Center for Science and Democracy

Written Testimony of Celia Viggo Wexler,

Senior Washington Representative,

Center for Science and Democracy at the Union of Concerned Scientists

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Chairman Issa, Ranking Member Cummings and members of the committee. Thank you for recognizing the importance of a more transparent government by holding this hearing during Sunshine Week. With more than 400,000 members and supporters throughout the country, the nonpartisan nonprofit Union of Concerned Scientists puts rigorous, independent science to work to solve our planet's most pressing problems. Our new Center for Science and Democracy is committed to promoting science and fact-based evidence to inform public policy decisions and enrich our democratic discourse. Thank you for giving me this opportunity to speak in support of this committee's pioneering efforts to reform the Federal Advisory Committee Act, or FACA.

Union of Concerned Scientists

Two Brattle Square • Cambridge, MA 02138-3780 • TEL: 617.547.5552 • FAX: 617.864.9405
1825 K Street NW, Suite 800 • Washington, DC 20006-1232 • TEL: 202.223.6133 • FAX: 202.223.6162
2397 Shattuck Avenue, Suite 203 • Berkeley, CA 94704-1567 • TEL: 510.843.1872 • FAX: 510.843.3785
One North LaSalle Street, Suite 1904 • Chicago, IL 60602-4064 • TEL: 312.578.1750 • FAX: 312.578.1751

Federal advisory panels are an established part of government. Annually, about 1,000 panels help federal agencies address challenges that touch on issues as diverse as the safety of prescription drugs, the quality of our air, hospital outpatient fees, animal health and biomass research. In 2012, expenditures on federal advisory panels totaled near $360 million, and involved more than 70,000 participants. [i] The advice such outside experts provide to federal agencies can far exceed their cost to the taxpayer.

But that advice should not be given in secret, nor should it be rendered by panelists who have undisclosed financial ties to entities that would directly benefit from a committee's recommendations. Indeed, it was concern about the lack of transparency in the dispensing of advice to the federal government that created the law to begin with. More than 40 years ago, Congress held a number of hearings that uncovered the existence of what some members termed a "fifth arm" of government that operated with very little scrutiny. Congress didn't even know how many advisory panels existed, although they assumed there were more than 2,000. Advisory panels routinely were held without any advance notice and were not open to the public. There was a concern that many advisory panels largely consisted of corporate insiders more than happy to influence public policy with nobody the wiser.[ii]

Congress justifiably felt that advisory panels had a place in government, an important one, but that the way they were operating was not democratic. In 1971, Sen. Lee Metcalf (D-MT) held a series of hearings on the federal advisory committee process. In his opening statement, he observed: "What we are dealing with in these hearings goes to the bedrock of government decision making. Information is the important commodity in this capital. Those who get information to policymakers, or get information for them, can benefit their cause, whatever it may be. ... And decision makers who get information from special interest groups who are not subject to rebuttal because opposing interests do not know about meetings – and could not get in the door if they did – may not make tempered judgments.

"We are looking at two fundamentals," Metcalf continued, "disclosure and counsel, the rights of people to find out what is going on, and if they want, to do something about it." [iii] That's still what FACA should be about – these two bedrocks of democracy – letting people know what their government is doing, and offering them a way to participate.

Over the years, however, the goals of FACA have been eroded, in part by flawed agency practices and also by unwise judicial decisions that created loopholes that allow advisory panel work to be done in secret. We urge you to:

- Address these loopholes and any unforeseen weaknesses in the original law;
- Ensure that FACA panels are truly independent and free of special-interest influence;
- Make their work fully transparent, and
- Create a foundation for FACA to flourish in the 21st century.

In its work in the 113th Congress, this Committee can wisely build on a foundation of legislative proposals, the most recent, The Federal Advisory Committee Act Amendments 0f 2011, HR 3124, approved unanimously by House Oversight and Government Reform members. HR 3124 contains many of the reforms my testimony will touch on. This Committee can also look to the work of the Office of Science and Technology Policy and its Scientific Integrity Memorandum, issued in 2010. The Memorandum specifically addresses the use of federal advisory committees to ensure the greatest scientific integrity.

Righting Judicial Wrongs

This Committee was a leader in reforms to address court-created gaps in our federal whistleblower law. It must assume the same role in addressing loopholes in FACA created by unwise judicial decisions. The loophole that has the most likelihood of causing mischief is the subcommittee loophole.

Currently, a FACA panel may form subgroups to achieve certain tasks and then report back to the full panel, where a public meeting and a vote would take place. There is nothing wrong with forming subcommittees to speed along a panel's work. What is wrong is excluding them from the law's transparency requirements. Subcommittees should be subject to the same public scrutiny as full advisory panels for the same reason: the public ought to be able to know the source of the advice their government relies on, and how that advice influences public policy decisions.

This is crucial because we know that advisory panels strive for consensus and often can be greatly influenced by the one or two members who may be most engaged and informed on the issue. Equally troubling, the subcommittee loophole makes it easy for subcommittees to avoid hearing alternative views at the time when the discussion of issues is at its formative stage, because there has been no public notice of a meeting, and no opportunity to speak or submit written comments.

In late 2009, for example, professionals working on health information technology issues complained that the Department of Health and Human Services appeared to be using the subcommittee loophole to hold secret meetings to discuss health IT policy under the American Recovery and Reinvestment Act. One IT expert was so frustrated by the lack of

transparency that he filed a Freedom of Information Act request to get access to the meeting minutes and agenda.[iv]

When government elects to do its work in secrecy, it not only weakens the public's faith in its policies, it also fails to benefit from the views of citizens whose skills and expertise may enrich the process.

We strongly urge that the contractor loophole be closed for very similar reasons. The fact that an agency has asked a contractor to do some of the work of forming a federal advisory panel should not change the rules of how that panel operates. As long as a contractor-formed panel's aim is to provide recommendations to a federal agency, it is doing the public's business, and ought to conduct that business in public.

We also urge you to close the loophole that permits federal officials to secretly and routinely seek the guidance of outsiders, as long as these non-federal participants are not voting members of an advisory group.[v] The public has a right to know not only who has been invited to be at the table, but those who were left out. The Cheney energy task force, for example, only sought the advice of energy companies. It failed to consult in any meaningful way with environmental groups.[vi]

Addressing Bad Agency Practices

Federal advisory panels consist of experts, who are called Special

Government Employees (SGEs), and representatives, selected to speak for a particular industry or stakeholder group. FACA requires that "the advice and recommendations of the advisory committee not be inappropriately influenced by the appointing authority or by any special interest." To that end, the Ethics in Government Act requires SGEs to file financial disclosure forms to identify any financial relationship that may constitute a conflict of interest. Essentially, a conflict or potential conflict occurs when an SGE or his immediate family has financial ties - through investments, employment, job offers, grants or consulting fees - to entities that will be affected by the advice the panel will give. The Ethics in Government Act requires that such conflicts be disclosed to the appropriate agency official. The agency may decide that the conflict is too great, and the SGE must not participate in a particular meeting or on a particular panel, that the extent of the financial relationship is too remote or insignificant to affect the SGE's participation, or that the conflict or potential conflict is outweighed by the benefit of the expert's participation. Agencies issue waivers to permit conflicted experts to participate. Members who are designated representatives instead of SGEs are not subject to these ethics rules.

While these conflict rules are not terribly onerous, agencies often have found ways to evade them. In 2004, the Government Accountability Office

examined advisory panels at the Department of Energy, the Department of the Interior, and the Department of Agriculture that consisted almost entirely of representatives, even when their expert advice was being sought, and they should have more properly been designated SGEs. The GAO again raised concerns about this practice in 2008, when it came before this Committee's subcommittee on Information Policy, Census and the National Archives. GAO director of natural resources and environment Robin Nazzaro testified that, "in light of indications that some agencies may continue to use representative appointments inappropriately," it would be prudent for Congress to address this problem in statute.[vii] As of 2012, more than 11,000 individuals served on advisory panels as representatives, while 22,000 members were designated SGEs.[viii] This ratio may still demonstrate an overuse of representative classification that a FACA reform law can address.

Curbing Conflicts of Interest

Agencies for the most part have not done a good job policing advisory panels for undue special-interest influence. At the Food and Drug Administration, recommendations made by federal advisory panels can mean millions of dollars in revenue for drug companies. Our research, and that of our colleagues working on public health issues, has uncovered many instances where panels included members with significant financial ties to drug makers

whose bottom lines would be affected by the panels' recommendations. These conflicts are all the more pernicious because they often emerge only in media accounts. Panelists often fail to disclose a potential conflict. Sometimes, the FDA decides that the conflict is not serious enough to warrant a waiver or a recusal.

Conflicts matter. In some cases, such as votes on the painkillers Bextra and Vioxx[ix] and the contraceptive Yaz,[x] conflicted experts made a difference in the outcome. But more common, and just as concerning, are the situations where conflicted experts are able to influence other panelists precisely because of their investment in the issue. Panels operate in ways similar to juries, and that means that committee members with the strongest views are able to influence the process in ways far beyond their votes.[xi] Our research into past FACA panels also has uncovered significant conflicts among experts serving on panels at the Centers for Disease Control, the National Institutes of Health, and the USDA.

How can we reduce conflicts? Certainly one way is to enlarge the pool of qualified applicants for advisory panel slots, and to engage the public in vetting these candidates. The EPA's Science Advisory Board does just that. It's also made the absence of a conflict of interest a major selection criterion.

While agencies often complain that the pool of experts is too small to avoid

conflicts, that has not been our experience. At the Union of Concerned Scientists, we invited members of our science network to apply for vacancies at FDA advisory panels. Within weeks, we received the CVs of 61 qualified candidates without conflicts. Those candidates alone would have filled more than half the 100 vacancies that were then pending on FDA advisory panels.[xii]

We recommend that Congress go much farther, and, at least for scientific or technical committees, ban all experts from FACA panels who have significant financial ties to businesses that will be affected by the panel's recommendations. Congress has already demonstrated its concerns about conflicts. The FACA Amendments Act of 1997 states that no federal agency may receive advice from the National Academy of Sciences or the National Academy of Public Administration unless certain conflict of interest and other disclosure requirements are met. The law requires that NAS and NAPA publicly disclose nominees and seek public comments on nominees' qualifications. The law directs NAS and NAPA to retain conflicted experts only when the participation of such an expert is "unavoidable." [xiii] This practice would not mean a loss of valuable expertise. A panel may ask any expert, no matter how conflicted, to make a presentation, and respond to questions. Conflicted experts, however, would not be permitted to engage in panel discussions and votes.

FACA for the Future

Also important for FACA reform is ensuring the highest degree of public participation and transparency in the work of advisory panels. At the very least, advisory panels must offer the public detailed minutes of meetings, but full transcripts are far preferable. All information about panels – the numbers of SGEs and representatives, and the reasons for their designations, the panel's charter, biographical information on panel members, waivers to conflicted members and the reasons for the waiver – should be accessible on an agency website. Panel meeting materials should also be part of the website's public record.

These common-sense openness reforms are reiterated in the Scientific Integrity Memorandum issued by Dr. John Holdren, director of the Office of Science and Technology policy, in 2010. The Memorandum recommends that agencies recruit panel members as widely and transparently as possible, and solicit nominations from the public. Public information about panelists and their qualifications should be part of the public record. When an agency must issue a conflict of interest waiver that too, should be publicly disclosed.

But we should aim for more comprehensive reforms. We would urge this Committee to explore innovative ways to use new technology to make advisory panels more inclusive. Holding panel meetings remotely should be

encouraged. It would save the government travel expense and per diems, and would permit more experts to participate, hopefully enlarging the pool of experts without financial ties to companies affected by panel recommendations. It would also make it possible for an interested and engaged citizen in Wyoming or Texas, Ohio or Florida to log on to a secure website, listen to the meeting, and ideally be able to participate.

It is the 21st century. We would hope that the General Services Administration could provide guidance to agencies about virtual meetings, and how to webcast their meetings inexpensively, or at least provide audio/video recordings of meetings. The disability community should also be consulted so that these participatory experiments do not exclude them.

We look forward to working with you to enact into law a FACA reform bill that includes all the reforms of HR 3124, but that also makes other significant advances in enhancing the transparency and accountability of federal advisory panels. With new leadership at the Senate Homeland Security and Governmental Affairs Committee, we believe the prospects for a bipartisan, bicameral reform bill have never been brighter.

[i] General Services Administration, "What is the Composition of Committees?", www.gsa.gov/portal/content/249049.

[ii] Barbara Tuerkheimer, "Veto by Neglect: The Federal Advisory Committee Act, " Center for Study of Responsive Law, based on a speech given Feb 6, 1975.

[iii] The Federal Advisory Committee Act, House Report to Accompany, S. 3529, 9 Sept. 1972, 54.

[iv] Joseph Coon, "Gov't. groups keep quiet on closed-door meetings," ModernHealthcare.com, 23 Dec. 2009. http://www.modernhealthcare.com/article/20091223/NEWS/312239986#

[v] Explanation of loopholes relies on the Testimony of Sidney A. Shapiro before the House Oversight and Government Reform Committee Subcommittee on Information Policy, Census and National Archives, Hearing on the Federal Advisory Committee Act, 2 Apr. 2008.

[vi] Joseph Kahn, "Cheney Refuses to Release Energy Task Force Records," New York Times, 4 Aug. 2001. http://www.nytimes.com/2001/08/04/us/cheney-refuses-to-release-energy-task-force-records.html

[vii] Robin M. Nazzaro, Testimony before the Subcommittee on Information Policy, Census and National Archives, Committee on Oversight and Government Reform, on The Federal Advisory Committee Act, 2 Apr. 2008

[viii] General Services Administration, "What is the Composition of Committees?" www.gsa.gov/portal/content249049.

[ix] Gardiner Harris and Alex Berenson, "10 Voters on Panel Backing Pain Pills Had Industry Ties," *New York Times*, 25 Feb. 2005. http://www.nytimes.com/2005/02/25/politics/25fda.html?_r=0&pagewanted=print&position=

[x] Jeanne Lenzer and Keith Epstein, "The Yaz Men: Members of FDA panel reviewing the risks of popular Bayer contraceptive had industry ties," *Washington Monthly*, 9 Jan. 2012. http://www.washingtonmonthly.com/ten-miles-square/2012/01/the_yaz_men_members_of_fda_pan034651.php

[xi] Diana M. Zuckerman, "FDA Advisory Committees: Does Approval Mean Safety?" A Report from National Research Center for Woman & Families, September 2006.

[xii] Michael Halpern, "We Found Independent Experts, The FDA Can Too," The Equation Blog, Union of Concerned Scientists, 18 Jun. 2012. http://blog.ucsusa.org/we-found-independent-expertsthe-fda-can-too/

[xiii] "Improving the Use of Science in Regulatory Decision-Making," *A Report from the Research Integrity Roundtable*, The Keystone Center, 5 Jul. 2012.