed rulemaking, two options were proposed: Option 1 consisted of retaining 30 CFR 784.14(g) and 817.41(b)(2) in their entirety as published on September 26, 1983 (48 FR 43956); Option 2 consisted of modifying the permitting requirement at 30 CFR 784.14(g) to remove the phrase "restore approximate premining recharge capacity" and of removing 30 CFR 817.41(b)(2) from the regulations entirely.

In the notice of proposed rulemaking, OSMRE provided an opportunity for the public to request hearings on the issue. No hearings were requested, and none were held. Twelve comment letters were received prior to the end of the comment period—two from State regulatory authorities, two from environmental organizations and eight from the coal mining industry. These comments have been analyzed and the results are summarized in the following section.

II. Rules Adopted and Responses to Public Comments

1. PART 784: UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN.

Section 784.14 Hydrologic Information

This section contains the permitting requirements for sampling and analysis; baseline information on ground and surface water; baseline cumulative impact area information; modeling; probable hydrologic consequences determination; cumulative hydrologic impact assessment; hydrologic reclamation; and ground and surface water monitoring plans. Specifically, paragraph 784.14(g) requires an application to include a hydrologic reclamation plan. The existing regulations at 784.14(g) require that the hydrologic reclamation plan include the measures to be taken to "restore approximate premining recharge capacity." In this final rule, OSMRE is implementing Option 2 of the proposed rule by removing the phrase "restore approximate premining recharge capacity" from 30 CFR 784.14(g). The reasons for this change are given in the following discussion of a corresponding change in 30 CFR 817.41.

2. PART 817: PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES.

Section 817.41 Hydrologic Balance Protection

This section contains performance standards requiring underground coal mining and reclamation activities to be conducted to minimize disturbance to the hydrologic balance within the permit and adjacent areas, to prevent material damage outside the permit area, and to support approved postmining land uses.

The suspended paragraph 817.41(b)(2) provided groundwater quantity protection by requiring the handling of earth materials and runoff in a manner that would restore the approximate premining recharge capacity of the reclaimed area. In this final rule OSMRE is removing § 817.41(b)(2) from the regulations.

The proposed rule asked for public comment on any legal and technical issues that might be pertinent to the restoration of approximate premining recharge capacity at underground mines. Comments were received on both types of issues.

After reviewing these comments, as well as the Act, its legislative history, and the remainder of the administrative record for this rule, OSMRE has concluded that nothing in the Act requires OSMRE to promulgate a rule requiring the restoration of approximate premining recharge capacity at underground mines. Moreover, potential impacts on hydrologic recharge capacity deriving from surface operations incidental to underground mining are insignificant. Therefore, OSMRE has concluded that a rule requiring the restoration of premining recharge capacity at underground mines is neither needed nor required. A detailed discussion of the reasons for these conclusions follows.

General performance standards for surface coal mining and reclamation operations appear in section 515(b) of the Act, 30 U.S.C. 1265(b). Corresponding performance standards governing the surface effects of underground coal mining operations appear in section 516(b) of the Act, 30 U.S.C. 1266(b).

The performance standards for surface operations include in section 515(b)(10)(D), "restoring recharge capacity of the mined area to approximate premining conditions * * *." While the corresponding performance standards for the surface effects of underground operations in section 516(b)(9) generally require the operator to "minimize the disturbances * * * to the quantity of water in surface ground water systems" they include no such specific requirement concerning the restoration of premining recharge capacity.

Section 201(c)(2) of the Act, 30 U.S.C. 1211(c)(2), requires OSMRE to "publish and promulgate such rules and regulations as may be necessary to carry out the purposes and provisions of this Act * * *." In the absence of a specific provision in section 516(b)(9), a rule on the restoration of premining recharge capacity at underground mines is required under section 201(c)(2) only if it is necessary to carry out the purposes of the Act. Based on technical considerations, OSMRE has concluded that such a rule is not necessary.

OSMRE received comments both supporting and challenging its authority to promulgate a rule requiring the restoration of recharge capacity at underground mines. The same provisions in the Act and its legislative history were used to support comments both *pro* and *con*.

Seven commenters stated that section 516(b)(9) of the Act does not authorize a requirement for operators of underground mines to restore recharge capacity. These commenters note that the language of section 516(b)(9)(A) (i) through (ii) and section 516(b)(9)(B) is virtually identical to that of section 515(b)(10)(A) (i) through (iii) and section 515(b)(10)(B), while the additional requirements in section 515(b)(10) (C) through (G), which includes the groundwater recharge capacity requirement, do not appear in section 516. OSMRE believes that the differences pointed out by the commenters support the conclusion that the office is not obligated by the Act to address premining groundwater recharge capacity at underground mines.

Five commenters found additional support for this conclusion in the legislative history of section 516 concerning the surface impacts of underground mines. House Report No. 95–218 discusses concerns with acid and toxic discharges from underground mines. H. Rep. No. 95–218, 95th Cong., 1st Sess. 127 (1977). This section of the report concludes by stating, "The standards included in the bill pertaining to minimizing the disturbances to the prevailing hydrologic balance both during and after coal mining operations, section 516(b)(9), are intended to meet the problem of continuing pollutional discharges after mining has ceased." There is no mention of "recharge capacity" in this reference to section 516(b)(9).

In contrast, two other commenters stated that House Report No. 95–218 supports a recharge capacity requirement for underground mines. They referenced a passage which discusses the short- and long-term disruptive impacts of mining on the ground water supply, and states that "Restoring recharge capacity does not mean restoring the aquifer, but rather that the capability of an area to recharge an aquifer be restored." *Id.* at 116. This passage continues by stating that those mining operations which "singularly or in combination would * * * seriously affect large aquifers * * * should be predicated on the ability of the operator to replace to the extent possible the groundwater storage and recharge capability of the site * * *." OSMRE believes that this referenced section of the report is applicable only to those operations that *seriously affect large aquifers* and that, ordinarily, such operations would not include the surface operations and surface impacts incident to underground mines.

Five commenters stated that section 516 applies specifically to surface impacts of underground mines, and that under section 516(b)(10), section 515 only applies with respect to surface impacts not specified in subsection 516(b). They contended that effects on recharge capacity are not surface impacts, and therefore a requirement for an underground mine to restore recharge capacity cannot be supported by either section 516(b)(10) or 515(b)(10). Another commenter stated that the language in section 516(b)(10) makes it apparent that the section 515(b) standards, specifically section 515(b)(10)(E), were intended to apply to underground mining operations, with such modifications as are necessary to accommodate the distinct difference between surface and underground mining.

Five commenters advanced the argument that principles of statutory construction dictate that specific provisions control when both general and specific provisions exist in the same statute. *United States* v. *Cihal*, 336 F. Supp. 261 (1972). On this basis, these commenters stated that since section 516(b)(9) imposes specific hydrologic requirements, not including a recharge capacity provision, then section 516(b)(7), which addresses general issues, cannot be interpreted as applying to hydrologic issues. Another commenter stated that remedial statutes should be construed broadly to effectuate congressional intent, with all ambiguities resolved in favor of coverage.

Four commenters discussed the requirement in section 510(b)(3) that the regulatory authority conduct an assessment of the probable cumulative impact of all mining on the hydrologic balance, and that the proposed operation be designed to prevent material damage to the hydrologic balance outside the permit area. One commenter concluded that since this section deals with permit approval or denial it does not support a performance standard concerning recharge capacity. The commenter pointed out that the language of section 510(b)(3) has been repeated verbatim in the permitting regulations at 30 CFR 784.14(g), as has the language from section 516(b)(9). Another commenter believed that section 510(b)(3) provides the authority to go "beyond minimization of impacts under section 516 and to adopt further regulations * * *."

One commenter stated that section 510(b)(3) was "essential in determining the cumulative impact on the groundwater recharge capacity for any affected aquifer". This section is a general requirement that relates to approval or denial of a permit and identifies written findings to be made by the regulatory authority. It does not stipulate specific recharge capacity requirements.

After consideration of the technical differences between surface and underground mining (described below), OSMRE believes that a rule requiring the restoration of premining recharge capacity at underground mines is not needed. Thus, resolving these opposing views of the statute is not required for OSMRE's disposition of this issue.

Technical concerns were also addressed by the comments. Eight commenters addressed the extremely small surface areas disturbed to facilitate underground mining operations when compared to the vast surface areas of recharge generally available to an aquifer. These commenters pointed out that in many instances the overburden is impacted only to a shallow depth, and does not intercept the coal seam. Furthermore, face-up areas for drift mines are generally located along the slopes of hills, which do not provide significant catchment areas for infiltration of precipitation. Surface facility areas associated with underground mines exist for the life of the mine, which is generally measured in decades. Consequently, even if recharge capacity is minimally impacted, it will re-adjust naturally during the life of the mine. Any change which may occur will be so small as to be unnoticeable because of the small size of the recharge area disturbed relative to the total recharge area for the aquifer and the shallow depth of disturbance. OSMRE agrees with these comments, and has concluded that the technical differences between the surface effects of surface and underground mining operations on recharge capacity are of sufficient magnitude to justify the removal of § 817.41(b)(2) and the corresponding reference in § 784.14(g).

The limited effect of underground operations on surface recharge capacity has been recognized from the outset of regulation under the Act. Thus, the 1979 permanent program rules did not include a provision requiring the restoration of premining recharge capacity at underground mines. While OSMRE had considered proposing such a rule, it concluded that

> Since the structural integrity of water bearing formations should not be significantly affected by underground mining, the recharge capacity of the formations should be maintained without any special precautions.

43 FR 41780 (Sept. 18, 1978). Upon further analysis, OSMRE agrees with this earlier conclusion.

As noted in the legislative history of the Act:

> Recharge capacity refers to the ability of an area to replenish its ground water content from precipitation and infiltration from surrounding lands. Restoring recharge capacity *does not mean restoring the aquifer*, but rather that the capability of an area to recharge an aquifer be restored. Spoil handling and placement and grading operations should be designed to enhance and [sic] recharge potential of the site. It is anticipated that in those mining operations which singularly or in combination would mine [sic] *seriously affect large aquifers*, mining should be predicated on the ability of the operator to replace to the extent possible the ground-water storage and recharge capability of the site by *selective spoil material segregation and handling*.

H.R. Rep. No. 95–218, 95th Cong., 1st Sess. 116 (1977) (emphasis added).

As this legislative history indicates, what Congress intended by use of the phrase "restoring recharge capacity" in § 515(b)(10)(D) did not entail restoring the aquifer, but only the handling of spoil materials and regrading of the surface, which are relatively insignificant activities at underground mines. Moreover, the Congress was concerned primarily with operations which would seriously affect large aquifers. Even at underground mines with surface facilities spread over a relatively large area, such facilities would not seriously affect large aquifers and neither spoil handling techniques nor regrading are likely to have any significant effect on recharge capacity.

One commenter suggested that the requirement to restore recharge capacity, as applicable in the East, may actually be undesirable. The commenter pointed out that steep slopes and shallow depth to bedrock results in recharge to shallow groundwater systems in weathered zones.

The commenter also pointed out that restoring minesites to premining recharge capacity would involve compaction of impermeable materials back to "rock-like porosity," which would result in precipitation runoff to the surface water system rather than to the aquifer. This comment is not pertinent to this rulemaking because the rule does not require compaction of spoil materials to "rock-like porosity."

One commenter pointed out that in addition to all the other differences between section 515(b)(10) and section 516(b)(9), the provision in section 516 eliminates the reference to "quality" that is found in section 515. The commenter believes that this distinction, in addition to the others enumerated above, provides clear indication that Congress intended that the underground coal mine operator not be subject to the same requirements as the surface coal mine operator. OSMRE does not believe that omission of this term in itself justifies not addressing the recharge issue for underground mining operations. However, the technical differences between surface and underground mining as discussed above, provide the basis for removing this requirement.

One commenter stated that the Congress specifically intended that all mining activities be conducted in a manner that minimizes disruption of the hydrologic regime on-site and off-site. This commenter stated that restoring approximate premining recharge capacity is one of the measures necessary to fulfill the intent of the Congress. OSMRE disagrees with this conclusion with respect to underground mining operations because this measure is not specifically identified by Congress in the Act. The conclusion also fails to recognize the regulatory consideration which the Act requires be given to the distinct differences between underground and surface mining operations. These aspects were discussed previously in this preamble.

This same commenter stated that technical literature makes it clear that underground mining in aquifer recharge zones in the Appalachian coal region may have a significant impact on the recharge capabilities of the area. The commenter, however, did not provide any technical references in support of the comment and OSMRE knows of no literature which addresses the issue of the effect of underground mine face-up areas on the recharge capacity of an area. OSMRE does not disagree with the comment. Considering the short time that these requirements have been in effect it is unlikely that there have been studies conducted to evaluate this situation properly. The removal of a coal seam may indeed have an impact on aquifer recharge; however, the net contribution to this impact from the surface facilities and face-up areas of underground mines is insignificant. When evaluated with respect to the small areas impacted by surface activities of underground mines, and the long duration of these activities, the impact to aquifer recharge zones is minimal.

One commenter addressed the regulatory history of the recharge capacity issue, citing several passages from the proposed and final permanent program preamble, and from the 1983 rulemaking. The commenter concluded that surface impacts of underground activities on the recharge capability of an area are indistinguishable from the surface effects of surface mining activities. OSMRE disagrees. There is no technical basis for equating the face-up area of an underground mine designed to provide mine access with either the open pit of an area mine or a contour mining operation that is designed to mine as far into the hillside and remove as much overburden as is economically practicable. The area and contour surface mines have a far greater impact due to their larger size and depth of overburden removal.

The same commenter also noted that a large underground mine face-up area may have a far greater impact on recharge than many small contour seam or auger stripping operations. OSMRE acknowledges that, given a specific set of circumstances, this may be true. However, as pointed out in discussions above, the recharge impact, which would be minimal, would mitigate itself over the life of the underground mine. The possibility of the situation the commenter describes actually occurring to an extent which would "seriously affect large aquifers" (H.R. Report 95–218, supra, at 116 (1977)) is very unlikely.

The commenter provided several technical references on the effects of stress-relief fracturing on groundwater as evidence that underground mine face-up areas significantly impact groundwater recharge. Several quotations from these references were cited with respect to the impacts that may occur when a certain type of stress-relief fracturing (onion-skin) takes place. The commenter states that these impacts will be accentuated by an underground face-up area. OSMRE has reviewed these documents and does not believe that they are relevant to the issue of aquifer recharge capacity at underground mine face-up areas. The effects identified in the references are near-surface impacts and may actually be eliminated during mining. There are major differences between the magnitude of the impacts resulting from an underground face-up area which occurs over a very short lateral area, and a contour mine which may wrap around an entire hillside. Contour mines could effectively cut off surface water infiltration to large portions of an aquifer as a result of impacting the stress-relief fracturing system whereas the small area of an underground mine face-up would have only limited local impact.

III. Procedural Matters

Effect in Federal Program States and on Indian Lands

The final rule applies through cross-referencing in those States with Federal programs. This includes Georgia, Idaho, Massachusetts, Michigan, North Carolina, Oregon, Rhode Island, South Dakota, Tennessee, and Washington. The Federal programs for these States appear at 30 CFR 910, 912, 921, 922, 933, 937, 939, 941, 942, and 947 respectively. The final rule also applies through cross-referencing to Indian lands under the Federal program for Indian lands as provided in 30 CFR 750.

Federal Paperwork Reduction Act

The information collection requirements in this rule have been approved by the Office of Management and Budget under 44 U.S.C. 3507 and assigned clearance number 1029–0039.

Executive Order 12291

The Department of the Interior has examined the final rule according to the criteria of Executive Order 12291 (February 17, 1981) and has determined that it is not a major rule and does not require a regulatory impact analysis. This determination is based on the finding that the regulatory revisions finalized by this rule will not impose any costs on the coal industry since the rule is removing a permitting requirement and a related performance standard. Therefore, the rule will not add to the cost of operating a mine in compliance with an approved regulatory program.

Regulatory Flexibility Act

The DOI has determined, pursuant to the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, that the final rule will not have a significant economic impact on a substantial number of small entities for the same reasons discussed in the preceding paragraph.

National Environmental Policy Act

OSMRE has prepared an environmental assessment (EA) of the impacts of this rule on the human environment. This EA is on file in the OSMRE Administrative Record at the address listed in the "ADDRESSES" section of this preamble. Based upon this EA, OSMRE has made a Finding of No Significant Impact (FONSI) in accordance with OSMRE procedures under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C).

Author

The principal author of this rule is Raymond E. Aufmuth, Division of Technical Services, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW., Washington, DC 20240, Telephone: 202–343–7952.

List of Subjects

30 CFR Part 784

Reporting and recordkeeping requirements, Underground mining, Surface mining.

30 CFR Part 817

Environmental protection, Reporting and recordkeeping requirements, Underground mining.

For the reasons set forth in this preamble, 30 CFR Parts 784 and 817 are amended as set forth below.

J. Steven Griles,

Assistant Secretary for Land and Minerals Management.

Dated: November 3, 1987.

PART 784—UNDERGROUND MINING PERMIT APPLICATIONS—MINIMUM REQUIREMENTS FOR RECLAMATION AND OPERATION PLAN

1. The authority citation for Part 784 is revised to read as follows:

Authority: Pub. L. 95–87, 91 Stat. 445 (30 U.S.C. 1201 *et seq.*), sec. 115, Pub. L. 98–146, 97 Stat. 938 (30 U.S.C. 1257), and Pub. L. 100–34, unless otherwise noted.

2. Paragraph (g) of § 784.14 is revised to read as follows:

§ 784.14 Hydrologic information.

* * * * *

(g) *Hydrologic reclamation plan.* The application shall include a plan, with maps and descriptions, indicating how the relevant requirements of Part 817 of this chapter, including §§ 817.41 to

817.43, will be met. The plan shall be specific to the local hydrologic conditions. It shall contain the steps to be taken during mining and reclamation through bond release to minimize disturbance to the hydrologic balance within the permit and adjacent areas; to prevent material damage outside the permit area; and to meet applicable Federal and State water quality laws and regulations. The plan shall include the measures to be taken to: avoid acid or toxic drainage; prevent, to the extent possible using the best technology currently available, additional contributions of suspended solids to streamflow; provide water treatment facilities when needed; and control drainage. The plan shall specifically address any potential adverse hydrologic consequences identified in the PHC determination prepared under paragraph (e) of this section and shall include preventive and remedial measures.

* * * * *

PART 817—PERMANENT PROGRAM PERFORMANCE STANDARDS—UNDERGROUND MINING ACTIVITIES

3. The authority citation for Part 817 is revised to read as follows:

Authority: Pub. L. 95–87, 91 Stat. 445 (30 U.S.C. 1201 *et seq.*), sec. 115, Pub. L. 98–146, 97 Stat. 938 (30 U.S.C. 1257), and Pub. L. 100–34, unless otherwise noted.

§ 817.41 [Amended]

4. In § 817.41, paragraph (b)(2) is removed.

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federal register

Wednesday
December 2, 1987

Part VI

General Services Administration

41 CFR Part 101-6

Federal Advisory Committee Management; Final Rule

GENERAL SERVICES ADMINISTRATION

41 CFR Part 101-6

[FPMR Amendment A-40]

Federal Advisory Committee Management

AGENCY: Office of Administration, GSA.

ACTION: Final rule.

SUMMARY: This final rule provides administrative and interpretive guidelines and management controls for Federal agencies concerning the implementation of the Federal Advisory Committee Act, as amended (5 U.S.C., App.) (hereinafter "the Act"). In a previous issue of the **Federal Register**, GSA published an interim final rule on the management of Federal advisory committees and requested comments (48 FR 19324; April 28, 1983). Additional comments were requested through an advance notice of proposed rulemaking published in the **Federal Register** on February 13, 1987 (52 FR 4631). A new proposed rule, removing suggested limitations on the size of Federal advisory committees, eliminating requirements for the provision of updated committee membership data on a quarterly basis and restrictions on the compensation of committee members, and reflecting other actions to streamline compliance with the Act, was published in the **Federal Register** on May 19, 1987 (52 FR 18774), with a 90-day comment period ending on August 17. All comments received were considered in formulating this final rule which is intended to improve the management and use of Federal advisory committees in the Executive Branch of the Federal Government.

EFFECTIVE DATE: January 4, 1988.

ADDRESSES: General Services Administration, Committee Management Secretariat (CTM), Washington, DC 20405.

Copies of all comments received are available for public inspection in Room 7030 of the General Services Building, 18th and F Streets NW., Washington, DC.

FOR FURTHER INFORMATION CONTACT: James L. Dean, Director, Committee Management Secretariat, Office of Management Services, Office of Administration, General Services Administration, Washington, DC 20405 (202) 523-1343.

SUPPLEMENTARY INFORMATION:

Background

GSA's authority for administering the Act is contained in section 7 of the Act and Executive Order 12024 (42 FR 61445, 3 CFR, 1977 Comp., p. 158). Under Executive Order 12024, the President delegated to the Administrator of General Services all of the functions vested in the President by the Act, as amended, except that the Annual Report to the Congress required by Section 6(c) shall be prepared by the Administrator for the President's consideration and transmittal to the Congress.

Discussion of Comments

As stated above, GSA issued a proposed rule on the management of Federal advisory committees in the **Federal Register** and invited comments. Nineteen commenters responded. Seven commenters had no substantive recommendations and were fully supportive of the proposed rule. Twelve others offered suggestions for improving numerous sections and the disposition of these recommendations is addressed as follows:

Clarify the Distinction Between Operational as Opposed to Advisory Committees

Two commenters suggested that further guidance in the final rule was necessary to assist agencies in interpreting what constitutes primarily an operational committee as opposed to one which performs only advisory functions, in order to determine coverage under the Act. Accordingly, GSA has added language to § 101-6.1004(g) in the final rule which more fully describes what, in general, constitutes operational functions.

While the legislative history of the Act contains the concept for the exclusion of operational committees, there is no precise legal definition of operational committee in either the Act or its legislative history. GSA believes that operational functions to be performed by an advisory committee must be so authorized by law, since the making or implementation of Government decisions is normally reserved to Federal officials as opposed to advisory committees. Additionally, sections 2(b)(6) and 9(b) of the Act provide that, unless specifically provided by statute or Presidential directive, advisory committees may not make determinations or express policy in matters under their consideration. Given the additional language in this final rule, GSA believes that it will be easier for agencies to identify committees which perform primarily operational functions.

Provide for Coverage Under the Act When Certain Groups Provide Consensus or Recurrent Advice

One commenter stated that the language in § 101-6.1004 (i) and (j) of the proposed rule was too tentative to specifically provide that acceptance of consensus advice or advice on a recurring basis from certain groups were determinants for coverage under the Act. GSA has accepted these suggestions and has strengthened the wording of these sections in the final rule.

Agencies are, in effect, cautioned that the Act would apply when an agency accepts the deliberations of a group as a source of *consensus* advice, when heretofore the agency had been obtaining the advice of attendees on an *individual* basis only. Also, when an agency *recurrently* uses a group at the group's request, as a source of advice on a preferential basis, exclusion of coverage under the Act may become questionable even if the group continues only to express its own views without further solicitations from Federal officials.

Strengthen the Provision for Excluding Coverage of So-Called Fact-Finding Subgroups

Several commenters were of the opinion that so-called fact-finding subgroups should continue to be excluded from coverage under the Act. However, it was their general consensus that § 101-6.1004(k) of the proposed rule was less than clear in including both the members of an advisory committee and any of its subcommittee members in this exclusion. One commenter felt strongly that this exclusion should apply to all members of an advisory committee and its subcommittees, whether or not the subcommittee members are members of the parent committee. GSA agrees with this recommendation since it parallels the language and intent expressed in § 101-6.1007(b) (3) and (4) which clarify certain requirements applicable to subcommittees. GSA has reworded the definition of "Advisory Committee" in § 101.6.1003 of the final rule to follow more precisely the language in section 3(2) of the Act, and has been more consistent in the use of the term "subcommittee" in § 101-6.1004(k) and § 101-6.1007(b)(3) of the final rule.

Another commenter felt that the language in § 101-6.1004(k) was not strong enough to preclude fact-finding subgroups from preparing what ultimately becomes the advice and recommendations of the chartered advisory committee, as opposed to simply gathering information and analyzing facts for the committee. GSA has modified the language in this provision to clarify that the results of such fact-finding activities are to be subject to the deliberation of a chartered advisory committee, or a subcommittee when subsequently conducting a meeting under the Act.

Provide Additional Guidance on the Requirements Applicable to Subcommittees

One commenter requested that the final rule provide additional guidance on the applicability of various requirements of the Act to subcommittees. Since the definition of "advisory committee" in section 3(2) of the Act specifically includes "* * * any subcommittee or other subgroup thereof * * *", GSA believes all requirements of advisory committees in the Act also apply to subcommittees. Furthermore, the Act itself contains no provisions for subcommittees which differ from those applicable to a full or parent committee. Absent more specific language in the Act, additional guidance by GSA which might serve to differentiate any requirements of subcommittees from those of advisory committees would be inconsistent with the Act.

Exclude From Coverage Under the Act Groups Convened by Agencies on an Ad Hoc Basis

One commenter recommended that the final rule contain an exclusion from coverage under the Act for so-called *ad hoc* groups lacking formal organization, structure, or continuing existence; convened by an agency to obtain views on particular matters of immediate concern. GSA is of the opinion that such an exclusion is not appropriate since the Act itself neither defines nor specifically excludes such groups. In fact, section 6(c) of the Act, providing for the President's annual report to the Congress, requires a statement for each advisory committee, "* * * of whether it is an *ad hoc* or continuing body * * *". Accordingly, GSA has not accepted the recommendation to exclude *ad hoc* groups since GSA believes that the language of section 6(c) of the Act evidences the intent of the Congress that a group is not to be excluded from coverage merely because it is convened on an *ad hoc*, or temporary basis.

Provide That Agencies May Exercise Policy Decisions in Issuing Exclusions for One-Time Meetings

In a comment directed toward GSA's position stated in the discussion of prior comments in the proposed rule (see 52 FR 18774, **SUPPLEMENTARY INFORMATION:**), a commenter suggested that the final rule should not preclude agencies from issuing an exclusion for one-time meetings. This commenter felt that GSA's opinion, that such an exclusion in the rule was not appropriate in view of the limited litigation history, should not bar agencies from issuing such exclusions. In fact, it was the opinion of this commenter that the absence of litigation history was not sufficient reason to limit management discretion.

GSA continues to believe that a one-time meeting exclusion in the final rule would be inconsistent with the Act, and does not intend to provide either a direct exclusion in § 101-6.1004 or provide that such a decision may be left to an agency, thereby implying GSA's support for such exclusions. Accordingly, GSA reiterates its opinion that in the absence of any judicial precedent to the contrary, meetings or groups which take place or meet only once should not be excluded from the Act's coverage solely on this basis.

Eliminate the Agency Requirement to Assess Duplication of Advisory Committees on a Governmentwide Basis

Two commenters pointed out the impracticability of requiring an agency to assess duplication of effort of already existing committees on a Governmentwide basis as opposed to an individual agency basis. Both commenters further asserted that this Governmentwide role could be performed by GSA during its own review process subsequent to the receipt of the agency's proposal in accordance with § 101-6.1007(b) of the rule.

Since GSA is responsible for reviewing and maintaining data on all advisory committees in every agency pursuant to several provisions of the Act, GSA agrees that it can effectively perform this function. GSA can also provide agencies, on request, information on other agency committees relative to potential duplication of effort issues.

GSA has rewritten the language in § 101-6.1007 (a) and (b)(2)(ii) of the final rule to reflect this concept by providing that an agency only consider the functions of a proposed committee for duplication of existing committees in the *same* agency.

Include the Agency's Plan for Balanced Membership in Federal Register Notices and Charters

One commenter suggested that an agency's plan to attain balanced membership for a proposed advisory committee, to be submitted in conjunction with the review required by § 101-6.1007(b) of the proposed rule, should be included in both the **Federal Register** notice of establishment and in the filed charter.

GSA has not adopted this suggestion for two reasons. First, the agency letter proposing the establishment of an advisory committee under general agency authority already contains this information, as specified by § 101-6.1007(b)(2)(iii) of the rule, and this letter would be a public record following the establishment of the advisory committee. Second, inclusion of this information in the **Federal Register** notice of establishment and the filed charter is not specifically required under sections 9 (a)(2) and (c) of the Act. For purposes of this comment, GSA has not altered § 101-6.1007(b)(1) or § 101-6.1015(a)(1) of the final rule.

Provide Additional Guidance on Balanced Representation and Selection of Members

One commenter was concerned that the proposed rule did not contain sufficient guidance on balanced representation and the selection of members, and suggested that the final rule provide additional instructions for agencies to follow in these areas. GSA recognizes that the guidelines in the proposed rule are limited to the language of the Act. However, GSA believes that the provisions of section 5(c) of the Act are broad enough to allow agency discretion in determining advisory committee representation and membership relative to applicable statutes, Executive Orders, and the needs of the agency responsible for the committee. Accordingly, GSA will retain the proposed guidelines in the final rule based on the language of the Act.

Provide Revised Recordkeeping Requirements

Two commenters, directly or indirectly, expressed concern over the recordkeeping requirements contained in the proposed rule. One commenter observed that it was not possible for the Committee Management Officer (CMO) to ensure compliance with sections 10(b), 12(a) and 13 of the Act, as required by § 101-6.1017. Section 10(b) of the Act requires that the records of an advisory committee *shall be* available at a single location at the advisory committee or the agency to which it reports during the committee's existence. This commenter suggested that GSA relax the requirement of § 101-6.1017.

Another commenter, taking a different view, complained of the haphazard approach by agencies to the public availability and retention of advisory committee records. This commenter recommended that the regulations be strengthened in these aspects.

For the following reasons, GSA has determined not to adopt the specific suggestions of either commenter. First, section 8(b)(2) of the Act provides that the CMO shall "assemble and maintain the reports, records, and other papers of any such committee during its existence." When sections 8(b)(2) and 10(b) are read together, it is clear that the records of an advisory committee are to be available at a single location and it is the CMO who is responsible for ensuring that this is accomplished. GSA has therefore decided against relaxing the requirements of § 101–6.1017 in the final rule.

The commenter who expressed concern over the haphazard approach to recordkeeping suggested that the final rule should: (1) Require agencies to keep committee records available for a certain period of time after a committee has terminated, and (2) address the perceived unavailability of the deliberative process privilege under the fifth exemption of the Freedom of Information Act (FOIA) to advisory committee records. For the following reasons, GSA has not adopted these comments.

First, pursuant to the National Archives and Records Administration Act of 1984, as amended, Pub. L. 98–497, the Archivist of the United States is responsible for records management in the Federal Government, including the issuance of regulations and guidance for records retention and disposition, as well as the process for identifying records appropriate for transfer to the permanent Archives of the United States. Since the Federal Advisory Committee Act is silent on records disposition for advisory committees, we see no reason or basis for GSA to alter normal Governmentwide procedures in this area which are the responsibility of the Archivist of the United States. Second, the commenter suggested that the Government's settlement of the law suit involving records of the Attorney General's Commission on Pornography was a concession that the deliberative process privilege under the fifth exemption of FOIA does not apply to advisory committees. Since cases may be settled for a variety of reasons which do not involve a decision on the merits, GSA does not believe that the mere settlement of a matter in litigation is dispositive of the legal issues raised in the litigation. Accordingly, GSA has determined not to adopt this suggestion.

Provide Guidance to Agencies Concerning the Applicability of the Anti-Lobbying Statute and Hatch Act to Advisory Committee Members

With respect to § 101–6.1033 of the proposed rule, one commenter stated that unless provided by statute, agencies should not compensate advisory committee members if they provide policy advice on proposals for legislation because this compensation would violate the anti-lobbying statute. (See 18 U.S.C. 1913). The same commenter also stated that GSA should direct agencies to ensure that any members of an advisory committee who are subject to the Hatch Act (5 U.S.C. 7321–7328) are aware of their obligations under that law.

For the following reasons, GSA has adopted neither suggestion. First, GSA does not believe that the traditional activities of an advisory committee fall within the scope of the activities which 18 U.S.C. 1913 was designed to protect against. Second, the Federal Advisory Committee Act itself does not reference the Hatch Act, and there is already a body of regulations on political activities by Federal employees which has been issued by the Office of Personnel Management, 5 CFR Part 733. Also, the Special Counsel of the Merit Systems Protection Board, who has responsibilities for investigation and administrative prosecution of alleged Hatch Act violations, issues advisory opinions on Hatch Act questions. GSA sees no need to issue regulations in this area when there are already regulations in place and an administrative mechanism available through agencies with greater responsibilities in this area than GSA.

Clarify the Procedures for Transmitting Follow-up Reports on Presidential Advisory Committee Recommendations

One commenter requested clarification in § 101–6.1035(a) of the proposed rule on the procedures required for transmittal of follow-up reports to the Congress on the disposition of Presidential advisory committee recommendations, as required by section 6(b) of the Act. GSA has decided to retain the proposed language in the final rule without further modification at this time. GSA agrees that there has been some confusion as to whether the agency responsible for supporting the Presidential advisory committee, or GSA, should transmit the report. GSA intends to propose further guidance in a future revision to this final rule following more consultation with the affected agencies.

Procedural and Administrative Comments

The final rule incorporates numerous technical and procedural recommendations made by several commenters, particularly in the following sections:

Section	Modification
101–6.1007(b)(2)	Requires proposed charter with agency letter.
101–6.1007(d)(1)	Provides that date of charter filing constitutes date of establishment.
101–6.1013 (a)(3) and (c)(3).	Eliminates proposed requirement for providing copies of filing letters to GSA by adding provision for filing dates on charters; makes related change to copies of Presidential advisory committee charters furnished to the Congress.
101–6.1015 (a)(2) and (b)(1).	Provides for timely notices in the **Federal Register** on a calendar-day basis.
101–6.1017 (a) and (d).	Adds requirements that membership lists and closed meeting determinations be included in records.
101–6.1025(b)	Adds requirement from section 10(c) of the Act on the certification to the accuracy of minutes of meetings.
101–6.1027(b)	Adds requirement to notify Secretariat when an agency head terminates a committee.
101–6.1035(d)	Provides for location for filing copies of reports with the Library of Congress.

Other sections were also amended or revised for clarity of intent, or corrected for errors in content and format.

These sections include:

Section	Modification
101–6.1002(d)	Changes citation of "the Act" to the Government in the Sunshine Act.
101–6.1007(b)(2)(iii).	Clarifies provision for considering the selection of members with respect to attaining balance.
101–6.1009	Corrects title of section to preclude inadvertent exclusion of committees directed or authorized by law; or established by the President.
101–6.1013(b)	Corrects heading of section to preclude inadvertent exclusion of committees authorized by law.
101–6.1015(a)(1)	Clarifies provision that a **Federal Register** notice of establishment is not required for committees specifically directed by law or established by the President.
101–6.1017	Eliminates sentence concerning files to preclude misinterpretation.
101–6.1019	Clarifies the status and role of the Designated Federal Officer.
101–6.1027(a)(3)	Specifies the means by which the President or an agency head terminates a committee.
101–6.1029(a)(1)	Clarifies the process involving the rechartering of committees specifically directed by law whose duration extends beyond 2 years.
101–6.1031(a)	Corrects heading of section to encompass committees authorized by law; specifies that the agency head is responsible for minor charter amendments.
101–6.1031(b)	Specifies that the agency head retains final authority for amending certain charters.

Additional Instructions

Pursuant to section 7(d) of the Act, the guidelines contained in this final rule with respect to uniform fair rates of pay for comparable services for members, staffs and consultants of advisory committees have been established after consultation by the Administrator with the Director, Office of Personnel Management.

Executive Order 12291

GSA has determined that this final rule is not a major rule for purposes of Executive Order 12291 of February 17, 1981, because it will not result in an annual effect on the economy of $100 million or more, will not cause a major increase in costs to consumers or others, and will not have significant adverse effects. GSA has based all administrative decisions on this final rule on adequate information concerning the need for and consequences of this final rule. GSA has also determined that the potential benefits to society from this final rule far outweigh the potential costs, has maximized the net benefits, and has chosen the alternative involving the least net cost to society.

Regulatory Flexibility Act

These regulations are not subject to the regulatory flexibility analysis or other requirements of 5 U.S.C. 603 and 604.

List of Subjects in 41 CFR Part 101–6

Civil rights, Government property management, Grant programs, Intergovernmental relations, Surplus Government property, Relocation assistance, Real property acquisition, Federal advisory committees.

Accordingly, 41 CFR Part 101–6 is amended as follows:

PART 101-6—MISCELLANEOUS REGULATIONS

1. The authority citation for 41 CFR Part 101–6 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390; 40 U.S.C. 486(c); sec. 7, 5 U.S.C., App.; and E.O. 12024, 3 CFR 1977 Comp., p. 158.

2. Subpart 101–6.10 is revised to read as follows:

Subpart 101-6.10—Federal Advisory Committee Management

§ 101-6.1001 Scope.

(a) This subpart defines the policies, establish minimum requirements, and provide guidance to agency management for the establishment, operation, administration, and duration of advisory committees subject to the Federal Advisory Committee Act, as amended. Reporting requirements which keep the Congress and the public informed of the number, purpose, membership, activities, and cost of these advisory committees are also included.

(b) The Act and this subpart do not apply to advisory meetings or groups listed in § 101–6.1004.

§ 101-6.1002 Policy.

The policy to be followed by Federal departments, agencies, and commissions, consistent with the Federal Advisory Committee Act, as amended, is as follows:

(a) An advisory committee shall be established only when it is essential to the conduct of agency business. Decision criteria include whether committee deliberations will result in the creation or elimination of, or change in regulations, guidelines, or rules affecting agency business; whether the information to be obtained is already available through another advisory committee or source within the Federal Government; whether the committee will make recommendations resulting in significant improvements in service or reductions in cost; or whether the committee's recommendations will provide an important additional perspective or viewpoint impacting agency operations;

(b) An advisory committee shall be terminated whenever the stated objectives of the committee have been accomplished; the subject matter or work of the committee has become obsolete by the passing of time or the assumption of the committee's main functions by another entity within the Federal Government; or the agency determines that the cost of operation is excessive in relation to the benefits accruing to the Federal Government;

(c) An advisory committee shall be balanced in its membership in terms of the points of view represented and the functions to be performed; and

(d) An advisory committee shall be open to the public in its meetings except in those circumstances where a closed meeting shall be determined proper and consistent with the provisions in the Government in the Sunshine Act, 5 U.S.C. 552(b).

§ 101-6.1003 Definitions.

"Act" means the Federal Advisory Committee Act, as amended, 5 U.S.C., App.

"Administrator" means the Administrator of General Services.

"Advisory committee" subject to the Act means any committee, board, commission, council, conference, panel, task force, or other similar group, or any subcommittee or other subgroup thereof, which is established by statute, or established or utilized by the President or any agency official for the purpose of obtaining advice or recommendations on issues or policies which are within the scope of his or her responsibilities.

"Agency" has the same meaning as in section 551(1) of Title 5 of the United States Code.

"Committee Management Secretariat" ("Secretariat"), established pursuant to the Act is responsible for all matters relating to advisory committees, and carries out the Administrator's responsibilities under the Act and Executive Order 12024.

"Committee member" means an individual who serves by appointment on an advisory committee and has the full right and obligation to participate in the activities of the committee, including voting on committee recommendations.

"Presidential advisory committee" means any advisory committee which advises the President. It may be established by the President or by the Congress, or used by the President in the interest of obtaining advice or recommendations for the President. "Independent Presidential advisory committee" means any Presidential advisory committee not assigned by the President, or the President's delegate, or by the Congress in law, to an agency for administrative and other support and for which the Administrator of General Services may provide administrative and other support on a reimbursable basis.

"Staff member" means any individual who serves in a support capacity to an advisory committee.

"Utilized" (or "used"), as referenced in the definition of "Advisory committee" in this section, means a committee or other group composed in whole or in part of other than full-time officers or employees of the Federal Government with an established existence outside the agency seeking its advice which the President or agency official(s) adopts, such as through institutional arrangements, as a preferred source from which to obtain advice or recommendations on a specific issue or policy within the scope of his or her responsibilities in the same manner as that individual would obtain advice or recommendations from an established advisory committee.

§ 101-6.1004 Examples of advisory meetings or groups not covered by the Act or this subpart.

The following are examples of advisory meetings or groups not covered by the Act or this subpart:

(a) Any committee composed wholly of full-time officers or employees of the Federal Government;

(b) Any advisory committee specifically exempted by an Act of Congress;

(c) Any advisory committee established or utilized by the Central Intelligence Agency;

(d) Any advisory committee established or utilized by the Federal Reserve System;

(e) The Advisory Committee on Intergovernmental Relations;

(f) Any local civic group whose primary function is that of rendering a public service with respect to a Federal program, or any State or local committee, council, board, commission, or similar group established to advise or make recommendations to State or local officials or agencies;

(g) Any committee which is established to perform primarily operational as opposed to advisory functions. Operational functions are those specifically provided by law, such as making or implementing Government decisions or policy. An operational committee may be covered by the Act if it becomes primarily advisory in nature. It is the responsibility of the administering agency to determine whether such a committee is primarily operational. If so, it would not fall under the requirements of the Act and this Subpart, but would continue to be regulated under relevant laws, subject to the direction of the President and the review of the appropriate legislative committees;

(h) Any meeting initiated by the President or one or more Federal official(s) for the purpose of obtaining advice or recommendations from one individual;

(i) Any meeting initiated by a Federal official(s) with more than one individual for the purpose of obtaining the advice of individual attendees and not for the purpose of utilizing the group to obtain consensus advice or recommendations. However, agencies should be aware that such a group would be covered by the Act when an agency accepts the group's deliberations as a source of consensus advice or recommendations;

(j) Any meeting initiated by a group with the President or one or more Federal official(s) for the purpose of expressing the group's view, provided that the President or Federal official(s) does not use the group recurrently as a preferred source of advice or recommendations;

(k) Meetings of two or more advisory committee or subcommittee members convened solely to gather information or conduct research for a chartered advisory committee, to analyze relevant issues and facts, or to draft proposed position papers for deliberation by the advisory committee or a subcommittee of the advisory committee; or

(l) Any meeting with a group initiated by the President or one or more Federal official(s) for the purpose of exchanging facts or information.

§ 101-6.1005 Authorities for establishment of advisory committees.

An advisory committee may be established in one of four ways:

(a) By law where the Congress specifically directs the President or an agency to establish it;

(b) By law where the Congress authorizes but does not direct the President or an agency to establish it. In this instance, the responsible agency head shall follow the procedures provided in § 101-6.1007;

(c) By the President by Executive Order; or

(d) By an agency under general agency authority in Title 5 of the United States Code or under other general agency-authorizing law. In this instance, an agency head shall follow the procedures provided in § 101-6.1007.

§ 101-6.1006 [Reserved]

§ 101-6.1007 Agency procedures for establishing advisory committees.

(a) When an agency head decides that it is necessary to establish a committee, the agency must consider the functions of similar committees in the same agency before submitting a consultation to GSA to ensure that no duplication of effort will occur.

(b) In establishing or utilizing an advisory committee, the head of an agency or designee shall comply with the Act and this subpart, and shall:

(1) Prepare a proposed charter for the committee which includes the information listed in section 9(c) of the Act; and

(2) Submit a letter and the proposed charter to the Secretariat proposing to establish or use, reestablish, or renew an advisory committee. The letter shall include the following information:

(i) An explanation of why the committee is essential to the conduct of agency business and in the public interest;

(ii) An explanation of why the committee's functions cannot be performed by the agency, another existing advisory committee of the agency, or other means such as a public hearing; and

(iii) A description of the agency's plan to attain balanced membership. For purposes of attaining balance, agencies shall consider for membership interested persons and groups with professional or personal qualifications or experience to contribute to the functions and tasks to be performed. This should be construed neither to limit the participation, nor compel the selection of any particular individual or group to obtain divergent points of view that are relevant to the business of the advisory committee.

(3) Subcommittees that do not function independently of the full or parent advisory committee need not follow the requirements of paragraphs (b)(1) and (b)(2) of this section. However, they are subject to all other requirements of the Act.

(4) The requirements of paragraphs (b)(1) and (b)(2) of this section shall apply for any subcommittee of a chartered advisory committee, whether its members are drawn in whole or in part from the full or parent advisory committee, which functions independently of the parent advisory committee such as by making recommendations directly to the agency rather than for consideration by the chartered advisory committee.

(c) The Secretariat will review the proposal and notify the agency of GSA's views within 15 calendar days of receipt, if possible. The agency head retains final authority for establishing a particular advisory committee.

(d) The agency shall notify the Secretariat in writing that either:

(1) The advisory committee is being established. The filing of the advisory committee charter as specified in § 101-6.1013 shall be considered appropriate written notification in this instance. The date of filing constitutes the date of establishment or renewal. The agency head shall then comply with the provisions of § 101-6.1009 for an established advisory committee; or

(2) The advisory committee is not being established. In this instance, the agency shall also advise the Secretariat if the agency head intends to take any further action with respect to the proposed advisory committee.

§ 101-6.1008 The role of GSA.

(a) The functions under section 7 of the Act will be performed for the Administrator by the Secretariat. The Secretariat assists the Administrator in prescribing administrative guidelines and management controls for advisory committees, and assists other agencies in implementing and interpreting these guidelines. In exercising internal controls over the management and supervision of the operations and procedures vested in each agency by section 8(b) of the Act and by § 101-6.1009 and § 101-6.1017 of this rule, agencies shall conform to the guidelines prescribed by GSA.

(b) The Secretariat may request comments from agencies on management guidelines and policy issues of broad interagency interest or application to the Federal advisory committee program.

(c) In advance of issuing informal guidelines, nonstatutory reporting requirements, and administrative procedures such as report formats or automation, the Secretariat shall request formal or informal comments from agency Committee Management Officers.

§ 101-6.1009 Responsibilities of any agency head.

The head of each agency that uses one or more advisory committees shall ensure:

(a) Compliance with the Act and this subpart;

(b) Issuance of administrative guidelines and management controls which apply to all advisory committees established or used by the agency;

(c) Designation of a Committee Management Officer who shall carry out the functions specified in section 8(b) of the Act;

(d) Provision of a written determination stating the reasons for closing any advisory committee meeting to the public;

(e) A review, at least annually, of the need to continue each existing advisory committees, consistent with the public interest and the purpose of functions of each committee;

(f) Rates of pay are justified and levels of agency support are adequate;

(g) The appointment of a Designated Federal Officer for each advisory committee and its subcommittees;

(h) The opportunity for reasonable public participation in advisory committee activities; and

(i) That the number of committee members is limited to the fewest necessary to accomplish committee objectives.

§ 101-6.1010 [Reserved]

§ 101-6.1011 Responsibilities of the chairperson of an independent Presidential advisory committee.

The chairperson of an independent Presidential advisory committee shall comply with the Act and this subpart and shall:

(a) Consult with the Administrator concerning the role of the Designated Federal Officer and Committee Management Officer; and

(b) Fulfill the responsibilities of an agency head as specified in paragraphs (d) and (h) of § 101-6.1009.

§ 101-6.1012 [Reserved]

§ 101-6.1013 Charter filing requirements.

No advisory committee may operate, meet, or take any action until its charter has been filed as follows:

(a) *Advisory committee established, used, reestablished, or renewed by an agency.* The agency head shall file—

(1) The charter with the standing committees of the Senate and the House of Representatives having legislative jurisdiction of the agency;

(2) A copy of the filed charter with the Library of Congress, Exchange and Gift Division, Federal Documents Section, Federal Advisory Committee Desk, Washington, DC 20540; and

(3) A copy of the charter indicating the Congressional filing date, with the Secretariat.

(b) *Advisory committee specifically directed by law or authorized by law.* Procedures are the same as in paragraph (a) of this section.

(c) *Presidential advisory committee.* When either the President or the Congress establishes an advisory committee that advises the President, the responsible agency head or, in the case of an independent Presidential advisory committee, the President's designee shall file—

(1) The charter with the Secretariat;

(2) A copy of the filed charter with the Library of Congress; and

(3) If specifically directed by law, a copy of the charter indicating its date of filing with the Secretariat, with the standing committees on the Senate and the House of Representatives having legislative jurisdiction of the agency or the independent Presidential advisory committee.

§ 101-6.1014 [Reserved]

§ 101-6.1015 Advisory committee information which must be published in the Federal Register.

(a) *Committee establishment, reestablishment, or renewal.* (1) A notice in the **Federal Register** is required when an advisory committee, except a committee specifically directed by law or established by the President by Executive Order, is established, used, reestablished, or renewed. Upon receiving notification of the completed review from the Secretariat in accordance with paragraph (c) of § 101-6.1007, the agency shall publish a notice in the **Federal Register** that the committee is being established, used, reestablished, or renewed. For a new committee, such notice shall also include statements describing the nature and purpose of the committee and that the committee is necessary and in the public interest.

(2) Establishment and reestablishment notices shall appear at least 15 calendar days before the committee charter is filed, except that the Secretariat may approve less than 15 days when requested by the agency for good cause. The 15-day advance notice requirement does not apply to committee renewals, notices of which may be published concurrently with the filing of the charter.

(b) *Committee meetings.* (1) The agency or an independent Presidential advisory committee shall publish at least 15 calendar days prior to an advisory committee meeting a notice in the Federal Register, which includes:

(i) The exact name of the advisory committee as chartered;

(ii) The time, date, place, and purpose of the meeting;

(iii) A summary of the agenda; and

(iv) A statement whether all or part of the meeting is open to the public or closed, and if closed, the reasons why, citing the specific exemptions of the Government in the Sunshine Act (5 U.S.C. 552(b)) as the basis for closure.

(2) In exceptional circumstances, the agency or an independent Presidential advisory committee may give less than 15 days notice, provided that the reasons for doing so are included in the committee meeting notice published in the Federal Register.

§ 101-6.1016. [Reserved]

§ 101-6.1017 Responsibilities of the agency Committee Management Officer.

In addition to implementing the provisions of section 8(b) of the Act, the Committee Management Officer will carry out all responsibilities delegated by the agency head. The Committee Management Officer should also ensure that section 10(b), 12(a) and 13 of the Act are implemented by the agency to provide for appropriate recordkeeping. Records include, but are not limited to:

(a) A set of approved charters and membership lists for each advisory committee;

(b) Copies of the agency's portion of the Annual Report of Federal Advisory Committees required by paragraph (b) of § 101-6.1035;

(c) Agency guidelines on committee management operations and procedures as maintained and updated; and

(d) Agency determinations to close advisory committee meetings as required by paragraph (c) of § 101-6.1023.

§ 101-6.1018 [Reserved]

§ 101-6.1019 Duties of the Designated Federal Officer.

The agency head or, in the case of an independent Presidential advisory committee, the Administrator shall designate a Federal officer or employee, who may be either full-time or permanent part-time, to be the Designated Federal Officer for each advisory committee and its subcommittees, who:

(a) Must approve or call the meeting of the advisory committee;

(b) Must approve the agenda;

(c) Must attend the meetings;

(d) Shall adjourn the meetings when such adjournment is in the public interest; and

(e) Chairs the meeting when so directed by the agency head.

(f) The requirement in paragraph (b) of this section does not apply to a Presidential advisory committee.

§ 101-6.1020 [Reserved]

§ 101-6.1021 Public participation in advisory committee meetings.

The agency head, or the chairperson of an independent Presidential advisory committee, shall ensure that—

(a) Each advisory committee meeting is held at a reasonable time and in a place reasonably accessible to the public;

(b) The meeting room size is sufficient to accommodate advisory committee members, committee or agency staff, and interested members of the public;

(c) Any member of the public is permitted to file a written statement with the advisory committee; and

(d) Any member of the public may speak at the advisory committee meeting if the agency's guidelines so permit.

§ 101-6.1022 [Reserved]

§ 101-6.1023 Procedures for closing an advisory committee meeting.

(a) To close all or part of a meeting, an advisory committee shall submit a request to the agency head or, in the case of an independent Presidential advisory committee, the Administrator, citing the specific provisions of the Government in the Sunshine Act (5 U.S.C. 552(b)) which justify the closure. The request shall provide the agency head or the Administrator sufficient time to review the matter in order to make a determination prior to publication of the meeting notice required by § 101-6.1015(b).

(b) The general counsel of the agency or, in the case of an independent Presidential advisory committee, the general counsel of the General Services Administration should review all requests to close meetings.

(c) If the agency head or, in the case of an independent Presidential advisory committee, the Administrator agrees that the request is consistent with the provisions in the Government in the Sunshine Act and the Federal Advisory Committee Act, he or she shall issue a determination that all or part of the meeting be closed.

(d) The agency head, or the chairperson of an independent Presidential advisory committee, shall:

(1) Make a copy of the determination available to the public upon request; and

(2) State the reasons why all or part of the meeting is closed, citing the specific exemptions used from the Government in the Sunshine Act in the meeting notice published in the Federal Register.

§ 101-6.1024 [Reserved]

§ 101-6.1025 Requirement for maintaining minutes of advisory committee meetings.

(a) The agency head or, in the case of an independent Presidential advisory committee, the chairperson shall ensure that detailed minutes of each advisory committee meeting are kept. The minutes must include:

(1) Time, date, and place;

(2) A list of the following persons who were present:

(i) Advisory committee members and staff;

(ii) Agency employees; and

(iii) Members of the public who presented oral or written statements;

(3) An estimated number of other members of the public present;

(4) An accurate description of each matter discussed and the resolution, if any, made by the committee of such matter; and

(5) Copies of each report or other document received, issued, or approved by the committee.

(b) The chairperson of each advisory committee shall certify to the accuracy of all minutes of advisory committee meetings.

§ 101-6.1026 [Reserved]

§ 101-6.1027 Termination of advisory committees.

(a) Any advisory committee shall automatically terminate not later than 2 years after it is established, reestablished, or renewed, unless:

(1) Its duration is otherwise provided for by law;

(2) The President or agency head renews it prior to the end of such period; or

(3) The President or agency head terminates it before that time by revoking or abolishing its establishment authority.

(b) If an agency head terminates an advisory committee, the agency shall notify the Secretariat of the effective date of termination.

§ 101-6.1028 [Reserved]

§ 101-6.1029 Renewal and rechartering of advisory committees.

(a) Advisory committees specifically directed by law:

(1) Whose duration extends beyond 2 years shall require rechartering by the filing of a new charter every 2 years after the date of enactment of the law establishing the committee. If a new charter is not filed, the committee is not

terminated, but may not meet or take any action.

(2) Which would terminate under the provisions of section 14 of the Act, and for which renewal would require reauthorization by law, may be reestablished by an agency provided that the agency complies under general agency authority with the provisions of § 101-6.1007.

(b) Advisory committees established by the President may be renewed by appropriate action of the President and the filing of a new charter.

(c) Advisory committees authorized by law or established or used by an agency may be renewed, provided that at least 30 but not more than 60 days before the committee terminates, an agency head who intends to renew a committee complies with the provisions of § 101-6.1007.

§ 101-6.1030 [Reserved]

§ 101-6.1031 Amendments to advisory committee charters.

(a) *Committees specifically directed by law or authorized by law; or established by the President.* The agency head shall be responsible for ensuring that any minor technical changes made to current charters are consistent with the relevant statute or Executive Order. When the Congress by law, or the President by Executive Order, changes the authorizing language which has been the basis for establishing an advisory committee, the agency head, or the chairperson of an independent Presidential advisory committee, shall:

(1) Amend those sections of the current charter affected by the new law or Executive Order; and

(2) File the amended charter as specified in § 101-6.1013.

(b) *Committees established or used by an agency.* The charter of an advisory committee established under general agency authority may be amended when an agency head determines that the existing charter no longer accurately reflects the objectives or functions of the committee. Changes may be minor, such as revising the name of the advisory committee, or modifying the estimated number or frequency of meetings. Changes may also be major such as those dealing with the objectives or composition of the committee. The agency head retains final authority for amending the charter of an advisory committee. Amending any existing advisory committee charter does not constitute renewal of the committee under § 101-6.1029.

(1) To make a minor amendment to a committee charter, an agency shall:

(i) Amend the charter language as necessary, and

(ii) File the amended charter as specified in § 101-6.1013.

(2) To make a major amendment to a committee charter, an agency shall:

(i) Amend the charter language as necessary;

(ii) Submit the proposed amended charter with a letter to the Secretariat requesting GSA's views on the amended language, along with an explanation of the purpose of the changes and why they are necessary. The Secretariat will review the proposed changes and notify the agency of GSA's views within 15 calendar days of the request, if possible; and

(iii) File the amended charter as specified in § 101-6.1013.

§ 101-6.1032 [Reserved]

§ 101-6.1033 Compensation and expense reimbursement of advisory committee members, staffs and consultants.

(a) *Uniform pay guidelines for members of an advisory committee.* Nothing in this subpart shall require an agency head to provide compensation, unless otherwise provided by law, to a member of an advisory committee. However, when compensation is deemed appropriate by an agency, it shall fix the pay of the members of an advisory committee to the daily equivalent of a rate of the General Schedule in 5 U.S.C. 5332 unless the members are appointed as consultants and compensated under 5 U.S.C. 3109. In determining an appropriate rate of pay for the members, an agency shall give consideration to the significance, scope, and technical complexity of the matters with which the advisory committee is concerned and the qualifications required of the members of the advisory committee. An agency may not fix the pay of the members of an advisory committee at a rate higher than the daily equivalent of the maximum rate for a GS-15 under the General Schedule, unless a higher rate is mandated by statute, or the head of the agency has personally determined that a higher rate of pay under the General Schedule is justified and necessary. Such a determination must be reviewed by the head of the agency annually. Under this subpart, an agency may not fix the pay of the members of an advisory committee at a rate of pay higher than the daily equivalent of a rate for a GS-18, as provided in 5 U.S.C. 5332.

(b) *Pay for staff members of an advisory committee.* An agency may fix the pay of each advisory committee staff member at a rate of the General Schedule in which the Staff member's position would appropriately be placed (5 U.S.C. Chapter 51). An agency may not fix the pay of a staff member at a rate higher than the daily equivalent of the maximum rate for GS-15, unless the agency head has determined that under the General Schedule the staff member's position would appropriately be placed at a grade higher than GS-15. This determination must be reviewed annually by the agency head.

(1) In establishing rates of compensation, the agency head shall comply with any applicable statutes, regulations, Executive Orders, and administrative guidelines.

(2) A staff member who is a Federal employee shall serve with the knowledge of the Designated Federal Officer and the approval of the employee's direct supervisor. If a non-Federal employee, the staff member shall be appointed in accordance with applicable agency procedures, following consultation with the advisory committee.

(c) *Pay for consultants to an advisory committee.* An agency shall fix the pay of a consultant to an advisory committee after giving consideration to the qualifications required of the consultant and the significance, scope, and technical complexity of the work. The compensation may not exceed the maximum rate of pay authorized by 5 U.S.C. 3109, and shall be in accordance with any applicable statutes, regulations, Executive Orders and administrative guidelines.

(d) *Gratuitous services.* In the absence of any special limitations applicable to a specific agency, nothing in this subpart shall prevent an agency from accepting the gratuitous services of an advisory committee member, staff member, or consultant who agrees in advance to serve without compensation.

(e) *Travel expenses.* Advisory committee members and staff members, while engaged in the performance of their duties away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5, United States Code, for persons employed intermittently in the Government service.

(f) *Services for handicapped members.* While performing advisory committee duties, an advisory committee member who is blind or deaf or who qualifies as a handicapped individual may be provided services by a personal assistant for handicapped employees if the member:

(1) Qualifies as a handicapped individual as defined by section 501 of

the Rehabilitation Act of 1973 (29 U.S.C. 794); and

(2) Does not otherwise qualify for assistance under 5 U.S.C. 3102 by reason of being an employee of an agency.

(g) *Exclusions.* (1) Nothing in this section shall prevent any person who (without regard to his or her service with an advisory committee) is a full-time Federal employee from receiving compensation at a rate which he or she otherwise would be compensated as a full-time Federal employee.

(2) Nothing in this section shall prevent any person who immediately before his or her service with an advisory committee was a full-time Federal employee from receiving compensation at the rate at which he or she was compensated as a full-time Federal employee.

(3) Nothing in this section shall affect a rate of pay or a limitation on a rate of pay that is specifically established by law or a rate of pay established under the General Schedule classification and pay system in chapter 51 and chapter 53 of Title 5, United States Code.

§ 101-6.1034 [Reserved]

§ 101-6.1035 Reports required for advisory committees.

(a) Within one year after a Presidential advisory committee has submitted a public report to the President, the President or his delegate will prepare a follow-up report to the Congress detailing the disposition of the committee's recommendations in accordance with section 6(b) of the Act;

(b) The President's annual report to the Congress shall be prepared by GSA based on reports filed on a fiscal year basis by each agency consistent with the information specified in section 6(c) of the Act. Reports from agencies shall be consistent with instructions provided annually by the Secretariat. This report has been cleared in accordance with FIRMR 201-45.6 in 41 CFR Chapter 201 and assigned interagency report control number 0304-GSA-XX.

(c) In accordance with section 10(d) of the Act, advisory committees holding closed meetings shall issue reports at least annually, setting forth a summary of activities consistent with the policy of Section 552(b) of Title 5, United States Code.

(d) Subject to section 552 of Title 5, United States Code, eight copies of each report made by an advisory committee, including any report on closed meetings as specified in paragraph (c) of this section, and, where appropriate, background papers prepared by consultants, shall be filed with the Library of Congress as required by section 13 of the Act, for public inspection and use at the location specified in paragraph (a)(2) of § 101-6.1013.

Dated: November 24, 1987.

T.C. Golden,

Administrator of General Services.

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