FDIC
FEDERAL DEPOSIT INSURANCE CORPORATION

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(PR-99-77 (11-29-77))

Statement by

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on the Government in the Sunshine Act.

before the

Subcommittee on Federal Spending Practices and Open Government
Committee on Governmental Affairs
United States Senate

November 29, 1977

I appreciate this opportunity to testify on the effect of the Government in the Sunshine Act on the Federal Deposit Insurance Corporation. I am FDIC General Counsel and accompanying me is Mr. Alan R. Miller, the FDIC's Executive Secretary.

Before suggesting a clarifying amendment to the Act which I believe would further the principles of this legislation, let me briefly review our experience with the Act. As originally anticipated, a significant portion of FDIC business is not suitable for open meetings. In our capacity as a bank regulator, we constantly assess the condition of banks, including their management. Sometimes it is necessary to consider issuing cease-and-desist orders to prevent unsound banking practices. Open consideration of these matters could unnecessarily endanger the safety and soundness of banks regulated by the FDIC.

Examples of regulatory matters considered by FDIC's Board of Directors which are customarily closed to the public are as follows:

1. Administrative enforcement proceedings under § 8 of the FDI Act, 12 U.S.C. § 1818

   Under § 8 of the FDI Act, the FDIC frequently issues cease-and-desist orders to prevent unsafe or unsound banking practices. Compliance with these orders helps return the bank to a sound position. However, open discussion of a case would result in the release of confidential information contained in examination reports and also significantly endanger the stability of the bank. Exemptions (8) and (9)(A)(ii)

are therefore applied to close these meetings. Additionally, the proceeding may involve sensitive discussions concerning the bank's management which, though relevant to our supervisory authority, would constitute an unwarranted invasion of personal privacy if publicly discussed. In these cases exemption (6) is also cited.

2. Applications under § 19 of the FDI Act, 12 U.S.C. § 1829

Under § 19 of our Act, an insured bank may not employ an individual who has been convicted of a criminal offense involving dishonesty or breach of trust without first securing FDIC consent. Very often the employee in question was convicted years before seeking employment at the bank. In many cases the individual went on to compile a good record following his conviction. Open discussions of the individual's earlier conviction would constitute an unwarranted invasion of personal privacy, and exemption (6) is applied to close the issue to the public.

3. Unusually sensitive bank applications

The FDIC receives numerous applications from banks. These include applications for insurance, to establish branches or remote facilities, and to retire capital notes. Some of these applications are now considered in open session. In other instances, however, the applicant bank may be suffering from a sensitive

problem such as weakness in its capital structure or management. In these particularly sensitive cases, exemptions (8), (9)(A)(ii) and (6) are applied to close the meetings.

In fulfilling its function as insurer of bank deposits and receiver of insolvent banks, the FDIC is often required to engage in sensitive negotiations with banks leading up to financial assistance to troubled banks or to the sale of certain assets of an insolvent bank and the assumption by the purchaser of its deposit liabilities. The remaining assets of a failed bank are then liquidated over time through countless commercial transactions. Open discussion of these deliberations could lead to a run on the bank, or to a smaller price being obtained from the sale of the bank than would otherwise be possible. Similarly, discussing a proposed liquidation transaction in public session could very easily reduce our return on the asset. To the degree that the FDIC does not receive the maximum price possible for a failed bank's assets, it would not be meeting its obligations as a receiver under State and Federal law.

Examples of financial assistance and liquidation matters closed to the public are as follows:

1. Requests for assistance under § 13 of the FDI Act, 12 U.S.C. 1823

Financially distressed banks may make application to the FDIC for financial assistance under § 13 of the FDI Act. Open consideration or premature disclosure of these matters could lead to a run on the bank. Accordingly,

exemption 8 (information contained in or related to bank examinations, condition, or operating reports) and exemption 9(A)(ii) (information the premature disclosure of which would significantly endanger the stability of any financial institution) are relied upon to close these matters to the public.

2. Purchase and Assumption Transactions

Meetings involving sensitive negotiations leading to the sale of certain assets of an insolvent bank and the assumption, by the purchaser, of its deposit liabilities are closed pursuant to exemptions (8), (9)(A)(ii), and 9(B) (information the premature disclosure of which would significantly frustrate a proposed agency action).

3. Liquidation of the Assets of an Insolvent Bank

Meetings to discuss proposed liquidation transactions are normally closed for the reasons discussed above. Liquidation cases cover a wide range of commercial transactions. They may, for example, involve selling an asset, compromising a debt, or settling a lawsuit. Exemptions that have been used in closing these matters are (4) (trade secrets or commercial or financial information obtained from a person and privileged or confidential), (6), (9)(B), or (10) (information relating to an agency's participation in a civil action).

Since the Act became effective in March of this year, the FDIC's ratio of open to closed meetings has been 1:3. Of the 77 meetings held from March 12 to November 22, a total of 1,102 agenda items have been considered. Four hundred and twenty-one of these items, or almost 40 percent, were considered in open meetings.

I want to emphasize, also, that determination as to what items of business must be closed to the public is not static. Approximately midway through our experience with the Act, transcripts of closed meetings were reviewed and it was noted that some of the bank application cases (such as applications for insurance, applications to establish remote facilities, applications to retire capital notes, etc.) which were being closed did not have to be closed. Accordingly, the procedures were revised so that all discussions of bank applications except those involving particularly sensitive issues are now open to the public.

In spite of these efforts to conduct more business in open session, these open meetings are not well attended. I do not believe this poor attendance is the result of FDIC procedures. In addition to announcing meetings in the Federal Register as required by the Act, announcements of meetings are posted on a large, prominently displayed bulletin board in the Corporation's lobby. If the public interest requires it, there are procedures for announcing a meeting through the use of a press release. Finally, a mailing list is maintained to notify individuals of pending meetings. Anyone who makes an inquiry about a meeting is also advised that his or her name can be added to the list.

Poor attendance at open meetings raises the question of whether the administrative burden of the Act is justified. This burden is a very sizeable one. In order to comply with the Act, a substantial amount of paper work and staff time is required for open meetings. Closing a meeting is an even more time-consuming process.

I would like to suggest that this burden is unduly heavy for the FDIC and the other three-member agencies, and that the Act should be reassessed to provide relief. Because this administrative burden has been and will continue to be the Corporation's greatest problem with the Act, I will discuss it in some depth.

The Act defines "meeting" to mean "the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business . . . ." This rather vague definition could be interpreted very broadly to cover almost any discussion of agency business among a quorum of agency members even if the discussion is exploratory in nature and even if it does not result in reaching a consensus on an issue before them.

Such a broad interpretation of "meeting" would not create the same problems in a large agency as in a three-member agency where two members constitute a quorum. In a five-member agency, two members can discuss agency policy and explore issues without a meeting taking place since a quorum would not be present. In a three-member agency such as FDIC, however, this broad construction

would require that all business discussions between any two members be treated as a meeting under the Act. Announcements would have to be made and sent to the Federal Register, votes taken, and if the "meeting" is to be closed a General Counsel's certification, list of attendees, and transcripts would also have to be provided. It would often be very difficult to assemble all of the staff necessary to carry out these requirements every time two of our directors wish to discuss an agency matter.

Where a consensus is reached, or where a decision is predetermined or finalized, the Act should, of course, apply. In question, however, are preliminary, exploratory discussions. Treating these as meetings under the Act could create an unmanageable burden in three-member agencies. The FDIC has not reached this point as yet because a third director has not yet been confirmed, and the Comptroller of the Currency, an ex-officio member of the Board, is not directly involved in the day-to-day operation of FDIC business. When a third director is confirmed, however, he will occupy an office in close proximity to Chairman LeMaistre and they should be permitted to converse frequently. Consequently, difficult administrative problems would arise if the broad interpretation of "meeting" were followed.

There are also problems in staff briefings of two directors if the broader interpretation is followed. The recording of the proceedings that would be required by the Act could well stifle free and open staff discussion of issues related to sensitive matters, since portions of the transcript could in time become available to the public.

Fortunately another reading of the definition of "meeting" is supported by the legislative history of this Act. The Senate Report states that:

> "It is not the intent of the bill to prevent any two agency members regardless of agency size, from engaging in informal background discussions which clarify issues and expose varying views . . . . when two members constitute a quorum, however, the agency must be careful not to cross over the line and engage in discussions which effectively, predetermine official actions."

In an Interpretive Guide to the Act, staff members of the Administrative Conference (the agency charged with overseeing agencies' implementing regulations) explain the definition of "meeting" in a way that would permit two directors of the FDIC to have preliminary discussions without triggering the Act's requirements.[1/]

We believe this is the correct construction of "meeting" under the Act and recommend that your Subcommittee consider clarifying the definition of "meeting" in a way that takes into account the special problems of three-member agencies under the Act. Let me emphasize that these comments should not be taken as opposition to the Act's primary purpose. The FDIC supported enactment of this legislation and intends to continue its efforts to increase public awareness of agency decision-making, consistent with our bank regulatory functions.

1/ See p. 18 of Government in the Sunshine Act -- An Interpretive Guide, Berg & Klitzman. Mention of this Guide is to carry, by the author's request, the following disclaimer. "This draft Guide has been prepared for the Office of the Chairman, Administrative Conference of the United States. It represents only the views of its authors, not necessarily those of the Office of the Chairman or the Conference."