



Executive Board Guidebook

August 2020

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SECTION 1: ROLES, RULES, AND RESPONSIBILITIES

FLC STRUCTURE

Origins

The FLC was organized in 1974 and formally created by the U.S. Congress in the Federal Technology Transfer Act of 1986¹ for the purpose of coordinating federal laboratory technology transfer. In addition to the statutory mandate, the FLC members have adopted Bylaws that govern how the FLC operates. The Bylaws describe the organizational structure, roles, duties, and activities of the FLC. While changes to the underlying statute require Congressional action and do not change very often, the Bylaws may be amended by a vote from the members.

The FLC is not a federal agency but is considered a “quasi-Governmental organization.”² This status allows for some flexibility for the organization, as not all requirements for Executive Branch agencies apply directly. However, many rules that do not apply directly to the FLC do apply to many of its members, and there are specific grant requirements that apply to the Cooperative Agreement Partner as well. The FLC strives to use best practices of government organizations to support its members and accomplish its statutory mission. The FLC is not subject to the financial and corporate governance rules and restrictions that apply to nonprofit boards, but is subject to the Joint Ethics Regulation.³

Professional Organization

The FLC is an organization of and for federal technology transfer professionals. The members of the FLC are defined by statute. All federal research and development laboratories (including both government operated laboratories and federally funded research and development centers) and agencies are the FLC members. Laboratories and agencies can designate representatives that serve as the FLC voting members. While the FLC can form alliances with industry, universities, state and local governments, nonprofit organizations and others, those entities are not members and cannot hold FLC office. Use of the FLC name and logo is covered by a U.S. Trademark (figure 1).



Figure 1, The FLC Logo is a registered trademark

¹ Public Law 99-502, codified at 35 U.S.C. 3710(e)

² Memorandum: “Status of the Federal Laboratory Consortium.” Barbara S. Fredericks, U.S. Department of Commerce Office of General Counsel. See also Appendix C.

³ 2 Title 5, Code of Federal Regulations, Part 2635, “Standards of Ethical Conduct for Employees of the Executive Branch.” See also FLC Bylaws Article V, Section 1(10) in Appendix B. See a summary of these standards at <http://www.oge.gov/Laws-and-Regulations/OGE-Regulations/5-C-F-R--Part-2635---Standards-of-ethical-conduct-for-employees-of-the-executive-branch/> or the entire text at <http://www.ecfr.gov/cgi-bin/text-idx?rgn=div5&node=5:3.0.10.10.9>

FLC ORGANIZATION

The FLC Bylaws describe the organizational structure and functions for the FLC. By statute, senior agency and laboratory representatives form the FLC voting members. These members enact the Bylaws and, under those Bylaws, elect officers for the FLC that collectively make up the Executive Board (EB). The EB comprises the elected representatives of the organization and serves as its directing body. Bylaws changes passed in 2020 resulted in a significant change in the structure of the EB, and the transition from the old structure to the new structure will take a full 2.5 years to implement. Figure 2 shows the approved EB structure under the 2020 changes to the Bylaws.

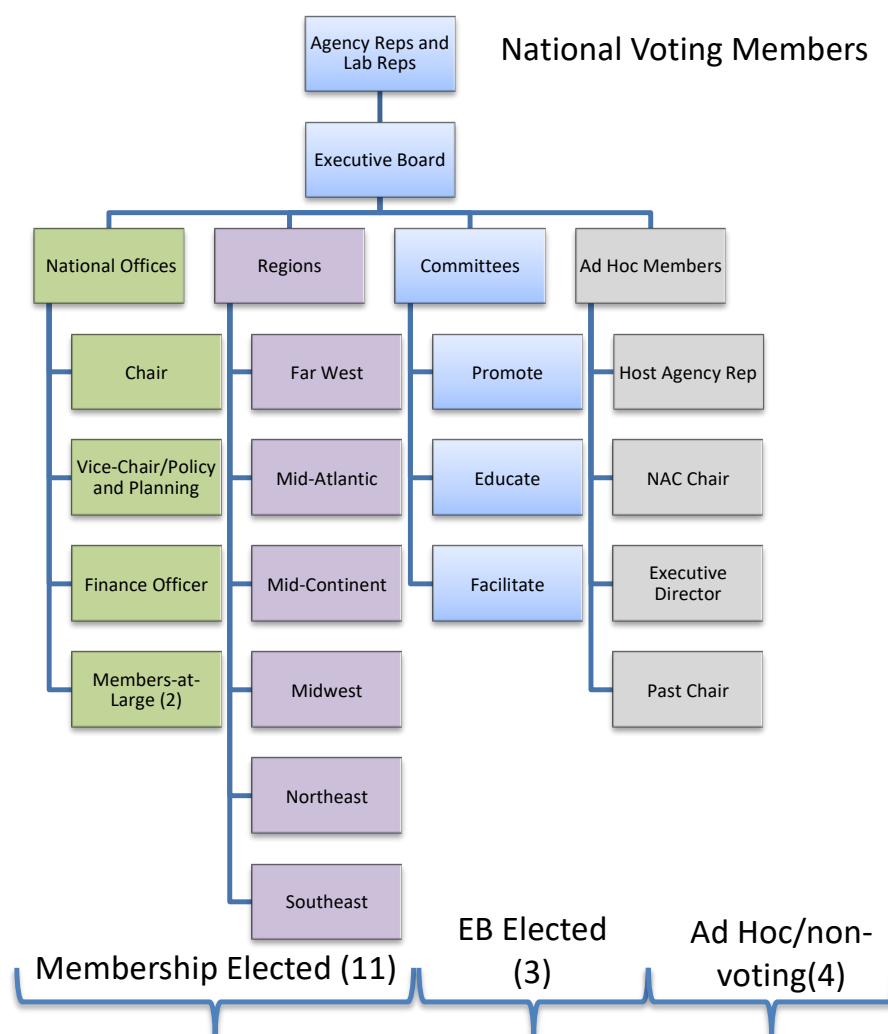


Figure 2, FLC Organization Chart

DUTIES OF BOARD MEMBERS

All EB members have some common duties, including participating in meetings, reviewing and contributing to reports, taking part in discussions, and representing the FLC as an FLC officer. Voting members have the responsibility of approving the overall actions of the FLC. Most EB members have additional duties assigned in the Bylaws to provide oversight in specific areas. It is important to fully participate in these activities in a timely fashion to ensure that the FLC operates and delivers on its mandates. All activities are directed toward implementing the FLC's goals as outlined in its Strategic Plan (see Appendix D).

While the duties and responsibilities are described in the statute, Bylaws, rules, and actions passed by the EB, each EB member also brings their interests and ideas as technology transfer professionals. While EB members are expected to act in good faith and be fair in their dealings, each individual should bring their professional interests and ideas to the discussion.

OTHER AREAS OF INVOLVEMENT TO CONSIDER

- Serving on a committee other than as Committee Chair
- Leading or participating in an ad hoc project
- Volunteering as an elections chair

NATIONAL INSTITUTE OF STANDARDS AND TECHNOLOGY (NIST)/HOST AGENCY

NIST serves as the Host Agency and provides a representative to the EB that serves as an advisory member. The FLC was created under Title 15 of the United States Code, which relates to Commerce. NIST is a part of the Department of Commerce and was given this responsibility. The FLC may request administrative support from NIST on a reimbursable basis. The FLC pays NIST for these services and overhead charges.

Some current roles of NIST/Host Agency are:

- Liaison between NIST and FLC
- Collects annual funding from agencies
- Holds funds in federal account, provides for administration of funds
- Coordinates with Finance Officer on funds
- Manages communication between EB members and other NIST staff
- Grant administration/Federal Project Officer for Cooperative Agreement Partner
- Issued and oversees Cooperative Agreement as a federal funding award on behalf of the FLC
Provides invitational travel
- Provides micro purchases via credit card
- Provides connection to GPO for printing services

SECTION 2: CONDUCTING BUSINESS

APPLICABLE RULES

As previously noted, the FLC operates under a federal statute and an approved set of Bylaws. The FLC Bylaws note that meetings will follow parliamentary procedures according to Robert's Rules of Order.⁴ The use of these rules helps to guide the discussion in an orderly way to accomplish business and provide a fair set of consistent practices for the FLC.

HOW DECISIONS ARE MADE

No unilateral board decisions may be made.

The EB will approve an overall strategic plan and will annually approve a budget and committee charters to guide actions for following year. Once a strategy has been set and a budget approved, the committees and regions operate to guide the implementation of the overall direction through the Cooperative Agreement Partner. Within that budget and vision, they are acting with approval and have authority to implement activities without further authorization from the EB as a whole. Significant deviations, changes in policies, committing additional funds, plans that would involve others outside your committee, and sensitive issues require an EB vote for approval.

Voting Members

While all EB members may actively engage in discussions and provide input, making a motion and voting are limited to certain EB members:

- Chair
- Vice Chair
- Finance Officer
- Recording Secretary*
- Members-at-Large**
- Regional Coordinators
- Standing Committee Chairs (Promote, Educate, Facilitate)

*The Recording Secretary role was eliminated in the 2020 Bylaw change. The Position will be phased out.

** The Members-at-Large will be reduced to two (2) over time as approved in the 2020 Bylaws.

Conducting a Vote

Voting may take place during EB meetings and are held in a manner to accommodate EB members who are present both in-person and virtually. Email votes can also be called at any time. A vote requires a quorum of at least half the EB being present to be valid. A quorum being present, a simple majority will determine if the motion is passed.

Votes follow the following process:

- An issue is raised by a member and is recognized by the Chair.
- The EB will discuss the issue and potential alternatives may be put forward by those present.
- A voting member will make a motion to be recognized by the Chair.
- The Chair will open debate for modification to all members, who may propose changes or may second the motion as put forward. All motions require a second to be put to the EB for a vote.

⁴ <https://www.robertsrules.com/>

- The Chair will call for a vote and poll the members. For matters that appear to the Chair to be relatively uncontested, a voice vote may be used. The Chair may individually poll members by roll or by a group indication of those in favor and those opposed. A member may request that the Chair individually poll members if they feel there is a reasonable concern that the votes were in error.
- The Cooperative Agreement Partner will enter the vote and the result into the minutes of the meeting.

Actions Requiring a Vote

The following actions at a minimum require a vote. The Chair will exercise discretion regarding other actions that rise to the level of requiring a vote from the EB.

- Budget (yearly)
- Committee Charters
- Strategic Plan/direction
- New large-scale initiatives
- Organizational policies and procedures (including Bylaws amendments to be put to a referendum)
- FLC Policies that define EB practices but do not rise to the level of the Bylaws

CONDUCTS OF BUSINESS

Meetings

The EB meets four times annually on a general schedule. Meetings are generally, but not always, planned for the third week of the month in order to allow some prior planning by EB members. A special meeting may be called, if necessary, by the Chair.

Table 1, Standing Executive Board Meetings

Topic	Timing
Seat new EB Members, Agency Representatives meeting	Fall (Typically October)
Strategic Planning	Winter (Typically January)
General Business	Spring (at National Meeting, /Typically April)
Budget and Charter Ratification	Summer (Typically July)

Participation options

The preferred method for attendance at the EB meetings is in person. Experience has shown that this is the best means to have discussions, build cohesion, and accomplish the work needed. The EB has sufficient funds to cover travel to meetings by EB members. Cooperative Agreement Partners may not travel using NIST invitational travel funds as it conflicts with host agency grant rules.

If an EB member cannot attend in-person, the Cooperative Agreement Partner will generally provide for videoconferencing or teleconferencing options. The Bylaws do allow for full participation and voting if the meeting is attended via video conference or conference call.

Where to Get Documents

The Cooperative Agreement Partner will provide a Board Book in advance of each EB meeting with key documents that will be considered. This material will be supplemented at the meeting with other presentation material, such as PowerPoint slides. Materials will generally be distributed via email and attached to the meeting invitation and will be attached under the Executive Board e-Group when the software is deployed.

SECTION 3: FINANCES AND SPENDING MONEY

FLC BUDGET

Funding for the FLC is determined as a formula by statute. All agencies contribute 0.008% of their intramural R&D annually as long as that amount exceeds \$10,000. NIST is charged with collecting these funds, which the FLC uses for its operations as approved by the EB. Funding collected by NIST is held in a specific account for the FLC and is not otherwise merged with other NIST monies. The FLC is responsible for maintaining its own financial solvency, and NIST does not provide additional funding or working capital if FLC funds reach zero. For this reason, the FLC tries to keep sufficient funds on hand at NIST in case there is an issue in the annual collections from agencies to prevent the FLC from closing operations. Current revenues for the FLC are approximately \$3M to \$4M per year, depending on the annual federal funding of research and development.

BUDGET

The EB will ratify a budget annually that describes expenses for the following year to implement the Strategic Plan. The budget process is the responsibility of the Finance Officer working with the Host Agency Representative and Executive Committee.

HOW MONEY CAN BE SPENT

Since NIST is the host agency and is responsible for administering FLC funds, disbursements must be made according to NIST policies. The following chart shows the different ways that FLC monies are spent.

Table 2, How Monies Are Spent

Mechanism	Uses	Amount	Process
Cooperative Agreement	The FLC has entered into a Cooperative Agreement with AUTM through NIST. This accounts for the majority of activities by the FLC.	\$3.2M annually	Budget prepared by Cooperative Agreement Partner and presented to the EB at the Budget Meeting for approval. Partner will work with Committees and Regions to implement the program.
Credit Card	Micro purchases outside of the Cooperative Agreement scope. Typical uses are sponsorships or other partnership opportunities.	Maximum \$10,000	Request to Chair, Finance Officer, Host Agency for use of funds directly from NIST
Invitational Travel	Travel by EB members, others requested by EB and not under Cooperative Agreement	As approved in budget or cleared by Chair/ Finance Officer	Request to Chair, Finance Officer, Host Agency for use of funds directly from NIST. Travel for EB meetings is approved.
Printing	Printing is generally done using the Government Printing Office through the Host Agency.	As approved in budget or cleared by Chair/ Finance Officer	Generally, start with Cooperative Agreement Partner. Work is done by GPO through NIST. May request to

			Chair, Finance Officer outside of Cooperative Agreement.
Interagency Agreements	Transfer of funds directly to another agency. Sometimes preferred agency method for travel. Also for other purposes that go through an agency other than Host Agency NIST	As approved in budget or cleared by Chair/ Finance Officer	Proposed in budget or through request to Chair, Finance Officer, Host Agency for use of funds directly from NIST. Travel for EB meetings is approved.

YOUR FIDUCIARY RESPONSIBILITIES

Budget

- Host Agency: Collect and distribute funds in accordance with internal procedures of the agency
- Finance Officer: Oversee budget process and availability of funds
- Voting Member: Ratify budget and charters
- Committees and Regions: Provide strategic direction and request supplemental funds as needed
- Chair: Approve funding requests above budget within available funds

Expenses

- Follow NIST invitational travel policies if applicable.
- Follow other source travel policies as applicable (Cooperative Partner, other agency).
- Request an Interagency Agreement as early as possible and include in budget development. Notify Chair, Finance Officer and Host Agency Rep of any changes as soon as possible.
- Ensure that projected expenses are included in the budget.
- Alert the Chair and Finance Officer if you have an unexpected expense before committing any funds.
- Work with the Cooperative Agreement Partner to ensure the best use of funds.
- Request credit card purchases from Chair, Finance Officer, and Host Agency for use of funds directly from NIST.

SECTION 4: COOPERATIVE AGREEMENT PARTNER: AUTM

Cooperative Agreement

Implementation is currently through a Cooperative Agreement with AUTM. The Cooperative Agreement is a broad and flexible way to conduct business. The EB will generally provide strategic direction to the Cooperative Agreement Partner (CAP) for implementation of the program as approved in the budget and charter. The CAP will strive to work with the Committees and Regions to effectively implement a high quality FLC program.

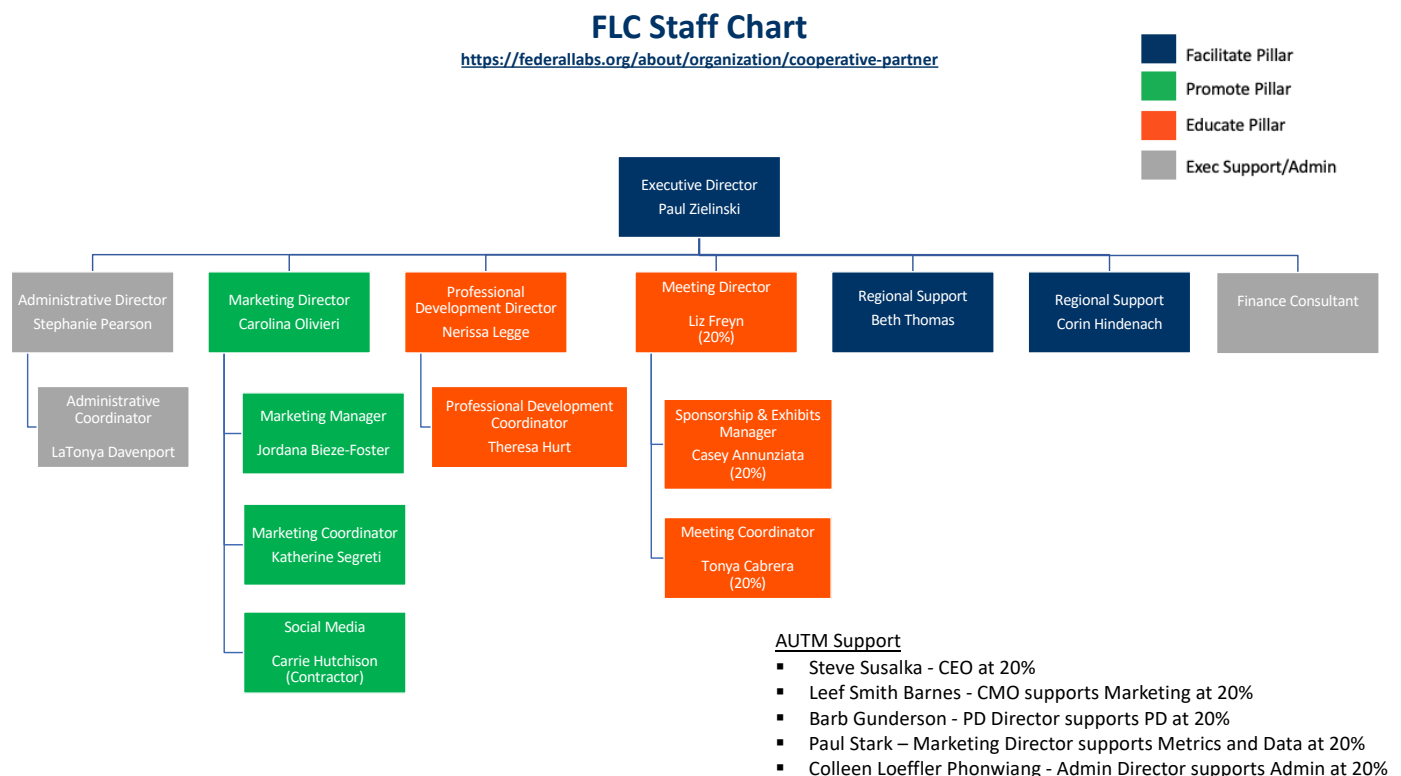
WORKING WITH THE COOPERATIVE AGREEMENT PARTNER

The CAP will work directly with the EB, Committees, and Regions on program implementation. Details on the CAP staff are available below and on the FLC website at <https://federallabs.org/about-us/organization/cooperative-partner>.

FEDERAL LABORATORY CONSORTIUM ORGANIZATIONAL CHART

Phone: +1- 678-298-1183

Email: info@federallabs.org



APPENDIX A – ESTABLISHING LEGISLATION OF THE FLC

TITLE 15 SECTION 3710(e)

- (1) *There is hereby established the Federal Laboratory Consortium for Technology Transfer (hereinafter referred to as the “Consortium”) which, in cooperation with Federal laboratories and the private sector, shall—*
- (A) *develop and (with the consent of the Federal laboratory concerned) administer techniques, training courses, and materials concerning technology transfer to increase the awareness of Federal laboratory employees regarding the commercial potential of laboratory technology and innovations;*
 - (B) *furnish advice and assistance requested by Federal agencies and laboratories for use in their technology transfer programs (including the planning of seminars for small business and other industry);*
 - (C) *provide a clearinghouse for requests, received at the laboratory level, for technical assistance from States and units of local governments, businesses, industrial development organizations, not-for-profit organizations including universities, Federal agencies and laboratories, and other persons, and—*
 - (i) *to the extent that such requests can be responded to with published information available to the National Technical Information Service, refer such requests to that Service, and*
 - (ii) *otherwise refer these requests to the appropriate Federal laboratories and agencies;*
 - (D) *facilitate communication and coordination between Offices of Research and Technology Applications (ORTA) of Federal laboratories;*
 - (E) *utilize (with the consent of the agency involved) the expertise and services of the National Science Foundation, the Department of Commerce, the National Aeronautics and Space Administration, and other Federal agencies, as necessary;*
 - (F) *with the consent of any Federal laboratory, facilitate the use by such laboratory of appropriate technology transfer mechanisms such as personnel exchanges and computer-based systems;*
 - (G) *with the consent of any Federal laboratory, assist such laboratory to establish programs using technical volunteers to provide technical assistance to communities related to such laboratory;*
 - (H) *facilitate communication and cooperation between Offices of Research and Technology Applications of Federal laboratories and regional, State, and local technology transfer organizations;*
 - (I) *when requested, assist colleges or universities, businesses, nonprofit organizations, State or local governments, or regional organizations to establish programs to stimulate research and to encourage technology transfer in such areas as technology program development, curriculum design, long-term research planning, personnel needs projections, and productivity assessments;*
 - (J) *seek advice in each Federal Laboratory Consortium region from representatives of State and local governments, large and small business, universities, and other appropriate persons on the effectiveness of the program (and any such advice shall be provided at no expense to the Government); and*
 - (K) *work with the Director of the National Institute on Disability and Rehabilitation Research⁵ to compile a compendium of current and projected Federal Laboratory technologies and projects that have or will have an intended or recognized impact on the available range of assistive technology for individuals with disabilities (as defined in section 3002 of title 29), including technologies and projects that incorporate the principles of universal design (as defined in section 3002 of title 29), as appropriate.*
- (2) *The membership of the Consortium shall consist of the Federal laboratories described in clause (1) of subsection (b) and such other laboratories as may choose to join the Consortium. The representatives to the Consortium shall include a senior staff member of each Federal laboratory which is a member of the Consortium and a senior representative appointed from each Federal agency with one or more member laboratories.*

⁵ This organization has been renamed National Institute on Disability, Independent Living, and Rehabilitation Research

- (3) *The representatives to the Consortium shall elect a Chairman of the Consortium.*
- (4) *The Director of the National Institute of Standards and Technology shall provide the Consortium, on a reimbursable basis, with administrative services, such as office space, personnel, and support services of the Institute, as requested by the Consortium and approved by such Director.*
- (5) *Each Federal laboratory or agency shall transfer technology directly to users or representatives of users, and shall not transfer technology directly to the Consortium. Each Federal laboratory shall conduct and transfer technology only in accordance with the practices and policies of the Federal agency which owns, leases, or otherwise uses such Federal laboratory.*
- (6) *Not later than one year after October 20, 1986, and every year thereafter, the Chairman of the Consortium shall submit a report to the President, to the appropriate authorization and appropriation committees of both Houses of the Congress, and to each agency with respect to which transfer of funding is made (for the fiscal year or years involved) under paragraph (7), concerning the activities of the Consortium and the expenditures made by it under this subsection during the year for which the report is made. Such report shall include an annual independent audit of the financial statements of the Consortium, conducted in accordance with generally accepted accounting principles.*
- (7)
 - (A) *Subject to subparagraph (B), an amount equal to 0.008 percent of the budget of each Federal agency from any Federal source, including related overhead, that is to be utilized by or on behalf of the laboratories of such agency for a fiscal year referred to in subparagraph (B)(ii) shall be transferred by such agency to the National Institute of Standards and Technology at the beginning of the fiscal year involved. Amounts so transferred shall be provided by the Institute to the Consortium for the purpose of carrying out activities of the Consortium under this subsection.*
 - (B) *A transfer shall be made by any Federal agency under subparagraph (A), for any fiscal year, only if the amount so transferred by that agency (as determined under such subparagraph) would exceed \$10,000.*
 - (C) *The heads of Federal agencies and their designees, and the directors of Federal laboratories, may provide such additional support for operations of the Consortium as they deem appropriate.*

APPENDIX B – FLC BYLAWS

See: https://federallabs.org/sites/default/files/flc_bylaws_52120.pdf

APPENDIX C – FLC STRATEGIC PLAN

See: <https://federallabs.org/flc-policies/flc-strategic-plan-2020-%E2%80%932025>

APPENDIX D – DEPARTMENT OF COMMERCE LEGAL OPINIONS



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D.C. 20230

IAN 02 2013

MEMORANDUM FOR: Phillip Singerman
Associate Director for Innovation and Industry Services
National Institute of Standards and Technology

FROM: Barbara S. Fredericks *BSF*
Assistant General Counsel
for Administration

SUBJECT: Status of the Federal Laboratory Consortium

This responds to your questions, which were forwarded to this office as a matter within our purview, concerning the status of the Federal Laboratory Consortium for Technology Transfer (FLC) and its relationship to NIST.

As set forth below, the FLC is not part of NIST, and it is not an "Executive agency" under 5 U.S.C. § 105. Nevertheless, because of its unique status, it should be viewed as a "quasi-Governmental organization" much like the National Academy of Sciences. The specific questions we were asked about how the FLC may obtain services from NIST, and the rules to which it is subject, require case-by-case review and are addressed individually below.

BACKGROUND

The FLC was initially established in the early 1970's as an *ad hoc* group of fewer than ten representatives of laboratories funded by the Department of Defense. Today, it includes over 300 member laboratories funded by over 25 Federal departments and independent agencies.

In 1980, the Stevenson-Wydler Technology Innovation Act (Stevenson-Wydler Act) required all Federal agencies that engaged in research and development to undertake efforts to transfer the benefits of such Government-funded work to the private sector. *See* Pub. L. No. 96-480, (October 21, 1980), *codified at* 15 U.S.C. § 3710. The Act established a Research and Technology Applications Office within each Federally-funded laboratory for the purpose of promoting the transfer of technology that was developed with Federal funds to states, academia, and the private sector. *See* Pub. L. No. 96-480, § 11, *codified at* 15 U.S.C. § 3710(b).

The Stevenson-Wydler Act referred to the FLC tangentially when it established a Center for the Utilization of Federal Technology (now the National Technical Information Service (NTIS))¹ within the Department of Commerce and directed the Center to obtain assistance and services from the National Science Foundation (NSF) and "the existing Federal Laboratory Consortium." *See* Pub. L. No. 96-480, § 11(d)(3).

Until passage of the Federal Technology Transfer Act (Pub. L. No. 99-502 (October 20, 1986)) (FTTA), the FLC had been funded by voluntary contributions from participating Federal departments and agencies and led by a program manager from the NSF. However, the legislative history to the FTFA observed that Federal funding and NSF support were not

¹ *See* Pub. L. No. 99-502, § 4(c)(1)(1986).

consistently provided. *See* S. Rep. No. 99-283 (99th Cong., 2nd Sess., reprinted in 1986 U.S.C.C.A.N. 3442, 3446, (April 21, 1986)).

In 1986, the FTTA amended the Stevenson-Wydler Act to formally establish the FLC to "remain a networking organization of federal laboratories and their technology transfer offices" and to "affiliate" the FLC with NIST. *See* H. Conf. Rep. No. 99-953 (99th Cong., 2nd Sess., reprinted in 1986 U.S.C.C.A.N. 3457, 3459 (October 21, 1986)), codified at 15 U.S.C. § 3710(e). Pursuant to the FTTA, the FLC's "members" consist of each Federal laboratory that has 200 or more full-time equivalent scientific, engineering, and related technical positions, and any other laboratory that may choose to join. The members are represented by a senior staff member from each Federally-funded laboratory and from each agency that funds one or more laboratories.² *See* 15 U.S.C. § 3710(e)(2). The FLC is funded from appropriations made available by each participating agency. Under 15 U.S.C. § 3710(e)(7)(A), each agency must transfer 0.008 percent of its research and development budget to NIST each year to support the FLC.

DISCUSSION

The FLC is not part of NIST

Nothing in the FTTA establishes the FLC within NIST. The legislative history provides at most that the FLC is "affiliated with" NIST so that it could have a permanent connection with a Federal agency and a more predictable source of funding than had been the case when the FLC was supported by other agencies and the NSF on an *ad hoc* and voluntary basis. *See* H. Conf. Rep. No. 99-953 (99th Cong., 2nd Sess., reprinted in 1986 U.S.C.C.A.N. 3457, 3459 (October 2, 1986)). In contrast, under the Stevenson Wydler Act, Congress specifically established the Center for Utilization of Federal Technology within NIST. This indicates that, if Congress had wished to place FLC within NIST, it knew how to do so. *See* Pub. L. No 96-480, § 11(d).

Moreover, under the FTTA, member agencies provide NIST a portion of their research and development budgets to fund the FLC and the FLC must reimburse NIST for services provided to it. *See* 15 U.S.C. § 3710(e)(4) and (7)(A). If the FLC were part of NIST, it would operate using funds appropriated to NIST, and the funding and reimbursement provisions of the FTTA would not have been necessary.

Finally, the legislative history provides that NIST is "not to be held responsible for performing the duties of the Consortium or accountable for the actions of the Consortium." S. Rep. No. 99-283 (99th Cong., 2nd Sess., reprinted in 1986 U.S.C.C.A.N. 3442, 3446, (April 21, 1986)). This also indicates that the FLC is a separate entity from NIST.

The FLC is not an Executive agency under 5 U.S.C. § 105

Pursuant to 5 U.S.C. § 105, the term "Executive agency" includes an Executive department, a Government corporation, or an independent establishment. Here, it is clear that the FLC is not an Executive department (or part of one) or a Government corporation. Therefore, the analysis turns to whether the FLC would be an independent establishment. Under 5 U.S.C. § 104(1), an "independent establishment" includes an establishment in the executive branch which is not: (1) an Executive department; (2) a military department, Government corporation, or part thereof; or (3) part of an independent establishment.

² Representatives of the laboratories need not always be Federal officials. For example, laboratories that are operated by contractors may have non-Federal representatives.

There is no bright line test for what constitutes an independent establishment under § 104 and it is necessary to examine each arrangement in its own context.³ The courts generally have applied the following four-part test to determine whether an organization is considered an independent establishment under § 104:

- (1) the organization was created by the Federal Government;
- (2) the organization was established to pursue Governmental objectives;
- (3) the officers of the organization are appointed by the Federal Government; and
- (4) Federal Government officials handle and control its operations.⁴

As set forth below, the first and second elements of the test are met. However, the third and fourth are not.

(1) The FLC was created by the Federal Government

The FTTA makes clear that the FLC - as it currently exists and operates - was created by the Federal Government. Under 15 U.S.C. § 3710(e)(1), it was formally established by Congress to organize the technology transfer activities of laboratories that depend in whole or in part on Federal projects and funding.⁵

(2) The FLC was established to pursue Governmental objectives

The FTTA requires the FLC to fulfill Governmental objectives called for under the Stevenson-Wydler Act, as amended by the FTTA. The FLC supports NTIS in its function as a central clearinghouse for the dissemination of scientific and technical information to state and local governments, and to private industry. NTIS also must refer all requests that it receives from state and local governments that require a response that cannot be met using NTIS's resources to the FLC. See 15 U.S.C. § 3710(d)(2) and (3).

The FLC also has substantial duties of its own under 15 U.S.C. § 3710(e)(1)(A) through (K). These provide, among other things, that the FLC will: (1) develop techniques, training courses, and materials concerning technology transfer to increase the awareness of Federal laboratory

³ See Washington Research Project, Inc. v. Dep't of Health Education, and Welfare, 504 F.2d 238, 245 - 46 (D.C. Cir. 1974) (concerning whether an organization was an "agency" under the Administrative Procedure Act (5 U.S.C. § 551(1))).

⁴ See Lebron v. National Railroad Passenger Corporation, 513 U.S. 374 (1995) (determining that the National Railroad Passenger Corporation (Amtrak) is a Federal entity for purposes of the First Amendment).

⁵ The facts show that the FLC is closely tied to the Federal Government. Under the FTTA, the FLC operates with Federal funds made available to it by Federal agencies (§ 3710(e)(7)); senior staff personnel of participating Federal agencies serve as representatives (§ 3710(e)(2)); it is authorized to obtain administrative services from NIST (§ 3710(e)(4)); and must submit an annual report to the President, Congress, and participating Federal agencies on its activities and expenditures, and also provide an independent audit, prepared in accordance with generally accepted accounting principles, of its financial statements (§ 3710(e)(6)). The Government Printing Office also recognizes the FLC as a Federal Board or Commission that is authorized to use the Federal Register. See U.S. Government Manual, 2012 ed., "Boards, Commissions, and Committees." Finally, the FLC's own By-Laws state that it is a Federal organization. "The Consortium is a federal organization organized by statute and shall abide by those federal laws and regulations that routinely apply to the various federal agencies." FLC By-Laws, Article II, § 2.

employees regarding the commercial potential of laboratory technology and innovations; furnish advice and assistance requested by Federal agencies and laboratories for use in their technology transfer programs (including the planning of seminars for small business and other industry); (3) provide a clearinghouse for requests, received at the laboratory level, for technical assistance from States and units of local governments, businesses, industrial development organizations, not-for-profit organizations including universities, Federal agencies and laboratories, and other persons; and (4) facilitate communications between the technology transfer offices of Federal laboratories. See 15 U.S.C. § 3710(e)(1)(A-D).

(3) FLC officers are not appointed by the Government

The third element of the § 104 test is not met here. FLC officers and representatives are not "appointed" by any official in the Executive branch in the sense that a Federal official recruits, selects, and signs a memorandum appointing any individual to serve as an officer or member. Rather, membership and status as a "representative" (which is required to be an officer) is automatic, so long as certain statutory qualifications are met. The FTTA provides, at 15 U.S.C. § 3710(e)(2), that the FLC's membership shall consist of the Federally-funded laboratories that have 200 or more full-time equivalent scientific, engineering, or related technical positions and such other laboratories that may choose to join. A senior staff member (which might, but need not, be a Federal official) of each of the member laboratories, and a senior representative from each Federal agency that funds one or more member laboratories shall serve as representatives to the Consortium.

Section 3710(e)(3) also provides that the representatives to the Consortium shall elect the Chair. Hence, the Chair is not selected or appointed by any Government official.

(4) Federal government officials do not control the FLC's operations

The fourth test is not met here because Federal officials do not control the FLC's operations. Under 15 U.S.C. § 3710(e)(3), all representatives elect the Chair. Although the current Chair is a Federal official (Dr. Mojdeh Bahar from the National Institutes of Health), the balance of the FLC's leadership shows a mix of Federal officials and representatives from laboratories.⁶

Nothing in the FTTA or the FLC's By-Laws require that the Chair or any other leadership position be held by a Federal official. Once an individual is a representative, he or she may be elected by other representatives to national and regional-level positions. See FLC By-Laws, Article V, §§ 2 and 3.

All activities are carried out by the Executive Board (as led by the Chair) which makes policy for the Consortium and establishes the annual budget. Nothing in the By-Laws provides for involvement of any Federal agency in activities of the Board, the Executive Committee (which conducts FLC business between Board meetings), or any subordinate committee or regional coordination office.

Comparison of the FLC to other organizations

We have compared the FLC to three other entities within the Department that have been determined to be independent establishments under 5 U.S.C. § 104 and, therefore, Executive agencies under 5 U.S.C. § 105, and we conclude that the FLC is different. These include the

⁶ See <http://www.federalallabs.org/home/contact/executive/>.

- First Responder Network Authority Board (FirstNet Board), the Denali Commission, and the Fishery Management Councils organized under the Magnuson-Stevens Act.

The legislation establishing the FirstNet Board that it is a Federal entity and an Executive agency under 5 U.S.C. § 105. See Pub. L. No. 112-96 (February 22, 2012), Title VI, Subtitle B, § 6201 et seq. The Board was established as an "independent entity" within the Department's National Telecommunications and Information Administration. See § 6204(a). The Board's duties are to build, deploy, and operate a nationwide public safety broadband network. See § 6202(a). The Secretary of Commerce appoints the Board's members under § 6204(b)(1)(D) and selects the Chair under § 6204(d).

The Denali Commission was established in 1998 pursuant to Pub. L. No. 105-277, §§ 301-309 (October 21, 1998), *codified at* 42 U.S.C. § 3121, note. It consists of seven Commissioners, including the Federal Co-chair, who is appointed by the Secretary of Commerce under § 303(b)(2)(B) and (c), and six other Commission members who are, under § 303(b), officials of the State of Alaska or Alaska organizations. The Commission's statutory role is to propose an annual work plan for providing Federal financial assistance in the State of Alaska that addresses rural and infrastructure development and job training needs in the State. See § 304(a). Once the Federal Co-chair approves the work plan, the Commission may award grants and make payments necessary to carry out the plan. See § 305(d). The Government Accountability Office has also concluded that the Denali Commission is a Federal agency. See B-322162 (September 19, 2011).

The Magnuson-Stevens Conservation and Management Act created eight Councils from regional groupings of coastal States and gave them certain authority concerning ocean fisheries to the seaward of their member States. See 16 U.S.C. § 1852(a).⁷ The Councils advise the Secretary in formulating fishery management plans within their respective geographic areas. See § 1852(h). After a management plan is prepared by a Council, it is submitted to the Secretary, who reviews it and either approves, disapproves, or partially disapproves it. See § 1854(a) and (b). If a Council fails to develop and submit a management plan, or fails to change a plan that the Secretary has partially or completely disapproved, the Secretary may prepare a management plan for that region. See § 1854(c). The Secretary of Commerce appoints a majority of the voting membership for three-year terms. See § 1852(a) and (b). The remaining members, voting and nonvoting, are State and Federal officials who serve in an ex officio capacity. See § 1852(b) and (c).

In each case, the organization meets all four elements of the test, including the last two elements, which are missing for the FLC. In all three cases, at least one member of the group is appointed by a Federal official. In the case of the Denali Commission and the Fishery Management Councils, Federal officials retain some authority over the work product of the group. None of this is present here.

The FLC is a "quasi-Government organization" much like the National Academy of Sciences

The FLC may be more readily compared to the National Academy of Sciences (NAS). They share similar origins. Like the FLC, the NAS began as a private group of scientists (albeit in the

⁷ The Department of Justice Office of Legal Counsel concluded, on March 14, 1995, that the Councils were "Executive agencies" within the meaning of 5 U.S.C. § 105.

1850s) until it was formally recognized by Congress through its Act of Incorporation dated March 3, 1863 (*codified at* 36 U.S.C. § 150301 et seq.)⁸

The NAS also exercises a Federal function by virtue of its duty to assist the Federal government in the performance of the latter's duties to further science and technology. *See* § 150303. Both entities are funded by the Government: the FLC in full and the NAS in part.⁹ Like the FLC, the NAS's members and officers are not appointed by Federal officials.¹⁰ The NAS also has authority to direct its own organization through adoption of a constitution and by-laws and determines its own membership. *See* § 150302. No Federal officials serve as NAS officers.¹¹

The NAS has been described as a "quasi-Government organization." In *Animal Legal Defense Fund, Inc. v. Shalala*, 104 F.3d 424 (D.C. Cir. 1997), advisory committees established by NAS were held to be subject to the Federal Advisory Committee Act (5 U.S.C. App. 2) (FACA) even though there was no finding that the NAS was an Executive agency under 5 U.S.C. § 105. Instead, the court extended the FACA's definition of "utilized committee" subject to the FACA to include "quasi-public organizations" that were "permeated by the Federal Government" such as the NAS. *Id.* at 429. Nevertheless, the NAS was not viewed as purely private either, because the court contrasted the NAS with another "wholly private organization" from another case. *Id.* at 430.

Hence, because of its strong comparison to the NAS, the FLC is a "quasi-government organization" that is subject to Federal rules in some contexts, but not others.¹² Each

⁸ *See* <http://www7.nationalacademies.org/archives/nasfounding.html>.

⁹ According to information on the NAS's website, in 2011, the NAS received \$280,156,384 through grants and contracts from over 20 Federal agencies, and \$49,692,077 from non-Federal sources.

¹⁰ The NAS's operating arm is the National Research Council (NRC), established by Exec. Order No. 2859 (May 11, 1918). As amended by Exec. Order No. 10668 (May 10, 1956), the membership of the NRC is as follows:

The Government shall be represented on the Council by members who are officers or employees of specified departments and agencies of the executive branch of the Government. The National Academy of Sciences shall specify, from time to time, the departments and agencies from which Government members shall be designated, and shall determine, from time to time, the number of Government members who shall be designated from each such department and agency. The head of each such specified department or agency shall designate the officers and employees from his department or agency, in such numbers as the National Academy of Sciences shall determine, who shall be members of the Council, but shall designate only those persons who are acceptable to the Academy.

This shows that even members of the NRC are not appointed by the Government, and the ultimate selection decision is subject to the NAS's control. This practice of allowing Federal employees to serve on behalf of their employing agencies is much like that of the FLC.

¹¹ *See* <http://www.nasonline.org/about-nas/leadership/nas-council.html>.

¹² For the purposes of applying the four-part test under 5 U.S.C. § 104, we draw no distinction between the fact that the NAS was expressly established as a "Government corporation" and the FLC was not. In each case, the important factor in our analysis is the fact that the organization was established by the Government and not the form that such establishment took. "Establishment" by the Government (as evidenced by the three Departmental examples discussed above) can take many forms. We could envision that each such organization could fall at a different point along a spectrum where there is a great deal of information concerning the type of organization that Congress contemplated at one end, and very little information at the other, yet each organization along the spectrum still would be "established" by the Government.

*circumstance must be evaluated on a case-by-case basis. With this background in mind, we turn to the specific questions raised by the in-coming correspondence.

Whether, in fulfilling its responsibility to provide administrative services to the FLC under § 3710(e)(4), NIST must comply with Government-wide requirements such as reporting FLC conference expenditures under Office of Management and Budget Memorandum (OMB) M-12-12 (May 11, 2012).

The FLC's expenses are not subject to the travel and conference controls imposed on NIST. The legislative history to the FTTA specifically provides:

The fund transfers for the Consortium are to be made to the National Bureau of Standards at the start of each fiscal year in which they are required. These funds should not be subject to controls imposed on National Bureau of Standards funds, such as personnel ceilings and domestic travel limits. The Committee expects the Bureau to transfer funds as requested by the Consortium.

S. Rep. No. 99-283 (99th Cong., 2nd Sess., reprinted in 1986 U.S.C.C.A.N. 3442, 3446, (April 21, 1986)(emphasis added).

In light of this explicit Congressional intent, and the fact that the FLC is not part of NIST, controls on expenditures of NIST funds for certain purposes do not apply to FLC funds solely by virtue of the fact that NIST holds the funds. Moreover, the FLC expenditures should not be used in calculations of any ceilings imposed on NIST with respect to travel or conference expenditures.

We also have considered whether the OMB Memorandum of May 11, 2012 applies to FLC independently of NIST and conclude that it does not. The OMB Memorandum is addressed to "Heads of Executive Departments and Agencies." As stated above, the FLC is a quasi-government organization, and not an Executive Department or agency under 5 U.S.C. § 105. NIST could, as a matter of policy, ask the FLC to comply with the provisions of the OMB Memorandum, but there is no legal requirement that it do so.

If NIST does not ask the FLC to comply with the OMB Memorandum, then, in light of considerable scrutiny about Government expenditures on travel and conferences, we recommend that NIST be explicit when it engages in such expenditures on behalf of the FLC and identify that it is not spending its own funds but, rather, is providing administrative services to the FLC on a reimbursable basis as mandated by 15 U.S.C. § 3710(e)(4).

Whether NIST must follow the Federal Acquisition Regulation (FAR) in letting contracts on behalf of the FLC.

The FAR (48 C.F.R. Parts 1-99) must be followed whenever appropriated funds are used to procure supplies or services by and for the use of the Government. See 48 C.F.R. Parts 1.104 and 2.101. In this case, all participating agencies provide appropriated funds to NIST, which uses the funds to obtain services for the FLC, a quasi-Governmental organization, to enable it to fulfill its Governmental objectives.¹³

¹³ We note that, under its Organic Act (15 U.S.C. § 273, 275a, and 278b), NIST performs services for and accepts reimbursement from non-Federal entities that are unquestionably private for-profit corporations; yet it uses Federal contracting procedures when that is required to provide the services.

Nothing in the FTTA gives NIST the necessary explicit authority to dispense with Federal procurement laws and regulations, including the FAR, when it provides services to the FLC.¹⁴ The legislative history that exempts the FLC's funds from controls on NIST funds such as personnel ceilings and travel limitations does not extend so far as to exempt all NIST transactions using the FLC's funds from the FAR. The exemptions mentioned in the legislative history involve policy ceilings on amounts that may be expended for specific purposes.¹⁵ In contrast, the FAR is largely grounded in statute under 41 U.S.C. § 421 et seq.¹⁶

Therefore, in expending funds on the FLC's behalf, NIST is bound by statutes, and those regulations that implement statutes, that govern how agencies may expend Federal funds, including the FAR in all transactions that it undertakes, including those undertaken on behalf of the FLC.

The extent to which there may be discretion in applying Departmental procurement rules and policies to entities that are not part of the Department is a matter within the purview of the Contract Law Division, and we are referring the question to that office.

Whether NIST may impose an overhead charge on funds that have been collected from other agencies and transferred to the FLC.

The FTTA requires each participating agency to transfer 0.008% of its annual research and development budget to NIST at the beginning of each fiscal year. "Amounts so transferred shall be provided by the Institute to the Consortium for the purposes of carrying out activities of the Consortium." 15 U.S.C. § 3710(e)(7)(A).

We have been advised that NIST accepts funds from other agencies through inter-agency agreements and deposits them in a separate account that it holds for the FLC. NIST transfers funds from this account to make disbursements to third parties as requested by the FLC. All outgoing transfers made on behalf of the FLC are subject to a surcharge that, in fiscal year 2012, was estimated to be less than 3%, and is paid to NIST for general support.

We see no legal problem with NIST collecting amounts to process outgoing transactions on the FLC's behalf so long as this charge is rationally tied to the actual cost of providing such services to the FLC. See Office of Management and Budget Circular A-25, § 2(a) (requiring that user charges be set to recover the full cost to the Government of providing a good or service). The FTTA authorizes NIST to provide administrative services, including support services, on a reimbursable basis. 15 U.S.C. § 3710(e)(4). This could include the cost of administering procurement actions on the FLC's behalf.

¹⁴ See also 31 U.S.C. § 6303 (an Executive agency shall use a procurement contract where the principal purpose is to obtain goods or services for the benefit of the Government).

¹⁵ The limitations referred to do not appear in the National Bureau of Standards (NBS) Authorization Act (Pub. L. No. 99-73 (July 29, 1985)) or its Appropriations Act (Pub. L. No. 99-180 (December 13, 1985)) for fiscal year 1986, which were in effect when the FTTA was under consideration. Had the limitations been statutory, they might reasonably have been expected to be found in one of those acts, and not in other free-standing legislation. The fiscal year 1987 NBS Authorization and Appropriations Acts were signed into law after the FTAA on October 20, 1986. See Pub. L. No. 99-574 (October 28, 1986), and Pub. L. No. 99-591 (October 30, 1986), respectively. Those Acts also did not include any limitations on personnel or travel costs for NIST.

¹⁶ We have conferred with the Contract Law Division and been advised that some portions of the FAR, mostly concerning the administration of contracting procedures, are policy-based.

However, we see no similar authority that would permit NIST to collect a surcharge on the incoming funds from other agencies. Generally, when Congress makes funds available to an agency on behalf of a specific beneficiary, for a specific purpose, and in a specific amount, Congress intends the entire amount to be transferred without deduction for administrative expenses. See 72 Comp. Gen. 317 (1993) (General Services Administration could not deduct a percentage of an earmark grant award to cover its administrative expenses). NIST has authority to collect amounts from the FLC, but only as a function of providing services to it. If there are expenses associated with the service of maintaining the FLC account, we could envision that NIST could collect from the FLC the actual cost of providing that service as an administrative expense under § 3710(e)(4), rather than by deducting a flat surcharge from the funding agencies' payments into the account.

Whether the FLC must use NIST or could seek services from other agencies or even from the private sector.

The FTTA requires that NIST provide administrative and support services to the FLC upon request. See 15 U.S.C. § 3710(e)(4). The legislative history makes clear that the intent was to assist the FLC by giving it a predictable source of funding and a "permanent connection" with NIST as a host agency. See H. Conf. Rep. No. 99-953, *reprinted in* 1986 U.S.C.C.A.N. 3457 at 3459.

However, there is no corresponding legal requirement imposed on the FLC to request services only from NIST. The legislative history even anticipated that the FLC might obtain services in the form of office space for its Washington, D.C. liaison office on a no-cost or a cost-reimbursement basis from other agencies. See S. Rep. 99-283, *reprinted in* 1986 U.S.C.C.A.N. 3442 at 3451. Hence, we see nothing in the FTTA that would prevent the FLC from obtaining services from other agencies. However, as a practical matter, because the FLC's funds are currently maintained by NIST, if the FLC wishes to obtain services from another agency, NIST must enter into an interagency agreement with that agency to obtain services for the FLC. NIST could do this under the Economy Act (31 U.S.C. § 1535) or under an agency's specific funds transfer authority.

As stated above, so long as NIST maintains the FLC's funds, it may only obtain services for the FLC from the private sector by procurement contract. Hence, the FLC may not seek services from the private sector using NIST without using Federal procurement procedures.

We were also asked whether the FLC could obtain legal services from the private sector, instead of from NIST. Because the FLC's funds originate as appropriated funds, and they do not lose their Federal character when they are transferred to and maintained by NIST, NIST is still subject to statutory restrictions on the ability to obtain private legal services for the FLC. This includes 5 U.S.C. § 3106 which provides that, unless otherwise provided for by law, Federal agencies may not employ attorneys for the conduct of litigation in which the United States is a party or has an interest and, instead, must refer such cases to the Department of Justice.

Moreover, while appropriated funds may be used to enter into a procurement contract to hire non-litigating attorneys as "experts and consultants" under 5 U.S.C. § 3109 (see 61 Comp. Gen. 69 (1981)), this requires a determination that the work could not be performed by regular Federal employees. See 5 C.F.R. § 304.103(b)(4).

• This determination must be made by the Department of Commerce General Counsel. Department Organization Order 10-6 provides, at § 4.04, that all personnel actions involving legal positions in the Department of Commerce will be coordinated by the Department's General Counsel. This would include personnel actions that are undertaken pursuant to procurement contract for personal services. Hence, before NIST could rely on the authority provided in 5 U.S.C. § 3109 to hire attorneys for the FLC through a contract, it must seek the required determination from the General Counsel.

Whether NIST could transfer funds directly to Federal Laboratories under the Economy Act or other authority.

Historically, NIST has not transferred funds directly to the FLC because the FLC does not have an account into which NIST could deposit the funds. Instead, it responds to FLC's requests for services by entering into procurement contracts with outside entities to obtain services on the FLC's behalf. The FTTA does not authorize direct transfers of funds to the FLC. We note that § 3710(e)(7)(A) provides that the FLC's funds "shall be provided by the Institute to the Consortium for the purpose of carrying out activities of the Consortium under this subsection." We read this language to specify that NIST cannot use the funds for its own needs but, instead, must use the funds for the benefit of the FLC. It does not provide the explicit authority needed for NIST to operate outside of established funds transfer mechanisms (with built-in fiscal controls) such as procurement contracts or interagency agreements.

The question then arose whether NIST could transfer the FLC's funds to the Federal laboratories where FLC representatives work to enable those laboratories to provide services (such as reimbursement for the representatives' travel) to assist the FLC. In some cases, it can. We have reviewed and cleared interagency agreements (including those falling under the Economy Act) between operating units of the Department and Government-Owned, Contractor-Operated laboratories in cases where this has been permitted by the agency that funds the laboratory. We could envision NIST entering into such agreements with laboratories on behalf of their sponsoring agencies to support the FLC. To streamline this process, we have crafted the attached template Economy Act agreement which may be used as a starting point with laboratories sponsored by other agencies.

Whether the FLC may establish itself as a non-profit organization.

If the FLC were to incorporate itself as a non-profit organization, no Federal official could assist the FLC or play any role in that activity. The Government Corporation Control Act (GCCA) provides that agencies may not establish corporations absent specific statutory authority. See 31 U.S.C. § 9102. If the FLC wishes to be a corporation, either NIST or the FLC would need to seek a legislative solution whereby Congress could designate the FLC to be a Government corporation and authorize Government officials to assist in establishing it.

The FTTA does not provide the necessary specific authority. In fact, the legislative history points to the contrary. The Senate Report states that the Senate Committee did not intend to change the decentralized nature of the Consortium. See S. Rep. No. 99-283, *reprinted in* 1986 U.S.C.C.A.N. 3442, at 3450-51. Similarly, the House Conference Report states that the FLC was to remain a networking organization of Federal laboratories and the technology transfer offices. See H. Conf. Rep. No. 99-953, *reprinted in* 1986 U.S.C.C.A.N. 3457 at 3459. This emphasis on keeping the FLC as it was prior to the FTTA demonstrates that Congress did not intend the FLC to alter its organization other than as specified in the FTTA. Moreover,

- Congress could have organized the FLC as a Federally-chartered corporation (as it did the NAS in 1863) but chose not to.

Although the FLC is not an agency, the Federal representatives of the FLC are employees of agencies and their activities (in the form of salaries and expenses) are paid from appropriated funds. Federal appropriations are only available to agencies for purposes "as provided for by law." See 31 U.S.C. § 1301(a). Because the GCCA prohibits establishment of corporations absent statutory authority, and nothing in the FTTA confers upon any agency the specific authority necessary to overcome the GCCA's prohibition, appropriated funds are not available to pay Federal employees to establish a Government corporation for the FLC. Hence, any efforts to establish such a corporation would need to be undertaken by the non-Federal representatives to the FLC.

Whether the FLC is subject to the Freedom of Information Act

We have also considered whether the FLC is subject to the Freedom of Information Act (FOIA) (5 U.S.C. § 552) and have concluded that it is not.

Case law provides that, regardless of how an organization is labeled, it is not subject to the FOIA if it is not controlled or supervised by the Federal government. See Irwin Memorial Blood Bank of the San Francisco Medical Society v. American Red Cross, 640 F.2d 1051 (9th Cir. 1981). We have established above that the FLC is not a Government agency because the FLC's members and officers are not appointed by the Government and the Federal officials do not control the FLC's operations.¹⁷ Because the FLC is not controlled or supervised by the Government, it is not subject to the FOIA as a matter of law.¹⁸

However, the Federal agencies that participate in FLC activities are subject to the FOIA, and any records that are in the custody and control of a Federal representative to the FLC would be subject to processing under the FOIA by the representative's agency. For example, NIST maintains certain records about the FLC as a function of its role as "host agency" to the FLC, while all Federal agencies participating in the FLC have custody and control of records about the FLC within their organizations or within the laboratories that they fund. If a Federal FLC representative official receives a FOIA request for FLC records, that person should forward the request to his or her agency's servicing FOIA office.

¹⁷ While not determinative of Federal agency status, we note that the FLC is not included in the Office of Personnel Management's Federal Agencies List (see <https://www.opm.gov/Open/Apps/Agencies>), and it was not among an extensive list of entities characterized in a recent Congressional Research Service report as "Organizations Independent of, But Dependent Upon, Agencies." See The Quasi Government: Hybrid Organizations with both Government and Private Sector Legal Characteristics, (June 22, 2011). The FLC is listed as a board or commission of the Government established by Congressional or presidential action. See U.S. Government Manual, 2012 ed., "Boards, Commissions, and Committees." However, as set forth above, Congressional establishment is one of four factors to be considered in determining an entities' status as a Federal agency, and the FLC does not meet two of the four.

¹⁸ Moreover, as a practical matter, the FLC does not have its own offices where records would be maintained and to which a FOIA request could be sent. While the FLC's website identifies particular individuals who occupy leadership roles, including the Washington, D.C. representative, the contact information is to those individuals directly and not to any FLC offices. The FOIA does not apply to individuals. See Few v. Liberty Mutual Insurance Co., 498 F. Supp. 2d 441, 452 (D.N.H. 2007).

We expect that additional questions about the FLC and the rules to which it is subject will arise as these matters are discussed further within NIST and with the FLC. Please contact me at 202 482-5384 or Alice McKenna of my staff at 202 482-5234 for further advice on such matters.

cc: Henry Wixon

Attachment



UNITED STATES DEPARTMENT OF COMMERCE
Office of the General Counsel
Washington, D.C. 20230

NOV 13 2013

MEMORANDUM FOR: Paul Zielinski
Director, Technology Partnerships Office
National Institute of Standards and Technology

FROM: Barbara S. Fredericks *BSF*
Assistant General Counsel
for Administration

SUBJECT: Applicability of the Federal Advisory Committee Act to Committees
Established by the Federal Laboratory Consortium

This responds to your request for legal advice concerning whether the Federal Advisory Committee Act (FACA) applies to committees established by the Federal Laboratory Consortium for Technology Transfer (FLC). As discussed below, so long as FLC committees serve to assist the FLC in its activities, advise only the FLC, and do not advise any Federal agency, they do not trigger the FACA.

Background

The FLC was formally established under the 1986 amendments to the Stevenson-Wydler Technology Transfer Act. See 15 U.S.C. § 3710. On January 2, 2013, we opined that the FLC was not an "executive agency" under 5 U.S.C. § 105 because, even though it was created by Congress to further Federal objectives, the Government does not appoint its officers or control its operations. Instead, the FLC was determined to be a "quasi-Government organization," much like the National Academy of Sciences (NAS).

The FLC's "members" include each Federally-funded laboratory that has 200 or more employees, and each agency that funds one or more laboratories. See 15 U.S.C. 3710(e)(2). These members are represented on the FLC by senior staff from each organization. The representatives need not be Federal officials; many Federally-funded laboratories are operated by contractors or private organizations and would not have representatives who were Federal officials.

The FLC's by-laws provide for the establishment of various types of committees to carry out the work of the FLC. As part of the FLC's governance structure, Article V, § 4a established a National Advisory Committee (NAC) comprised of individuals from the FLC's user communities including, but not limited to, industry, academia, state and local governments, and Federal laboratories. The FLC website currently lists eleven individuals on the national advisory committee who come from Government, academia, and the private sector. Thus, the NAC includes people who are not Federal employees.

Article IX, § 1 established two "Consortium committees" for: (1) financial management, and (2) planning and policy. Article IX, § 4 also provides for six "standing committees" on (1) awards, (2) educational institutions and training, (3) legal issues, (4) marketing and public relations, (5) program issues, and (6) state and local government. These committees may also include individuals who are not Federal employees.

Discussion

The FACA governs the organization and operations of "any committee, board, commission, council, conference, panel, task force or other similar group . . . which is . . . established or utilized by one or more agencies in the interest of obtaining advice or recommendations." 5 U.S.C. App. 2, § 3 (emphases added). A primary exclusion from the FACA involves any committee that is composed wholly of full-time, or permanent part-time, officers or employees of the Federal Government. See id. at § 3(2)(C)(i). Therefore, the FACA is potentially triggered any time a Federal agency obtains consensus advice or recommendations from a group that includes at least one individual who is not a Federal employee. See Association of American Physicians & Surgeons v. Hillary Rodham Clinton, 813 F. Supp. 82 (D.D.C.1993).

The FLC is not subject to the FACA when it receives consensus advice from groups, even where those groups include individuals who are not Federal employees. This is because the FLC is not an "agency" for the purposes of the FACA. Section 3(3) of the FACA incorporates by reference the definition of "agency" found at 5 U.S.C. § 551(1) which provides that an agency is an "authority of the Government of the United States, whether or not it is within or subject to review by another agency."

The NAS, to which the FLC has been closely compared, has been held not to be an "agency" subject to 5 U.S.C. § 551(1) and, therefore, the FACA, because it possesses none of the characteristic functions of an agency such as rule-making, adjudication or licensing; received no appropriations; and has no vested authority, no power to implement its own advice, or authority to impose any sanctions. See Lombardo v. Handler, 397 F.Supp. 792, 794 (D.D.C. 1975). The FLC is substantially similar to the NAS in these respects because it also lacks power to regulate, control, or proscribe non-Governmental activities, and it does not receive its own appropriations but, instead, relies on funds from other agencies transferred to its account with NIST. For the same reasons, it is not an "agency" under the FACA and is therefore not subject to the Act's procedural requirements as the recipient of advice from its committees.

However, Lombardo was sharply limited with respect to the NAS in Animal Legal Defense Fund v. Shalala, 104 F.3d 424 (D.C. Cir. 1997) (ALDF), where a committee that reported to the NAS to assist that organization in developing advice for a Federal agency was found to be subject to the FACA.¹ The D.C. Circuit found that the NAS's committee was "utilized" by a Federal agency and, therefore, subject to the FACA, because the NAS, even though it wasn't an agency, was a "quasi-public" organization "permeated by the Federal government." Id. at 428, quoting Public Citizen at 463 (1989). As a result, any group that is created and managed by a quasi-government organization for the purpose of providing advice to Federal agencies is subject to the FACA and its procedural requirements, including chartering the group, providing advance notice of meetings, holding open meetings, and providing access to committee records. See 5 U.S.C. App. §§ 9 and 10.²

¹ This was not because the NAS had become an agency under 5 U.S.C. § 551(1), and the holding in that regard in the Lombardo case was not overruled. Rather, in the intervening 22 years since the Lombardo case, the Supreme Court had occasion to define what constituted a "utilized committee" under the FACA and determined that that term included committees formed by quasi-government organizations such as (by way of example) the NAS. See Public Citizen v. Dep't of Justice, 491 U.S. 440 (1989).

² Since (and in response to) the ALDF case, Congress has amended the FACA to develop alternate requirements for committees formed by the NAS. See Pub. L. 105-153, §2(a), (b), Dec. 17, 1997, codified in principle part at 5 U.S.C. App. 2, § 15.

In light of the strong similarities between the NAS and the FLC, it would seem that the FLC committees should be subject to the FACA under the holding in the ALDF case. However, in this matter, the organizations are dissimilar because each uses its committees for different purposes. For example, much of the FLC committees' work focuses on internal management matters and any advice that is provided goes to the FLC Executive Board for the Board's use in governing FLC activities, and is not provided to Federal agencies.³ In contrast, the NAS does not create committees for its own internal use but, instead, uses them to obtain advice for Federal agencies.⁴ While the organizations are very similar, the way they use their committees is different, and this difference warrants a different outcome than that set forth in the ALDF case.

Therefore, the FLC is not subject to the FACA because it is not a Federal agency under that statute. Moreover, even though the FLC may be a quasi-government organization like the NAS, it is still not subject to the FACA so long as its committees report only to it, and the FLC does not use them to obtain advice for Federal agencies.

If you have any questions regarding this matter, please contact Alice McKenna of my staff at 202 482-5234.

³ The NAC provides the FLC Executive Board with user community views and advice related to the operation of the FLC. The Financial Management Committee monitors funding, drafts the annual budget, keeps books for the cash accounts, prepares financial reports, calls for and oversees audits, and advises the Executive Board on changes in available funds. The Planning and Policy Committee makes recommendations to the Executive Board regarding plans, goals, policies and positions to support the strategic plan of the FLC. The six standing committees are responsible for FLC functions such as advertising, promotion, and public relations; education and training of user communities; and development and testing of appropriate technology transfer processes, and report on these matters to the Executive Board.

⁴ According to its website, the NAS creates peer-reviewed consensus reports, primarily for the Federal government, that are developed by study committees of scientists, engineers, and health professionals.

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Sent: Thursday, May 16, 2019 5:37 PM
To: Silverthorn, Courtney (Fed) <courtney.silverthorn@nist.gov>
Cc: Schiffer, Jeremy A. (Fed) <jeremy.schiffer@nist.gov>; Lieberman, Melissa J. (Fed) <melissa.lieberman@nist.gov>; Zielinski, Paul R. (Fed) <paul.zielinski@nist.gov>
Subject: re Use of Cooperative Agreement to Support the Federal Laboratory Consortium

Courtney,

You asked our office whether NIST may enter into a cooperative agreement on behalf of the Federal Laboratory Consortium (FLC) for the performance of FLC duties provided in 15 U.S.C. § 3710(e)(1). We see no legal problem with such an approach.

NIST receives funds from participating Federal agencies pursuant to 15 U.S.C. § 3710(e)(7), which requires participating Federal agencies to transfer a set percentage of its budget each year to NIST to enable the FLC to carry out activities laid out in 15 U.S.C. § 3710(e)(1). These activities include development and administration of techniques and training courses to increase awareness of the commercial potential of laboratory technology, furnishing advice and assistance on agencies' technology transfer programs, providing a clearinghouse for requests for technical assistance, facilitating the use of Federal laboratories, and establishing programs to stimulate research and to encourage technology transfer among other things.

Pursuant to 15 U.S.C. § 3710(e)(4), NIST is charged with providing the FLC with administrative services such as office space, personnel, and support services, on a reimbursable basis, upon request by the FLC. One such administrative service that NIST provides is the management of FLC funds to enable the fulfillment of the FLC's duties under 15 U.S.C. § 3710(e)(1). Currently, upon FLC's request, NIST procures the services of a contractor to perform activities authorized under section 3710(e)(1). NIST proposes that it instead award a cooperative agreement.

By memorandum dated January 2, 2013, our office addressed various issues regarding the status of the FLC. In that opinion, we stated that ". . . so long as NIST maintains the FLC's funds, it may only obtain services for the FLC from the private sector by procurement contract. Hence the FLC may not seek services from the private sector using NIST without using Federal procurement procedures." It contains no discussion of whether a cooperative agreement would or would not be acceptable, as this question was, as you note, not posed at the time.

There is no inherent authority for an executive agency to award financial assistance, so an agency must have specific authority to do so. Agencies choosing to award financial assistance are also subject to the Federal Grant and Cooperative Agreement Act of 1977 (FGCA), 31 U.S.C. §§ 6301-6308, which establishes standards that agencies are to use in selecting the most appropriate funding vehicle as between a procurement contract, grant, or cooperative agreement. Moreover, an agency cannot have another agency undertake activities on its behalf that it would not have authority to do on its own. See 5 Comp. Gen. 757 (March 24, 1926).

In our January 2, 2013 memorandum, we concluded that the FLC is not an executive agency for purposes of 5 U.S.C. § 105. For the same reasons, the FLC is not an executive agency for purposes of the FGCA and is therefore not subject to the FGCA. Although NIST will award the cooperative agreement at issue here on FLC's behalf, it is not doing what cannot be done indirectly because the FLC is not an executive agency for whom statutory authority is required to award financial assistance. As the FLC otherwise is mandated to perform activities listed in 15 U.S.C. § 3710(e)(1), NIST is required to provide support to the FLC, NIST maintains the FLC's funds, NIST otherwise has authority to award a cooperative agreement for the subject activities at issue here, and a cooperative agreement appears to be an appropriate instrument for the type of activities contemplated, we do not see an issue with NIST awarding a cooperative agreement on FLC's behalf to enable the execution of FLC's mission.

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