



The Federal Advisory Committee Act and the UMRA Section 204 Exemption: Department of Health and Human Services (HHS) Frequently Asked Questions

Question 1. What is the purpose of the Federal Advisory Committee Act (FACA)?

Answer 1.

The FACA governs the establishment, operation, and termination of advisory committees comprised of federal employees and members of the public. The Act is designed to assure that the public is kept informed of the “number, purpose, membership, activities, and cost of advisory committees”.¹ It also holds federal agencies accountable for the management and use of advisory committees as a primary mechanism for obtaining public input on federal policies and issues.

Question 2. When does the FACA apply?

Answer 2.

The FACA applies when an agency has (1) “established or utilized” a committee, panel, board, etc.; (2) that contains at least one non-federal member; (3) for the purpose of “obtaining advice or recommendations” from that group as a whole; and (4) on issues “within the scope of an agency official’s responsibilities”.² A committee that is not established by the federal government is “utilized” by the agency pursuant to the FACA when an agency either exercises actual management *or* control over its operation.³ There is no statutory definition of “actual management or control”; therefore, the following questions should be posed in determining whether a group is “utilized”: (1) Does the agency manage or control the group’s membership or composition? (2) Does the agency manage or control the agenda? (3) Does the agency fund the activities of the group?⁴

No one factor is dispositive, and the totality of the circumstances should be examined to determine if the FACA applies. If the FACA applies to a group, then a strict set of statutory restrictions govern the actions of the group. If the agency does not either establish, manage, or control the committee, or if one of the other factors above does not apply, then the FACA’s requirements do not apply. For example, the FACA does not apply to groups that are assembled to provide individual input and advice, rather than to obtain advice from the group as a whole,

¹ The Federal Advisory Committee Management Final Rule, 41 C.F.R. §102-3.10 (2017).

² 41 C.F.R. §102-3.25.

³ *Id.*

⁴ 41 C.F.R. § 102-3, Sub. A, App. A.

because the third factor does not apply. That factor also does not apply to groups assembled to exchange facts or information, rather than to seek advice. Additionally, there are exemptions to the FACA.

Question 3. What is the UMRA Section 204 Exemption to the FACA?

Answer 3.

The statutory exemption to the FACA found in the Unfunded Mandates Reform Act of 1995 (UMRA)⁵ applies when:

- (1) meetings are held exclusively between Federal officials and elected officers of State, local, and tribal governments (or their designated employees with authority to act on their behalf), acting in their official capacities; and
- (2) such meetings are solely for the purposes of exchanging information, or advice relating to the management or implementation of Federal programs established pursuant to public law that explicitly or inherently share intergovernmental responsibilities or administration.

2 U.S.C. §1534(b).

Question 4. What is the purpose of the UMRA Exemption?

Answer 4.

The purpose of the UMRA is to minimize unfunded mandates imposed by the federal government on state, local, and tribal governments. The UMRA's FACA exemption is intended to facilitate communication between the federal government and state, local, and tribal governments without the FACA acting as a hindrance to effective intergovernmental consultation.⁶ The exemption is construed broadly to apply to any meeting called to discuss areas of shared responsibility, or any meeting called for any purpose related to intergovernmental responsibilities or administration. The content of the meetings should consist of exchanges of views, information, or advice on the implementation of intergovernmental responsibilities or administration, including those that arise from statute, regulation, or Executive Order. Federal employees may attend, speak, and participate in UMRA FACA-exempt meetings as needed and as appropriate.

⁵ 2 U.S.C. §1534(b) (2012).

⁶ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-95-20, GUIDELINES AND INSTRUCTIONS FOR IMPLEMENTING SECTION 204, "STATE, LOCAL, AND TRIBAL GOVERNMENT INPUT," OF TITLE II OF P.L. 104-4 (Sept. 21, 1995).

OMB's guidelines on the UMRA provide that:

- intergovernmental consultations should take place as early as possible, beginning before issuance of a proposed rule and continuing through the final rule stage, and be integrated explicitly into the rulemaking process;
- agencies should consult with a wide variety of State, local, and tribal officials;
- agencies should estimate direct costs and benefits to assist with these consultations; and
- the scope of consultation should be based on common sense and be commensurate with the significance of the action being taken.

Question 5. If an agency workgroup is comprised of only tribal leaders, does this mean the UMRA exemption has been met?

Answer 5.

Not necessarily. The UMRA exemption applies only to communications *between* federal officials and “elected officers of... tribal governments” or “designated employees with authority to act on their behalf” while “acting in their official capacities.” Several tribal leaders serve on the boards of national organizations, health boards, health consortiums, and corporations, but for the exemption to apply a tribal leader must sit on the UMRA FACA-exempt group as a representative of his/her Tribe and be acting in his/her official capacity as an elected leader of that Tribe.

Question 6. Can anyone other than an elected officer of a tribal government participate in a group that meets the UMRA exemption?

Answer 6.

Yes. Employees of an elected officer of a tribal government who have authority to act on that officer's behalf and who are designated to do so in writing may participate in an UMRA FACA-exempt group in lieu of the elected officer. A designated representative should have authority to speak for and bind the Tribe he or she is representing in the same manner that the tribal official would.

In addition, a Washington representative of an association representing elected tribal officials may be designated by an elected tribal leader to participate in UMRA FACA-exempt group meetings.

Question 7. What is a “Washington representative?”

Answer 7.

An individual who represents an association representing elected officials of Tribes and who has been designated by an elected tribal leader to participate in an UMRA-FACA exempt group meeting. Federal agencies are encouraged to communicate with these individuals because:

they often know which local elected officials are the most knowledgeable about, interested in, or responsible for, implementing specific issues, regulations or programs, and can ensure that a broad range of government officials learn of and provide valuable insight concerning a proposed intergovernmental mandate.⁷

Washington representatives should have authority to speak for and bind the Tribe he or she is representing in the same manner that the tribal official would.

Question 8. Can members of the public attend an UMRA FACA-exempt meeting?

Answer 8.

Yes, but they can only observe the meeting and not participate in any way. This is because the purpose of the UMRA exemption is to facilitate consultations exclusively between federal officials and elected tribal officials acting in their official capacities (or designated employees with authority to act on their behalf) on intergovernmental shared responsibilities.

Question 9. What is the role of a technical advisor?

Answer 9.

At the request of a group member, a technical advisor can attend a meeting and provide individual advice to that member. This advice is to be given in a non-disruptive manner in the form of private counsel to the member, either communicated discreetly and directly to the member, or away from the group meeting as a whole. Technical advisors are not members of the group and are not allowed to sit at the table with or speak to other members during the meeting.

⁷ OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-95-20, GUIDELINES AND INSTRUCTIONS FOR IMPLEMENTING SECTION 204, “STATE, LOCAL, AND TRIBAL GOVERNMENT INPUT,” OF TITLE II OF P.L. 104-4 (Sept. 21, 1995).

Question 10. Can an UMRA FACA-exempt group form subcommittees?

Answer 10.

Yes, but the requirements for the UMRA FACA exemption must be maintained for the subcommittee as well. Subcommittees are groups that report to the parent committee and not directly to a federal officer or agency, regardless of whether the members also serve on the parent committee.⁸ To satisfy the UMRA exemption, the members of the subcommittee must be: 1) elected tribal leaders acting in their official capacities; or 2) the designated employees of elected tribal leaders with authority to act on their behalf; or 3) the representative of a Washington association designated by elected tribal leaders to act on their behalf. Also, technical advisors cannot participate in subcommittees except to advise members on the subcommittee, in the manner described in the Answer to Question 9, above.

Question 11. May urban Indian organization leaders and Indian Health Board members participate in an UMRA FACA-exempt group?

Answer 11.

The UMRA exemption to FACA is limited in scope. The UMRA Exemption is clear that the exemption applies only when elected tribal leaders are “acting in their official capacities.” Unless Congress specifically provides otherwise, urban Indian organization leaders and Indian Health Board members are not authorized to sit on an UMRA FACA-exempt group in their own right because they are not elected officials of tribal governments acting in their official capacities on behalf of their Tribe.

The American Recovery and Reinvestment Act of 2009 (ARRA)⁹ specifically expanded the Centers for Medicare & Medicaid Service’s (CMS) Tribal Technical Advisory Group (TTAG) authority to allow an Urban Indian Organization representative to sit on the council. This statutorily-created expansion of the UMRA FACA exemption does not apply to other committees.

Question 12. What happens if a tribal leader on a workgroup loses his/her election? May he/she continue to serve out his/her term on an UMRA FACA-exempt group?

Answer 12.

No. Only elected leaders of a tribal government acting in their official capacity (or their designated representative) may serve as a member on a group operating under the UMRA

⁸ 41 C.F.R. §102-3.25.

⁹ Section 5006(e)(1).

exemption. If an elected leader loses an election or is not reappointed to his/her elected office, then that individual is no longer eligible to serve on the group. If, however, the former leader is also an employee of a newly-elected officer of the tribal government and has authority to act on that officer's behalf, the newly-elected officer may designate, in writing, the former leader to serve on the group in lieu of the newly-elected officer.

Question 13. Why is compliance with the FACA so important?

Answer 13.

Actions taken by advisory committees or groups that do not comply with the FACA or that do not meet the UMRA Exemption to the FACA may be invalidated by the courts. In addition, any action that an agency takes based on the recommendation of a non-compliant, non-exempt advisory committee may also be invalidated. For example, in *Idaho Wool Growers Ass'n v. Schafer*,¹⁰ the Idaho Wool Growers Association challenged the Forest Service's use of two advisory committees. The court found that the two committees did not fit the FACA exemption for intergovernmental committees because there was no proof that the state government members were either elected state officials or their designated employees with authority to act on their behalf. Because the committees were not FACA-exempt and did not follow the FACA requirements, the court barred the Forest Service from using any of the committees' recommendations.

¹⁰ 637 F. Supp.2d 868 (D. Idaho 2009).