United States Senate
WASHINGTON, DC 20510

November 9, 2017

The Honorable Gene L. Dodaro
Comptroller General of the United States
U.S. Government Accountability Office
441 G Street NW
Washington, D.C. 20548

Dear Mr. Dodaro:

Thank you for accepting our request for review of the Environmental Protection Agency (EPA) policies and procedures for nominating and selecting federal advisory committee (FAC) members. On October 31, 2017, EPA Administrator Scott Pruitt issued a new directive governing the selection of scientists to its 22 FACs. On November 3, 2017, Administrator Pruitt announced his intention to appoint new members to three FACs. As EPA continues to change its FAC membership criteria and membership, GAO's review is becoming more timely and important.

The most significant change in policy is EPA's decision that "no member of an EPA federal advisory committee currently receive EPA grants, either as principal investigator or co-investigator, or in a position that otherwise would reap substantial direct benefit from an EPA grant."[1] While the intent of the new policy has been explained as enhancing "independence," "state, tribal, and local government participation," "geography diversity," and "fresh perspectives,"[2] many have noted that the effect appears to be to strengthen the voice of industry-funded scientists. Terry Yosie, the advisory board's director during the Reagan administration, has described EPA's new direction as "represent[ing] a major purge of independent scientists and a decision to sideline the SAB from major EPA decision-making in the future."[3]

EPA is required by law to maintain balance and protect against conflicts of interest on its FACs, and GAO has previously reviewed the adequacy of EPA's policies.[4] GAO's recommendations to EPA in 2001 did not suggest that categorical exclusions of groups of scientists based on the source of their research funding would help EPA meet its legal requirements. Instead, GAO urged EPA "to develop policies and procedures that better identify and mitigate potential

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[1] Memo from E. Scott Pruitt, Administrator, to Assistant Administrators et al. "Strengthening and Improving Membership on EPA Federal Advisory Committees," Oct. 31, 2017.
[2] Id.
[3] Juliet Eilperin et al., *In unprecedented move, EPA to block scientists who get agency funding from serving as advisers*, WASHINGTON POST, Oct. 31, 2017.
[4] Government Accountability Office, *EPA's Science Advisory Board Panels: Improved Policies and Procedures Needed to Ensure Independence and Balance*, July 2001.

conflicts of interest and support the development of balanced panels."[5] EPA's new policy appears to rest on the premise that scientists "reap substantial direct benefit" from EPA grants and therefore cannot be "motivated by service and committed to providing informed and independent expertise and judgment" when serving on FACs.[6]

We doubt this premise withstands scrutiny. In *Cargill v. United States*, 173 F.3d 323 (5th Cir. 2004), the United States Court of Appeals for the Fifth Circuit agreed, rejecting a challenge to an advisory board established under the Federal Advisory Committee Act because that board included government-funded scientists.

> NIOSH [National Institute for Occupational Safety and Health] did not fail to manage BSC [Board of Scientific Counselors] to avoid inappropriate influence when it permitted participation by former HHS [Department of Health and Human Services] employees and grant recipients....
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> NIOSH is the major sponsor of occupational safety and health research, and it is therefore not surprising that BSC, whose members are selected because they are experts in that field, would include some persons who had worked for or received a grant from HHS. Working for or receiving a grant from HHS...does not impair a scientist's ability to provide technical, scientific peer review of a study sponsored by HHS or one of its agencies. Moreover, if HHS were required to exclude from peer review committees all scientists who somehow had been affiliated with the department, *it would have to eliminate many of those most qualified to give advice*.

Cargill, 173 F.3d at 339 (emphasis added). As *Cargill* suggests, not only is the premise of the new policy flawed but it may be counterproductive.

While EPA is taking steps to "eliminate many of those most qualified to give advice," it appears to be making it easier for industry-funded scientists to serve on FACs. Under this new policy, EPA will be replacing representatives of public and private universities including Harvard, Stanford, Ohio State University, and the University of Southern California with scientists who work for Philips 66, Total, Southern Company, and the American Chemistry Council.[7] The double-standard is striking: an academic scientist that receives an EPA grant *for any purpose*

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[5] *Id.* at 20.
[6] Oct. 31, 2017 Memo from Pruitt.
[7] Current Science Advisory Board members can be found at: https://yosemite.epa.gov/sab/sabpeople.nsf/WebExternalCommitteeRosters?OpenView&committee=BOARD&secondname=Science%20Advisory%20Board

cannot provide independent advice on *a completely different subject matter* on any of EPA's science advisory boards, while industry scientists are presumed to have no inherent conflict even if their research is entirely funded by a company with a financial stake in an advisory board's conclusions.

When a policy, like this one, does not on its face address the problem it purports to solve it should get exacting scrutiny to determine what in fact its true purpose is. To that end and in addition to the questions raised in our initial request, we urge GAO to consider the following in its analysis:

1. Does receiving an EPA grant present a legitimate conflict of interest that should automatically bar a scientist from being able to serve on an EPA advisory board, committee or panel under the Federal Advisory Committee Act or any other recognized standard?
2. Is the problem of EPA-funded scientists lacking independence from EPA a real one? In other words, has EPA based its policy on evidence of EPA-funded scientists not having acted "independently and objectively"[8] on a FAC because of their source of funding?
3. Is the risk of academic scientists not acting "independently and objectively" because of the source of their funding qualitatively different from industry-funded scientists?
4. Under the new EPA policy, state, tribal and local scientists are specifically exempted from the policy prohibiting service on a FAC by those who receive the EPA grants. Is there a factual basis to support the premise that state, tribal or local scientists are more independent from EPA than other scientists who receive the same grants? What evidence did EPA review to come to this conclusion? Does EPA have in place sufficient policies and procedures to guard against improper conflicts of interest from these scientists?[9]
5. Have any other agencies implemented similar changes in the policies and procedures governing advisory board membership? If so, which ones, and have those policies enhanced board "independence"?
6. Do scientists who receive EPA grants "reap substantial direct benefit", and if so, what would that benefit be?
7. Will the exclusion of all scientists currently receiving EPA funding undermine the ability of EPA to attract qualified scientists to serve on its FACs?

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[8] Oct. 31, 2017 Memo from Pruitt.

[9] For example, Michael Honeycutt, of the Texas Commission on Environmental Quality (TCEQ), has been appointed Chair of the SAB. In a 2014 report, the *Center for Public Integrity* documented the relationship between Honeycutt and Toxicology Excellence for Risk Assessment raising questions about Mr. Honeycutt's impartiality as a state regulator. Rosalind Adams, *One-stop science shop has become a favorite of industry—and Texas*, CENTER FOR PUBLIC INTEGRITY, Dec. 19, 2014, available online at: https://www.publicintegrity.org/2014/12/19/16546/one-stop-science-shop-has-become-favorite-industry-and-texas.

8. Is there any evidence that prior EPA boards lacked geographic diversity, is geographic diversity a statutory or other requirement for board membership, and is this policy being implemented in a way to assure it?[10]
9. EPA's new policy put a priority on "fresh perspectives." What definition is EPA using to decide whether a scientist offers "fresh perspectives"? Is that definition consistent with FACA and its implementing regulations?

We look forward to GAO's work on this project.

Sincerely,

Sheldon Whitehouse
United States Senator

Thomas R. Carper
United States Senator

Edward J. Markey
United States Senator

Brian Schatz
United States Senator

Bernard Sanders
United States Senator

Jeanne Shaheen
United States Senator

Mazie K. Hirono
United States Senator

Gary C. Peters
United States Senator

Sherrod Brown
United States Senator

Al Franken
United States Senator

[10] Of the eighteen new members, three represent associations based in Washington DC, three come from North Carolina (joining two returning SAB member from that state), and two are from Texas (joining three Texans already on the SAB). States that will no longer be represented as a result of these changes include Illinois, New Jersey, and Rhode Island.