



September 3, 2024

Dear Tribal Leader,

I am writing to share important information with you for our Tribal and Federal workgroup members on the relevant rules pertaining to the Federal Advisory Committee Act (FACA) and FACA's Unfunded Mandates Reform Act (UMRA) exemption. When a workgroup or committee is formed by a Federal agency, there may be rules for the committee members to follow. Here is a summary of the FACA and UMRA requirements:

As background, FACA governs the operation of Federal advisory committees and emphasizes public involvement through open meetings and reporting. The FACA requirement is implicated when an agency has: (1) established or utilized a workgroup/committee; (2) that provides consensus advice/recommendations to the agency on issues or policies; and (3) consists of at least one non-federal member. *See* 5 U.S.C, App. 2. Further, FACA imposes procedural requirements on Federal agencies that convene advisory committees, such as issuing a charter, having open meetings, providing advance notice of meetings in the *Federal Register*, having a Federal official in attendance, maintaining detailed minutes, and making advisory committee records available to the public. Each Federal agency that sponsors advisory committees must adhere to FACA's requirements, as well as U.S. General Services Administration (GSA) regulations (as GSA oversees FACA).

Under FACA, advisory committees can be created only when they are essential to the performance of a duty or responsibility conveyed upon the Executive Branch by law or Presidential Directive. Before committees can be set up, high-level officials within the sponsoring agency must review and approve the request. Once a committee is approved, a charter is prepared outlining the committee's mission and specific duties and forwarded to GSA for final review. Following a required public notification period, and the filing of the charter with Congress, the committee may begin operation. The FACA also mandates that each agency sponsoring a Federal advisory committee appoint a Committee Management Officer to oversee the administration of the Act's requirements, as well as a Designated Federal Officer. Unless the renewal of a committee charter is justified under FACA, the charter automatically expires after a two-year period. *See* <https://www.gsa.gov/policy-regulations/policy/federal-advisory-committee-management/advice-and-guidance/the-federal-advisory-committee-act-faca-brochure>.

That said, we much more frequently utilize the UMRA exemption to FACA (2 U.S.C. § 1534(b)), which is intended to strengthen partnerships and communications between the Federal Government and its state, local, and Tribal counterparts. The UMRA provides a critical exemption to FACA to facilitate communication between the Federal Government and state, local, and Tribal governments without the FACA impeding effective intergovernmental consultation. The IHS relies on the UMRA exemption for its Tribal Leader Workgroups,

for example, the Contract Support Costs Advisory Group. The UMRA exemption applies to committee and sub-committee meetings.¹

Federal employees and elected Tribal Leaders may attend, speak, and participate in UMRA FACA-exempt meetings. In addition, a designee – an employee of the Tribe who may attend on the Tribal Leader’s behalf – may participate if the designation is in writing, signed by the Tribal Leader, and if the designee is given authority to act on the Tribal Leader’s behalf. Moreover, individuals who are not Federal employees may attend UMRA FACA-exempt meetings as technical advisors, but they are not workgroup members. Non-federal technical advisors may not sit at the table with workgroup members and may not speak to the other workgroup members during the meeting. Their role is limited to privately advising the workgroup members who requested their attendance. If the technical advisors are a mix of Federal and non-federal employees, only the Federal employees may engage with the workgroup members. The non-federal technical advisors must give advice to the workgroup member in a non-disruptive manner in the form of private counsel whispered to the workgroup member, passed through notes, or communicated away from the workgroup meeting for the workgroup to remain an UMRA FACA-exempt meeting. Regardless of the composition of the technical advisors, the important thing to remember is that they are not official workgroup members, and do not need to be “nominated” to an UMRA FACA-exempt workgroup. If these guidelines are not followed, agency action – taken based on the committee’s recommendations – may be invalidated.

Finally, certain groups do not trigger FACA. For example, if the IHS were to seek individual input rather than soliciting consensus advice from the group, FACA would not be implicated.

The IHS values the ongoing and collaborative relationships with our Tribal Workgroup partners. I trust you find this information helpful.

Sincerely,

Roselyn Tso
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Roselyn Tso
Director

¹Subcommittees are groups that report to the parent committee. Technical advisors can advise members but may not participate in the subcommittee discussions.