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November 20, 2024

Transition Co-Chairs Howard Lutnick and Linda McMahon
Mar-a-Lago
1100 S. Ocean Blvd.
Palm Beach, FL 33480

Dear Transition Co-Chairs Howard Lutnick and Linda McMahon:

President-elect Trump has announced that he intends to name Elon Musk and Vivek Ramaswamy to lead a “Department of Government Efficiency” (the Department) in the new administration.¹ According to Mr. Trump, the Department “will provide advice and guidance from outside of Government, and will partner with the White House and Office of Management and Budget [OMB] to drive large scale structural reform, and create an entrepreneurial approach to Government never seen before.”² Mr. Trump’s announcement did not indicate the date on which the Department would be established, but it stated that the Department “work will conclude no later than July 4, 2026,” approximately a year and half into Mr. Trump’s second term.³

The Department, of course, is not a true governmental department, which can be created only by an act of Congress. Based on publicly available information about the Department’s purpose and proposed leadership, it appears that the Department will be subject to the requirements of the Federal Advisory Committee Act (FACA). Accordingly, the Department must abide by the rules of that law and you should instruct Mr. Musk and Mr. Ramaswamy to prepare to conduct their operations in accordance with the law.

These requirements include establishing fair balance and representation on the committee, holding open meetings and maintaining and preserving records available to the public.

Congress enacted FACA in 1972 “to enhance public accountability of advisory committees established by the Executive Branch and to reduce wasteful expenditures on them.”⁴ FACA applies when the President or an agency establishes or utilizes “a committee, board, commission, council, conference, panel, task force, or other similar group ... to obtain advice or recommendations for the President or one or more agencies or officers of the Federal Government.”⁵ A group comprised solely of federal officers or employees falls outside FACA’s scope.⁶

¹ <https://truthsocial.com/@realDonaldTrump/posts/113472884874740859>.

² *Id.*

³ *Id.*

⁴ *Public Citizen v. Dep’t of Justice*, 491 U.S. 440, 459 (1989).

⁵ 5 U.S.C. § 1001(2)(A).

⁶ 5 U.S.C. § 1001(2)(B)(i).

The Department of Government Efficiency will reportedly be led by two people who are not governmental employees, Mr. Musk and Mr. Ramaswamy, and be formed for the purpose of providing “advice and guidance” to the White House and OMB on structural reform to the federal government. Moreover, Mr. Trump’s statement that he wants the Department to remain “outside of Government,” as well as Mr. Musk’s recent solicitation to recruit employees to the Department through X (formerly Twitter),⁷ indicates that the entity will not be composed solely of federal officers or employees. Therefore, to the extent that the Department will conduct work during Mr. Trump’s term in office, the Department must be treated as an advisory committee under FACA.

FACA imposes several requirements on advisory committees to ensure that the government obtains quality advice from diverse sources and operates transparently. Advisory committees must be established with “a clearly defined purpose,” have a membership that is “fairly balanced in terms of the points of view represented and the functions to be performed,” and “contain appropriate provisions to assure that the advice and recommendations of the advisory committee will not be inappropriately influenced by the appointing authority or by any special interest,” among other requirements.⁸ Advisory committees must have a charter that includes, among other information, “the estimated annual operating costs for the committee in dollars and person-years” and “the estimated number and frequency of committee meetings.”⁹ Advisory committee meetings generally must be “open to the public” and advisory committees must provide an opportunity for interested persons to attend meetings and file statements.¹⁰ Advisory committee records and other papers also “shall be available for public inspection.”¹¹

Since enactment of FACA, Presidents have complied with the statute’s requirements when soliciting recommendations from outside the government, specifically including high-profile efforts to examine and make recommendations related to government spending and revenue.

- In 1982, President Reagan issued an executive order creating the Executive Committee of the President’s Private Sector Survey on Cost Control in the Federal Government,¹² commonly referred to as the Grace Commission. The Grace Commission was formed to “conduct a private sector survey on cost control in the Federal Government and [to] advise the President and the Secretary of Commerce, and other Executive agency heads with respect to improving management and reducing costs.”¹³ Membership included up to 170 “members appointed by the President from among citizens in private life.”¹⁴ In creating “an advisory committee to study cost control in the Federal Government,” President Reagan understood that he was acting “in accordance with the provisions of the Federal Advisory Committee Act.”¹⁵
- President Reagan also appointed members to a National Economic Commission (NEC), an advisory commission created by the Omnibus Budget Reconciliation Act of 1987 (OBRA).¹⁶ The NEC was charged with making “specific recommendations regarding ... [m]ethods to reduce the Federal budget deficit while promoting economic growth and encouraging saving and capital

⁷ <https://x.com/DOGE/status/1857076831104434289>.

⁸ 5 U.S.C. § 1004(b), (c).

⁹ 5 U.S.C. § 1001(c).

¹⁰ 5 U.S.C. § 1009(a).

¹¹ 5 U.S.C. § 1009(b).

¹² Exec. Order 12369 (June 30, 1982), 47 Fed. Reg. 28899 (July 2, 1982).

¹³ *Id.*

¹⁴ *Id.*; Exec. Order 12398 (Dec. 31, 1982), 48 Fed. Reg. 377 (Jan. 5, 1983) (increasing size of commission).

¹⁵ *Id.*

¹⁶ Pub. L. No. 100-203, § 2101, 101 Stat. 1330, 1330-33 (1987).

formation” and a “means of ensuring that the burden of achieving the Federal budget deficit reduction goals of the United States does not undermine economic growth and is equitably distributed and not borne disproportionately by any one economic group, social group, region or State.”¹⁷ The NEC was composed of 14 members, including up to 10 private citizens, of whom at least 1 had to be from each major political party and at least 8 had to be “leaders of business or labor, distinguished academics, State or local government officials, or other individuals with distinctive qualifications or experience.”¹⁸ OBRA expressly designated the NEC as an advisory committee under FACA.¹⁹

- When President Clinton created a Bipartisan Commission on Entitlement Reform in 1993 to “recommend potential long-term budget savings measures involving (1) revisions to statutory entitlement and other mandatory programs; and (2) alternative tax reform proposals,” he also acted pursuant to his authority under “the Federal Advisory Committee Act.”²⁰ Like the prior cost-cutting commissions under President Reagan, President Clinton’s commission was composed of individuals with a broad range of viewpoints—32 members, of which 20 were Senators or Representatives equally balanced between the two major parties and 12 were “individuals from either the public or private sector who have experience and expertise in the areas to be considered” by the commission.²¹
- President Obama did not depart from this consistent line of precedent when he created the National Commission on Fiscal Responsibility and Reform in 2010,²² also called the Simpson-Bowles Commission. The Simpson-Bowles Commission was “charged with identifying policies to improve the fiscal situation in the medium term and to achieve fiscal sustainability over the long run.”²³ Membership in the Simpson-Bowles Commission was bipartisan and reflected a broad range of views: It consisted of 6 members from the House of Representatives and Senate equally divided among the two majority parties, and six private citizens (including the Chairs Alan Simpson and Erskine Bowles) also divided between the two major parties.²⁴ Although President Obama’s executive order did not expressly reference FACA, the Simpson-Bowles Commission understood that it was subject to FACA’s requirements and, thus, published notice of its meetings in the Federal Register, as required by the law.²⁵

The newly announced Department of Government Efficiency, while more radical in objective, is consistent with prior initiatives by Presidents Reagan, Clinton, and Obama to solicit advice and recommendation on spending cuts from individuals outside the government.

¹⁷ *Id.* § 2103, 101 Stat. at 1330-34 to 1330-35.

¹⁸ *Id.* § 2102, 101 Stat. at 1330-34.

¹⁹ *Id.* § 2104(f), 101 Stat. at 1330-35 to 1330-36; see also *Public Citizen v. Nat’l Econ. Comm’n*, 703 F. Supp. 113, 115 (D.D.C. 1989) (“It is undisputed that the [NEC] is subject to the open meeting requirement of FACA.”).

²⁰ Exec. Order 12878 (Nov. 5, 1993), 58 Fed. Reg. 59343 (Nov. 9, 1993).

²¹ *Id.*; Exec. Order 12887 (Dec. 23, 1993), 58 Fed. Reg. 68713 (Dec. 28, 1993) (increasing size of commission).

²² Exec. Order 13531 (Feb. 18, 2010), 75 Fed. Reg. 7927 (Feb. 23, 2010).

²³ *Id.*

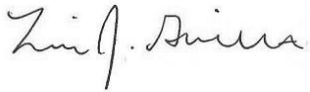
²⁴ *Id.*; President Obama Establishes Bipartisan National Commission on Fiscal Responsibility and Reform (Feb. 18, 2010) (naming Chairs); President Obama Names Members of Bipartisan National Commission on Fiscal Responsibility and Reform (Feb. 26, 2010) (naming other private members).

²⁵ 5 U.S.C. § 1009(a)(2); see also 75 Fed. Reg. 75606 (Oct. 26, 2010); 75 Fed. Reg. 26185 (May 11, 2010); 75 Fed. Reg. 18469 (Apr. 12, 2010).

Mr. Trump has charged the Department with a far-reaching mission, and the Department's recommendations, if adopted, could affect the lives of millions of Americans in profound ways. FACA is designed expressly for situations like this: If the government is going to turn to unelected and politically unaccountable persons to make recommendations as grand as \$2 trillion in budget cuts, it must ensure those recommendations come from a balanced and transparent process not rigged to benefit insiders.

Accordingly, this "external entity" is subject to FACA and you should take measures now to ensure it is established and built out in line with FACA requirements, including that it be fairly balanced in terms of the points of view represented, and that its work is conducted with the openness that FACA demands.

Sincerely,



Lisa Gilbert
Co-President



Robert Weissman
Co-President