



Key Principles and Practical Advice for Complying with the *Federal Advisory Committee Act* (FACA)

Prepared for US Forest Service employees and our partners

Contact: Peter Williams, PhD,

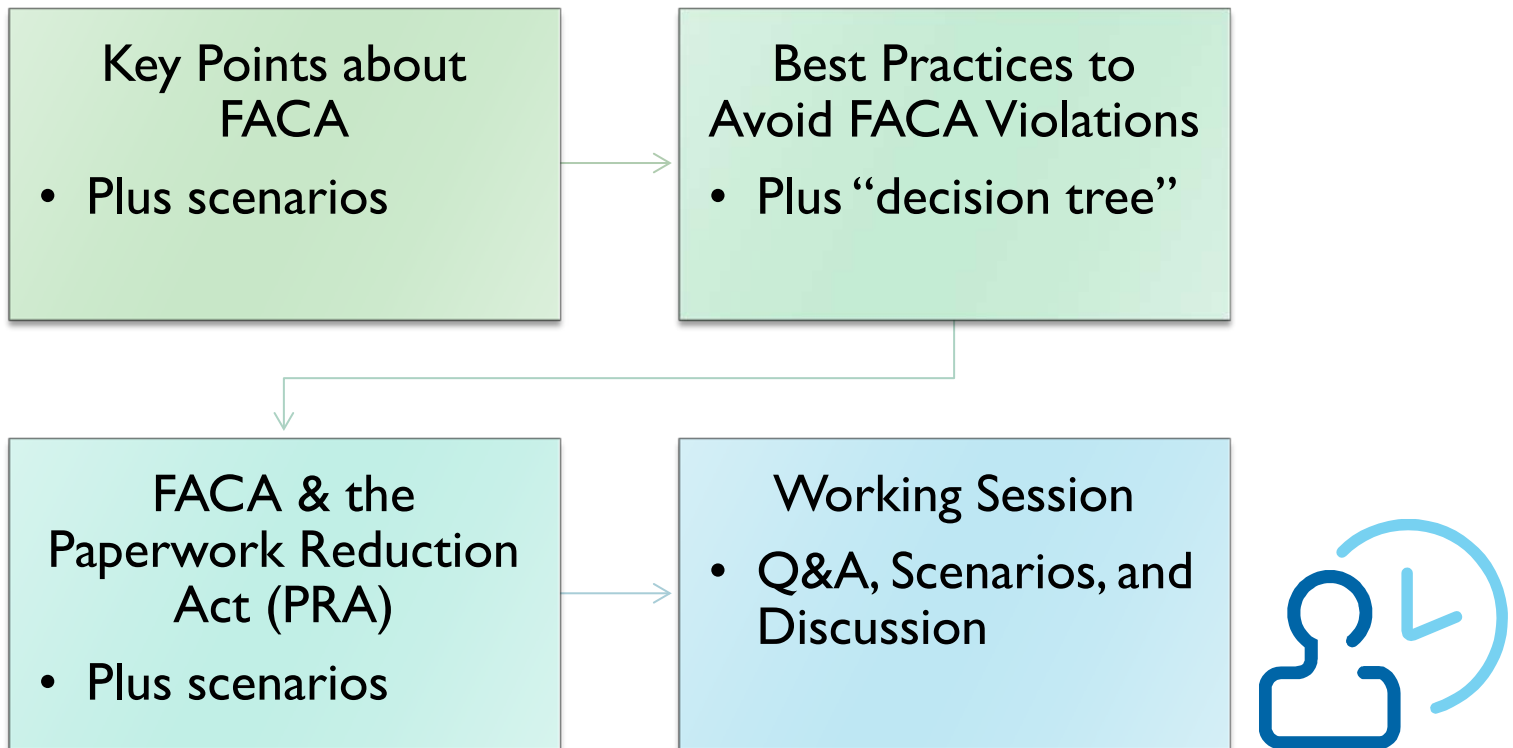
USDA-Forest Service, Ecosystem Management Coordination staff

August 2013

What to Expect Today

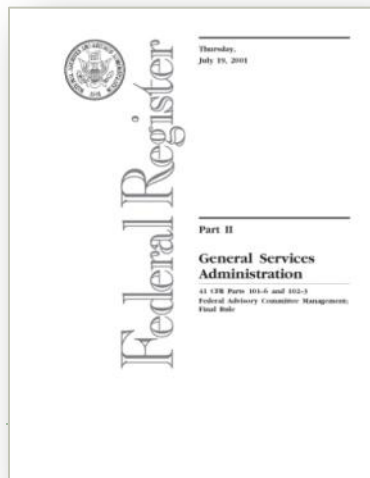
Purpose

- Understand FACA and related laws affecting collaborative planning



Key Points about the Federal Advisory Committee Act (FACA)

- ▶ Congress passed the *Federal Advisory Committee Act (FACA)* in 1972: “Government in the Sunshine” or “Sunshine Law”
- ▶ Historically: Advisory Committees have been around since George Washington’s Presidency—First one helped address Whiskey Rebellion of 1794
- ▶ Mid-20th Century: Congress recognizes need for regulation
- ▶ Today: General Services Administration (GSA) manages FACA committees and related regulations (latest is 2001).



Key Points about the Federal Advisory Committee Act (FACA)

- ▶ **FACA's Purpose:** “Legislative intent” for FACA is to ensure citizen involvement in federal decisions is equitable, that no one individual or group has undue influence.

“...ensure that advice by the various advisory committees formed over the years is objective and accessible to the public. The Act [FACA] formalized a process for establishing, operating, overseeing, and terminating these advisory bodies...”

Our Purpose:

Mostly, those of us in the field want to design and conduct our public engagement efforts so we **DON'T TRIGGER** FACA's applicability unintentionally.

- Although a FACA committee *can* be an important part of a public engagement process, we also want to make sure that (1) our processes don't unintentionally trigger FACA and (2) we know when FACA applies and when it doesn't.
- Reduce Risk of a Procedural Violation: Let's design our public engagement efforts so FACA doesn't apply unless we want to set up a FACA committee intentionally.



Key Points about the Federal Advisory Committee Act (FACA)*

When does FACA apply?:

A federal agency must comply with FACA when it (1) **establishes, utilizes, controls, or manages** (2) **a group with non-federal members that** (3) **provides the agency with consensus advice or recommendations.**

▶ Two things you NEED TO KNOW:

1. Only groups that meet all three of these legal elements are subject to FACA
 - ▶ **Example:** It wouldn't violate FACA to establish a group that includes non-federal members as long as you don't seek consensus advice from the group or "utilize" it.
2. Understanding FACA is easiest if you break it into three questions:
 - 1) **How do you work with a group? – Do you utilize it?**
 - 2) **Who is in the group? – Are there non-federal, non-exempt participants?**
 - 3) **What does the group do for you? – Is the process aimed at consensus?**

▶ ***** A definitive determination about whether FACA applies to a particular group is a fact-specific inquiry that generally requires consultation with the Office of General Counsel (OGC).



Key Points about the Federal Advisory Committee Act (FACA)

When does FACA apply?:

A federal agency must comply with FACA when it (1) **establishes, utilizes, controls, or manages** (2) a group with non-federal members that (3) provides the agency with consensus advice or recommendations.

- ▶ **How do you work with the group? – Do you “utilize” it?:**
 - ▶ **“Utilize”:** Under FACA, the term *utilize* does not have its ordinary meaning. Instead, FACA’s regulations provide that an agency “utilizes” a group only when it exercises *actual management or control over a group’s operations* [41 C.F.R § 102-3.25](#).
 - ▶ **TIP:** *Utilize* is defined by “actual management or control”
 - ▶ The GSA regulations (2001) help explain what this means (see next slide)



Key Points about the Federal Advisory Committee Act (FACA)

“Actual management or control over a group’s operations”

Although there is no precise legal definition of “actual management or control,” the following factors may be used by an agency to determine whether or not a group is “utilized” within the meaning of the Act:

- (a) Does the agency manage or control the group’s membership or otherwise determine its composition?
- (b) Does the agency manage or control the group’s agenda?
- (c) Does the agency fund the group’s activities? *

Answering “yes” to any or all of questions 1, 2, or 3 does not automatically mean the group is “utilized” within the meaning of the Act. However, **an agency may need to reconsider the status of the group under the Act IF THE RELATIONSHIP IN QUESTION ESSENTIALLY IS INDISTINGUISHABLE FROM AN ADVISORY COMMITTEE** established by the agency.

Federal Register 66:139(37736)

* For example, are we paying for a contractor?



TIP: If it walks like a duck and quacks like a duck...



Key Points about the Federal Advisory Committee Act (FACA)

When does FACA apply?:

A federal agency must comply with FACA when it (1) **establishes, utilizes, controls, or manages** (2) a group with non-federal members that (3) provides the agency with consensus advice or recommendations.

▶ Scenario:

- ▶ You hire a contractor to provide services that are “functionally equivalent” to the FS *establishing, utilizing, controlling, or managing* a group and the group has non-federal members.
- ▶ What are the implications from a FACA-related perspective? What should you think about?
- ▶ Questions or clarification?



Key Points about the Federal Advisory Committee Act (FACA)

When does FACA apply?:

A federal agency must comply with FACA when it (1) establishes, utilizes, controls, or manages (2) a group with non-federal members that (3) provides the agency with consensus advice or recommendations.

- ▶ **Who is in the group? – Are there non-federal, non-exempt participants?**
 - ▶ The *Uniform Mandates Reform Act of 1995* provides a limited EXEMPTION from FACA for certain groups of federal employees and elected officers of state, local, and tribal governments (or their properly designated employees) *acting in their official capacity* (see [2 U.S.C. § 1534\(b\)](#)). Other examples include:
 - ▶ Intragovernmental committees composed entirely of federal employees
 - ▶ Local civic groups
 - ▶ Groups established to advise State or local officials
 - ▶ CAUTION: The purpose of such a group must be solely to exchange views, information, or advice relating to the management or implementation of Federal programs
 - ▶ TIP: Although the exemption is limited, treat it as broadly as needed to facilitate intergovernmental discussions about shared responsibilities.



Key Points about the Federal Advisory Committee Act (FACA)

When does FACA apply?:

A federal agency must comply with FACA when it (1) establishes, utilizes, controls, or manages (2) a group with non-federal members that (3) provides the agency with consensus advice or recommendations.

▶ Scenario:

- ▶ You meet with a group that includes non-federal employees.
- ▶ What else do you need to know? What are some FACA-related risks? How might you reduce those?
- ▶ Questions or clarification?



Key Points about the Federal Advisory Committee Act (FACA)

When does FACA apply?:

A federal agency must comply with FACA when it (1) establishes, utilizes, controls, or manages (2) a group with non-federal members that (3) provides the agency with consensus advice or recommendations.

- ▶ **What does the group do for you? – Is the process aimed at CONSENSUS?**
 - ▶ The key test is whether the goal for the group is to reach group consensus

“The development of consensus among all or some of the attendees at a public meeting or similar forum does not automatically invoke FACA” *Federal Register 66:139(37736)*
 - ▶ Individual group members can provide their own personal opinions, advice, or recommendations without implicating FACA.
 - ▶ This is true even if several individual members of a group provide similar or identical opinions, advice, or recommendations.



Key Points about the Federal Advisory Committee Act (FACA)

When does FACA apply?:

A federal agency must comply with FACA when it (1) establishes, utilizes, controls, or manages (2) a group with non-federal members that (3) provides the agency with consensus advice or recommendations.

▶ Example:

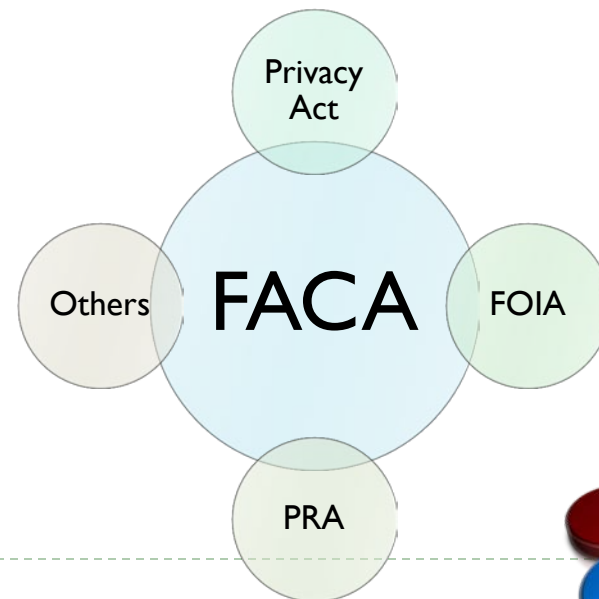
- ▶ You are hosting a meeting and notice that the group is starting to reach consensus.
- ▶ Is this an issue from a FACA-perspective? What else can you do if this happens?
- ▶ Questions or clarification?



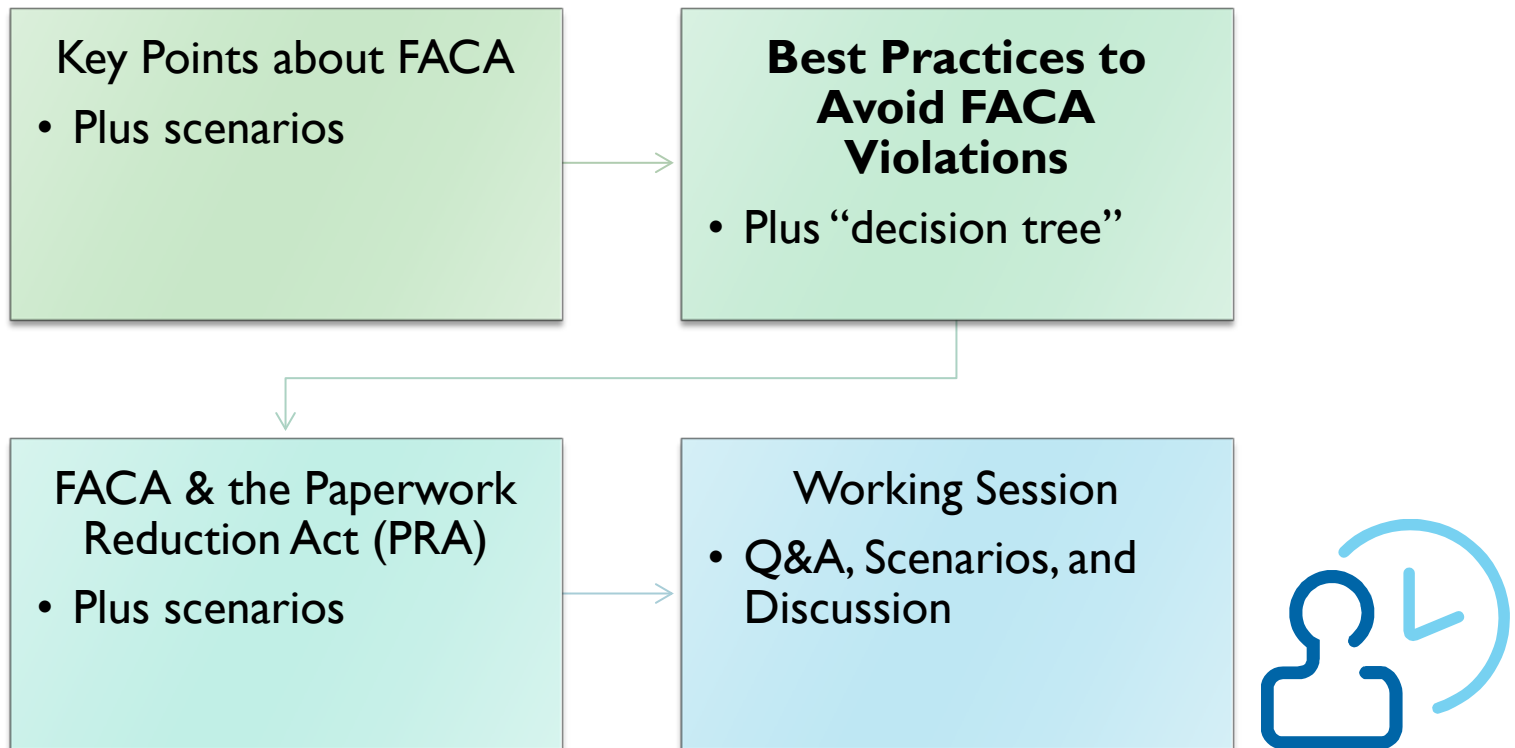
Key Points about the Federal Advisory Committee Act (FACA)

▶ Laws Related to FACA:

- ▶ **Privacy Act**—Participants can have reasonable expectations of privacy
- ▶ **Freedom on Information Act (FOIA)**—Non-participants can learn what happened
- ▶ **Paperwork Reduction Act (PRA)**—Agencies can't collect information from participants except as allowed under PRA regulations

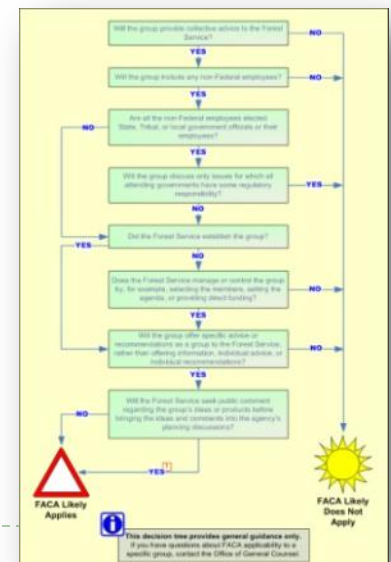


Best Practices to Avoid FACA Violations



Best Practices to Avoid FACA Violations: **BASICS**

- ▶ The simplest way to comply with FACA is to host only meetings with non-federal employees that are "open to all" and transparent.
 - ▶ In addition, make clear to all participants that the AGENCY, by law, must value insights from each individual and organization separately and equitably AND must not rely solely on any single individual or group perspective when making agency decisions.
- ▶ Help participants understand how to work with the Forest Service in a FACA-compliant manner
- ▶ **ALSO:**
 - ▶ CONSENSUS—How to address?
 - ▶ TRANSPARENCY—What does this look like?



Best Practices to Avoid FACA Violations : **CONSENSUS**

- ▶ **CLARIFY:** Ensure that Forest Service staff and external stakeholders understand what constitutes **CONSENSUS** advice or recommendations under FACA
- ▶ **AVOID:** Do NOT solicit consensus advice or recommendations from a group that was established, utilized, managed, or controlled by the Forest Service
 - ▶ **IF THE FS ESTABLISHES, UTILIZES, MANAGES, OR CONTROLS A GROUP...**
INFORM (verbally and in writing) group members that the agency cannot obtain the group's consensus advice or recommendations without triggering FACA;
- ▶ **REMIND:** Seek advice or recommendations from interested stakeholders only after making clear that the agency is **NOT** asking the group to reach consensus or to provide only consensus advice
 - ▶ **BUT:** This is true even if several individual members of a group provide similar or identical opinions, advice, or recommendations.



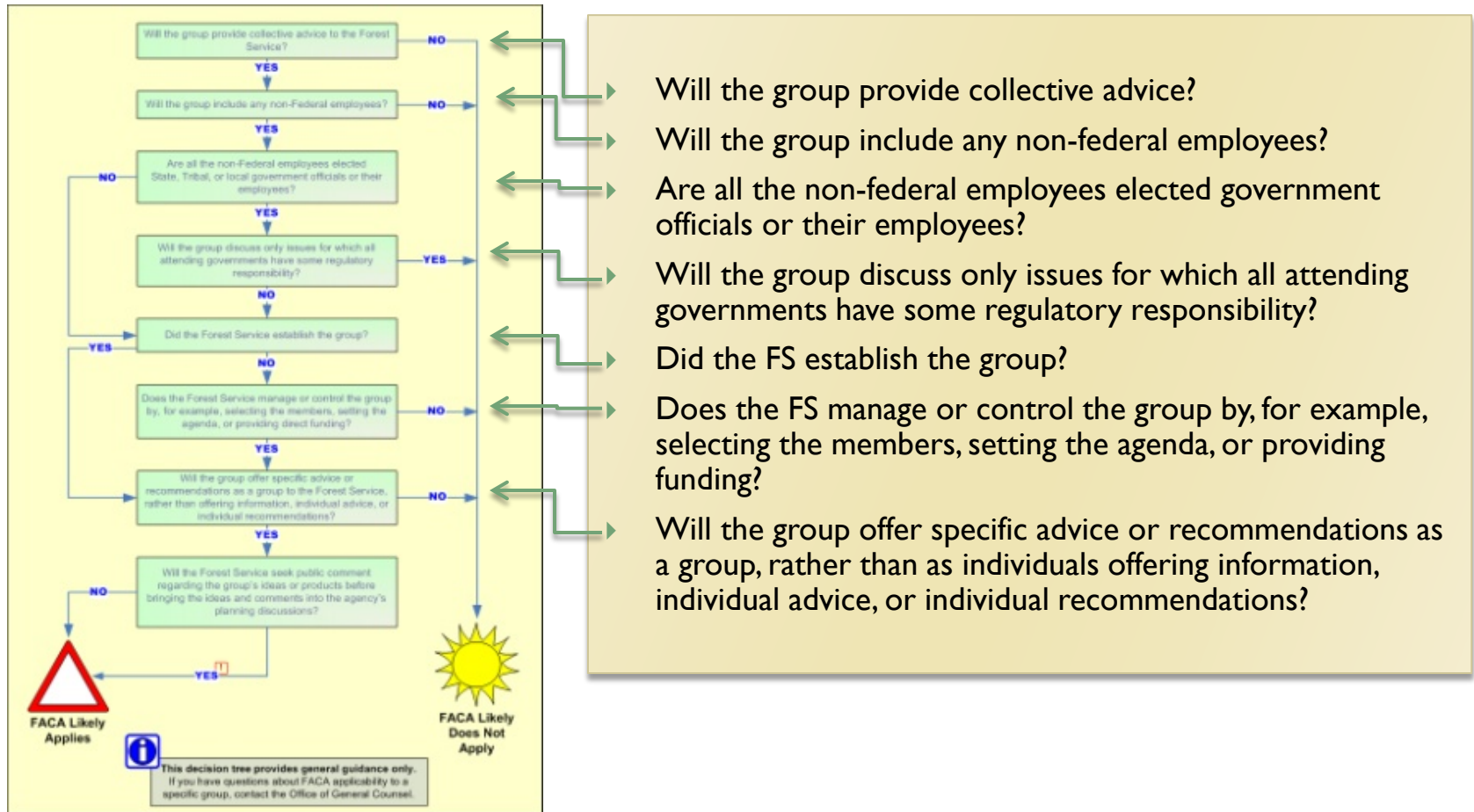
TIP: Consensus across individual opinions is not the same as having a consensus process

Best Practices to Avoid FACA Violations: **TRANSPARENCY**

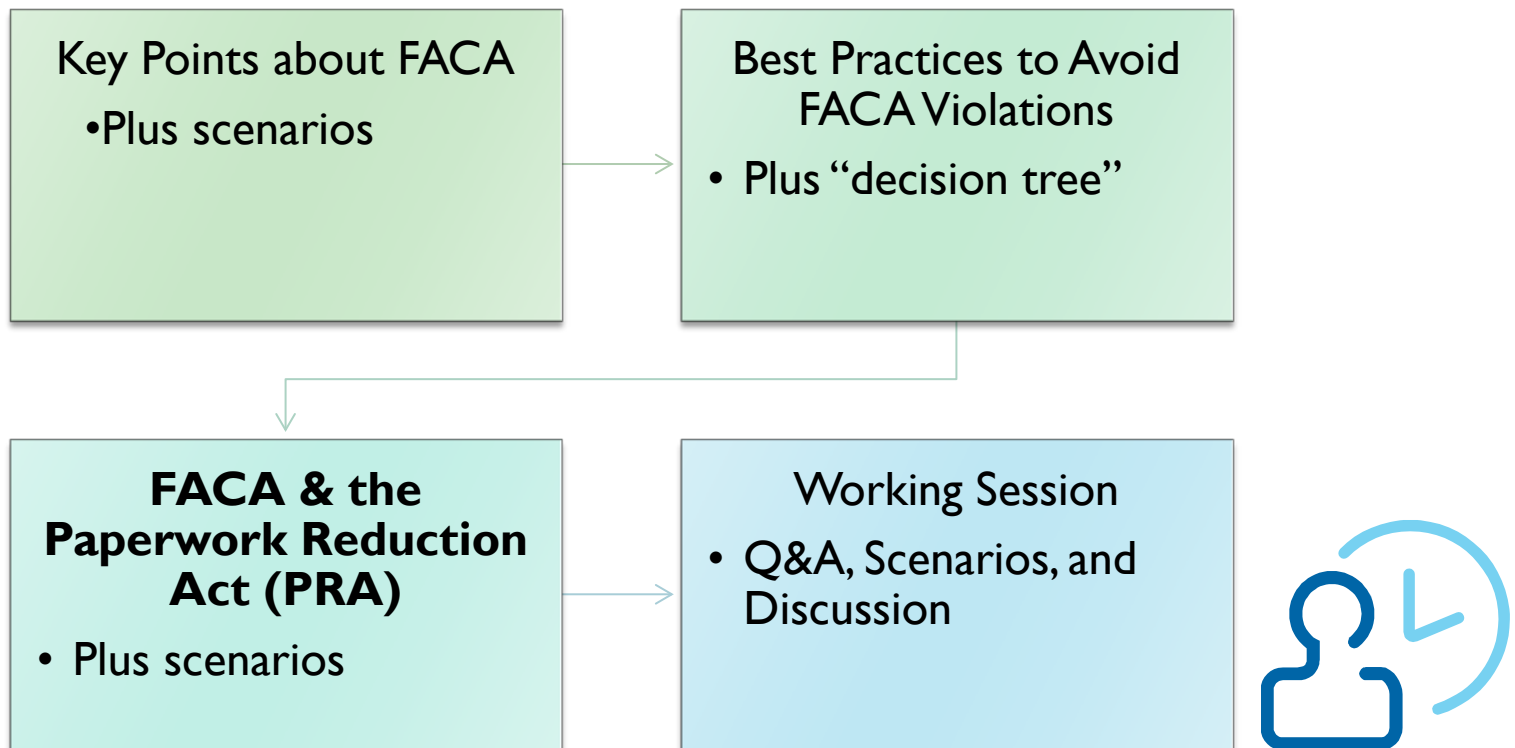
- ▶ Ensure that collaborative meetings are open to the public and properly advertised in advance
 - ▶ Newspaper(s) of record, local papers, etc.
- ▶ Keep detailed minutes of all collaborative meetings
 - ▶ Consistency is important: Do this in a consistent way for all meetings, even if it's just transcribing flipcharts
 - ▶ TIP: Make sure the participants are part of deciding how this will happen and understand what will or will not be part of the minutes (with Privacy Act in mind, maybe the minutes contain just content without attribution to a person)
- ▶ Make all records, reports, transcripts, minutes, and other information related to a collaborative group publicly available
 - ▶ Again, remember to pay attention to Privacy Act and FOIA too



Best Practices to Avoid FACA Violations: **DECISION TREE**

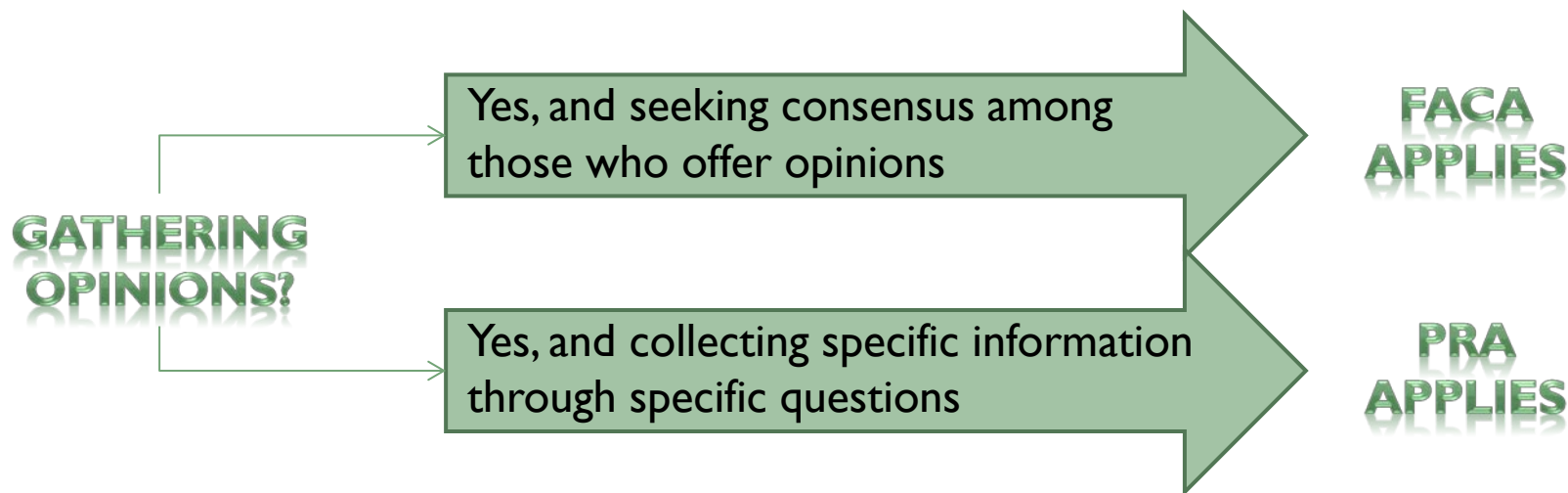


FACA & the Paperwork Reduction Act (PRA)



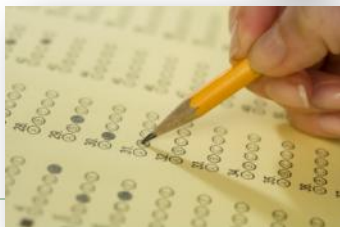
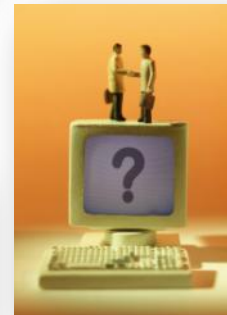
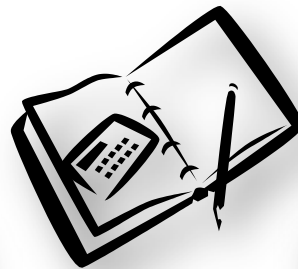
FACA & the Paperwork Reduction Act (PRA)

- ▶ **Why do we care?**: Gathering opinions from individuals doesn't trigger FACA, but sometimes *gathering opinions* can constitute collecting INFORMATION, which is governed by the Paperwork Reduction Act (PRA) when done by federal agencies
 - ▶ The Paperwork Reduction Act (PRA) of 1995 (P.L. 104-13) replaced the PRA of 1980, as amended in 1986, and applies to *collection of information by federal agencies*. The Office of Management and Budget (OMB) is responsible for federal regulations implementing the PRA (5 CFR 1320).



FACA & the Paperwork Reduction Act (PRA)

- ▶ **How is *INFORMATION* defined?:** OMB regulations define *information* specifically to meet the PRA's legislative intent.
 - ▶ “Information” means “any statement or estimate of fact or opinion, regardless of form or format, whether in numerical, graphic, or narrative form, and whether oral or maintained on paper, electronic or other media” ([5 CFR 1320.4\(h\)](#)).



FACA & the Paperwork Reduction Act (PRA)

- ▶ **Are there EXEMPTIONS to this definition of INFORMATION?:**
 - ▶ Yes, consistent with the legislative intent, OMB regulations establish ten (10) **EXEMPTIONS** that do not constitute “information” (and, therefore, related activities do NOT constitute “information collection”) for PRA purposes.
 - ▶ Two of these exemptions are especially relevant to public engagement and collaboration activities that may occur as part of LMP revision:
 - ▶ **EXEMPTION #4:** “Information does not include ... facts or opinions submitted in response to GENERAL SOLICITATIONS of comments from the public, published in the Federal Register or other publications, regardless of the form or format ...” (5 CFR 1320.3(h)(4))
 - ▶ **EXEMPTION #8:** “Information does not include ... facts or opinions obtained or solicited at or in connection with public hearings or meetings” (5 CFR 1320.3(h)(8))

“A GENERAL SOLICITATION may have a degree of specificity. For example, a general solicitation may pose a series of specific questions designed to elicit relevant public feedback; but the solicitation may not be a survey and the responses should be unstructured.”

OMB memo, April 7, 2010



TIP: Asking specific questions at a public meeting is fine if unstructured responses are OK

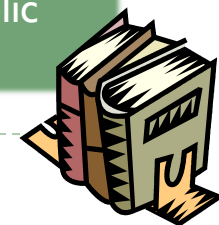
FACA & the Paperwork Reduction Act (PRA)

▶ **Putting this all together:**

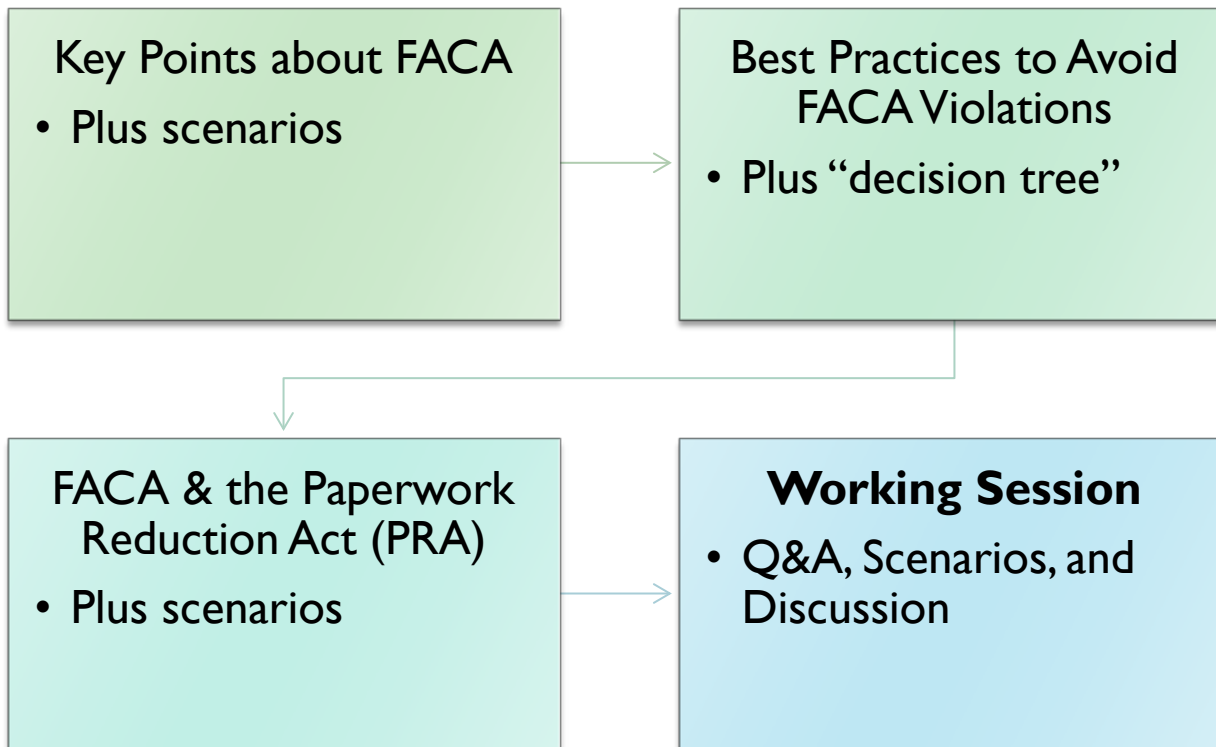
- ▶ PRA and FACA are like “**BOOKENDS**” to a public engagement process: An ambiguous meeting description can create concern about either PRA or FACA violations or both.
- ▶ “**PRA Bookend**”: PRA doesn't apply to public meetings convened so participants can exchange “facts or opinions” and that might include “general solicitations” (PRA Exemption #8)
- ▶ “**FACA Bookend**”: FACA doesn't apply if a group that includes non-federal employees is convened only to *exchange individual opinions*, even in response to general solicitations, as opposed to being convened for the purposes of reaching *consensus* (Tip: be careful not to call it “exchanging information”)



TIP: Neither PRA nor FACA apply if a general request for individual “facts or opinions” occurs in response to a *general solicitation of information* during a public meeting (“between the bookends”)



Working Session



Working Session

1. General questions?
2. What would be most useful?
 1. Brainstorming?
 2. Think through specific scenarios?
 3. Think through specific public engagement ideas?

