OVERSIGHT OF THE GOVERNMENT IN THE
SUNSHINE ACT—PUBLIC LAW 94–409

HEARINGS
BEFORE THE
SUBCOMMITTEE ON FEDERAL SPENDING
PRACTICES AND OPEN GOVERNMENT
OF THE
COMMITTEE ON
GOVERNMENTAL AFFAIRS
UNITED STATES SENATE
NINETY-FIFTH CONGRESS
FIRST AND SECOND SESSIONS

NOVEMBER 29, 1977; JUNE 13 AND AUGUST 4, 1978

Printed for the use of the Committee on Governmental Affairs
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OVERSIGHT OF THE GOVERNMENT IN THE SUNSHINE
ACT—PUBLIC LAW 94-409

TUESDAY, NOVEMBER 29, 1977

U.S. Senate,
Subcommittee on Federal Spending Practices, and Open Government, Committee on Governmental Affairs,
Washington, D.C.

The subcommittee met, pursuant to notice, at 10 a.m., in room 1114, Dirksen Building, Senator Lawton Chiles (chairman of the subcommittee) presiding.

Present: Senator Chiles.

Staff members present: Ronald A. Chiodo, chief counsel and staff director; Janet R. Studley, counsel; Robert F. Harris, deputy staff director; and Christine Sheridan Betts, chief clerk.

Senator CHILES. Good morning. We will convene our hearings.

OPENING STATEMENT OF SENATOR CHILES

Senator CHILES. When I first came to Washington, 7 years ago, I noticed that all of the doors in town were closed. Whatever of the public's business was being conducted behind those doors was apparently of such import and necessary secrecy that the public could not be trusted to know how its own Government ran.

Besides the sensitivity of the matters under discussion, I was told, was the necessity to let Commission and committee members meet in camera so that they could be "very frank" in discussing the matters at hand.

Well, I don't buy that. Most people who are reluctant to state their opinions publicly are reluctant because they either are unable to state their position or simply don't understand the matter at hand.

While I can sympathize with their desire to be inarticulate in front of as small a group as possible, I don't think fear of embarrassment should override the public's right to see their own Government being run, warts and all.

Government in the Sunshine works well in Florida. Although a number of Florida newspaper people had to get themselves thrown out of meetings or into jail, they were successful in forcing reluctant bureaucrats to conduct the public's business in public.

I was sitting in a closed Senate committee meeting one morning when it struck me that the matter being discussed was the budget for the Botanical Gardens. While the matter was obviously of great importance to the employees there, no one suggested that the national
security would be materially weakened if the Chinese found out we were into azaleas this year. In the end, it turned out the meeting was closed because somewhere along the line someone had closed the meeting one day many years ago and no one had ever thought to open the door again. In due course, we opened the doors of the Congress, so that today practically all meetings are entirely open to anyone who chooses to attend. Hopefully, the taxpayers will become slightly more trusting of a Congress which does their business in the open. Certainly, we have not weakened the Republic by discussing the Botanical Garden’s budget in public.

When I first introduced the “Government in the Sunshine Act,” everyone laughed. The next year I had 16 cosponsors. Everyone stopped laughing and got mad. We heard an ocean of testimony which proved beyond any reasonable doubt that if this law were passed economic depression would be unavoidable. Short of suggesting that a plague of locusts would lay waste to the Middle West, the bill’s detractors prophesied an unending stream of disaster which would befall us.

Well, the bill passed the Senate by 94 to 0. The House vote was 384 to 0. In spite of the chorus’ muttered’s of doom, the act went into effect on March 11. And, 8 months later, the Republic still stands. Hopefully, we have convinced the doomsayers that the general public can be taken into its Government’s confidence. Someday we may even convince the general public to take us into their confidence.

What we intend to do today is see how well the Government in the Sunshine Act is faring. We will ask opponents and defenders of the act what their views are now that the act has been in effect for 8 months. We will ask the agencies what their difficulties have been, and chastise them in some instances for particularly flagrant violations of the act.

But most of all, we want to begin to change people’s minds about the whole idea of Government in the Sunshine. The Congress has overwhelmingly stated that the people of this country have a perfect right to know and observe our Government being run. With a few exceptions—secret material, plans for criminal prosecutions, or material which would constitute an invasion of privacy, there is no commonsense reason why citizens don’t have every right to watch how the Government is spending their money.

Citizens cannot hold Government officials accountable for their actions if they don’t know what those officials are doing. We want to make sure that the public has the opportunity to be informed about and to understand its Government activities. The agencies make decisions which directly affect all Americans. Today we hope to determine how accessible the decisionmaking processes really are.

Government employees should not instinctively resist a requirement to make their policy decisions in public. Most agencies are proud of their capacity for rational thought, and of their staff’s ability to assemble a comprehensive set of documentation and policy options. I would think they would be proud to have their skill and ability displayed in public. We hope to convince some, if not all, of them that Government in the Sunshine is the most desirable way to go about conducting the public’s business.
I am particularly pleased that OMB is going to testify today. As we all know, the President himself campaigned actively in support of the right of the people to have free and open access to the operations of their Government. Accordingly, we expect to learn from OMB today what initiatives they have taken and what oversight mechanisms they have instituted to insure that sunshine is a reality, not only in collegial agencies, but in all of our Government's daily operations.

COMMON CAUSE

Our first witnesses this morning will be Mr. David Cohen, president of Common Cause. As I imagine everyone is aware, Common Cause is one of the principal movers and shakers in helping us get the Government in the Sunshine Act passed. In a town which is noted for its collective short memory, it would be worthwhile to remember that sunshine had some formidable and articulate opponents. It was put in a simpler form in a law review article by Mr. Jerry Markham. He wrote:

The hearings and debates and so-called sunshine requirements have tended to break down into two mobs of sorts, one desiring complete public access to governmental decisionmaking processes and another wishing only for as little public disclosure as will placate current public opinion.

He goes on to quote from the Pickwick Papers: "In deciding which of these two mobs to join, Mr. Pickwick's advice might be useful: 'Don't ask any questions. It's always best on these occasions to do what the mob do.' 'But suppose there are two mobs,' suggested Mr. Snodgrass. Shout with the largest,' replied Mr. Pickwick." I think the debate on sunshine was a lot more intellectual than that and in the end the legislation reflected a very modest position. Still, we ended up with the biggest mob, including Mr. Pickwick. The question is what, if anything, have we won.

Now that the clamor of the debate has died away I think it is time to see what we have. Mr. Cohen, we would like to have you come on first, to find out from you what you think we have.

TESTIMONY OF DAVID COHEN, PRESIDENT OF COMMON CAUSE, ACCOMPANIED BY MS. ANNIE McBRIDE, ASSOCIATE LEGISLATIVE DIRECTOR, AND ROBERT RODRIGUEZ

Mr. Cohen. Thank you very much, Mr. Chairman.

With me is Anne McBride, who serves as our associate legislative director, and who is our manager on the sunshine legislation.

Senator Chiles. Ms. McBride did a tremendous job in managing that issue and converting a lot of people. That vote of 94 to 0 was sort of a magical vote, and sometimes it was quite illusive until it finally materialized. I think Ms. McBride had a lot to do with that.

Mr. Cohen. We've asked Anne McBride to top that in for a copy of the campaign finance reform legislation.

On my right is Robert Rodriguez who supervised the study that we did on the first 3 months of the implementation of the Sunshine Act.

We very much appreciate the opportunity to be here, Mr. Chairman, and what I would like to do, with your permission, is ask that our
study and that my statement be made part of the record, and what I
would like to do is summarize portions of the testimony.

Senator CHILES. We will do that. We appreciate your summarized
testimony. It looks like we are going to have a long hearing and it
gives us a little more time for the questions.

OVERSIGHT IS ESSENTIAL

Mr. COHEN. First, Mr. Chairman, I think it is absolutely welcome
that you have begun the serious process of congressional oversight on
implementation of the Sunshine Act. Too often laws are enacted but
their implementation is ignored, and I think we all know enough about
how law works to know that laws are not self-executing or self-enforc­
ing. They need attention and monitoring and we have always believed
the congressional oversight is essential if our Federal programs and
laws are to work as intended.

I think the most important thing that can come out of these hearings
is not only to determine how the Sunshine Act is working in its early
stages, to send a forceful signal from this committee and from the
Congress that you are serious about agency compliance with the letter
and spirit of this law.

COMMON CAUSE STUDY

What I would like to do, Mr. Chairman, is summarize the results
of our study which was based on a survey of the number and status
of meetings held by the 47 agencies covered by the act during the first
quarter.

Our survey found that 39 percent, 232 of 591 meetings held during
the quarterly period study were entirely closed to the public. Also
24 percent or 143 of 591 meetings held during the quarterly period
were partially closed to the public. But only 37 percent or 216 of these
591 meetings held were fully open to the public.

Exemptions relating to financial information accounted for 38 per­
cent of the exemptions used to close meetings.

The statistics are plainly disturbing and I think they establish pre­
sumptively that there are serious problems
with the agencies im­
plementing the Sunshine Act.

The fact is, it is not working as Congress intended it to and any
time you have a situation in which five-eights of the meetings are either
closed or partially closed for a law that intended open meetings, it
is a serious problem and the fact that this is the way it began, it is
important to nip it so that we change the course or direction, and that
this committee can play a role in teaching the agencies how to live by a
pattern and a habit of openness, and to change the old habit of when
in doubt, close.

Our analysis of the use of the exemptions of the agencies closing
meetings or portions of meetings indicates that the 10 exemptions
to the openness rule were used to close entire meetings or portions of
meetings 835 times.

While much of the public debate surrounding the need for excep­
tions in the Sunshine Act centered on the concern for national security
and the unwarranted invasion of personal privacy, 38 percent of the
time the exemptions cited were those regarding financial information, and an analysis of the data reveals that matters of national security accounted for only 1½ percent of the closed meetings while invasions of personal privacy were cited for closing only 9 percent of the time.

The data indicates that the financial exemptions may well be used by agencies in a mindless manner, in a manner that is plainly overused.

The Federal Reserve Board is a prime example, and as all of us know from the efforts of trying to achieve the law, the Federal Reserve Board was its most persistent opponent, probably the ultimate doomsayer. And Chairman Burns fought the law vigorously, and although the Federal Reserve Board is covered by the act the broad language of the exemptions dealing with financial matters mean that as a practical matter few of the Board’s meetings would be open to the public.

Our own studies show that subjects dealing with office furniture and office renovation were closed under the guise of financial information and that is Chairman Burns and the Federal Reserve Board just thumbing its nose at this law.

The disproportionately large number of closed meetings justified by the Fed on the grounds that they are of a sensitive financial nature, that is hard to believe when you are dealing with office design and furniture.

What I would like to do, Mr. Chairman, is turn to our suggested recommendations.

THE NEED FOR EXECUTION ACTION

First, we believe that agency compliance with the Sunshine Act requires active Presidential leadership and initiatives as well as continuous congressional oversight. So far we do not see that Presidential initiative has been forthcoming. We think, as you stated in your opening remarks, that President Carter campaigned on a theme of openness and I think open meetings is the first step in building an affirmative antisecrecy policy in Government.

It can be implemented administratively at this point because of the law that the Congress passed. Those administrative innovations and initiatives have not been forthcoming.

Senator CHILES. I would certainly agree with you on that point.

As I recall there were times during the campaign when even Executive order was discussed as a method to open up Government. This happened at a time the sunshine bill had not yet been passed. I recall that statements were made that, whether the Sunshine Act was passed or not, Executive order could open up these meetings. Certainly now we recognize that, while we have covered the collegial bodies, so to speak, an Executive order could go much further by setting policy and could certainly implement sunshine much more effectively by setting some guidelines or setting some enforcement task group within the executive branch.

And while we always talk about the exceptions, no one seems to talk about the fact that an exemption under the act is not enough to close a meeting. In addition to finding an appropriate exemption, the agency must make a determination whether or not there is an over-
riding public interest in opening the meeting in spite of that exemp-

And I would be very interested today in seeing how our agencies
have dealt with that requirement. I think some strong language, from
the Executive would be most helpful in getting the agencies to stop
resisting open Government.

Mr. Cohen. The point I want to make before we get to the specifics
of our suggestions, and we are not bashful about making some sug-
gestions on what steps the President could take, is that here was a
chance to actually carry out campaign promises with specific per-
formance and it only takes the stroke of a pen, the convening of the
appropriate people within the executive branch to take a clear signal
and that signal just has not been coming and I think it is important
that this committee let the executive branch know that they ought to
begin performing specifically.

Senator Chiles. This committee hopes that signal is going to come
today.

Mr. Cohen. Well, it is just unrealistic to expect that absent Presi-
dental initiative that agencies which resisted the law are going to
clamor to follow overriding public interest of openness.

In our judgment the President should issue a directive to the agen-
cies affirming the administration's commitment to openness, establish
standards of openness and require that agencies comply with not only
the letter but the spirit of the act. The directive should recommend
that agencies close meetings only when there is an overriding public
interest in doing so.

The act allows an agency to close a meeting under certain circum-
stances, but does not require it to do so. An agency can decide even
whether an exemption applies that the public interest is served by
openness and justification for meeting in secret. One of the things the
President could do very easily is say from the agencies affected by
the bill, I want to have regular reports on how many meetings are open,
and how many meetings were closed, and what your reasons are for
closing those meetings, and what that overriding public interest is, if
an agency does close a meeting, and that simple kind of a signal puts
the appointees on notice that they had better shape up by learning how
to operate in an open way.

Few agencies are following this approach.

We believe that they should be directed to do so by the President.
The President should direct the agencies to include in their regula-
tions such items as a broad definition of meetings, including commit-
tees and subdivisions.

Over and over again you get the sense that meetings are being held,
but that they are not called meetings.

A requirement that notice be given 10 days in advance of a meeting.

A provision permitting the use of sound recorders and photographic
equipment.

And I think we have enough experience now to know that it is time
to prohibit notational voting on substantive items, and it is important
to require why a meeting is closed, the exemption and the purpose
behind it, and the reason behind it ought to be listed in the Federal
Register.
There ought to be a requirement that certification procedures in the General Counsel take place prior to holding of a closed meeting and there ought to be a procedure that would allow a citizen to request that a closed meeting be open, as well as a justification for the use of expedited closing procedures.

In our judgment the OMB has a critical role to play. Although agencies have been given flexibility in developing regulations, the act does not provide for any review of these regulations by any agency of Government to determine whether they adequately meet the act’s requirements and spirit.

We urge the President to direct the Office of Management and Budget to review for the White House each agency’s regulations to insure that they meet the high standards of openness.

OMB’s approval of the regulation should be based on their compliance with the Presidential directive that I discussed earlier. Just asking OMB to do it absent the directive will just become a technician’s game.

The point here is that policy ought to be established. The OMB ought to carry out the policy. That is why we need the directive, and then the responsibility ought to be fixed with OMB to review the other agencies’ regulations.

The results of the review, including any recommended changes, should be made available to the public for comment and discussion.

On oversight hearings, as we stated at the outset, Senator, we believe that the oversight hearings that you have initiated here are critical to the future of the Sunshine Act. We believe that every agency must be held accountable to Congress for its performance under the act.

We believe that there are several basic questions that must be answered to the oversight process. Are the exemptions being properly used? Do the exemptions need to be more narrowly written? Are agencies ignoring the presumption of openness? Is the expedited closing procedure being used properly by the appropriate agencies? Do the expedited closing procedures serve the public interest?

I hope that we can learn today.

I know you will make an effort to hear from the agencies on why these meetings have been closed, what positive steps will be taken to change practices? And I think it would be useful as a sign of this committee’s seriousness about this question that after these oversight hearings are completed, if the committee were to issue a report with specific recommendations and that degree of formality, has a way of putting public officials on notice and working at changing their current habits.

Included in our study is a model regulation design to implement the Government in the Sunshine Act. And that is part of what we asked to be submitted for the record. I hope that this can serve as at least a point of departure for showing that the job is doable.

In a real sense you have to refight the debate all over again. There are always those who will say that it can’t work or matters will be paralyzed. It hink they don’t get paralyzed from openness. They may get paralyzed from closeness but they surely don’t get paralyzed from openness.
The agencies covered by this law make decisions that affect all Americans in very specific ways. I think the point that you made earlier about people being able to know what’s going on is fundamental to accountability of public officials is right.

And equally right, Senator, is that citizens just want to know what’s going on so they can understand what is happening to them. That is part of what the Government is about. It is part of what leadership is about. And we can’t lead unless people do know what’s going on, and that’s why it is so important for the President to change his ways and to establish once and for all a clear policy of openness and a clear direction that he wants this law to work, and that he intends to make it work.

Thank you.

THE FLORIDA EXPERIENCE REVISITED

Senator Chiles. Thank you very much for your statement.

Your findings, I am afraid, are similar to those in a study that the Library of Congress has done for us. As we might have expected, some agencies took us literally. Others, it would seem, are not aware that the act has been passed, and the only conclusions that I can draw now is that we are in a sort of hiatus period.

Sunshine at the operating level has neither been a resounding success nor a resounding failure.

I guess that you could be very, very disappointed about this. But, I can’t say that I am too surprise because this really is again following the established pattern.

We passed the act in Florida and immediately upon the passage of the act many of the boards and agencies across the State felt that this couldn’t apply to them. It was just something that they would have to pay some kind of a token significance to, but no more than that. So we found school boards, county commissions, others, coming up with a pattern on how they were going to operate, whether they would hold a meeting in the morning beforehand or whether some would just ignore the act completely. A few complied.

But we went through that period of time and fortunately had the courts helping. People were bringing cases which certainly helped us enforce the law. I am surprised that in 8 months somebody hasn’t brought a sunshine case about some of these Federal agency meetings. That hasn’t happened yet, but it took a period of time, really several years, before everybody finally knew that Sunshine was going to be the law in the State of Florida and was going to be enforced.

It may take that period of time here, but we are going to make sure that eventually we get the same kind of message across, that is that the law is going to be enforced. We are really talking about such a change in approach that the agencies’ overriding concern will be to find out how to open a meeting, not to figure out how to close a meeting.

I don’t think this change in perspective has come yet to many of the agencies. It has to some, and we certainly want to applaud them.

THE LIBRARY OF CONGRESS STUDY

We asked the Library of Congress to study this for us. Their conclusions are similar to the Common Cause study. Of 1,002 meetings
which were subject to the Sunshine Act, 339 were totally closed, and 108 partially closed, for a total of 527 or 53 percent of the meetings. Your findings are somewhat higher but, as you will notice, later, not all of the meeting notices were published in the Federal Register in the first place. Still, based on admittedly soft data, it is clear that some agencies have a lot more closed meetings than others.

In order to avoid treating slightly suspect data in a totally mechanical fashion we analyzed the Library’s data in five different ways: Raw number of meetings, raw number of closed and partially closed meetings, percentage of all meetings to closed meetings, percentage of all meetings compared to all partially closed meetings, and, then, fifth, a percentage of all partially or all closed meetings for agencies which had more than 35 meetings during the period.

The last category is designed to screen out relatively small agencies which have few meetings. For example, the Harry S. Truman Scholarship Committee led the percentage lists because three of their meetings were partially closed. Presumably, it discussed the academic credentials of various applicants.

Leaving these out, we saw five or six agencies kept the doors closed much of the time. The Securities and Exchange Commission, Federal Trade Commission, Federal Power Commission, and, surprisingly, the Commodity Futures Trading Commission.

I will place the Library of Congress study and your study in the record at this point.

[The studies follow:]

THE LIBRARY OF CONGRESS,
CONGRESSIONAL RESEARCH SERVICE,

To: Senate Subcommittee on Federal Spending Practice
   Attn: Pete Roman.
From: Rogelio Garcia, Analyst, Government Division.
Subject: Sunshine Act Meetings.

The following information and material is sent in response to your request for a compilation of Sunshine Act meetings listed in the Federal Register, copies of law review articles dealing with or analyzing the Sunshine Act, and “horror” story clippings about the need for such a law.

An analysis of Sunshine Act meetings listed in the Federal Register between March 24, when it began listing such meetings in a special section, and September 9 reveals the following:

1) 1,003 meetings were listed—527 were completely (339) or partially (188) closed to the public. Relative exemptive provisions were cited in only 193 of the 527 meetings that were fully or partially closed.

2) 32 agencies held totally or partially closed meetings, but only 12 of them cited relevant exemptive provisions—none did so in all instances—when holding such meetings.

3) Agencies most frequently closing all or part of their meeting included the Securities and Exchange Commission (64), the Nuclear Regulatory Commission (45), the Federal Reserve System (43), the Federal Trade Commission (33) and the Commodity Future Trading Commission (30).

4) Provisions most frequently cited in closing all or part of a meeting included 5 USC 552b (c) (4) (8) (9) (A) (10)—42—5 USC 552b (c)—28—and 5 USC 552b (c) (10)—24.

The above figures are taken from Tables 1, 2 and 3 of this report.

Several law articles dealing with the Sunshine Act are attached, as is a copy of pages S19433, 19442–43 of the Congressional Record of November 6, 1975, which succinctly state the need for such an act. These pages from the Congressional Record are being sent because a review of our files failed to uncover any “horror” story clippings regarding the need for a Sunshine Act.
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TABLE 3.—BREAKDOWN OF EXEMPTIVE PROVISION CITED TO CLOSE ALL OR PORTION OF MEETING

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<td>NRC.</td>
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<td>NRC.</td>
</tr>
<tr>
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<td>NRC.</td>
</tr>
<tr>
<td>(c)(5) and (d)(5).</td>
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<td>NRC.</td>
</tr>
<tr>
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<td>ITC and NRC.</td>
</tr>
<tr>
<td>(c)(7) and (d)(7).</td>
<td>5</td>
<td>ITC.</td>
</tr>
<tr>
<td>(c)(8) and (d)(8).</td>
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<td>PRRC.</td>
</tr>
<tr>
<td>(c)(9) and (d)(9).</td>
<td>1</td>
<td>CAB.</td>
</tr>
<tr>
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</tr>
<tr>
<td>(c)(9)(A) and (d)(9)(A).</td>
<td>43</td>
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</tr>
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</tr>
<tr>
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<tr>
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<td>NRC.</td>
</tr>
<tr>
<td>(c)(10)(H) and (d)(10)(H).</td>
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<td>NRC.</td>
</tr>
<tr>
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<td>NRC.</td>
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<td>(c)(10)(K) and (d)(10)(K).</td>
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<td>2 NRC; 9 PRC; 9 PC; 3 ICC; 1 ITC.</td>
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<td>(c)(10)(L) and (d)(10)(L).</td>
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<td>NRC.</td>
</tr>
<tr>
<td>(c)(10)(M) and (d)(10)(M).</td>
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<td>FTC.</td>
</tr>
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<td>29 CFR 1612.3(a) (5 U.S.C. 552b(c) and (d)(4)).</td>
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<td>EEOC.</td>
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Total | 193 |

TABLE 1.—SUNSHINE MEETINGS BY AGENCY

[As listed in Federal Register, Mar. 24 to Sept. 9, 1977]

<table>
<thead>
<tr>
<th>Agency</th>
<th>Total</th>
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<th>Partially closed</th>
<th>Totally/ partially closed</th>
<th>Occasions exemptive provision cited</th>
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<tr>
<td>Civil Aeronautics Board (CAB)</td>
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<td>Consumer Product Safety Commission (CPSC)</td>
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<td>11</td>
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<td>21</td>
<td>2</td>
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<td>(FSCSA) Settlement Commission</td>
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<td>28</td>
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### SUNSHINE MEETINGS BY AGENCY—Continued

[As listed in Federal Register, Mar. 24 to Sept. 9, 1977]

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<td>(FPC) Federal Power Commission</td>
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<td>(FRS) Federal Reserve System</td>
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<td>(FTC) Federal Trade Commission</td>
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<td>(ICC) Interstate Commerce Commission</td>
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<td>(MRC) Mississippi River Commission</td>
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### SHADOWS OVER THE SUNSHINE ACT—A COMMON CAUSE STUDY OF FEDERAL AGENCY COMPLIANCE WITH THE GOVERNMENT IN THE SUNSHINE ACT OF 1976

#### SUMMARY

Multi-member executive branch and independent agencies have often been criticized as being largely unaccountable and overly secretive in their deliberations. Congress enacted the Government in the Sunshine Act of 1976 (Public Law 94–409) to help remedy this situation by opening the decision making processes of these agencies to the public. The data contained in this study are based on a Common Cause survey of the number and status of meetings held by 47 agencies covered by the Government in the Sunshine Act during the first calendar quarter under the Act from March 12, 1977 through June 12, 1977. The data reveal that a substantial part of the decision-making process within the 47 agencies covered by the Act is still carried on behind closed doors despite the 1976 Act.

Common Cause found that:
—39 percent (or 232) of 591 meetings held during the quarterly period were entirely closed to the public;
—24 percent (or 143) of 591 meetings held during the quarterly period were partially closed to the public; and
—only 37 percent (or 216) of all 591 meetings were entirely open to the public.

The data indicated a strong tendency on the part of agencies to close meetings in spite of the Act's presumption in favor of openness and the public's interest in openness. Our analysis of the 825 times exemptions were used to close meetings or portions of meetings indicates heavy use of the exemption related to financial information—it was cited 38 percent of the time (or 315 times).
The Common Cause study documents the number of open, closed, and partially open/closed meetings held by the covered agencies during the first quarterly period under the Act. A large portion of the data regarding the status of meetings was taken from the Sunshine Act Meeting notices section of the Federal Register. When an agency covered by the Act closes a meeting or portion of a meeting, the Agency is required by the Act to cite the relevant exemption which justifies the closing of the meeting. Our data regarding exemptions reflects the information submitted by each agency.

Common Cause contacted the agencies and asked them to review our draft list of meetings for any omissions or errors and to provide us with the correct information and relevant exemptions. Where appropriate, corrections offered by the agencies have been incorporated in our study. A number of examples cited within the body of the study point to agency disregard for the spirit and sometimes the letter of the Act. They indicate that the fact that less than forty percent of all meetings are fully open to the public may have as much to do with agency attitudes regarding openness and accountability in government as it does with the legitimate use of the Act’s exemptions.

It is, the study concludes, unrealistic to expect that those agencies which lobbied so vigorously against the enactment of the Sunshine Act will now comply with the letter and spirit of the law. Their past resistance to openness pose a direct challenge to President Carter’s commitment to openness in government. Common Cause believes the President and the Congress must take certain specific steps to ensure meaningful compliance with the Sunshine Act and to set a new tone of openness in government.

The study recommends that:

- the President issue a directive to the agencies covered by the Act affirming the Administration’s commitment to openness in government and requiring that agency regulations conform not only to the letter but also the spirit of the Act;
- the President direct the Office of Management and Budget (OMB) to review each agency’s regulations to ensure that they meet high standards of openness; and
- the Congress conduct thorough oversight hearings (including witnesses from agencies covered by the Act) in order to examine the extent of agency compliance with the Act.

The study includes a model agency open meetings regulation to implement the Act. In addition to provisions explicitly required by law, highlights of the model regulation include:

- a procedure to permit any person to make a timely appeal from an agency decision to close a meeting or portion of a meeting or limit the disclosure of information;
- a provision to make records and other documents quickly and inexpensively available to the public;
- a proposal to limit the use of notational voting to agency decisions that are of a routine rather than substantive nature;
- a provision to require notice of meetings 10 days in advance of the meetings;
- a provision to require that minutes be kept of all open meetings and that a transcript or recording be kept of all closed meetings;
- a provision to permit the unobtrusive use of photographic equipment and sound recorders; and
- a provision to require that the general counsel’s certification for closed meetings that is mandated by the Act must be completed prior to the holding of a closed meeting or portion of a meeting rather than after the meeting.

I. INTRODUCTION

On September 13, 1976, President Gerald R. Ford signed into law the Government in the Sunshine Act (Public Law 94–409).

The result of years of effort led in Congress by Senator Lawton Chiles (D-Fla.) and Representative Dante Fascell (D-Fla.) with the support of citizens’ organizations including Common Cause, the Government in the Sunshine Act is the most comprehensive anti-secrecy measure affecting federal agencies since the Freedom of Information Act of 1966. It represents a further, necessary step in the continuing effort to make government at all levels more responsive to the needs of its citizens.

The basic purpose of the Act is to provide that meetings of multi-member federal agencies (a majority of the members of which are appointed to their posi-
tions by the President with the advice and consent of the Senate) shall be open to the public. The Act provides ten narrowly defined exemptions to the openness rule that can be used to close meetings unless the public interest requires otherwise. In addition, it provides for a prohibition on ex parte communications to and from agency officials with respect to the merits of certain pending proceedings.

The basic premise underlying the Act is the principle that the government belongs to the people. The people, in the words of Federalist No. 49, "* * * are the only legitimate foundation of power, and it is from them that the constitutional charter is derived." Government, if it is to be fully accountable must be accessible and open. Secrecy is fatal to accountability. Citizens cannot hold government officials accountable if they do not know what government officials are doing. In the words of James Madison: "A popular government, without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy; or, perhaps both."

All the great instruments of accountability that the citizen must depend upon—Congress, the courts, the electoral process, the press—may be rendered impotent if the information crucial to their functioning is withheld. Secrecy perpetuates abuse of power, thwarts citizen participation, and diminishes the accountability and responsiveness of government.

By and large, agency commissioners are far removed from the public view. Little is known of their day-to-day activities and the impact of those activities on our nation. Yet few would deny that government agencies are playing an ever increasing role in our way of life.

Agency secrecy makes it extremely difficult if not impossible for the citizen-consumer-taxpayer to effectively compete with the behind-the-scenes influence of the special interests. The ironic thing is that government secrecy is no problem for the special interest lobbyists. They have ways of knowing what goes on. The close relationship between agency officials and the special interests has been documented time and again. A Common Cause study (Serving Two Masters, October 1976) revealed widespread conflicts of interest within the executive branch departments and federal agencies. A more recent study (With Only One Ear, August 1977) revealed that consumer interests were seldom represented before the independent regulatory commissions as compared with representatives of the industry they regulate. The study found that the 39 regulatory commissioners surveyed met with representatives of regulated industry ten times more often than they did with representatives of consumer organizations or concerned individuals.

It is not surprising then that public confidence in agency officials has declined precipitously in recent years. We have seen grievous abuses of power in the past, but the problem is not power as such; the problem is power that cannot be held accountable in part because it is veiled in secrecy. Earlier this year, pollster Louis Harris found that a substantial majority of Americans (71 percent) support the concept of opening "almost all meetings to the public of federal boards, commissions, agencies, and Congressional Committees."

The Government in the Sunshine Act represents one attempt at making government more accountable. One of its aims is to cast the light of sunshine on federal agencies in order to increase public understanding of and access to the decision-making process in the formulation of policy within executive branch and independent agencies. In any discussion where the public interest is at stake, it is essential that a broad perspective be brought into play and that the debate not be limited to rather narrow bureaucratic or special interests.

Certainly no one can guarantee that a greater awareness of the process will reverse the precipitous decline in public confidence in agency officials and their decision-making. It may, if officials are not performing as they should, lead to less confidence. But whatever the outcome, ultimately our system of democratic government will have been strengthened.

II. SUMMARY OF THE MAJOR PROVISIONS OF THE ACT


Coverage

The open meetings provisions of the Government in the Sunshine Act apply to the 47 federal agencies that are headed by a collegial body of two or more mem-
bers, a majority of whom are appointed by the President with the advice and consent of the Senate. The Act requires that every portion of every meeting must be open to the public unless the meeting involves the discussion of information which falls within one of the Act's ten specific exemptions. In case of doubt as to whether a meeting or portion of a meeting falls within one of the exemptions, the Act establishes a presumption in favor of openness according to the legislative history. Even where a matter clearly falls within an exemption, the discussion must be open where an agency finds that the public interest requires.

A "meeting", as defined by the Act, includes those "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." According to the legislative history, "meeting" also includes the deliberations of committees or subdivisions of the agency where their meetings are held to formulate recommendations to the agency, as well as briefing sessions attended by at least a quorum of agency members where the members have an opportunity to ask questions or seek clarification of matters of concern.

Exemptions

Unless the agencies find that the public interest requires otherwise, meetings may be closed if they relate to one of the following exempt categories:

1. national security matters that are specifically authorized and properly classified;
2. internal personnel rules and practices;
3. matters specifically exempted from disclosure by statute;
4. trade secrets and commercial or financial information obtained from a person and privileged or confidential;
5. formal censure or accusation of a crime;
6. clearly unwarranted invasion of personal privacy;
7. law enforcement investigatory records or information;
8. information contained in or related to reports used by agencies responsible for the regulation or supervision of financial institutions.
9. information the premature disclosure of which would: (a) lead to financial speculation or significantly endanger the stability of any financial institution; or (b) significantly frustrate implementation of a proposed agency action; or
10. issuance of a subpoena; participation in a civil action or proceeding; or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication made on the record.

Procedure to close a meeting

A meeting or portion of a meeting may be closed by majority vote of the entire membership of an agency. A vote need not occur during a meeting and can properly be taken by circulating a written ballot or tally sheet.

A copy of each vote on the closing of a meeting must be made available to the public whether or not the meeting or session is closed. This provision is designed to inform the public of the full voting record of each agency member on the issue of openness. When a vote to close fulfills the requirements for closing a meeting, the Act requires a full written explanation of the action. A list of all persons expected to attend the meeting must be made available to the public.

Expedited closing procedure

The Act permits any agency, a majority of the meetings of which may properly be closed under exemption (4), (8), (9) (A), or (10), to close these meetings by special regulation and under simplified, expedited procedures. An agency qualifying under this provision may dispense with most of the closing procedures normally required of agencies including the requirement that meeting notices be published in the Federal Register.

1 A list of agencies which have issued regulations implementing the open meetings provisions of the Act appears on page 21. A list with citations to both the proposed and final rules appears in Appendix C beginning on page 49 of this study.
Public Notice

With certain exceptions, the agencies must give public notice at least one week in advance of meetings of the time, place, and subject matter of meetings. The one week notice provision may be waived by a recorded vote of a majority of the members of an agency if notice is then given at the earliest practicable time. Notice must be submitted for publication in the Federal Register.

Records of closed meetings

For each closed meeting, the chief legal officer of an agency must certify that the meeting may be closed and must state the relevant exemption. The agencies must maintain a complete transcript of electronic recording or detailed minutes of each closed meeting or portion of a meeting. The agencies must make available to the public any portion of a transcript, recording, or minutes that does not contain exempt material.

Enforcement

The district courts of the United States have jurisdiction to enforce the Act by declaratory judgment, injunctive relief, or other relief as may be appropriate. Any person may bring an action and the burden is on the agency to sustain its action. The court may examine in camera the relevant transcript, recording, or minutes. The court may award reasonable attorney fees and other litigation costs.

Ex parte communications

The Act also prohibits any interested party in a formal agency adjudication or on-the-record rule-making from making an ex parte communication with an agency official involved in the decision-making process. Any agency official who receives or makes an ex parte communication must place on the public record all written communications and memoranda stating the substance of the communication. Violation of the ex parte provision may be sufficient ground for a decision adverse to any party that knowingly commits the violation.

III. METHOD OF STUDY

A. Approach

The Common Cause findings in the study were based on a survey of the meetings held by the 47 agencies covered by the Act during the first calendar quarter after the effective date of the Act. Pursuant to the mandate of the Act, each agency was required to promulgate regulations implementing the open meetings provision of the legislation within 180 days after the bill's enactment. Final regulations were to be published in the Federal Register by March 12, 1976. In addition, each agency was required to give 30 days notice before the implementation of the final regulations with an opportunity for written comment by any person. We found that fewer than half of the covered agencies complied with the statutory deadline specified by the Act (Appendix C beginning on page 49 lists dates and Federal Register citations to proposed and final regulations).

After examining the regulations that were eventually promulgated by the agencies, we concluded that the wide variance in the substantive quality of regulations, coupled with the widespread misunderstanding of some of the basic provisions of the Act, necessitated independent monitoring of agency compliance not only with the letter but also with the spirit of the Act.

This study deals only with Section 3, the open meetings provisions of the Government in the Sunshine Act. No attention is given to Section 4, which deals with ex parte communications in formal agency proceedings.

The information contained in this study is designed to provide an overview of agency compliance with the Act. The study has two major parts: the first is a statistical breakdown of the number of open, closed, and partially open/closed meetings held by each agency with the relevant exemptions cited by each agency when closing meetings. The second part is a series of substantive recommendations designed to improve implementation of the Act. The first part is based largely on a review of the Sunshine Act Meetings notice section of the Federal Register during the first calendar quarter under the Act, the period beginning March 12, 1977 (the effective date of the Act) through June 12, 1977. The second part is based on a review and analysis of agency compliance with the Act during the first quarterly period.

Due to the number of agencies covered by the Act, a thorough discussion of each agency's regulations is not possible in this report. Instead we have
reviewed agency regulations implementing the Act and designed a model regulation incorporating those agency provisions we believe best implement the letter and most accurately reflect the spirit of the Act. This model regulation appears in Appendix D beginning on page 50 and is summarized beginning on page 27.

The data contained in this study should be useful to the Congress and the President in carrying out their oversight responsibilities in order to determine whether: first, exemptions are being properly used; second, the presumption of openness is being ignored; third, the exemptions need to be more narrowly defined; and fourth, whether the expedited closing procedure is being abused by the agencies. Section V of the study beginning on page 24 contains a full discussion of Common Cause’s recommendations.

It is our hope that this study will strengthen the principle of openness and accountability in government. Common Cause believes agency compliance with the letter and spirit of the Act, which is consistent with President Carter's desire for a new era of openness, will go a long way toward ensuring that the public has access to the “fullest practicable information regarding the decision-making processes of the Federal Government” as called for by the Act.

B. Collection of the data

With certain exceptions, each agency covered by the Act was required to give public notice one week in advance of meetings of the time, date, location, and subject matter of each meeting held and to submit that notice for publication in the Federal Register. A large portion of the data contained in this study was taken from the Sunshine Act Meetings notice section of the Federal Register for the period beginning March 12, 1977 through June 12, 1977. The study reflects the information submitted by each agency to the Federal Register. In addition, 17 agencies claimed use of the expedited closing provisions of the Act and announcements of their meetings were not published in the Federal Register under all circumstances. Subsection (d) (4) of the Act permits any agency, a majority of the meetings of which may properly be closed under exemptions (4), (8), (9) (A), or (10) to close these meetings by special regulation and under simplified, expedited procedures. Agencies can qualify under this subsection if they close a majority of their meetings under any of the four cited exemptions.

The expedited closing procedures were designed primarily for those agencies that are responsible for regulating financial institutions, securities, and commodities as well as agencies that have adjudication as their primary or sole responsibility. As the legislative history clearly points out, these agencies “often have to conduct their sensitive business in private, and on short notice.” (S. Rept. 94-354, at 29)

It is important to emphasize that the expedited closing procedure does not permit an agency to close any meeting which is not otherwise eligible to be closed, nor does it permit the agency to omit in each case a determination as to whether the public interest calls for invoking the exemption. It does, however, allow an agency to dispense with most of the closing procedures—most significantly for the purpose of our study—the requirement that meeting notices be published in the Federal Register.

In order to ensure that our records accurately reflected the number and status of all meetings held—not only by agencies using the expedited closing procedures but also by the other agencies covered by the Act—Common Cause wrote and asked the chair of each agency to review our draft list of meetings for any omissions of errors and to provide us with the correct information. Where appropriate, corrections offered by the agencies have been incorporated in our study.

C. Designation of the status of agency meetings

For purposes of our study, agency meetings were designated as either open, closed, or partially open/closed. The designation of a meeting as either opened or closed is self-explanatory. Those meetings at which members of the general public were permitted to attend were designated as open. Those which were entirely closed to the public under one of the Act’s ten exemptions were designated as closed.

The meeting designation “partially open/closed” (PO/C) indicates a meeting at which a portion of the meeting’s agenda is open to the public and the remainder of the meeting is closed under one of the appropriate exemptions. In most instances, meetings with the PO/C status were designated as such by the agency in their announcement appearing in the Federal Register. For the purposes of our study in order to ensure the reliability and consistency of the data, Common Cause extended the PO/C status to include two or more sessions held consecu-
tively by an agency without an announced recess period between meetings. For example, sessions announced in the following manner were designated as PO/C regardless of the designation given them by the agency:

- 9:00 a.m.—Open.
- 9:45 a.m.—Closed (or held at the conclusion of the open session).

Any two sessions held consecutively but with an announced recess period between them where one of the sessions was open and the other closed were designated as separate meetings. For example:

- 9:00 a.m.—Open.
- 12:00 noon—Recess for lunch.
- 2:00 p.m.—Closed.

The chart beginning on page 22 provides a listing of the total number of open, closed, and partially open/closed meetings held by each agency covered by the Act. In addition, we included the number of times exemptions were used by each agency to close a meeting or portion of a meeting.

The Act requires agencies to cite the relevant exemption justifying the closing of a meeting or portion. Our data regarding exemptions is based on information supplied by each agency to Common Cause. The total number of exemptions exceeds the number of closed or partially closed meetings because agencies are permitted to cite more than one exemption when closing a meeting or portion of a meeting.

IV. FINDINGS

The chart on page 22 summarizes the total number of meetings held by the 47 agencies covered by the Act as well as the use of exemptions to close meetings or portions of meetings.

As the data indicate, a large number of meetings held by the agencies were closed or partially closed to the public and press. Our survey found that:

- 39 percent (or 232) of 591 meetings held during the quarterly period were entirely closed to the public;
- 24 percent (or 143) of 591 meetings held during the quarterly period were partially closed to the public; and
- only 37 percent (or 216) of the 591 meetings held were fully open to the public; and
- exemptions relating to financial information accounted for 38 percent of the exemptions used to close meetings.

No comparative data exist to measure the impact of the Act on the meeting practices of the covered agencies. The large number of meetings which were not open to the public raises serious questions about the extent of agency compliance with the Act. In light of the fact that the law contains a presumption in favor of openness, we believe the fact that less than forty percent of agency meetings were entirely open to the public indicates the possibility of agency over use of the exemptions. Even where a matter falls within one of the Act’s ten exemptions, the Act provides that the discussion must be open where the public interest requires.

We doubt that the authors of this legislation anticipated that fewer than forty percent of all meetings held would be entirely open to the public. We find it highly unlikely that the public interest is served where more than sixty percent of the meetings are closed or partially closed to the public.

Our analysis of the use of exemptions by agencies closing meetings or portions of meetings indicates that the exemptions were used to close entire meetings or portions of meetings 825 times. Thirty eight percent (or 315) of the time the exemptions cited were those regarding financial information (exemptions 4, 8, and (9) (A)).

This heavy use of the financial exemptions is in spite of the fact that much of the public debate surrounding the need for exemptions in the Government in the Sunshine Act centered on the concerns in the Government in the Sunshine Act centered on the concern for national security and the unwarranted invasion of personal privacy. An analysis of the data reveals that matters of national security (exemption 1) accounted for only 1.5 percent of the closed meetings or portions while invasion of personal privacy (exemption 6) was cited for closing only 9 percent of the time.

The data indicate that financial exemptions may well be over used by agencies without concern for the public interest in these important matters.

We can only conclude that agency compliance with the letter and spirit of the Act is a mixed record. A number of agencies appear to be making every effort to contract their business in the sunshine and provide the public with the fullest
practicable information regarding their decision-making process. For example, the Civil Aeronautics Board has held nearly 70 percent of its meetings in open session. Additionally, the CAB’s regulations implementing the Act’s open meeting provisions permit any person to petition the Board to reconsider the closing of a meeting.

Another agency that appears to have gone beyond the literal requirements of the Sunshine Act in several ways in order to affirmatively implement the spirit of open government is the U.S. International Trade Commission. First, the Commission did not exercise (as it could have) the option under the expedited closing provision which would permit an agency to close its meetings by regulation. Second, the Commission’s regulations go beyond the literal requirements of the Act by requiring that a complete transcript or electronic recording be kept for all Commission meetings whether open or closed to the public. Third, the Commission through its informative notices has taken affirmative steps to widely disseminate public notices by maintaining a “sunshine” mailing list and by sending copies of these notices to the press.

Most agencies have not gone beyond the minimum requirements in order to carry out the spirit of the legislation. Many agencies seem to be adapting to the Act but only grudgingly. They view the Act as a procedural burden to be circumvented when possible. They continue to conduct business as usual behind closed doors.

The Federal Reserve Board is a prime example. Chairman Arthur Burns fought vigorously in Congress to exempt the Board from the law. Although the Board is covered by the Act, the broad language of the exemptions dealing with financial matters mean that as a practical matter few of the Board’s meetings will be open to the public. In fact, of the 37 meetings held by the Fed, 30 were entirely closed. The disproportionately large number of closed meetings are justified by the Fed on the grounds that matters of a sensitive financial nature were being considered by the Board as permitted by the Act. But the fact that the Board elected to close one of its meetings in order to consider a proposed office furniture design as well as the Board’s building renovation project raises serious questions about the Fed’s willingness to comply with the spirit and meaning of the Sunshine Law (see 42 F.R. 21899).

Another agency worthy of attention is the Interstate Commerce Commission which recently disposed of one of the most important cases in its history in private. Although not reflected in our data because it occurred after the first calendar quarter of the Act, the Commission closed its June 28, 1977 meeting to determine the tariff rates on the transportation of oil in the Alaska pipeline. Certainly a question of such national importance should have been considered in open session based on an agency finding that the public interest would be served by openness. A more recent example of the ICC’s questionable application of the Sunshine Act occurred on August 17, 1977 when, according to an article appearing in the Washington Star of August 28, 1977, agency members met in private with members of a trade association (the National Industrial Traffic League). According to the ICC’s general counsel “it wasn’t a meeting to conduct business or deliberation, it was a working meeting with general exchanges of views • • • so in terms of the Sunshine Act it was not a meeting.” We believe this is a perverse interpretation of the Act in light of the fact that as a matter of policy, agencies are obligated to broadly define meetings in order to further the spirit of the Act (see S. Rept. 94–354 at 18). Certainly no one would deny the importance of an agency attempting to gain insight as to the problems affecting the business they are charged with regulating. However, we doubt the wisdom or the propriety of an agency meeting in private with an association that has a clear and vested interest in the outcome of agency decisions.

These examples point to agency disregard for the spirit and sometimes the letter of the Act. They indicate that the fact that less than 40 percent of all meetings are open to the public may have as much to do with agency attitudes regarding openness and accountability in government as it does with the legitimate use of the Act’s exemptions.

AGENCIES COVERED BY THE GOVERNMENT IN THE SUNSHINE ACT

2. Civil Aeronautics Board (CAB).
3. Commodity Credit Corporation (CCC) (Board of Directors).
9. Export-Import Bank of the United States (EIB) (Board of Directors).
10. Federal Deposit Insurance Corporation (FDIC) (Board of Directors).
12. Federal Farm Credit Board (FFCB) within the Farm Credit Administration.
17. Federal Reserve Board (FRB).
19. Harry S. Truman Scholarship Foundation (HSTSF) (Board of Directors).
21. Inter-American Foundation (IAF).
22. Interstate Commerce Commission (ICC).
23. Mississippi River Commission (MRC).
24. National Center for Productivity and the Quality of Working Life (NCPQWL).
27. National Labor Relations Board (NLRB).
30. National Science Foundation (NSF).
31. National Transportation Safety Board (NTSB).
32. Nuclear Regulatory Commission (NRC).
34. Overseas Private Investment Corp. (OPIC) (Board of Directors).
35. Postal Rate Commission (PRC).
36. Railroad Retirement Board (RRB).
37. Renegotiation Board (RB).
39. Tennessee Valley Authority (TVA) (Board of Directors).
40. Uniformed Services University of the Health Sciences (USUHS) (Board of Regents).
41. U.S. Civil Service Commission (USCSC).
42. U.S. Commission on Civil Rights (USCCR).
46. U.S. Postal Service (USPS) (Board of Governors).
47. U.S. Railway Association (USRA).
### SUMMARY OF MEETINGS HELD BY AGENCIES UNDER THE SUNSHINE ACT

<table>
<thead>
<tr>
<th>Agency</th>
<th>Partially open/closed</th>
<th>Frequency and use of exemptions to close a meeting or portion</th>
<th>Totals</th>
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See footnotes at end of table, p. 22.
### SUMMARY OF MEETINGS HELD BY AGENCIES UNDER THE SUNSHINE ACT—Continued

| Agency          | Open | Closed | Partially open/closed | Totals | 1  | 2  | 3  | 4  | 5  | 6  | 7  | 8  | 9  | 9A | 9B | 10 | Totals |
|-----------------|------|--------|-----------------------|--------|----|----|----|----|----|----|----|----|----|----|----|-----|
| 42. USCCR       | 2    | 7      | 5                     | 14     |    |    |    |    |    |    |    |    |    |    |    | 10  |
| 43. USFSCC      | 20   | 0      | 0                     | 20     |    |    |    |    |    |    |    |    |    |    |    | 7   |
| 44. USITC       | 4    | 0      | 14                    | 18     | 14 | 3  |    |    |    | 1  |    |    |    |    |    | 1   |
| 45. USPC 2      | 1    | 6      | 1                     | 8      |    |    | 1  |    |    |    |    |    |    |    |    | 1   |
| 46. USPS 2      | 5    | 0      | 0                     | 5      |    |    |    |    |    |    |    |    |    |    |    | 29  |
| 47. USRA        | 0    | 0      | 3                     | 3      |    |    |    |    |    | 3  |    |    |    |    |    | 10  |
| **Total**       | 216  | 232    | 143                   | 591    | 12 | 51 | 47 | 128| 16 | 74 | 22 | 86 | 23 | 101 | 65 | 7   |
| **Percentage**  | 37%  | 39%    | 24%                   | 100%   | 1.5| 6.2| 5.7| 15.5| 1.9| 2.7| 10.4| 2.8| 12.2| 7.9| 24.2| 100|

1 Exemption key:
- (1) National defense classification.
- (2) Internal personnel rules.
- (3) Specifically exempted by statute.
- (4) Trade secrets.
- (5) Criminal accusation.
- (6) Personal privacy.
- (7) Law enforcement.
- (8) Regulation of financial institutions.
- (9) Premature disclosure (see 9A and 9B).
- (9A) Premature disclosure/financial speculation.
- (9B) Premature disclosure/frustrate implementation.
- (10) Civil action or formal agency adjudication.

2 Agencies using the expedited closing procedure.

Note: Total number of exemptions exceeds total number of closed or partially closed meetings because agencies may cite more than 1 exemption when closing a meeting.
V. RECOMMENDATIONS

Agency compliance with the Sunshine Act requires active Presidential leadership and initiative and continuous Congressional oversight. The legislation was vigorously opposed by a number of executive branch and independent agencies prior to its adoption by Congress. These agencies argued that the presence of the press and public at their meetings would inhibit open and candid discussion, impede the progress of their work, and force them to decide controversial matters in secret before official meetings. They proposed every conceivable justification for closing their meetings and lobbied for special exemptions.

It is unrealistic to expect that the agencies which lobbied so vigorously against the enactment of the Sunshine Act will now comply with the letter and spirit of the law. Their past resistance to openness poses a direct challenge to President Carter’s commitment to openness in government. Common Cause believes the President and the Congress must take certain specific steps in order to ensure meaningful compliance with the Sunshine Act and to set a new tone of openness in government.

A. Presidential directive

The President should issue a directive to the agencies affirming the Administration’s commitment to openness, establishing standards of openness, and requiring that agency regulations conform not only to the letter but also the spirit of the Act.

The directive should emphasize that agencies should close meetings only when there is an overriding public interest in doing so. The Act allows an agency to close a meeting under certain circumstances but does not require it to do so. An agency can decide even where an exemption applies that the public interest is served by openness and outweights the justification for meeting in secret. Many agencies are not following this approach. We believe they should be directed to do so by the President.

B. O.M.B. review

Although agencies have been given flexibility in developing regulations, the Act does not provide for any review of these regulations by any agency of government to determine whether they adequately meet the Act’s requirements and spirit.

President Carter should direct the Office of Management and Budget (OMB) to review for the White House each agency’s regulations to ensure that they meet high standards of openness. O.M.B.’s approval of the regulations should be based on their compliance with the Presidential directive discussed above. The results of the review, including any recommended changes, should be made available to the public.

C. Oversight hearings

We believe that Congress should hold comprehensive and thorough oversight hearings on agency implementation of the Act. Agencies subject to the requirements of the Act should be called before Congress. They should be required to provide Congress with a tabulation of the total number of meetings closed to the public and the reasons for closing these meetings.

Congress in its oversight function should examine: whether exemptions are being properly used—this should include an examination of the minutes or transcripts of those meetings closed to the public in order to determine whether they legitimately fall within any of the Act’s ten exemptions; whether the presumption of openness is being ignored; and whether the Act’s exemptions need to be more narrowly written. Special attention should be given to the use of exemptions relating to financial matters.

Congress should also examine whether the expedited closing procedure is being legitimately used by the 17 agencies that have invoked the provision. The Act allows an agency which will be closing a majority of its meetings under certain exemptions to issue regulations for closing these meetings through expedited procedures. Common Cause recognizes that agencies that regulate financial institutions, commodities, or securities, or that have adjudication as a primary responsibility may on occasion need to conduct agency business on short notice and in closed session. However, the use of regulations to close whole categories of meetings should be carefully monitored. Since only a few of the 17 agencies explain how they determined that a majority of their meetings can be anticipated to be closed, Congress should require each agency that wishes
to continue to qualify under this provision to document fully, on the basis of records of meetings over the past several years, that a majority of its meetings do fall within the specified exemptions.

D. Model agency regulations

Appendix D beginning on page 50 of this study is “A Model Agency Regulation To Implement The Government in the Sunshine Act.” Although all agencies covered by the Act have promulgated regulations implementing the open meetings provision of the law, Common Cause believes that each agency should periodically review its existing regulations for possible improvements. Any revision should be based on an evaluation of the agency’s— as well as the public’s— experience under existing regulations. Amendments should be designed to further the Act’s spirit of openness based on a reasoned and thorough analysis of the legislative history and agency experience under the Act. Where the law permits agency discretion in implementing the Act’s open meeting provisions, the Common Cause model regulation offers a guide to possible revisions in existing agency regulations in order to further the spirit of the Act.

A brief section-by-section analysis of the Common Cause model regulation follows:

1. Purpose: Section 1 generally describes the policy behind the open meetings provisions of the Government in the Sunshine Act. Each agency covered by the Act should affirmatively state the Congressional policy underlying the Act—that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government.

2. Definitions: Section 2 generally defines terms used in the model regulation. The model regulation differs significantly from most agency regulations in its definition of a meeting. The term “meeting” as used in the model regulation reflects the language of the Act by defining the term to include those meetings of the agency itself as well as divisions or committees of the agency where they are authorized to act on the agency’s behalf. While it appears from the legislative history that agency committees or subdivisions are covered by the Act, many agency regulations do not apply to these meetings (H. Rept. 94–880, at 7; see also S. Rept. 94–354, at 17–19). It also appears from the legislative history that as a matter of policy agencies are obligated to broadly define meetings in order to further the spirit of the Act. The model regulation has been written to include meetings of committees and subdivisions held to formulate recommendations to the agency as well as briefing sessions attended by at least a quorum of agency members, where the members have an opportunity to ask questions or seek clarification of matters of concern.

3. Notice of meetings: Section 3 of the regulation specifically states the notice requirements each agency must comply with when calling a meeting. This section has been written to encourage the agency to use all reasonable means necessary to ensure that the public is fully informed of all public announcements pursuant to this section.

Public notice of meetings is a significant part of the Act, since meetings are obviously only effective open to those who have notice of them. However, the Act itself does not describe what is meant by public announcement. The legislative history indicates that more is required than merely publishing a notice in the Federal Register, posting notices on bulletin boards within the agency, and filing copies with the secretary of the agency. The Conference Report stated:

“... means of publicizing such information should include posting notices on the agency’s public notice boards, publishing them in publications whose readers may have an interest, and sending them to the individuals on the agency’s general mailing list maintained for those who desire to receive such material.” (at 19; see also H. Dept., at 14).

This indicates that agencies should publish notice of meetings in the periodicals of groups that would be affected by decisions made during those meetings. Agencies should establish mailing lists of individuals or groups that consult with them, including groups that represent consumer interests. Notice of meetings should be sent to those on the list.

Additionally, the Act requires the agency to give public notice at least one week before meetings. This provision does not prohibit an agency from drafting a regulation providing for a longer notice period. The model’s provision requiring that at least ten days public notice be given prior to each meeting is offered because the seven-day requirement of the Act may not be sufficient to ensure that notices will be published in time for subscribers to the Federal Register to receive them and
make plans to attend agency meetings. Allowing time for publication and mailing, 10 day notice will result in the equivalent of 7 day notice for recipients. In order to ensure that public notice in advance of a meeting is adequate, agencies should attempt to provide longer notice whenever possible.

4. Open meetings: Section 4 of the model regulation generally states that every portion of every meeting of the agency shall be open to public observation. Since the Act does not define public observation, agencies are given some discretion in regulating the kinds of conduct permitted by members of the public at open meetings.

Obviously, public observation does not include the right to interfere in the conduct of the meeting. The Common Cause model regulation has been written to permit the unobtrusive use of sound recorders and photographic equipment.

We believe it to be a questionable practice and a possible violation of the spirit of the Act for agencies to prohibit the use of sound recorders or photographic equipment where their use is unobtrusive. Allowing the use of photographic equipment and sound recorders offers the best opportunity for accurate and complete reporting of meetings. The use of these devices would permit a subsequent, more reasoned analysis of the discussion at an open meeting, as well as enhance public understanding of agency proceedings.

Additionally, the model regulation prohibits meetings from being held in places which discriminate on the basis of race, color, creed, national origin, ancestry, religion, or sex.

5. Criteria to close meetings: Pursuant to the provisions of the Act, an agency may close certain types of meetings or portions of meetings under any of the law's ten exemptions to the openness rule. The agency must determine that openness is not in the public interest. In addition to using the language contained in the Act specifying the ten exemptions to the openness rule, Section 5 of the model regulation attempts to define in more specific fashion the kinds of information that are exempt from disclosure where possible.

Sections 5(b) (2), (4), (5), and (6) of the model regulation have been drafted in a more detailed fashion, borrowing heavily from the manner in which courts have interpreted analogous exemptions to public disclosure in the Freedom of Information Act of 1966.

Agencies may wish to further define activities or subject matter exempt from disclosure that pertain to their agency. Agencies, however, should construe those exemptions narrowly in light of recent judicial interpretation of analogous FOIA exemptions and the broad purposes to be served by the open meeting requirements.

6. Procedure to close meetings or limit the disclosure of information: Section 6 establishes the procedures an agency must follow to close a meeting or portions of a meeting and to withhold from the public announcements relating to the meeting otherwise required by the Act. To the extent that a person's interests may be directly affected, this section reflects the letter of the Act by permitting any person to petition the agency in writing to close a portion of a meeting pursuant to any of three specific exemption provisions. In addition, the model regulation provides that within one day after an agency votes to close a meeting or portion of a meeting, the general counsel of the agency is responsible for issuing an opinion certifying that the portion or portions of the meeting or series of meetings were properly closed to the public by the agency.

Since the Act does not address the question of whether the general counsel's certification must take place prior to a closed meeting or portion, this provision reflects the Congressional intent that the certification procedure be completed before a closed meeting or portion of a meeting (see S. Rept. 94–1178, at 19).

7. Procedure to open meetings: Section 7 permits any person to make a request that a meeting or portion of a meeting be open. Although this provision is not mandated by the Act, its inclusion in the model regulation is reasonable and consistent with the spirit of the Act. For example, this section permits any agency employee to petition the agency in writing to open a meeting or portions which might otherwise be closed if that employee's appointment, employment, or dismissal is the subject of the meeting or portion. The agency will be required to open the meeting upon receipt of a petition from the employee. The following language in the Senate Report supports the position that any person may waive his or her personal privacy and request that the meeting be open:

"The main purpose of the exemption (6) is to protect an individual's privacy. It would clearly not be appropriate, therefore, to invoke this paragraph when the individual involved prefers the meeting to be open." (S. Rept. 94–354, at 22).
8. Expedited closing procedure: Section 8 is intended for agencies regulating financial institutions, securities, and commodities as well as agencies the primary or sole responsibility of which is to conduct adjudicatory proceedings. The provision contained in the model regulation implements subsection (d) (4) of the Act which permits any agency that may properly close a majority of its meetings under exemptions (4), (8), (9)(A), or (10) or any combination of these exemptions to close these meetings by special regulation. The agency does not have to explain its decision to close these meetings and the 7 day notice requirement does not apply. The agency must, however, vote to close these meetings and make a record of the vote available to the public. An agency invoking subsection (d) (4) of the Act should describe in detail its basis for determining that a majority of its meetings will be closed. It is clear from the legislative history that requiring a justification of the use of the expedited closing procedure is reasonable and necessary.

Each agency invoking the expedited closing procedure should periodically examine its use of the provision and issue justifications for its continued use. As the legislative history indicates:

"Even if it could close a majority of its meetings, an agency should examine whether it will really need to close such a large number of its meetings under the specific (d) (4) exemptions. Full recognition must be given to the fact that this bill establishes a new principle of openness that is equally applicable to all agencies." (S. Rept. No. 94--354, at 29).

9. Recordkeeping requirements: This section requires each agency to maintain a complete transcript or electronic recording of each meeting closed to the public. The Act permits an agency which closes a meeting or portion of a meeting pursuant to exemptions (8), (9a), or (10) to maintain a transcript, recording, or minutes. Common Cause believes the maintenance of minutes may be inadequate, particularly where an action is brought in federal district court to enforce the requirements of the Act. Minutes are highly subjective and sometimes do not reflect the actual conduct of a meeting. To ensure that the court has access to the fullest possible information in order to determine whether an agency has in fact properly closed a meeting, each agency should maintain a transcript or recording of each meeting or portion closed to the public.

Additionally, this section requires that minutes be kept of each open meeting. This provision furthers the policy of the Act which declares that the "public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government." The fact that a meeting is open to the public in no way guarantees that all interested members of the public will be able to attend. Minutes are essential.

Records are to be kept of all matters of a routine nature that are disposed of by notational voting. Matters of a routine nature include the placing of an item on the agenda, selecting the time, date, and location of a meeting, or reviewing a request to open or close a meeting. These records are to be indexed and made available in the same fashion as records of closed meetings. The regulations provide that decisions of a substantive nature or significant procedural decisions may not be made by notational voting. The statute places the burden on the agency to keep and make available the minutes of its open meetings.

10. Public availability of records and other documents: Section 10 implements the spirit of the legislative history that agencies are expected to make the meeting record materials available promptly in anticipation of the receipt of public requests for these materials. A large number of agency regulations, however, provide for the availability of and access to non-exempted material only upon request. Those regulations providing for the availability of non-exempted material "upon request" place the burden on the public. This would appear inconsistent with the Act which places the burden on the agency to review its meeting records to determine what can be released. As the legislative history indicates:

"The transcripts and recordings that may be made public must be promptly placed in a public document room. The agency must do this on its own initiative, rather than waiting until it receives a particular request." (S. Rept. No. 94--354, at 32).

This burden is consistent with the burden imposed on the agency to justify its closed meetings and the withholding of information.

Additionally, Section 10 of the regulation provides an appeals process from an initial determination by the agency to withhold materials under Section 5.
APPENDIX A

HIGHLIGHTS OF THE LEGISLATIVE HISTORY

The Government in the Sunshine Act was introduced during the 92nd Congress on August 4, 1976 by Senator Lawton Chiles (D-Fla.). A companion bill was introduced in the House by Representative Dante Fascell (D-Fla.). The measure, with certain exceptions, provided that all meetings of any government agency at which official business is transacted must be open to the public.

A more comprehensive and expanded version of the original legislation with bipartisan co-sponsorship was introduced at the start of the 93rd Congress by Senator Chiles. The companion bill to the expanded Senate version was offered in the House by Representative Fascell in August of 1973.

Nearly a year passed before hearings were held on the legislation by the Subcommittee on Reorganization, Research, and Internal Organizations of the Senate Government Operations Committee. Testimony was received by the Subcommittee from a number of public officials and public interest representatives, including Common Cause. Several months later, in the fall of 1974, the Subcommittee heard from officials representing the views of federal agencies, including the Interstate Commerce Commission, Civil Aeronautics Board, and the Securities and Exchange Commission.

During the 94th Congress, the proposal was again introduced by Senator Chiles and referred to the Subcommittee on Federal Spending Practices, Efficiency, and Open Government of the Committee on Government Operations. The bill was eventually reported out favorably by the full committee with a number of modifications. Most notable was the narrowing of the scope of the bill to cover only those multi-member agencies headed by persons appointed by the President with the advice and consent of the Senate. Further amendments were added specifying additional grounds justifying the closing of meetings.

The legislation was then referred to the Senate Committee on Rules and Administration and the Committee on the Judiciary. Judiciary agreed to report the bill with the right to amend on the floor. At the insistence of then Majority Whip Robert C. Byrd (D-W. Va.), the Rules Committee divided the Sunshine Act in two, with one bill applying only to executive agencies and a separate resolution covering Senate committees (S. Res. 9).

The Rules Committee then voted to maintain the status quo on Congressional committee meetings. Instead of requiring open meetings it recommended that each Senate Committee determine at the start of every Congress its own policy toward open and closed meetings.

This recommendation became known as the Rules Committee substitute. When it was brought to the floor of the Senate on November 5, 1975, Senator Byrd and other Rules Committee members were sharply rebuffed. In a rare defeat for Senator Byrd, advocates of sunshine and a strong open meeting rule defeated the Rules Committee substitute by a lopsided 77–16 vote. The Senate passed both the resolution (S. Res. 9) and the Sunshine Act (S. 5) by unanimous votes of 94–0.

On the House side, Representative Bella Abzug (D–N.Y.) introduced a slightly revised version of the earlier Fascell measure. It was referred to the Subcommittee on Government Information and Individual Rights of the Committee on Government Operations chaired by Abzug. Following hearings, the bill was reported out favorably by the full committee.


Key documents in the legislative history of the Act follow:

House Reports: No. 94–880, Pt. 1 and No. 94–880, Pt. 2, accompanying H.R. 11656 (Comm. on Government Operations) and No. 94–1441 (Comm. of Conference).

Senate Reports: No 94–354 (Comm. on Government Operations), No. 94–381 (Comm. on Rules and Administration) and No. 94–1178 (Comm. of Conference).


At the direction of the Speaker, the bill was referred to the Committee on the Judiciary, where the Subcommittee on Administrative Law and Government Relations held further hearings. After adopting further amendments, the Judiciary Committee formally reported the bill to the full House where it was adopted by a vote of 390-5 on July 28, 1976 (H.R. 11656).

The differing proposals passed by each Chamber were ironed out in a conference Committee. On August 31, the House unanimously approved the Conference Report by a vote of 384-0, and the Senate agreed to it by voice vote. On September 13, 1976, former President Ford signed the bill into law (Public Law 94-409).
APPENDIX B

Government in the Sunshine Act of 1976

Public Law 94-409
94th Congress, S. 5
September 13, 1976

An Act

To provide that meetings of Government agencies shall be open to the public, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "Government in the Sunshine Act".

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

OPEN MEETINGS

SEC. 3. (a) Title 5, United States Code, is amended by adding after section 552a the following new section:

"§ 552b. Open meetings

(a) For purposes of this section—

(1) the term 'agency' means any agency, as defined in section 552(e) of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) the term 'meeting' means 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, but does not include deliberations required or permitted by subsection (d) or (e): and

(3) the term 'member' means an individual who belongs to a collegial body heading an agency.

(b) Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c) Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the
interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

"(2) relate solely to the internal personnel rules and practices of an agency;

"(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

"(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

"(5) involve accusing any person of a crime, or formally censuring any person;

"(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

"(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, or in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

"(8) disclose information contained in or related to examination, operating, or condition reports prepared by, or on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

"(9) disclose information the premature disclosure of which would—

"(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

"(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

"(10) specifically concern the agency's issuance of a subpoena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.
“(d) (1) Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a) (1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

“(2) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (3), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

“(3) Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

“(4) Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (b) (6), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

“(e) (1) In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

“(2) The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time.
subject matter of a meeting, or the determination of the agency to
open or close a meeting, or portion of a meeting, to the public, may be
changed following the public announcement required by this subsection
only if (A) a majority of the entire membership of the agency
determines by a recorded vote that agency business so requires and
that no earlier announcement of the change was possible, and (B) the
agency publicly announces such change and the vote of each
member upon such change at the earliest practicable time.

“(3) Immediately following each public announcement required by
this subsection, notice of the time, place, and subject matter of a
meeting, whether the meeting is open or closed, any change in one of
the preceding, and the name and phone number of the official design­
nated by the agency to respond to requests for information about the
meeting, shall also be submitted for publication in the Federal
Register.

“(f) (1) For every meeting closed pursuant to paragraphs (1)
through (10) of subsection (c), the General Counsel or chief legal
officer of the agency shall publicly certify that, in his or her opinion,
the meeting may be closed to the public and shall state each relevant
exemptive provision. A copy of such certification, together with a state­
ment from the presiding officer of the meeting setting forth the time
and place of the meeting, and the persons present, shall be retained by
the agency. The agency shall maintain a complete transcript or elec­
tronic recording adequate to record fully the proceedings of each
meeting, or portion of a meeting, closed to the public, except that in
the case of a meeting, or portion of a meeting, closed to the public pur­
suant to paragraph (8), (9) (A), or (10) of subsection (c), the agency
shall maintain either such a transcript or recording, or a set of minutes.
Such minutes shall fully and clearly describe all matters discussed and
shall provide a full and accurate summary of any actions taken, and
the reasons therefor, including a description of each of the views
expressed on any item and the record of any rollcall vote (reflecting
the vote of each member on the question). All documents considered in
connection with any action shall be identified in such minutes.

“(2) The agency shall make promptly available to the public, in a
place easily accessible to the public, the transcript, electronic record­
ing, or minutes (as required by paragraph (1)) of the discussion of
any item on the agenda, or of any item of the testimony of any witness
received at the meeting, except for such item or items of such discus­
sion or testimony as the agency determines to contain information
which may be withheld under subsection (c). Copies of such transcript,
or minutes, or a transcription of such recording disclosing the identi­
ity of each speaker, shall be furnished to any person at the actual cost of
duplication or transcription. The agency shall maintain a complete
verbatim copy of the transcript, a complete copy of the minutes, or a
complete electronic recording of each meeting, or portion of a meeting,
closed to the public, for a period of at least two years after such meet­
ing, or until one year after the conclusion of any agency proceeding
with respect to which the meeting or portion was held, whichever
occurs later.

“(g) Each agency subject to the requirements of this section shall,
within 180 days after the date of enactment of this section, following
consultation with the Office of the Chairman of the Administrative
Conference of the United States and published notice in the Federal
Register of at least thirty days and opportunity for written comment
by any person, promulgate regulations to implement the requirements

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of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

"(b) (1) The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after an public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action.

In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, minutes of a meeting closed to the public, and may take such additional evidence as it deems necessary.

The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

"(2) Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

"(i) The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

"(j) Each agency subject to the requirements of this section shall annually report to Congress regarding its compliance with such requirements, including a tabulation of the total number of agency"
meetings open to the public, the total number of meetings closed to the public, the reasons for closing such meetings, and a description of any litigation brought against the agency under this section, including any costs assessed against the agency in such litigation (whether or not paid by the agency).

"(k) Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

"(l) This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

"(m) Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title."

(b) The chapter analysis of chapter 5 of title 5, United States Code, is amended by inserting:

"552b. Open meetings."

immediately below:

"552a. Records about individuals."

EX PARTE COMMUNICATIONS

SEC. 4. (a) Section 557 of title 5, United States Code, is amended by adding at the end thereof the following new subsection:

"(k) In any agency proceeding which is subject to subsection (a) of this section, except to the extent required for the disposition of ex parte matters as authorized by law—

"(A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding, an ex parte communication relevant to the merits of the proceeding;

"(B) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding, shall make or knowingly cause to be made to any interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

"(C) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or knowingly causes to be made, a communication prohibited by this subsection shall place on the public record of the proceeding:

"(i) all such written communications;

"(ii) memoranda stating the substance of all such oral communications; and

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“(iii) all written responses, and memoranda stating the substance of all oral responses, to the materials described in clauses (i) and (ii) of this subparagraph;

“(D) upon receipt of a communication knowingly made or knowingly caused to be made by a party in violation of this subsection, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

“(E) the prohibitions of this subsection shall apply beginning at such time as the agency may designate, but in no case shall they begin to apply later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

“(2) This subsection does not constitute authority to withhold information from Congress.”.

(b) Section 557 of title 5, United States Code, is amended—

(1) by striking out “and” at the end of paragraph (12);

(2) by striking out the “act.” at the end of paragraph (13) and inserting in lieu thereof “act; and”;

and

(3) by adding at the end thereof the following new paragraph:

“(14) ‘ex parte communication’ means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this subchapter.”.

(c) Section 556(d) of title 5, United States Code, is amended by inserting between the third and fourth sentences thereof the following new sentence: “The agency may, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, consider a violation of section 557(d) of this title sufficient grounds for a decision adverse to a party who has knowingly committed such violation or knowingly caused such violation to occur.”.

CONFORMING AMENDMENTS

Sec. 5. (a) Section 410(b)(1) of title 5, United States Code, is amended after “Section 552 (public information),” the words “section 552a (records about individuals), section 552b (open meetings),”.

(b) Section 552(b)(3) of title 5, United States Code, is amended to read as follows:

“(3) specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;”.

(c) Subsection (d) of section 10 of the Federal Advisory Committee Act is amended by striking out the first sentence and inserting in lieu thereof the following: “Subsections (a)(1) and (a)(3) of this section shall not apply to any portion of an advisory committee meeting where

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the President, or the head of the agency to which the advisory committee reports, determines that such portion of such meeting may be closed to the public in accordance with subsection (c) of section 552b of title 5, United States Code."

**EFFECTIVE DATE**

Sec. 6. (a) Except as provided in subsection (b) of this section, the provisions of this Act shall take effect 180 days after the date of its enactment.

(b) Subsection (g) of section 552b of title 5, United States Code, as added by section 3(a) of this Act, shall take effect upon enactment.

Approved September 13, 1976.

**LEGISLATIVE HISTORY:**

HOUSE REPORTS: No. 94-880, Pt. 1 and No. 94-880, Pt. 2, accompanying H. R. 11656 (Comm. on Government Operations) and No. 94-1441 (Comm. of Conference).

SENATE REPORTS: No. 94-354 (Comm. on Government Operations), No. 94-381 (Comm. on Rules and Administration) and No. 94-1178 (Comm. of Conference).

CONGRESSIONAL RECORD:

Vol. 121 (1975): Nov. 5, 6, considered and passed Senate.


Aug. 31, House and Senate agreed to conference report.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:

APPENDIX C
DATES AND FEDERAL REGISTER CITATIONS TO PROPOSED AND FINAL AGENCY REGULATIONS

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<th>PROPOSED REGULATION</th>
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<td>24. National Center for Productivity and the Quality of Working Life (NCQWL)</td>
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<td>46. U.S. Postal Service (USPS) (Board of Governors)*</td>
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*17 agencies have claimed use of the expedited closing procedure (d)(4) of the United States Code.

1 Much of the information contained within this Appendix was obtained from the Office of the Chairman, Administrative Conference of the United States.
SECTION 1

Purpose
(a) Consistent with the principle that the public is entitled to the fullest practicable information regarding the decision-making processes of the federal government, it is the purpose of this Subpart to open all meetings of the agency to public observation while at the same time protecting the rights of individuals and the ability of the government to carry out its responsibilities. These regulations are promulgated pursuant to the directive of Section (g) of the Government in the Sunshine Act [Public Law 94-409, 90 Stat. 1241, 5 U.S.C. 552b (g)] to implement the open meetings requirement of the Act.

(b) One of the primary purposes of this regulation is to inform the public to the fullest extent possible of the agency’s activities. The agency believes that in order to guarantee public confidence in the integrity of its decisionmaking, it must conduct its business in an open manner, whenever possible.

SECTION 2

Definitions
For purposes of this Subpart:
(b) “Change” as applied to the time or location of a meeting includes cancellation of a meeting.
(c) “Meeting” means the deliberations, including conference telephone calls, of a quorum of the members of the agency or a committee or subdivision of the agency where these deliberations determine or result in the joint conduct or disposition of official agency business. Meeting includes briefing sessions attended by at least a quorum of agency members where members have an opportunity to ask questions or seek clarification of matters of concern. It does not include deliberations to take action to open or close a meeting or to release or withhold information. Except for matters of a routine nature, “meeting” shall be construed to prevent agency members from considering individually agency business that is circulated to them sequentially in writing unless no conduct or disposition of agency business occurs during circulation.
(d) “Member” means an individual who belongs to a collegial body, a majority of the members of which are appointed to their positions by the President with the advice and consent of the Senate.
(e) “Person” includes an individual, partnership, corporation, association, exchange, or other entity or organization.
(f) “Routine nature” as applied to the subject matter of deliberations includes: action to open or close a meeting; release or withhold information; place an item on the agenda; or select the time, date, and location of a meeting.
(g) As used in this Subpart, all terms not defined shall have the meaning given by the Act.

SECTION 3

Notice of meetings
(a) Prior to each agency meeting, the agency shall issue a public notice which—
(1) states the time, date, and location of the meeting;
(2) lists the subject matter or agenda items to be discussed at the meeting;
(3) States which portions of the meeting shall be open or closed to public observation; and
(4) provides the name and business telephone number of the official designated by the agency to respond to requests for information about the meeting.
(b) Public notice shall be made not less than ten days prior to the meeting unless a majority of the members of the agency determines by a recorded public vote that the meeting must be called at an earlier date. If an earlier date is established, the agency shall make a public announcement as required in paragraph (a) of this Section within 24 hours.
(c) The time or location of a meeting may be changed following the public announcement required in paragraph (a) of this Section only if the agency publicly announces the change within 24 hours.
(d) When the agency has voted to close any portion of any meeting pursuant to Section 5 of this Subpart, the notice referred to in paragraph (a) of this Section shall also include, or be amended to include—
(1) a list of persons and their affiliations reasonably expected to be present at the closed meeting, portion, or series of meetings;
(2) a written copy of the vote of each member on whether or not the meeting, portion, or series of meetings will be closed to public observation;
(3) a full, written explanation of the agency's action in closing the meeting, portion, or series of meetings; and
(4) a copy of the certification of the general counsel required by Section 6 that the meeting, portion, or series of meetings were properly closed to the public by the agency.

(e) The subject matter of a meeting or the determination to open or close a meeting or portion of a meeting to the public may be changed following the public announcement required in paragraph (a) of this Section only if—

(1) a majority of the entire membership of the agency determines by a recorded vote that the public interest requires it and that no earlier announcement of the change was possible; and
(2) the agency publicly announces the change and the vote of each member upon the change within 24 hours.

(f) When a vote to close a portion or portions of a meeting in accordance with Section 5 of this Subpart or a vote to change the subject matter of a meeting or to change a determination to open or close a meeting or portion of a meeting to the public fails for lack of a majority of the entire membership of the agency, the vote shall be published as part of the notice required by paragraph (a) of this Section.

(g) The agency must use all reasonable means to ensure that the public is fully informed of public announcements pursuant to this Section. This includes but is not limited to—

(1) posting of notices on the agency's public notice boards and in its Public Information Office;
(2) publishing notices in publications with readers who may have an interest in the agency's operations;
(3) sending press notices to publications of general as well as specialized readership; and
(4) sending notices to persons on the agency's general mailing list or a mailing list maintained for persons requesting the material. Any person who requests it shall be given notice of all special or rescheduled meetings in the same manner as is given to members of the agency.

(h) Immediately following the issuance of each public notice required by this Section, the agency shall submit for publication in the Federal Register except to the extent that the information is exempt from disclosure under Section 5 of this Subpart and the agency determines that nondisclosure is consistent with the public interest:

(1) notice of the time, date, location, and subject matter of a meeting;
(2) which portions of the meeting shall be open or closed to the public;
(3) any change in one of the preceding; and
(4) the name and business telephone number of an official of the agency who may be contacted for information about the meeting.

SECTION 4

Open meetings

Members shall not jointly conduct or otherwise dispose of agency business other than in accordance with this Subpart.

(a) Every portion of every meeting of the agency or committees or subdivisions of the agency shall be open to the public unless closed pursuant to Section 6 or Section of this Subpart.

(b) This regulation shall not apply to any chance meeting or a social meeting at which matters relating to official business are not discussed. No chance meeting, social meeting, or electronic communication shall be used to circumvent this regulation to discuss or act upon a matter over which the agency has supervision, control, jurisdiction, or advisory power.

(c) A convenient location with sufficient space, visibility, seating, and acoustics shall be provided for all meetings to accommodate observation by the public.

(d) This Subpart shall not be construed to allow any observer to interfere in the conduct of the meeting; nor does it prohibit removal of any person who willfully disrupts the orderly conduct of a meeting.

(e) Meetings shall not be held in places which restrict membership or attendance or otherwise discriminate on the basis of race, color, creed, national origin, ancestry, religion, or sex.
(f) All or any part of an open meeting may be recorded by any person in attendance by means of a tape recorder or any other means of visual or sonic reproduction provided that the recording does not actively interfere with the conduct of the meeting.

(g) This Section does not prohibit the use by the agency of notational voting to make agency decisions on matters of a routine nature. Matters of a routine nature include the placing of an item on the agenda, selecting the time, date, and location of a meeting, or reviewing a request to open or close a meeting. No decision with respect to any rulemaking or administrative order may be made by notational voting.

SECTION 5

Criteria to close meetings

(a) Except in cases where the agency finds that the public interest requires otherwise, every meeting of the agency shall be open to the public.

(b) The agency may close all or portions of agency meetings when it determines that disclosure is not in the public interest and where the subject matter to be discussed is likely to—

1. disclose matters that are specifically authorized under criteria established by an executive order to be kept secret in the interests of national defense or foreign policy and are in fact properly classified pursuant to the executive order;

2. relate solely to the internal personnel rules and personnel practices of the agency, including but not limited to rules for the use of parking facilities, working hours, or sick leave;

3. disclose matters specifically exempted from disclosure by statute (other than the Freedom of Information Act, as amended 5 U.S.C. 552), provided that the statute—

   (i) requires that the matters be withheld from the public in a manner that leaves no discretion on the issue; or

   (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

4. disclose trade secrets and commercial and financial information obtained from a person on a privileged or confidential basis, where the disclosure of the information is likely to cause harm to the competitive position of the person from whom the information was obtained;

5. involve accusing any person of a crime or formally censuring any person, including but not limited to—

   (i) requests by the agency that the Attorney General of the United States institute a criminal action against any person believed to have violated any law which the agency is responsible for administering; and

   (ii) the consideration of any administrative proceeding regarding the censure of a person for violation of an internal agency regulation or for violation of the agency's standards of ethical conduct;

6. disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy; personal information includes but is not limited to home address, social security number, medical history, date and place of birth, and personal or family history; this information may be withheld only where it is clear that the interest in maintaining personal privacy outweighs the public interest in disclosure; wherever practicable, an effort should be made to release information by deleting that portion of the information that can be used to identify individuals;

7. disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in these records, but only to the extent that the production of the records or information would—

   (i) interfere with enforcement proceedings;

   (ii) deprive a person of a right to a fair trial or an impartial adjudication;

   (iii) constitute an unwarranted invasion of personal privacy;

   (iv) disclose the identity of a confidential source and, in the case of a record compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source;

   (v) disclose investigative techniques and procedures; or
(vi) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions where the premature disclosure of the information would be likely to have an adverse effect on currencies, securities, commodities, or other matters of a serious financial nature;

(9) disclose information the premature disclosure of which would—
   (i) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to—
      (A) lead to significant financial speculation in currencies, securities, commodities or
      (B) significantly endanger the stability of any financial institution; or
   (ii) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action; except where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make the disclosure in its own initiative prior to taking final agency action on a proposal; or

(10) specifically concern an agency's issuance of a subpoena, or its participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct or disposition by an agency of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing.

SECTION 6

Procedures to close meetings or limit the disclosure of information

(a) Meetings shall not be closed to the public and information about a meeting or portion of a meeting shall not be withheld from the public meeting notice without a recorded vote of a majority of the entire membership. For this purpose, these votes shall be cast by the members themselves without the use of proxies.

(b) When a subdivision or committee of an agency meets, the vote of a majority of the entire membership of the subdivision or committee is necessary to close a meeting or limit the disclosure of information.

(c) A majority of the agency membership may vote to close a series of meetings or portions of meetings if the meetings are held no more than thirty days after the initial meeting of the series.

(d) A closed meeting or information withheld from disclosure is limited to subjects exempt from the requirement of disclosure listed in Section 5 of this Subpart.

(e) Before any meeting or portion of a meeting may be closed, the general counsel or chief legal officer of the agency has the responsibility for certifying and issuing an opinion of whether an exemption applies to a meeting or a portion of a meeting.

(f) A determination that one portion of a meeting is exempt and may be closed does not justify the closing of any other portion.

(g) If a majority of the agency membership votes to close a meeting or portion of a meeting, the agency shall within one day make publicly available—
   (1) a list of persons and their affiliations reasonably expected to be present at the closed meeting, portion, or series of meetings;
   (2) a written copy of the vote of each member on whether or not the meeting, portion, or series of meetings should be closed to the public;
   (3) a full, written explanation of the agency's action in closing the meeting, portion, or series of meetings; and
   (4) a copy of the certification of the general counsel required by this Subpart that the meeting, portion, or series of meetings were properly closed to the public by the agency.

(h) Notwithstanding that the members may already have voted not to close a meeting, whenever any interested person requests in writing that the agency close a meeting or a portion of a meeting or prevent disclosure of information pertaining to the meeting because it is likely to—
(1) involve accusing someone of a crime, or formally censuring someone;
(2) disclose personal information constituting a clearly unwarranted disclosure of personal privacy; or
(3) disclose personal information which if written would be contained in the records, but only to the extent that the production of the records or information would—
  (i) interfere with enforcement proceedings;
  (ii) deprive a person of a right to a fair trial or an impartial adjudication;
  (iii) constitute an unwarranted invasion of personal privacy;
  (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, confidential information furnished only by the confidential sources;
  (v) disclose investigative techniques and procedures; or
  (vi) endanger the life or safety of law enforcement personnel;
the agency shall, upon the request of one of its members, vote on whether to close the meetings or portion of the meeting or withhold the pertinent information.

SECTION 7

Procedure to open meetings
(a) Following any announcement that the agency intends to close a meeting or portion of a meeting, any person may make a request that the meeting or portion be opened.
(b) A request to open a meeting shall be made of the chair of the agency or his or her designee, who shall see that the request is circulated to all members of the agency within one business day from the day on which it is received.
(c) The request shall set forth the reasons why the person making the request believes the meeting or portions of the meeting should be open to the public.
(d) The agency upon the request of any member or its general counsel shall vote on the request.
(e) If the request is supported by the votes of a majority of the agency membership sufficient to constitute a quorum, an amended public meeting announcement shall be issued and the agency shall immediately notify the person making the request of its decision.
(f) If no agency member or the general counsel requests that a vote be taken on a request to open a meeting, the chair shall certify that no vote was taken and shall notify the person making the request of the agency action within 48 hours.
(g) Agency actions to withhold information pertaining to a meeting shall conform to the procedures set forth in paragraphs (a) through (e) of this section. No information required to be disclosed under Section 5 of this Subpart may be withheld without a recorded vote of the members of the agency.
(h) Whenever any agency employee whose appointment, employment or dismissal is to be the subject of a meeting or portion of meeting closed to the public pursuant to Section 5 requests in writing to the agency that the agency open that meeting or portion of meeting, the agency shall open that meeting or portion of meeting to the public.

SECTION 8

Expedited closing procedure
(a) Any meeting or portion of a meeting may be closed to the public pursuant to Section 5, Subsections (b) (4), (b) (8), (b) (9) (A), or (b) (10) of the Act or any combination of them provided that—
  (1) a majority of the members of the agency vote by recorded vote at the beginning of the meeting or a portion of the meeting or portion to close the exempt portion; and
  (2) a record of the vote of each member on the question is made available to the public in the agency's Public Information Office within one day of the vote.
(b) Unless the information is exempted from disclosure by Section 5 of this Subpart, the agency must as soon as possible provide a public announcement of—
  (1) the time of the meeting;
  (2) the date of the meeting;
  (3) the location of the meeting;
  (4) all subjects of the meeting;
(5) closed status of the meeting; and
(6) the name and business telephone number of the agency official whose
duty it is to respond to requests for information about the meeting.

SECTION 9

Recordkeeping requirements

(a) The agency shall maintain a complete transcript or electronic recording
of any meeting or a portion of a meeting closed pursuant to Sections 5 and 6 of
this Subpart.

(b) The agency shall maintain complete and accurate minutes of all meetings
open pursuant to Section 4 of this Subpart.

(c) Minutes of a meeting or portion of a meeting shall fully and accurately
describe all matters discussed and shall provide a full and accurate summary of
any actions taken and the reasons for the action, including a description of the
views expressed by any member on any item and the record of any rollcall vote.
All documents considered in connection with any action shall be identified in the
minutes.

(d) All records required to be kept by paragraphs (a) and (b) of this Section
shall be public records and shall be made promptly available to the public not
later than 48 hours after a meeting with respect to minutes of a meeting, except
for the portion or portions of the discussion which the agency determines to
contain information which may be withheld under Section 5 of this Subpart.

(e) The agency shall maintain all records required to be kept under para­
graphs (a) and (b) of this Section for a period of at least two years after any
meeting, or until one year after the conclusion of an agency proceeding with
respect to which the meeting was held, whichever occurs later.

(f) Records shall be kept of all matters disposed of by notational voting,
where agency members consider individually agency business which is circulated
sequentially in writing. These records shall include all documents circulated and
all votes and comments made in writing by any member in responding to the
circulated material. These records shall be indexed and made available in the
same fashion as records of closed meetings.

(g) Nothing in this Subpart expands or limits the present rights of any person
under the Freedom of Information Act, 5 U.S.C. 552, except that the exemptions
set forth in Section 5 shall govern in the case of any request made pursuant to
the Freedom of Information Act to copy or inspect the transcript, recordings,
or other records described in this Section.

(h) Nothing in this Subpart authorizes the withholding from any individual
of any record, including transcripts, recordings, or minutes required by this
Subpart which is otherwise accessible to such individual under the Privacy Act,

(i) Public access to documents being considered at agency meetings may be
obtained by access to the public files of the agency.

SECTION 10

Public availability of records and other documents

(a) All documents and records required to be made and maintained by Sec­
tions 4, 6, 7, and 8 of this Subpart shall be made available to the public for
examination and duplication during regular business hours, except for an item
or items of discussion or testimony that the agency determines to contain infor­

mation which may be withheld under Section 5 of this Subpart.

(b) Where all or any portion of a document or record is withheld pursuant to
Section 5 of this Subpart, the copy of the record or document available for public
inspection shall reflect the existence of the withheld portion and shall indicate
the exemption which justifies the withholding.

(c) Requests for materials not immediately available and for material with­
held under Section 5 of this Subpart shall be made pursuant to the provisions
of the Freedom of Information Act.

(d) The agency shall designate an official to receive requests for information
required to be maintained by this Subpart. Within 10 days after a request for
materials pursuant to paragraph (c) of this Section is received, that official
shall make a determination as to whether to comply with the request and shall
immediately give written notice of the determination to the person making the
request. If the determination is to deny the request, the notice to the person making the request shall include a statement of the reasons for denial and a notice of the rights of the person making the request to appeal the denial and the time limits for an appeal as well as a copy of the agency procedures for an appeal.

(e) Any person who has been denied all or part of a request made pursuant to paragraph (c) of this Section may appeal the denial to the agency. An appeal is taken by delivering a written notice of appeal to the officer or office specified by the agency to receive appeals. The notice shall include a statement that it is an appeal from a denial of a request made pursuant to Section 9(c) and the Government in the Sunshine Act.

(f) Within twenty days after the appeal is received, the agency itself or an official designated by the agency shall make a final determination on the appeal. In making the determination, the agency shall consider whether to waive the provisions of any exemption contained in Section 5 of this Subpart in order to promote the public interest in openness. The agency shall immediately give written notice of the final determination to the person making the appeal. If the final determination on the appeal is to deny all or part of the request, the notice to the person making the request shall include a statement of the reasons for denial and a notice of the person’s right to judicial review of the denial.

(g) All materials available or made available to the public under this section shall be placed in a centrally located agency office to which the public has access during business hours of the agency.

(h) Copies of materials available for public inspection under this Section shall be furnished to any person at the actual cost of duplication.

(i) Where practicable, self-service duplication of requested documents on agency machines will be made available to any person requesting the documents.

(j) Persons requesting copies of the transcripts of meetings, where the agency has prepared a transcript, shall be charged for the duplication of the transcript only.

(k) Where data has been extracted from the agency's public records on magnetic tape computer files, copies of the tape files may be secured on a reimbursable basis, upon a written request. The fee charges for the preparation and duplication of materials shall in no case be greater than the cost to the agency. No fee shall be charged for any expenses incurred in the search for documents required to be maintained under this Subpart or for any costs incurred in determining whether records or any portion of them are exempt.

(m) Records and documents shall be furnished without charge or at a reduced charge where the agency determines, upon application, that a waiver or reduction of the fee is in the public interest.

(n) Certification of any agency record shall be performed without charge.

THE SUN SHINES IN THE COMMODITY FUTURES TRADING COMMISSION

Senator Chiles. Mr. Cohen, I was surprised to see the Commodity Futures Trading Commission on the list. As you know, and I assume everybody else knows, Mr. Bill Bagley, the Commission Chairman, is one of the most ardent advocates of sunshine in town. He is the author of California’s principal pieces of sunshine legislation and has made considerable attempts to open upon his Commission’s activities to the public. I wonder if you could explain how he got in this fix of being on the list as No. 1?

Mr. Cohen. One of the reasons he says—and Mr. Rodriguez reminds me—deals with the fact that some of their items are litigation, but I think the best way to understand it is for him to be here and explain it.

Senator Chiles. Well, we have a copy of a recent letter on this matter and and I will place it in the record at this point.

[The letter follows:]
Re Common Cause report on open meetings.

Mr. David Cohen,
President, Common Cause,
Washington, D.C.

Dave: I was mildly shocked (but not chagrined) by the report indicating that we (of all people) have more closed meetings than open and that we use the “expedited procedure” approach. Let me say this about that—

As we have one market surveillance meeting a week and at least one enforcement meeting a week and have several judicial sessions per month, we will always have more closed sessions than open. Our open general sessions, lasting several hours, are held once a week. I would hope that can be understood and explained.

And yes, we have been using expedited procedures. But because of your report (and the fact that I asked questions) “staff” now tells me that we can avoid this. As “market” meetings etc. are now regularly scheduled, we can simply schedule and announce them prospectively, as you suggest.

We will also announce, sometimes after the fact, any emergency market-type or enforcement-type meetings that will from time to time become necessary.

And further, just so you know, we are still the only agency in town which (1) hands out staff papers so those listening can understand, (2) allows upon request public participation in our regular meetings, (3) has open budget meetings, (4) broadens the definition of meetings, and (5) prevents in advance the possibility that the Commission might meet in a facility that discriminates in any way. All of this has not been easy and the staff (some of them) still think I’m crazy.

So—keep up the good work. Without you, and a few people on the Hill and in the press, I’d be all alone. And that of course would confirm the views of staff.

Bill.

P.S.—Good to see you the other day. Let me know what, where, when I can do.—B.

Senator Chiles. I am particularly impressed with it. His is the only agency which now distributes staff papers to those in the audience so they can understand what’s going on. I think that’s important.

Mr. Cohen. That is a very useful idea.

In our own work we have discovered, and it is no great discovery, but once you do it it works much better. We follow the same principle in our own relations with our governing board. We send out the notices 2 and 3 weeks before the meeting so that people do have a chance to read them and comment and understand.

Senator Chiles. Well, I think it is also important. You note that many of these agencies are dealing with technical subjects, and in many of the meetings they are dealing with people who are in the industry that they are regulating. They pick up a jargon that they use, jargon within the industry. They talk about document numbers and other abbreviated items that they understand but no one else can understand. Then they say: “We have opened some of our meetings, but the public isn’t there. We don’t know why they are not there.” They might as well be conducting a Greek seminar if there isn’t some way of understanding what is taking place. I think that is tremendously important if people are going to have some view of what goes on in Government.

Mr. Cohen. I think as defenders of the proposition that nothing should be left solely to the experts. We have taken it upon ourselves as
part of our responsibility to begin to cover some of these agency meetings. We can’t cover all 47 of them and don’t pretend to, but I think those of us in the public interest movement learn what’s going on, and I think with that I think we can begin to show the experts that the terrain is not only theirs.

Senator Chiles. Well, I note that also he allows, upon request, public participation in meetings. He has opened his budget meetings and broadened the definition of meetings. He also makes sure that the Commission meetings are held in facilities which are open and do not discriminate in any way. We think all of those are laudable steps.

I want to thank you all very much for your participation and for your statement, and we look forward to continuing to work with you.

Miss McBride. Thank you.

Mr. Cohen. Thank you.

[The prepared statement of Mr. Cohen follows:]
Mr. Chairman and Members of the Senate Committee, Common Cause appreciates the opportunity to come here today and present to this Subcommittee the results of one of our recently completed studies, *Shadows Over the Sunshine Act: A Common Cause Study of Federal Agency Compliance with the Government in the Sunshine Act of 1976*. With your permission, we would like to submit the entire study for the record.

We commend you, Mr. Chairman, for beginning the serious process of Congressional oversight on the implementation of the Sunshine Act. Too often laws are enacted—but their implementation ignored. Laws seldom are self-enforcing—they need attention and monitoring. We have always believed that Congressional oversight is essential if our federal programs and laws are to work as intended. These oversight hearings of this Subcommittee will play a critical role in determining how the Sunshine Act is actually working. Of equal importance, they will send a forceful signal that Congress is serious about agency compliance with the letter and spirit of this landmark openness law.

**RESULTS OF THE STUDY**

Mr. Chairman, at this point, I would like to summarize the results of our study.

The data contained in the study are based on a survey of the number and status of meetings held by 47 agencies covered by the Government in the Sunshine Act during the
first quarterly period beginning March 12, 1977 through June 12, 1977.

Our survey found that:

-- 39% (232) of 591 meetings held during the quarterly period were entirely closed to the public;

-- 24% (or 143) of 591 meetings held during the quarterly period were partially closed to the public;

-- only 37% (or 216) of the 591 meetings held were fully open to the public; and

-- exemptions relating to financial information accounted for 38% of the exemptions used to close meetings.

The implications of these statistics are plainly disturbing. Despite a landmark law mandating openness in multi-member executive agencies, despite President Carter's call for a new era of executive branch openness, the prevailing pattern remains the same: to avoid openness. Decisions are still made behind closed doors.

Surely no public interest is served when well over half of agency meetings are closed or partially closed to public observation. Secrecy perpetuates abuse of power, thwarts citizen participation, and diminishes the accountability and responsiveness of government.
When the House of Representatives in 1973 passed a Sunshine rule covering its committee meetings, a long held tradition of behind-closed-doors legislating was immediately reversed. Common Cause found that in the first 12 months of House implementation of its Sunshine rule, over 80% of its meetings were held in public. Although we have no similar statistics for the Senate, which adopted an open door policy in 1975, it is clear to those who follow Senate committee action that the closed meeting is the rare exception to the general rule of openness.

Congress passed the Government in the Sunshine Act with the high expectation that the process of secret decision-making by executive branch agencies, boards, and commissions would finally end. When, in the first three months under the Act, far fewer than half of all meetings are open to the public, serious questions are raised about the extent of agency compliance.

At a minimum, the data clearly indicate a strong tendency on the part of agencies to close meetings under one of the Act's ten exemptions in spite of the presumption in favor of openness and the interest of the public at large in openness. The Act makes it clear that even where a matter falls within one of the Act's ten exemptions, the discussion must be open when the public interest requires it. With fewer than half the meetings open to the public, the strong and likely possibility exists of agency overuse of the exemptions.
We doubt that the authors of this legislation anticipated that fewer than forty percent of all meetings held would be entirely open to the public.

Our analysis of the use of exemptions by agencies closing meetings or portions of meetings indicates that the ten exemptions to the openness rule were used to close entire meetings or portions of meetings 835 times. While much of the public debate surrounding the need for exemptions in the Government in the Sunshine Act centered on the concern for national security and the unwarranted invasion of personal privacy, thirty eight percent (or 315) of the time the exemptions cited were those regarding financial information (exemptions 4, 8, and (9)(A)). An analysis of the data reveals that matters of national security (exemption 1) accounted for only 1.5% of the closed meetings or portions while invasion of personal privacy (exemption 6) was cited for closing only 9% of the time.

The data indicate that financial exemptions may well be overused by agencies without concern for the public interest in these important matters. The Federal Reserve Board is a prime example. Chairman Arthur Burns fought vigorously in Congress to exempt the Board from the law. Although the Board is covered by the Act, the broad language of the exemptions dealing with financial matters mean that as a practical matter few of the Board's meetings will be open to the public. In fact, of the 37 meetings held by the Fed, 30 were entirely closed. The disproportionately large number of closed meetings are justified by the Fed on the grounds that matters
of a sensitive financial nature were being considered by the Board as permitted by the Act. But the fact that the Board elected to close one of its meetings in order to consider a proposed office furniture design as well as the Board's building renovation project raises serious questions about the Fed's willingness to comply with the spirit and meaning of the Sunshine Act. (see 42 F.R. 21899).

Another agency worthy of attention is the Interstate Commerce Commission which after the law was in force, disposed of one of the most important cases in its history in private. Although not reflected in our data because it occurred after the first calendar quarter of the Act, the Commission closed its June 28, 1977 meeting to determine the tariff rates on the transportation of oil in the Alaska pipeline. Certainly a question of such national importance should have been considered in open session based on an agency finding that the public interest would be served by openness. A more recent example of the ICC's questionable application of the Sunshine Act occurred on August 17 when, according to an article appearing in the Washington Star of August 28, 1977, agency members met in private over lunch with members of a trade association (the National Industrial Traffic League). According to the ICC's general counsel "it wasn't a meeting to conduct business or deliberation, it was a working meeting with general exchanges of views... so in terms of the Sunshine Act it was not a
meeting." We believe this is a perverse interpretation of the Act in light of the fact that as a matter of policy, agencies are obligated to broadly define meetings in order to further the spirit of the Act (see S. Rept. 94-354 at 18). Certainly no one would deny the importance of an agency attempting to gain insight as to the problems affecting the business they are charged with regulating. However, we doubt the wisdom or the propriety of an agency meeting in private with an association that has a clear and vested interest in the outcome of agency decisions.

These examples point to agency disregard for the spirit and sometimes the letter of the Act. They indicate that the fact that less than 40 percent of all meetings are entirely open to the public may have as much to do with agency hostility to openness and accountability in government as it does with the legitimate use of the Act's exemptions.

In marked contrast, it does appear that some agencies are making every effort to provide the public with the fullest practicable information regarding their decision-making process.

For example, the Civil Aeronautics Board has held nearly 70% of its meetings in open session. Additionally, the CAB's regulations implementing the Act's open meeting provisions permit any person to petition the Board to reconsider the closing of a meeting.
A number of other agencies have gone beyond the literal requirements of the Sunshine Act in order to affirmatively implement the spirit of open government. Unfortunately most agencies have not gone beyond the minimum requirements in order to carry out the spirit of the legislation. Many agencies seem to be adapting to the Act but only grudgingly. They view the Act as a procedural burden to be circumvented when possible.

RECOMMENDATIONS

Agency compliance with the Sunshine Act requires active Presidential leadership and initiative and continuous Congressional oversight. The legislation was vigorously opposed by a number of executive branch and independent agencies prior to its adoption by Congress. These agencies argued that the presence of the press and public at their meetings would inhibit open and candid discussion, impede the progress of their work, and force them to decide controversial matters in secret before official meetings. They proposed every conceivable justification for closing their meetings and lobbied for special exemptions.

It is unrealistic to expect that the agencies which lobbied so vigorously against the enactment of the Sunshine Act will now comply with the letter and spirit of the law. Their past resistance to openness poses a direct challenge to President Carter's commitment to openness in government. Common Cause believes the President and the Congress must take certain
specific steps in order to ensure meaningful compliance with the Sunshine Act and to set a new tone of openness in government.

A. Presidential Directive

The President should issue a directive to the agencies affirming the Administration's commitment to openness, establishing standards of openness, and requiring that agency regulations conform not only to the letter but also the spirit of the Act.

The directive should recommend that agencies close meetings only when there is an overriding public interest in doing so. The Act allows an agency to close a meeting under certain circumstances but does not require it to do so. An agency can decide even where an exemption applies that the public interest is served by openness and outweighs the justification for meeting in secret. Few agencies are following this approach. We believe they should be directed to do so by the President.

The President should direct the agencies to include in their regulations such items as:

- a broad definition of meetings, including committees and subdivisions;
- a requirement that notice be given 10 days in advance of a meeting;
- a provision permitting the use of sound recorders and photographic equipment;
-- a requirement that certification procedures of the General Counsel take place prior to the holding of a closed meeting;

-- a procedure that would allow a citizen to request that a closed meeting be open;

-- a justification for the use of the expedited closing procedure.

B. O.M.B. Review

Although agencies have been given flexibility in developing regulations, the Act does not provide for any review of these regulations by any agency of government to determine whether they adequately meet the Act's requirements and spirit.

President Carter should direct the Office of Management and Budget (OMB) to review for the White House each agency's regulations to ensure that they meet high standards of openness. O.M.B.'s approval of the regulations should be based on their compliance with the Presidential directive discussed above. The results of the review, including any recommended changes, should be made available to the public.

C. Oversight Hearings

As we stated at the outset, Mr. Chairman, we believe that the oversight hearings that you have initiated are critical to the future of the Sunshine Act. We believe that every agency must be held accountable to Congress for its performance under the Act.
We believe that there are several basic questions that must be answered through the oversight process:

-- Are the exemptions being properly used?
-- Do the exemptions need to be more narrowly written?
-- Are agencies ignoring the presumption of openness?
-- Is the expedited closing procedure being used properly by the appropriate agencies?
-- Do the expedited closing procedures serve the public interest?

D. Model Regulations

Included in our study is a model regulation designed to implement the Government in the Sunshine Act. Although all agencies covered by the Act have promulgated regulations implementing the open meetings provision of the law, Common Cause believes that each agency should periodically review its existing regulations for possible improvements. Any revision should be based on an evaluation of the agency's -- as well as the public's -- experience under existing regulations. Amendments should be designed to further the Act's spirit of openness based on a reasoned and thorough analysis of the legislative history and agency experience under the Act. Where the law permits agency discretion in implementing the Act's open meeting provisions,
the Common Cause model regulation offers a guide to possible revisions in existing agency regulations in order to further the spirit of the Act.

Mr. Chairman, the American public has a vital interest in open agency decision-making. These agencies make decisions which affect all Americans in specific ways, from the quality of television commercials to the price of gas and electricity. The successful implementation of the Sunshine Act, creating a truly open process, is the only chance the citizen-consumer-taxpayer has to counter the behind the scenes influence of the special interests.

We would be happy to assist you and this Subcommittee in any way we can as you proceed with oversight of the Sunshine Act.
Senator CHILES. Our next witness is Lynne K. Zusman, Chief, Information and Privacy Section, Civil Division, U.S. Department of Justice.

The Civil Division has responsibility under the Sunshine Act for defense of litigation. We are glad to welcome the Justice Department here today.

Your written statement will be inserted in the record and we would greatly appreciate hearing the Department's views on the Sunshine Act.

TESTIMONY OF LYNNE K. ZUSMAN, CHIEF, INFORMATION AND PRIVACY SECTION, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE

Ms. ZUSMAN. Good morning, Senator. It is a privilege and honor to be here and to be representing the Department of Justice.

As I tried to indicate in the statement that we have submitted to the subcommittee, the Department of Justice views the Sunshine Act as a very important part of the concept of openness in Government. Along with our responsibilities in the area of freedom of information and in the area of the Privacy Act we regard the Government in the Sunshine Act as adding an extremely important dimension to the concept of making the maximum disclosure of information about the decisionmaking process of Government available to private citizens.

I would like to respectfully bring to your attention a minor correction in your statement that there had been no litigation at all. That is almost 99.44 percent true. We have about half of one lawsuit which was recently filed. I say “half” because it is a very interesting situation where the plaintiff is bringing the action under the Freedom of Information Act as well as the Sunshine Act. The purpose of the lawsuit is to obtain a written document which was discussed during an open meeting wherein the position of the plaintiff in the lawsuit is that the meeting was not truly open because this document had not been made available to it at the time of the meeting.

This lawsuit was quite recently filed and the Department of Justice is defending it. I am sorry but I can't say anything more about it because it is a matter currently in litigation.

Senator CHILES. Well, we thank you for correcting us, and bringing that matter to our attention. I did not know of any case.

Mr. ZUSMAN. I am particularly interested in your experience with the Florida statute because I gather from your remarks that there was a volume of litigation probably fairly recently after the statute became effective. We had anticipated that probably there would be litigation under the Federal statute. That hypothesis was based on the large volume of litigation that occurred as a result of the 1974 amendments to the Freedom of Information Act; that is, the volume of litigation that has been so very extensive that it has really almost caught the Department of Justice off guard.

The office that I am the section chief of is an office of 11 attorneys and we are responsible at the moment for roughly 1,000 lawsuits
around the country. About two-thirds involve the Freedom of Information Act.

I frankly don’t know why the Federal experience under the Sunshine Act has been so different from the Florida experience. What also is somewhat bewildering is the fact that Department has not been engaged in the process of prelitigation or consulting although we are available to do that.

As the Senator may be aware, prior to the enactment of the Federal statute, several members of the Office of Legal Counsel in the Department of Justice, primarily, Deputy Assistant Attorney General Mary Lawton and Attorney David Marblestone, were active in discussions about the proposed legislation. I have checked with Mr. Marblestone very recently and he verified the same experience that my office has had virtually no inquiry from the agencies as to interpretations of specific parts of the statute.

I am afraid I don’t feel qualified to guess why that is.

Senator Chiles. I am not sure that I feel qualified either, but, like you, I am surprised. I will note a number of the cases in Florida initially were brought by the press. There has always been a completely different kind of attitude on sunshine by the national press than was true in Florida. That has always amazed me, too.

In Florida the reason we really had sunshine was because of the continual persistence of the press. Every time you held a closed meeting in Florida, you had to throw some of the press out. They took your picture when you went in and your picture when you went out, and they displayed them. After a while, the people become so incensed they began to ask everybody in public office how they stood on sunshine.

Finally, after a while the heat got so great that the bill finally came out of committee where it had rested for a long period of time. And, as it always seems to happen with the public vote, sunshine passed very strongly once it passed.

Then when the boards and commissions ignored the act and began to hold their secret meetings and other meetings, many of these cases were brought by the press.

As I say, we have never had the same strong interest of the national press up here. I think they have been so used to operating with the doors being closed, and by leaks or by being told afterward what happens, that there has just never been that kind of interest that there was, or that kind of persistence that there was in the Florida situation. That may have something to do with it.

Ms. Zusman. Well, I don’t know whether one very rapid effect of these hearings will be that suddenly we will be faced with some lawsuits. I think that that is possible. You are turning up the heat in sunshine and maybe something will—

Senator Chiles. Well, that may be true.

DEPARTMENT OF JUSTICE—ADVICE TO THE AGENCIES

I note that Barbara A. Babcock, Assistant Attorney General, wrote a letter to different agencies in connection with your Civil Division’s responsibility for defense of the act, and that letter was dated April 19, 1977. I would like to put a copy of that in the record.
[The letter follows:]  

**APRIL 19, 1977.**

Mr. WAYLAND D. McCLELLAN,  
General Counsel, U.S. Foreign Claims Settlement Commission,  
Washington, D.C.

DEAR MR. McCLELLAN: In conjunction with the Civil Division's responsibilities for the defense of litigation under the Sunshine Act, 5 U.S.C. § 552b, I think it might be helpful to comment from time to time on matters which may raise potential litigation issues. This is the first such letter. I hope that you will consider the discussion in this letter as a part of our joint responsibility to insure that the Sunshine Act works and to avoid litigation whenever possible. Please feel free to distribute the letter to your staff so that our offices can cooperate and work together toward effective implementation of the Sunshine Act.

Recently promulgated agency regulations bring to light a number of matters of interest which may merit consideration within your office:

1. Several agencies define the term "meeting" as used in subsection (a) (2) of the Sunshine Act (5 U.S.C. § 552b(a) (2)) in such way as to limit the joint deliberations which are subject to the Act. For instance we believe that in order to avoid ultimately fruitless litigation, a "briefing session" attended by at least the number of agency members required to take action on behalf of the agency, where the members attending have an opportunity to ask questions or seek clarification of matters of concern, should be included within the purview of regulations or practices applying the term "meeting". Where the deliberations do determine or result in the joint conduct or disposition of official agency business, and except as specified in subsection (d) or (e) of the Act, such deliberations are meetings subject to the Act. Should your agency have drawn a more narrow regulation, it leaves the agency's proceedings subject to continuous attack. Subsection (h) (1) of the Act (5 U.S.C. § 552b(h) (1)) provides that suits challenging agency action may be brought prior to the action challenger or within 60 days after the meeting out of which the violation allegedly arises "except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this said section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting." I suggest that you insure that the term "meeting" is broadly defined in practice so that the statute of limitations can come into play and so that the potential for litigation can be reduced.

2. The Act requires that agency meetings shall be open to "public observation" (5 U.S.C. § 552b(b)). Obviously public observation does not include the right to participate in the meeting. Likewise, the right to observe does not include any right to disrupt a meeting. Within these limits, I suggest that you accommodate members of the public desiring to attend open meetings. Meetings should be held in a room that has ample space, sufficient visibility, and adequate acoustics. Again, in order to avoid needless litigation over issues which do not go to the heart of the Act, the public should be permitted to take notes and photographs (without flash aids) and should be permitted to make sound recordings in a non-obtrusive manner. Each of these measures will enhance the public's ability to observe meetings and still permit the agency's business to proceed. If your agency has regulations not consistent with the foregoing, I suggest that you consider amending them. Of course, any person may attend a meeting without indicating his identity and/or the person, if any, whom he represents and no requirement of prior notification of intent to observe a meeting may be required.

3. A number of agency regulations explicitly provide that meetings will be open although an exemption may permit the closing of the meeting or portion thereof. I can add that a general practice of opening meetings to the fullest extent practicable will not only reduce litigation under the Act but will likely place us in a better posture in litigation, if and when any litigation occurs. I am also certain that a vote of the membership of your agency on whether to close a meeting or portion thereof would, of course, take the public interest into account.

I hope that the foregoing discussion is of assistance to you. I would welcome any suggestions you may have for matters appropriate for discussion in future, similar letters.

Very truly yours,

BARBARA ALLEN BABCOCK,  
Assistant Attorney General.
Senator CHILES. I am impressed by the letter because it appears to me that the Division in trying to prepare, and to get agencies to prepare, for the possibility of litigation that Justice has come up with good guidelines as to what the agencies should be doing. Ms. Babcock states:

[W]e believe that in order to avoid ultimately fruitless litigation, a “briefing session” attended by at least the number of agency members required to take action on behalf of the agency, where the members attending have an opportunity to ask questions or seek clarification of matters of concern, should be included within the purview of the regulations or practices applying to the internal “meeting.”

I am delighted to see that.

I note that a number of the agencies define those sessions as being preliminary sessions. I think they definitely fall within the act’s broad definition of meeting. I think that litigation will bring that out.

I am glad to see that the Justice Department does not want to defend on those grounds and wants to have that matter cleared up.

Ms. Babcock further states:

Should your agency have drawn a more narrow regulation, it leaves the agency’s proceedings subject to continuous attack.

At the bottom of that paragraph Ms. Babcock continues:

I suggest that you insure that the term “meeting” is broadly defined in practice so that the statute of limitations can come into play and the potential for litigation can be reduced.

Paragraph 2 of Ms. Babcock’s letter addresses public observation:

I suggest that you accommodate members of the public desiring to attend open meetings. * * * [T]he public should be permitted to take notes and photographs. * * * [I]t should be permitted to make sound recordings in a non-obtrusive manner. Each of these measures will enhance the public’s ability to observe meetings and still permit the agency’s business to proceed.

A number of agencies say you have got to have their permission to record or photograph. One of them even regulates the taking of notes. Others ban photographing. Some have outlawed sound recordings.

We in the Senate seem to be able to conduct our meetings with people moving around with mikes and with sound recording devices. In fact, we are happy to see it. I guess it is the nature of our business, maybe, but I don’t see that those things should handicap people. I am delighted that the Justice Department doesn’t see that either.

The letter also says:

Of course, any person may attend a meeting without indicating his identity and/or the person, if any, whom he represents, and no requirement of prior notification of intent to observe a meeting may be required.

Well, we found that some agencies make you give prior notification if you are going to attend, and then you must identify yourself. I am delighted to see the Justice Department clearing that up.

A general practice of opening meetings to the fullest extent practicable will not only reduce litigation under the Act, but will likely place us in a better posture in litigation, if and when any litigation occurs. I am certain that a vote of the membership of your agency on whether to close a meeting or portion thereof would, of course, take the public interest into account.

I am glad that she is sure. I hope she is right.

We do want to place this letter in the record. I would like to ask you, has the Department come up with any guidelines on notation voting?
Ms. Zusman. No, we have not been asked any specific interpretations yet. In preparing for my appearance this morning, I did meet with individuals who had been involved in the development of the act previously, and I did learn that it had been contemplated at one time that in the Office of Legal Counsel in the Justice Department, which performs a very strong consulting role to the agencies in many subject areas, there had been some thought of producing guidelines in the form of a blue book memorandum, similar to what had been done when the FOIA was originally enacted, and then when the FOIA was amended. The blue book, as we call it, has been very helpful to the agencies and I did inquire whether there was any likelihood that OLC would be taking on this responsibility in regard to the Sunshine Act.

I guess it is in limbo. It was considered last winter and it wasn’t followed through on. It may be, perhaps, that if there were sufficient interest or encouragement that something like that might be done.

Senator Chiles. Well, that seems to be the prevailing theme around here, that everything is sort of in limbo. We can’t find any hand at the helm right now in providing these guidelines, but we are looking for it. We are continuing through this meeting, hopeful that we are not only going to have a hand at the helm, but wind in the sails.

Ms. Zusman. The Department would like to help you in any way that is appropriate. Obviously, wherever it is possible it is a good idea to reduce litigation, to reduce the strain on the courts, and to practice preventive law and try and assist the agencies in comporting their behavior to the standards and the intent of the legislation. I think, basically, it comes down very often to a commonsense interpretation. We all know what the framework of the statute is, and we all know that the purpose of it is to provide the maximum accessibility to meetings, and I think that this is the theme of the letter that you quoted from.

Senator Chiles. It very definitely is. The letter was very encouraging. I am delighted to see the Department taking such an approach. We thank you very much for your appearance here today.

Ms. Zusman. You are very welcome.

[The prepared statement of Ms. Zusman follows:]
In your letter of November 2, 1977 to the Attorney General, you stated that the purpose of this hearing was to discuss the impact of the Act since its effective date of March 11, 1977. To date, only one lawsuit has been filed under the Act, and we have had little experience with the Act.

We have previously transmitted to the Subcommittee two letters sent to government agencies by Assistant Attorney General Barbara A. Babcock regarding the Sunshine Act. The letter sent on March 7, 1977 alerted the agencies to the imminent effective date of the statute and that the Information and Privacy Section is assigned the responsibility for defending all litigation under the Act. In the letter of April 19, 1977 several specific matters were addressed and Ms. Babcock noted that a general practice of opening meetings to the fullest extent practicable is desirable.

1/ In Consumers Union of the United States, Inc. v. Board of Governors of the Federal Reserve System, (U.S.D.C. D. D.C., No. 77-1800), plaintiff asserts that defendant violated 5 U.S.C. 552b(b) of the Sunshine Act by failing to make available a memorandum discussed during an "open" meeting. The lawsuit was filed on October 17, 1977 and the government answered on November 21, 1977.
The Sunshine Act clearly adds an important dimension to the accessibility of information to American citizens about their Government. The Department of Justice stands willing to cooperate in any way to assist the achievement of the goals of the Sunshine Act.
Senator CHILES. Our next witness will be Miles A. Cobb, General Counsel of the Federal Deposit Insurance Corporation. The FDIC is charged with promoting and preserving public confidence in banks through the provisions of insurance coverage for bank deposits.

Mr. Cobb, it is a pleasure to have you with us today. Your statement in full will be inserted in the record. If you could summarize your remarks in any way it would be appreciated because we do have a full line of witnesses.

TESTIMONY OF MILES A. COBB, GENERAL COUNSEL, FEDERAL DEPOSIT INSURANCE CORPORATION; ACCOMPANIED BY ALAN R. MILLER, EXECUTIVE SECRETARY

Mr. Cobb. I will just hit the high points of the statement, Senator. With me is Alan Miller, FDIC's Executive Secretary.

I think in summary we have found that, as the act anticipated, a fair portion of the items to come before the FDIC Board are not suitable for open meetings. As a consequence we have found that on an item basis we have closed those portions of meetings dealing, for example, with the issuance of cease and desist orders designed to prevent unsafe or unsound banking practices and with applications by banks to employ individuals who have at some point in their life been convicted of a criminal offense involving dishonesty or breach of trust. Under the provisions of our act FDIC approval is required to hire that kind of employee.

We have also closed to the public those agenda items dealing with applications where the applicant bank may be suffering from a sensitive problem involving a weakness in its capital structure or management.

The FDIC is also charged with responsibilities as insurer of bank deposits and as receiver of insolvent banks and in those capacities the Board is frequently involved in negotiations with banks leading up to financial assistance to troubled banks or the sale of certain assets of an insolvent bank and the assumption by the purchaser of its deposit liabilities. As receiver of failed banks the FDIC and its Board of Directors must also pass on the sale or liquidation of bank assets in countless commercial transactions. As a consequence, in these areas of our responsibility we have closed agenda items dealing with applications by financially distressed banks to the FDIC for financial assistance. We have closed agenda items involving sensitive negotiations leading to the sale of assets of an insolvent bank and the assumption by the purchaser of its deposit liabilities. We have also closed agenda items which involve the discussion of proposed liquidation transactions such as sales of assets, compromises of debts, settlements of lawsuits.

Now, since the Sunshine Act became effective we have had 77 meetings from March 12 to November 22 involving a total of 1,102 agenda items. Four hundred and twenty-one of these items were considered in open session, approximately 40 percent of the total.

The point we would like to make in that regard is that we don’t view this as static. About midway through our experience under the act, we
reviewed transcripts of closed meetings and noted that some of the bank application items, such as applications for insurance, applications to establish remote facilities, applications to retire capital notes of banks, which items were being closed up to that point, did not have to be closed. Accordingly, procedures were revised so that all discussions of bank applications except those involving particularly sensitive issues are now open to the public.

We are a three-member agency, and we have been concerned, of course, about the definition of the term "meeting." The definition in the act is somewhat vague. It can be interpreted very broadly to cover almost any discussion of agency business among two members of our Board of Directors, even if the discussion is exploratory in nature and even if it does not result in reaching a consensus on a decision. We view that interpretation as not in the best interest of the working of FDIC. It is very difficult for two Directors who share office space on the same floor of our building to, in effect, live in an isolation booth and never discuss any matters relating to agency business without first going through the procedure of calling a meeting, or if it is a particularly sensitive matter to provide for a closed meeting.

So what we are concerned about are the preliminary exploratory discussions and we have, as you know, in our regulations, followed the language of the Senate report on the bill which I will quote:

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 action.

At the present time the problem is not a serious one because we have one vacancy on the Board, but we expect that to be filled in the near future. Chairman LeMaistre and the new director will share office space on the same floor and should be permitted to discuss informally preliminary background matters without the necessity of calling a meeting.

That is our biggest problem with the act, and while we feel we can live with the legislative history in the Senate report, it would be preferable if that issue were clarified for us, and we believe other three-member agencies would feel likewise.

In closing, I would like to emphasize that the FDIC supported the enactment of this bill throughout its legislative process and will continue to make efforts to increase public awareness of what we do, consistent with our bank regulatory responsibilities.

Thank you.

Senator Chiles. Thank you. I understand that there are many of your meetings that necessarily have to be closed. That is exactly why we wrote exemptions within the act under which you could close meetings. We were not trying to endanger banks that might be on the verge of insolvency, nor were we trying to expose people in matters of privacy.

And I can share the concern expressed in your statement that your agency is having a tough time with provisions of the act, especially when you have two people constituting a quorum.

Your regulations do exclude from the definition of a meeting, informal background discussions among Board members and staff which clarify issues and expose varying views. You also exclude sessions
with individuals from outside the corporation, and meetings where Board members listen to a presentation and elicit additional information. That second part gives me problems. I think you might have problems with it also. I can understand the convenience of not holding such meetings publicly, but I find it difficult to believe that you can conclude, before such a session is held, that that meeting is not going to result in a predetermination of agency business. What might start off as exposing a view could easily end up as a unanimous agreement, especially when you are bringing in outsiders to present their views.

I believe the decisionmaking process logically includes discussions which clarify issues and elicit information. I know that there is a fine line that you draw here. Two people on the same floor and two of them constitute a quorum I can understand that having two members constitute a quorum, working together on the same floor, gives you particular problems.

I note in your statement, too, though, that you say you go through a great deal of difficulty in having to open a meeting. I can't understand why it is so difficult to open a meeting. Can you tell me why you have such difficulty in opening a meeting?

Mr. Cobb. I wouldn't say that that's particularly burdensome. It is more burdensome to close a meeting, as it probably should be.

Senator Chiles. That probably has something to do with the intent of the act.

Mr. Miller. Mr. Chairman, to give the General Counsel his due, we send down all of the papers that will come to the next Board meeting and he makes a distinction between the ones that might be closed and the ones that might not be closed, and I am not too sure that from the standpoint of the person involved, that it is one single process. It is the closing, of course, where the work is involved.

GUARDING THE PUBLIC INTEREST

Senator Chiles. Well, I understand that you have recently moved to amend your regulations to make clear that the act of closing a meeting is a two-step process, requiring a determination of whether the public interest requires an open meeting despite the availability of the exemption.

Mr. Cobb. That's correct.

Senator Chiles. Would you tell us what criteria you use in making a determination as to whether the public interest requires that a meeting to be kept open?

Mr. Cobb. I would say that as a general proposition that in most cases we cite exemptions (6), (8), and (9)(A), and that if it appears from the agenda item that it is likely that information would come out in the meeting which would significantly endanger the stability of a financial institution, then we don't believe the public interest dictates that that be discussed in public.

In effect, if we determine that a particular exemption, for example, applies because of the nature of the information and the likelihood of it being discussed, then we do not believe that the public interest requires that that be discussed publicly.

Similarly, if it is likely that information which the language of the act says "constitutes a clearly unwarranted invasion of personal
privacy,” will be discussed in a meeting, then I would say we don’t believe that the public interest requires that that be discussed.

For example, these cases that I mentioned where the FDIC is required to approve employment by a bank of someone with a certain kind of criminal record. We don’t think that the public interest requires that that person’s record, which may be many years old, be discussed in public.

Senator Chiles. Well, I can understand that, but I am just wondering if there is anyone in the agency who addresses himself to the public interest issue. Is the public interest surveyed with the same thoroughness, the issue of whether the meeting falls within an exemption?

Mr. Cobb. Well, the directors consider that question and make that finding.

Senator Chiles. The other thing that I am concerned with, while I would agree with you generally that the financial stability of a bank can be sensitive, at what stage should the public be advised that banks are in trouble, that banks are failing, that there is instability? Are we going to keep that information from the public indefinitely? It is more convenient, maybe, for the banking community to get another bank to come in and sort of take over the assets. But at what stage is the public entitled to know that there are a heck of a lot of banks in trouble? Now, we are not talking about the First National Bank, we are talking about the fact that banks in a particular region are in trouble.

Mr. Cobb. Well, the FDIC does make public the number of banks that are on what is called its problem list nationwide without identifying regions or individual banks. That has been made public for a number of years.

Now, we don’t think that it is in the interest of the public to disclose the financial difficulties of any particular bank. A bank is a very sensitive instrumentality. It can be destroyed in a very short order if public confidence is undermined and there are a lot of uninsured deposits in banks because our insurance is limited. Other persons who have financial interests in banks are not protected by the FDIC and we think the public interest in general is served by our being able to work out a smooth transition of an insolvent bank without our forcing the issue by disclosing its problems.

“HOLEY” CERTIFICATIONS

Senator Chiles. Well, let me just ask you something else. I see some of the problems that you face is writing a closed meeting certification, which in itself might disclose information which would be sensitive and the very basis of closing the meeting. I note that where you have included sensitive information in the certification, you end up with big holes in these public documents.

Mr. Cobb. We excised the names of banks, is what we did.

Senator Chiles. Well, it would seem to me that we could avoid that kind of circumstance by at least describing the subject matter in general terms.

Mr. Cobb. For example, the certifications that we do now where the agenda item is under section 8 of our act involving a cease and desist
order to be issued against a bank to attempt to correct an unsafe and unsound condition, it is my judgment that all of those will be closed and we no longer list them individually by bank, but we certify the generic category.

Senator Chiles. You certify now a generic category, a cease and desist order against the bank for unfair practices.

Mr. Cobb. Or a number of banks. It is just one agenda item.

Senator Chiles. I think that's much better.

How often and under what circumstances have you used the abbreviated exemption status for eliminating the 7-day-prior-notice rule?

Mr. Cobb. Our regulations do provide for expedited closing.

Senator Chiles. I am just wondering if you have found it necessary to use that and if so how many, and in what instances.

Mr. Miller. I don't have a number. We do do that, particularly on liquidation accounts where there is a very tight timeframe, for instance on an offer to purchase something or there is property we have a lien on and we suddenly discover some prior lienholder is in the process of foreclosing.

I don't have a real feel for the number. Percentagewise, it is rather small, but we do do that consistently.

Senator Chiles. I note from your formal statement that you haven't had much public attendance at your meetings.

Mr. Cobb. No, we have not.

Senator Chiles. What steps have you all taken to try to make sure that the public can understand what is taking place at your meetings? Much of what you do is technical. You are involved in technical matters. Do you have any kind of a briefing statement that would be available to public observers, a summary of what the proceedings are?

Mr. Cobb. No, we have not done that. Our premeeting notification procedures involve publication in the Federal Register and public posting of the notices in our lobby, and we do have a mailing list which is available for those who wish to be notified. At the present time there are only a handful who have asked to be notified. We do follow that procedure.

We have not undertaken a briefing of the meetings or press releases. We don't seem to find much press interest in some of these things. Of course, those items which would be of most interest to the press we are not about to discuss in open meetings.

Mr. Miller. About one-half of our cases are applications of the banks for insurance or relocations of branches or the like. In our publication we do indicate the bank and what it is applying for.

Senator Chiles. Normally do you have in attendance just the parties that are affected?

Mr. Cobb. I don't recall since the act went into effect any parties even appearing.

Mr. Miller. I think we have had some in appeals under the Freedom of Information Act.

Senator Chiles. But the parties are notified that you will be taking up the application at that time?

Mr. Cobb. Yes.

Senator Chiles. Well, we thank you very much.

Mr. Cobb. Thank you very much. Senator.

[The prepared statement of Mr. Cobb follows:]
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 K. 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 FDIC Act, 12 U.S.C. § 1818

Under § 8 of the FDIC 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 FOI Act, 12 U.S.C. § 1824**

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 orancies 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 FDIC Act, 12 U.S.C. 1823

Financially distressed banks may make application to the FDIC for financial assistance under § 13 of the FDIC 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(d) (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)(a), or (11) (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, tran­
scripts 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 FÜC 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 FÜC, 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 pro-
cedings 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.

"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.

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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."
Senator CHILES. Our next witness will be the Honorable Charles Curtis, Chairman of the Federal Energy Regulatory Commission, and previously the Federal Power Commission. Mr. Curtis was recently confirmed by the Senate on October 20, 1977, so I am especially pleased to have him here to tell us about the leadership he will be providing for the agency in carrying out the spirit and letter of the Sunshine Act.

Mr. Curtis, if you would briefly summarize your remarks we will insert your statement in full in the record.

TESTIMONY OF CHARLES B. CURTIS, CHAIRMAN, FEDERAL ENERGY REGULATORY COMMISSION

Mr. CURTIS. Thank you, Senator.

As you indicated in your remarks I am newly confirmed in the Office of Chairman of the Federal Energy Regulatory Commission. This is an agency which came into existence under the terms of the Department of Energy Organization Act. It was activated on October 1.

Necessarily, therefore, my comments before you today will relate to the experience at the Federal Power Commission, on which I had the privilege to serve as its last Chairman, before the termination of that agency coincident with the activation of the Department of Energy.

As you may know, the Federal Power Commission opened its meetings to public observation, prior to the enactment of the Sunshine Act, on April 1, 1976. The first Federal Power Commission open meeting took place on April 21, or approximately 5 months before the act was adopted, and approximately 11 months before it became effective. A total of 71 Commission meetings were held during that period and all but 5 of them were open to the public.

The Federal Power Commission implemented by Order No. 562 the provisions of the Sunshine Act on March 11, 1977, and between that date and October 1, 1977, the Federal Power Commission held 46 meetings or approximately 8 meetings per month. Of the 46 meetings only 4 were closed to public observation.

One of the closed meetings concerned the Alaska natural gas pipeline system, then the subject of an on-the-record proceeding in connection with formulating the FPC recommendation to the President under the terms of the Alaska Natural Gas Transportation Act. The other three meetings involved a number of pending on-the-record proceedings, civil litigation, or internal personnel matters, all properly closed to the public.

Since the activation of the Federal Energy Regulatory Commission the Commission has held 13 meetings. Of this number only two have been closed in part to public observation. Those sessions were closed in order to discuss pending civil litigation involving the Commission. In both cases that involved actions which the Commission may take with respect to pending applications for certiorari to the Supreme Court.
At the time the implementing regulations of the Sunshine Act were adopted, the Federal Power Commission recognized that a majority of its meetings could properly be closed to the public pursuant to exceptions provided in 4, 8, 9(A), or 10 of the act, thus qualifying the Commission to adopt simplified procedures for closing Commission meetings under subsection (d)(4) of section 3 of that act. The Federal Power Commission determined not to adopt such procedures. This reflected a conscious policy to close meetings only on a case-by-case basis. Absent some future need to modify our procedures, which is unknown to me today, the Federal Energy Regulatory Commission will continue to follow the more restrictive practice previously adopted by the Federal Power Commission.

We believe in maximizing the opportunity for public involvement in the decisionmaking process and it will continue to be the Commission's policy to close meetings or parts of meetings only on a selective and limited basis as the need arises.

I have mentioned in my prepared remarks a number of problems with implementation of the Sunshine Act and one of those is a request for legislative clarification of the definition of "meeting." It would be helpful to provide further congressional guidance in this respect.

The second area involves practical considerations that we have encountered in meeting the 7-year advance notice requirement through publication in the Federal Register, given the fact that this agency is required to take action within a statutory time period of 30 days with respect to a number of the most important aspects of the Commission's work and is also required to act for emergency purposes, in conjunction with the President, in dealing with the deepening natural gas supply shortage problem.

I do not intend my summary remarks to repeat those contained in my prepared statement, but I would be happy to respond to any questions.

A MEETING BY ANY OTHER NAME

Senator CHILES. Thank you, sir.

I notice that the definition of a meeting in your regulations, while basically tracking the statute, embellishes it somewhat. Specifically, you define meetings as face-to-face deliberations thus eliminating conference calls and, interestingly in order for a quorum to constitute a meeting, the Secretary or his designate must be present. Is there some reason for having the Secretary or his designate to have to be there to constitute a quorum?

Mr. CURTIS. I don't know the history behind the Federal Power Commission's adopting that definition. It had been adopted before I got there. My personal view is that face-to-face deliberations are not a prerequisite to a defined meeting under the Sunshine Act. Conference calls, as well, would necessitate compliance with the intent of the Sunshine Act.

As to the Secretary's presence, I can only offer a guess, but we will be happy to supply an explanation of that. I assume that it is out of the caution for the legal requirement that there be a record of the meeting of the Commission, as required under the terms of the Sunshine Act. But, it is not intended to define out from the Sunshine Act require-
ments those meetings which may be for decisionmaking purposes simply because of the absence of the Secretary.

I think it was directionally intended the other way.

Senator Chiles. I note that on page 8 of the statement, you state that preliminary discussions can be excluded from the definition of a meeting. That interpretation would seem to be in plain disagreement with your own regulations defining a meeting. It would seem to me that the preliminary discussions of the Commission would be the very discussions when the public might be most interested in hearing the Commission's views. First, because they would like to know his or her instinctive reactions, and second, those reactions are going to determine what the agency's business is going to be at a later point.

I am concerned as to how we can be sure beforehand that a preliminary discussion wouldn't in fact turn out to be something very final. Briefings from outside parties or agencies also interest me. Even if the Commissioners do nothing besides sit there and don't say a word while being briefed by outsiders, I think, as a member of the public, I would like to know what kind of information the Commissioners are being given. After all, it is on the basis of information of all sorts that you make your decisions.

How do you currently treat such briefing sessions?

Mr. Curtis. Since I have been a member of the Federal Power Commission and also the Federal Energy Regulatory Commission there has not been any such meeting in which someone outside the agency briefed the Commission. This presents a problem. We have a new Commission, that is to say, new Commissioners who bring different levels of experience and familiarity to the task that they have undertaken to perform.

We have attempted to go through an educational process by having staff briefings on the regulatory purposes behind the Federal Power Act, for example. The briefings considered its legislative history, what had been the Federal Power Commission’s regulatory attitude and objectives in administering that act, where had the agency concluded a limit on its jurisdictional responsibilities, and where might there be opportunities to further that jurisdictional reach or to retreat from a reach that the agency had previously engaged in.

Now, those types of briefings of the Commission, in my opinion, do not constitute a meeting within the purview of the Sunshine Act. If in the course of that meeting, however, the discussion becomes so focused that it would lead members of the Commission to formulate a decision with respect to a particular issue or matter which may be pending before the Commission, then I think at that point we step over the line.

As you noted in the Senate report that accompanied the Sunshine Act, Senator, what constitutes a meeting is a matter which would have to be within the judgment of the members of a collegial body, keeping mindful that the presumption would be to stop the proceeding if that line is stepped over. But I suggest to you it is not a very bright line and any guidance you could give to us so that we may carry out the intent of the Congress properly would be helpful.

As you know, the Administrative Conference has concluded an analysis of the Sunshine Act. In this particular regard they noted that there is difficulty in determining what is a meeting for purposes of the
requirements of the Sunshine Act and borrowed rather heavily from the legislative history created by your committee in suggesting an interpretive guide for an agency to observe.

I guess my question to you is whether that guide comports with your understanding of the intent of the Congress.

Senator CHILES. Well, I think the Justice Department letter comes much closer than the Administrative Conference to what I would consider to be in the legislative history.

The Administrative Conference writes a nice treatise. I have read it several times, and I don't know what I have read after I finish reading it. But, I can understand the Justice Department letter. When in doubt, err on the side of openness. I think that's exactly what the legislative history and the act itself are trying to set forth.

Mr. CURRIS. Well, Senator, I hope this committee would observe that the Federal Power Commission has had a pretty good record of openness and I think the Federal Energy Regulatory Commission is equally committed to that.

Senator CHILES. I do want to applaud the Federal Power Commission for its early actions in opening up its meetings. I think that's laudable and I want to applaud you for that.

NOTATION VOTING—DECISIONMAKING BEHIND CLOSED DOORS?

I am particularly interested in getting your views on the matter in which the Commission handled its decision regarding a route to bring gas from Alaska. That was reported in the Washington Star on May 3, 1977, and according to that article, which I will submit for the record, the Commission attempted to avoid the Sunshine Act while conducting much of its business through notation voting which is not expressly prohibited by the act; but for a decision that seems to be one of the most important decisions the Commission has ever handled with 45,000 pieces of public testimony, notation voting seems to hardly be in keeping with the intent of the act.

[The article follows:]

[From the Washington Star, May 3, 1977]

TWO PIPELINES PREFERRED—FPC CAN'T DECIDE ON ROUTE TO BRING GAS FROM ALASKA

(By Stephen M. Aug)

President Carter has begun consideration of a Federal Power Commission recommendation in which the commissioners couldn’t make up their minds which of three routes should bring huge quantities of Alaskan natural gas to the 48 contiguous states—a recommendation handed down following a highly unusual meeting yesterday.

About all the four commissioners could decide was that U.S. consumers need the 20 trillion cubic feet of natural gas known to exist at Prudhoe Bay, Alaska—enough to provide about 5 percent of the Nation's gas consumption for the next 25 years—and that the gas probably should be transported over land, rather than via ocean vessels.

And even at that, the commissioners left open the possibility that if the Canadian government won't grant permission on acceptable terms to build a pipeline through Canada, the gas may have to be shipped by a riskier route involving liquifying it, shipping the liquid in special tankers and converting it back to gas at a plant on the West Coast.
Chairman Richard L. Dunham and Commissioner James G. Walt—backed a 4,600-mile gas line proposed by the Alcan Pipeline Co., a consortium of the Northwest Pipeline Corp. and three Canadian firms. This pipeline would follow the new Alaska oil pipeline before branching off into Canada where it would parallel an existing highway.

Further, in an apparent attempt to avoid the new federal law that requires open meetings, the commissioners in this case have accomplished much of their business by so-called notation voting—sending memos from one office to the other in their ninth-floor complex at commission headquarters, 825 North Capitol St.

According to one account, after the new Sunshine Act went into effect the commissioners were given advice that they could not get together even to have a staff briefing. One source pointed out that things got so touchy that even if the commissioners were sitting in a room talking about basketball and somehow the subject moved around to the Alaskan gas case. Every time the gas situation was mentioned, “Smith would run out of the room. You just couldn’t mention Alaska without gyrating the furniture.”

The commissioners, however, made their final decisions at an open meeting yesterday—a meeting marked by almost total secrecy by the commissioners themselves as to what they were talking about.

Dunham named the various chapters of the report to be issued. The commissioners made their comments by referring to paragraphs for footnotes—but never reading them so those in the audience could understand what they were talking about.

In fact, when the commissioners considered the letter to the President—the document which contains a summary of the FPC’s recommendations—only code names were given for the various drafts.

Commissioners Don S. Smith and John H. Holloman III backed the Alaskan Arctic Gas Pipeline Co. plan to build a pipe through virgin territory in Northern Alaska and through the Mackenzie Delta in Canada. Alaskan Arctic is a consortium of five gas companies.

All of the commissioners rejected a plan by El Paso Alaska Co. to build a line entirely in Alaska ending on the South Coast from which liquified gas would be shipped in tankers 1900 miles to California.

The cost of any of the projects ranges from $6 to $10 billion.

An FPC judge in February recommended the Alaskan arctic plan be implemented.

Under the 1976 Alaska Natural Gas Transportation Act, the President has until Sept. 1 to make his recommendation to Congress—although he may postpone his decision until Dec. 1. Congress then must either approve it or return it for revisions.

Although the FPC recommendation is just that—not a final decision—the Alaskan gas matter is generally conceded to be one of the most important cases the FPC ever has handled, and, following lengthy public hearings during which nearly 45,000 pages of testimony were compiled plus thousands of pages of exhibits, most of the agency’s consideration of the matter has been in private. In fact, so secret have its deliberations been that even its closest staff experts have not attended meetings.

Senator Chiles. What limits do you intend to place on the use of notation voting?

Mr. Curtis. Well, can I comment on the Alaska Natural Gas Transportation Act decision?

Senator Chiles. Yes.

Mr. Curtis. I think one of the aspects of that, that the committee may wish to consider, is that the Congress took that decision away from the Federal Power Commission and lodged it, instead, in the hands of the President and of the Congress by approving the President’s recommendation through joint resolution, which the Congress has only recently approved. The Commission’s deliberations that you referred to, in connection with the Commission’s consideration of the Alaskan
natural gas transportation system, conserved the recommendation that
the Commission was to make to the President.

Now, of course, the embodiment of that decision was a matter of
public record.

I think that the Commission decision must have been a particularly
difficult one, as to whether it should have an open meeting since it
involved our foreign relations with the Government of Canada, as well as
participation in the Presidential and congressional decisionmaking
processes. I would be happy to ask the member of the Commission who
sat at the time that the matter was under consideration to provide the
committee with an explanation of the considerations that went into the
determination to close that meeting, if the committee should so desire.
Again, I was not there at the time.

Senator CHILES. Is there any publication of the notation votes?
Mr. CURTIS. Yes, there is an official record of that which delineates
those items which the Commission has determined by notation vote.

One of the things that I have done since I got to the Commission has
been to have books compiled of the proposed orders that the Commis-
sion has under consideration, for review by the public participants in
our meetings. Heretofore, they were not able to track the Commission
discussion, which focused on various paragraphs in the proposed
orders. Now they can and I think that has increased the public's
understanding of those meetings which they have attended.

Second, on the notation voting—

Senator CHILES. Well, I note that one of the things that was raised
in the Star article about the public meeting held at the time of the
announcement of the Commission's decision or recommendation was
that no one really knew what was taking place because all of the com-
ments were made with reference to paragraphs and in codes. There
was no way anybody could understand what was going on. You say
you have changed that?

Mr. CURTIS. I think that's a proper criticism and we have changed
that, sir. I think it has worked pretty well, although we have had
trouble with members of the audience ripping out the pages of the
proposed orders. Therefore, it is hard to keep the copies current, even
during the period of Commission deliberation. That is a practical
problem, but we, nonetheless, intend to continue the practice.

On notational voting, what I have asked the Secretary to explore
is the use of notational voting only when it follows public considera-
tion; that is, where the Commission has reached a determination at an
open meeting and then has the proposed order redrafted for circula-
tion.

Senator CHILES. Well, that's exactly why we did not expressly
prohibit notation voting. People started raising examples dealing
with shopkeeping matters, routine matters. One of the things we were
trying to keep agencies from saying is that the act was just going
to be a harassment, keeping an agency from being able to operate.
Thus, we didn't prohibit notation voting.

On the other hand, we find that sometimes if a meeting does not
fall within one of the exemptions, and thus should be opened, an
agency can circulate papers and decide issues by notation voting. We
definitely see that as evading the act. We may have to do something about notation voting. It would be unfortunate if we are forced to because of agency abuse, because there are areas, as you have just pointed out, when you have already made a decision and simply circulate it for final approval, where notation voting seems to make a lot of sense.

Mr. Curtis. Sir, in regard to your concern that the public be provided with additional information at Commission meetings, it should be noted the staff papers could be requested under the Freedom of Information Act. My personal view is to take one step at a time in determining the types of materials that may be distributed to the public, when those materials serve as the backup for Commission decisionmaking. These backup memorandums are all in the category of interagency memorandums and contain various recommendations from the staff as to the Commission's decisionmaking responsibility.

I must confess that I have some concern with a broad circulation of such documents for two reasons. One, I think there is some legitimacy in the assertion that it would impede the frank and open communication of the staff with the Commission. And second, that the Commission would have the opportunity——

Senator Chiles. What if you had a digest rather than a complete document? Perhaps you could distribute some kind of digest that could serve as a summary of the arguments in the case. In other words, the public should not be prohibited from knowing what the basic arguments are.

Mr. Curtis. I would agree with that. Our proposed orders attempt to state the facts, as well as the contesting points of view, and the Commission's proposed determination of those facts and arguments.

Our proposed orders as I noted, are now made available to the public participants so that they may understand what is the case before the Commission, the nature of the arguments and contested point of view, and the Commission's proposed resolution of those matters.

The underlying documents to which I referred, the various recommendations of, say, the Office of General Counsel or our Office of Producer and Pipeline Regulations, are sometimes in conflict as to the wisdom of particular Commission action. The proposed judgment of the Office of General Counsel may often relate to a strategy in litigation which would clearly be subject to an exemption from disclosure.

Senator Chiles. Well, what about the public notice before the meetings? I understand that Columbia Gas Transmission Corp. requested that the Commission expand the format of its published agenda in order to describe each action being considered by the Commission.

As I understand your format, the docket numbers indicate that public documents may be examined in your office. In your response to the Columbia Gas request, you adopted the suggestion due to the fact that:

The purpose of the act is to open the deliberations of the Commission to the public rather than expand the public's right to secure information which would otherwise be exempt from public disclosure.

It looks like there could be some middle ground here in which you could identify the subject matter in a way adequately to inform the general public thoroughly. Legislative history makes clear that docu-
ments and names are not enough. Each reference to a generic subject matter, such as consumer complaints or applications for new routes does not meet the requirements of this subsection.

You know, when your announcement comprises 56 docket numbers and corporate names, you cannot expect the public to troop down to the information office and wade through all those files.

Mr. Curtis. No, I think that also is a problem, Senator.

Beginning next week, although this has been in process for sometime, we will have a more refined Commission agenda which breaks down the docket items by subject matter identification that will help.

As far as presenting a digest of each item, I believe we would have significant administrative problems in doing that, but we will certainly consider whether we can provide a brief description of the nature of cases which are before the Commission.

Often we have sessions which involve more than 100 docket items, and the Federal Power Commission has been roundly criticized in the past for its inability to manage its caseload expeditiously.

We have a great deal of problems in just getting the documents to the point of decisionmaking.

We are frantically trying to catch up with our process all the time. Further expansion of the agenda format, while in the interest of the public understanding of the Commission's proceedings, would add significant burdens upon our administrative staff. Frankly, I think you just have to balance the contesting interests and resources.

Senator Chiles. I understand you have a great problem in trying to catch up. I have been among those criticizing the way the Commission has handled that in the past.

**Can the public record an open meeting?**

I note your regulations prohibit the use of recording devices by public observers during the open meetings.

Would you tell me how it bothers you if someone sitting in the audience has a recording device in his lap?

Mr. Curtis. It does not bother me at all, sir. I propose to change that aspect of the regulations.

I would just state the obvious that regulations are regulations of the Commission, and require majority vote.

A sitting member of the Commission, who also served on the Federal Power Commission at the time that prohibition was adopted, has strong views against the use of recorders. This will have to be matter of discussion.

Senator Chiles. I hope that you might read that sitting member a copy of Ms. Babcock's letter from the Justice Department. She would hate to be defending any lawsuit involving someone who had a recording device. You might tell that seated member that if he continues to be a majority, he might find me in the audience with my recording device.

The same thing, applies, of course, to the picture taking. I notice that you prohibit cameras also. It would seem that as long as it is not disruptive, picture taking should be permitted. Gosh, it's nice to get your picture taken sometimes.

Mr. Curtis, I would like to thank you for your appearance here today and for sharing your agency's views with us, and I hope you—
Mr. Curtis, Senator, if I may make just one parting comment. My answer to your question relating to whether our regulations define meetings as face-to-face deliberations should be clarified for the record. I stated it would be my personal view that you could not eliminate conference calls from the requirements of our regulations because I did not recall that as an aspect of our regulations.

I have now had the opportunity to check that. As I read our implementing regulations, it tracks exactly the language of the statute with respect to the definition of a meeting. I am wondering if there is some confusion that I am not aware of.

Senator CHILES. What we were looking at was the Administrative Order No. 8, which was dated April 9, 1976, and which, under definitions, is used in this order and subsection C. It said that Commission meetings are defined as face-to-face deliberations of at least the number of Commissioners required to take action.

Mr. CURTIS. Yes, sir. That was the order prior to the Sunshine Act. After enactment of the Sunshine Act, the Commission took guidance from the Congress.

Senator CHILES. Good, we are delighted with that change.

Thank you very much.

Mr. CURTIS. Thank you, sir.

[The prepared statement of Mr. Curtis follows:]
Mr. Chairman and Members of the Subcommittee,

I am appearing today in response to your November 2nd letter concerning the implementation and impact of the Government in the Sunshine Act since it became effective on March 11, 1977. Your staff has indicated to us that your particular interest is the implementation of the statute's open meeting requirements.

Although I am meeting with you today as the Chairman of the Federal Energy Regulatory Commission, of necessity, my statement relates, in large measure, to the Federal Power Commission's experience under the Sunshine Act. As you are aware, upon the activation of the Department of Energy on October 1, 1977, the Federal Power Commission, on which I had the privilege of serving as the last Chairman, was terminated and most of its jurisdictional responsibilities were transferred to the new Federal Energy Regulatory
Commission. The FPC's regulations, including those implementing the Sunshine Act, were made applicable to the FERC by Order No. 1 issued October 6, 1977.

FPC Administrative Actions to Open Commission Meetings

As you may know, the Federal Power Commission opened its meetings to public observation prior to enactment of the Sunshine Act pursuant to its Administrative Order No. 160, issued April 1, 1976. 1/ The first FPC open meeting took place on April 21, 1976, or approximately five months before the Sunshine Act was adopted and approximately 11 months before it became effective. A total of 71 Commission meetings were held during that period and all but five of them were open to the public.

The Federal Power Commission issued Order No. 562, 2/ implementing the Sunshine Act, on March 11, 1977. The FPC's regulations for implementation of the open meeting provisions of the Sunshine Act were prepared in consultation with the Administrative Conference of the United States.

1/ See Appendix A.
2/ See Appendix B.
The proposed regulations were widely supported by the respondents to the notice of proposed rulemaking as an important extension of the process of opening FPC deliberations to public scrutiny. Indeed, as one respondent noted:

"The Commission's open meetings have provided the public with a better understanding of the Commission's decision-making processes, and have enabled . . . parties vitally affected by Commission regulation to better plan their operations on the basis of the Commission's expressed intentions . . . ."

Between March 11 and October 1, 1977, the FPC held 46 meetings under Order No. 562, or approximately 8 meetings per month. Of the 46 meetings, only 4 were closed to public observation. 3/ Two of the meetings concerned the Alaska Natural Gas Pipeline System, then the subject of an on-the-record proceeding before the FPC in connection with its recommendation to the President. The other two meetings involved a number of pending on-the-record proceedings, civil litigation, or internal personnel matters properly closed to the public.

3/ Copies of General Counsel Certifications required by the Sunshine Act are contained in Appendix C.
Since the activation of the Federal Energy Regulatory Commission on October 1, the Commission has held 13 meetings. Of this number only 2 meetings have been closed in part to public observation. Those sessions were closed in order to discuss pending civil litigation involving the Commission.

At the time Order No. 562 was adopted, the FPC recognized that a majority of its meetings could properly be closed to the public pursuant to exemptions 4, 8, 9A or 10 of the Sunshine Act, thus qualifying the Commission to adopt simplified procedures for closing Commission meetings under subsection (d)(4) of Section 3 of the Act. The FPC decision not to adopt such procedures reflected a conscious policy to close meetings only on a case-by-case basis. Absent some future need to modify our procedures, we will continue to follow the more restrictive procedures for closing Commission meetings. We believe in maximizing the opportunity for public involvement in the decision-making process and it will continue to be Commission policy to close meetings or parts of meetings only on a selected and limited basis as the need arises.

4/ Copies of the General Counsel Certifications are contained in Appendix D.
Implementation Problems and Issues

Implementation of the Sunshine Act has given rise to some difficulties and issues have come to light which may require legislative clarification.

The legislative history of the Sunshine Act reveals that there was considerable discussion about what should constitute a "meeting" for Sunshine Act purposes. As stated in the Administrative Conference's very helpful interpretive guide to the statute, "[d]efining the scope of the term 'meeting' is one of the most troublesome problems in interpreting and applying the Sunshine Act." 5/ There appears to be a fine line between those joint activities of a collegial body which require Sunshine Act procedures and those which do not.

In order to discharge our responsibilities, it is necessary for Commission members to consult and discuss matters of general concern on an almost daily basis. I believe the need for this kind of ongoing interaction was well recognized by the Congress and is reflected

in the effort that went into the formulation of what constitutes a "meeting" for Sunshine Act purposes. It was intended, I believe, that the open meeting requirements of the Act were to be observed whenever a quorum of the Commission met for the purpose of resolving or discussing the resolution of Commission business. The statutory language defining a "meeting" and its legislative history reflect that it was not the intent of the Congress that all sessions at which a quorum or more of the Commission is present and at which matters under our general jurisdiction are brought up should be elevated to the level of a "meeting" within the meaning of the statute. Yet, there is inadequate guidance in the legislative materials as to where the line should be drawn between activities that must be carried out in a public forum and those that need not be.

The Administrative Conference's interpretive guide offers a valuable suggestion on this point. The Conference urges that exploratory and informational discussions among Commissioners be exempted from the open meeting requirements as long as they do not become so focused as to be likely to result in a decision or the taking of firm positions on
pending matters. \textsuperscript{6/} I believe this suggestion has considerable merit and warrants Congressional consideration. In any event, it would clearly be desirable if Congress could refine the definition of "meeting" so as to insure public access to agency decision-making without impeding the necessary daily give and take among Commission members. 

Another area of concern is the need for expedition of Commission business. By statute, the FERC is required to review, analyze, and decide whether to suspend a proposed rate increase within 30 days after a filing is made. In many instances it is impossible to complete this process prior to the minimum 7-day notice period normally required by the Sunshine Act. The problem is compounded by our lack of control over the timing of such rate increase applications.

In addition, there are emergency filings before the Commission which must be decided more quickly than the 7-day notice period contemplates. Thus, for example, seven of eighteen late items added to the Commission's agenda

\textsuperscript{6/} "A discussion which is sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency is a meeting, while, in our view, a discussion which is merely informational or exploratory is not." p. 7.
during November related to emergency applications under the Natural Gas Act. While the statute does contemplate such exigencies (§3(e)(2)), additional voting recordations and notice requirements must be satisfied with resulting administrative and paperwork burdens. Since the need to change Commission agendas is not an infrequent occurrence, consideration should probably be given to whether this problem is sufficiently widespread among affected agencies to warrant modification of the statute's requirements.

We have attempted to institute administrative procedures which diminish the burden of late additions to the agenda. Our regulations allow deletions from the Commission's agenda to be made without further action by the Commission or the necessity of further public notice. The public is informed of the practice in our meeting notices, and is advised to contact the Secretary's office for the current status of a particular item on the agenda. This practice, it seems to me, is preferable to the alternative of leaving matters off the public agenda until we are certain they are ready for Commission consideration.
and then, in many instances, having to issue a late addition notice. Such notices are almost never published in the Federal Register until after the Commission meeting has been held.

The lead-time required by the Federal Register for publication of our Sunshine Act documents is also a major problem in the Act's implementation. Due to the Commission's weekly meeting schedule and the normal 3-to-5 day delay between Federal Register receipt of documents and publication, notices of closed meetings and late-added items are usually published well after the fact. This is a recurrent problem despite our practice of telecopying such notices directly to the Federal Register in order to avoid mail and messenger delays.

In order to complement our Federal Register notice procedures, the Commission has copies of all notices and press releases posted in the Office of Public Information and makes printed copies available in that office twice daily. In addition, the Commission's Secretary maintains a special mailing list for meeting notices.
Other procedures have been adopted to enhance public awareness of Commission activities. For the first time, copies of proposed Commission orders and opinions under consideration are being made available to the general public at open meetings. Public observation has also been improved through the recent installation of audio-amplification equipment.

All of the above procedures have been established to overcome the shortcomings of Federal Register publication of our Sunshine Act notices and to enhance public observation and understanding of the Commission's decisional process. We will continue to evaluate our notice procedures and will revise those procedures as appropriate to effectuate the purposes of the Sunshine Act.

This concludes my prepared statement. I and the Commission staff with me today will be pleased to respond to your questions.
Before Commissioners: Richard L. Dunham, Chairman; Don S. Smith, John H. Holloman III, and James G. Watt.

ADMINISTRATIVE ORDER NO. 160

PUBLIC ATTENDANCE AT COMMISSION MEETINGS

(April 1, 1976)

1. Purpose. In order for the Commission to carry out its mandate to provide Federal regulation in the public interest of the interstate electric and natural gas utility service, the Commission recognizes the principle that the public interest is best served when regulatory affairs are open to the fullest extent practicable. To ensure the achievement of this goal, it is the purpose of this Order to bring to the attention of all Bureaus, Offices, and Regional Offices the policy of the Commission to open Commission meetings to the public and, whenever practicable, to notify the public in advance of all Commission meetings.

2. Definitions. As used in this Order:

(a) "Commission Staff" includes the employees of the Federal Power Commission other than the five Commissioners;

(b) "Commission" includes the five Commissioners of the Federal Power Commission acting in an official capacity; and

(c) "Commission meetings" are defined as the face-to-face deliberations of at least the number of Commissioners required to take action on behalf of the Commission where such deliberations concern the joint conduct or disposition of Commission business and are conducted with the Secretary or his designate present.
3. **Open Commission Meetings**: Open Commission meetings will be attended by the Commissioners, the Commission Staff, and any other individual or group desiring to observe the meetings. The public will be invited to observe the meetings but not participate nor to record any of the discussions by means of electronic or other devices, or cameras. Access to documents being considered at Commission meetings shall be obtained in the manner set forth in Section 1.36 of the Commission's Rules of Practice and Procedure.

4. **Physical Arrangements for Open Meetings**: The Secretary shall be responsible for seeing that ample space, sufficient visibility, and adequate acoustics are provided for public observation of the Commission meetings.

5. **Closed Commission Meetings**: Closed Commission meetings will be attended only by the Commissioners, the Commission Staff, and the Secretary. Closed Commission meetings may be held when it is determined by a majority of the Commissioners that the disclosure of information pertaining to a meeting, or any portion thereof, would be likely to:

   (a) disclose matters (i) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (ii) are in fact properly classified pursuant to such Executive order;

   (b) relate solely to internal personnel rules and practices of an agency;

   (c) disclose information required to be withheld from the public by any statute establishing particular criteria or referring to particular types of information, including 15 U.S.C. 717g(b); 18 U.S.C. 825(b); 18 U.S.C. 1905;

   (d) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential, including geological and geophysical information and data, including maps, concerning wells;
(e) involve accusing any person of a crime, or formally censuring any person;

(f) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy, including personnel and medical files and similar files;

(g) disclose information contained in investigatory records compiled for law enforcement purposes, but only to the extent that the disclosure of such records would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel;

(h) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(i) disclose information, the premature disclosure of which would --

   (1) in the case of information prepared by an agency which regulates currencies, securities, commodities, or financial institutions, (a) be likely to lead to significant financial speculation, or (b) significantly endanger the stability of any financial institution;
(11) in the case of any agency, (a) be likely to significantly frustrate implementation of a proposed agency action, or private action contingent thereon; or (b) relate to the purchase by such agency of real property;

This paragraph shall not apply in any instance where the Agency is required by law to make such disclosure prior to taking final agency action on such proposal; or

(iii) be inconsistent with the provisions of Public Law 93-579 (89 Stat. 1896) and implementing Commission regulations. (See particularly Commission Order No. 536, as amended).

(j) specifically concern the Commission's issuance of a subpoena, or the Commission's participation in a civil or criminal action, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the Commission of a particular case of formal agency adjudication pursuant to the procedures in Section 554 of Title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing.

This section shall not apply where the Commission finds that the public interest requires otherwise.

6. Public Announcement. Advance notice of Commission meetings will be provided to the public at the earliest practicable time.

(a) Commissioners and the Staff are responsible for reporting meeting arrangements to the Office of the Secretary at the earliest possible time. Such reports are to include the following information:
(i) Date, time, and place of the meeting;

(11) Subject of the meeting (as fully and precisely designated as possible);

(iii) Whether the meeting is open; and

(iv) Name and telephone number of the Commission official who is to respond to requests for information about the meeting.

(b) The Secretary shall ensure the timely publication of notice of Commission meetings which is to contain the information described in subsection (a) of this section.

(c) Following each Commission meeting, the Secretary shall issue a list of Commission actions taken, which shall become effective as of the date of issuance of the related order or other document, which the Secretary shall issue in due course, all in the manner prescribed by the Commission under the Natural Gas Act, Federal Power Act or other legal authority.

7. The provisions of this Order shall be effective for the Commission meeting as of April 21, 1976.

8. Supersession. Administrative Order No. 65, dated June 18, 1958, and any other order that is inconsistent with the contents herein are hereby superseded.

Subsequent to the issuance of this Order, the appropriate portions thereof will be published as a Commission directive.

By the Commission.

(SEAL)

Kenneth F. Plumb,
Secretary.
APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION
(18 CFR Parts 1 and 3)

Before Commissioners: Richard L. Dunham, Chairman;
Don S. Smith, John H. Holloman III,
and James G. Watt.

Adoption of Rules Governing )
Observation of Commission )
Meetings and Ex Parte Com- ) Docket No. RM77-4
munications )

Order No. 562

Order Adopting Rules Governing
Observation of Commission Meetings
and Ex Parte Communications

(Issued March 11, 1977)

On November 15, 1976, the Commission issued a notice
in this proceeding, 41 Fed. Reg. 52,303 (1976), wherein
we proposed to amend portions of Parts 1 and 3 of the
Commission's rules and to adopt a new Section 1.3a,
Chapter I, Title 18, C.F.R., to be entitled "Notice and
procedures for Commission meetings." The purposes of
the proposed changes are to conform the Commission's
current open meeting procedures to the requirements of
section 3 of the Government in the Sunshine Act (Act),
Pub. L. No. 94-409, and to revise and clarify its
current ex parte rule in light of section 4 of the Act.

The Commission had previously issued a notice in
Docket No. RM76-24, stating that it had been petitioned by
certain utilities and others to amend its ex parte rule,
18 C.F.R. §1.4(d) (1976). The petition proposed the
amendment for the stated purpose of facilitating the
disposition of matters before the Commission by allow-
ing informal discussions between Commission staff counsel,
or certain other Commission employees, and counsel for
parties to proceedings before the Commission concerning
proposed settlements or proposed agreements for disposi-
tion of particular issues. To the extent that the
comments filed in Docket No. RM76-24 have been
incorporated by reference by respondents herein, they

DC-C-41
have been considered in revising the proposed *ex parte* rule.

The notices provided for a period of comment and comments were received from 24 parties in Docket No. RM77-24 1/ and 11 parties in Docket No. RM77-4 2/. The concerns of the commenting parties are discussed hereafter according to subject matter. In addition to the opportunity for written submittals, an on-the-record public conference was held on February 24, 1977 in response to a request for further consideration of the proposed *ex parte* rule amendments. A number of participants from within and without the Commission attended. 3/

Open Meeting Provisions

The meetings of the Commission, i.e., the deliberations of the Commissioners, have been opened to public observation since April 21, 1976 pursuant to Administrative Order No. 160, issued April 1, 1976. The respondents indicated no objection to the proposed procedures in light of the Act. Some suggestions for technical revisions to the proposed rules are adopted and are not specifically discussed herein.

The Southern California Edison Company (Edison) requested that the Commission allow public observers at open meetings to record such meetings by electronic equipment or cameras in order to benefit those interested persons who are unable to attend due to distance from Washington, D. C. In view of the fact that official minutes of such meetings will be made, which will be available to members of the general public, and that ample provision is made for members of the press desiring to report on the Commission's public

1/ See Attachment A.
2/ See Attachment B.
3/ See Attachment C.
deliberations, we decline to accede to Edison's request. The logistical difficulties coupled with the potential for interruption do not warrant allowing the requested procedures in view of alternatives available to those unable to attend the Commission's open meetings.

The Director of the U.S. Department of Health, Education and Welfare's Consumer Affairs Office commented that the agenda for an open meeting should be publicized as early as possible and at least one month in advance, whenever possible. We will, of course, give notice of such meetings as early as possible, although we recognize that it will likely be infeasible to announce the agenda for a particular meeting more than one week in advance in most situations. The Director also urged that we use the Commission's 24-hour telephone "Hotline" for announcing upcoming meetings. Technical limitations prevent us from extending total taped message time to include meeting announcements at the present; however, we believe the suggestion is a good one and we intend to pursue its implementation whenever it appears technically feasible to do so.

Columbia Gas Transmission Corporation, et al. requested that the Commission expand the current format of its published agenda in order to describe each action being considered by the Commissioners. The Commission's current procedure is to announce its agenda by designating each agenda item by complete docket number without further elaboration. We believe that this procedure is sufficient to alert interested members of the public of the general matters to be considered, particularly in the context of current filings that are available for public inspection. We therefore decline to adopt the suggestion due to the fact that the purpose of the Act is to open the deliberations of the Commissioners to the public rather than to expand the public's rights to secure information which would otherwise be exempt from public disclosure under the Freedom of Information Act. 5 U.S.C. §552(b)(k), 90 Stat. 1241, 1246.

Congresswoman Bella Abzug, Chairwoman of the Government Information and Individual Rights Subcommittee of the House Committee on Government Operations made several suggestions for clarifying amendments
which are adopted herein without further elaboration. Congresswoman Abzug incorrectly asserted, however, that the Commission cannot avail itself of exemption 9A of the Act "since [the Commission] is not 'an agency which regulates currencies, securities, commodities, or financial institutions.'" In light of our responsibilities under various statutes respecting certain corporate transactions of regulated utilities, we do not choose to delete exemption 9A from the Commission's regulations under the Act. See, e.g., 16 U.S.C. §§824b, 824c, 825d and 825q; 15 U.S.C. §77K.

Congresswoman Abzug, without citing any authority for the proposition, suggested that the Commission had no discretion to delete individual items on an agenda without notice. The Commission's proposed procedure would result in the announcement of items for Commission consideration, even though the staff work might not have been completed at the time of the announcement. To eliminate flexibility with respect to deletions of agenda items would serve no useful purpose, while creating additional administrative burdens. The proposed procedure gives adequate notice to the public that a particular matter may be considered at a meeting. The agenda is subject to further check with the agency contact person designated in the notice. We therefore believe that retaining the proposed procedure best serves the needs of the public.

We recognize that a majority of the Commission's meetings may properly be closed to the public pursuant to exemptions 4, 8, 9A or 10 of the Act or any combination thereof. In such a situation, the agency is authorized to provide by special regulation for the closing of meetings under 5 U.S.C. §552b(d)(4), 90 Stat. 1241, 1243. Certain procedural and informational requirements of the Act do not apply to any portion of a meeting closed under such special regulations. This Commission has been in the vanguard in its commitment to a policy of open meetings since the adoption of Administrative Order No. 160. While we do not preclude the possibility that at some future time due to changing conditions the Commission may find it appropriate to provide a more streamlined
mechanism for closing meetings, we decline to do so at the present time.

**Ex Parte Communications**

The Commission's proposal to modify its rule regarding ex parte communications in light of the Act and the legislative history thereof was the focus of considerable comment. Most comments were critical of the Commission's current rule and the proposed rule, arguing that both were unduly restrictive and should be revised to track the language of Section 4 of the Act. Substantive comments are responded to hereafter.

Several respondents commented that the proposed rule was in conflict with the Act because the proposed rule, though less restrictive than the current rule, was more restrictive than and, it was argued, in conflict with the Act. We recognized, and so announced, in our notice of rulemaking that the present rule served to impede unnecessarily the conduct of Commission business by prohibiting generally all contacts between Commission employees and any interested person in any contested on-the-record proceeding. At the same time, we recognized that Section 4 of the Act established a floor, not a ceiling, for prohibited ex parte communications. Thus, the Act would supplement more stringent restrictions against ex parte contacts which an agency may have issued prior to the Act. H.R. REP. NO. 94-880, Part I, 94th Cong., 2d Sess. 19 (1976).

To the extent that our proposed ex parte rule continues to be more restrictive than the minimum required by the Act, we believe that it serves a valid purpose in preventing even the appearance of improper contacts between those within and without the

4/ Several respondents expressed concern that improper contacts may occur between trial staff and advisory staff in the absence of an express prohibition and of separation of function within the staff. We do not believe that further actions are necessary in this regard since we construe 18 C.F.R. §1.30(f) as prohibiting improper contacts between different staff elements. Thus, any Commission employee who participates in a substantial manner in a contested on-the-record proceeding should enter a formal appearance in that proceeding, whether or not appearing as a witness or as staff counsel, and should thereafter refrain from improper contacts with the advisory, i.e., decisional, staff.
agency. To the extent that the proposed rule would allow limited, informal discussions between staff counsel or certain Commission employees and counsel for parties to proceedings before the Commission, we believe that the relaxation of our present rule in this regard would have the salutary effect of expediting the disposition of Commission business without diminishing the integrity of the decisional process. In any event, non-unanimous settlement proposals would be required to be served upon all parties to a proceeding for such action as they may consider appropriate prior to any formal submission to the Commission. Even after the filing of proposed settlement agreements with the Commission, our practice is to allow submission of comments on the proposal before any action is taken by us. Given the existence of these safeguards against the unfair treatment of any party to a proceeding before this Commission, we cannot believe that such a practice can be reasonably considered to erode public confidence in the administrative process.

Several respondents suggested that the proposed definition of ex parte contacts should be revised to exclude requests for status reports. We encourage such requests to be made to the Secretary. In light of the Act, which expressly excludes requests for status reports on any matter or proceeding covered by the Act as being an ex parte contact, we will not include such requests within our definition of ex parte contacts. S. REP. NO. 94-1178, 94th Cong., 2d Sess. 29 (1976); H.R. REP. NO. 94-1441, 94th Cong., 2d Sess. 29 (1976). At the same time, we wish to make it clear that we will not allow such a request to be used as an indirect or subtle effort to influence the substantive outcome of a covered proceeding. In doubtful cases, Commissioners and staff shall treat the communication as ex parte so as to protect the integrity of the decision-making process. H.R. REP. NO. 94-880, Part I, 94th Cong., 2d Sess. 20-21 (1976).

5/ Unaccepted proposals of settlement may continue to be privileged and shall not be admissible in evidence against any counsel or person claiming such privilege pursuant to 18 C.F.R. §1.18(e) (1976).

6/ See, e.g., 18 C.F.R. §3.100(b) (1976).
It was also suggested by several respondents that the proposed exemption (vi) to the *ex parte* rule should eliminate the prohibition against contacts with decisional employees made after reasonable prior notice to and consent of all parties. In order that we not preclude legitimate contacts between the Commission and its staff and outside interested persons, we herein eliminate the limitation. We do so since it is our belief that the decisionmaking process is protected in instances where all parties have been given reasonable prior notice and have unanimously consented to certain communications.

Alabama Power Company *et al.* suggested that the definition of an *ex parte* communication be modified to clarify that such a communication is prohibited only when it is relative to the merits of an on-the-record proceeding pending before the Commission. We agree that such is the purpose of Section 4 of the Act, H.R. REP. NO. 94-880, Part I, 94th Cong., 2d Sess. 19-20 (1976), and our proposed rule. Accordingly, our rule will be clarified as suggested.

The Executive Committee of the Federal Power Bar Association (Association) and several participants at the public conference suggested that we define who is a decisional employee with greater precision. We consider this to be an appropriate request and will direct the Commission's Secretary to prepare and issue a list of decisional employees who are to be protected from non-consensual *ex parte* contacts. Such a list cannot, however, be considered as eliminating the burden upon outside persons to inquire of staff members whether they are decisional employees in a particular proceeding. Similarly, a member of the staff not listed as a decisional employee who acts in that capacity with respect to a particular proceeding should so inform any interested outside person attempting to make an *ex parte* contact.

This responsibility of the decisional staff is the analogue of the responsibility of the trial staff to make an appearance in a particular proceeding in order to inform the public and the decisional staff that they will not thereafter be involved in the decisional process. See, *e.g.*, Tr. 5. Having
voluntarily made or entertained prohibited *ex parte* communications, an employee will be prohibited from future participation in the decisional process of the relevant pending on-the-record proceeding. See, e.g., Tr. 50-51.

The Association also suggested that the Commission clarify those proceedings covered by the *ex parte* prohibition. We believe that the proposed rule sufficiently defines the scope of the prohibition to cover any proceeding "required by statute, constitution, published Commission rule or regulation or order in a particular case, to be decided on the basis of the record of a Commission hearing..."

Edison urged that we modify the proposed rule to eliminate the provision for triggering the prohibition by the filing of protests and notices to intervene in a particular proceeding. We do not believe that this provision creates any additional difficulties for the public since it parallels the definition of "contested on-the-record proceeding" in the current rule. More importantly, however, there are sometimes unavoidable, but lengthy, intervals between the filing of protests or petitions to intervene and any notice for hearing which may be issued in a particular proceeding. In such instances, we do not believe that such delays, unavoidable though they may be, should serve to erode public confidence in the decisional process by effectively preventing protestants and intervenors from being informed about and participating at all stages of a pending proceeding.

The Commission finds:

(1) The notice and opportunity to participate in this rulemaking proceeding with respect to the matters presently before this Commission through the submission, in writing, and presentation at a public, on-the-record conference held on February 24, 1977 of data, views, comments, and suggestions in the manner described above, are consistent and in accordance with the procedural requirements prescribed by 5 U.S.C. §§553.

(2) Good cause exists for making the amendments herein adopted effective immediately upon issuance.
(3) It is necessary and appropriate for the administration of the Government in the Sunshine Act, the Federal Power Act and the Natural Gas Act, that the Commission's General Rules be amended as herein provided.

The Commission, acting pursuant to the authority granted the Federal Power Commission by the Federal Power Act, as amended, particularly Sections 308 and 309 (49 Stat. 858, 859; 16 U.S.C. 825g, 825h), by the Natural Gas Act, as amended, particularly Sections 15 and 16 (52 Stat. 829, 830; 15 U.S.C. 717n, 717o), and by Pub. L. No. 94-409 (90 Stat. 1241) orders:

(A) Part I --- Rules of Practice and Procedure --- Chapter I, Title 18 of the Code of Federal Regulations, is amended as follows:

1. Section 1.1(c)(1) is revised to read as follows:

§1.1 The Commission

      * * * * *

(c) Sessions.

      * * * * *

(1) Public. Public sessions of the Commission will be held after due notice as ordered by the Commission. (See §§1.3 and 1.3a).

2. Section 1.2(a)(1) is revised to read as follows:

§1.2 The Secretary.

(a) Official records. (1) The Secretary shall have custody of the Commission's seal, the minutes of all action taken by the Commission, the transcripts, electronic recordings or minutes of meetings closed to public observation, its rules and regulations and its administrative orders.
3. Immediately following section 1.3, a new section 1.3a, Notice and procedures for Commission meetings, is added. Section 1.3a reads as follows:

§ 1.3a Notice and procedures for Commission meetings.

(a) Definitions. In this section:

(1) "Agency", as defined in 5 U.S.C. 551(1) as "... each authority of the Government of the United States, whether or not it is within or subject to review by another agency, ..." includes "... any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency ..." [5 U.S.C. 552(e)] which is headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2) "Meeting" means the deliberations of at least the number of individual members of the Federal Power Commission required to take action on behalf of the Commission where such deliberations determine or result in the joint conduct or disposition of official Commission business, but does not include deliberations required or permitted by subsections (d)(3) and (f) of this section;

(3) "Member" means an individual who belongs to the collegial body heading the Federal Power Commission; and

(4) "Staff" includes the employees of the Federal Power Commission other than the five Commissioners.
(b) Open meetings. (1) Every portion of every meeting of the Federal Power Commission will be open to public observation subject to the exemptions provided in subsection (d)(1) of this section. Open meetings will be attended by the Commissioners, certain Commission staff, and any other individual or group desiring to observe the meeting. The public will be invited to observe and listen to the meeting but not to participate nor to record any of the discussions by means of electronic or other devices or cameras. Documents being considered at Commission meetings may be obtained subject to the procedures and exemptions set forth in section 1.36 of this Part.

(2) Commission members shall not jointly conduct or dispose of agency business other than in accordance with this section.

(c) Physical arrangements. The Secretary shall be responsible for seeing that ample space, sufficient visibility, and adequate acoustics are provided for public observation of the Commission meetings.

(d) Closed meetings. (1) Meetings will be closed to public observation where the Commission properly determines, according to the procedures set forth in paragraph (3) of this subsection, that such portion or portions of the meeting or disclosure of such information is likely to:

(i) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and are (B) in fact properly classified pursuant to such Executive order;

(ii) relate solely to the internal personnel rules and practices of an agency;
(iii) disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. §52), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(iv) disclose the trade secrets and commercial or financial information obtained from a person and privileged or confidential, which may include geological or geophysical information and data, including maps, concerning wells;

(v) involve accusing any person of a crime, or formally censuring any person;

(vi) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy, including personnel and medical files and similar files;

(vii) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or, (F) endanger the life or physical safety of law enforcement personnel;
(viii) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(ix) disclose information the premature disclosure of which would ---

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(x) specifically concern the Commission's issuance of a subpoena, or the Commission's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the Commission of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. §§4 or otherwise involving a determination on the record after opportunity for a hearing.

(2) Commission meetings shall not be closed pursuant to paragraph (1) of this subsection when the Commission finds that the public interest requires that they be open.
(3) (i) Action to close a meeting, or portion thereof, pursuant to the exemptions defined in paragraph (1) of this subsection shall be taken only when a majority of the entire membership of the Commission votes to take such action. A separate vote of the Commission members shall be taken with respect to each Commission meeting a portion or portions of which are proposed to be closed to the public or with respect to any information which is proposed to be withheld. A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each Commission member participating in such vote shall be recorded and no proxies shall be allowed.

(ii) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the Commission close such portion to the public for any of the reasons referred to in paragraph (d)(1)(v), (d)(1)(vi), or (d)(1)(vii) of this section, the Commission, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(iii) Within one day of any vote taken pursuant to subparagraph (d)(3)(i) or (d)(3)(ii) of this section, the Secretary of the Commission shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the Secretary shall, within one day of the vote taken pursuant to subparagraph (d)(3)(i) or (d)(3)(ii) of this section, make publicly available a full written explanation of the Commission's action closing the portion together with a list of all persons expected to attend the meeting and their affiliation. The information required by this subparagraph shall be disclosed except
to the extent that it is exempt from disclosure under the provisions of subsection (d)(1) of this section.

(e) Transcripts. (1) Prior to a determination that a meeting should be closed pursuant to subsection (d) of this section, the General Counsel of the Commission shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the Secretary of the Commission as part of the transcript, recording, or minutes required by subsection (e)(2) of this section.

(2) The Secretary shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to subsections (d)(1)(viii), (d)(1)(ix)(A), or (d)(1)(x) of this section, the Secretary shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any roll-call vote (reflecting the vote of each member on the question). All agenda documents considered in connection with any Commission action shall be identified in such minutes.

(3) The Secretary shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting.
or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion was held, whichever occurs later.

(4) Within a reasonable time after the adjournment of a meeting closed to the public, the Commission shall make available to the public, in the Office of Public Information of the Commission, Washington, D.C., the transcript, electronic recording, or minutes (as required by paragraph (2) of this subsection) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the Director of Public Information determines to contain information which may be withheld under subsection (d) of this section. Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription (See §3.102).

(5) The determination of the Director of Public Information to withhold information pursuant to paragraph (4) of this subsection may be appealed to the Chairman of the Commission, in his capacity as administrative head of the Commission pursuant to Section 1 of Reorganization Plan No. 9 of 1950. The Chairman, or officer designated pursuant to section 3b.224(f) of this subchapter, will make a determination to withhold or release the requested information within twenty days from the date of receipt of the request for review (excluding Saturdays, Sundays, and legal public holidays).

(6) For an extension of the time limit prescribed by subsection (e)(3) of this section, the provisions of section 1.36(f)(3) of this part shall apply.

(f) Public announcement. (1) Except to
the extent that such information is exempt from disclosure under the provisions of subsection (d) of this section, in the case of each meeting, the Secretary of the Commission shall make public announcement at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and telephone number of the official designated by the Commission to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the Commission determines by a recorded vote that Commission business requires that such meeting be called at an earlier date, in which case the Secretary shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2) The time or place of a meeting may be changed following the public announcement required by subsection (f)(1) of this section only if the Secretary publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the Commission to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (i) a majority of the entire membership of the Commission determines by a recorded vote that Commission business so requires [as for example, pursuant to subsection (d)(3)(ii) of this section] and that no earlier announcement of the change was possible, and (ii) the Secretary publicly announces such change and the vote of each member upon such change at the earliest practicable time: Provided, That individual items which have been announced for Commission consideration may be deleted without notice.
(3) The "earliest practicable time", as used in this subsection, means as soon as possible, which should in few, if any, instances be later than the commencement of the meeting or portion in question.

(4) The Secretary of the Commission shall use reasonable means to assure that the public is fully informed of the public announcements required by this subsection. For example, such announcements may be posted on the Commission's public notice boards, published in official FPC publications, or sent to the persons on a mailing list maintained for those who want to receive such material.

(5) Immediately following each public announcement required by this subsection, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in a preceding announcement, and the name and telephone number of the official designated by the Commission to respond to requests for information about the meeting shall also be submitted by the Secretary of the Commission for publication in the Federal Register.

(6) Following each Commission meeting, the Secretary shall issue a list of Commission actions taken which shall become effective as of the date of issuance of the related order or other document, which the Secretary shall issue in due course, all in the manner prescribed by the Commission under the Natural Gas Act, Federal Power Act, or other legal authority.

* * * * *

4. Section 1.4(d) is amended as follows:

a. Paragraph (1) is amended by adding two new definitions to the second sentence.
b. Five new subparagraphs (v), (vi), (vii), (viii), and (ix) are added to paragraph (2).

c. Paragraph (3) is amended by the addition of a phrase to the first sentence and by the addition of two additional sentences.

d. Paragraph (4) is amended by deleting the fourth sentence.

e. Paragraph (6) is redesignated as paragraph (7) and a new paragraph (6) is added.

f. Newly designated paragraph (7) is completely revised.

Section 1.4(d), as amended, reads as follows:

§ 1.4 Appearances and practice before the Commission.

* * * * *

(d) Ex parte communications.

* * * * *

(1) **

For the purposes of this paragraph, the term "ex parte communication" means an oral or written communication relative to the merits of an on-the-record proceeding pending before the Commission which is not on the public record and with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered by this section; the term "decisional employee" means a Commissioner or member of his personal staff, an administrative law judge, or any other employee of the Commission who is or may be reasonably expected to be involved in the decisional process of the proceeding; the term "contested on-the-record proceedings" means **

(2) The prohibitions contained in paragraph (d)(1) of this section do not apply to a communication:
(v) When the communication is between the staff counsel assigned to the proceeding or, in the presence of or after coordination with such staff counsel, any other employee of the Commission (except a decisional employee) and any party or counsel to any party or parties to the proceeding or, in the presence of or after coordination with such counsel or party, and agent of any such party: Provided, That any employee of the Commission who may reasonably be expected to participate in the decisional process may waive such participation by entering a staff appearance in the proceeding: Provided further, That non-unanimous settlement offers shall thereafter be served on all participants in the proceeding prior to the submission of such offers to the Commission;

(vi) Which all the participants agree may be made on an ex parte basis;

(vii) Related to routine safety, construction, and operational inspections of project works by the Commission staff not undertaken to investigate or study a matter pending in issue before the Commission in any on-the-record proceeding;

(viii) Related to routine field audits of the accounts or any books or records of a company subject to the Commission's accounting requirements not undertaken to investigate or study a matter pending in issue before the Commission in any on-the-record proceeding;
(ix) Which relates solely to a request for supplemental information or data necessary for an understanding of factual materials contained in documents filed with the Commission in a proceeding covered by this subsection and which is made in the presence of or after coordination with counsel, except a communication with a decisional employee, in the absence of waiver of participation.

(3) All written communications prohibited by paragraph (d)(1) of this section, all sworn statements reciting the substance of all such oral communications, and all written responses and sworn statements reciting the substance of all oral responses to such prohibited communications shall be delivered to the Secretary of the Commission who shall place the communication in public files associated with the case, but separate from the record material upon which the Commission can rely in reaching its decision. The Secretary shall serve such communications upon all parties to the proceeding. The Secretary shall also serve a copy of the sworn statement to the communicator and allow him a reasonable opportunity to file a response.

(4) A Commissioner, member of his immediate staff, Administrative Law Judge, or any other employee of the Federal Power Commission who receives an oral offer of any communication prohibited by paragraph (d)(1) of this section shall decline to listen to such communication and shall explain that the matter is pending for determination. If unsuccessful in preventing such communication, the recipient thereof shall advise the communicator that he will not consider the communication. The recipient shall prepare a sworn statement setting forth the substance of the communication and the circumstances thereof within 48 hours and deliver the statement to the Secretary of the Commission for compliance with the procedures established in paragraph (d)(3)
of this section.

* * * * *

(6) Upon receipt of a communication knowingly made in violation of paragraph (d)(1) of this section, the Commission, Administrative Law Judge, or other employee presiding at the hearing may require, to the extent consistent with the interests of justice and the policy of underlying statutes, the communicator to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation.

(7) The prohibitions contained in paragraph (d)(1) of this section shall apply from the time at which a proceeding is noticed for hearing or the person responsible for such communication has knowledge that it will be noticed for hearing or at the time at which a protest or a petition or notice to intervene in opposition to requested Commission action has been filed, whichever occurs first.

* * * * *

5. Section 1.36 is amended as follows:

   a. Subsection (a) is amended by adding a new sentence immediately following the second sentence.

   b. Paragraph (14) of subsection (c) is redesignated as paragraph (15) and a new paragraph (14) would be added.

   c. Subparagraph (iii) of the newly designated paragraph (15), in subsection (c), is revised.

   Section 1.36, as amended, reads as follows:

   §1.36 Public information and requests.

   * * * * *
Docket No. RM77-4 - 23 -

(a) Notice of proceedings.

Notice of applications for certificates of public convenience and necessity under section 7 of the Natural Gas Act is provided for by §157.9 of this chapter.
Notice of public sessions and proceedings and of meetings of the Commission is provided for by §§1.3 and 1.3a of this chapter.

(c) Public records.

(14) Transcripts, electronic recordings, or minutes of Commission meetings closed to public observation containing material non-exempt pursuant to §1.3a of this Part.

(15) All other records of the Commission except for those that are:

(iii) Specifically exempted from disclosure by statute (other than 5 U.S.C. §§2b), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(B) Section 3.102(b), Part 3--Organization; Operation; Information and Requests; Miscellaneous Charges; Ethical Standards, Chapter I, Title 18 of the Code of Federal Regulations is amended by adding a new sentence immediately following the
third sentence. As amended, §3.102(b) reads as follows:

§3.102 Public information requests, and assistance; miscellaneous charges.

* * * * *

(b) Any person may obtain a copy of the schedule of fees by requesting such schedule from the Office of Public Information in person, by telephone, or by mail. Copies of transcripts, electronic recordings, or minutes of Commission meetings closed to public observation containing material non-exempt pursuant to §1.3a of this Part are available to the public at the actual cost of duplication or transcription.

* * * * *

(C) The Secretary shall issue a list of employees usually participating in the decision-making process, which is to be updated periodically.

(D) The Secretary shall cause prompt publication of this order to be made in the Federal Register.

By the Commission.

( S E A L )

Kenneth F. Plumb,
Secretary.
RESPONDENTS IN DOCKET NO. RM76-24

American Bar Association
Cities of Adrian, Minnesota, Et al.
Columbia Gas of Kentucky, Inc., Et al.
Consumers Power Company
The Dayton Power and Light Company
Delmarva Power and Light Company
Executive Committee of The Federal Power Bar Association
FPC-Bureau of Natural Gas
FPC-Office of Administrative Law Judges
FPC-Office of Economics, Bureau of Power, Office of the
   General Counsel, and Office of Special Assistants
Georgia Power Company
Gulf Power Company
Interstate Natural Gas Association of America
The Montana Power Company
Northern Natural Gas Company
Pacific Power and Light Company
Phillips Petroleum Company
Power Authority of the State of New York
Public Service Commission of the State of New York
Public Service Company of New Mexico
Public Service Electric and Gas Company
Southern California Edison Company
Tucson Gas and Electric Company
Wisconsin Municipal Electric Utilities
RESPONDENTS IN DOCKET NO. RM77-4:

Cong. Bella Abzug

Alabama Power Company, Et al.

Columbia Gas Transmission Corporation, Et al.

Consumers Power Company

Executive Committee of the Federal Power Bar Association

FPC, Bureau of Natural Gas

HEW, Virginia H. Knauer, Director, Office of Consumer Affairs

Interstate Natural Gas Association of America

Northern Natural Gas Company

Southern California Edison Company

Tenneco Oil Company
Participants in Public Conference in
Docket No. RM77-4 held February 24, 1977

PRESENT:

ROMULO L. DIAZ, JR., of the Commission, presiding

WILLIAM I. HARKAWAY, 1750 Pennsylvania Avenue, N.W.,
Washington, D.C. 20006, on behalf of the Federal Power
Bar Association

JEROME J, MC GRATH,
JOHN H. CHEATHAM,III, of the Interstate Natural Gas
Association, on behalf of the Interstate Natural Gas
Association

WILLIAM G. PORTER, JR., of Porter, Stanly, Platt &
Arthur, 37 W. Broad Street, Columbus, Ohio, on behalf
of Alabama Power Co., et al.

RICHARD M. MERRIMAN, of Reid & Priest, 1701 K Street,
Northwest, Washington, D.C. 20006, on behalf of the
Federal Power Bar Association

FRANCIS J. WALSH, 1101 17th Street, Northwest, Washington,
D.C., on behalf of Union Texas

C. R. TILLEY, of Columbia Gas System Service Corporation,
1625 I Street, N.W., Washington, D.C. 20006, on behalf
of Columbia Gas System Service Corporation and Columbia
Gas Transmission Corporation

FREDERICK T. SEARLS, of Debevoise and Liberman, 806
15th Street, Northwest, Washington, D.C. 20005, on
behalf of Alabama Power Company, et al.

THOMAS F. RYAN, JR., 321 15th Street, Northwest,
Washington, D.C. 20005, on behalf of himself

KENNETH RICHARDSON,
JOSEPH J. SOLTERS,
WILLIAM BAGLIEBTER,
ROBERT SCARBROUGH,
LILO SCHIFTER,
H. H. HAMMOND,
WILLIAM W. LINDSAY, of the Federal Power Commission, on
behalf of the Federal Power Commission
MARY JANE KLIPPLE, Room 500, 1101 17th Street, N.W.,
Washington, D.C. 20036, on behalf of Foster Associates

CARL W. ULRICH, of Chapman, Gadsby, Hannah and Duff,
1700 Pennsylvania Avenue, N.W., Washington, D.C. 20006,
on behalf of Colorado Interstate Gas Company

GEORGE L. WEBER, of Consolidated Natural Gas Service
Co., Inc., 1101 16th Street, N.W. Washington, D.C.,
on behalf of Consolidated Natural Gas Co.

WILLIAM WARFIELD ROSS, 1320 19th Street, N.W., Washington,
D.C. 20036, on behalf of the Administrative Law Section,
American Bar Association

HARRY L. ALBRECHT, 1120 Connecticut Avenue, N.W.,
Washington, D.C. 20037, on behalf of Natural Gas
Pipeline Co.

ANTHONY D. PRYOR, P.O. Box 2511, Houston, Texas 77001,
on behalf of Tennessee Gas Pipeline Co.

MORTON L. SIMONS, of Simons & Simons, 1629 K Street, N.W.,
Washington, D.C. 20006
APPENDIX C
April 7, 1977

General Counsel Certification


Inasmuch as the purpose of the meeting is to discuss information, the premature disclosure of which would be likely to lead to significant financial speculation in currencies, securities, or commodities or significantly endanger the stability of any financial institution or be likely to significantly frustrate implementation of a proposed agency action; or concerns discussion of the conduct or disposition of a particular case of formal agency adjudication pursuant to the procedures in 5 U.S.C. 554 or otherwise involving a determination on the record after opportunity for a hearing, the meeting falls within exemptions to the open meeting requirements, specifically 5 U.S.C. 552b(c)(9)(A) and (B), 18 C.F.R. §1.3a(d)(ix)(A) and (B), and 5 U.S.C. 552b(c)(10), 18 C.F.R. §1.3a(d)(x).

Drexel D. Journe
General Counsel

July 21, 1977

General Counsel Certification

I hereby certify that an administrative meeting to follow the Commission's regular public meeting on July 26, 1977 may be closed to the public pursuant to 5 U.S.C. 552b and 18 CFR §1.3a(d). The purpose of the closed meeting is to discuss pending civil litigation; the initiation, conduct or disposition of pending agency actions subject to the procedures of 5 U.S.C. 554 or otherwise involving a determination on-the-record after opportunity for a hearing; internal personnel rules and practices of the Commission; and other administrative matters which may be properly closed to the public. Thus, meeting falls within the exemptions to the open meeting requirements, including 5 U.S.C. 552b(c)(2), (9) (B), and (10); 18 CFR §1.3a(d)(ii), (ix)(B), and (x).

Drexel D. Journe
General Counsel
General Counsel Certification

I hereby certify that an administrative meeting to follow the Commission's regular public meeting on August 11, 1977 may be closed to the public pursuant to 5 U.S.C. 552b and 18 CFR § 1.3a(d). The purpose of the closed meeting is to discuss pending civil litigation; the initiation, conduct or disposition of pending agency actions subject to the procedures of 5 U.S.C. 554 or otherwise involving a determination on-the-record after opportunity for a hearing; internal personnel rules and practices of the Commission; and other administrative matters which may be properly closed to the public. Thus, meeting falls within the exemptions to the open meeting requirements, including 5 U.S.C. 552b(c)(2), (9)(B), and (10); 18 CFR § 1.3a(d)(ii), (ix)(B), and (x).

Robert W. Ferdue
Acting General Counsel

September 15, 1977

Acting General Counsel Certification

I hereby certify that an administrative meeting to follow the Commission's regular public meeting on September 16, 1977 may be closed to the public pursuant to 5 U.S.C. 552b and 18 CFR § 1.3a(d). The purpose of the closed meeting is to discuss pending civil litigation; the initiation, conduct or proposition of pending agency actions subject to the procedures of 5 U.S.C. 554 or otherwise involving a determination on-the-record after opportunity for a hearing; internal personnel rules and practices of the Commission; and other administrative matters which may be properly closed to the public. Thus, meeting falls within the exemptions to the open meeting requirements, including 5 U.S.C. 552b(c)(2), (9)(B), and (10); 18 CFR § 1.3a(d)(ii), (ix)(B), and (x).

Robert W. Ferdue
Acting General Counsel
October 18, 1977

Acting General Counsel Certification

I hereby certify that an administrative meeting to follow the Commission's regular public meeting on September 16, 1977 may be closed to the public pursuant to 5 U.S.C. 552b and 18 CFR § 1.3a(d). The purpose of the closed meeting is to discuss pending civil litigation; the initiation, conduct or proposition of pending agency actions subject to the procedures of 5 U.S.C. 554 or otherwise involving a determination on-the-record after opportunity for a hearing; internal personnel rules and practices of the Commission; and other administrative matters which may be properly closed to the public. Thus, meeting falls within the exemptions to the open meeting requirements, including 5 U.S.C. 552b(c)(2), (9) (B), and (10); 18 CFR § 1.3a(d) (ii), (ix)(B), and (x).

Robert W. Perdue
Acting General Counsel

November 17, 1977

CERTIFICATION OF GENERAL COUNSEL

I certify that the Federal Energy Regulatory Commission is authorized under 5 U.S.C. 552b(c)(10) to consider in a closed meeting matters relating to the Commission's position on consideration of the application for certiorari to the Supreme Court in Greene County Planning Board v. F.P.C.
TESTIMONY OF DANIEL O'NEAL, CHAIRMAN OF THE INTERSTATE COMMERCE COMMISSION; ACCOMPANIED BY MARK EVANS, GENERAL COUNSEL

Mr. O'Neal. Yes, sir, we have a longer statement, Mr. Chairman, that we have submitted for the record.

I am pleased to be here today to present the views of the Interstate Commerce Commission on the Sunshine Act.

Our experience since the act took effect 9 months ago has been favorable. Although the provisions of the act have limited, to a certain extent, some of our prior flexibility in terms of the timing and agenda of our meetings, we have had no serious problems of implementation.

The vast majority of our meetings since March of this year have been open to the public, and many have been attended by the public and members of the media. The act has gone far toward achieving the congressional purpose of increasing the public awareness of, and confidence in, the decisionmaking process.

Shortly after it was signed into law, the Commission moved to implement both the spirit and the letter of the act. We believe that our sunshine regulations and our interpretation of them with respect to specific meetings clearly illustrate that the Commission has willingly complied with the act's provisions.

Since our regulations were adopted, 81 percent of all meetings held by the Commission and its divisions have been completely open to public scrutiny, and portions of some of the remaining 19 percent of our meetings also have been open. Not only have most of our recent meetings been open, but also there have been more total meetings since implementation of the act. It certainly has not created major impediments to our holding meetings.

Although the number of meetings we hold has been rising, I must mention that notation voting—voting in writing without a meeting being held—is still the principal means through which we dispose of most of our workload. The Commission and its divisions vote on a large number of cases through this technique, and frequently do so on rather short deadlines. We feel that notation voting is a necessary tool to deal with the Commission's workload.

In addition to opening most of our meetings, we have voluntarily released the transcripts of several of our closed meetings, even when the act would have permitted us to withhold disclosure of the transcript. The entire transcripts of 4 of the 10 closed Commission meet-
ings have been released, while 2 of the other transcripts were partially released.

One of those released transcripts was of our closed meeting in which we determined to suspend tariffs of the Alaska pipeline system. We were not required to release that transcript, but we determined that the release would serve the public interest and would be of value to all parties with an interest in the case.

The Commission has gone beyond the literal requirements of the act in other ways besides the release of the transcripts. For example, the Commission has attempted to disseminate widely our public notices of meetings by maintaining a mailing list of persons who have requested notice of our meetings, and by making copies available to the press, including the trade press.

Also, our regulations permit any person to petition the Commission to open a meeting proposed to be closed. Also, I might add, as well, that the Commission has opened its notation votes to the public, including the narrative portion of any vote.

Although I believe the Commission has successfully implemented regulations which comply with the provisions of the act with no major problems, we have experienced some difficulties of which I think you should be aware.

These relate principally to determining what is or is not a meeting of the Commission within the meaning of the act, and to adapting to the 1-week notice requirement in establishing an agenda for the meetings.

As Chairman of the Commission, for example, I have felt an increasing need to meet regularly, but informally, with other members of the Commission to exchange general information concerning matters affecting the agency and to discuss general problems concerning the Commission's operation. For the most part, I would have no hesitation about opening such informal sessions to public observation—although in all candor I expect that the effectiveness of this kind of meeting would be somewhat reduced if it were exposed to the public. The problem that we see has been one of notice. The act requires 1 week's advance notice of the subject matter of each meeting. Yet, the kind of informal session that I have in mind does not lend itself to a defined agenda.

I am advised that if the discussion of such sessions were kept tentative and exploratory, sessions could be held without attempting to formulate an agenda.

Regardless of whether such sessions may properly be considered as outside the act's scope, I am inclined to think we can adequately comply with the act's spirit by publicly announcing at least 1 week in advance that we propose to hold such an informal session—possibly in my personal office over coffee—and that the sessions would be open to the public.

Senator CHILES. How much room does your personal office have, and how much coffee do you have?

Mr. O'NEAL. We will give it a try, and see how many people show up.

Senator CHILES. Well, personally I think that it is good that you would go ahead and publish notice of such a meeting, unless the place where you are going to have it is unavailable to the public and not
really open to them. If so, I think you are running the risk that it is still sort of closed.

Your own office might be a little foreboding to people, and might not be. I do not know what your office looks like.

Mr. O’Neal. I do not think my office would be foreboding actually. The thought is that we would like to have some informal exchange of information. There are a lot of things that happen at the Commission that I know about that the rest of the Commissioners do not. I would like to keep them better informed.

Senator Chiles. I think those things are valuable. I think they also could be valuable to the public to get some kind of feeling for what is going on. People tend to think, and continuously say there won’t be the same kind of a frank discussion if you have public scrutiny. I know something about how human nature is in discussions like that, and after having seen what happened in Florida and up here in our markup sessions, which we used to close, there is no difference in the quality of the discussions.

You forget that anybody is around you, and if you have got the courage of your convictions you stand there and argue fully. And if you do not have courage, then you are not worth your salt to start with. But those people that do, before long find that if their voices are going to mean anything, they are going to have to argue their convictions.

And the same things that happened before, as far as taking off your coats and calling people by first name, all of those things that people said would all be done away with once we opened up the markup sessions, just have not happened. You go right back to doing business the way you always did it.

Mr. O’Neal. Well, I think our experience has been similar in the regular meetings that the Commission has. I think the first meeting that we had under the Sunshine Act was very quiet, but since we have had more and more experience, the members are much more open in what they say.

The only area where there is some restraint is, I think, when you start talking about personnel. Obviously, the framers of this act contemplated that those matters should not be discussed publicly, and sometimes, no matter what you are talking about when you are talking about the work of an agency, you tend to drift off into discussions about personnel. That is what I mean when I say there may be some restraint in that area, and since we do not know what the agenda would be really, we cannot be very specific. It would be difficult to identify what might be closed.

So that is really what I am getting at. I really do not think that this is going to be an overwhelming problem, and at least I am willing to try it and see what happens. If we need to make some adjustment, and if we think there needs to be a change in the law or something, we can come back to you with recommendations.

In sum, in spite of a few problems, I believe the Commission has properly balanced the right of public access against individual rights and the necessity for efficient and effective performance of its responsibilities.

I would like to mention that a thorough review and re-evaluation of our sunshine regulations will take place on or about the anniversary
date of the regulations. Included in this re-evaluation will be consideration of the recommendations recently made by Common Cause, some of which may have merit.

As one example, Common Cause has suggested that minutes be kept of open meetings which is a matter we will likely consider in our re-evaluation of the regulations.

I should say we do keep notes now and give copies to members of the public on request. We are not keeping a transcript of those meetings nor do we always keep detailed notes.

Incidentally, I should mention here that the regulations we have in effect now treat committees of Commissioners that are not authorized to act for the Commission as outside the act, and, therefore, not subject to the notice requirements or any other provisions of the Sunshine Act. I had some doubts about that provision when it was first put in the regulations, and since that time every committee meeting we have had—there have only been about two or three—have been open. We have gone back to the General Counsel specifically on this matter, and he agrees with me that the act would cover these kinds of meetings.

By the way, I do not think I introduced the General Counsel.

This is Mark Evans, who is our General Counsel.

That concludes my brief statement, and we would be happy to try to answer any questions which you might have.

WHEN IN DOUBT, OPEN

Senator CHILES. Well, certainly there is some doubt as to what a meeting is. One thing is clear, however, that the mere setting of a gathering is not determinative as to whether the gathering is a meeting under the purposes of the act.

Discussions held in the boardroom or the Chairman’s office are not the only gatherings covered. Conference telephone calls, meetings outside the agencies, are equally subject to the agency’s business being discussed.

You referred in your testimony to a meeting which the majority of the members of the ICC attended. This was hosted by the National Industrial Traffic League. You state that it was a working conference and luncheon to permit an informal exchange of views on informal developments in transportation regulations.

That description sounds to me as if the discussion could have involved some agency business, in view of the fact that the Interstate Commerce Commission regulates transportation. Before the Commission decided to attend, it must have seemed likely or at least possible that such agency matters might come up and be discussed. In fact, your testimony reflected such concern.

The Sunshine Act clearly instructs that when in doubt, open. In view of the doubt that obviously existed as to whether the Sunshine Act might apply or not, it would seem to me that you should have considered it a meeting and given notice and opened it up for observation.

You know, one of the purposes of the act, to me the strongest purpose, is to quell public distrust. I have always found, myself, that at the closed meetings that I attended, nothing went on that was illegal, immoral, improper, and that the public should not really have
been privy to. It was the closing of the door that made it so bad, that the public could wonder what went on. It seems to me that when people can wonder what the Interstate Commerce Commission is doing across the street meeting with some group, that that is the danger.

Mr. O'Neal. Mr. Chairman, you have just described this meeting perfectly.

There was nothing that occurred there that could not have been discussed in the public view. I never considered the meeting as a secret meeting. I consider the meeting as a mistake, I wish we had not done it. We won't do it again.

Senator Chiles. Well, we learn through those mistakes. I do not mean to say that we are not going to learn a lot. Some of them I am still learning from.

Mr. O'Neal. If you want to get into the question of whether we treated that meeting properly, I would like to give the General Counsel an opportunity to speak on that.

Senator Chiles. Well, good.

Mr. O'Neal. Well, I consider it a mistake, but I did and do not consider it illegal, and just for the record, I want to make that very clear.

Senator Chiles. Fine, I will accept that. I think there are exemptions, as we said when we put these exemptions in here, that people can use if they want to close many meetings that would not have to be closed, and really should not be closed. But they can take that exemption and close the meeting.

On the other hand, we did put the exemptions in areas in which there was some strong public purpose to close. Otherwise, perhaps we would not have gotten the act passed to start with, because people could say, well, wait a minute, this means that banks will go under, or people's reputations will be dishonored. Of course, it depends on how they are used, whether we end up with something that is valid or not. I do not want to get into a legal discussion because you probably could defend the closing of the meeting on a legal basis. That is why we put in the other consideration that after you find that you have a valid reason, what is the overriding public interest.

**NOTATION VOTING REVISITED**

One of the primary aims was to cast light on the Federal agency decisionmaking process in order to increase public understanding on how agency policy operates.

In your statement you indicated that most of your workload is disposed of by notation voting. Such voting is in writing, on the basis of written material, as I understand, and, of course, we do not prohibit that.

How does the public understand what took place in those meetings? What is available for them to look at later? You told me something about that, but I want to get that clearer in my mind.

Mr. O'Neal. Well, the way these cases are handled, there are several thousand cases voted on by the Commission every year in this way. The material that goes into the decisionmaking process, memos from the staff and so forth, are circulated to each office.
Usually there is a vote date by which votes are requested to be submitted. The members vote by indicating in a memorandum any changes they think ought to be made and, if there is a draft circulation, any ideas they have on the issues and then they also indicate which way they vote.

Many votes are issued with “I vote to do this subject to the following changes.”

All of that material, that is the voting material, shows what the member feels about the issue, not just whether he is for it or against it, and this is made available. This policy was initiated as a part of our regulations under the Sunshine Act.

Now, the way we read the Freedom of Information Act, which I think is the only act that would apply to the notation voting, only the votes—that is, an indication of whether you voted for or against it—would have to be made public. But we have gone way beyond that and have also made the narrative discussion of the members’ positions available as well.

Senator Chiles. I think that is good, especially since you are using it in such a large number of cases.

Do you place any specific limits on the types of matters that are disposed of by this method as opposed to an open meeting?

Mr. O’Neal. Well, I believe this gets into a basic question about the whole philosophy of how the agency has disposed of a lot of questions in the past. I think originally notation voting was designed to be used only in the less significant, the mundane, the routine cases. My opinion is that there has been a tendency to use it for more important cases as well.

What I have been trying to do in the last several months is move us away from that posture and start considering more of the more significant cases in conference, because I think that is where they should be discussed. I think you have a better collegial interchange when the members are all present and can discuss the various issues that are presented.

That is not just a sunshine issue, This is an issue that relates to the whole management by the agency of our entire decisionmaking process.

We said in the statement that we felt that there are more meetings being held now than there were before. I am reasonably comfortable that is accurate. But also I know it is true that we are taking up more significant issues in conference than we did in the past.

Senator Chiles. Well, it would seem important from the sunshine aspect to have the collegiate discussion. However, we did not prohibit notation voting because, again, we wanted agencies to be able to handle routine matters in that manner.

If notation voting is being used as a way of getting around meetings on important decisions, then I am sure the Congress will have to try to do something about it.

Mr. O’Neal. Well, I want to say we are not using it to get around the Sunshine Act. In fact, I think as we have indicated in the statement, that for our agency this act has been beneficial in many ways. I will continue to move the more important issues before the Commission to handle in conference.
WHO IS GUARDING THE PUBLIC INTEREST?

Senator CHILES. We discussed the fact that even though a discussion falls within one of the listed exemptions it could be in the public's interest to open such a meeting. Judging from your concurrence to ICC's implementing regulations, I believe you would agree with this approach. You exhibit deep appreciation for the fact that it often may be in the public interest to open a meeting that would fit under the exemption.

You pointed out that closing meetings to avoid financial speculation would only heighten speculation. I am afraid the public interest consideration is often slighted, if not overlooked entirely.

What steps have you taken in regulation to highlight this overriding concern in the law regarding the public interest considerations when your Commission is deciding whether to close a meeting or not?

Mr. O'NEAL. Well, I am not sure if I could point to any specific statement or guideline that we use, but I think we are well aware, at least I am, of the thrust of the act which is certainly to err in favor of openness, and that is the philosophy I try to follow, at least when I am voting.

Senator CHILES. Do your regulations require that the General Counsel make some recommendation in regard to this item?

Mr. O'NEAL. Well, the General Counsel, of course, must certify whether a meeting can be closed. There is nothing in the regulations that requires us to check with the General Counsel ahead of time on just the general issue of whether or not a meeting should be closed.

I can say as a matter of practice that this is done.

Senator CHILES. Our concern is that most of the regulations require the General Counsel to certify that a meeting may be closed, that it will fit within 1 of the 10 exemptions. It seems, however, that you should also have some provision and somebody to take cognizance of the public interest consideration. The General Counsel might say you could close it, but is there still overriding reason to open that meeting? If no one ever looks at that, then anytime it falls within 1 of the 10 exemptions and the General Counsel agrees, the meeting is closed.

So we are trying to find out if there is some highlighting of the public interest. One of the agencies requires a two-step process in its regulations.

Mr. EVANS, Senator, it may be worth mentioning that the practice in our agency is that the General Counsel's certification is only requested when a member decides he would like to propose that the meeting be closed.

There are many occasions where agenda topics are proposed which could be held in closed session, but the Commissioner who proposes it does not propose that the meeting be held in a closed session. In these cases the question whether it should be closed is never even approached.

The only time my certification is requested is when someone wants a meeting to be closed, and then every Commissioner is aware—and frequently I have made them aware in the course of memorandums that I have written—that they can always open a meeting in the public interest that could otherwise be closed. I think that this public interest
aspect is reflected in the votes of the Commission as to whether to close a meeting. Although it is not in the regulations, it is certainly part of the practice of the agency.

Senator Chiles. Then you only certify when one of the members asks that a meeting be closed?

Mr. Evans. That is right.

Senator Chiles. I would still feel more comfortable even when that step is taken if someone then took up the matter of the public interest: All right, it can be closed, member A wants it closed, is there still prevailing public reason why it should not be closed?

Mr. O'Neal. Well, I think this is something that is discussed. If this is handled in a notation vote, I would usually express my view on whether I thought it should be opened or closed.

Senator Chiles. I wish you would consider that when you are looking at your regulations.

Mr. O'Neal. We certainly will. I will take a look at adding that step. I guess we have not focused much attention on it because I do not really think it has been a problem.

I think that the issue has been confronted in each case so far as I am aware.

Senator Chiles. The item that we have raised also is the inability of the public to understand what is going on in many of the meetings because of the technical jargon and the way the agenda is written. What has the agency done in this regard?

Mr. O'Neal. Well, we have followed, I guess, an uneven practice. In some cases we have made documents available ahead of time before the meeting. Prior to every open meeting our office of Public Information gathers together all the information it can find and puts together a package for issuance to the press. In every case we make it known that staff members are available to discuss the issues after the meeting in case anybody is interested in what happened, and do not know what happened.

I think we have not followed a practice, though, of making public every staff document that has been used by the Commission in these meetings. Some have been released upon request, and others have not. So I guess this is another area for our reevaluation of the regulations.

Senator Chiles. How do you treat the recording of your open meetings?

Mr. O'Neal. The recording of them, in what way?

Senator Chiles. Do you prohibit the use of tape recorders?

Mr. O'Neal. No. There is nothing in the regulations that says anything about recordings or photographs or cameras.

Senator Chiles. You referred in your testimony to a closed meeting held in June of 1977 concerning the Alaska pipeline system. You stated that you released the transcript of this June meeting in August of 1977, even though the act did not require the release of discussions because it fell within one of the act’s exemptions.

I think you noted that you released it because of the great public interest in it. I am just wondering, with that great public interest, why was the meeting closed to start with, and what did the 6 weeks’ delay accomplish? Why couldn’t the meeting have just been held openly? Why wouldn't public interest have allowed the meeting to be held in the open to start with?
Mr. O'Neal. Some of the members feel that the meeting should have been open. There was discussion on that very point. The major reason the Commission majority decided to close the meeting was that this was a case in which there was a fairly highly charged atmosphere around the case. There were a lot of people who probably would show up at the meeting, and that it might be difficult to maintain an orderly discussion on this issue.

The issues were thoroughly discussed, though, and the transcript was, as I said, made available.

Now one thing we will be looking at as we reexamine the regulations is the speed with which we review the transcription this kind of a case, and decide whether or not to release it.

I think that delay from June to August is probably a little bit longer than it should be. I think we could probably speed that up.

Senator Chiles. Well, it seems to me that those issues, those reasons that you cited, could be very persuasive to somebody who is there. Those are the kind of meetings that the public ought to see. It seems to me that the transcript was interesting. In other words, the economy of the country was not going to collapse. There was not going to be a bank failure because of it. It was the fact that it was going to be a tough decision, and a lot of things you might prefer no one ever know about.

But really, when we are talking about this kind of government that belongs to the people, I think they are entitled to see that. I think that is very beneficial for them to see. You might have had a little television there at that meeting, I expect you would have had some.

Mr. O'Neal. I think we would have.

Well, I personally agree with what you are saying—

Senator Chiles. And 6 weeks later reading about it in a transcript is very sterile.

Mr. O'Neal. Yes, that is true. But so far as exposing the public to what went on, I think it does do that, but, of course, there is not as much coverage when you have a transcript released as there is when television is covering the proceeding.

Senator Chiles. Well, all the stories were written before that 6 weeks from leaks and other sources.

Mr. O'Neal. Well, the Commission's order in the case—which fully explained the basis for our decision—was issued immediately after the session. We also held a news conference to explain what the Commission had done. So, as far as knowing what happened and what the end result was, I think that was probably adequate.

Senator Chiles. Was the public interest served by closing that meeting?

Mr. O'Neal. Well, I am in an awkward position on this one.

Senator Chiles. Well, give me your view.

Mr. O'Neal. I voted to open the meeting, and one other member, Vice Chairman Clapp, also voted to open the meeting. I did feel, however, that the majority had a legitimate argument for closing. The case involved very important issues, and I think the members were concerned about any possible disruption in the meeting that might have caused us to have a decision that was not thoroughly thought through.
Senator Chiles. You mean some of your Commissioners felt they might have been intimidated if they had the meeting—

Mr. O’Neal. Well, you know, the atmosphere if there were television involved, for example, or if there was a huge crowd, I think, does raise a question as to whether the members are going to be able to think of all the issues that really should be raised in a case like that.

That was a complicated case. The Commission took an approach that was somewhat different than it had taken in the past, and not all the members were thoroughly familiar with the direction we were going in until we had a good discussion at the meeting. Furthermore it was clear that the case would be thoroughly litigated and there was concern about inadvertently contributing to the litigation issues. The case is currently before the U.S. Supreme Court.

So, I just think it was a close case on the question of opening or closing the meeting. I will be glad to supply a copy of the press release relating to this which we issued when we released the document.

Senator Chiles. Well, it just seems to me to be exactly the kind of meeting that the public could have been educated by, and could have understood something about how your agency works. I dare say very few people understand very much about the Interstate Commerce Commission, and yet it has tremendous power over our lives through the regulations that you have adopted. And now you are talking about regulatory reform, and about whether you should go into many areas.

All of that really could have been such an educational thing. I am just disappointed that the public was denied that, because I think this Government belongs to them, belongs to the people. It does not belong to your members. It does not belong to us in the Congress, and somehow we continue to take it on ourselves to act as if we know what is best for them. We will spoon feed them or we will give them what is best. Then we wonder why they do not trust us, and why we have this miserable rating of public confidence.

I think a lot of it, we bring about by our own actions.

We thank you very much for your testimony.

Mr. O’Neal. Thank you.

[The prepared statement of Mr. O’Neal follows:]
Mr. Chairman, Members of the Subcommittee:

I am pleased to appear before you today to present the views of the Interstate Commerce Commission on a subject of considerable interest both to the Congress and to the public -- the Government in the Sunshine Act. The Sunshine Act was a substantial legislative achievement, and I am glad to be able to report that our experience since it took effect nine months ago has been favorable.

Although the provisions of the Sunshine Act have limited to a certain extent our prior flexibility in terms of the timing and agenda of our meetings, we have had no serious problems of implementation. The vast majority of our meetings since March of this year have been open to the public, and many of those meetings have been well-attended by members of the public and representatives of the media. The discussion at the open meetings has frequently been lively. In our judgment, the Act's open-meeting requirement has gone far toward achieving the Congressional purpose of increasing public awareness of and confidence in the collegial decision-making of Federal agencies.

Shortly after it was signed into law, the Commission moved aggressively to implement both the spirit and the letter
of the Sunshine Act. We believe that our Sunshine regulations and our interpretation of them with respect to specific meetings clearly illustrate that the Commission has willingly complied with the Act's provisions.

Since our regulations were adopted, 81 percent of all meetings held by the Commission and its divisions have been completely open to public scrutiny, and portions of some of the remaining 19 percent of our meetings have also been open. Not only have most of our recent meetings been open, but also there have probably been more total meetings since implementation of the Act. The Act certainly has not created any major impediment to our holding meetings.

Although the number of meetings we hold has been rising, I should mention that notation voting -- that is, voting in writing without a meeting being held -- is still the principal means through which we dispose of most of our workload. The Commission and its divisions vote on a very large number of cases daily through this technique, frequently on short deadlines. We feel that notation voting is a necessary tool to deal with the Commission's workload.

In addition to opening most of our meetings, we have voluntarily released the transcripts of several of our closed meetings, even when the Act would have permitted us to withhold disclosure of the transcript. The entire transcripts of four
of the ten closed Commission and division meetings have been released, while two of the other transcripts were partially released. One of these released transcripts was of our closed meeting in which we determined to suspend tariffs filed by owners of the Trans-Alaska Pipeline System. We were not required by the Sunshine Act to release this transcript. We determined, however, that its release would serve the public interest and would be of value to all parties with an interest in the case as well as the public.

The Commission has gone beyond the literal requirements of the Act in other ways besides the release of transcripts. For example, the Commission has attempted to disseminate widely our public notices by maintaining a mailing list of persons who have requested notice of our meetings. Also, our regulations permit any person to petition the Commission to open a meeting proposed to be closed.

Although I believe the Commission has successfully implemented regulations which comply with the provisions of the Sunshine Act with no major problems, we have experienced some difficulties of which I think you should be aware. These difficulties relate principally to determining what is and what is not a meeting of the Commission within the meaning of the Act and to adapting to the one-week notice requirement in establishing an agenda for our meetings.

- 3 -
As Chairman of the Commission, for example, I have felt an increasing need to meet regularly but informally with the other members of the Commission to exchange general information concerning matters affecting the agency, and to discuss general problems concerning the Commission's operation. For the most part, I would have no hesitation about opening such informal sessions to public observation -- although in all candor I expect that the effectiveness of this kind of meeting would be somewhat reduced if it were exposed to the public.

The problem has been one of notice. The Act requires one week's advance notice of the subject matter of each meeting. Yet, the kind of informal session I have in mind does not lend itself to a defined agenda. I am advised that, if the discussion at such sessions were kept tentative and exploratory, the sessions could be held without attempting to formulate an agenda.

Regardless of whether such sessions may properly be regarded as outside the Act's scope, I am inclined to think we can adequately comply with the Act's spirit by publicly announcing at least one week in advance that we propose to hold such an informal session -- possibly in my personal office over coffee -- that the session will be open to the public, and that the subject matter of the meeting will be general matters of common concern to the members of the Commission but will not include discussion of any specific pending proceeding or formal agency action.
One recent session, highlighted in the recent Common Cause study of Sunshine Act compliance, also warrants the Subcommittee's attention. It illustrates the extent to which reasonable persons may disagree over the meaning of the word "meeting." The National Industrial Traffic League, one of the leading representatives of the Nation's consumers of transportation services -- the shipping public -- invited the members of the Commission to attend a working conference and luncheon sponsored by the League's officers to permit an informal exchange of views on general developments in transportation regulation. Before accepting the invitation, I consulted with the Commission's General Counsel at some length concerning whether attendance by a majority of the Commissioners at such a conference would contravene the Sunshine Act's provisions. We ultimately concluded that the Act would not apply because the conference would not be a meeting within the Act's definition -- that is, it would not involve deliberations by members of the Commission that would determine or result in the joint conduct or disposition of official agency business.

Since it was our understanding -- which later proved correct -- that the discussion at the League's conference was to be general and informational, with no discussion of any
matter likely to be pending before the Commission, we concluded that the session was not within the Sunshine Act's coverage. Common Cause strongly disagrees with that legal conclusion, although its study does not reflect the analytical basis of its disagreement. I am satisfied that the Commission's attendance at the League's conference did not violate the provisions of the Sunshine Act.

In sum, in spite of a few problems, I believe the Commission has properly balanced the right of public access against individual rights and the necessity for efficient and effective government performance of its responsibilities.

So far I have been talking about the open meeting requirements of the Sunshine Act, which I believe are probably of foremost concern to this Subcommittee. I would now like to make brief mention of the second major provision of the Act -- the section regarding ex parte communications. This section amends the Administrative Procedure Act by expressly prohibiting any ex parte contact between agency members or decisional employees and persons outside the agency regarding the merits of any formal Commission proceeding. This same prohibition, as you may know, has long been a part of the Interstate Commerce Commission's Rules of Practice and its Canons of Conduct (for Commission personnel), and thus as far as this agency is concerned, the Act has made little if any substantive change.
Finally, I would like to mention that a thorough review and re-evaluation of our sunshine regulations will take place on or about the anniversary date of the regulations. Included in this re-evaluation will be consideration of the recommendations recently made by Common Cause, some of which may have merit. As one example, Common Cause has suggested that minutes be kept of open meetings, which is a matter we will likely consider in our re-evaluation of the regulations.

Thank you for this opportunity to comment on the Sunshine Act, and I will be glad to respond to any questions you may have.
Senator Chiles. Our next witness will be Mr. Fred Favor of the Local and Short Haul Carriers National Conference.

Mr. Favor, to use your own words, your association is mostly comprised of the "Mom and Pop" family businesses who are involved in the local hauling and pickup and delivery services. That is correct, is it not?

Mr. Favor. Yes, sir.

Senator Chiles. So your members are mostly small businessmen and women. I appreciate the care and concern that went into your opening statement. We will insert it in the record in full.

I want to ask you to condense your presentation to us, if you will, in our interest of time.

Perhaps if you start on page 3, since you outline there the frustrations that you were having in meeting with the ICC, and the apparent treatment that others seemed to enjoy. Then I think by the time you get to page 6 you will have outlined your case or our interest in your case clearly.

Mr. Favor. Mr. Chairman, we do have a 2½- to 3-page statement which does exactly what you stated.

Senator Chiles. Fine.

TESTIMONY OF FRED G. FAVOR, EXECUTIVE DIRECTOR, LOCAL AND SHORT HAUL CARRIERS NATIONAL CONFERENCE, ACCOMPANIED BY EVERETT HUTCHINSON, ATTORNEY

Mr. Favor. May I introduce on my right Mr. Everett Hutchinson of the law firm in Washington of Fulbright & Jaworski, which represents the conference on some matters. Mr. Hutchinson is a former Commissioner at the ICC, from 1955 to 1965. He served as Chairman in 1965, and was Deputy Under Secretary of Transportation in 1967 under President Johnson.

His firm has been working for us over 2 years now, on some of these matters. On my left with the law firm also, is David Sutherlund.

Our experience with the Interstate Commerce Commission the last few years has raised fears that this agency is seeking to abandon its congressionally mandated role.

We believe the agency is in part misusing the Sunshine Act to accomplish administratively what Congress has not sanctioned. It is now nearly impossible to obtain two-way communication at the Commission. We believe that this is contrary to the intent, if not the letter, of the Sunshine Act.

This subcommittee is aware of the conference's efforts to meet face to face with the ICC in an honest effort to discuss the philosophies behind the regulatory changes. We requested this by letter dated August 1, 1977, and on August 16, 1977, the ICC Chairman by letter declined to grant the forum request, suggesting that we testify instead at one of the six regional hearings on a limited subject.

On August 17, 1 day after an ICC ethics debate, six of the eight Commissioners held a private meeting and a luncheon with the officers of a major shippers association in a Washington hotel. While the Commission may or may not have intended to violate the Sunshine Act, the fact that the Chairman granted that private meeting while refusing the small business truckers an open meeting was discriminatory.
The August 17 meeting received extraordinary attention by him, as we pointed out in our complete statement. A vote was—no vote was taken on our request. He also asked for advice from the ICC General Counsel who said the private meeting in a hotel was not an agency meeting and therefore not under the purview of the Sunshine Act.

It was this discrimination by the ICC against the small businesses that prompted us to seek details and documents from the ICC under provisions of the Sunshine Act, and the Freedom of Information Act. The shippers request to the ICC was dated August 5, 1977, we understand, 4 days after our request for an open meeting.

The topics discussed were major transport issues, some before the Commission. I might add parenthetically here, Mr. Chairman, that we did ask for summaries of discussion copies in our Freedom of Information filing. We received nothing except the chairman's assertion that no substantive issues were discussed, and that nothing in the way of business coming before the Commission was determined.

Attached to our complete statement is a roughly chronological statement of events, and we ask you to juxtapose these against a single August 5 letter which got immediate results for a more powerful group. Our listing you will note is four pages long.

In addition, we ask that certain materials which we submit and which are too voluminous for photocopying be made part of the record. I have them here.

On August 20, the ICC issued a press release announcing that a hearing on trucking regulation would begin November 10. Even though we had sought such a meeting for several weeks—we were never officially informed that the meeting sought had been scheduled, although the ICC press release specifically mentioned our conference as one of those organizations which wished to be heard. Deadline for participation notices to the ICC was October 27. Press coverage appeared on October 24. In fact, we were not furnished ground rules for our portion of the November 10 hearings, when we finally learned that we had a portion of it, until November 2, much too late to circulate the word properly.

We proceeded as best we could.

After the August 17 meeting the details were disclosed in the press, we had written each Commissioner asking whether the conference should be granted an open forum. Two did not respond, and we have been unable to obtain a satisfactory reason as to why they did not.

In addition to the circumspect behavior the August 17 meeting represents, it appears that a negative result of the Sunshine Act has been to cause agencies to stifle communication rather than facilitate access.

We thank you for your attention and the opportunity to voice our concern.

Senator CHILES. I thank you for your statement.

Mr. O'Neal, the Chairman of the ICC, noted in his statement that by having a meeting with the National Industrial Traffic League, the agency was making a legitimate effort to make themselves more accessible to members of the transportation community.

I take it you would agree with that as being a good goal for the ICC?

Mr. FAVOR. Yes, sir, Mr. Chairman. We say so in the complete statement that we object to no one meeting with the Commission, even

1 See attachments to Mr. Favor's prepared statement.
under the circumstances that occurred on August 17. We just feel there should be the same access to everyone else.

Senator Chiles. Well, I certainly wish you luck in getting your meeting with the ICC, and if you are successful, I certainly hope that that meeting is held in public.

Mr. Favor. Well, we did get a meeting of sorts. It was not as we requested. We wanted an open two-way discussion-type meeting, and got a hearing instead or what amounted to a hearing, so we did not get what the NIT League got on August 17 in being able to discuss informally some of the problems.

Senator Chiles. Well, I think there is value in the type of meeting that you are talking about. Sunshine would not try to prohibit that, but we would like it to be in the open when there are discussions, especially with ingroups which the agency is regulating. We think it could be beneficial to the groups and to the regulatory agency, but we think the public is also entitled to be able to view that meeting, and know what takes place just as I think they should have been able to do in the meeting across the street. I hope you will be successful in the future in getting some kind of discussion with the ICC, and I hope it will be public as I said.

Mr. Favor. We agree, Mr. Chairman, and I might point out that one of the reasons we wanted an open meeting was that we felt that full disclosure would come out on our side.

Senator Chiles. Thank you, sir.

Mr. Favor. Thank you.

[The prepared statement of Mr. Favor follows:]
STATEMENT
of
The Local and Short Haul Carriers National Conference
before the
Subcommittee on Federal Spending Practices
and Open Government
U. S. Senate Committee on Governmental Affairs
November 29, 1977

The Local and Short Haul Carriers National Conference welcomes this opportunity to testify regarding its experiences connected with the implementation of the "Government in the Sunshine Act" which became effective March 11, 1977. This organization -- a small trade association located in Washington, C. C. -- represents small for-hire trucking companies, many of which are "mom and pop" family businesses classified by the Interstate Commerce Commission as Class III motor common carriers engaged in pickup and delivery services in metropolitan areas as well as in rural communities. Since we represent truckers, some Federally regulated and some not, our experience with the Government in the Sunshine Act is in this case limited to the Interstate Commerce Commission which grants certificates of authority to operate to many of our members, or registers state certificates of intrastate for-hire common carriers. "Common carrier" means the trucker is required to serve everyone upon demand, similar to the way taxicabs are legally obligated in the District of Columbia. The Conference also represents those for-hire exempt carriers that operate solely in commercial zones exempt from regulation.

Our experiences with the Interstate Commerce Commission in the past several months have raised grave fears and doubts that this oldest of Federal agencies, the
original consumer interest agency, is seeking to abandon its role as regulator to the great detriment of small businesses and the quality of life in rural America and urban center cities, and is, in part, misusing the Sunshine Act to accomplish administratively what Congress has not sanctioned. It is now nearly impossible to obtain two-way communication at the Commission. Office appointments are difficult to get. Oral hearings are rare. Large informal meetings are certainly not routinely granted. And witnesses are precluded from asking questions of commissioners at public hearings.

We do not wish to involve this subcommittee in the substantive issues of our problems with the Commission. They are more properly within the jurisdiction of other Congressional committees. We would merely point out that whatever the merits of any one of the Commission's proposals to lessen regulation, the proposals in the aggregate achieve the very result which Congress has refused to enact. Certainly there are adequate indications that the ICC Chairman does not wish to give the Congress an opportunity to react to agency actions. We believe that this is contrary to the intent, if not the letter, of the Sunshine Act, which is to provide more access to the governmental process.

As a small business industry, we have long been concerned with the regulatory decisions of the ICC, but recently most seriously with its arbitrary recommendation that exempt commercial zones be expanded in blanket fashion nationwide. There was no public outcry for such action, no sound factual data upon which to base it; just a 5-4 vote of commissioners (taken after one member known to oppose it had resigned) that such a change ought to be made. In rushing to what appeared to be a pre-determined decision the Commission denied numerous and frequently-made requests for an oral hearing, including one from the Conference. While the decision (Ex Parte No. MC-37, Sub-No. 26) is currently before a Federal court for review, it points up to a great degree the ongoing attempt of the ICC to reduce its workload.
by widening its areas of non-involvement. This is in disregard of the statutory responsibility imposed by Congress upon the Commission. The fact is for-hire truckers now operating in the exempt commercial zones actually are seeking regulation and the stability it would bring to local freight transportation service for the consumer.

This subcommittee we know is already aware of the Conference's efforts to meet face-to-face with the ICC in an honest effort to discuss the policy and philosophy behind the Commission's recent regulatory changes and how those changes impact upon local and short haul carriers which are largely small businessmen. We sought a forum to provide two-way communication and we wanted it open to the public. We made our request in a strongly worded letter which articulated local and short haul truckers' frustrations at being deregulated out of business by a Commission which seemed either unaware or uncaring. This letter was sent on August 1, 1977. On August 16, the ICC Chairman by letter declined to grant the Conference its requested forum, suggesting instead that we testify at one of six regional hearings on a limited subject scattered across the nation. As one of our companies put it, that was tantamount to a veterinarian's saying: "Your horse is sick? Well, we're having a meeting in Dallas to discuss vertebrates next week." On August 17, 1977 --- as disclosed by the Washington Star --- one day after an ICC ethics debate, six of the eight commissioners held a private meeting and luncheon with the officers of a major shippers association in a Washington hotel. The agenda we learned later contained several items of major concern to us which were before the Commission. While the Commission Chairman may not have intended to violate the Sunshine Act, the fact that he granted that private meeting while refusing the small business truckers an open meeting was discriminatory.

What added to our concerns is that one commissioner wrote us that the Chairman normally does not poll fellow commissioners regarding meetings such as the forum
we requested. Yet, the Chairman wrote us that he polled the other commissioners regarding the shipper meeting, pointing at least to the fact that this meeting received extraordinary attention by the Chairman. He also asked for advice from the agency general counsel who opined that the private meeting in a hotel was not an "agency meeting" and therefore not under the purview of the Sunshine Act. He attended the meeting and luncheon with the commissioners.

It was the discrimination by the ICC against the carriers we represent that prompted us to seek details and documents from the ICC under the provisions of the Sunshine Act and Freedom of Information Act. This was after the ICC Chairman wrote us on September 7, 1977 denying that he had closed the door on the forum request, contending that the shipper meeting was neither private nor unfair, and promising to see that the local and short haul trucking industry receives proper attention. Curiously, the Conference never received the original of that letter. What we did receive was a hand-delivered photocopy on September 9, 1977, with a note from the Chairman's office which said the letter was mailed on the 8th but that the Chairman felt it should have been hand-delivered. Neither did the Conference receive a copy of the letter to the Commission from the shipper group inviting the commissioners to the August 17 luncheon which the Chairman said was enclosed with his letter of September 28 responding to our Sunshine Act inquiry. The shipper request to the ICC was dated August 5, 1977, we understand, four days after our request for a forum. The topics to be discussed at the shipper meeting, billed as "The Second Annual Report to the Interstate Commerce Commission, The Shipper's Viewpoint on Transportation," dealt with major transport issues.

ICC Secretary Homme provided us a few more details concerning ICC counsel's opinion that the August 17 meeting was not an "agency meeting" because it did not involve "deliberations (that) determine(d) or result(ed) in the joint conduct or dis-
position of official agency business." (We were not provided materials upon which that opinion was based.) Yet, the ICC, in particular its Chairman, has been under attack by the motor carrier industry for having prejudged these vital transport issues.

To add to the importance of what transpired at the ICC-shipper meeting, the companies of at least two of the shipper association officers are members of the Committee Urging Regulatory Reform for Efficient National Trucking (CURRENT) an association whose goals, we believe, are to deregulate for-hire truck transportation, particularly the small business segment of it, so as to achieve further concentration of control of pricing to their advantage as large and powerful business concerns. This meeting behind closed doors thwarted the concept of Government in the Sunshine.

Though we still aren't finished with our saga about trying to gain an open meeting with the Commission, let us point for a moment to the Commission's unique procedure in officially announcing in the Federal Register its Sunshine meetings. In at least three instances, the ICC has caused to be published in the Federal Register Sunshine meeting notices after the actual meeting date. The ICC in the September 22, 1977 issue of the Register announced the agenda for a September 20 meeting which was to be partially open and closed. The Register noted it received the agenda for publication at 4:21 p.m., September 19. Secondly, in the September 28 issue of the Register, the agenda for a 3 p.m., September 26 meeting (closed) was filed at 10:07 a.m. of the meeting day. In the September 20 issue of the Register, the ICC announced a 3 p.m. September 14 meeting which has been filed for publication on September 16.

More recently the ICC caused to be published what we consider to be a classic. The case involved was Ex Parte MC-343, Nationwide Increased Freight Rates and Charges, 1977 for railroads. The item was an announcement of an oral hearing which was scheduled for November 8. The item was published in the November 8 Register and was submitted for publication November 7. The notice was dated November 2.
and among the warnings it posed was a filing deadline of November 4. While this item was not listed among the Sunshine meeting notices, we believe this example shows a clear failure to observe the Sunshine Act. Certainly the blame for such flagrant abuse can be shoved onto the shoulders of anyone within the bureaucracy, but we think it also shows the basic disregard by the Commission for congressional mandates, including the National Transportation Policy. We fear the ICC is out to change policy affecting our industry as fast as possible and with as little interference from us as possible.

But back to our saga...

Unbelievable effort was required to obtain our own open forum at the Commission. Rather than relate it here, we are attaching a roughly chronological listing of major activities which we ask you to juxtaposition against the single August 5 letter which got immediate results for a more powerful group. In addition, we ask that certain background materials which we submit and which are too voluminous for photocopying in the same quantity as this prepared statement be made a part of the record.

On October 20, the ICC issued a press release announcing that a Washington, D. C. hearing on trucking regulation would begin November 10. Even though we had for several weeks sought a Washington forum, we were never officially informed that the meeting sought had been scheduled, although the ICC press release specifically mentioned our Conference as one of those organizations which wished to be heard. Deadline for participation notices to the ICC was October 27. In one instance the ICC called in the story to a weekly trade publication after closing hours on its deadline day. Had a reporter not stayed late that day, the news (the ICC version of it) might not have reached thousands of truckers. We were precluded from issuing a press release of our own not only by the timing but also for lack of
official word. In fact, we were not furnished ground rules for our portion of the
November 10 hearing, when we finally learned we had a portion of it, until November 2,
much too late to circulate the word properly to our carriers. In spite of at least three
earlier letters requesting the forum and an opportunity to be heard, the Conference
was required to repeat its request to the ICC Secretary's office by the deadline of
October 27 to obtain needed hearing time. To some, these incidents may seem minor,
isignificant or at best the result of laxity. But we believe the Commission led by
its new Chairman is motivated by political considerations rather than dedication to
regulate motor transportation for the benefit of the consumer as mandated by the Con­
gress.

We call your attention to the following:

---An effort by the Chairman to reduce the size of the ICC to seven
members. This has brought considerable pressure to bear on
commissioners due for reappointment and, we believe, has
forced others into early retirement. Our members view this
as reverse "packing" of the Commission. By law there are
eleven required.

---Authorization by the Chairman of an ICC press release regarding
imposition of new time limits for considering cases before the
Commission. The press release said the necessity of time
limits reflected a unanimous opinion of the commissioners
when in fact they had not been consulted. The Chairman was
forced to apology publicly for this by his peers.

---The frequency that the Chairman's name now appears on the
headings of ICC press releases and reports in a reversal of
previous procedures.
---A far too liberal speaking engagements policy which could explain office foul-ups.

---The Commission Chairman last month told a gathering of independent truckers that he is giving them priority status.

At the November 10 hearing, after calling for a two-way exchange of information, the Chairman advised "We aren't here to answer questions." Thus our hopes for an open and meaningful discussion of vital issues were thwarted. Although we had been granted adequate witness time, the Chairman used our own tentative schedule, shortened for his convenience, to cut us off before statements could be completed adequately summarizing the rapidly occurring demise of small business in trucking.

After the August 17 meeting details were disclosed in the press, we wrote each commissioner asking an opinion on whether or not the Conference should be granted a forum. Two did not respond, and we have been unable to obtain a satisfactory answer as to why they did not answer our inquiry. It appears that one negative result of the Sunshine Act has been to cause agencies to shrink from the light of openness and to stifle communication rather than facilitating access.

It should be recognized at this point that as a Conference we do not object to the ICC or any other agency meeting with members of the industry it regulates, the shippers served, and the consuming public. However, a dual standard of granting one group of major shippers a private full Commission audience on their turf and not granting an open two-way meeting for small for-hire trucking companies constitutes discrimination in violation of the National Transportation Policy.

What we are saying is that there are strong indicators that the Commission has over reacted to political pressures for reform of the industry, is moving too fast
too soon without providing those affected adequate opportunity to be recognized and
heard, and is not adequately consulting Congress on the issues. Based on our visit
with the ICC on November 10, we wonder if we were listened to by some commis-
sioners. We represent small motor carriers who are on the front line of this fight
over regulatory policy. Local and short haul common carriers operate over 70 per-
cent of for-hire trucks. Yet we estimate that only about 11 percent of those regulated
carriers earn more than $1 million in annual gross revenues. Because of our gen-
erally small individual company revenue size, we desperately need access to the
Federal decision-making process to avoid being wiped out. We feel the Commission
is inhibiting this access and could better solve its workload problems by stream-
lining internal operations and seeking from Congress adequate funds and staff to do
the job Congress has given it. We rely on an informed Commission and on fair com-
petition in order to perform our role in the total transport effort.

May we inject at this point a very real concern about the quality of life in
America...a recent Harris survey shows that Americans feel the quality of their
lives has worsened. This is not news to us because we are the small businesses
which deal daily with other businessmen who are only too aware of the economies
of life. Prices and inflation are too high. It is not an exaggeration to say that the
Nation's needs are supplied by truck. By disruption of truck transportation, the
bureaucracy will have succeeded in further reducing the quality of life. It is not
truck rates that increase the cost of manufactured goods. Rather it is fault of those
who equate efficiency of production with quality of product. The local cartageman
and short haul motor carrier already are the most efficient because of keen competi-
tion; to be otherwise would be fatal. These carriers survive because of service.
It would be wrong to attempt to defuse a consumer revolt against products by punish-
ing the guy who delivers the product.
The efforts of this subcommittee in seeing to it that these issues obtain full disclosure in the public interest are appreciated.

Thank you for your attention and the opportunity to voice our concerns.

Respectfully submitted,

Fred G. Favor
Executive Director
Local and Short Haul Carriers
National Conference
1616 P Street, N. W.
Washington, D. C. 20036
Local and Short Haul Carriers
National Conference's recent efforts
to be heard at the Interstate Commerce Commission

10-14-75
Formal request by Conference for an oral hearing in the commercial zone case. Denied.

4-14-76
Conference's oral hearing request reiterated. Denied.

8-1-77
Letter requesting informal meeting with the Commission. Copies were furnished to Interstate Commerce Commissioners; All Members of Congress; Hon. Stuart Eizenstat, Assistant to the President for Domestic Affairs Policy, The White House; Hon. Bert Lance, Director, Office of Management and Budget; Hon. Brock Adams, Secretary of Transportation; Hon. A. Vernon Weaver, Administrator, Small Business Administration; Hon. Anthony S. Stasio, Acting Assistant Administrator for Advocacy and Public Communications, Small Business Administration; Mr. Bennett C. Whitlock, Jr., President, American Trucking Associations, Inc.; Mr. Robert Shertz, Chairman of the Board, American Trucking Associations, Inc.; Mr. C. James McCormick, Chairman, STRONG Committee, American Trucking Associations, Inc.; Mr. John M. Kinnaird, Vice President, Government Relations Division, American Trucking Associations, Inc.; Mr. John Lewis, President, National Small Business Association; Mr. Wilson Johnson, President, National Federation of Independent Business, Inc.; Mr. Lloyd Espinosa, President, National Conference of State Transportation Specialists; Mr. Paul Rodgers, General Counsel, National Association of Regulatory Utility Commissioners and Transportation trade press.

8-1-77
Letter requesting support of Small Business Administration sent to Honorable A. Vernon Weaver, Administrator.

8-1-77
Letters sent individually to the ICC commissioners requesting support for the informal meeting.

8-1-77
Letter sent to the president of the National Federation of Independent Business, Inc. seeking its support.

8-1-77
Letter sent to the president of the National Small Business Association seeking its support.

8-1-77
Letter sent to Honorable Brock Adams, Secretary of Transportation, request DOT to co-sponsor the informal Washington meeting.

8-1-77
Letter sent to Honorable Stuart Eizenstat, The White House, requesting support for the ICC meeting.

8-1-77
Letter sent to Director, National Association of Regulatory Utility Commissioners, requesting its support for the ICC meeting.

8-1-77
Letter sent to SBA Advocacy office head requesting support within SBA.

8-1-77
Press release on contents of August 1, 1977 letter to ICC Chairman O'Neal prepared and distributed.

8-3-77
Story published in daily Traffic World.
Letters sent to the chairmen and members of the following Congressional committees seeking support for the ICC meeting:

- Senate Commerce, Science and Transportation Committee
- Senate Select Committee on Small Business
- House Interstate and Foreign Commerce Committee
- House Small Business Committee

Letter sent to legislative aide to Representative John B. Breaux in response to a telephone inquiry concerning policy considerations regarding economic regulation of the small motor carriers.

Letter sent to over 200 members of the Short Haul Survival Committee, an ad hoc group of short haul motor carriers fighting the ICC's commercial zone decision, advising them of the August 1, 1977, letter to the Commission.

Story published in *Transport Topics*.

Story published in weekly *Traffic World*.

Conference staff met with three Small Business Administration advocacy aides.

Special bulletin mailed to Conference members regarding developments.

Letter mailed to 10,000 non-Conference local and short haul motor carriers advising them of developments.

Letter written to Chairman O'Neal by Small Business Administration supporting Conference request for a meeting.

Hundreds of communications with ICC and members of Congress made by local and short haul motor carriers requesting support for the ICC meeting; hundreds of letters sent by members of Congress to ICC on the matter.

Letter written by ICC Chairman O'Neal to Conference denying August 1, 1977, request for a public informal meeting with the ICC.

Seven members of ICC and General Counsel met privately and had lunch with National Industrial Traffic League in response to an August 5, 1977, letter request.


Letter sent by Conference to Chairman O'Neal protesting this discriminatory treatment. Copies: same as August 1, 1977 letter.

Special bulletin mailed to Conference members advising of developments.

Press release on contents of August 23, 1977, letter to Chairman O'Neal prepared and distributed.
A second letter to each ICC Commissioner sent requesting support and statement of position on the matter.

A second letter urging support of the National Association of Regulatory Utility Commissioners sent to that organization.

A second letter sent to Honorable Brock Adams, Secretary of Transportation.

A second letter sent to SBA Administrator Vernon Weaver.

A second letter sent to Honorable Stuart Eisenstat, The White House.

Copies of Conference August 23, 1977, letter to ICC Chairman O'Neal given widespread industry circulation.

Memorandum regarding developments sent to all members of the 95th Congress.

Story published in Washington Star.

Letter written to Conference by ICC Commissioner Murphy advising of circumstances under which a response by the Commission to the Conference's August 1 letter occurred.

Letter written to Conference by ICC Commissioner Gresham advising of his position.

Letter written to Chairman O'Neal by Honorable John Elliott, Commissioner, New Mexico State Corporation Commission.

Letter circulated to NARUC Committee on Motor and Air Carriers by National Association of Regulatory Utility Commissioners headquarters advising of Conference predicament.

Emergency meeting of Conference Board of Directors held in Chicago.

"Sunshine" open meeting of Commission monitored.


Press release on Freedom of Information Act filing prepared and distributed.

Letter from Small Business Administration received by Conference advising the agency will persevere at ICC on Conference's behalf.

Letter from Commission Vice Chairman Charles L. Clapp providing his position on Conference's requested meeting.

Letter from Commission Chairman O'Neal further stating his position.
Letters written responding to both Vice Chairman Clapp and Chairman O'Neal, circulated to all commissioners.


Story published in Transport Topics.

Conference filing made in Ex Parte No. MC-106 protesting imposition of a filing deadline while hearings being held reiterating Conference request for a Washington meeting.

Story published in Transport Topics.

Press release on Conference September 19 filing prepared and distributed.


Letter from Commissioner George M. Stafford stating his position.

Conference letter sent to Commissioner Stafford.

Letter sent to President Carter regarding urban policy.

Press release regarding letter sent to President Carter on urban policy as related to trucking prepared and distributed.

Story on possible Senate hearings regarding Sunshine Act aspects published in Traffic World.

Story published in Washington Star.

Story published in Traffic World regarding September 28 letter to President Carter.

Letter from Chairman O'Neal further responding to Conference's Freedom of Information Act and Sunshine Act request for details of the August 17 ICC-NIT League meeting.

Conference letter sent to Chairman O'Neal responding to him, circulated to other commissioners and industry.

Press release prepared and distributed on further details of August 17 meeting.

Story published in Transport Topics.


ICC issues press release advising a Washington Conference on trucking regulation will be held November 10, 11, and 12.
Mr. JOHN E. WAGNER,
President, The Local and Short Haul Carriers National Conference,
Washington, D.C.

DEAR MR. WAGNER: Your letter of August 1, 1977, is indeed a strong indictment of many of the Commission's recent actions in the field of motor carrier regulation. I gather that you do not expect me to respond to, or even comment on, the many questions which you have raised, but rather that you seek a more open and general forum in which your members' problems can be aired.

It may be, as you allege, that we have acted without full appreciation of the impacts of our actions upon the local and short haul motor carriers. If this is the case, that situation must be corrected. No one can be a stronger believer than I am in the principle that action by the government should be taken only when the consequences of the results are understood and predicted as accurately as possible.

Your proposal for a day-long open conference on the situation of the local and short haul carriers is an interesting one. As you probably know, I have scheduled a series of public meetings on the general subject of motor carrier regulation, and you can assume from that action that public dialogue on regulatory questions has my strong support. I hope that your members will be able to participate in these hearings.

Please accept this reply as being made on behalf of the entire Commission.

Sincerely yours,

A. DANIEL O'NEAL, Chairman.

[From the Washington Star, August 23, 1977]

ICC ETHICS DEBATE FOLLOWED BY A FREE LUNCH

(By Stephen M. Aug)

Last Tuesday members of the Interstate Commerce Commission spent an hour and a half arguing over the ethics of allowing those affected by ICC decisions to buy their lunches.

They didn't reach a formal decision, but a hint of their leanings might have come the next day, when they accepted cocktails and lunch from a shipper association.

Six members of the agency trooped across Pennsylvania Avenue from the ICC building at 12th Street and Constitution Avenue to a private dining room at the Washington Hotel, where they dined with top officials of the National Industrial Traffic League after spending about 45 minutes in a private session discussing transportation.

The NIT League is an organization that represents about 1,800 business firms, chambers of commerce and other organizations that are involved in transportation. The organization is frequently before the ICC urging it to reject higher rates for railroads or truckers.

The meeting and luncheon were all the more unusual for other reasons. First, officials at both the Association of American Railroads and the American Trucking Associations said their top officers have not had the benefit of private sessions with the commissioners as a group. The NIT League is usually opposing actions proposed by members of both the AAR and the ATA.

Second, officials at three other regulatory agencies say they do not meet privately with industry groups—though they have been public sessions at the agencies' offices.

Advised of the nature of the NIT League meeting, CAB General Counsel James C. Shultz said that while he had not studied the situation, "it's fair to say that the general board practice for presentations of this nature would be through an announced meeting in the board's offices."

Many regulators have become more sensitive in recent years to the propriety of meeting privately with groups that could be affected directly by agency decisions. As a result, practices such as the public meetings at the CAB and FCC have come about.
Further, passage of the Government in the Sunshine Act also has made regulators more conscious of avoiding private sessions. The new law which went into effect early this year requires all multimember agencies to hold their meetings in public and give advance notice of their intention to meet.

In this case, six of the eight members of the ICC, accompanied by the agency's chief lawyer, went to the NIT League session. James E. Bartley, executive vice president of the league, said similar sessions have been held in past years and they are "just sort of a review of legislative matters" and other transportation issues.

"We do protest some rates that are published by the various motor carriers and railroads," Bartley said in an interview, "but our basic position is that the carriers be able to justify what rates they are seeking." He said no rate cases were pending.

Bartley said the discussions considered ICC efforts to involve the public in the regulatory process, recommendations made by the commission staff to trim down federal regulation of trucking—which the league generally supports—comments about an ICC chairman's recent report to the White House, improvements in communications between ICC and the Department of Transportation and an invitation in the commissioner to attend the league's 70th convention in Chicago this year.

ICC Chairman A. Daniel O'Neal is on vacation and was unavailable to comment on the meeting. The acting chairman, Charles L. Clapp, refused to make himself available to discuss the matter.

Commissioner Robert C. Gresham, however, confirmed that the commissioners did not pay for their lunch. "We didn't pay for the damn thing, no it was strictly a freebie," he said, "and that's what I'm saying. If we're going to cut it out, let's cut it out altogether. Let's don't have some one day and not the next."

Gresham was strongly critical last week of the proposed new ethics rules which would not permit commissioners to accept free lunches except at conventions and similar sessions. Gresham said at the time that ICC members and employees are as honest "as you will find anywhere in government. Every one of them has good judgment—he knows what is right and what is wrong."

The only commissioners who didn't attend the NIT league session were Dale W. Hardin, who has announced his intention to retire, and Alfred T. MacFarland, who is on vacation. Commissioner Rupert L. Murphy attended the working session, but left before lunch.

Among those from the NIT League were Stanton Sender, a Washington-based transportation expert at Sears, Roebuck & Co., and William K. Smith, a vice president for transportation at General Mills Inc., who also is chairman of the board of the U.S. Railway Association. Host for the meeting was J. Robert Morton, president of the league and vice president for corporate transportation at Combustion Engineering Inc.

Gresham contended that even under the new code of ethics it would be proper for the commissioners to accept lunch under the circumstances of the NIT League session. "They say if you are a participant in a working meeting you may accept food and drink served in connection with that meeting," Gresham pointed out.

Commissioner Betty Jo Christian, who was among the most outspoken commissioners in favor of generally abolishing free lunches, agreed. She said commission employees should pay their share of lunch costs in restaurants, but luncheons in connection with working meetings are "entirely appropriate."

Advised that such private meetings themselves are frowned upon by other agencies, she said, "certainly that's something we should think about."

Mark L. Evans, ICC general counsel, said that before the commissioners agreed to meet with the league he looked into the propriety of accepting lunch and the question of whether the appearance of such a large number of commissioners (six out of the eight) would constitute an official meeting under the terms of the Sunshine Act.

Evans said he determined that accepting lunch was proper. And he ruled it was not an official ICC meeting because the NIT League president presided, and not the ICC chairman.

Moreover, "it didn't involve deliberations among the commissioners, nor did it result in joint conduct . . . or deliberations of official agency business. It was simply an opportunity for the commissioners to trade very general views over the future of transportation and regulation and the shippers viewpoint."
Dear Mr. Chairman:

The small, family-owned businesses this Conference represents were shocked and dismayed when you advised us on August 16, 1977, that you were not accepting our request for a meeting with the Commission.

They were outraged when they learned that on the next day (August 17) the entire Commission present in Washington held such a meeting with the powerful National Industrial Traffic League.

We are grateful that you correctly gauged our letter of August 1 as an indictment of Interstate Commerce Commission regulatory treatment of local cartage and short haul for-hire motor carriage, but, alas, we fear you once again have missed the point regarding our major complaint.

The issue is discrimination by the Commission against a major, viable, indispensable segment of American transportation. It encompasses a great deal more than just the subject of entry into the motor carrier business.

Your suggestion that we present our views at the six regional meetings is a near perfect example of the naivete or arrogance which led to our August 1 letter. We view these meetings as nothing more than a charade. We do not intend to be so easily side-stepped.

Our segment of the trucking industry has been through these “transportation town meetings” before, most recently with the Department of Transportation, for example. Such meetings appear to be only exercises in symbolism for political and public relations purposes. Late last winter amid much fanfare DOT announced nine similar regional meetings. Only two have been held—both with severely restricted subject matter, format, and spokesmen selection—arousing suspicions that once an increase in the Administration’s public approval rating was accomplished the rest were dropped.

The Interstate Commerce Commission cannot regulate effectively in a vacuum from cloistered offices nor by use of mere window dressing.

You are correct to gather that the local and short haul segment of the trucking industry wishes to voice its problems with the ICC at an “open and general forum.” We are not of the opinion that six meetings scattered across the United States on such a broad subject as motor carrier entry regulations constitutes a satisfactory response to our request. Indeed, such an open and public forum as we seek would be similar to those the Commission has held in recent years on the subjects of agent-carrier relationships, productivity standards, owner-operators fuel crisis problems and restrictions on service by motor common carriers.

Time allotted for the six regional meetings you refer to is woefully inadequate to obtain realistically meaningful data on the subject of motor carrier entry regulations, let alone the broad range of problems articulated in our August 1 letter. The thrust of the six public meetings you refer to is primarily on ways to simplify licensing (entry) procedures for trucking. Other announced topics on which informed comment is sought are ways in which the ICC can be of assistance to the small businessman, and ways to reduce regulatory lag. We submit here and now that the ICC can best help the small businessman by not deregulating him out of business and by granting his request to be heard adequately.

It was due precisely to this kind of Commission failure to pay substantive attention to the requests and problems of our segment of the trucking industry as exemplified by the 14 items listed in our August 1 letter that led to its being written in the first place. We remind the Commission, for example, that we pleaded unsuccessfully for an oral hearing in the commercial zone case. Since you support “public dialogue on regulatory questions,” we respectfully request that you schedule, after consultation with the other commissioners, at least a one-day Washington, D.C. forum on the discrimination and indifference our industry sees in your agency’s policies and trends. In fact, it would seem wiser and less expensive to...
forego the regional meetings you propose until after our meeting at the Commission.

Mr. Chairman, we reiterate our request for a Washington conference on the problems of the small for-hire trucking companies. Why cannot the request be granted as made? Why has not it already been granted? The fact that it has not been promptly granted demonstrates the primary point of our August 1 letter.

Unless the Commission is not as concerned about the public interest and the health of the nation's transportation system as it is your responsibility to be, there should be no question about granting the request. Why has there been?

By copy of this letter we are respectfully requesting all members of Congress to help us determine answers to the above questions and to get to the bottom of what is going on at the Commission.

Mr. Chairman, since your August 16 letter states that it was made "on behalf of the entire Commission," we ask to be informed as to the vote among the commissioners on our August 1 proposal, not only as to numbers but also by name.

We would remind you that our request is for an open and public meeting with the Commission—not private.

Your earliest response is requested.

Sincerely,

Mr. H. Gordon Homme,
President.

THE LOCAL AND SHORT HAUL CARRIERS NATIONAL CONFERENCE,

Mr. H. Gordon Homme,
Acting Secretary and Freedom of Information Officer,
Interstate Commerce Commission, Washington, D.C.

DEAR SIR: Pursuant to the Freedom of Information Act, as amended, (5 U.S.C. § 552) and in line with the "Government in the Sunshine" Act (Pub. L. No. 94-409), the Local and Short Haul Carriers National Conference hereby requests the following information regarding the Commission's August 17, 1977 meeting with members of the National Industrial Traffic League (League) held at the Washington Hotel in Washington, D.C.:

1. the names of all commissioners in attendance at such meeting;
2. the names of all League officers and shipper representatives present at such meeting;
3. the name(s) of persons requesting such meeting and the name(s) of Commission officers giving approval for such meeting;
4. a copy of the official transcript of such meeting, or in lieu thereof, a summary of all matters discussed and considered at said meeting; and
5. with respect to (4) above, if a summary is provided we request that such summary disclose the following in summary form:
   a. all discussions relating to matters pending before the Commission, i.e., rates, rulemaking proceedings, staff recommendations relating to motor carrier entry, and competition within the motor carrier industry;
   b. all recommendations received from attendees (both public and private) regarding future Commission actions involving rates, rulemaking proceedings, motor carrier entry and competition; and
   c. all recommendations received from attendees (both public and private) regarding suggested amendments to the Interstate Commerce Act involving both procedural and substantive regulation of the motor carrier industry and other modes of transportation subject to the jurisdiction of the Commission.

Should you determine that some of the information requested is exempt from disclosure, please advise us which exemption you believe covers the material not being disclosed. In addition, should a portion of any requested matter be considered exempt from disclosure, we trust that you will make every endeavor to disclose those portions which are "reasonably segregable" from the exempt matter. We, of course, reserve all rights to appeal any such determinations.

We request that all fees for gathering and reproducing this information be specifically waived in light of the clear Congressional policy against ex parte communications in transacting government business. In this regard, we are certain that the Commission embraces the Brandeis maxim that with respect to government business "sunlight is the best disinfectant."
If you have any questions involving this request please contact me at the above number. We trust your reply to this request will be forthcoming with the ten working days provided by law.

Sincerely,

FRED G. FAVOR,
Executive Director.

INTERSTATE COMMERCE COMMISSION,

Mr. Fred G. Favor,
Executive Director, Local and Short Haul Carriers National Conference, Washington, D.C.


The Freedom of Information Act applies only to identifiable agency records. Although your letter requests “information” rather than “records,” I have attempted to locate records that might be responsive to your inquiries. I have found one item: an agenda prepared by the National Industrial Traffic League and apparently distributed to all persons who attended the August 17 meeting. I enclose a copy of the agenda.

The Commission’s General Counsel has advised me that in his opinion the August 17 meeting was not an “agency meeting” under the Sunshine Act because it did not involve “deliberations [that] determine[d] or result[ed] in the joint conduct or disposition of official agency business,” within the meaning of 5 U.S.C. 552b(a)(2). No transcript or electronic recording was made of the meeting, nor were any official minutes or summary prepared.

Although I am not in a position to respond to your other inquiries, Chairman O’Neal may be able to furnish some of the additional information you have requested. I have accordingly referred your letter to him for that purpose.

Since the enclosed document is the only record I have been able to locate in response to your request, I do not believe that this letter denies any portion of your request. Nevertheless, I call your attention to 49 C.F.R. 1001.4, which provides a right of appeal to the Chairman of the Commission from a denial by the Secretary of any Freedom of Information Act request. Such an appeal must be filed within 30 days of the date of this letter.

Sincerely yours,

H. G. Homme, Jr.,
Acting Secretary.

INTERSTATE COMMERCE COMMISSION,

Mr. Fred G. Favor,
Executive Director, Local and Short Haul Carriers National Conference, Washington, D.C.

DEAR MR. FAVOR: Acting Secretary Homme has referred to me your letter of September 9, 1977, requesting certain information concerning the August 17, 1977 meeting attended by seven Commissioners and officials of the National Industrial Traffic League. I will try to answer your questions.

1. The following Commissioners attended the meeting: Chairman O’Neal, Vice Chairman Clapp, Commissioner Murphy, Commissioner Brown, Commissioner Stafford, Commissioner Gresham, and Commissioner Christian. General Counsel Evans also attended. Commissioner Murphy did not attend the luncheon portion of the meeting.

2. I am informed that the following officers of the NIT League attended the meeting: J. Robert Morton, President; W. K. Smith, Vice President; Stanton P. Sender, Treasurer; Donald Boyes, Chairman, Executive Committee; Harry D. Gobrecht, Vice Chairman, Executive Committee; John F. Donelan, General Counsel; James E. Bartley, Executive Vice President; John A. McQuaid, Assistant to Executive Vice President; Jeffrey C. Kline, Director of Economics.

3. The meeting was requested by James E. Martley, the League’s Executive Vice President, in a letter to me dated August 5, 1977. I enclose a copy of that letter. After polling the other members of the Commission and after discussing the mat-
ter with the Commission's General Council, I had my office notify the League that the Commissioners named above, together with the General Counsel, would attend. Each member of the Commission "approved" his or her own attendance at the meeting. The General Council advised me before I agreed to attend the meeting that in their current form or as then proposed to be modified by a staff committee. He also advised me that in his opinion the meeting proposed by the NIT League would not be an "agency meeting" within the meaning of the Government in the Sunshine Act and that public notice therefore would not be required under that Act.

4. As Acting Secretary Homme's letter stated, the Commission made no transcript or official summary of the matters discussed at the meeting. Mr. Homme sent you a copy of an agenda prepared by the League and distributed to persons who attended the meeting. I believe that each topic on the agenda, though not necessarily in the order indicated, was covered in brief remarks, except that I do not recall hearing any comments on the "Status of USRA and Northeast Rail Reorganization."

5. The discussion was in all respects general and quite brief. As I stated in my September 7, 1977, letter to Mr. Wagner, there was no discussion bearing on any specific proposals before the Commission. I do not believe that any recommendations were made concerning the topics to which you refer in your question (5). Some of the League officers may have referred to the League's publicly stated position on one or more broad regulatory issues, but any such references were general. The Commission members were given some written materials expressing the NIT League's policies. I enclose copies of those materials, all of which I believe were in the public domain at the time they were provided.

Please let me know if I can be of further assistance.

Sincerely yours,

A. DANIEL O'NEAL, Chairman.

THE LOCAL AND SHORT HAUL CARRIERS NATIONAL CONFERENCE,

Hon. A. DANIEL O'NEAL,
Chairman, Interstate Commerce Commission,
12th and Constitution Avenue N.Y., Washington, D.C.

DEAR MR. CHAIRMAN: Thank you for your September 28 letter furnishing certain information about the Commission's August 17, 1977, meeting with officials of the National Industrial Traffic League. We appreciate your effort to be responsive to our questions.

As stated previously, we asked the questions, among other reasons, in an attempt to find out why you would consent so readily (August 5 invitation letter for an August 17 affair) to a private Commission meeting with the League and not agree to meet publicly with us, as requested by our letter of August 1, which predated the League's letter by four days. (Incidentally, a copy of that August 5 League letter was not among the enclosures in the envelope we received containing your September 28 letter.)

While your letter answered some of our questions, it raised several others which are rather disturbing. We discuss them here, and in so doing, respectfully ask again for your positive response to our request for a mid-November meeting with the Commission.

The Conference is disappointed that no transcript or official summaries were made of the August 17 meeting, particularly since several of those matters listed on the agenda for the meeting directly impact upon the small, family-owned for-hire trucking companies and are therefore vitally important to us. The agenda alone certainly includes serious Commission business topics of major importance to local and short haul carriers, as well as to the entire motor carrier industry. The subject of motor carrier entry, as one example, is of vital concern. Your statement notwithstanding, the 39 recommendations of the Task Force are before the Commission. That topic, we note, was among the August 17 meeting agenda items. How can we be certain in view of the topical agenda sans transcript or summaries whether some members of the Commission have prejudged the issues regarding motor carrier entry and other Commission administrative deregulation matters as a result of the August 17 meeting, or as a result of other similar private meetings with League officials which may have occurred prior to August 17? We are surprised to note that
two of the five non-staff League officers in attendance August 17 are representatives of companies who are active members of CURRENT, an organization whose announced policies are, in our view, for the specific purpose of deregulating the for-hire trucking industry. Our August 1 letter requesting an open forum at the Commission on the agency's policies regarding, among other things, the regulatory structure expressed our concerns about administrative deregulation. These issues of such grave national importance are hardly topics for private meetings with any special interest group.

We have no way of knowing whether pro-deregulation spokesmen had already achieved their influencing of the Commission toward its current deregulatory policies and trends which are devastating the small carriers. Without transcript or summaries we have no way of knowing but that the August 17 meeting and luncheon were simply a generalized rehash of specifics covered previously and a "pat on the back" appreciation banquet of sorts for those who are reacting favorably to the deregulation arguments.

In our opinion conduct such as the August 17 meeting represents totally thwarts the purpose of the Government in the Sunshine Act. That Act was designed to allow open air free exchange of ideas in government and was specifically enacted to prevent strong and articulate groups from unduly influencing governmental policy which impacts broadly on the general public.

We hasten to reiterate, as Conference President John Wagner has said previously, that we have no quarrel with the Commission's meeting openly with League officials—even if some of them espouse deregulatory views. In fact, we encourage it; it would be unseemly of us to attempt to prevent such meetings. Rather we seek opportunity to present our views in Washington to what we would hope would be the objective ears of Commission decision makers, an opportunity that thus far has been denied. A primary reason for our requesting information concerning the August 17 meeting was to determine from a due process standpoint whether we are being dealt with fully and fairly. Your September 28 letter presents no explicit guidelines for the granting of such private and public meetings, other than apparent caprice.

We find it interesting and a telling commentary, for example, that the commissioners were individually polled concerning the August 17 meeting and not polled for our request for a meeting. This gives a dimension of importance to the August 17 meeting that belies the downplay you attempt to give it in the closing paragraphs of your September 28 letter. How do you think this discrepancy in polling of the commissioners makes the small carriers this Conference represents feel about the importance the ICC Chairman places upon their major public service transportation role?

Further, there remain serious questions about the August 17 "agency meeting" decision, notwithstanding the opinion of Commission General Counsel, since we have not been provided the basis for his decision. The August 17 meeting does raise the spectre of concern. In view of the Washington Star stories (most recently the front page, right hand column item of Thursday, September 29, copy enclosed) and in view of a Senate subcommittee's expression of interest to the Conference in this matter, there is certainly substantial question as to whether the "agency meeting" decision is on ground as solid as your General Counsel would have you believe.

Abstain a granting of the Conference's request for a public Washington meeting and a convincingly sincere commitment from you to the requisite level of objectivity in receiving our views at such a meeting, it is entirely natural for the Conference to continue to ask why one party is promptly granted a private Washington meeting by your office and a public meeting denied another. With all due respect, local and short haul carriers remain shocked and outraged by such inexplicable and discriminatory treatment.

We appreciate your offer of further assistance. As stated, you can be most helpful by scheduling the public forum we request and committing yourself to the necessary level of objectivity. In our view, under the circumstances such actions are required by the responsibilities of your public office and the oath you took upon entering it.

Finally, Mr. Chairman, we wish you to know that the Conference takes no pleasure in these exchanges of pointed letters, especially with a person occupying an office of authority that it is our normal tendency to direct a large measure of respect toward and to expect fairmindedness from in return. May we suggest the setting of a date for our requested Washington forum, a putting
away of linguistic swords and shields, and a mutual building of resolve to make the forum a positive, constructive event in the public service interest of sound transportation regulation.

Sincerely,

FRED G. FAVOR,
Executive Director.

Enclosure.

[From the Washington, Star, Sept. 29, 1977]

U.S. AGENCIES CRITICIZED ON SECRECY
CLOSED MEETINGS CONTINUE DESPITE 'SUNSHINE' LAW

(By Stephen M. Aug)

Despite the new law requiring government agencies to conduct their business in public, a substantial part of government decisions are still being made behind closed doors, a study by Common Cause, a citizen lobby group, reported today.

The study, which examined meetings held by 47 agencies covered under the "Government in the Sunlight Act" during the first three months the law was in effect, disclosed that only 37 percent of the 51 meetings held during the three months were entirely open to the public.

Another 24 percent were partly closed to the public, and 39 percent were entirely closed.

The study said that the most frequently used reason for closing the meetings was that discussions related to financial information that apparently might result in securities market speculation. Nevertheless, one agency closed a meeting on the grounds it was going to take up the question of whether to buy new furniture, and another held a private conference with a trade association and shortly afterwards denied there was even a meeting.

The new law, which went into effect in March, requires all multimember government agencies—those run by two or more members—to hold all meetings in public. Meetings may be closed for any of 10 reasons—such as national security discussion, internal personnel rules, trade secrets, criminal investigations, private personnel matters and pending court suits.

The study pointed out that most agencies are using the exemptions wherever they can simply as an excuse to close a meeting, rather than obeying the spirit of the new law which favors public decision making.

The 73-page report singles out two agencies as examples of those organizations adapting to the new law only grudgingly. "They view the act as a procedural burden to be circumvented when possible. They continue to conduct business as usual behind closed doors."

The two are the Federal Reserve Board, whose chairman, Dr. Arthur Burns, fought vigorously in Congress to exempt the board from the law, and the Interstate Commerce Commission.

The report pointed out that the Federal Reserve Board granted broad discretion in closing its meetings because exemptions in the law provide for holding closed sessions when they involve regulating financial institutions or when discussions would lead to premature disclosure of financial data and resulting speculation in securities markets.

During the first three months the new law was in effect—March 12 through June 12 of this year—the Fed had 37 meetings, of which 30 were entirely closed to the public, two were only partly open and five were entirely public.

"The disproportionately large number of closed meetings are justified by the Fed on the grounds that matters of a sensitive financial nature were being considered by the board as permitted by the act," the report said.

"But the fact that that board elected to close one of its meetings in order to consider a proposed office furniture design as well as the board's building renovation project raises serious questions about the Fed's willingness to comply with the spirit and meaning of the Sunshine Law."

Theodore E. Allison, secretary of the board, objected to this characterization. He said that although Burns had vigorously fought application of the new law to some of the Fed's functions, "He's been just as Vigilant in his insistence that the Federal Reserve Board be diligent in observing the act."
Allison said the meetings on buying furniture and renovating the building were closed so that potential salesmen would not have advantages in competitive bidding. He said the meetings were reported and transcripts were available immediately after the meeting in the board’s public reference room. “We’re in 100 percent compliance with the Sunshine Law.”

The ICC several months ago discussed one of the most important cases in its history in private—the agency closed its June 28 meeting when it determined tariff charges on the transportation of oil through the new Alaska pipeline.

And just several days ago the commission held another closed meeting when it considered appeals from the oil companies which wanted to increase their rates on the pipeline.

“All certainly a question of such national importance should have been considered in open session based on an agency finding that the public interest would be served by openness,” the report said.

The study also referred to a Washington Star disclosure of a private meeting and luncheon in which six ICC members met with top officials of a trade association last month. The ICC’s general counsel said the session wasn’t a meeting in the true sense of the word because no business was conducted. “We believe this is a perverse interpretation of the act,” the Common Cause report says.

The report said that while nobody denies the importance of an agency trying to gain understanding of the problems affecting the business they are charged with regulating, “We doubt the wisdom or the propriety” of agency meetings held in private with officials of “an association that has a clear and vested interest in the outcome of agency decisions.”

ICC Chairman A. Daniel O’Neal said several weeks after the luncheon with the National Industrial Traffic League that while nothing directly before the commission was discussed at the luncheon, “if I’d have thought about it a little more before accepting the invitation • • • I probably would have insisted it be made very public.”

Common Cause had praise for two agencies which it said appeared to be making every effort “to provide the public with the fullest practical information regarding their decisionmaking process.”

It pointed out that Civil Aeronautics Board has held nearly 70 percent of its meetings in the open and the agency’s rules governing open meetings permit any person to petition the CAB to reconsider the closing of a meeting.

The U.S. International Trade Commission, the report said, has gone “beyond the literal requirement of the law to implement the spirit of open government. It said the commission did not exercise the option of having rules which would permit it to close meetings on an expedited basis; it has required a complete transcript for all meetings whether open or closed, and has tried to widely publish its meeting notices through use of a mailing list.

“Most agencies have not gone beyond the minimum requirements in order to carry out the spirit of the legislation,” the report says. “Many agencies seem to be adapting to the act, but only grudgingly. They view the act as a procedural burden to be circumvented when possible.” The report includes a table showing the number of meetings that agencies have held, the number that have been closed and the various reasons.

Among the agencies that have been making substantial use of the closed sessions are:

The Export-Import Bank board of directors, which has held 26 meetings, all of them closed on the grounds trade secrets might be disclosed.

Federal Home Loan Bank Board, 23 meetings, 12 entirely closed and 11 partly closed.

Nuclear Regulatory Commission, 42 meetings, 20 closed, nine partly closed.

Securities and Exchange Commission, 49 meetings, 31 closed, seven partly closed.

Those agencies that have held no closed meetings include the Commodity Credit Corporation, Council on Environmental Quality, Inter-American Foundation, Mississippi River Commission, National Commission on Libraries and Information Science, National Council on Education Research, National Mediation Board, Tennessee Valley Authority, Uniformed Services University of the Health Sciences Board of Regents and the U.S. Postal Service Board of Governors.

Common Cause prepared the study for hearings before a Senate Governmental Affairs subcommittee that were to have been chaired by Sen. Lawton Chiles.
D-Fla., the principal Senate sponsor of the Sunshine Act. The hearings were to have been held yesterday, but were canceled because of the Senate energy filibuster.

Common Cause also had a few recommendations. These urge the President to require agency regulations to conform to the spirit of the Sunshine Act, and they would allow the use of cameras and tape recorders at meetings, require minutes to be kept of open meetings and transcripts of closed meetings and limit the use of a commonly used method to get around having an open meeting—the use of notational voting by which agency members write their votes on memorandums which are delivered by messenger from office to office, thus avoiding any need for a meeting.

INTERSTATE COMMERCE COMMISSION,

Mr. Fred G. Favor,
Executive Director,
Local and Short Haul Carriers National Conference, Washington, D.C.

DEAR MR. FAVOR: Acting Secretary Homme has referred to me your letter of September 9, 1977, requesting certain information concerning the August 17, 1977 meeting attended by seven Commissioners and officials of the National Industrial Traffic League. I will try to answer your questions.

1. The following Commissioners attended the meeting: Chairman O'Neal, Vice Chairman Clapp, Commissioner Murphy, Commissioner Brown, Commissioner Stafford, Commissioner Gresham, and Commissioner Christian. General Counsel Evans also attended. Commissioner Murphy did not attend the Luncheon portion of the meeting.

2. I am informed that the following officers of the NIT League attended the meeting: J. Robert Morton, President; W. K. Smith, Vice President; Stanton P. Sender, Treasurer; Donald Boyes, Chairman, Executive Committee; Harry D. Gobrecht, Vice Chairman, Executive Committee; John F. Donelan, General Counsel; James E. Bartley, Executive Vice President, John A. McQuaid, Assistant to Executive Vice President; Jeffrey C. Kline, Director of Economics.

3. The meeting was requested by James E. Bartley, the League's Executive Vice President, in a letter to me dated August 5, 1977. I enclose a copy of that letter. After polling the other members of the Commission and after discussing the matter with the Commission's General Counsel, I had my office notify the League that the Commissioners named above, together with the General Counsel, would attend. Each member of the Commission "approved" his or her own attendance at the meeting. The General Counsel advised me before I agreed to attend the meeting that in his opinion attendance would not violate the Commission's Canons of Conduct, in their current form or as then proposed to be modified by a staff committee. He also advised me that in his opinion the meeting proposed by the NIT League would not be an "agency meeting" within the meaning of the Government in the Sunshine Act and that public notice therefore would not be required under that Act.

4. As Acting Secretary Homme's letter stated, the Commission made no transcript or official summary of the matters discussed at the meeting. Mr. Homme sent you a copy of an agenda prepared by the League and distributed to persons who attended the meeting. I believe that each topic on the agenda, though not necessarily in the order indicated, was covered in brief remarks, except that I do not recall hearing any comments on the "Status of USRA and Northeast Rail Reorganization."

5. The discussion was in all respects general and quite brief. As I stated in my September 7, 1977, letter to Mr. Wagner, there was no discussion bearing on any specific proposals before the Commission. I do not believe that any recommendations were made concerning the topics to which you refer in your question (5). Some of the League officers may have referred to the League's publicly stated position on one or more broad regulatory issues, but any such references were general. The Commission members were given some written materials expressing the NIT League's policies. I enclose copies of those materials, all of which I believe were in the public domain at the time they were provided.

Please let me know if I can be of further assistance.

Sincerely yours,

A. DANIEL O'NEAL, Chairman.
Senator Chiles. Our next witness will be the Honorable John R. Evans of the Securities and Exchange Commission, who protects investors against malpractices in securities.

We are happy to have you before us. Your statement in full will be inserted directly in the record.

TESTIMONY OF JOHN R. EVANS, COMMISSIONER, U.S. SECURITIES AND EXCHANGE COMMISSION, ACCOMPANIED BY HARVEY L. PITT, GENERAL COUNSEL

Mr. Evans. I will very briefly summarize my prepared statement.

I am pleased to have this opportunity to review with you the Commission's experience over the last 6 months in administering the Government in the Sunshine Act.

With me today is Harvey L. Pitt, the Commission's General Counsel, who is very knowledgeable with respect to the details of our experience.

Immediately following the adoption of the Government in the Sunshine Act in September 1976, our Office of General Counsel began the process of developing new rules and amending existing rules to carry out the purposes of the act. During the process, prior to adoption of the act, we expressed our support for the act's objectives, but also our concern that certain of the burdens of compliance might outweigh the benefits of the act to the public.

We knew that most of our meetings could not be open to the public given our broad-ranging prosecutorial and quasi-judicial functions, and the fact that even our rulemaking procedures often include discussions of active enforcement cases. Nevertheless, we were determined to comply, not only with the letter of the new law, but also with its spirit.

Members of the Commission, our General Counsel, and other members of our staff devote a substantial amount of time to carry out the objectives of the Sunshine Act. Our General Counsel will not certify that a meeting may be closed unless the matters to be considered are clearly within one of the act's exemptions.

On occasion, he has refused to certify that matters may be considered in a closed meeting, despite some strong views to the contrary, because of our commitment to implement the act fairly.

In addition, even though our General Counsel has been prepared to certify that a meeting could be closed as a matter of law, the Commission has voted to open a number of meetings where we did not believe that a closed meeting was necessary.

Since the act became effective on March 12 of this year, the Commission has held 150 meetings. We have been able to hold 60 of these, or 40 percent of the total, open to the public.

It is important to realize, however, that the number of items considered at these meetings varies greatly and that generally more items are considered in closed meetings than in open meetings; thus the 40 percent figure may not represent the percentage of items considered at public meetings.
I believe that open meetings have been beneficial to the public and to the Commission. I say this because the comments we have received about our public meetings indicate that observers have often been impressed by the discussions and by the consideration afforded to opposing viewpoints on major issues, as well as by the overall competence and fairness of the Commission's deliberations.

In light of our efforts to comply fully with the Government in the Sunshine law, we are very concerned about an article which appeared in the Washington Star last week, which was based on a report prepared by the Library of Congress for this subcommittee. The article indicated "by and large, Federal agencies are ignoring the new Government in the Sunshine law."

The Securities and Exchange Commission was singled out as "the agency that appears to make most use of closed meetings." The article also stated that the "SEC gave valid reasons for closing the meetings in only 43 of the 64 instances***."

I cannot speak for any other agency, but I can assure you that we are not ignoring the law. I would also like to point out that while it may be true that we have closed more meetings than other agencies, this is because the Commission has held substantially more meetings than other agencies. The Library of Congress figures indicated that 20 other agencies closed a greater percentage of their meetings than did the SEC.

Moreover, the fact that a majority of Commission meetings were closed is, I am sure, no surprise to you or other members of the congressional committees in which the Sunshine Act legislation was developed.

Indeed, the legislative history of the act indicates that because of our extensive enforcement activities and the potentially adverse impact of premature publicity on financial institutions and the public markets for securities, the majority of our meetings were expected to be closed, and that has been our experience.

Finally, the conclusion of the Library of Congress report that valid reasons were not provided for closing 21 Commission meetings may be misleading. Although we cannot be certain as to the methods used by the Library of compiling its statistics, it appears that the analysis is based on a survey of the notices sent by agencies to the Federal Register. The Commission amends these notices whenever necessary, such as when the previously announced time or date of the meeting is changed. Usually, those short notices only set forth the change, and refer the public to the initial published notice for additional details about the meeting, including the applicable Sunshine Act exemptions.

We have reviewed our records, and found there have been a total of 34 such amending notices, which contained no citations to exemptive provisions of the Sunshine Act. Virtually all of these notices were published to reflect schedule changes made after the regular weekly notices had been published, and involved either a change in date for consideration of a matter scheduled earlier, a deletion of a scheduled item, or the scheduling of an emergency matter that could not have been scheduled earlier.

Our tabulation of these notices, the dates of the meetings, and the general description of the items considered can be made available to the subcommittee if you so desire.
In any event, although we should have cited the exemptive provisions in these amendatory notices, as well as in the initial notices, I can assure the subcommittee that no matter is ever considered by the Commission without its first having been reviewed by the General Counsel for compliance with the act. No meeting is closed unless we are certain that one or more of the act's exemptions is applicable and that it is in the public interest to close the meeting in question.

I believe that since the passage of the Sunshine Act the Commission has been successful in its endeavor to open a significant number of its meetings to the public, in keeping with the act's philosophy that, as a general rule, Government business should be conducted in the open.

Actually, I believe we have been able to open more of our meetings than we thought we would be able to open at the time the act was approved.

Our full statement calls to the attention of the subcommittee several important problems which we believe justify modifications in the act. To conserve time, I will not discuss these unless you prefer that I do.

Senator Chiles. Thank you very much.

I am happy to note from your testimony that the SEC is concerned with carrying out the objectives of the act and is devoting a substantial amount of time and effort to that end.

Secrecy in Government tends to perpetuate public suspicion and abuse of power. Public knowledge of governmental action is essential to the democratic process.

Government officials cannot be held accountable for their actions if no one knows what went on behind the closed doors. Federal agencies make decisions which affect all of us directly or indirectly. Until recently, the public has just had no opportunity to view the decision-making process. Sunshine's overriding purpose is to protect and preserve a citizen's rights to observe Government and learn how decisions are made.

I notice from your opening statement such things as "[t]he act recognizes * * * that the desirability of public access to this information must be balanced against the need to protect the rights of individuals and to assure the ability of government to carry out its responsibilities."

I agree with you. It has never been our intention to destroy either our Government or the individual citizen. A few sentences later you say: "The other sections of the act provide a procedural framework which, at least in theory, is designed to protect the objectives of the act." [Emphasis added.]

I just wonder from this, Would you say that your agency has a negative or positive view toward the act itself?

Mr. Evans. I would say we have a very positive view toward the act. The reason that we made the statement which you just read is that we think some of the act's procedures may impose a burden which by far outweighs the benefit to the public of those procedures. These are the areas we have suggested the subcommittee consider.

Senator Chiles. We have been told that the general public does not seem to have taken advantage of the sunshine law, at least not in any considerable numbers. It seems that the lobbyists are at least in on it. Representatives of vested and regulated interests regularly attend the
Commission's meetings and appear to be principal beneficiaries. We wonder if, in fact, there is some reason for this, whether it is because agency meetings are not widely reported in the media with some 200 meetings a month and 40-odd agencies involved. The logistics problem for even the largest newspaper, radio, and TV stations are obvious.

Second, there is some question as to whether anyone but an experienced insider could understand what is happening.

To what extent do you think trade talk and technical jargon interferes with the average person's understanding of the topics under discussion?

UNDERSTANDABLE MEETINGS

Mr. Evans. I think it can, on occasion, depending on the subject under consideration, interfere to a significant degree. The issues that we consider at the SEC are often technical issues, sometimes very technical. In the absence of an understanding of at least the basics of what we are considering, it would be very difficult in many instances for an average member of the public to understand what we are discussing.

They do not have the memos we have received, and sometimes it takes months to get up to speed on some of the issues that we are considering. The uninitiated would probably not understand it very well. However, I do believe those who have an interest in the particular subject matter that is being discussed can understand what we are talking about.

We do not try to use unusual terms. We do not try to use jargon that is not understandable, and our attempt has been to try to provide enough information to people coming in to our meetings that they can at least understand the issues to be considered.

Senator Chiles. I understand you try to distribute summaries of relevant background information pertaining to the agenda items. I think that is very helpful and necessary to allow the public to try to have some perception of what you are doing.

Mr. Evans. Yes, we have been doing that, and we may need to do more in that area. Some of the subjects we consider are rather complex, and a short review or brief description sometimes is not really sufficient to give an understanding of what we are discussing, but we do think it is usually helpful and a step in the right direction.

Senator Chiles. Well, I think it is, and we would like to include some of those items in our record, because I think they do point out some helpful items.

[Material referred to follows:]

SECURITIES AND EXCHANGE COMMISSION

(Thurday, October 27, 1977—10:00 A.M.—Open Meeting Agenda)

(1) ITEM: APPLICATION FILED BY ISRAEL HOTELS INTERNATIONAL, INC., FOR AN EXEMPTIVE ORDER

Background

Israel Hotels International, Inc., a Delaware corporation engaged solely in the business of owning the land and buildings known as the Tel-Aviv Hilton Hotel, has applied for an order exempting the company from certain reporting requirements under the Securities Exchange Act of 1934.
On January 4, 1977, all of the issued and outstanding stock of the company was acquired by Establishments Norima, Enkas, Machkim and Opil and all obligations attendant to its debt securities are guaranteed by the State of Israel.

(2) ITEM: APPLICATION FILED BY ICH CORPORATION FOR GENERAL RELIEF PURSUANT TO RULE 252(f) UNDER REGULATION A

Background
ICH Corporation is an insurance holding company organized under the laws of the state of Missouri, whose common stock is listed on the American Stock Exchange. Through its subsidiaries, ICH Corporation is principally engaged in the sale of insurance and mutual fund shares.

At present, the Regulation A exemption under the Securities Act of 1933 is unavailable to the company because of certain orders of permanent injunction entered against three affiliates. The company has requested general relief in this matter for the purpose of adopting a stock purchase plan under which certain insurance agents and managers of Ozark National Life Insurance Co., a 99.9%-owned subsidiary of ICH Corporation, may acquire common stock through annual purchases.

(3) ITEM: ADVANCE NOTICE OF PROPOSED RULEMAKING CONCERNING DISCLOSURE OF CORPORATE DEBT SECURITY RATINGS

Background
The Commission will consider publishing an advance notice requesting comments on the possible disclosure of corporate debt security ratings in filings with the Commission under the federal securities acts.

It has been the Commission's traditional policy not to permit disclosure of corporate debt security ratings in prospectuses and reports filed, but, issuers have been required to disclose the lowering of the rating of their debt securities in filings. However, based on staff considerations, letters from the public, literature authored by securities professionals and academicians, the Commission will now consider publishing an advance notice of possible changes regarding this and related issues.

(4) ITEM: PROPOSED AMENDMENTS TO FORM S-16: SHORT REGISTRATION FORM UNDER THE SECURITIES ACT OF 1933

Background
Comments have been received on the proposed expansion of the availability of Form S-16 for the registration of certain primary offerings, as announced in December, 1976.

The Commission will now consider soliciting comments on proposals which would expand the usage of this short registration form to permit the registration of (1) securities being offered to the public for cash by certain issuers about which information is widely disseminated among the investing public and (2) securities being offered by issuers eligible to use the form to existing shareholders through either rights offerings or dividend investment plans.

(5) ITEM: PROPOSED AMENDMENTS TO REGISTRATION AND REPORTING FORMS, DISCLOSURE GUIDES AND RULES APPLICABLE TO FOREIGN PRIVATE ISSUES

Background
In December, 1976, the Commission solicited public comment concerning means of improving disclosures presently required by certain foreign private issuers under the Securities Exchange Act of 1934.

The Commission will now consider requesting comments on amendments to the registration statement, periodic report and annual report forms used by certain foreign private issuers. These proposals would integrate the registration and annual report forms into a single form, which would be substantially similar in information content to those forms authorized for use by domestic and certain North American issuers. The periodic report form would basically be amended to require an English translation of materials filed with such reports.

The Commission will also consider requesting comments on a proposed guide which require more extensive disclosure by certain foreign private issuers of management remuneration in registration statements filed with the Commission.
ITEM: FREEDOM OF INFORMATION ACT APPEAL OF C. C. CLINKSCALES, III

Background

By letter dated June 16, 1977, C. C. Clinkscales, III requested access to the correspondence between the Commission and CBS, Inc. and RCA Corporation in 1976 and 1977 relating to the processing of each corporation’s proxy statements for its 1977 annual meeting. The Freedom of Information Act Officer partially granted Mr. Clinkscales’s request, however, certain materials were withheld pursuant to certain exemptions under the Act. Mr. Clinkscales has appealed from the determination of the Freedom of Information Act Officer.

ITEM: PROPOSED AMENDMENTS FILED BY THE NEW YORK STOCK EXCHANGE CONCERNING SPECIALIST CAPITAL AND MANPOWER REQUIREMENTS

Background

On August 26, 1977, the New York Stock Exchange filed a proposed rule change which would eliminate its “three-man” unit rule for specialist firms and lower its specialist capital requirements to the greater of $100,000 or 25% of position requirements. In addition, the Exchange is proposing to rescind a rule which prohibits multiple specialists in a particular stock from entering limit orders into a combined limit order book.

MEETING ATTENDANCE

Mr. Evans. You also mentioned the media and the extent to which they cover commission meetings. When we have items of significant public interest, I believe the media often does pick them up and report on them.

Senator Chiles. They are in attendance at your meetings?

Mr. Evans. The media is in attendance at almost every meeting.

Senator Chiles. I assume that the media for trade publications are present and they disseminate information to those within the trade.

Mr. Evans. Those are the ones that are generally there. The media for other news publications or general newspapers are generally there only when there is a major item of public interest, but I think that is the way we expected it to be.

Senator Chiles. What about briefing papers and memorandums which the members use to guide their deliberations? Are those available to the audience?

Mr. Evans. No, they generally are not. Within those memoranda are statements of staff opinions and recommendations, the release of which may adversely affect the Commission. I am not aware that we have ever made these memoranda available to the public at large.

Mr. Pitt. I might add also that these memorandums are often more complicated and complex in their jargon than the actual meetings, so that in terms of advising the public of what was taking place, they would often not be very useful.

Senator Chiles. I notice a number of agencies prohibit public recording of meetings. You require specific permission. Why do you require specific permission?

Mr. Evans. We simply want to know if someone is going to record them. We do not ourselves record the discussions at our open meetings anymore because of the cost involved. We record our closed meetings, as the act requires, but we refrain from recording open meetings, and we would like to know if something is going to do it.
We have had individuals ask us for permission, and we have never refused permission to record or to take pictures, but we want to be aware of what is going on at our meetings.

Senator CHILES. What do you do about photographing?

Mr. EVANS. The same procedure applies. They ask our Secretary, and he finds out how they would like to do it. I am not aware that we have ever turned down a request for photographs, either.

Senator CHILES. I am glad to note that the SEC publishes the SEC News Digest which once a week contains announcements of Commission meetings for the following week. However, you say that primarily those attending are representatives of the vested or regulated interests. Do you see that as a drawback to the legislation?

Mr. EVANS. That fact that they attend or that the public does not attend?

Senator CHILES. The fact that the vested interests do attend.

Mr. EVANS. As I indicated previously, I think they have been impressed with the way we make our decisions. The principal drawback is that we are frequently engaged in litigation and other types of controversies with such entities, and we have to be aware of the possibility that, in the context of such a controversy, a comment of a Commissioner or a member of the staff, as opposed to the final decision of the Commission, might be used against us. Accordingly, one of the recommendations we have made is that this sort of individual statements not be permitted when the Commission takes formal action. We would like any challenge to Commission action to be directed to the reasoning given by the Commission as a whole, not to any statement, perhaps made in an effort to provoke discussion, by any member of the staff or any member of the Commission. That is the principal drawback I see.

Otherwise, I think it is perfectly appropriate for them to be there and to see how we consider the issues and for them to be aware of the reasons why we decide matters the way we do. I think it has been beneficial to them and to us.

Senator CHILES. Well, generally when we say that the vested interests attend, many times we have people on both sides of the spectrum representing the vested interests, so that in itself makes for some kind of general flowing out of that information. Those attending might be adversary parties in many instances.

Mr. EVANS. I think that is often true. We probably have some adversaries attending some of our meetings; generally, it would be mostly industry representatives of those whom we regulate or attorneys who have a specific interest in the area.

We have had some attendees that have represented investors and the general public interest, but rather few in those categories.

It might also be considered a drawback of the act that it increases the contacts between the regulators and the regulated industry, which might not promote the appearance of propriety that should always be maintained.

I do not think, however, that our Commission has ever been accused of making judgments that were particularly beneficial to the regulated interests that have been in attendance at our meetings. In fact, if anything, the comments by those who we regulate have been that they
wish we were more like other agencies and took more account of their desires in our decisionmaking.

Senator CHILES. In testimony before a House subcommittee, the editor of Advertising Age stated that sunshine laws might have been beneficial to the general public. He testified that since there are often considerable delays between the time a vote is taken on a specific issue and the time that that decision is made public, the staff or Commissioners inside the agency or others have a readymade opportunity to make private use of the information. He did not name instances that it did happen; he just said it could.

Why not stand up and tell the whole world or at least as many people as are willing to listen, what the decision is then and there? It would seem that that would save us an ocean of internal speculation and investigation, and it might make it quite clear that the Federal agency is not and cannot make improper use of inside information. Would you say that that could be true at times?

Mr. EVANS. It could be true, yes.

In our agency most of the decisions that we make are made public rather quickly. Injunctive actions, enforcement actions, decisions with respect to rulemaking are made public rather quickly. Of course, there are some things that cannot be made public right away, such as a decision to begin a nonpublic investigation of an individual or a publicly-traded company. That would not be fair.

Senator CHILES. One of the arguments against the open meetings was that it could lead to financial speculation or this kind of profit-making by someone. It seems like that information always gets out at some time and many times it just gets out to insiders. But if everybody gets the same shot at the information, then it does not really add to that kind of speculation. Only when it can leak out or maybe by observing activities, someone can say: “I can tell what the Federal Reserve System is doing because I watch one person. I can tell by watching what one manager in the Federal Reserve System does and by what he starts to do, what the decision in a closed meeting has been.”

When somebody knows that they can take advantage of that, by allowing the general public to know what the decision was, the speculative effects would be eliminated.

Mr. EVANS. We have had a very good record of not having “leaks” at our agency, which we are proud of, and the fact that we make things public as quickly as possible is also beneficial in that respect, I believe.

The problem we often have is that we may be considering a matter such as suspending trading in a security, for example, and someone listening to us could immediately take action on it, before disclosure to the general public could be effected. He would thus have an advantage by virtue of the fact that he was able to attend our meetings, whereas the general public does not have that ability, and he could make a profit on the knowledge he acquires.

Ordinarily a trading suspension decision would be announced publicly within 10 or 15 minutes, sometimes earlier, so it is done immediately. The same approach exists with an enforcement action. We try to get announcements of such matters out as soon as practicable because we are aware of the fact that leaks can occur and that would be unfair.
Senator CHILES. I think that it is very important that you do that.

Mr. Pitt. There is one additional problem that we have noted, however, particularly with respect to injunctive actions, which is if they are publicly disclosed before the staff is ready to file its papers in court that we can then be the subject of lawsuits seeking to ward off our own action, and this gives an advance warning in some cases that is inappropriate.

Mr. Evans. We have also found in some cases where a person found out about our decision to bring an enforcement action, they would then try to dissuade us from the decision that we had made and try to give us additional reasons as to why we should not have made that decision. This can slow up the process to an unacceptable degree.

Senator CHILES. In the footnote on page 8, you say that visitors to your meetings are asked who they work for. There is a registry, I guess, that you keep at the bottom of your elevator, or somewhere in the building.

Would you deny entrance to someone who refused to identify himself?

Mr. Evans. I don't know the answer to that. I think it is just a nonmandatory practice. We have had some problems with a bombing in one of our offices in Denver, and threats in some other offices, including the one here in Washington, so we have a registry where the people who are coming in and do not have a pass sign their name, and indicate who they work for, and where they intend to go, so they won't wander through the agency.

We keep the record for that purpose so that we will know where they are, and why they are there, but if someone said they would not tell us where they were from, I could not imagine we would refuse to have them come in. Perhaps Mr. Pitts is aware of our policy in this regard?

Mr. Pitt. So long as they can satisfy the security guard with proper identification. We have not had any problems in this regard. Most people are willing to tell us what their professional affiliations are.

Mr. Evans. Or if they do not have any.

Senator CHILES. Commissioner Loomis in a letter to me dated September 13, 1977, commented that "the discipline which the act imposes, by requiring that open agenda items, and certain classes of closed items, be scheduled at least a week in advance, has assisted the Commission to plan its work flow and to anticipate regulatory matters which will require its consideration. A large percentage of our work involves investigatory and enforcement matters which * * * can always benefit from prompt action." The act allows for announcement at the earliest practicable time for emergency time sensitive matters.

You are still concerned that the act does not provide enough flexibility to allow emergency enforcement of investigatory matters?

Mr. Evans. We suggest in our statement that for those matters that are of an enforcement nature where there is no question that they may and would be considered at a closed meeting, that perhaps it is unnecessary to have any notice because the notice itself is so general that we do not believe it provides anything that is helpful to the public.

If there is another purpose for that, then it may be worth it, but I am not aware of any such purpose. We do not think the public gains very much from it and, as a matter of fact, we do have a lot of issues...
that come up rather quickly that we need to make decisions on and to the extent that we can cut down the time required to process those matters, it could be helpful to us.

Senator Chiles. Thank you very much.

[The prepared statement of Mr. Evans follows:]
Mr. Chairman, Members of the Subcommittee:

I am pleased to have this opportunity to review with you the Commission's experience over the last six months in administering the Government in the Sunshine Act. With me today is Harvey L. Pitt, the Commission's General Counsel, who has had a key role in assuring our compliance with the Act and is very knowledgeable with respect to the details of our experience. As the Subcommittee is aware, the Act was adopted to ensure, to the fullest practicable extent, public access to "information regarding the decision making process of the federal government." The Act recognizes, however, that the desirability of public access to this information must be balanced against the need to "protect the rights of individuals" and to assure "the ability of the government to carry out its responsibilities."

In order to allow the public the fullest possible access to the decision making processes of government, subsection (b) of the Act, 5 U.S.C. 552(b), provides, as a general rule, that "every portion of every meeting of an agency shall be open to public observation." This general rule is subject to ten exception provisions, set forth in subsection (c), which defines those agency deliberations that may occur at a closed meeting.

The other sections of the Act provide the procedural framework which, in theory, is designed to promote the objectives of the Act by imposing upon agencies certain requirements which must be followed, with respect to both "open" and "closed" agency meetings. Immediately following the adoption of the Government in the Sunshine Act in September 1976, our Office of General Counsel

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*/ 5 U.S.C. 552b, note.

began the process of developing new rules and amending existing rules to carry out the purposes of the Act.

During the legislative process, we had expressed our support for the Act's objectives but also our concern that certain of the burdens of compliance might outweigh the benefits to the public. We knew that most of our meetings could not be open to the public given our broad ranging prosecutorial and quasi-adjudicative responsibilities and the fact that even our rule-making decisions often include discussions of active enforcement cases. Nevertheless, we were determined to comply not only with the letter of the new law, but also its spirit.

During the last three months of 1976, our Office of General Counsel prepared an analysis of our meetings and found that an overwhelming number of them contained matters that would be closeable under the Sunshine Act. We then began a trial period during which members of the Commission were advised by the General Counsel's Office which matters on the Commission's agenda would be required to be open to the public by the Act. Staff members were not advised of this experiment in order that discussions would continue just as before. In this way, we could see what problems might arise if the meetings were public. After several weeks, this process was opened up to the staff so that we could all gain experience before the Act became effective. On the basis of that experience, we approved rules that we believe fully implement both the letter and spirit of the Sunshine Act, and at the same time protect the Commission's need, in order to discharge its responsibilities properly and fairly under the federal securities laws, to prevent improper public disclosure of exempt information.

To carry out the objectives of the Sunshine Act, each member of the Commission, and the General Counsel, personally devotes a substantial amount of his time to ensure compliance with the Act. Our General Counsel will not certify that a meeting may be closed unless the matter is clearly within the contem-
pletion of one of the exceptions. On occasion, he has refused to certify a
meeting as closed, despite some strong views to the contrary, because of our
commitment to implement the Act fairly. On the other hand, even though
our General Counsel has been prepared to certify that a meeting could be closed
as a matter of law, we have voted to open a number of meetings where we did not
not believe that a closed meeting was necessary.

Since the Act became effective on March 12, 1977, the Commission has held
150 meetings. We have been able to hold 60 of these, or 40 percent of the
total, open to the public. I believe the open meetings have been beneficial
not only to the public, but also to the Commission. I say this because the
comments we have received about our public meetings indicate that the observers
have often been impressed by the depth of discussion and the consideration
afforded to opposing viewpoints on major issues by the Commission as well as
the overall competence and fairness of the Commission's deliberations.

In this regard, I believe it is appropriate briefly to comment on a report
prepared by the Congressional Research Service of the Library of Congress on
"Sunshine Act Meetings" for the Senate Subcommittee on Federal Spending Prac­
tices and Open Government, concerning which an article appeared in the Washing­
ton Star on November 21, 1977. According to the author of that article, the
report of the Library of Congress showed that the Securities and Exchange Com­
mission was the agency that made the "most use of closed meetings" and that
the "SEC gave valid reasons for closing the meetings in only 43 [of 64]
instances * * *" This article also appeared to suggest that federal agencies
such as this Commission are "by and large * * * ignoring the new Government­
in-the-Sunshine law."

I do not believe that the report prepared by the Library of Congress
supports all of the conclusions in the newspaper article. However, apart from
that reservation, I do wish to call the following facts to the Subcommittee's attention concerning the statistics compiled by the Library of Congress.

First, while it may be true that the Securities and Exchange Commission has more "closed" meetings than other agencies, this is primarily because the Commission has apparently held substantially more meetings than other agencies. Even the incomplete data upon which this report is based indicates that out of 46 agencies whose compliance with the Sunshine Act was evaluated, the Securities and Exchange Commission held the most meetings between March 24, 1977 and September 9, 1977, the time period under study.

Moreover, the fact that a majority of Commission meetings was closed is, I am sure, no surprise to the Congressional committees in which the Sunshine Act legislation was developed. Indeed, the Senate Report accompanying the Government in the Sunshine Act noted this fact, in connection with its discussion of the provision allowing certain agencies to close their meetings by rule, pursuant to the modified procedure set forth in subsection (d)(4) of the Act, if a majority of that agency's meetings could be closed pursuant to certain of the exemptive provisions. It stated that subsection (d)(4) "will largely apply to agencies which regulate financial institutions, securities, or commodities, and which will often have to conduct their sensitive business in private, and on short notice ***" The report further indicated that the Securities and Exchange Commission was among those agencies which would be permitted to issue regulations pursuant to these provisions, because a majority of its meetings were expected to be closed. S. Rep. No. 94-354, 94th Cong., 1st Sess. (1975) at 28-29. The Committee's expectation at the time it considered this legislation has been verified by our subsequent experience.

In addition, the Library report implies that for 21 of our closed Commission meetings held between March 24 and September 9, 1977, valid reasons for closing
these meetings were not provided. Although we cannot be certain as to the methods used by the Library in compiling its statistics, it appears that the Library's analysis is based on a survey of the notices sent to the Federal Register, for publication pursuant to subsection (e)(1) of the Act, 5 U.S.C. 552b(e)(1). The Commission supplements its regular weekly notices with amending notices whenever necessary, such as when the previously announced time or date of a meeting is changed. Usually, these short amending notices simply set forth the change, and refer the reader back to the initial notice for additional details, including the Sunshine Act exemptions which the Commission had invoked.

We have reviewed our records and have found that there have now been 34 of these notices which contained no citations to exemptive provisions of the Sunshine Act. Virtually all of these notices were for schedule changes made after the regular weekly notices had been sent, and involved either a change in date for consideration of a matter scheduled earlier, a deletion of a scheduled item, or notice of an emergency matter that could not have been scheduled earlier. Our tabulation of the notices, the dates of the meetings, and a general description of the items considered is available to the Subcommittee if you desire. In any event, although we should have cited the exemptive provisions in these amending notices, as well as in the initial notices, I categorically assure the Subcommittee that no matter is ever considered by the Commission, regardless of whether it is scheduled for an open or closed Commission meeting, without its first having been reviewed by the General Counsel for compliance with the Act. No meeting is closed unless we are certain that one or more of the exemptions is applicable, and that it is in the public interest to close the meeting in question.

Before I leave this subject, I would also like to call to the attention of the Subcommittee the fact that a review of the Library's report indicates that a number of agencies have a higher percentage of closed meetings than we
do. I believe that, since the passage of the Sunshine Act, the Commission has endeavored, successfully in large measure, to open a significant number of its meetings to the public, in keeping with the Act's philosophy that, as a general rule, government business should be conducted in the open.

Inasmuch as this Subcommittee is holding oversight hearings on the administration of the Act for the first time, we have been asked to bring to the attention of the Subcommittee those problems—technical, procedural and substantive—which seem to us to call for some modification of the Act.

Because a primary responsibility of the Commission is to assure appropriate disclosure of material facts by those persons to whom the investing public entrusts its capital, we are naturally sympathetic to the principal objective of the Act, to bring the fullest practicable information to the public regarding the decision making processes of the federal government. Nonetheless, we also have a responsibility, imposed by the Congress, to protect the investing public, and we believe that we must maintain our ability to meet that responsibility. Whenever the ability of the Commission to act is impeded for the sake of inflexible procedural requirements which, while theoretically designed to assure the public access to information about its government, do not in fact perform this function, the Commission would be remiss if it did not report to you its concerns.

Subsection (e)(1) of the Act, 5 U.S.C. 552b(e)(1), provides for the scheduling and public notification of agency meetings. It states:

"In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject
matter of such meeting, and whether open or closed

to the public, at the earliest practicable time."

Subsection (e)(3) of the Act provides for publication in the Federal Register of

the notice required by subsection (c)(1). In general, our rules require that

notices of prospective open meetings be posted on the public information board

in the lobby of the Securities and Exchange Commission at least one week prior
to the consideration of any matter listed therein. These notices are also sub­
mitted at that time to the Federal Register for publication. This announcement

contains a brief description of the subject matter to be discussed, the date,
place and time at which the Commission will consider the matter, whether the
meeting, or any portion of it, will be open or closed, and the name and telephone
number of a Commission official designated to respond to requests for information
concerning the meeting at which the matter will be discussed. Should the Commission
determine, by recorded vote, that earlier consideration of any matter not previously
posted is necessary, a public announcement is made, posted in the lobby, and
submitted to the Federal Register at the earliest practicable time.

In addition, the Wednesday edition of the Commission's daily publication,
the "SEC News Digest," contains announcements of Commission meetings, both open
and closed, for the following week, and revises that information as soon as
practicable when changes in the previously announced schedule are made. The
"SEC News Digest" has a current circulation of over 3,000, and is subscribed to by
many persons who regularly follow the Commission's activities. Moreover, in order
to allow the public to understand better the discussion at open meetings, the
Commission has informally begun to distribute summaries of relevant background
information pertaining to agenda items to attendees at these meetings. We have
previously submitted a number of these summaries to your staff for the Subcom­
mittee's information.
In spite of these efforts, if the extent to which members of the public attend open Commission meetings is any measure of how successful the notice and dissemination provisions of the Act have been in involving the general public in the work of the Commission, then we must conclude that they are not working as expected. Based on a review of the affiliations of persons who attend Commission meetings, it is apparent that it is the representatives of vested and regulated interests who regularly attend Commission meetings and who are, therefore, the primary beneficiaries of the Act. */ We do not think that this problem can be solved merely by increasing the time between the publication of the notice and the meeting. In fact, because our investor constituency is located throughout the United States and because these people do not, for the most part, have the resources to come to Washington whenever the Commission discusses a matter in which they have an interest, it is doubtful that significant numbers of investors would attend agency meetings regardless of how much advance notice was provided.

The effects of this are unfortunate. Those persons who attend our meetings are persons who will be subject to the regulations or other agency actions we often discuss at open meetings. The information gained at these meetings often amounts to little more than the Commission inquiring into the legal authority available to it to protect the public interest. Questions may be posed, or doubts expressed, for the sake of discussion. There is no exemption available for such discussions, and yet, those present at our meetings may seek to utilize such candid discourse in seeking to vitiate our efforts to protect the public. We believe that, at a minimum, therefore, the Act should make clear what the law already is—that comments by individual Commissioners or staff members may not be used against the agency; only the agency's prepared explanation of its action should serve as the basis for any judicial challenge to the agency's action.

*/ All persons attending open Commission meetings register at the reception desk in the lobby of the Commission's building, where they receive a building pass. These persons are requested to state, inter alia, their professional affiliation, if any.
In the Commission's view, the procedural requirements of the Act relating to closed Commission meetings place too great a burden on the Commission, when compared with the public benefits received.

One of the principal reasons for the difficulties created for the Commission by the Act relates to the treatment required to be accorded matters exempt from the open meeting requirements of the Act. As discussed above, a large percentage of our work involves investigatory and enforcement matters which often require prompt action. While subsection (d)(4) of the Act, 5 U.S.C. 552b(d)(4), eliminates some of the procedural hurdles attendant upon the consideration of enforcement matters, the Act has nevertheless significantly hampered the Commission's ability to deal with some emergency enforcement problems. */

For example, frequently the Commission must consider the issuance of a subpoena, the filing of a complaint to enjoin an ongoing fraud, or the commencement of a federal investigation upon very short notice because of the nature

*/ Because the Commission is an agency a majority of whose meetings may properly be closed pursuant to Exemptions 4, 8, 9(A) or 10, it need not follow the full procedural requirements of subsections (d)(1), (2), and (3) and subsection (e).

See 5 U.S.C. 552b(d)(4), which provides:

"Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time."

The Commission has implemented rules as authorized by this subsection.

See 17 CFR 200.405.
and volatility of the matter involved. The requirement of the Sunshine Act that a notice be published, a vote held, and the General Counsel's certification obtained in order to engage in such deliberations often entails procedural steps which seem to do little to further the Act's goals. Since the Commission must delete all identifying details from the public certification and public notice concerning meetings in this category, the notices which are released afford the public little, if any, real knowledge with respect to the Commission's deliberations concerning law enforcement matters.

Even when no emergency attends the Commission's consideration of a law enforcement matter, the procedural requirements of the Act appear to make little sense from the vantage point of the general public, since identifying characteristics must be deleted from the public notices. The problem is compounded should the Commission need to change its schedule for any reason. The procedural steps necessary to effect a Commission vote to modify an earlier Commission vote, and to publish a notice superceding a previously published notice in the Federal Register and in the Commission's "News Digest," appear pointless when little of substance is revealed to the public in any event.

The Commission believes that its business could be facilitated, with no attendant interference with the goals of the Sunshine Act, if subsection (d)(4) of the Act, 5 U.S.C. 552b(d)(4), were amended to permit agencies to close deliberations within the exemptions set forth in that subsection solely by rule and without the public notice requirements presently set forth in the proviso to subsection (d)(4). As noted above, since most law enforcement matters fall within these exemptions, the notice requirements burden the Commission but do not appear to assist the public in any meaningful way.

Moreover, in the Commission's experience, it would better serve the apparent purposes of Exemption 4 if it were dropped from the list of those exemptions included in subsection (d)(4) and if it were replaced by Exemption 5. Exemption 4 concerns the disclosure of "* * * trade secrets and commercial or financial
information obtained from a person and privileged or confidential." The legislative history indicates that,

"This paragraph applies to meetings which disclose trade secrets or financial or commercial information obtained from any person where such trade secrets or other information could not be obtained by the agency without a pledge of confidentiality or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom the information relates."

S. Rep. No. 94-354, 95th Cong., 1st Sess. at p. 23. Exemption 5, on the other hand,

"covers meetings which accuse an individual or corporation of a crime, or formally censure such person. An agency regulating financial or security [sic] matters may wish to censure a firm for failing to live up to its professional responsibilities, or an agency may consider whether to formally censure an attorney for his conduct in an agency proceeding. Opening to the public agency discussion of such matters could irreparably harm the person's reputation. If the agency decides not to accuse the person of a crime, or not to censure him, the harm done to the person's reputation by the open meeting could be very unfair."

S. Rep. 94-354, supra, at 22. Insofar as the Commission's experiences is concerned, we believe that Exemption 5 bears a closer relationship to the other exemptions enumerated in subsection (d)(4) and should replace Exemption 4 in that provision.

We also suggest that the requirement of subsection (f)(1) of the Act, 5 U.S.C. 552b(f)(1) — that a verbatim transcript or recording be made of Commission meetings closed pursuant to subsection (d)(4), 5 U.S.C. 552b(d)(4) — ought to be eliminated, or at least modified. Not only does this requirement add significantly to the cost of these meetings but, in addition, it exposes agencies to the threat of burdensome litigation designed to afford the target of a Commission investigation some delay, even if it is extremely unlikely to result in the release of any significant information to the public. There is
also some danger of frivolous and dilatory litigation seeking, for purposes unrelated to the Sunshine Act, to obtain these transcripts or recordings in order to frustrate law enforcement actions. */ On the other hand, the detailed requirements prescribed by subsection (f)(1) of the Act, 5 U.S.C. 552b(f)(1), with respect to minutes of agency meetings as a substitute for transcripts (in the case of meetings closed pursuant to Exemptions 8, 9A, or 10) make it entirely impractical to maintain minutes. Accordingly, at the present time, we feel we have no real alternative but to prepare a verbatim recording of all closed Commission meetings. As we previously indicated to the subcommittee, these problems could be resolved if the fourth sentence of subsection (f)(1) were amended to read:

"Such minutes shall fully and clearly describe all agenda items discussed and shall provide a full and accurate summary of all actions taken and the record of any roll-call vote, reflecting the vote of each member on the question.

Similarly, if this suggestion is adopted, we urge that the use of minutes be expanded to include discussion exempt from public observation pursuant to Exemption 5 of the Act. Alternatively, we suggest that the statute should make it clear that under no circumstances should access to any transcript required to be maintained by the Act be provided to those who are the subjects of actual or potential law enforcement activity. Agency action should be justified by reference to what the agency as a whole has done and what reasons the agency has stated to support its action. This has always been the law, and it would not be appropriate for an off-hand remark or comment by any individual Commissioner or member.*/

* The Commission's experience under the Freedom of Information Act has been that suits under that Act have occasionally been instituted to enjoin Commission investigations or enforcement action until insubstantial claims under the FOIA are finally resolved by the courts. While we have not yet had any lawsuits filed against us under the Sunshine Act, and do not anticipate massive litigation arising under it, we are concerned that at least some parties may attempt to use the Act to delay or impede the effectiveness of particular Commission decisions.
of the staff to be used against the Commission as a whole.

In addition, the Commission is concerned that the failure of subsection (f)(1) expressly to provide that, in addition to the agency's General Counsel or chief legal officer, his or the agency's designee may result in a legal challenge to agency action taken at a meeting held in circumstances where the General Counsel was himself unable to provide the certification required by the Act.

While we agree that the power to certify that an agency meeting may be closed should be restricted to responsible legal officers of the agency, we do not believe it was Congress' intention that agency work cease unless it could be shown that the the General Counsel was on business or on vacation. The Commission has implemented a procedure pursuant to which the next senior member of the General Counsel's staff performs the certifications when the General Counsel is physically absent from the Office. Beyond this, the rule provides for a chain of command by rank and seniority. See 17 CFR 200.21. But, we recommend to the Subcommittee that the statute be amended to provide specifically for a similar procedure to be employed when the General Counsel's time can be spent more profitably on matters of significant importance to the public, thus ensuring that the statute does not inadvertently create technical grounds for objecting to agency action which the Congress clearly never intended.

The Commission also believes that the requirement of subsection (d)(5) of the Act, 5 U.S.C. 552b(d)(5) — that "a full written explanation" of the agency action to close a meeting dealing with enforcement related matters be provided — is impractical, particularly in light of the statute's recognition an explanation should not include any exempt information. As a practical matter, there would appear to be little which can be said by way of explanation, beyond citation to the particular exemption involved, which
would not reveal exempt information. Accordingly, subsection (d)(5) would appear to serve little useful purpose with respect to law enforcement related matters and we suggest it should be eliminated.

Finally, we understand that the Federal Reserve Board has recommended that the Act be amended to provide a specific exemptive provision to permit agencies to close meetings at which discussions of pending or proposed legislation will occur. We concur in that recommendation. We believe the public interest is best served by full and frank discussions on the many legislative proposals that are referred to us for comment. Such discussions may not occur in a public meeting for fear that one's statements may, at a later time, be used against the agency in some other context.

We hope that these comments will be helpful to the Subcommittee in its efforts to provide more meaningful information to the public about the workings of its government while not adversely affecting the ability of the government to carry out its responsibilities. This is a goal which the Commission wholeheartedly supports. Mr. Pitt and I will be pleased to attempt to respond to any questions the members of the Subcommittee may have.
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Senator Chiles. Our next witness will be Mr. Richard Berg, Executive Secretary of the Administrative Conference of the United States.

Under the Government Sunshine Act, the administrative conference is assigned with assisting agencies subject to the act in carrying out their duties. This morning we anticipate hearing the results of those consultations and hearing what the Conference has done to assist and guide the agencies in carrying out the law.

TESTIMONY OF RICHARD K. BERG, EXECUTIVE SECRETARY, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, ACCOMPANIED BY STEPHEN KLITZMAN, STAFF ATTORNEY

Mr. Berg, Thank you, Mr. Chairman.

I am Richard Berg, Executive Secretary of the Administrative Conference of the United States, I would like to present my colleague, Stephen Klitzman, who has worked with me on all Sunshine Act matters from the very beginning.

Senator Chiles. Thank you, sir. We will include your statement in full in our record, and we would appreciate it very much, in the interest of time, if you could digest that.

Mr. Berg. Well, I will certainly do so.

I would like at the start to emphasize one point both about my testimony today and the interpretive guide that has been cited in the hearing earlier.

The Conference is a body of 90 members which operates in parliamentary fashion. The activities with respect to the Sunshine Act have been performed by the staff of the Office of the Chairman.

I am testifying on behalf of the chairman’s office, and the interpretive guide is a publication, will be a publication of the chairman’s office, and in neither case does this necessarily represent the views of the full body, which has never had an opportunity to pass on the sunshine matters.

Now, the act required in the 6 months between the enactment of the Sunshine Act and its taking effect that the agencies promulgate regulations after consultation with the chairman’s office, with our office. Pursuant to the mandate of the act we engaged in these consultations with nearly all of the 47 affected agencies through informal meetings, through circulation of draft regulations and other material, through commenting in writing and orally on their regulations, and through responding to their questions. We also attempted to serve as a clearinghouse for Sunshine Act information, and I hope that we performed some service in that respect.

When this consultation activity was at an end, we turned to collecting in a single body of work the substance of our activity and the learning which had been generated. Out of this effort we developed an interpretive guide to the Government in the Sunshine Act, which we circulated in a tentative version last May to all the affected agencies and interested groups and to the staff of this subcommittee.

We received many worthwhile comments, and we have been revising the guide accordingly. We have submitted the final manuscript for publication, and we expect the guide to come out sometime in the
winter. We hope that it will be helpful to the agencies, to Congress, and to the interested public.

We have not, since the effective date in March attempted to act as a watchdog or monitor on implementation of sunshine. We are not prepared to discuss the experience of agencies generally or of particular agencies under sunshine. Fortunately, a number of significant agencies have testified already.

On the basis of our work, though, we can point to a number of particular problem areas which occur to us as worthy of attention. These are in the general categories of public observation, public understanding, public notice, and public access.

The questions about public observation have been alluded to in the hearing earlier, principally, the question whether recording and photography will be allowed at agency open meetings. We have pointed out to the agencies the relevance of Administrative Conference Recommendation 72–1, Broadcast of Agency Proceedings [CFR § 305.72–1], which I might add, was adopted in 1972, not with sunshine particularly in mind, but with a view premised on the belief that media coverage of administrative proceedings would enhance public understanding of such proceedings, and should be encouraged subject to appropriate limitations and controls.

The Department of Justice has also urged the agencies to permit nonobtrusive sound recordings as well as the taking of notes and non-flash pictures. I do not believe there has been any problem about the taking of notes.

With respect to public understanding, this is also a question that a number of previous witnesses have touched upon. If, in the course of meetings, the agency personnel obscure the discussion with a mass of jargon and statutory citations, then much of the value of the open meeting provision will be lost. At least a few agencies have taken positive steps to assist members of the public to understand and follow the course of their meetings.

A number of the agencies have testified as to their experience in this regard. In addition, I would like to point to the Federal Communications Commission, which has published a brochure entitled “A Guide to Open Meetings.” This details room arrangements, locating key personnel, describes voting procedures and terminology, and offers other information about Commission procedures. The International Trade Commission has also taken steps in this direction.

In fairness to the agencies, it should be recognized that they frequently deal with highly specialized subject matter, and they cannot be expected to make complex matters simple for the benefit of members of the general public.

Indeed, I suggest that the agencies’ principal goal should be to make their proceedings comprehensible to members of the interested public, that is to say, those who have followed the course of the agencies’ business and are familiar with the general nature of the agencies’ work.

I suspect that those are, in fact, the people who are attending these meetings. It would probably be useful for agencies to have more specific information about exactly who their publics are because this will, of course, affect the amount and nature of the information that they make available to the public who attend.
There have been questions about public notice. To make meaningful the right to attend an agency meeting, we have pointed out to the agencies that the Sunshine Act encourages the widest possible circulation of meeting information. There is a requirement for publication in the Federal Register, but this, in many cases, because of the time factor, will be inadequate notice, and the agencies have been made aware of the fact that Federal Register publication is only part of their duty of public notice. We have encouraged them and this committee has encouraged them to use their imaginations in finding other means of communicating with their interested public.

Here again, it is important for the agencies to know who their interested publics are.

The timing of agency notices, the 7-day requirement is that the agencies must submit notice to the Federal Register 7 days in advance of the meeting.

Of course, this does not mean that the notice will appear in the Federal Register 7 days in advance. In fact, there is frequently a 3- or 4-day lag, and to deal with this problem, the Federal Register people have been imaginative, I think, in working with the agencies on methods of speeding up the transmission. There is, in my testimony, reference to a short-form notice which can be sent, by telecopy equipment or by hand delivery, which will cut down on the turnaround time between submission and publication.

However, you do lose on the amount of information which can go into the notice, and I think that part of the problem which has been alluded to in the testimony earlier about the failure of the agencies adequately to explain the grounds for closing has arisen from the fact that the so-called short-form notice contains the bare minimum of what the statute requires. The statute does not require that the Federal Register notice include the ground for closing, but merely whether or not the meeting is to be closed.

Of course, the notice does include the name and phone number of the contact person, so anyone who has any interest in knowing why a particular meeting is being closed can find out by making a phone call.

I think that this problem has led to a certain amount of misunderstanding.

Finally, I would like just to touch upon the question of public access to meeting records. The act requires, as you know, that recordings or transcripts be made of all closed meetings, and that thereafter the agency must make all nonexempt materials available to the public.

There has been a question and a divergence of views in the agency regulations as to whether the agencies must go through the process of, in effect, declassifying the transcript or the recording in advance, or only upon request of members of the interested public. We have pointed out to the agencies, and I think the legislative history is very clear on this point, that there is a positive duty to go through this material as promptly as possible upon completion of the meeting, and to make that material public, available to the public, and not simply wait for a request.

A number of agencies, particularly the smaller agencies where there has not been a great demand for access to those materials, feel that
this may be somewhat unreasonable, but the act and the legislative history seem to us to be clear in imposing that responsibility.

Finally, there has been a fairly technical problem as to the interaction of the procedures of the Freedom of Information Act and the Sunshine Act.

We gave considerable thought to this problem in the course of our perfecting the guide, and it is our conclusion that with respect to the processing of requests for access to transcripts and recordings, the agency should apply Freedom of Information Act procedures rather than devise procedures relying solely on the Sunshine Act.

The principal point of difference here will be the question of the time limitations. The Sunshine Act provides no specific time limitations on handling requests for access. The Freedom of Information Act does. The Freedom of Information Act time limits should be applied.

These are just a few of the legal and technical problems that we see, and by working with the agencies we have attempted to be helpful and hope to continue to be helpful. We look forward to working with this subcommittee in any future evaluation and amendment of the Sunshine Act.

Thank you.

Senator Chiles. Thank you.

A MEETING IS A MEETING IS A MEETING . . .

I note that the Administrative Conference has narrowly construed the definition of meeting. I just wonder if there is a difference between the definition as set forth in the Administrative Conference's writings and the definition of meeting that Barbara Babcock, an Assistant Attorney General, sent a letter to the agencies on April 19, in which she wrote that several agencies define the term meeting in such a way as to limit the joint deliberations which are subject to the act. She goes on to urge agencies to avoid ultimately fruitless litigation and take a broad view of what constitutes a meeting. Thus she suggests that the term meeting is broadly defined.

It would appear that they are taking a more broad definition of what constitutes a meeting than your interpretation.

I was wondering if you agree with that. I notice, for example, the preliminary deliberations, briefings, all those items are pretty well covered within the definition of meeting.

Mr. Berg. Senator, I am aware of the Department of Justice letter. In fact, in fairness to all concerned, we have included it as an appendix in the final version of our guide, but I must say, I do disagree with it. I think that it does not give adequate consideration to the lengthy and the tortuous legislative history that went into formulating the definition of meeting.

The term “meeting” is defined as “deliberations” of the required number of agency members, “where such deliberations determine or result in the joint conduct or disposition of official agency business.” And practically every word there was wrestled over in the course of the legislative history.

The proposition which I think is the alternative proposition, alternative to our definition, is the proposition that any discussion of
agency business by a quorum is a meeting. If that is what was meant, there was a lot easier way to say it. But, in fact, the term “deliberations” is used, and in the legislative history given some weight. The term “joint conduct” is used and given some weight. The terminology, “determine or result in,” was substituted in conference for the term “concern,” and the legislative history indicates that all these word choices were made in attempts to narrow somewhat the concept of “meeting,” with the idea, as I understand it, of focusing in on the exchanges which lead to the agency decisions, which are primarily directed to the agency decisions and part of the decisionmaking process.

It seems to me, therefore, that it is clear that there was some attempt to exclude very preliminary exchanges. There is this passage in the Senate report [p. 19] which a previous witness referred to—concededly referring to discussions between two members—which lends credit to the view that preliminary discussions are not within the meaning of the definition of meeting.

Senator Chiles. Well, you state in the guide that your treatment of meetings has much to recommend it in terms of the practical problems of the day-to-day operations in agencies.

Mr. Berg. That is true. I certainly try to keep in mind the practical problems.

Senator Chiles. Well, I do not think the purpose of the act was really to take care of the day-to-day operations of the agencies. I think the overall purpose of the act, the overriding purpose, is to open up Government. If I would have issue with the definition, it would be that you have gone further to accommodate the day-to-day practical operations of the agencies, rather than to err on the side of openness.

Mr. Berg. Well, the question of what they should do when in doubt is one thing, and I would fully agree that when in doubt, the act encourages them to err on the side of openness, and this is true with respect to briefings and all these other categories.

But before you can be in doubt, you have to have some idea of where the line is that you are in doubt about, and I think that before the agencies can focus in on these close questions of what is a meeting and what is not a meeting, you have to have some idea of where the line of demarcation is. Otherwise, your doubts will keep proceeding further and further to the outer limits.

There are practical needs. There are particularly practical needs in the case of the three-member agencies. We had witnesses from a three-member agency here this morning. There are many of these agencies. I presume that you get two members talking to each other, and you do not want to encourage them to talk about something frivolous. It would be nice if they spent their working day focusing in on working matters. So, how do you handle these things if you take the position that every discussion of agency business, however preliminary, is a meeting? How do the agencies live with this? I confess I do not know.

Senator Chiles. Well, maybe that is what we are going to find out more about, if we ever get any litigation on this subject. We thank you very much for your testimony today, and your work with regard to the act.

[The prepared statement of Mr. Berg follows:]
STATEMENT OF
RICHARD K. BERG, EXECUTIVE SECRETARY
ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Oversight Hearing on the Implementation of the
Government in the Sunshine Act
Before the
Senate Subcommittee on Federal Spending Practices and Open Government
Senate Committee on Governmental Affairs
November 29, 1977

We appreciate the opportunity to testify before this Subcommittee today. I am Richard K. Berg, Executive Secretary of the Administrative Conference, and this is Stephen Klitzman, a staff attorney at the Conference. Together, we have been working since September 1976 on Sunshine Act matters and most recently, on preparation for this hearing.

As you know, the Administrative Conference of the United States -- a permanent, independent Federal agency -- has as its mission the improvement of the administrative procedures of all Federal departments and agencies. The purpose of the Conference, simply stated, is to assist the agencies and the Congress in the development of procedures that provide greater fairness and expedition for participants in the administrative process, more effective attainment of the agencies' goals, and lower costs to taxpayers. The members of the Conference have special expertise on questions of administrative law and procedure.

A body of approximately 90 members, the Conference speaks through its formal statements and recommendations, adopted at semi-annual plenary sessions. The Conference as a body has not taken a formal position on "government in the sunshine." Rather, its working arm, the Office of the Chairman, testified on the legislation and consulted with the agencies in the preparation of their regulations under subsection (g) of the statute. Therefore, the views we are expressing are those of the Office of the Chairman on a matter which has not been considered by the Conference.
At the outset, we would like to describe briefly the nature of the consultative role of the Office of the Chairman in the promulgation of agency regulations implementing the Sunshine Act. What have we done? What are we doing? Pursuant to the mandate of subsection (g) of the statute, we consulted with nearly all the 47 affected agencies between October 1976 and March 12, 1977, the effective date of the Act. First, we circulated a letter describing our view of the consultative function, and an outline or checklist of what we thought the agencies should seek to cover in their regulations. Subsequently, we conducted a series of informal meetings attended by representatives of most of the affected agencies, circulated draft agency regulations and memoranda prepared by other agencies, responded to telephone inquiries, submitted written comments to a limited degree on proposed regulations, and, generally, served as a clearing-house for information and informal advice on the Act.

Out of this consultative activity we developed an Interpretive Guide to the Government in the Sunshine Act. A tentative version of this guide was circulated last May to the agencies and interested groups, including the staff of this Committee, and we solicited and received comments and criticisms. We have been working intermittently on a revised version, and we just recently turned the manuscript over to the General Services Administration for graphic design and printing by the Government Printing Office. We are optimistic that the printed Guide will be available for general distribution well before March 12, 1978, the Sunshine Act's first birthday of effective operation. A compendium of materials drawn from our consultative efforts, as well as from the published legislative history and agency regulations, the Guide should be useful to the agencies, as well as the courts, the Congress and members of the public. The Guide does discuss differing agency approaches to the procedural obligations imposed by the Act, and occasionally cites examples of what we consider to be
"better" agency practices in dealing with particular procedural problems. Hence, it should be of some utility in any analysis and subsequent amendment of the current statutory requirements.

We have not in the past and do not now function as a "watchdog" or monitoring office on day-to-day agency implementation of the Sunshine Act. That function might usefully be performed by some government office, but to date, it has not been undertaken by the Office of the Chairman of the Administrative Conference. Hence, we cannot testify in any detail as to how the agencies are in fact implementing the statute and their own regulations.

However, on the basis of our work for the Guide, on some limited attendance at agency meetings, on our own reading of the Federal Register and other publications, and on a reduced but continuing number of agency queries and consultations, we are able to offer some comments on a few of the problem areas indicated by agency regulations and practice.

As you are aware, the Sunshine Act is a very specific statute that does not grant the agencies much opportunity to increase their discretion by regulation. Therefore, the majority of agencies appear to have played it safe, and their regulations, by and large, track the provisions of the Act. On significant matters, for example, such as the definition of "meeting" and the exemptions, the regulations mirror the language of the statute.

Nevertheless, there are some agency variations and practices which are worth noting. Our focus is on four areas which should most concern the public: public observation, public understanding, public notice, and public access.

Public Observation. One question on which the agencies have been sharply divided is whether to permit the public or press to photograph, televise or tape record meetings. Some agencies freely permit the use of tape recorders and cameras during the meetings, whereas others may require permission to be sought in advance,
while others bar use of cameras or recording devices entirely. No agency, so far as we know, restricts the right to take notes at a meeting.

The Act does not define "public observation," nor does it expressly confer a right to record, photograph, or televise an open meeting. It remains an open question whether the right to do so in a manner which does not disrupt or interfere with the meeting is part of the right of observation.

We have pointed out to the agencies the relevance of Administrative Conference Recommendation 72-1, Broadcast of Agency Proceedings. The recommendation is premised on the belief that radio-television coverage of many administrative proceedings will enhance public understanding of agency proceedings and should be encouraged "subject to appropriate limitations and controls." The Department of Justice has also urged agencies to permit "non-obtrusive" sound recordings, as well as the taking of notes and non-flash pictures. I might note that although the agencies are not required by the Sunshine Act to record their open meetings, the prospect of recordings in the hands of the general public is likely to induce agencies to make their own recordings as protection in the event that a dispute arises as to the events of the meeting.

Public Understanding. The Sunshine Act does not require an agency to permit members of the public to participate in an open meeting -- merely to attend, to listen and to observe. The value of such observation, at least to members of the general public, can be negated if agencies make no attempt to explain their business, or worse, obscure the course of discussion in a confusing mass of agency jargon and statutory citations. At least a few agencies have taken steps to assist members of the public to understand and to follow the course of their meetings. The Federal Trade Commission, for example, makes available before
each open meeting a summary of the matters on its agenda in order to facilitate public understanding of the discussion. The Federal Communications Commission has published a brochure entitled, "A Guide to Open Meetings." It includes a room arrangement which locates key agency personnel, describes their functions, explains voting procedures and terminology, and offers other information about Commission procedures under the Sunshine Act. And the International Trade Commission distributes to its public observers the non-confidential portions of documents discussed at its open meetings.

In fairness to the agencies it should be recognized that they frequently deal with highly specialized subject matter, and they cannot be expected to make complex matters simple for the benefit of members of the general public. Indeed, I suggest that the agency's principal goal should be to make their proceedings comprehensible to members of the "interested public," that is to say, to those who have some ongoing interest in and familiarity with the work of the agency, for I suspect that the great majority of observers of these meetings fall into this category.

Public Observation, Public Understanding, and Notation Procedure. Both public observation and understanding of an agency's decisionmaking process will obviously be diminished if the agency decides to conduct more of its business by written circulation of agenda items instead of in an open, or even closed, meeting. We have cautioned the agencies in the informal gatherings we held in 1976, in consultations, and in the Interpretive Guide that to comply with the spirit of the Sunshine Act they should refrain from excessive reliance on notation procedure. It's difficult to determine whether the agencies are using notation voting procedures more now than they did before the Sunshine Act. But we do
believe that a consensus has developed among the agencies that at the very least, their public image will suffer if they switch to notation voting with respect to items which in the past were disposed of at meetings.

Of course, many Sunshine agencies have long used notation voting, often for disposition of routine, non-controversial agency business. Notation procedure is also frequently the most effective means of securing a final "sign off" on a formal agency opinion or other document. In short, notation procedure can perform a valuable function in permitting meeting time -- usually in short supply -- to be reserved for those matters which can most profit from a collegial exchange.

Some agencies have demonstrated their sensitivity to the possibility that notation procedure might be abused by detailing the circumstances and procedures under which they expect to conduct business by circulation of documents. I refer, for example, to the regulations of the ICC, FTC, and SEC. These agencies provide for recording the votes of each Commissioner on each agenda item conducted by notation procedure and in the case of the ICC, to make these votes "or other statements of position" available to the public. Moreover, both the FTC and SEC are codifying an apparently long-standing practice which has also been the practice at the Federal Communications Commission, i.e., allowing a Commissioner to place on the meeting agenda any written matter circulated to the members for consideration and voting by notation procedure.

These procedural checks on the use of notation procedure are designed, in the words of the FTC, "to insure that the practice of 'business by circulation' is understood by the public and to demonstrate good faith in complying with the Act."
Public Notice. To make meaningful the right to attend an agency meeting, we have repeatedly pointed out to the agencies that the Sunshine Act encourages the widest possible circulation of meeting information. Meetings will be effectively open only to those interested persons who receive adequate and timely notice of them. As one agency regulation put it, "The provision for comprehensive public notice of agency meetings is the keystone to fulfillment of the Congressional policy expressed in the Act."

How has this public notice principle fared in agency practice? First of all, with regard to the timing of agency notice, we believe that public announcement seven days in advance of the meeting, as required by subsection (e)(1), frequently will be inadequate notice, particularly because of the time lag between submission to and publication in the Federal Register. (Normally, a document is published in the Federal Register on the third work day after it is received. The Federal Register, however, has adopted a special format and procedure for expedited service on Sunshine meeting notices. This format has affected the contents of agency notices, and we will consider it when we review the contents of agency notices.) Consequently, in our Guide and our consultations, we have advised the agencies to provide longer notice whenever possible and to use additional means of notification so as to reach interested persons more quickly and effectively than Federal Register notice.

Another problem related to the timing of agency meeting notices arises in subsection (e)(1).

It allows an agency to shorten the one-week advance notice of its meetings if "a majority of the members of the agency" votes by recorded vote "that agency business requires" the meeting to be held with less than seven days notice. In such a case, the requisite public announcement of the time, place, subject matter, and open-closed status of the meeting must still be provided "at the earliest practicable time."
Legislative history indicates that this "escape clause" allowing for shorter notice is not to be relied upon routinely but should be primarily used to deal with emergency, late-breaking items.

A few agencies reflect this emergency emphasis in their final regulations implementing 5 U.S.C. §552b(e)(1). Most, however, merely repeat the statutory language and do not emphasize the emergency nature of the clause. A review of Federal Register Sunshine notices reveals extensive reliance on this short notice procedure.

In our Guide, we take the position that the better agency practice would be to place procedural limits or impose criteria on the use of the shorter notice, "escape clause" of subsection (e)(1). For example, the Federal Communications Commission provides in the announcement of any last minute meeting the vote of each agency member on the decision to give less than seven days notice. The announcement will also "specify the nature of the emergency situation if it is not clear from the subject matter." 47 C.F.R. § 0.605(e), 42 F.R. 12864, 12868. When the International Trade Commission calls a meeting on short notice, it will "apprise interested members of the public that such an 'emergency' meeting is being held" by promptly posting public notices on agency bulletin boards, immediately sending out copies of the notice to a mailing list and "when advance notice is very short, [b]y telephoning interested and affected persons." 42 F.R. 11242.

Concerning the contents of public notice, subsection (e)(3) requires that, immediately after each public announcement required by subsections (e)(1) and (e)(2), the agency must submit for publication in the Federal Register, notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, change in any of these items, and the name and phone number of an agency person to contact for additional information. These seven items
are the minimum contents of the meeting notice, to be published in the Federal Register whether the meeting is to be open or closed, unless the meeting is covered by the expediting procedures of subsection (d)(4). A few agencies include in their Federal Register notices information required to be made public by subsections (d)(3) and (f)(1), such as the votes of members on closings, explanations of closings, lists of expected attendees and the certifications of the General Counsel. Some agencies have also included in (e)(3) notices a paragraph informing the public of the procedure to request a closing under subsection (d)(2).

These additional items of information are not required to be published in the Federal Register, nor are they included in the standard format for expedited publication of meeting notices announced by the Federal Register as a means of cutting the time lag between submission and publication of notices. This "short form notice" includes only the minimum information required by subsection (e)(3).

Hence, it is misleading to suggest, as did the Library of Congress survey of Sunshine Act meetings listed in the Federal Register between March 24 and September 9, that because relevant "exemptive provisions were cited in only 193 of the 527 meetings that were fully or partially closed," agencies are not complying with the explanation requirements of the law and are trying to "get around the law" or away with something. In fact, subsection (e)(3) does not require such explanation in the Federal Register notice, nor does the short form Federal Register notice permit it.

The publication of the additional information cited in subsections (d)(3) and (f)(1) does, of course, provide the public with a fuller explanation and more complete notice of closed agency meetings. Where an agency opts not to submit a notice in the standardized format, it would be practical and efficient
to issue a single document complying with subsections (d)(3) and (e)(3), and referring as well to the General Counsel's certification required in subsection (f)(1). Agencies submitting short form notices to the Federal Register should issue and make available the (d)(3) information -- members' votes, explanations of closings, and lists of expected attendees -- using bulletin boards, press releases, or whatever additional means of notification or public announcement they have adopted. While the certification of the General Counsel need not be published in the Federal Register, it too should be issued or made available by the agency. See, e.g., regulation of the Civil Aeronautics Board, 14 C.F.R. § 310b.4, 42 F.R. 14681.

Public Access to Meeting Records. A key provision of the Sunshine Act is the requirement in subsection (f) that agencies maintain recordings, transcripts, or, under certain circumstances, detailed minutes of each closed meeting. These meeting record materials must promptly be made available to the public, although the agency is, of course, entitled to delete those parts of the discussion that dealt with exempt information. A number of practical and legal problems deriving from this requirement have come to our attention. First, some agencies were reluctant to undertake the task of editing the meeting record materials before a request for such materials was received. It is perhaps understandable that an agency, particularly one of the less prominent agencies, might feel that the work involved in deleting exempt material from a transcript or recording might well await the unlikely event of a request from a member of the public. However, we think the Act is clear -- and we have so advised the agencies -- that there is a duty to provide an edited version of the meeting record, whether transcript, recording or minutes, in advance of a request. This does not mean, of course, that an agency should not review or reconsider its decisions to delete material in the light of particular requests, or, indeed, the passage of time.
The handling of requests for meeting records raises another fairly technical problem — the interrelationship of the Sunshine Act and the Freedom of Information Act. Subsection (k) in the Sunshine Act says, of course, that nothing in the open meeting provisions of the Act "expands or limits" rights under the Freedom of Information Act, except that the Sunshine Act exemptions rather than the FOIA exemptions shall govern the disposition of requests for meeting record material. Now there has been some disagreement among the agencies as to whether the procedures for handling Freedom of Information Act requests should be applied to these requests under the Sunshine Act. Some agency regulations expressly refer to or incorporate FOIA procedures, others set up a separate set of procedures, while still others do not really say how they plan to handle requests for meeting record materials. The principal question at issue here is whether the time limits in the FOIA for handling requests — 10 working days for initial disposition and 20 working days on appeal — will apply to Sunshine Act requests. We did not advise the agencies on this point last winter and it was not dealt with in the tentative version of our Guide. However, we have come to the conclusion that FOIA procedures, both at the agency level and on judicial review, should govern these requests for meeting records. We believe this is what Congress intended, and we do not see that the result creates any particular practical problems. This is not to say that the agencies must process requests for meeting records in precisely the same way they process ordinary FOIA requests. But we do believe that their procedures must accord with the requirements, particularly the time limits, of the FOIA.

Conclusion. These are just a few of the legal and practical problems we have identified as part of our consultative role in the promulgation of regulations implementing the Government in the Sunshine Act.
We have attempted to be as helpful as possible to the agencies and to the
cognizant Committees of Congress, and we believe our Interpretive Guide will be
of additional assistance.

Finally, we look forward to working with the Subcommittee on Federal
Spending Practices and Open Government and the Committee on Governmental Affairs

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OFFICE OF MANAGEMENT AND BUDGET

Senator CHILES. Our final witness today is Mr. Wayne Granquist, Associate Director for Administrative Management in the Office of Management and Budget.

It would seem to me that if there is any message from previous witnesses, it would be that there is a firm need for guidance and management. Frankly, I am pleased to hear what guidance we are going to receive.

TESTIMONY OF WAYNE GRANQUIST, ASSOCIATE DIRECTOR FOR ADMINISTRATIVE MANAGEMENT, OFFICE OF MANAGEMENT AND BUDGET, ACCOMPANIED BY ROBERT BEDELL, ASSOCIATE GENERAL COUNSEL

Mr. GRANQUIST. Thank you, Mr. Chairman.

With me today is Mr. Robert Bedell, Associate General Counsel.

We are pleased to be here today to discuss the Government Sunshine Act and to answer questions that the subcommittee may have. As the prime sponsor of this legislation, you, Mr. Chairman, know of this administration's longstanding interest and involvement with the field of information practices, including the Government in the Sunshine Act.

As you know, long before he became President, President Carter endorsed the concept of more "sunshine" on our Government's processes. His commitment to that principle is fundamental.

For President Carter, the openness of our governmental processes is not a procedural hurdle to be dealt with during decisionmaking, it is an essential element of his approach to governing. In an address before the Federal Bar Association in May—at which I believe you also spoke, Mr. Chairman—Robert J. Lipshutz, the President's Counsel, summarized President Carter's views on openness as follows:

Plainly if you believe in the competence and compassion of the American people, you will want to remove whatever barriers separate those people from their government. One of those is secrecy—that secrecy which too often arises from fear of the people's good sense and judgment.

The Government in the Sunshine Act was enacted in the fall 1976 and became effective this past March. Its purposes are as bold and revolutionary for the meetings of those agencies it covers, as the Freedom of Information Act was over 10 years ago with regard to the availability of Government records.

Like the Freedom of Information Act in another area, the Government in the Sunshine Act stands on its head the previous general policy of these agencies by declaring that their business meetings shall be open to—and for—the public, unless one of the specific statutory grounds for closing is found to exist and is also determined to override the public interest in holding a meeting in the sunshine.

No one expected that this fundamental change in the way the covered agencies conducted their business would occur overnight or without continual diligence. It is apparent, in that regard, that the commitment you demonstrated during the passage of the legislation has not diminished with its signing. These hearings should accomplish much in determining what changes in procedure or regulation would better implement the purposes of the act. Our view of the agency implemen-
tation has been limited, but our initial impression is that although much has been done, we can and should expect more. Our impression also is that the difficulties lie less with the wording of the act than they do with the attitudes of some agencies toward the act's implementation.

Statistical representations of the number of meetings held, open, closed or partially closed cannot answer all questions about the implementation of the act. Exemptions were clearly spelled out in the legislation. Nevertheless, the first quarter operating statistics compiled by Common Cause and published in its report of September 1977, "Shadows Over the Sunshine Act," reinforce the need to watch carefully for a trend to a greater proportion of open meetings.

This administration is totally committed to the goals and principles of the Government in the Sunshine Act.

We shall follow the implementation of the act carefully and continue to review the performance of covered agencies. It is our hope that in the near future the statistics with regard to agency performance will obviate the need for major changes. We at OMB shall keep in close touch with these developments and will be anxious to continue to work with you and your staff on this legislation.

Like the related Freedom of Information Act, the Federal Advisory Committee Act, and the Privacy Act of 1974, the Government in the Sunshine Act relies on each agency to interpret and implement their provisions. The Advisory Committee Act and the Privacy Act, however, provide for a single agency to assume some oversight role and to issue interpretive guidelines. We would consider organizational alternatives such as this to be appropriate for inclusion in the Sunshine Act should agency performance over a longer period of time prove unsatisfactory. We would urge caution, however, in moving too quickly with such organizational changes, since the Sunshine Act recognizes, by addressing itself to each agency, that the differing circumstances in which each agency operates make general solutions difficult.

It seems to us, also, that the overall goal of this legislation and the President's commitment to openness in Government is best served by insuring that each agency make openness an integral part of its procedures and be held accountable for its actions in that regard.

We would be concerned that the covered agencies not view the act as the fundamental responsibility of an organization other than itself. That, after all, is the principle of Cabinet government so often stated by President Carter—that his appointees are responsible and accountable for carrying out their programs in accordance with the policies of the administration and the clear intent of the Congress and the law.

I will be pleased to respond to questions, Mr. Chairman.

Thank you.

Senator CHILES. Mr. Granquist. I asked most of the other witnesses if they would give me a brief summary of their statements, and put their statements in full in the record, so we would have time to ask questions. I did not have to make that request of you because your statement was not quite that full.

I am delighted to hear the continuation of the President's commitment to open Government and to sunshine.

I must say that I am tremendously disappointed to find that we are going to take a cautious approach. How long would an administration that is elected for 4 years be cautious? We are now one-fourth
through that administration. We are into the month of December now, and I wonder how long we have to be cautious.

I read your remarks, and then I look and see a transcript of “Meet the Press” with guest Jimmy Carter, Presidential Candidate. This occurred on July 11, 1976. In answer to a question Jimmy Carter, then candidate for the Presidency, said that he would have the strongest possible commitment as President to protect the right of the press to speak freely. He said:

... I favor strong sunshine laws. One of the first acts I intend to take if I am elected President is by executive order to open up as many of the deliberations of the Executive Branch of Government as possible, and I would join in with the efforts that have been pursued by Senator Stone and Senator Lawton Chiles of Florida and others to pass a comprehensive sunshine law for the whole federal government. So everything I do as President will be designed, within the bounds of rationality, to open up the deliberations of government to the people through the press.

Senator CHILES. I read that and then I hear words of caution. That concerns me a little bit.

You state:

We would consider organizational alternatives such as this to be appropriate should agency performance over a longer period of time prove unsatisfactory. We would urge caution, however, in moving too quickly with such organizational changes.

This is followed by language on the principle of Cabinet Government.

Everybody has to stand on his own. What this act needs is some Executive leadership, What I thought we were going to get from this President was that kind of Executive leadership. I do not find that in the statement that you have given me today from OMB.

Mr. GRANQUIST. Let me distinguish between two matters, Mr. Chairman. I did not come here, obviously, to defend the administration's record in the broadest concept of “openness of Government.” I can give you a couple of examples that I am personally familiar with, and that we are working with at OMB.

One, is the President’s reorganization project, some efforts of which I have under my jurisdiction. There we are working in a very open manner. We are holding public meetings and consulting openly with a broad range of the public and the Congress.

Another example of the openness of this administration is the fact that we have just published in the Federal Register this week for the first time, I believe, in history, a draft Executive order which we would hope to issue later this year on regulatory policy and process.

The goal of that Executive order, which has been approved by the President in principle, is to indeed open the regulatory process to the public interest. It will require that agendas of regulatory actions be published semiannually, it will ask that the public be fully informed of progress made in regulatory activity, by asking that work plans be utilized in managing that process, and that the general thrust of regulatory activity be one that involves public participation.

In terms of the implementation of the Sunshine Act itself, the thrust of my remarks is really this: We would like to continue to work with your committee to see if, in fact, the trend is a trend towards closing committee meetings and see if there are institutional changes we
could help to undertake which would help to make the act more effective.

We should recognize also that we are dealing here with basically independent regulatory commissions, and we are sensitive to the executive branch relationships to those agencies.

Senator Chiles. Well, it seems that OMB is, as the Office of Management and Budget, usually the arm of the President implementing and carrying out Executive orders. They come out of OMB normally, do they not?

We have got somebody in the Attorney General's office saying: "If I have got to defend a lawsuit against you, I hope you will have a broad definition of the word meeting." I was delighted to see that kind of letter. But, that is someone who says: "I have got the responsibility of defending you in a lawsuit, and I hope to be successful."

But I do not find any voice in the executive branch that says: "We are going to monitor, and we want a report of how many meetings that are open, and closed, and why. We are interested, and it is the focal point of this administration that meetings be opened."

Has that message gone out? Are the agencies and commissions so independent that the President of the United States should not speak to them or that OMB should not speak to them as the management arm of the President of the United States?

If they are that independent, then I wonder how we are going to perform a role of leadership.

Mr. Granquist. Let me say, Mr. Chairman, that these hearings will be very helpful in both the testimony the witnesses and the material submitted for the record.

They do, sir.

Senator Chiles. And I have always thought of OMB as being that agency of the Government which coordinates Presidential activity and directive as it applies to the executive branch. And now today I find that OMB is just going to continue to monitor sunshine or watch it with interest and read the reports with interest and caution.

Certainly, from my hearing today, we get a mixed sort of bag of reports of what is happening, both from the Common Cause report and from the Library of Congress report, which was done for us. I do not think we can sit back and say that the act is working with any tremendous degree of success. And now I find that there is no Executive leadership, and that OMB does not intend to perform that role. If OMB is not going to perform that role, I do not know where leadership is going to come from. I do not know whether anyone else has been designated.

I am delighted to hear of the Executive order that you are working on with regard to regulatory agencies. Do you know of any other Executive orders that have come down to open up as many of the deliberations of the executive branch of Government as possible?

Mr. Granquist. I am not personally aware of any.

Senator Chiles. Well, I do not know of any either at this time.

It seems that we do not have someone in the executive branch who is going to monitor the act. We have got the Administrative Conference which is writing treatises of what they think the act means. We will certainly take your comments on the testimony quite seriously, and
I really mean that we will work closely with your staff, and this committee, and yourself to see what possible alternatives there are and explore what can be done toward the end of more effective implementation of the Sunshine Act.

At this particular stage, we are not prepared, and that is why I used the words “with caution,” to endorse any specific changes.

Senator Chiles. Well, Mr. Granquist, let me say that I hope you will take this quite seriously. I want you to know that I am going to take the statement of OMB quite seriously, too. Those comments of caution I am going to take quite seriously. I hope after you have had a chance, and after the office has had a chance to digest this, we will have an opportunity to discuss this further. I look forward to that.

I do not think the President of the United States intends to go back on the promise that he made in this regard. I do not think that he would want to approach with caution a matter like this. I do not think that he would be afraid to say to the other agencies and commissions, even though they may be independent, that he would be afraid to express the feelings that he has so strongly expressed before in regard to open Government. I look forward to seeing how that is going to be expressed.

It seems to me the Office of Management and Budget is the logical place for such leadership to originate. If it is not, then maybe there has to be some other kind of agency. Under the circumstances, I will say we are going to complete our hearings, but I want to recess these hearings because I think we are going to have further discussions in this regard.

Thank you very much.

Mr. Granquist. Thank you, Mr. Chairman.

[Whereupon, the hearing was recessed at 12:30 p.m.]
The subcommittee met, pursuant to notice, at 9:30 a.m., in room 2288, Dirksen Building, Senator Lawton Chiles (chairman) presiding. Present: Senator Chiles.

Staff members present: Ronald A. Chiodo, chief counsel and staff director; Janet R. Studley, counsel; Robert F. Harris, deputy staff director; and Christine Sheridan Betts, chief clerk.

Senator CHILES. It has been more than 6 months since our subcommittee recessed its first oversight hearing on the Government in the Sunshine Act.

In November 1977, Wayne Granquist testified that OMB was carefully following the implementation of the act and continuing to review the performance of covered agencies. He also said OMB can and should expect more than the agencies had done to date. However, at that same hearing, it became clear that OMB had in fact taken no action to follow the implementation of the act, and was learning for the first time that day what was happening in agencies covered by the act.

We didn't adjourn that hearing last November; I simply recessed the hearing because we were very disappointed in what little we heard from OMB regarding its role in the management of sunshine. I knew that I wanted and needed to have further, more detailed discussions with the Office of Management and Budget in this regard.

A few months later, however, I did have the chance to talk about sunshine a little more. On March 16, at Jim McIntyre's confirmation hearings as the Director of OMB, I received a firm commitment that OMB would at last take a very active role in monitoring and advising the agencies on their implementation of the Sunshine Act. That was good news to me, and I was pleased then to learn that, finally, the President's commitment to open government was going to be realized.

If there was one clear message that I received from our November hearings and from subsequent dealings with several agencies, it is that there is a dire need for guidance and management in the implementation of sunshine. The agencies are still having problems in adopting a spirit of openness in their conduct of the public's business. We have seen so many tortured interpretations of the act's key provisions, that I am beginning to think that we have an excess of paranoid commissioners and far too many general counsels out there with over-
active imaginations. Their purposes seem to be to maneuver around the act as much as possible.

Some agencies still haven’t figured out what a meeting is. In one instance, a meeting held outside of the agency’s four walls was declared not to be a “meeting” under the act. I am still reading newspaper articles about agencies that are holding “briefings and information sessions” which are not considered to be meetings although information discussed lays the groundwork for future agency decisions.

It is also alarming to hear of agencies that conduct public meetings, but the staff and the members are the only ones who can figure out what is going on because the commissioners are making a determined effort to be cryptic. I asked to see some public certifications of closed meetings. One agency sent me an impressive stack of papers that closely resembled swiss cheese because of all the holes left by its general counsel’s scissors. Now, these are very real problems. They are interfering with the act’s proper operation. But, the problems are not insurmountable. They are merely problems in understanding the act that could be solved with some straightforward executive leadership and advice.

This agency resistance is inconsistent with the overwhelming intent of the law to open up the whole decisionmaking process to the public. This pervasive attitude is also inconsistent with the President’s own firm stand on openness and accountability in Government.

Government in the sunshine has had a curious history. No one was too interested in it when we first started talking about it up here. I had a great deal of respect for the notion of open government after watching it work in Florida. I became firmly convinced that secrecy is not necessary to the effective resolution of conflicting views and interests. Secrecy does not enhance or improve how our Government works.

On the contrary, secrecy, and the whole paranoid mentality that goes along with it, has severely hindered and damaged the integrity of this Government. After working hard, we finally convinced some of our fellow legislators that this was the case, and when this succeeded, the time was finally ripe for the Sunshine Act. Open government was a popular notion in the wake of Watergate. Who could take a stand against it after we all saw what evil lurks behind closed doors.

Well, as a result of Watergate, we have seen all sorts of reforms—ethics reform, budget reform, Government in the sunshine. Yet, the public’s confidence is still low. I was at a hearing recently at which pollster Lou Harris testified. Mr. Harris’ poll showed that the present confidence level in Government institutions is even lower today than 5 years ago, at the height of the Watergate scandal. It is clear that despite protestations of wanting to make Government more responsive, Government has not been more responsive. At least our citizens don’t think so. Mr. Harris told us that people do not feel that Government has opened up to them significantly, despite our legislative efforts to bring the workings of the bureaucracy into the sunshine.

At today’s hearing I hope we are going to begin to change this perception. And I sit here in anticipation of learning in detail what OMB has done since our last oversight hearing 6 months ago to fulfill the President’s commitment to sunshine.

We are delighted to have you here today, and with Mr. Granquist, and we are delighted to hear from you, sir.
Mr. McINTYRE. Thank you, Mr. Chairman. I have with me as you have mentioned, Mr. Wayne Granquist and Mr. Bill Nichols, also from the Office of Management and Budget. Senator CHILES. We are delighted to have you here. Mr. NICHOLS. Thank you. Mr. McINTYRE. We are pleased to appear before you today to testify on the Office of Management and Budget activities with respect to the Government in the Sunshine Act. I have prepared testimony which I would like to submit for the record. Senator CHILES. Your testimony in full will be included in the record in anyway you would like it.

TESTIMONY OF JAMES T. McINTYRE, DIRECTOR, OMB; ACCOMPANIED BY WAYNE GRANQUIST, ASSOCIATE DIRECTOR AND WILLIAM NICHOLS

Mr. McINTYRE. I would like to limit my opening remarks to a short summary of the more salient points of my prepared testimony. First of all, I would like to say that the policy that underlies the Government in the Sunshine Act that the public is entitled to the fullest practical information regarding the decisionmaking processes of the Federal Government, is one that we certainly support in this administration. The intent and purposes of the act, to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities, are also consistent with the administration’s point of view about openness in Government. We believe that the Sunshine Act is an important public policy. In fact, the President on June 9 sent a memorandum to the heads of departments and agencies of the Government in which he asked OMB to record the number of meetings subject to the act, to note whether those meetings are open or closed, and if closed, to state the reasons for closing them. In effect, we were asked to compile information from which we can evaluate compliance with this act. This information will be passed along to the President and to the Congress with recommendations for whatever actions may be appropriate to meet the spirit as well as the letter of the law. It is important that the agencies and the Congress note the President’s and the Office of Management and Budget’s strong support of this act, and the principles for which the assistance of good faith efforts is needed in its implementation. There is a useful and constructive role that the Office of Management and Budget can play in evaluating compliance with this act. Accordingly, we have established a monitoring system to track and record the activities of the agencies under the Sunshine Act. We intend to continue this tracking and reporting. We will work with the Attorney General to help assure that our litigating positions reflect the administration’s policy.

We will work with the agencies, the Attorney General, and the Administrative Conference of the United States to insure adequate policy and legal guidance in the implementation of this law.

As I have indicated previously, we intend to report to the President and the Congress on the implementation of the act by the various
agencies covered by it. We will also comment from time to time on agency practices and, where appropriate, recommend whatever actions may be necessary or appropriate to meet the spirit as well as the letter of the law.

Our review of agency notices for the first 5 months of this year indicate the following. Mr. Chairman, I will read just slightly over a page of statistical information, which is covered in my prepared testimony, but I think it is important to highlight these statistics at this time.

Some 47 agencies placed a total of 733 notices of meetings in the Federal Register; 29 percent or 211 of those notices were published 7 or more days before the scheduled date of the meetings; 85 percent or 627 were published on or before the date of the meeting, and 15 percent were published after the announced date of the meeting. Hence, 51 percent or 378 notices were for open meetings; 23 percent or 171 notices were for closed meetings; and 25 percent or 184 notices were for partly closed meetings.

So, 16 agencies had only open meetings; 6 agencies had no totally open meetings; 74 percent of the notices for closed or partly closed meetings did not explain or cite a specific exemption of the act as a basis for the closing; 9 agencies cited particular exemptions as the basis for closing meetings.

The most frequently cited exemption was subsection 9, which was cited 81 times out of 258. The next most frequent were subsection 8, cited 47 times; subsection 10, cited 44 times, and subsection 1 cited 38 times.

One agency cited only a provision of its own regulations as the basis for closing meetings.

During this period, 380 notices of changes—either day, time, or agenda—in previously announced meetings were published by 32 agencies. Only 34 percent of those notices were printed before the scheduled date of the meeting. Most of the change notices, in fact 84 percent, were to indicate changes in the agenda of meetings.

Mr. Chairman, with this brief overview of what the Office of Management and Budget has done and what we intend to do, and with a brief recap of the statistical information gathered over the 5 months, I will conclude my testimony and answer any questions that you might have.

Senator Chiles. At the outset, I am quite pleased with your statement and the steps that you and the President have taken toward clarifying the administration’s commitment to sunshine and taking leadership roles.

The President’s memorandum which you cited and which was dated June 9, 1978, I think, finally puts the President on record not from a campaign promise, but now as the Chief Executive, of taking a commitment for openness and for sunshine.

The Library of Congress has prepared a study at my request on sunshine covering the entire year.¹ A total of 2,177 sunshine meetings were held and 52 percent of these meetings were completely or partially closed—15 agencies closed 75 to 100 percent of their meetings; 1 agency sent in late notices 52 percent of the time; other agencies, 42 percent of the time. I find these figures to be truly disturbing.

¹ See p. 395.
These figures might not tell the whole story, but they indicate how open or closed our Federal agencies are. These studies reinforce what I have learned from our first oversight hearing and from subsequent encounters with the individual agencies, and that is that there is a critical need for OMB active leadership.

What is your personal view at this time of the agencies' compliance with the sunshine statute?

Mr. McIntyre. Mr. Chairman, from a review of the publications in the Federal Register, I think one could conclude that there are numerous efforts that could be made to improve the openness of Government. It is very difficult to tell without further evaluation exactly how many meetings might be involved, because the Federal Register data simply reflected the number of notices, so I think we are going to have to develop a better information system to give you any real recommendations and to give you some accurate evaluations of the agencies' compliance.

It is my feeling that we have a legitimate role in trying to provide that type of suggestion for further compliance, and better information on complying with the Sunshine Act.

INTERPRETIVE GUIDANCE FROM OMB

Senator Chiles. As I said at the outset after your statement, I think the President in his memo has made a strong effort toward fulfilling his long held commitment. Your testimony also reflects your concern for promoting the principles of the Sunshine Act, and I am very happy to see this administration taking a leadership role.

I note that your testimony seems to center on gathering data and developing statistical analysis of the agency sunshine activity. I think statistics are important and useful in identifying the overall trends. I feel, though, that in addition to the statistics, we certainly need the interpretive guidance on a continuing basis, and you mention that in your statement. I certainly hope that as we get into the future endeavors of the OMB, we are going to find that you are not going to be just gathering statistical data, because we can get some information through the Library of Congress and some others for gathering statistics. I hope that we are always going to have the leadership role played by OMB and the interpretive guidance that I think is so necessary.

Mr. McIntyre. Mr. Chairman, I think I pointed out in my opening remarks that the President's letter or memorandum to the heads of the departments and agencies anticipated that the Office of Management and Budget would make recommendations with regard to compliance and to appropriate action to meet the intent or the spirit of the law. We do intend to do that.

Senator Chiles. I am glad to learn from your testimony you expressed your views on matters where uniformity would be useful. Will these expressions include interpretive guidance on the act's provisions? I assume they will.

Mr. McIntyre. Yes; I think we will give some general guidance. We will also try to give the agencies some suggestions as to the proper reports, reporting format, as well as general guidance on how we think the act was intended to be interpreted.
Senator CHILES. And those would be on some kind of a continuing basis.

Mr. McINTYRE. That is right; we will certainly work very closely with the Department of Justice which is responsible for providing legal advice generally to the agencies of the executive branch of the Government.

Senator CHILES. The Department of Justice expressed its views on certain sunshine issues in a letter last year to all agencies subject to sunshine and Justice stated and I quote: "Several agencies define the term 'meeting' in such a way as to limit the joint deliberations which are subject to the act. For instance we believe"—and I am quoting from Justice—do you have that so you can show that to him? Mr. McINTYRE. We do not have that.

Senator CHILES. "For instance we believe that * * * a 'briefing session' should be included within the purview of regulations or practices applying the term 'meeting' * * *; I suggest that you insure that the term 'meeting' is broadly defined." That letter goes on further and suggests that public observation include permitting observers to photograph and report an agency meeting.

Moreover, Justice urges agencies to adopt a general practice of opening meetings to the fullest extent practicable and on fully considering the public interest before closing any meeting. The definition of the term "meeting" is extremely important to the proper interpretation of Sunshine Act.

Now, it is clear to us and correctly so we think, that the Justice Department has interpreted the term "meeting" very broadly. What is your opinion or OMB's opinion on this matter? And would you plan on conveying that?

Mr. McINTYRE. I would defer with the Department of Justice on the legal interpretation of a meeting, and I would have to support the Department of Justice's position on how broadly to define meeting. We would make every effort to insure that the Justice Department's interpretation of the term "meeting" be disseminated widely and was brought to the attention of the appropriate agencies, but I am not in the business of giving legal advice, and I have to rely on the Department of Justice.

Senator CHILES. I am delighted to hear, though, that you would plan to convey the interpretation of the Justice Department.

Mr. McINTYRE. Absolutely.

Senator CHILES. I note the fact that OMB does rely on the Justice Department in its interpretation to the agencies.

Mr. McINTYRE. That would be within the scope of my authority. I might also mention, Mr. Chairman, that with respect to the interpretation of agency regulations, I believe that the act also assigns the Administrative Conference of the United States some role in reviewing the regulations of the agencies in this regard, and we would also try to cooperate and coordinate these activities with the conference.

Because of their role in reviewing the sunshine regulations prior to publication, they do have a great deal of legal expertise which we could also put to use, I think.

Senator CHILES. I think the act provides that the Administrative Conference consulted in the promulgation of the rules and regulations, but I don't believe that the act gives them any role in regard to interpre-
tation or any further role other than that they will be consulted in the promulgation of the rules and regulations.

Common Cause has also expressed concern over the agency compliance with the Sunshine Act. The use of notation voting is an area of particular concern. Although there are legitimate uses of the procedure, it provides a clear opportunity for abuse and avoidance of holding meetings.

Would you plan to monitor the agencies' use of notation voting to insure against the circumvention of the act?

Mr. McIntyre. To the extent that we could and it would be feasible, we would certainly try to do that. I think this goes to, Mr. Chairman, the collection of various types of information that would be required to evaluate the compliance of the various agencies with the act.

**MONITORING USE OF EXEMPTIONS—EVALUATING TRANSCRIPTS**

Senator Chiles. Common Cause is also questioning the agency's excessive use of exemptions, especially exemption 9-B—that is the catch-all exemption—and we have experienced difficulty with this particular exemption because many agencies are using it when no other exemption fits. In fact, in your testimony you note that that is one of the most frequently cited exemptions.

I am happy to learn from your testimony that you will be keeping track of the agency’s use of exemptions and will evaluate whether they are used properly. It would seem to me that the only valid way to do this would be by reviewing transcripts of closed meetings.

Would you conduct such reviews?

Mr. McIntyre. Well, Mr. Chairman, I hadn't really thought about whether the proper way to evaluate the compliance for this particular exemption would be to review transcripts. It certainly is one way to develop information and we will use every resource that we can to develop such information. We certainly will monitor the use of exemptions and if it is deemed that this method can be used, we would certainly be willing to come back and recommend changes to strengthen that provision of the act.

Senator Chiles. I just cite looking at the transcripts because if you get a list and maybe in their notice they say we are closing the meeting and we are using 9-B, if someone, and that is a closed meeting—if someone didn't look at the transcripts of that closed meeting, there would be no way of knowing whether they have abused it or not unless you send them a questionnaire and state: Have you abused the exemption process?

Mr. McIntyre. Mr. Chairman, that would certainly be one way that we might use to try to evaluate the compliance with the spirit of the law and the letter of the law, in evaluating whether or not his exemption was being abused.

Senator Chiles. I think that that would be some help to the agencies really, if they knew that there was somebody who was going to evaluate these transcripts. Then I think they would know at the time they started to close a meeting whether, in fact, someone was going to be able to look at that and determine whether it was a valid use or not. I think that would help them very much in making that initial deter-
mination as to whether the public interest would be served in the closing of a meeting.

Mr. McIntyre. We think the fact that the President sent out the memorandum to the agencies and put everyone on notice that OMB will be looking at compliance with the Sunshine Act, that will also put everyone on notice and the agencies will take a closer look at their compliance with the law. I think that that is a very important point.

Senator Chiles. Absolutely. We think so. We just want the agency to understand that someone is not going to just look at the notice of their meetings and collect some statistical data based on that notice but that someone is going to look at, in fact, what took place in that meeting and determine whether the exemptions used were proper or not.

You mentioned in your statement that you are now working with the Administrator of GSA to coordinate your monitoring effort. Could you tell us what envision is the relationship you would establish between the GSA and the Office of Management and Budget?

Mr. McIntyre. Well, the GSA currently has a similar responsibility for monitoring the performance of advisory committees. We are currently undertaking discussions with the GSA to see if we might coordinate our effort to keep track of meetings.

STAFF COMMITMENT

Senator Chiles. What would be OMB's direct staff commitment to sunshine?

Mr. McIntyre. Well, as you know, the monitoring effort has just been initiated. Because we are committed to holding down the size of the Executive Office of the President we are trying to see if there are other working relationships, such as those outlined with GSA, which can help minimize the number of personnel that we might have to commit in OMB.

I can assure you that we will do whatever is necessary to carry out the responsibilities that I have outlined to you today, and I believe that we can do them within our current resources. We are going to try.

Senator Chiles. I certainly look forward to calling you personally any time I have a problem with sunshine, but there may be someone else in your shop that I might call in case I miss you any time that I call. I'd like to know who will be directly in charge. How will the line responsibility go?

Mr. McIntyre. Well, I will delegate the responsibility to Mr. Granquist to be the next in line for monitoring the Sunshine Act, so if you can't get me, call him.

Senator Chiles. If I can't get him, who do I call?

Mr. Granquist. I am always there.

Mr. McIntyre. If you can't get him, we will probably ask Mr. Bill Bonsteel, who works for Mr. Granquist, to do the day-to-day work on this along with some resources from our General Counsel's Office.

Senator Chiles. Could you tell me at this time who does have the lead responsibility? That would be Mr. Bonsteel?

Mr. McIntyre. Yes, Mr. Bonsteel.
Senator CHILES. And then the other people would be from your General Counsel's Office?

Mr. McIntyre. On an as-needed basis, yes, sir. In other words, if we develop the suggested guidance to the executive agency, we certainly want that to be cleared through our attorneys.

Senator CHILES. Can you tell me right now what kind of staff commitment that you have?

Mr. McIntyre. As I said, Mr. Chairman, we have just gotten this effort underway. We don't know exactly how much of a commitment we are going to have to make. Currently I have assigned Mr. Bonsteel to do the day-to-day work under the supervision of Mr. Granquist.

Senator CHILES. Under them, can we say we have anybody full time that will be working on sunshine?

Mr. McIntyre. If it takes a full-time person, then we will have to make that determination. At the current time, Mr. Bonsteel has been able to deal with the data collection that we have talked about.

Senator CHILES. Currently all we really have is the data collection. We don't have anything else.

Mr. McIntyre. We are not monitoring transcripts yet; we are not doing some of the other things that will be necessary as a followup for our evaluation of agency performance and as we get into that, we will just have to see what types of staff commitments have to be made. But I can assure you that we will do everything we can, whatever is necessary, to carry out the responsibilities that I have outlined to you today.

Senator CHILES. What do you envision?

Mr. McIntyre. Mr. Granquist can add to that, if you like, about his own activities.

Mr. Granquist. Mr. Chairman, as we get more data and get more of an impression about what the problems are, one of the first things I think we will do is convene a group of people, not necessarily all from OMB, but people from throughout the Government, to look over the questions that have arisen and issue some guidance to agencies much along the lines that OMB has within its Privacy Act responsibilities.

That is an activity I see coming up in the next month or two. There will be questions of resources, but I think we can probably work with GSA on a lot of the routine collection matters and use OMB's resources for policy determination.

Whether that is one full-time person, or less, it is very difficult to say.

Senator CHILES. Last March, as you know, Mr. McIntyre, I told you to let me know if you needed some additional resources to undertake sunshine oversight. Can you envision what GSA's staff commitment will be?

Mr. McIntyre. We do not know that yet.

Senator CHILES. When did you think you will be in a position to tell the committee the details of the agreement that you work out with Mr. Solomon?

Mr. McIntyre. I would say within a month.

Senator CHILES. You also mentioned in your statement that the President has asked the Attorney General and others to help. Can you tell us who are the others being referred to here?
Mr. McIntyre. Basically, the others refer to the Office of Legal Counsel within the Department of Justice which provides legal advice to the various agencies with respect to interpretations of the law. That is principally who we are referring to.

Senator Chiles. What role do you see the Justice Department playing beyond having taken a position that suits will not be defended if meetings are closed without good cause?

Mr. McIntyre. Well, I think that the Department of Justice, as I indicated earlier, will play a key role in providing legal advice to the agencies generally. Their responsibility for interpreting the law and for working with the affected agencies as well as with OMB in developing interpretations and dealing in interpretative difficulties, I think would be a useful role that the Department of Justice should play, and we will work with them to develop and disseminate such guides.

Senator Chiles. You have told me that maybe we will have some idea of what GSA's role will be in their commitment within a month. What kind of accomplishments can we anticipate within the next 6 months?

Mr. McIntyre. Well, I think that one accomplishment will be to insure that some interpretative guidance has been developed and disseminated to the affected agencies. I think that is one thing you can depend upon. Another thing is that we will be able to provide the Congress with certain information with respect to the compliance with the law, and if we are able to do so, we will also try to provide the Congress with some recommendations for any changes that might need to be made to improve the compliance with the law.

You will certainly know by then the type of staff commitment that OMB will devote to this effort. We will have completed any types of information-gathering forms that we will need to gather information to evaluate compliance with the law. I think you can expect within the next 6 months, considerable progress in implementing the steps that I have told the committee today we were going to take.

Senator Chiles. That sounds good. Going back to the Administrative Conference, I will have to tell you I am a little concerned about the Administrative Conference in this role. We have had some serious problems with the parts of their Interpretative Guide to the Government on the Sunshine Act.

Can you tell me now who in the Conference will be involved and what specifically you see, what responsibilities they will have?

Mr. McIntyre. Mr. Chairman, I personally can't tell. I haven't met with the Conference and tried to work that out. I don't know if my staff has. Let me ask them.

Mr. Nichols. It will be the chairman of the Conference, or Mr. Berg, who is the executive director.

Mr. McIntyre. My staff tells me that people ultimately responsible for the role of the Conference in this effort would be the chairman and the director of the Conference. As I indicated earlier, the Conference does have a responsibility to review agency sunshine regulations prior to their publication, and that is the role which we would anticipate them continuing to play.

It is a statutory role, but it is also a role that does give them insights into the law. And we would feel that that type of expertise, legal expertise, could be put to good use in our own work with the Depart-
ment of Justice, and in our own role in monitoring the compliance with the law.

Senator CHILES. I think that you should give that issue your immediate attention and get back in touch with me. In your statement today, you say you are committed to holding down the size of the Executive Office of the President, and that therefore, you don't want any additional resources for sunshine implementation.

I just want to go on the record to say that in a way I believe you are engaging in a false economy. There are many management issues beyond Sunshine which if OMB were to add staff and give them proper direction, I think the Government could operate with greater efficiency and with less burden on the taxpayer, and I think that is what you and the President should be seeking.

I would like to see the President give you some additional people and tell you that with those additional people he expects you to do certain things, find certain facts, cut certain wastes and make those people productive in certain ways. You people are saying, “look here, we have a nice Office of OMB and it hasn’t grown any. It only has so many people, and the rest of the bureaucracy is out doing its thing on the people and where you all should be, the agency, that should be trying to trim that and pair that down.”

I won't ask you to comment on that. The efforts you described in your testimony will provide us with useful information on the agency compliance. I think that will be a great help to us. You state that you will also report to the President, and to the Congress, on agency experiences with the act.

How often do you plan to make these reports, and do you know what form that they will be in?

Mr. McINTYRE. Mr. Chairman, we anticipate that we will be in continuous contact with you and your staff on our efforts to monitor the compliance with the law. I don't have a specific form developed, and I would like to develop the timeframe for reporting after some discussions with you and your staff to see what frequency would serve you best, and that we could meet. But I do intend to communicate with the various committees that have legislative jurisdiction on this law, and I expect that we would have to work out the frequency of reporting and also guidance on the form and content of the report.

I anticipate working that out with you and your staff.

METHOD OF GATHERING INFORMATION

Senator CHILES. Do you know what method will you use to learn about agency experiences?

Mr. McINTYRE. About agency experiences?

Senator CHILES. Yes: in your statement you also say that you were going to report to the President and the Congress on agency experiences with the act, what they experience with the act.

Mr. McINTYRE. I think we would be asking the agencies to describe their experiences under the act. It will be part of our information-gathering effort from all of the affected agencies.

Senator CHILES. I am glad that you will be reviewing and commenting on the regulations of the agencies. This, of course, is very important. Will this include a review and comment on how well the
agencies are following their regulations? In other words, do you intend to keep track of how well an agency follows its own regulations?

Mr. McIntyre. To the extent that we can do that along with all the other responsibilities we are undertaking, we will try to do it. It may be that the best approach would be to have the task force that Mr. Granquist referred to earlier initially review these regulations, and to follow the performance of the agencies, and give us some interpretation as to how well the agencies are complying with their own regulations, but to the extent that we have the ability and resources to do it, Mr. Chairman, we will try to do as good, as thorough a job in analyzing compliance with this law, as possible.

OMB CIRCULAR A-10

Senator Chiles. A previous director of OMB, Mr. Jim Lynn, issued a letter encouraging agencies to freely use exemptions to the Sunshine Act, specifically exemption 9-B, to close meetings at which budgetary information might be discussed.

Some agencies have taken this guidance as a not-so-suttle-hint from OMB and have chosen to close meetings on the basis of exemption 9-B for budgetary reasons. This advice is contrary to the law. Perhaps OMB might feel the law should be changed, but looking at this subject realistically, even if the worst happened and requests for appropriated funds were mentioned at open meetings, the public would really know very little about truly sensitive information.

I am curious to learn what advice you have given with respect to this, what action you have taken with respect to this previous OMB Sunshine advice, and whether you can tell me whether this is still a part of official OMB policy.

Mr. McIntyre. Well, I haven't encouraged agencies to close meetings simply because they might mention they are going to buy some furniture or that they may discuss their appropriations. We do have a circular A-10. It does not direct that all budgetary meetings be closed. The circular does acknowledge that it is not possible to determine, in advance, that all budgetary meetings will meet the requirements of the Sunshine Act permitting a meeting to be closed.

What the circular does say is that we believe that some meetings concerned with budgetary development would meet the requirements for closing and because of the serious consequences that may result from such meetings that the agency should carefully consider their decisions.

The President's position is that agency should open as many meetings as possible, and I think that he has forcefully stated that position in his memorandum.

Senator Chiles. What is going to take precedence, A-10 or the President's pronouncement; A-10 or the Attorney General's interpretation that the act should be construed broadly?

Mr. McIntyre. Mr. Chairman, like a lot of other things in life, good common sense and judgment needs to prevail sometimes. I would think that you would have to look on this on a case-by-case basis, and an agency would have to determine the extent to which its discussion of budgetary issues would have some adverse impact on the ability of that agency to carry out its responsibilities.
I would say that it is important that the budgetary issues be presented to the President in such a manner that he can make his decision and present his budget recommendations to the Congress. At that point, all budget recommendations to the public can certainly be fully debated, and are fully debated before the committees of Congress.

There is almost an entire year in which budgetary priorities are debated before the Congress.

Senator Chiles. Well, what troubles me is we have a letter from a director of OMB which does not even have a semblance of a balance that you are talking about today which encourages closing specifically, and very emphatically, and encourages the use of exemption 9–B as a means of closing those meetings, and if that letter is still the official policy of OMB and certainly A–10 didn’t say that it is not, you could read A–10 and that letter, and shade A–10 very much toward where that letter goes.

That, to me, would sort of negate what appears to be the thrust of the President’s letter, when he is talking about in the public interest, a meeting should be open. So, that gives us great concern.

Mr. McIntyre. The President’s letter would take precedence over the Director of OMB, but I will be glad to address this question of circular A–10.

IMPROVING AGENCY PRACTICES

Senator Chiles. Thank you. From your testimony I see that we have agreed that there is a need for citizens to be well informed and you state that OMB can play a useful role in seeing that the spirit of the act is met. I have long felt that this was the case, and I believe that there is much that can be done to enhance the Sunshine Act.

There are so many practices that are not specifically mandated by the act but which would go a long way in furthering open Government. For example, it would be helpful for public observers at a meeting to have access to staff papers. This often contributes significantly to understanding what is going on in meeting. In fact, some agencies are already doing this.

Not only does it contribute to public understanding, but in some cases it is absolutely necessary for a meaningful observation—as in the case where agency members talk in terms of page and paragraph numbers.

What will OMB do to encourage these practices?

Mr. McIntyre. I don’t think we would encourage any practice of cryptic discussions to evade or to avoid compliance with the law. I think the real question is what will we do to prevent such practices.

Senator Chiles. You have phrased it much better than I did.

Mr. McIntyre. In that regard, I would say that I think this goes back to your question about monitoring the compliance with the regulations, making sure that agencies are in compliance with their own regulations, and trying to determine as we perform the monitoring, whether or not the agencies do use efforts to avoid full compliance.

Senator Chiles. You also state in your testimony that you think it would be good practice for agencies to cite exemptions in the Federal Register notices, and to give explanations for closed meetings. I think that is a very good idea.
Will you communicate to the agencies your thoughts on this matter?

Mr. McIntyre. Yes.

Senator Chiles. In your statement you refer to the situation of a proper attitude, if Sunshine is to be truly effective. I have maintained for a long time that the attitude of the agency toward open Government is the critical point. I think one of the biggest impediments to sunshine’s full implementation up to now has been in some agencies, a negative attitude. Many agencies thus far have resisted opening their meetings to public scrutiny.

I think, however, you have taken some important steps to create a positive attitude with the President’s memorandum and your active involvements. The President’s memo makes crystal clear to me that there is a strong and real commitment to Sunshine.

I sincerely hope that you will continue to express this commitment to sunshine and that you will exercise a visible leadership role. I think this executive leadership is the key ingredient to changing the attitude that has been displayed on the part of some of these agencies and breaking them of their old habits of secrecy.

We thank you very much for your attendance here today.

Mr. McIntyre. Thank you, Mr. Chairman. I look forward to working with you and your staff as we proceed to implement these commitments we made to you today.

[The prepared statement of Mr. McIntyre follows:]

PREPARED STATEMENT OF JAMES T. McINTYRE, DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

Mr. McIntyre. Mr. Chairman and members of the committee, I am pleased to be here today to talk about the Government in the Sunshine Act. As you know, the President and we at OMB share your concern for open government. The Sunshine Act of which you, Mr. Chairman, are one of the principal authors, provides an important statutory basis for openness.

We believe that the act and its underlying principles will become even more important in the future, as it should. If one believes in the public’s good judgment and the need for citizens to be well-informed, then barriers to access to the government must be removed. We believe secrecy is such a barrier.

The Sunshine Act requires many meetings of commissions and boards of the Executive Branch to be open to the public. This is why the President strongly supports it.

Because the act applies to about 50 different agencies, its terms attempt to accommodate differences among these agencies. The act provides, for example, that there are exceptions to the general rule that meetings be open to public observation.

There are also exception procedures in the act to allow agencies to react in emergency situations and to take action quickly. But this flexibility, as well as some of the ambiguities that result from the legislative process, may lead to results not intended by the Congress.

Therefore, I believe it is important that the Executive Branch respond in good faith to the efforts of Congress to accommodate the special and sincere concerns of the agencies. It is at this point, the point of implementation and of fair and reasonable interpretation of the Sunshine Act, that the President and OMB play a useful role.

We believe that the attitude in which the act is implemented is most important. If the agencies are aware that the President and OMB are squarely behind the act and are committed to its success, we will be well on the way toward successful implementation.

As you know, last week the President issued a memorandum to the heads of agencies regarding the implementation of the Government in the Sunshine Act. The President stated in part that: “I urge the agencies covered by the Sunshine Act to respect it by opening to the public as many meetings as possible.”
The memorandum also pointed out that the President has asked me to keep records of meetings held subject to the act. I will report to him and to the Congress on agency progress in opening their meetings, as well as reasons for closing when agencies have determined that their meetings must be closed.

We have already begun to monitor these meetings and I will discuss some of the results later in this testimony. We are working now with the Administrator of General Services to coordinate our monitoring efforts.

The President also asked the Attorney General and others to help assure that meetings are closed only if it would be demonstrably harmful to open them. These are the only closed meetings that would be defended in litigation under the act.

We remain sensitive to limitations on our ability to take action in this area. For example, OMB was not given any authority by the act, and many of the agencies covered by the act have special status. There is still, however, a useful role that OMB can play in seeing that the spirit as well as the letter of the act is met.

I discussed with the President our limited authority in this area, and our limited resources. As you are aware, we are committed to holding down the size of the Executive Office of the President, and we believe that we can do what the President has asked without additional resources.

Specifically we intend to:

- Keep track of the number of notices or meetings subject to the Sunshine Act and the number of these announcing meetings which are open to public observation, closed, or partially open and partially closed;
- Keep track of agency use of the exemptions and the special procedures in the act so that the facts will be at hand to evaluate whether any of these provisions are being used in a manner other than they are intended;
- Review notices of sunshine meetings that appear in the Federal Register to help evaluate whether they are timely and informative;
- Report to the President and to Congress on agency experiences with the act and such other things as its costs, public attendance, et cetera;
- Work with the agencies, the Department of Justice and the Administrative Conference of the United States to help assure that the agencies have sufficient legal and policy advice on the interpretation of the act;
- Express our views on matters without assuming specific responsibilities the act gives to other agencies where uniformity would be useful such as in the timing and content of agency reports under the act; and
- Review and comment on regulations of the agencies on a selected basis.

We have reviewed the notices of meetings subject to the Sunshine Act which have appeared in the Federal Register during the period January through May of this year. The act does not contain a list of the agencies covered by it, but uses instead a generic definition to define the agencies covered.

The committee reports accompanying the House and Senate bills listed 47 agencies the committees believed to be covered by the act. However, this list is not the same as the list we have compiled of agencies that issued notices during the first 5 months of this year.

Of the 47 agencies listed in the committee reports, four did not issue regulations required by the act and did not give notice of any meetings. Those agencies are: The National Council on Quality in Education; the National Credit Union Board; the National Homeownership Foundation (Board of Directors); and the National Library of Medicine (Board of Regents).

We have been informed that the National Credit Union Board, National Library of Medicine (Board of Regents), and the National Council on Quality in Education are advisory committees subject to the Federal Advisory Committee Act and, therefore, are not covered by the Sunshine Act. In fact, the National Council on Quality in Education has been terminated.

In addition, 3 of the 47 agencies (listed in the committee reports) which issued regulations under the act did not give any notice in the Federal Register of meetings subject to the act. These three agencies are: The Board of International Broadcasting; the Export-Import Bank of the United States (Board of Directors); and the Federal Farm Credit Board within the Farm Credit Administration.

We have been informed by the Board of International Broadcasting that they have not held any meetings subject to the act during the past 5 months because of vacancies on the Board and other matters.
The Export-Import Bank and the Federal Farm Credit Board have provided in their regulations that meetings will be held on specified days of the week or of the month, and that additional notice is posted elsewhere. Therefore, of the 47 agencies listed in the committee reports, 40 issued regulations and gave notice in the Federal Register during the first 5 months of this year of meetings subject to the Government in the Sunshine Act.

Seven agencies which were not included in the committee's list issued regulations and gave notice of meetings in the Federal Register in the first 5 months of this year. Those seven agencies are: Copyright Royalty Tribunal; National Museum Services Board; Federal Home Mortgage Corporation; Metric Board; National Railroad Passenger Corporation; Postal Rate Commission; and White House Conference on Libraries and Information Science.

The office of the Chairman of the Administrative Conference of the United States (ACUS) issued a booklet entitled "An Interpretive Guide to the Government in the Sunshine Act" in June of this year that includes a list of agencies which issued final regulations under the act.

That list includes two more agencies that were not included in the committees' lists and did not give notice in the Federal Register in the first 5 months of this year. These two agencies are: The Council on Environmental Quality and the National Center for Productivity and Quality of Working Life.

The 47 agencies which did give notice in the Federal Register of meetings subject to the act placed a total of 733 original notices of meetings. There were also 380 notices of changes to previously announced meetings.

Hence, 211 of the 733 notices (or 29 percent) were published 7 or more days before the scheduled date of the meeting; 627 of the 733 notices (or 85 percent) were published on or before the date of the meeting; and 106 of the 733 notices (or 15 percent) were published after the announced date of the meeting.

Although it is important that as much advance notice as possible be given, these statistics should not be interpreted as indicating notices that were not timely within the meaning of the act. The act requires only a public announcement of a meeting—and not necessarily a Federal Register announcement—at least 1 week before the meeting.

An agency may also give less notice when a majority of the board members determines by a recorded vote that the agency business requires that the meeting be called at an earlier date. The act also permits an agency to change the time of a meeting if it publicly announces the change at the earliest practical time. Notice in the Federal Register is required by the act immediately after the public announcement.

We believe that the judgments which lead to the provisions permitting flexibility in the scheduling of meetings are sound, although this does not permit simple determinations as to whether an agency's notices are timely or not.

We hope that the agencies will take note of these statistics, and copies of this testimony will be sent to them. They should attempt to provide as much advance notice of meetings as possible.

So, 378 of the 733 notices (or 51 percent) were for meetings open to public observation. This contrasts with a figure of 37 percent open meetings reported by Common Cause for the period of March through June of 1977. And 177 of the 733 notices (or 23 percent) were for closed meetings. This compares with 39 percent closed meetings in that earlier report.

Also, 184 of the 733 notices (or 23 percent) were for meetings which were partially open and partially closed. This compares with 24 percent during the first calendar quarter of the act as reported by the Common Cause.

During the first 5 months of this year, 76 percent of the 733 notices of meetings indicated that the meetings were either entirely or partially open to the public observation; stated another way, 49 percent of the meetings were entirely closed or partially closed.

As with the statistics on notices of meetings, these numbers do not suggest that any particular meetings were improperly closed or improperly opened. Their value is in determining trends over longer periods and in identifying problem areas.

Hence, 16 agencies held all of their meetings open to the public, and 6 agencies held all of their meetings closed.

Although 261 of the 355 notices of closed or partially open and partially closed meetings (or 74 percent) did not explain or cite a specific exemption of the act for closing the meeting or portion of the meeting. The act does not require that
the basis for closing be included in the Federal Register notice, we think that it would be good practice.

Those who look at the Federal Register for notice of these meetings should find a short explanation of why the meeting was closed as well as more detailed explanations of the closing that the act requires. And 9 agencies cited particular exemptions as the basis for closing meetings.

Because more than one exemption may be cited for a closing, a total of 258 exemptions were cited in 97 closings by these 9 agencies. Exemptions, 9, 9A, and 9B were cited the most—a total of 81 times—followed by exemption 8 (47 times), exemption 10 (44 times), and exemption 1 (38 times). One agency (EEOC) cited only a provision of its own regulations as the basis for closing its meetings.

During this 5-month period, there were 380 notices by 32 agencies of changes to previously announced meetings. These changes were to the date, time, or agenda of meetings. Often there was more than one notice of change for a meeting. While not all of the changes affected the time or the date of meetings, only 128 of the 380 changes (or 34 percent) were published in the Federal Register before the scheduled date of the meeting. Most of these changes (84 percent) were noticed to indicate changes in the agenda of meetings.

Again, changes are permitted by the act and we believe that changes are necessary. However, we are concerned that too many changes can frustrate the purposes of the act by reducing the effective amount of notice given for meetings. As with the length of original notice, if you don’t have notice of a meeting in time to attend, it doesn’t do you much good learn that it was open.

We intend to work with you, Mr. Chairman, and with the agencies to continue to monitor the agency activities under the Sunshine Act. Longer range trends in these statistics will permit more meaningful evaluation of compliance with the act.

We believe that the role for OMB I have outlined today makes sense and will help to assure a successful implementation of this important legislation. These steps will not, by themselves, however, guarantee success. Success will also require your continued interest and vigilance and that of your committee, and the cooperation of the agencies covered.

I want you to know that we intend to do our part. I have attached a copy of the President’s Memorandum to the Heads of Departments and Agencies.

[Copy of the letter referred to follows:]

THE WHITE HOUSE,

MEMORANDUM FOR THE HEADS OF DEPARTMENTS AND AGENCIES

The Government in the Sunshine Act requires certain Executive agencies to give notice of their business meetings and open them to public observation unless they must be closed for any of ten specific reasons. If the agency finds that the public interest requires, it must open its meeting to public observation even if there is a reason to close it. The same reasons which permit Executive agencies to close their meetings also permit advisory committees to close theirs.

To evaluate compliance with this Act, I have asked the Director of the Office of Management and Budget to record the number of meetings subject to the Act, to note whether those meetings are open or closed, and if closed, to state the reason for closing them. He will pass this information along to me and to the Congress, recommending whatever actions may be appropriate to meet the spirit as well as the letter of the law.

In litigation under the Act, the Attorney General and the affected agencies must not defend the closing of any meeting unless they can demonstrate that harm would have resulted if an open meeting had been held.

I urge the agencies covered by the Sunshine Act to respect it by opening to the public as many meetings as possible.

JIMMY CARTER.

Senator Chiles. Thank you.
The hearing is adjourned.

[Whereupon, at 10:32 a.m. the committee was adjourned.]
The subcommittee met, pursuant to notice, at 9:30 a.m., in room 3302, Dirksen Office Building, Senator Lawton Chiles (chairman of the subcommittee) presiding.
Present: Senator Chiles.

Staff members present: Ronald A. Chiodo, chief counsel and staff director; Janet R. Studley, counsel; Robert F. Harris, deputy staff director; and Christine Sheridan Betts, chief clerk.


The first amendment guarantees freedom of speech and of the press. Its primary objective is to make Government responsible to the people it serves. The first amendment embodies the "profound national commitment of the principle that debate on public issues should be uninhibited, robust, and wide open." To accomplish this, the public has a right to know, indeed it must know, what Government is doing, and how it is handling the public's business.

The Sunshine Act, which went into operation in March 1977, acknowledges the citizen's right to know and, for the first time, brings the Federal agency decisionmaking process into the light of day. It clearly expresses as our national policy that the public is entitled to observe and be fully informed on what the Federal agencies are doing, how they operate, and, equally important, why they make the decisions they do.

There was an overwhelming popular support for the Sunshine Act when it was passed by the Congress. The idea of an open Government was very appealing after we all saw what a closed Government could produce. The Federal Government had effectively lost the trust and confidence of those it governed.

Earl Warren once noted that: "If anything is to be learned from our present difficulties, compendiously known as Watergate, it is that we must open our public affairs to public scrutiny on every level of government." Sunshine represented a major effort to do just that by prohibiting secrecy in agency decisionmaking. It is the most comprehensive antisecrecy measure since the Freedom of Information
Act. It extends the open Government concept, and in many ways provides a more meaningful understanding of the governing process. To effectively evaluate governmental policies and actions, and to be able to choose representatives intelligently, our citizens must be able to understand the decisionmaking process. Actually witnessing deliberations yields a much better understanding of this process than reading subsequently prepared documents.

Yet, despite our legislative efforts, the polls show that the public's confidence in Government is even lower today than it was at the height of the Watergate scandal. The public is still skeptical and suspicious about the Federal bureaucracy. Despite all the rhetoric about making Government more open, accountable, and responsible to the public, it is clear that Government has so far failed to convince the public that it, indeed, is responsive and accountable.

I see this as a serious flaw in our Government. It is our responsibility to instill confidence in those we govern and we have failed. Either the Federal Government hasn't effectively opened up to the public or else it hasn't adequately communicated its openness.

Secrecy, and the resulting exclusion of people from participating in their own Government, can too easily be used to subvert democracy. It no longer can be excused as an operational necessity. Lack of candor and straight-dealing in Government only leads to public frustration, alienation, and distrust.

We in Congress have taken a strong stand against Government secrecy. And I understand now that the administration is also firmly committed to open Government. On June 9, 1978, President Carter issued a memorandum to the heads of departments and agencies urging the agencies to open up as many meetings as possible in full compliance with the spirit of the Sunshine Act. He has asked the Office of Management and Budget to monitor agency implementation and to report the results to the President and to Congress. He has also instructed the Attorney General and the agencies not to defend the closing of any meeting unless they can clearly demonstrate that harm would have resulted from opening the meeting.

It is this subcommittee's responsibility to oversee the implementation of the Sunshine Act. I want to know if it is working—and if it is not, why not. The one message I heard loud and clear at our first oversight hearing last November is that the agencies are having difficulties in implementing both the spirit and the letter of the law. This message has been compounded by my dealings with some agencies since that hearing.

Judging from the updated study of sunshine completed by the Library of Congress, I can see that there is still an inordinate number of meetings being closed. The majority of the meetings held in the past year were closed, with 30 percent of the agencies closing between 75 percent to 100 percent of their meetings. I should note, however, that there were 12 agencies which held all open meetings. One of these, the U.S. Foreign Claims Settlement Commission, held 41 meetings last year—all open.

Overall, I find the Library of Congress statistics to be disturbing. They don't necessarily tell the whole story, but they do give a good indication of how open, or rather how closed, our Federal agencies are. I think they show that although a few agencies have experienced
little difficulty in operating in the sunshine, some obviously are still having serious problems.

There's been a lot of institutional resistance to "open Government." This was evident at our first hearings on Sunshine before the act was passed and again at our first oversight hearing in November. Some initial resistance is understandable. The agencies were too comfortable with operating in secrecy. That's the way this Government has always run. I knew it wouldn't be a simple task to penetrate the aura of secrecy. Old habits are hard to change. But, this law has been in effect for well over a year. The change in attitude and procedures within the agencies should have been completed by now. The resistance should have dissipated. I hope to find that it has.

I am looking forward to hearing from our witnesses on their experiences with sunshine implementation and how institutional attitudes toward public scrutiny have changed. I hope to discover that we are making progress and that this Government is finally beginning to operate in the Sunshine.

FEDERAL RESERVE BOARD

Governor Miller, we are delighted to have you as our leadoff witness and to hear your statement as to what your experiences have been with the Federal Reserve.

TESTIMONY OF G. WILLIAM MILLER, CHAIRMAN, BOARD OF GOVERNORS, FEDERAL RESERVE SYSTEM

Mr. Miller. Thank you, Mr. Chairman.
Chairman Chiles, I appreciate the opportunity to be here. Let me report from some history in my formal testimony since I am relatively new to the Board.

The Board of Governors has not had any significant problem in complying with the letter and spirit of the Sunshine Act. There have been some additional costs and new procedural requirements, but Congress wisely addressed some of our special problems by formulating provisions designed to assure that sensitive and confidential financial information is not prematurely disclosed.

We deal quite often either with confidential financial information, or information from bank examination reports, or other materials which could result in financial speculation in markets. Because we deal in these sensitive areas—or, perhaps, because of our unique role—exemptions from the open meeting requirement probably apply more to the Board's meetings than to those of other agencies.

The Board's effective consideration of many of its issues has also been aided by the authority granted to use minutes rather than verbatim recordings. This has encouraged the continuation of free and open discussion and, therefore, has allowed our deliberations to continue to be effective.

The authority to close meetings under the so-called "expedited procedures" is also of great help to the Board in its operations. Typically, this procedure is used to close meetings dealing with monetary policy, or with proposals relating to specific banks or bankholding companies, or with foreign banking matters, or with bank enforcement matters.
These we are able to handle without the more cumbersome procedures of advance notice.

Because of the nature of the Board's activity and the nature of the exemptions that authorize the use of expedited procedures, it may be expected that a substantial percentage of the Board's agenda items will continue to be handled by this procedure.

I thought a few statistics would be useful. The Sunshine Act has been in effect for about 16 months. In 1977, 27 percent of the Board's 114 meetings were either open or partially open. Referring to your comment, the Board was one of the agencies whose meetings were less than 50 percent open during 1977.

Through June 1978, however, 43 percent of the Board's meetings had been open or partially open.

Looking at agenda items in 1977, 17½ percent were open and 82½ percent were closed. During the first 6 months of this year, the picture has changed substantially; 26 percent of the agenda items have been open.

The Board has developed a program to aid the public in understanding and obtaining the maximum possible benefit from its open meetings. We have published a pamphlet to help inform the public. And, we make most staff memorandums considered at open meetings available to the public in advance of the meeting. A brief statement about each item is usually made at an open meeting so the public can understand the issue we are discussing. Incidentally, a summary of agenda items is also published in advance. I have included a sample of the summary made available to the public with my testimony.

We do make photographs of Board members and seating charts available so that the public can follow the remarks of individual participants. We do make personnel available to the public for questions after the meetings.

You may be interested in attendance at the Federal Reserve open meetings. The first open meeting was held on March 28, 1977, and was attended by 25 persons.

It was interesting to me that when we recently held an open meeting on some rather significant subjects, we had to move from the board room to a special room to accommodate the attendance of 85 people—the largest attendance of the public we have had. Otherwise, public attendance has ranged from zero to 39; the average number has been 9.

The Board maintains a mailing list for notices of meetings. In addition to printing notices in the Federal Register, we make advance notices of meetings available in two of our own offices and in the Treasury Department's press room. We also make notices of open meetings available to a news wire service for wider distribution. If there is ever an unexpected change in an agenda item, we call media representatives who regularly attend our sessions and individuals known to have an interest in a particular item so that they will be aware of the addition or deletion of an item. If the change is significant, we call each of the persons interested in the Federal Reserve on our so-called sunshine mailing list.

The record of each closed Board meeting is made available to the public in our Freedom of Information Office promptly after the meeting, unless the Board has voted to withhold part or all of the dis-
cussion under the act’s exemptions. For closed meetings, there are either minutes or recordings which may be listened to by the public, and transcripts are available on request. Material that is withheld temporarily is released as soon as it can be. The public may come into the Freedom of Information Office and get immediate access to all pertinent files and records.

There are some associated costs with implementation of the act. The Board has reassigned two full-time employees to work solely on sunshine matters. We have had to install a public address system and a recording system. We have had to expand additional time of staff of the Secretary’s and General Counsel’s Offices in handling these matters. We estimate that compliance with the act costs about $100,000 per year.

Also, there has been some delay in processing matters before the Board because of procedural requirements of the act, such as necessary notices. The Board continues to work on ways to minimize delays while meeting the spirit and purpose of the act.

The Board has previously written to you about its concern that the Board’s discussion of legislative matters be held in an open meeting. The Board believes that Congress intended, under exemption (9) (B), that an agency’s deliberations about legislative matters could be closed since its position or action or policy could be frustrated by premature disclosure.

Many times, the Board discusses positions of negotiation or fallback positions. The Board feels that it would frustrate the achievement of our primary legislative goals to disclose prematurely an alternate position on pending legislation.

I also feel that Congress, in some cases, would prefer to hear from us directly first, rather than after our views have been made public at a sunshine meeting.

CONGRESSIONAL TESTIMONY

Senator CHILES. I hate to interrupt your statement, but it seems to me that if the Congress can open up its markup meetings, and does, and finds that that works with our problems, so can the Federal Reserve Board.

Now, you are talking about negotiating fallback positions and compromising. Whether we are talking about the very legislation that’s going to affect the Federal Reserve, the public, defense, or anything else, we open up our meetings. Of course, if it is national security, we may close the markup session, but all of those other things we take, from the Clean Air Act to the energy legislation, we find that we now can deal with it in open session. The public can see what goes on and can educate themselves as to what really happens when we come to making some of these compromises.

They have always read about the deals that were made before in smoke-filled rooms. Now we find that we can open up that process. I just find that the hardest thing in the world is, if the Congress can do that, why some agency feels like its fallback positions or its trade-offs or what it’s going to do in coming to the Congress should be done in closed session?
Mr. Miller. Senator, suppose the Federal Reserve were a Senator—of course, it could never be elevated to that position, but suppose it were a Senator—then it would come to a markup session after having worked with its staff on a proposals that might be introduced for the first time as an amendment or a change at that markup session. The press or the public would not have been in the office of the Senator when he worked with his staff to decide on the position he would take at markup.

You are asking us to come to a markup session having previously publicly disclosed that we would accept this or that amendment. I think that a Senator does have the right—in the Halls of Congress and with his own colleagues—to decide privately what his position is going to be or what he will propose or how he will vote before he comes to markup. All we are asking is what an agency have that same right—

Senator Chiles. And I would like to give you that right as a member of the Federal Reserve Board, to meet with your staff, to deal with them, to walk down the hall with them, to be able to take any position you want, but when you sit in that collegiate body, which is a public body, which is dealing with the public's business, which is setting procedures and is not really a tradeoff vis-a-vis the Federal Reserve and the Congress, we both belong to the public, both the Congress and the Federal Reserve, I think the people are entitled to see what happens in that process.

I think it is an educational process. I think that's how they learn something about their Government and what takes place, and I really don't see anything to be gained from closing that. I saw the greatest reluctance in the Congress and on the part of the Members of the Congress when we were talking about opening the markup sessions. Oh, my goodness, you can't do that. You are not going to call each other by first names, take your coats off and get down to the nitty-gritty and do what you have to do, and, after all, the lobbyists can see what we are doing. We want to keep them outside. And the other argument was that you know so-and-so, he is going to be playing with the television cameras if you have an open session and we will never get the meeting done.

All of those fears that people had, generally just have not come to pass. They operate just the way they operated in the past, and I think that's exactly what would happen in the Federal Reserve System when the system opens, and I think clearly the intent of the Sunshine Act is that that kind of meeting would be open.

Mr. Miller. Senator, I certainly agree with everything you say about the need for openness in Government. I certainly agree with the thrust of your statement, but I do believe there is a distinction to be made here. The Senator has an advantage by being able to develop, privately, a negotiating position. The Congress has already recognized in the act that if the Federal Reserve were, say, going to buy some land, we wouldn't want the seller to know that the maximum we would pay is $1 million; the public would benefit if we could buy it for $750,000.

We have some very important legislation pending before the Banking Committees on the question of membership in the Federal Reserve. We have made proposals, and we may make counterproposals. But for us to say in advance that we would sell for $1 million instead of $750,000
puts us at a disadvantage. We have discussed publicly the position we
have taken and submitted to Congress. If we have a counterproposal
to offer, could we go back and have another open meeting—not make
any real decision, always adopt the minimum position and have to
inch up meeting by meeting to solve the problem—or we could adopt,
in private discussion, our strategy and then publicly debate the merits
of the proposal's substance.

I don't see much difference between the negotiating process among
congressional committees and the negotiating process in buying prop­
eries. We are all trying to maximize our ability to do the best from
the view of the public interest. The difference is not in what we are
trying to accomplish. But I do believe that there is a difference between
an open markup session and an open agency meeting on legislative
matters. A Senator can come to a markup with his mind made up as to
what concessions he would be willing to make but without his col­
leagues knowing that he would make concessions—he can maximize
the use of his vote—while we might be asked to disclose our negotiating
position in advance.

Senator Chiles. Well, you know, we can carry this a long way, and
I don't want to belabor it that much, but we have many times two
committees with vested interests in a piece of legislation. There are
very many times when I think the Budget Committees is in conflict
with the Finance Committee in regard to budgetary matters, or the
Budget Committee or the Finance Committee and the Appropriation
Committee are battling, and so it would be very nice sometimes if the
Appropriations Committee would not have to worry that the Budget
Committee could know what they were doing in regard to trying to
find out with respect to, for example, the refundable tax credit, how
the Appropriations Committee can get jurisdiction, but we don't have
that right.

We deal with those open meetings and each committee reads the
other committee's printing and has somebody there so they can moni­
tor that and it works all right. There is some legislative history on
this point.

During the debate I stated on the floor of the Senate in a discussion
of this exemption with Senator Percy that 9-B might cover a meeting
involving a response to a congressional request for views or testimony
if the request itself stated that the reply must be kept confidential.
That floor comment was made off the cuff. It was made just during
the debate on a newly presented question.

Now that I have had more time to study it I am not even sure that
that kind of request for confidentiality is sufficient to close one of your
meetings. But other than that, certainly as far as the legislative history
of it goes, that was the only time during the legislative history that
anyone said that they thought such a meeting could be closed.

Excuse me for interrupting you.

Mr. Miller. That's quite all right; I think it helps the discussion.
The problem isn't that monumental; it's the natural consequence of
human nature. If you can't lay out three or four positions, you will
lay out only your primary position and not make a decision on alterna­
tives; that's what will happen. It's human nature not to disclose
acceptable compromises in advance of bargaining.
Quite apart from the question we are discussing, Senator, there is the question of the requirement that exists for verbatim recording of discussions of legislative matters. Members of our Board have felt constrained by this requirement from expressing themselves completely freely when they are talking about legislative proposals. While this may be a process of education, I think the verbatim recording requirement inhibits open discussion. If minutes were permitted, there would be a lot more freedom of discussion.

This, of course, relates to the question of whether a meeting on legislative matters is open or closed. Even if discussions were closed, we would prefer nonrecorded meetings.

Another area that I would mention is discussion of sensitive personnel matters.

Senator Chiles. Did you have a meeting to discuss your testimony here today?

Mr. Miller. Yes; since this isn’t a negotiating session, the meeting was completely open.

Senator Chiles. It was open and that was a free discussion?

Mr. Miller. Certainly. We are trying to report to you on our experience under the act. Not all legislative matters need to be closed. We have open meetings on many legislative matters when we are merely responding to a request by Congress to supply facts, information, or experience—for instance, if we were discussing whether we thought the Federal Reserve Building in St. Louis worked out well after we built it. It would be different if we were negotiating what we would pay the contractor. We wouldn’t want him to know the maximum commitment we would extend. We would want to open bids and get the lowest bid we could, not to have everybody bid at our maximum. So there is a difference in the nature of the legislative discussions we are asking be closed.

Discussing our sunshine experience is not sensitive in that regard.

The issue of personnel matters is somewhat similar. The feeling of the Board is that when members are talking about individuals— their competence, their performance, or their candidacy for appointment or promotion—it is inhibiting to record such meetings and keep them for 2 years. The spirit of the act could be achieved just as well by maintaining minutes.

Let me say, as a personal comment and from personal observation that I believe the Board of Governors is on a learning curve, making substantial improvements in meeting the spirit of the Sunshine Act. I want to say to you that whatever the issues of concern we mention today, we are anxious to learn and to fulfill that spirit, and that we will do our best to do so.

We hope these comments—which are mainly positive, with a few little worries mentioned on the side—will be constructive. We would be happy to respond to your questions.

Thank you very much.

Mr. Chiles. Thank you very much.

And in that last closing part of your remarks, as I mentioned earlier, one of the biggest obstacles I think to the full realization of open government has been this kind of a resistance. It is not something that’s new to me. I saw it happen in Florida when we passed the Sunshine Act. I saw it happen in the Congress when we first started
opening meetings here. Institutional attitudes have been kind of negative when it comes to opening up the inner workings of agencies that have historically operated in secret. Those attitudes are sometimes firmly ingrained.

Some agencies have overcome that resistance. In fact, I have heard some people say that it has caused the agency members to better prepare themselves because it is a public meeting and that there have been better discussions as a direct result of Sunshine.

We feel that that’s been the result in the Congress. Now that we have open markups, the Senators have to be prepared when they go to those markups and not just depend on that staff member who sits at their back and tells them everything that’s gone on to that date, because the press and the public are there.

We know, of course, historically that the Fed has been too enthusiastic about the prospect of openness. In fact, the Fed wanted to be excluded by name out of the Sunshine Act and sort of resisted the act all the way down, even to the final conference committee, there was still much resistance.

When you submitted the Board’s first annual Sunshine report last March, you mentioned at that time that your service on the Board had been so brief that you actually did not have a personal basis for assessing the act’s impact on the Board’s operation. You did send me, however, Dr. Burn’s letter from last September because your colleagues generally concurred with Dr. Burn’s views. If I recall correctly, Dr. Burns had a rather dim view of the Sunshine Act and I do recall that very vividly.

By now you have had some time to evaluate the act and its impact on the Board so I was delighted to hear your last comments. I take it that’s your personal view.

Mr. MILLER. It is the view of the Board, Senator Chiles.

Senator CHILES. That’s what I wanted to know.

Mr. MILLER. You notice the change going from 17½ percent to 26 percent of open agenda items. The trend is in the right direction.

Senator CHILES. That’s a very positive change and the trend is very definitely in the right direction.

Mr. MILLER. I might say that the nature of our business is such that Congress felt many areas should properly be closed: Information that is financially sensitive, confidential information, enforcement of banking laws, and so forth. We still feel these areas should be closed.

Our goal now is to try to have 50 percent of our meetings open and 50 percent of them closed, and our technique is to deal once a week with all open items and once a week with all closed items. This begins a trend toward more open items and more open meetings.

PRESIDENT’S MEMO

Senator CHILES. Are you familiar with the President’s memo to the agencies with regard to the Sunshine Act?

Mr. MILLER. Yes.

Senator CHILES. Can you tell me, What is your reaction to his directive to the Attorney General regarding the defense to sunshine suits?

Mr. MILLER. I had no particular reaction because I don’t think we have seen that as a problem during my tenure.
Senator CHILES. Your agency has a statutory authority of its own?

Mr. MILLER. The Board is an independent agency. We are trying to comply with the spirit of such directives, but as I said, we have a different status, as you know.

Senator CHILES. What impact would you see the President's directives as having upon your agency and the Sunshine policies?

Mr. MILLER. It is part of a cumulative process of encouraging the Board to take a more constructive look at how it can be more open. It reinforces the trend toward more openness.

Senator CHILES. As a matter of Federal policy, do you have an opinion as to whether there should be a single litigation for a Government-wide statute like this to provide for a uniformly applied sunshine law?

Mr. MILLER. We normally use the Department of Justice in our litigation, so I would see no harm in your suggestion. However, the preference of the Board, generally, is to have the authority to do its own litigation at least, in selected cases, because we have areas of special competence.

Senator CHILES. I see that, but I am talking about a generalized statute like this. I foresee a situation where there might be a half-dozen different interpretations, for example, as to what is the definition of a meeting.

Mr. MILLER. I would have no personal objection to being held to one definition because I think efficiency would be served by common application. If there is some impediment to this then Congress can correct it; if there is not, I think we all should act the same way.

DISTRIBUTION OF STAFF PAPERS AND BACKGROUND DOCUMENTS

Senator CHILES. In many instances the topic of discussion in an open meeting could be fairly technical. It is not easy for a member of the general public to have a meaningful understanding of what's being discussed. Generally only reporters and interested persons who regularly follow the Federal Reserve Board's activities know the jargon well enough to understand what's going on.

What measure has the Fed taken to assist the general public in understanding the Board's discussions, especially those involving specialized jargon?

Mr. MILLER. Senator, we have done several things. First, we publish a summary which puts into fairly plain language—even I can understand it—the points that are going to be discussed and their implications. This is quite brief, and because we know that those who are really interested in a subject could not understand it thoroughly with only the summary, we have also—generally, with very few exceptions—made staff papers available to those who request them.

Normally, under Freedom of Information, I believe there is a 10-day period for reply to requests, but our compliance is better. We get material for the meetings to those who request it in advance without any delay. I believe this has resulted in our hearings being attended by people who are or can become thoroughly informed on the issues.

Senator CHILES. I think that's a very positive thing. I know that's of great assistance.

I wonder if you aren't placing sort of the initial burden on the individual to obtain these papers. Some agencies routinely distribute
staff papers to the public. I understand the Fed’s requirement for request for background papers be submitted in writing at least 2 days before a meeting and I have heard that that can be a significant burden. Most of the people that we have spoken to have told us by the time they receive notice of one of your meetings they literally almost have to carry a handwritten request to your office because there is not sufficient time to mail it and to be able to get that back.

Mr. Miller. You may be right. We may want to examine that procedure. Our purpose is to make the papers available without a burdensome procedure. I think most of the people who follow the Federal Reserve drop by and pick up our materials, but if there is something better we can do I think we should look at it.

Senator Chiles. I understand that you do receive some requests for virtually 100 percent of your open meetings and it would seem then that the Board can automatically assume that there will be requests for documents for every open meeting and because of that if they were more freely available it would be of some help.

Mr. Miller. I think that’s worth looking at.

Senator Chiles. I understand that you release some staff documents and then withhold others, not on the basis that the document involves a sensitive issue as described in one of the sunshine exceptions, but merely because they consist of intra-agency memorandums and recommendations. The documents that are released are also intra-agency memos containing staff opinions and recommendations. I can’t understand where you draw the line. It seems that the withheld memos don’t contain truly sensitive information such as national defense matters or other matters that you are given a specific exemption on. You are going to discuss them at an open meeting, so I can’t understand where the line is drawn in releasing them.

So, can you tell me what criteria would be used to discriminate between those intra-agency memos containing staff opinions that you are going to disclose and those which you don’t?

Mr. Miller. Mr. Chairman, as I understand it, the Board has taken the position that release of documents is governed by the Freedom of Information Act. The only memoranda that I know of that have been withheld are ones that were exempt from disclosure under the Freedom of Information Act as intra- or interagency memos. The background for that exemption, as I understand it was the fear that if such documents were available under the Freedom of Information——

Senator Chiles. Well, under that theory you can withhold all of the intra-agency memoranda. You are not doing that. You are disclosing or providing some of them, so it seems like to me there has got to be some other judgment that’s being made. You are not using that FOIA exception to exclude them all.

Mr. Miller. I am not aware of any other criterion. I will certainly look and see if there is one.

REHEARSED MEETINGS

Senator Chiles. One problem that we had in the early stages of Sunshine in Florida was the occurrence of rehearsed meetings. This resulted when members of a committee or a cabinet attended premeeting discussions. Essentially the details of some issues subject to discussion at the meeting were discussed and worked out by several
members before the real meeting began. Now, this was one way to avoid having a controversial issue fully aired in the public.

The Florida courts, however, didn’t take kindly to that activity and they put an end to it.

I have some correspondence between a member of your staff and the Federal Trade Commission. The Federal Trade Commission expressed disappointment and concern over the lack of information presented at a Federal meeting. The Federal Trade Commission believed this position was not given a fair treatment at your meeting. Your staff had failed to present the Board with many significant points that were critical to the Board’s full consideration of issues before reaching a final decision.

In response, the director of your Division of Consumer Affairs informed the Federal Trade Commission that under the Board’s current procedures all matters to be placed on its agenda were thoroughly discussed in advance by several members so that at least those Governors would be familiar with the subject and be able to address it when the matter comes before the Board. In this case several Board members discussed the pros and cons of the issue prior to the Board’s open meeting in order to be prepared to speak to them at the Board table.

The letter further states that thus the discussion in the open meeting reflected a considered opinion arrived at after reviewing the arguments. That sounds a little like a premeeting session that would be contrary to the intent of the Sunshine law. The purpose of the act was to open up the whole decisionmaking process and not necessarily just to see a reflection of a considered opinion.

Is this practice of thoroughly discussing in advance issues to be addressed at a meeting, is that a standard practice in effect?

Mr. Miller. Senator, I am not aware of such a practice. I don’t believe it exists at the Federal Reserve. You are reading from material which was called to my attention and which I think goes back to last fall. Since that time, the FTC has indicated that their views have been adequately reflected in our meetings.

There may also be a possible misinterpretation. The Governors do seek briefings from the staff on complicated issues, so that they can do their homework and be prepared.

Senator Chiles. I am certainly not adverse to that.

Mr. Miller. I am certain you are not.

There is one other thing we do that might be misunderstood. There are some committees of the Board, each composed of less than a quorum of the Board. They oversee matters that may require direction to staff to develop a series of options and prepare material for presentation to the Board. They have no authority to make a decision for the Board. My experience is that when the committee materials come forward, the Governors do not have any view that there has been a premeeting or that a predecision has been made that they have to ratify. Quite often, they take exactly the opposite view and vote exactly the opposite view. So I am aware of no predecisionmaking.

In the particular instance that you cite, there may, to a degree, have been something like a briefing I wouldn’t know. My own experience is that most individual Governors may, on complicated issues, seek a briefing. My own practice is to have the secretary and a few members
of the staff run through the agenda with me to make sure that I understand the issues and can preside effectively. I only go into depth on an issue when I feel that such understanding is part of my homework.

**PETITION TO OPEN**

Senator Chiles. Some agencies have, by regulation or otherwise, established a procedure which allows for any person who petitions the agency to open a meeting that is proposed to be closed. This permits the reconsideration of the decision to close.

I understand that you don't have an established procedure in this regard. I believe that at least one request to open the meeting was brought to the Board's attention and the meeting was opened. I am pleased to see the willingness of the Board to reconsider closing of the meeting. This practice, however, seems to hinge on your staff's determination as to whether the Board should even know of a request. Your staff has informed us that it uses its discretion in bringing these matters to the Board's attention. Also, the public generally is unaware that you might reconsider your decision to close in an appropriate case.

I would wonder if you would look at the possibility of establishing uniform procedures for permitting such requests with determinations to be made by the Board members themselves rather than being made by staff?

Mr. Miller. I certainly will, because I think that is properly a Board decision. Under our so-called "expedited procedures," the Board votes on whether to close any specific item. If we do not vote to close an item—if the public interest suggests it should be open—we would open the item and put it on a subsequent open agenda, with proper notice given to the public. I was not aware that requests to reconsider closing a meeting were not given to the Board, but I will certainly look at this issue because I think they should be.

Senator Chiles. My concern there would be that although the act itself provides for those sensitive matters that would need to be closed, we did enumerate items and, of course, we gave the Fed additional reasons to close meetings; it still carries a presumption of openness. In addition to those specific items there is still the proviso that in spite of the fact that an exemption would lie, the Board still needs to make a decision that the overall public interest would still not best be served by opening the meeting. I think that's very, very important because I think if the staff can go down and sort of find any one of those checkoff items as being an exception then they can automatically close the meeting, especially if a prevailing attitude is one toward operating in a closed manner. But I would think if the Board is changing its attitude and seeking to open meetings, certainly it should know of a request to open a meeting and that there may be some general overriding public purpose to be served by the meeting being open. That certainly should come to the attention of the Board.

Mr. Miller. It certainly should. Let me just repeat that our current procedure is for the Board itself to decide on closing any item. It either makes the determination in advance, with adequate time for the 7-day notice, or it operates under the expedited procedure which allows it to vote at the particular meeting. Perhaps the gap is in not
knowing of a request to open a meeting; we will certainly look at that and make sure we get knowledge of such requests.

Senator Chiles. I want to commend you on your Guide to Government in the Sunshine. I think that’s a very useful way to assist the public, and also indicates your commitment to promote openness at the Fed.

One of our staff members recently visited your Freedom of Information Office and noticed that none of those guides were on display. She asked for one and received it, but apparently they are kept behind the counter. I wonder if you know how they are distributed?

Mr. Miller. Those pamphlets are on display on a rack in our main lobby.

Senator Chiles. Well, I think when you have a piece of material as positive as that, you would not want someone to be hiding it under the counter. You would want it out.

Mr. Miller. You don’t make many sales if you keep the merchandise hidden, I agree.

MAILING LIST

Senator Chiles. The subcommittee has received some complaints from individuals who say they have called the Fed and asked about public notices of Board meetings. They were not told about your mailing list but were simply told that the notices were posted in the Treasury. One individual upon learning of the mailing list from someone else outside the Fed had to write a letter and specifically ask to be put on the mailing list and was told a phone call was not sufficient. It seems to me that’s kind of an example of some institutional resistance. It is a problem for the public, but yet it is sort of subtle and hidden somewhere and I am not sure if that ever gets to your attention. I would appreciate it if you would check it.

Mr. Miller. That sounds a little bureaucratic, and we certainly need to do better than that. We don’t need to put up barriers.

Senator Chiles. I notice that the mailing list issue, and again that’s a very positive thing, I think, that you have that mailing list. I notice that that did not get into the Government in the Sunshine Guide. I just bring that to you your attention. If that’s reprinted at any time that would be helpful if that was in that Guide, too.

Mr. Miller. Good point.

Senator Chiles. The definition of the word “meeting,” it seems has been misconstrued by a lot of people. A meeting includes briefing or informational discussion of, in effect, the conduct of the agency that is attended by a quorum of the agency members. The Justice Department is urging the agencies to define meetings broadly to include such sessions.

I understand the Fed conducts weekly Friday briefings on the state of the economy but they are not treated as meetings.

If it is during such informational briefings that members of an agency receive and reflect upon the basic information on which a later discussion may be based it seems those meetings would impact agency policy.

Mr. Miller. Chairman Chiles, those briefings relate to the preparation for monetary policy decisions which, of course, would be made in closed meetings. They do not relate to rulemaking decisions that would
be publicly discussed. A lot of the information we get at those briefings is not yet public. It is subject to——

Senator CHILES. Do you consider that to be sensitive information?

Mr. MILLER. There could be a marked impact if those meetings were open. Sensitive data could be misinterpreted as indicating that the Federal Reserve is about to do something in monetary policy. I never attended one of those briefings in which anything that would touch on any aspects of the Board’s business other than monetary policy was presented. The briefings are a regular means for staff to advise the Board on developments relating to the aggregates or other economic data.

Senator CHILES. Chairman Miller, again I want to thank you for your testimony and what I see is a positive reaction of the Fed now in moving under sunshine. Thank you.

Mr. MILLER. We like to respond positively, and I hope that we can show continued progress in meeting your objectives, Mr. Chairman. Thank you very much.

[Mr. Miller’s prepared statement, with attachments, follows:]
margin regulations; proposals involving a specific bank or bank holding company formation or further bank acquisition; other bank regulatory matters such as applications for membership, issuance of capital notes, and investments in bank premises; foreign banking matters; and bank supervisory and enforcement actions, such as cease and desist and officer removal proceedings.

In adopting the Board's regulation providing for the use of expedited procedures, it was ascertained that of the 493 meetings of the Board held in the three calendar years prior to enactment of the Sunshine law, 94 percent could have been properly closed pursuant to exemptions that would sanction use of these procedures. Because of the nature of the Board's activities and the nature of the exemptions that authorize the use of expedited procedures, it may be expected that a substantial percentage of the Board's agenda items will continue to be closed under this procedure.

BOARD RECORD OF OPEN AND CLOSED MEETINGS

Operating under the Government in the Sunshine Act during 1977, 27 percent of the Board's 114 meetings were either open or partially open. At these meetings the Board considered 638 individual agenda items, of which 17.5 percent were open and 82.5 percent closed. As to many of the closed items, tape recordings of the Board's discussions were placed in the Board's Freedom of Information Office soon following the meeting, thus making these discussions available to the public. Taking the release of these recordings into account another 5.3 percent of the items considered by the Board in 1977 are now open to the public.

For 1978 through June 30, 43 percent of the Board's meetings were either open or partially open. The Board has considered a total of 377 agenda items during this period; 26 percent in open sessions, and 74 percent in closed meetings.

OPEN MEETINGS PROCEDURES

The Board has put a good deal of effort into developing a program to aid the public in understanding and obtaining the maximum possible benefit from its open meetings. A pamphlet has been prepared to increase the public's understanding of the application of the Sunshine Act to the Board's meetings. A copy is attached to this statement.

The Board makes most staff memoranda considered at open meetings available to the public upon request submitted prior to the meeting. Such requests are given priority treatment by the Board's Secretary. Before presentation of an item on the agenda at an open meeting, a brief statement of the issues involved is usually made for the benefit of the public. Members of the public attending the meeting are provided with an agenda summarizing the issues to be discussed. An example is attached to this statement. Photographs of Board Members and seating charts are available in the Board room. Following each meeting a representative of the Public Affairs Office is available for further questioning about the proceedings. In short, the Board endeavors to help the public understand the proceedings at open meetings.

Twenty-five persons attended the first open meeting of the Board on March 28, 1977. Since then attendance has varied widely, depending on the public interest in the subjects to be considered. Attendance was large at one recent meeting in which the Board's proposed membership program, the proposed Community Reinvestment Act regulation, and aspects of the International Banking Act legislation were considered. That meeting was attended by about 85 members of the public. Otherwise, attendance has ranged from 0 to 39, averaging 9 a meeting.

The Board maintains a mailing list for notices of meetings. In addition to printing notices in the Federal Register, the Board makes advance notices of meetings available to the public at the Board's Freedom of Information and Public Affairs Offices and at the Treasury Department's press room. Also, notices of open meetings are provided to a news wire service for use on its Washington "city wire." All notices invite the public to address inquiries to the Board's Public Affairs Office, which is prepared to provide details about any meeting. In the event of an unexpected change in an open agenda item, when advance written notice is unlikely to be received in time by the public, media representatives who regularly attend such sessions and individuals known to have an interest in particular matters on the Board's agenda are advised of the change by telephone.
When the change is significant, calls are also made to each of the persons on the Board's Sunshine mailing list—approximately 40 in number.

**RECORDS OF MEETINGS**

As indicated earlier, the Board has also made a conscientious effort to comply with the spirit of the Sunshine Act with respect to the availability of minutes, transcripts, and recordings.

The record of each closed Board meeting is made available to the public in the Board's Freedom of Information Office promptly after the meeting, unless the Board has voted to withhold part or all of the discussion under the Act's exemptions. For closed meetings there are either minutes, or recordings which may be listened to by members of the public. Transcripts of recordings can be obtained upon request. Cover sheets attached to the released material indicate whether the entire record is available and list any subjects withheld. Material that is withheld temporarily is released as soon as it is determined that the exemptions under which it was withheld no longer apply. The public may come into the Freedom of Information Office and obtain immediate access to pertinent files, minutes and records.

**COSTS OF GOVERNMENT IN THE SUNSHINE**

While we have endeavored to maximize the benefits to be derived from implementation of the Act, it should be noted that such efforts are not without associated costs. We have had to reassign resources within our staff so that two persons now work solely on Sunshine matters, one processing public announcements and the other processing the recordings and minutes of closed meetings. In order to meet our open meeting and recording obligations, it has been necessary to install a public address and multi-track recording system at a substantial cost to the Board. Compliance with the substantive and technical requirements of the Act continues to place heavy additional demands on staffs of the Secretary, the General Counsel's office and others. We estimate that the cost to the Board of complying with the Sunshine Act is approximately $100,000 per year.

Another cost, of a somewhat different nature, but of particular concern to me, relates to the delay in processing of matters before the Board as a result of compliance with procedural requirements of the Act. For instance, some items which prior to the Act were brought to the Board at a moment's notice are now delayed as much as two weeks to accommodate the Sunshine public notice and voting requirements. Items ready for Board action at an open meeting have been deferred in order that a grouping of such matters may be presented at one open meeting, rather than requiring the public to attend a series of meetings, each with only one or two open items on the agenda. The Board continues to consider appropriate steps that might be taken to minimize such delay.

**SUGGESTED AMENDMENTS TO THE ACT**

The Board has previously written to you about its concern as to any requirement that the Board's discussion of legislative matters be held in open meetings prior to their presentation to the Congress. It is the Board's belief that Congress dealt with this question by adopting exemption (9)(B) under which an agency's deliberations may be closed if public discussion would make known information, the premature disclosure of which would be likely to frustrate significantly implementation of a proposed agency action. Two reasons support closing of legislative items on the basis of this exemption.

First, the legislative process usually contains elements of negotiation and compromise, and premature disclosure of positions on legislative matters could significantly frustrate the attainment of legislative goals sought by an agency. Discussion of legislative matters often involves the consideration of strategy to be pursued in the accomplishment of legislative objectives favored by the Board.

For example, the Board may decide to support a particular legislative proposal but determine at the same time to support various alternative proposals should the Board's preferred position prove unacceptable to the Congress. Premature disclosure of the fact that the Board is willing to support alternative
proposals could significantly frustrate the Board's ability to obtain support for its primary objective.

Second, Congress often expects that views on legislative matters will first be given to Congress. The important working relationship between Congress and the agencies could be significantly frustrated if agency views on legislative matters were prematurely disclosed to the press and the public.

Nevertheless, the Board's application of exemption (9) (B) to legislative discussions has been questioned by parties asserting that it was improper to use this section to close a meeting considering testimony to be given to the Congress. For this reason, the Board urges your Subcommittee to take action in the form of either an amendment or a clear statement in support of the Board's interpretation.

Even if the authority to close the discussion of legislative matters under exemption (9) (B) is clarified, another basic problem remains of the inhibiting effect that a requirement for verbatim recording has on the Board's consideration of legislative matters. According to my colleagues on the Board, the free and spontaneous exchanges that were formerly present in Board discussions of legislative matters have been somewhat constrained by the recording requirements for such a meeting. It would seem that the Board and other collegial agencies should be able to communicate to Congress positions that have been formulated during a meeting that has permitted uninhibited expression of each member's views. The public interest would not be harmed if agency deliberations were conducted in closed nonrecorded sessions where the results are later exposed to the public in the course of committee hearings. The Board recommends that the law be amended to permit legislative discussions to be subject only to the maintenance of minutes.

Discussion of sensitive personnel matters has also been hampered by the Act's recording requirements. Board members, meeting in collegial fashion, cannot be expected to express in complete candor their views regarding candidates for senior Federal Reserve positions, when each word spoken is recorded. The creation and retention for at least two years of substantial numbers of recordings reporting such sensitive deliberations seems unwise and, moreover, unnecessary. Accordingly, the Board also recommends that the Act be amended to enable an agency to discuss individual personnel matters in closed session subject to the maintenance of minutes rather than the verbatim transcript or recording now required.

Mr. Chairman, I assure you that the Board intends to continue to carry out the letter and spirit of the Government in the Sunshine Act to the best of its ability. I hope these comments have been responsive to the Subcommittee's request, and I will be pleased to answer any questions you may have.

Attachments.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, OPEN MEETING AGENDA, WEDNESDAY, MAY 10, 1978

1. SUMMARY AGENDA

Because of its routine nature, no substantive discussion of the following item is anticipated. Summary agenda items are generally resolved on the basis of the written documentation without detailed discussion by the Board members. Typically, staff recommendations are uniform and in accord with established policy. Questions may be asked by Board members, but if any Board member wishes to express a substantive view on the merits of a proposal, the item is moved to the regular discussion agenda.

Summary item 1(a)

Proposed interpretation of Regulation A (Extensions of Credit by Federal Reserve Banks) to provide that a bankers' acceptance secured by a field warehouse receipt covering readily marketable staples is eligible for discount by a Federal Reserve Bank, despite the fact that the warehouseman is an employee of the owner of the goods.

Reserve Bank loans to member commercial banks, known as discounts, must be secured by collateral deemed "eligible" for discount by specific Board action. Recently, the Board was asked to review its 1933 interpretation concerning the eligibility for discount of bankers' acceptances secured by field warehouse receipts. Under that interpretation, such acceptances were determined to be ineligible for discount because the actual custodian of the goods was so closely identified with the owner of the goods that, in the Board's view, the lending
bank's security might be impaired. A review of the 1933 interpretation seemed desirable because of changes in commercial practice and law in the 44 years since its adoption. Furthermore, under the Board's Regulation D (Reserves of Member Banks), the sale of ineligible acceptances by member banks results in additional reserve liability for the member bank, thereby making the question of ineligibility of significance to member banks.

A proposed interpretation reversing the 1933 position of the Board was issued for comment in December 1977. Of the 23 comments received, all but two favored adoption of the proposed interpretation. As a result of the comments received, certain technical changes have been made to the proposed interpretation, but the final edition is essentially the same as the proposed.

Staff is recommending approval of the proposed interpretation.

2. DISCUSSION ITEM

Proposal for a Uniform Interagency Bank Rating System (UIBRS) to evaluate and rate commercial banks.

After extensive discussions among staff of the Federal bank regulatory agencies, preliminary agreement on the key performance dimensions of commercial bank operations has been reached. The proposed UIBRS describes a general framework for a uniform approach to rating banks. It was designed to measure the quality of a bank's operating performance and reflect in a comprehensive manner the institution's overall financial condition.

UIBRS builds upon and improves the present Federal Reserve approach to rating banks by explicitly including earnings and liquidity as components in the evaluation of a bank's performance, in addition to capital, asset quality and management. UIBRS also sets forth the important judgmental considerations and essential factors that must be weighed in the process of assessing each of these performance dimensions as well as in assigning a composite rating. The proposed system expands the performance gradation scheme to allow the rating of each individual dimension of a bank's operating performance on a scale of one to five. Finally, qualitative criteria are described for five distinct composite categories which relate the degree of supervisory concern to the seriousness of an institution's problems. Common use of these five composite categories among the agencies will introduce an important element of uniformity into the rating of banks and enhance interagency communication with respect to individual institutions.

Staff is recommending approval of the Uniform Interagency Bank Rating System.

3. DISCUSSION ITEM

Proposal to publish for comment an amendment to Regulation Y to permit bank holding companies to underwrite property and casualty insurance related to extensions of credit.

The performance of this activity by bank holding companies is not included among those that have been designated by the Board in Section 225.4(a) of Regulation Y (Bank Holding Companies) as "closely related" to banking. The discussion at this meeting should focus on whether there is sufficient basis to consider property and casualty insurance underwriting as closely related to banking and whether to publish a proposal for comment that would add this activity to the list included in Regulation Y.

The Board's staff is divided in its recommendation. The Division of Banking Supervision and Regulation and the Legal Division, although not making a final determination at this time, believe there is evidence that underwriting property and casualty insurance that protects collateral related to extensions of credit is an activity closely related to banking.

The Division of Research and Statistics, however, recommends that the Board not propose property and casualty insurance underwriting as a permissible activity for bank holding companies under Section 4(c)(8). Staff believes the underwriting of property and casualty insurance is an activity which is only marginally related to banking, and that there are no functional or historical reasons to consider the activity to be bank related.

4. DISCUSSION ITEM

Proposed amendments to Regulations G (Securities Credit by Persons Other Than Bank, Brokers, or Dealers), T (Credit by Brokers and Dealers), and U (Credit by Banks for the Purpose of Purchasing or Carrying Margin Stocks) to
provide that only those dealers submitting bid and offer quotations for a given stock to an automated quotation system will be counted as market-makers in determining whether a stock should be shown on the Board's list of Over-the-Counter margin stocks.

Since the early 1930's, the Federal Reserve has been directed by law to restrain the excessive use of credit for the purpose of buying securities. This is done by requiring that funds lent to acquire securities be a certain amount less than the market value of the securities. The difference between the credit value and market value of any security is the margin, which is normally expressed as a percentage. Margin requirements apply to certain securities traded on the over-the-counter market, as well as to securities listed on a national securities exchange. The Board publishes a list of covered-over-the-counter stocks. One of the requirements for inclusion on the Board's list is that a certain number of dealers make bona fide bids and offers for such stock.

When the OTC list was first published by the Board in 1969 the "pink sheets" of the National Quotation Bureau were the only consistent source of the required price information. Since that time an automated quotation system, NASDAQ, has been developed to a point where price information on all stocks on the Board's list can now be obtained from it.

Information from the "pink sheets" is now duplicative of material from NASDAQ. Moreover, reviewing it requires an expenditure of staff and computer time no longer deemed necessary to complete the analysis required in surveying the stocks eligible for the Board's list. Accordingly, in March 1978, the Board issued for comment the proposed amendments to Regulations G, T, and U (docket no. R-0147) to permit the Board to use survey data from NASDAQ only. Of the fifteen comments received, all but one supported the Board's proposal. Staff is now recommending final adoption of the amendments as proposed.


The Board of Governors meets several times a week to consider matters relating to the official supervisory, regulatory, and monetary policy responsibilities of the central bank. These meetings are conducted in compliance with the Government in the Sunshine Act. The public is welcome to attend and observe all meetings, except those that the Board determines should be closed under exemptions provided in the law, as listed at the end of this pamphlet.

Procedures for both OPEN and CLOSED meetings of the Board are described in the following pages. Additional information is available from the Board's Public Affairs or Freedom of Information Offices.

Open Meetings—Notice and Attendance

Notices of open meetings are published in the Federal Register, and copies are usually available seven days in advance of the meeting from the Board's Freedom of Information and Public Affairs Offices and in the Treasury Department Press Room. Information about agenda items may be obtained by phoning the Public Affairs Office between 8:45 a.m. and 5:15 p.m.

In order to enhance the public's understanding of its discussions, the Board makes most staff memoranda considered at open meetings available to the public. Requests for documents should be made in writing to the Secretary of the Board as far in advance of the meeting as possible and received no later than the close of business two working days before the meeting.

Open meetings generally begin at 10 a.m. in the Board Building, at 20th Street and Constitution Avenue, NW. Ample seating is provided in a section of the Board Room reserved for the public. Visitors are asked to check in with the guard at the main entrance. In the Board Room, attendees are provided with a seating chart identifying the members of the Board and an agenda summarizing the issues to be discussed during the course of the meeting. We request that cameras and recording devices not be used unless approved in advance by the Public Affairs Office.

The Summary Agenda

Items on the Summary Agenda are usually the first to be considered during an open meeting. Items placed on this agenda are those of a routine nature which often can be resolved without extensive discussion by Board members. Typically this agenda is used for recommendations which have the consensus of the staff and are in accord with established policy. Questions may be asked by
Board members but if any Board member wishes to express a substantive view on the merits of a proposal it is moved to the Discussion Agenda.

The discussion agenda
Items on the Discussion (or Regular) Agenda are presented orally by staff members from the division originating a proposal or by Board members with oversight responsibility for a particular matter. Following presentation and discussion of each agenda item the members of the Board vote in order of seniority, with the Chairman or the presiding officer generally casting the last vote.

CLOSED MEETINGS—NOTICE REQUIREMENTS
Items considered in closed session include primarily: bank and bank holding company supervisory matters, discussions of which generally disclose information from bank examination reports or commercial and financial information obtained in confidence by the Board; monetary policy and other matters whose premature release could be used in financial speculation; and personnel matters. The two types of closed meetings, discussed more fully below, are:
1. “Recorded” meetings—or those meetings which require advance public notice of one week. The Sunshine Act requires a full transcript or electronic recording of these meetings. For them, the Board uses a multi-track recording system that enables identification of each speaker.
2. “Expedited” meetings—or those meetings which do not require advance public notice. Customarily, the Board prepares minutes of these meetings.

Recorded meetings
Notices of meetings closed to the public under exemptions 1, 2, 3, 5, 6, 7, and 9B of the Sunshine Act are published in the Federal Register and copies are available from the Board’s Freedom of Information and Public Affairs Offices, and in the Treasury Department’s Press Room—generally a week before the meeting. Federal Register notices indicate the time, place, subject matter, and closed status of the meeting; and the name and phone number of the official designated to respond to requests for information about the meeting. As required by law, the following additional information is available in advance of a meeting in the Board’s Freedom of Information Office:
A notice citing the applicable exemptions and reasons for closing an item; the anticipated attendance during discussion of that item; and the vote by Board members for closing the item.
As necessary, a notice indicating any change in time of meeting, any deletion or addition of an item, and any change in the open/closed status of an item.
After a meeting has been held, the following information is made available in the Board’s Freedom of Information Office:
The certificate of the General Counsel, stating that the meeting may be closed to the public and citing applicable exemptions.
If applicable, a statement of the vote by Board members to withhold information from the copy of the recording or transcript released to the public, and the exemptions cited.
A full cassette recording of the meeting, unless the Board has determined that the recording or a portion of the recording is exempted from release. Recordings or portions of recordings initially withheld are often released at a later date when their exempted status no longer applies.
The Presiding Officer’s Statement, giving the time and place the meeting was held and the persons present.
Special facilities are provided in the Freedom of Information Office for listening to recordings. Or, cassettes may be purchased at $5 per copy.

Expedited meetings
Because a majority of its meetings can properly be closed pursuant to exemptions 4, 8, 9(A), or 10, the Board is qualified under the law to use expedited procedures for closing certain meetings. Expedited items include supervisory, regulatory, and enforcement matters relating to a specific financial institution, and monetary policy matters. Minutes of these meetings, rather than recordings, are usually maintained by the Board.
Copies of notices of meetings closed under expedited procedures are available from the Board’s Freedom of Information and Public Affairs Offices and in the Treasury Department Press Room. Such notices indicate the time, place, and subject matter of the meeting; exemptions applicable to the closing of an item;
and the phone number of the official designated to respond to requests for information about the meeting. Additional information about expedited meetings available for inspection in the Freedom of Information Office includes:

The certificate of the General Counsel stating that the meeting may be closed to the public and citing applicable exemptions.

Minutes of the meeting, unless the Board has determined that the minutes or portions of the minutes are exempted from release. These minutes fully and clearly describe all matters discussed, and provide an accurate summary of any actions taken and the reasons for any action. The minutes also include a description of each of the views expressed on any item and a record of any roll call vote. Minutes or portions of minutes initially withheld may be released when their exempted status no longer applies.

The Presiding Officer's Statement giving the time and place a meeting was held and the persons present.

Minutes may be examined in the Freedom of Information Office. Or, copies of minutes may be purchased at 10 cents per page.

OTHER PROCEDURES FOR HANDLING OFFICIAL BUSINESS

Not all matters coming before the Board are considered at Board meetings. The Board uses two other procedures to handle official business: notation voting and delegation of authority. Under the first procedure, routine business is conducted by circulating material to each Board member for written vote and comment. Upon request by a Board member, however, any such item may be referred to the Board's regular agenda for discussion and is then subject to the provisions of the Sunshine Act.

Under the second procedure, authority is granted to individual members of the Board or its staff, or to Reserve Bank staff, to act on behalf of the Board. A copy of the Board's "Rules Regarding Delegation of Authority." 1 may be obtained from the Freedom of Information Office.

SUNSHINE EXEMPTIONS

Under the Sunshine Act meetings may be closed to the public when presentations to the Board are likely to—

1. Disclose matters authorized under Executive Order to be kept secret in the interests of national defense or foreign policy.
2. Relate solely to internal personnel rules and practices of an agency.
3. Disclose matters specifically exempted from disclosure by statute.
4. Disclose trade secrets, commercial or financial information obtained from a person and privileged or confidential.
5. Involve accusing any person of a crime or censuring any person.
6. Disclose information of a personal nature where disclosure would constitute invasion of personal privacy.
7. Disclose investigatory records compiled for law enforcement purposes.
8. Disclose information contained in or related to examination, operating or condition reports prepared for or used by an agency responsible for regulation or supervision of financial institutions.
9. Disclose information the premature disclosure of which would—
   (A) (i) lead to significant financial speculation in currencies, securities or commodities; or
   (ii) significantly endanger the stability of any financial institution; or
   (B) be likely to significantly frustrate implementation of a proposed agency action.
10. Specifically concern the agency's issuance of a subpoena or participation in a civil action or proceeding.

CONSUMERS UNION

Senator CHILES. Our next witness this morning is Mr. Mark Cymrot, senior litigator, and Ms. Ellen Broadman, attorney, of the Consumers Union, Washington, D.C., which is a nonprofit membership organization chartered in 1936 under the laws of New York, for consumer goods

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1 12 C.F.R. Part 265.
and services and the management of family income. The Consumers Union is probably best known for its publication, Consumer Reports.

We are happy to have you with us this morning. I would like you to please, if you can, summarize your written testimony and your written statement will be inserted in the record.

TESTIMONY OF MARK CYMROT, SENIOR LITIGATOR, CONSUMERS UNION, WASHINGTON OFFICE, ACCOMPANIED BY MS. ELLEN BROADMAN, ATTORNEY

Mr. CYMROT. Thank you, Mr. Chairman. We do intend to briefly summarize our written testimony. Ms. Broadman will discuss her actual experience attending board meetings, and I will discuss Sunshine Act litigation from earlier this year arising from Ms. Broadman's experience.

Ms. BROADMAN. Before describing my experiences at the Federal Reserve Board, I would like to stress the importance of the Sunshine Act to groups like Consumers Union. Because the secrecy with which some agencies act, open meetings are often one of the few sources of information we have on how agencies act and make their decisions. With this information, we are better able to participate in agency procedures in a meaningful way and to comment on proposed regulations.

While public participation and scrutiny may oftentimes add complexity to agency proceedings, it often results in more fully considered and better informed decisions. For this reason we are a strong supporter of the Sunshine Act.

My most extensive experience with the Sunshine Act has involved the Federal Reserve Board. In the summer of 1977, I began attending Board meetings because I was particularly interested in the enforcement actions that they intended to take involving the Truth in Lending Act. A recent survey of the Comptroller of Currency and some hearings before a House committee had revealed that the agencies had not enforced the Truth in Lending Act adequately since 1969 when the act was first enacted. Because of this inadequate enforcement, there were widespread violations of the act which had resulted in enormous overcharges to consumers.

I was also interested in learning of the Board's position on Truth in Lending Act amendments that were then pending before Congress. The meetings were often incomprehensive. Most of the meetings that I attended focused on staff memorandum and proposals that were not made available to public observers.

At one meeting, the Governors discussed a proposed statement to be issued by the Federal Reserve Board on Truth in Lending Act reform. Each Governor took a turn stating revisions that he thought were necessary in this proposed document. The conversation consisted of such uninformative statements as, "I think this specific word should be deleted from line 5, on page 4." "I think this sentence should be inserted at page 9, line 3." and so on.

At points during this discussion people in the audience just looked at one another and laughed because it was clear that nobody knew what was going on.
Even at meetings where staff proposals were discussed generally, the Governors would often refer to pages and lines in these documents. Also, at one meeting, one of the Governors actually read from the document. Not knowing what the entire document said or the context within which the sentence was written, it was very difficult to follow the conversations and understand the decisionmaking process. On one occasion a Governor was having a debate with another Governor and referred to him a section in the staff document without saying what that section said. Needless to say, without the staff documents it was impossible to fully understand the decisionmaking process that we were entitled to view under the Sunshine Act.

One of the industry lobbyists fairly routinely concerned one of the Federal Reserve employees after staff meetings in order to get a translation of what we had actually observed.

Having attended those meetings I am convinced that all the documents which served as a basis for a decisionmaking process at a sunshine meeting must be disclosed to the public if the purposes of the Sunshine Act are to be fulfilled.

I also attended several meetings after our lawsuit was settled with the documents in hand and that experience further convinced me of the importance of their disclosure to meaningful implementation of the Sunshine Act.

At this point Mark is going to discuss the act and some of the positive changes that have occurred at the Federal Reserve Board since that time.

Mr. Cyrmrot. Well, based on Ellen's experience in the summer of 1977 when she was attending meetings where truth in lending was being discussed and she did not understand what was happening, we made a formal request for staff documents for two of the meetings and that request was denied. We appealed that denial but prior to the decision on the appeal we were forced to file suit because of the 60-day statute of limitations in the Sunshine Act. Our right to action would have expired if we waited any longer, so we filed suit to obtain these documents in the U.S. district court here in Washington, D.C.

After the suit was filed the Board did give us the two documents we requested. However, the suit proceeded because there was a question about what the future policy of the Board would be.

We started discovery in that suit. We served subpoenas on several members of the Board and on Commissioner Gardner. At that point entered into settlement discussions and the suit was settled.

The basis of the settlement was that the Board would establish a procedure for making public the staff documents being discussed at the open meeting and this procedure was published in the Federal Register in January 1978.

Under the new procedure, if a written request is made at least 48 hours in advance of the open meeting, it will be given priority treatment. Priority treatment means that a decision on the request for the document will be made prior to the meetings except if there is some extraordinary circumstance that prevents that from occurring. The second thing that the Board agreed to do was generally make available the staff documents. Again, the staff documents would be made public, but the Board reserved the right in extraordinary circumstances to withhold certain documents.
Now, in our view, the suit accomplished the release of staff documents and established a new procedure to obtain these documents. It also made the Board much more sensitive to the needs for open meetings and the problems of a group like ours and how we have to get information through these open meetings because the information is generally not available otherwise.

The suit did not accomplish certain things, though, that we would have liked to see occur.

First of all, it did not decide the question of whether documents can be obtained under the Sunshine Act or whether observers are limited to the Freedom of Information Act procedure.

It was our view that where the Sunshine Act says that every portion of every meeting of the agency shall be open to public observation, the staff document is a portion of the meeting when it is discussed at a meeting. The legal significance of this issue whether the Sunshine Act or the Freedom of Information Act applies, gets back to the point that you were making to Chairman Miller. That's the question of whether exemption 5 of the Freedom of Information Act, which is the exemption of disclosure of intra-agency memorandums is applicable to open meeting documents.

This exemption was not included in the Sunshine Act and we believe the reason for that was that the purpose of the exemption is to protect the deliberative processes of the staff. Yet, the Sunshine Act mandates that when it comes to the Board table, this deliberative process should be in the sunshine and the public should be permitted to see what process the Board goes through in making a final decision. Therefore, we don't believe that this exemption should be applicable in a situation where you have discussion of documents at open meetings.

Now, in our experience, there has been significant improvement at the Federal Reserve Board. We receive staff documents. We have received all staff documents relating to the meetings that we have requested. As Ms. Broadman said, that makes the meetings much more understandable and we are able to do our job better as a result of being able to understand the process that the Board is going through.

While all of our requests have been granted we learned that in the period of January to May of 1978, 26 requests from other people have been denied. We find that disturbing. I think that the issue of whether intra-agency memoranda exemptions to the Freedom of Information Act, whether that should apply to sunshine documents is still a very significant question because of the Board's continued resistance to disclosure.

Senator CHILES. Do you think there could be some difference, that your request has been complied with because you brought suit and the other people have not shown that they would litigate so their requests might have been denied?

Mr. CYMROT. Well, we certainly noticed that we caught the Board's and staff's attention with a lawsuit and we have been treated very well since that time. It is very possible that others who have not taken the trouble to file suit are not being treated as well. Yes, there is a possibility. I have no definite information on that.

The one other matter that we are concerned with, the Board has put out a pamphlet on the Sunshine Act. We think it is an excellent
pamphlet but they have not included the new procedure in the Code of Federal Regulations where the Board has its regulations concerning disclosure of documents. So, most lawyers in particular or people who know to look in the CFR to find out what procedures they would follow would not see those expedited procedures in the Code of Federal Regulations. We think that is a further indication that there is still resistance of the Board to widely distributing this open meeting procedure and resistance to the concept of openness.

I think we are prepared for any questions that you would like to raise.

**BENEFITS OF SUNSHINE**

Senator Chiles. The primary purpose of the Sunshine Act is to give members of the public an opportunity to obtain more information about Government decisionmaking. You say it is one of the few opportunities that you have to get information and you also note in your testimony that all the secrecy in the decisionmaking process also allows for decisions to be made without vigorous public debate and criticism and comments that could cause something to be much more fully considered in reaching decisions. So I guess that it is your opinion that Sunshine benefits not only those members of the public that want to see what's going on but also the agencies and the general public at large that would be the recipient of those decisions?

Mr. Cymrot. Absolutely. I think the open meetings permit us to find out what's happening at the agencies and present our views. At the same time it permits others to present their views and in that way the agencies receive a much broader set of views and more information to make their decisions.

Senator Chiles. The heads of some agencies have told us that Sunshine has forced them to be more efficient due to the notice requirements and also to be better prepared for open meetings because they are subject to public scrutiny. Could you give us any examples from your own experience as to how Sunshine has helped the decisionmaking process?

Mr. Cymrot. Well, yes, we have several examples. As testimony indicated, we are working on the truth-in-lending problem that all of the bank regulatory agencies have, and we found out that an open meeting was about to occur where certain guidelines for enforcement of the act were going to be discussed and perhaps decided upon. We wrote a letter for the Federal Reserve Board, indicating that these proposals were disturbing to us in several respects and we thought that they should put these proposals out for public comment. The need for public comment was then discussed at the open meeting and public comment was received. I think the guidelines have taken too long, but I think the final product will be a better product.

Senator Chiles. Can you add anything to that?

Ms. Broadman. That's definitely the best example. Generally, we have learned of Board actions in several cases because we have gotten notices of open meetings at which they were going to be discussing these actions. We petitioned the Board recently to issue some regulations that would require lenders to retain records that would document noncompliance with the Truth in Lending Act. That open meeting was certainly very informative and useful to us, and ultimately they did grant our request, which we were very pleased with.
Senator CHILES. I think it is very clear that the problem you encountered with the Federal Reserve Board regarding the incomprehensible open meetings is a significant one. We have received numerous complaints that the same situation exists in other agencies, and the notion of holding a public meeting and proceeding to speak in such a way that no one can comprehend a discussion, certainly poses a real threat to sunshine. Certainly such a meeting doesn’t fulfill the purpose of the act. There is no way that I think you can consider that to be an open meeting. Documents discussed at an open meeting are an integral part of the discussion and decisionmaking process, and I am troubled about this continuing problem. I think it really does harm the concept of open government.

Do you think that there is a danger that these meetings could actually result in misinforming the public, therefore creating more confusion and misunderstanding of what an agency is doing than if they had closed a meeting to start with?

Mr. CYMRUT. Absolutely. If you are sitting in an open meeting and not understanding the discussion and basically just guessing what the various members of the Commission or Board are talking about, you are going to make wrong guesses. When we pass misinformation along or when others pass misinformation along, it can be very damaging.

Senator CHILES. Now that you are obtaining those staff memorandums, do you think they are helpful to your understanding of the Board’s discussions, the Fed’s discussions?

Mr. CYMRUT. Very helpful.

Miss Broadman?

Ms. BROADMAN. Yes; it is like the difference between day and night. With the staff memorandum, I have had no trouble following the discussions at all the meetings that I have attended. Even in situations where the memorandums are not specifically discussed, having those memorandums and having the factual information that the Governors are using to discuss the issues—

Senator CHILES. There is an old story, you can’t follow the players without a program.

Ms. BROADMAN. Exactly. So they are extraordinarily useful.

Senator CHILES. You mentioned in your testimony you finally got a complete copy of a staff memo that the Fed initially distributed, but there was certain information withheld. What was the difference between the edited copy and the complete copy?

Ms. BROADMAN. The difference was rather striking. Whoever edited the memo certainly had a heavy hand. One of the more humorous deletions was the section which described a meeting that Mark and I had attended. They completely deleted what happened at the meeting, what the consumer representatives said and what the lenders said.

Mr. CYMRUT. We were at that meeting, but they would not tell us what we said when we were there.

Senator CHILES. They were afraid to tell you what you said at the meeting?

Ms. BROADMAN. That’s right.

They also deleted anything that gave you a sense of what the memo was about. They deleted the entire section of the action requested
which the memo was discussing. They also left out subject headings. For example, on page 4 they left out the section of the heading which said “time limit for reimbursement,” but then they cut out “how far back should a creditor be required to go on making reimbursement for violations.” So they just left out information on what the memo was about. None of the information involved anything of any sensitive nature, a bank examination, or anything of that sort.

Senator CHILES. It is just some staff member’s feelings on what he ought to allow people to see or not?

Ms. BROADMAN. Yes.

Senator CHILES. That guy was probably a censor in World War II. Ms. BROADMAN. It certainly looked like it.

There was one part of the memo that did give some of the staff members some problems. They were not happy, I guess, with letting out a paragraph which disclosed the extent of noncompliance with the law. The paragraph basically said that 35 percent of the member banks had actually overcharged consumers under the Truth in Lending Act and cited amounts that consumers have been overcharged. The average overcharged per bank was $2,500. There were significant overcharges in amounts exceeding $100,000 per bank. This information was very useful to us; it was information that the public really needs to know to comment on appropriate enforcement actions.

Mr. CYMROT. I think the point is that we can’t conceive of why those portions were deleted. We can’t imagine any harm that possibly could occur. The staff wasn’t identified. In many cases you are not talking about staff arguments. There just doesn’t seem to be any reason for it.

Senator CHILES. Now that the agencies keep records of their closed meetings as they are required by law, some like the Nuclear Regulatory Commission keep transcripts of open meetings. The Fed and most agencies have not begun this yet. Is it difficult to obtain information from an agency of what happened at an open meeting and if, for some reason, you couldn’t attend it?

Mr. CYMROT. Yes. If you are not there, by and large you miss it unless there is a staff member who is willing to tell you what happened. Sometimes there is a staff member and sometimes there is not.

Senator CHILES. You think it would be beneficial if there were transcripts of the open meetings?

Mr. CYMROT. Yes; you have transcripts of the closed meetings, but it seems to be completely backward that they don’t have transcripts of the open meetings, since those are the ones that even they agree that the public is supposed to know what happened at those meetings.

Ms. BROADMAN. That was a problem for us. We wanted to have transcripts of an open meeting that we had attended, but there was no way that we could document what we had heard.

Senator CHILES. Well, I guess as a lawyer you never want to be in a position, they call it champerty or something if you encourage people to file lawsuits, but I sometimes think there is a very beneficial effect of judicial interpretation, especially with a new law like sunshine. We are going to have to see what the court is going to say on some of these matters even though I feel, as I expressed in many instances, what the legislative intent was, and I know what my intent was. But when you get to interpreting what words mean or what the legal effect is, that always is left up to a gray area of how people are going to inter-
pret that, and I think it will only be when the court really gets into the area and starts making some of these interpretations that it will be completely clear. This is necessary, especially if some agencies are going to try to nitpick and to continually thwart what is the avowed purpose of the law.

I am delighted to see what appears to be a changed attitude in the Fed, and also you say that you are seeing that change, too, but I think some lawsuits being filed, I think there is no doubt about it, the fact that you are filing suit has also brought about some changes. That's probably going to be very necessary to clear the law's parameters and have the act work properly.

Mr. Cymrot. Yes; we always looked at litigation as a last resort.

Senator Chiles. Right; and it should be.

Mr. Cymrot. I agree, it should be. It is simply that there is still considerable resistance in the Government to the idea of openness. We hear complaints about many other agencies, and unfortunately, it may be only litigation that will get these agencies to change.

Senator Chiles. Of course, some of the express provisions in the act allow for litigation and provide the method for litigation. There is a limit to what this committee or any committee of the Congress can do in its oversight procedures. We can try to bring attention and put the spotlight on them, or bring people up, but we can't ultimately order something to be done which the court can.

Mr. Cymrot. That's right. It is up to the citizens who are concerned about their rights to information about our Government to enforce those rights.

Senator Chiles. Thank you very much for your testimony.

[The prepared statement follows:]

STATEMENT OF MARK CYMROT, SENIOR LITIGATOR, AND ELLEN BROADMAN, ATTORNEY, CONSUMERS UNION, WASHINGTON OFFICE

Mr. Chairman, Consumers Union appreciates the opportunity to testify at these hearings on Government in the Sunshine Act. We support the Act and recommend that it be strengthened in certain respects.

IMPORTANCE OF THE ACT

Open meetings under the provisions of the Government in the Sunshine Act provide the public a unique opportunity to observe and understand the considerations underlying important governmental decisions. By opening agency decisions to public scrutiny, the Act enables the public to understand better the concerns and rationale of federal decisionmakers and to obtain important information related to the issues under consideration. This process improves the ability of interested members of the public to comment meaningfully on agency proposals, follow discussions at the agency agenda table, and otherwise participate more fully in agency proceedings.

The Sunshine Act is important because, as our experience has proven, openness does not come easily to many Government agencies. In fact, some agencies appear to have an inborn inclination toward secrecy. For behind the shield of secrecy, agencies can take action without provoking vigorous public debate and

1 Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide information, education, and counsel about consumer goods and services and the management of the family income. Consumers Union's income is derived solely from the sale of Consumer Reports, its other publications and films. Expenses of occasional public service efforts may be met, in part, by nonrestrictive noncommercial grants and fees. In addition to reports on Consumers Union's own product testing Consumer Reports, with more than 1.8 million circulation, regularly carries articles on health, product safety, marketplace economics, and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.
without encountering open public criticism. They also more readily can avoid submission of public comments, which must be given reasoned consideration in proceedings subject to judicial review. While public discussion and scrutiny can create a more complicated decisionmaking process, it often results in more fully considered and better formulated decisions, consistent with the interests of all parties affected.

FEDERAL RESERVE BOARD

Our most extensive experience with the Government in the Sunshine Act has involved the Board of Governors of the Federal Reserve System.

The Board traditionally has been one of the most secretive agencies in the government, and one of those least open to outside comment and criticism. Board employees have been among the government employees least willing to discuss important consumer issues and to provide information concerning those issues, particularly since former Chairman Arthur Burns had the FBI investigate the disclosure of certain interest rate information to us. Open meetings, therefore, are one of the very few sources of information that we have. Our experience illustrates the importance of the Sunshine Act and a number of problems which have arisen with it.

THE BOARD'S IMPLEMENTATION OF THE SUNSHINE ACT

This same attitude towards secrecy was displayed initially by the Board in its implementation of the Sunshine Act.

In May, 1977, Consumers Union attorneys attended a series of open Board meetings at which truth in lending simplification and enforcement were discussed. Both issues were important to consumers. Legislation was pending in Congress to amend the Truth in Lending Act, and a recent survey of the Comptroller of the Currency had disclosed "substantial noncompliance" by national banks with the Truth in Lending Act. By attending the open meetings, we sought to educate ourselves better on the issues and to identify the concerns and positions of all interests involved in the debate.

The meetings were often incomprehensible. The Governors discussed at length staff memoranda and proposals which were not available to the public observers. At times, various Governors suggested revisions to proposed legislative comments and testimony. Suggestions took the form, for example, that certain words on a specified page and line be changed or deleted. At other times, Governors referred in discussion to specific statements or recommendations in staff memorandum, without describing those statements or recommendations. For example, one Governor ended a debate with another Governor by stating his view that the analysis in the staff memorandum disposed of the other's concerns.

In 1973, Consumers Union requested from the Board a compilation of interest rates charged by individual banks on a variety of consumer installment loans. Even though this information was widely advertised by individual banks and made available to any consumer who asked a particular bank, the Board refused to disclose its compilation. The information was sought for a "Consumers Guide to Banking" to be prepared by the San Francisco Consumer Action in order to assist San Francisco area consumers to shop for credit. During the course of our suit to obtain the Board's compilation, a Board employee, without being solicited to do so, provided it to us. Angered, then Chairman Arthur Burns summoned the FBI to identify the source of the "leak". When the employee admitted he had disclosed the data, he was fired. Congressional hearings were held to question the propriety of the Board's refusal to disclose the information and the Board's response to the disclosure. See letter from Representative Patman to Representative Henry S. Reuss, Chairman of the House Banking, Currency & Housing Committee, 121 Congressional Record, at H. 1233 (February 27, 1975).


Confusion was further engendered by the unavailability to the public of the technical backup information provided in the staff memoranda. We often missed entire portions of the discussion while we attempted to piece together the meaning of earlier statements. Needless to say, those who observed such “open” meetings could make little sense of the discussion.5

SUNSHINE ACT LITIGATION

Faced with this frustrating situation, Consumers Union filed with the Board a written request for the staff memoranda discussed at the June 27 and August 17 open meetings. The request was denied. We then filed suit because the Board's practice undermined the entire purpose of the Sunshine Act.6

After we filed suit, the Board released the two staff memoranda which we sought. On reading these documents we were amazed that the Board had denied our initial request. There was no information in either document7 which reasonably could be characterized as confidential or disclosure of which would be contrary to the public interest.

Release of the two documents did not dispose of the issues raised in the suit, however, since the Board's future policy was still at issue. The suit was settled by an agreement under which the Board agreed to release regularly the staff memoranda which are the subject of Sunshine Act open meetings. The Board retained the right to delete specific portions of the documents or to withhold specific documents at its discretion. The Board also agreed to an expedited procedure to enable persons who make a written request for a staff document at least 48 hours in advance of the open meeting to obtain the document by the time of the meeting. As part of the settlement, the Board issued the settlement agreement as a policy statement.8

PRESENT BOARD PROCEDURE

Favorable changes have occurred subsequent to the settlement of the lawsuit. The Board has granted all of our requests to date for disclosure of staff memoranda to be discussed at open meetings. The Board recently published a pamphlet on the Sunshine Act which includes an explanation of how documents discussed at open meetings can be obtained prior to the meeting. This pamphlet has been made generally available, although not distributed at open meetings. At all the meetings which we have attended, agendas are available listing the items to be acted on during the open portions of meetings and summarizing the major issues involved in the decisionmaking. A seating diagram is distributed identifying the participants in the meeting. With the agenda, staff documents and seating chart we have been able to follow the discussions at Board meetings and better understand the process by which decisions are reached.

Even so, some problems persist. Although we have been given all the documents that we have requested, some requests of others have been denied. The Board has denied some requests solely on the basis of Exemption 5 of the Freedom of Information Act which applies to inter-agency and intra-agency memorandums. (See Exhibit E.) It refuses to recognize that documents which are discussed at open meetings can be obtained under the Sunshine Act which does not include an exemption for inter-agency or intra-agency memorandums. The Board insists documents are available only under the FOIA and uses Exemption 5 to deny the public any documents it decides to withhold.

Also, many persons with an interest in the Board's deliberations remain unfamiliar with procedures for obtaining these documents. We have been surprised to learn that attorneys who work on issues directly affected by Board action do not know of the availability of these staff documents. We attribute this to the Board's refusal to include these procedures in its regulations published in the Code of Federal Regulations—a standard reference source for identifying agency procedures.

5 A similar situation reportedly arose at a recent meeting of the Securities and Exchange Commission. Washington Star, June 8, 1978 at B5, submitted to the Subcommittee as exhibit A.
6 A copy of the Complaint is submitted to the Subcommittee as exhibit B.
7 Submitted to the Subcommittee as Exhibit C.
Settlement of the Consumers Union lawsuit, of course, means that there is no case law precedent for disclosure of documents discussed at open meetings which is applicable to other agencies.  

**REHEARSED “OPEN” MEETINGS**

We recently learned that the discussions at the Board's meetings have not been the free and open exchanges envisioned by the Sunshine Act. According to a letter dated October 27, 1977 from Janet Hart, Director, Division of Consumer Affairs at the Board, to Lewis H. Goldfarb, then the Acting Assistant Director for Special Statutes of the Federal Trade Commission, the Governors are briefed in advance of the meeting by the staff. The open discussion which is intended to occur at the public meeting actually occurs in private. After Mr. Goldfarb complained that the FTC's view a Board staff opinion had not been presented to the Board, Ms. Hart responded: “... under the Board's current procedures all matters to be placed on its agenda are thoroughly discussed in advance by several members so that at least those Governors will be familiar with the subject and able to address it when the matter comes before the Board. Governors Jackson, Partee, and Lilly all received our staff memorandum which set out the arguments in favor of restricting EC-0007. They discussed the reasons pro and con in order to be prepared to speak to them at the Board table. Thus, the discussion in the open meeting on September 28 reflected a considered opinion, arrived at after reviewing the reasons you had put forward in your original letter and in the staff meeting.”

Thus, under the Board's present procedure, at least some discussions at the open meeting have been no more than a performance of a previously edited and rehearsed script. We believe that this practice undermines the Sunshine Act's purpose of encouraging public viewing of the actual decisionmaking processes.

This practice does not appear to violate the Act. Further, it is difficult to conceive of a statutory mechanism for preventing this abuse, since any prohibition could prevent necessary or desirable communications between members of collegial agencies except at scheduled meetings. Nonetheless, we wish to call it to this Committee's attention with hope that the Committee can encourage the Board to comply with the spirit as well as the letter of the law.

**THE SUNSHINE ACT SHOULD BE STRENGTHENED WITH RESPECT TO DISCLOSURE OF DOCUMENTS**

Although we wholeheartedly support the general policies of the Sunshine Act, we believe that the Act needs to be strengthened in several respects. Presently, the treatment of documents under the Sunshine Act is unclear, in part because of the provision of the Act, 5 U.S.C. § 552b (k), which states: “Nothing herein expands or limits the present rights of any person under Section 552 [the Freedom of Information Act.] ...”

The Board is of the view that documents can be obtained only under the Freedom of Information Act, and not under the Sunshine Act, even if the documents are part of an open meeting. It has withheld staff documents under Exemption 5, which exempts from disclosure: “(5) inter-agency or intra-agency memorandum or letters which would not be available by law to a party other than an agency in litigation with the agency.” 5 U.S.C. § 552(b) (5).

While most of the exemptions to the Freedom of Information Act were included in the Sunshine Act, the inter-agency memorandum exemption was not. The purpose of Exemption 5 was to protect agency deliberative processes. *EPA v. Mink*, 410 U.S. 73 (1974). The Sunshine Act, however, mandates that the deliberations of collegial agencies be open to public view at the final decisionmaking stage. In

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1 The Civil Aeronautics Board just recently announced a policy of discretionary disclosure of most portions of staff documents which are discussed at open meetings. However, the CAB does not make clear whether such documents will be made available in advance, or only after open meetings. 43 Fed. Reg. 22543, May 25, 1978.

Some, but not all, other agencies subject to the Act have a similar policy of disclosure. The Consumer Product Safety Commission, Food and Drug Administration, and Interstate Commerce Commission routinely make these materials available to the public, while the Federal Communications Commission, Federal Maritime Commission, and Securities and Exchange Commission do so rarely, if ever. The Federal Trade Commission's policy lies somewhere between these two groups of agencies, permitting disclosure of some, but not all, staff documents.

18 Copies of the letters exchanged between Ms. Hart and Mr. Goldfarb have been submitted to the Subcommittee as exhibits F and G.
our view, Exemption 5 is inappropriately applied to staff documents discussed at open meetings. However, the issue has never been resolved in court, and the Act is sufficiently ambiguous to make the outcome of litigation which challenges this practice uncertain. The Sunshine Act, therefore, should be amended to require disclosure of such documents.

We recommend that the Act (1) should specify that all documents to be discussed at open meetings must be disclosed prior to such meetings and (2) should set forth the procedures by which this information may be obtained. These documents should be defined as a part of the "meeting," 5 U.S.C. § 552b (a) (2) 11 and, therefore, should explicitly be available for public observation pursuant to 5 U.S.C. § 552b(b).12 Certainly, such a reading of the Sunshine Act conforms with its overriding purpose of enabling the public to scrutinize and understand agency decisionmaking.

THE SUNSHINE ACT STATUTE OF LIMITATION SHOULD BE EXTENDED

In addition, the 60-day statute of limitations in the Sunshine Act, 5 U.S.C. § 552b(h) (1), is too short and conflicts with the administrative procedure in the Freedom of Information Act.

In Consumers Union v. Board of Governors, the Sunshine Act statute of limitations would have expired if we had withheld suit until our administrative remedies were exhausted under the Freedom of Information Act. We requested the staff documents for the August 18, 1977 open meeting by letter dated August 25. The Board denied our request on September 19, 1977 and we appealed this denial on September 21, 1977. Under the Freedom of Information Act, the Board had until October 20, 1977 to respond to our appeal. However, the Sunshine Act statute of limitations on our claim expired on October 17, 1977. Thus, we were placed in a serious dilemma. We could file our suit before the 60-day statute of limitations ran and preserve our rights under the Sunshine Act, but risk dismissal of our 'FOIA' count for failure to exhaust our administrative remedies. Or, we could await Board action and preserve our claim under FOIA, but forgo our remedies under the Sunshine Act.

Parties seeking documents related to open meetings should not be placed in this dilemma. The Sunshine Act statute of limitations should be extended to one year to avoid this conflict between the Sunshine Act and FOIA, and to allow time for parties to lawsuits arising under the Act to prepare their cases properly.13

CONCLUSION

In closing, we again thank the committee for this opportunity to comment on very important public interest legislation, the Government in the Sunshine Act.

EXHIBIT A

[From the Washington Star, June 8, 1978]

“CLOUDS FILTER ‘SUNSHINE’ AT SEC MEETING”

There were a few clouds at the Securities and Exchange Commission’s “sunshine” meeting yesterday as the five commissioners discussed moves to shed more light on corporate affairs.

Although the session was open to the public—as required under the year-old Government in the Sunshine Act—the meeting was difficult for members of the public to follow.

The staff had prepared a 60-page document containing all its recommendations. But the commission refused to release it despite the fact that without knowing

11 5 U.S.C. § 552b(a) (2) provides “the term ‘meeting’ means 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, but does not include deliberations required or permitted by subsection (d) or (e) ...”
12 5 U.S.C. § 552b(b) provides: “Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.”
13 There is no magic to the one year figure. Any period will suffice which permits exhaustion of the Freedom of Information Act process plus reasonable time for a potential plaintiff to prepare a lawsuit for filing. However, in view of agency records retention practices, we see no reason why the one year provision would in any way prejudice or inconvenience agency interests.
what recommendations are being discussed it is difficult for members of the public
attending an SEC meeting to know what the commissioners are talking about.
At one point during the nearly three-hour meeting, Commissioner Irving Pol-
lack, in discussing a matter other than corporate government, said he didn't under­
stand footnote 5 on page 20. Aside from the commissioners and a few staff mem­
bers who had the document, nobody in the audience knew what he was talking
about.
SEC Chairman Harold Williams, in discussing the corporate governance recom­
mendations, consistently referred to them by number—recommendations 1 through
7 were left for another time, for example—but because the commission declined to
make the staff recommendations available, members of the audience could not
know what they concerned.
An attempt by The Washington Star to have the SEC make the recommendations
available—in much the same manner as the Federal Energy Regulatory
Commission, Civil Aeronautics Board and Federal Reserve Board make staff
papers available prior to a public meeting—was rejected.
Commission general counsel Harvey Pitt pointed out that the Sunshine Act has
not expanded the scope of material that would not be available under the Freedom
of Information Act. The staff memo was a document prepared solely for the com­
missioners, he pointed out, and is exempt from mandatory public disclosure.
The reason, he indicated, was that if the public were given staff documents the
staff would not feel free to express itself.
After the meeting, a staff member agreed to brief reporters on the staff recom­
mendations on which the commissioners had voted.

EXHIBIT B

United States District Court for the District of Columbia

Civil No. 77-1800

CONSUMERS UNION OF THE UNITED STATES, INC., plaintif, v. BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM, defendant

Complaint for Injunctive and Declaratory Relief

Plaintiff, Consumers Union of United States, Inc., by its undersigned counsel,
complaining of the defendant, alleges:

COUNT I

1. This is a civil action seeking injunctive and declaratory relief under the
Government in the Sunshine Act, 5 U.S.C. § 552b, against defendant’s failure to
have a portion of its August 17, 1977 meeting open to public observation and its
continued refusal to provide plaintiff with access to and an opportunity to copy a
memorandum dated August 12, 1977 entitled “Proposed Remedies to Truth in
Lending Violations” (hereafter, “the August 12 memorandum”).

2. Plaintiff is a nonprofit membership organization chartered in 1956 to
provide information, education and counsel about consumer needs and services
and the management of the family income. Plaintiff is the publisher of Consumer
Reports, a monthly magazine with a circulation of approximately 1.8 million,
which regularly carries reports of its own product testing and articles on health,
product safety, marketplace economics, and legislative, judicial and regu­
latory actions which affect consumer welfare. In addition, plaintiff represents
the interests of its members through testimony before Congress, upon
invitation to testify, and before the executive agencies and through litigation
in the courts. Many of plaintiff’s members enter into consumer credit trans­
actions which are subject to the requirements of the Truth In Lending Act and,
therefore, have an interest in effective enforcement of that Act.

3. Defendants, a collegial body composed of seven members appointed to
their positions by the President with the advice and consent of the Senate, heads
the Federal Reserve System. Defendant is subject to the provisions of the
Government in the Sunshine Act.

4. The court has jurisdiction of this action pursuant to 5 U.S.C. § 702, and 28
5. Defendant is responsible for enforcement of the Truth In Lending Act, 15 U.S.C. § 1601 et seq, with respect to consumer credit transactions of member banks of the Federal Reserve System.

6. Defendant and other federal financial institution regulatory agencies responsible for enforcement of the Truth In Lending Act have failed to enforce the Act effectively during the eight years since it took effect. During the past year, these agencies, through the examiners employed by them, have begun to expand greater efforts in examining the financial institutions under their regulatory jurisdiction for Truth In Lending Act violations. These agencies have found widespread non-compliance with the Act, resulting in overcharges of interest to borrowers in consumer credit transactions. Due to these overcharges, many such financial institutions owe substantial amounts of money as restitution to such borrowers.

7. To cope with this alarming situation, defendant and the other federal bank regulatory agencies are attempting to develop joint guidelines for their bank examiners regarding the ordering of payment of restitution to aforesaid borrowers.

8. On August 17, 1977, defendant held an open meeting subject to the requirements of the Government in the Sunshine Act, during which the Governors discussed staff recommendations concerning the proposed joint guidelines.

9. Prior to this meeting, the staff recommendations had been transmitted to the Board in the August 12 memorandum. Also prior to the meeting, plaintiff requested from defendant copies of any documents to be discussed at the meeting.

10. During the course of the discussion of the truth in lending guidelines at the August 17 meeting, the August 12 memorandum was frequently referred to and discussed in detail. Due to defendant’s refusal to make available the August 12 memorandum, much of the discussion during this portion of the meeting was incomprehensible to plaintiff and to the other members of the public present at the meeting even though plaintiff was familiar with truth in lending issues.

11. Therefore, the portion of the August 17 meeting relating to proposed guidelines and the August 12 memorandum was not, in fact, open to public observation.

12. On August 25, plaintiff requested from defendant access to and an opportunity to copy the August 12 memorandum in order to better understand what has occurred at the Board meeting. This request was denied, and defendant continues to deny plaintiff access to this document.

13. Plaintiff has exhausted all administrative remedies and has no adequate remedy at law.

WHEREFORE, plaintiff respectfully requests the Court to grant plaintiff the following relief:

a. A permanent injunction against defendant’s refusal to make promptly available to plaintiff and other members of the public the August 12 memorandum;

b. A declaratory judgment declaring that defendant has violated the Government in the Sunshine Act by failing to have all portions of the August 17 meeting open to public observation and is continuing to violate that Act by refusing to provide plaintiff and other members of the public access to the August 12 memorandum;

c. The costs and disbursements of this action, including reasonable attorneys fees and other litigation costs reasonably incurred by plaintiff, and

d. All other relief that the Court deems necessary and proper.

COUNT II

14. This is a civil action seeking injunctive and declaratory relief under the Freedom of Information Act, 5 U.S.C. § 552, against defendant’s refusal to provide plaintiff access to and an opportunity to copy a memorandum dated August 12, 1977 entitled “Proposed Remedies to Truth in Lending Violations” and a memorandum dated June 23, 1977 entitled “Major Issue in Truth In Lending Simplification” (hereafter the June 23 and August 12, memoranda).

15. Plaintiff repeats and reiterates, with the same force and effect as if set forth at length here, the allegations of paragraphs 2 and 3 above.

17. The June 23 and August 12 memoranda were discussed in detail during the June 27 and August 12 open meetings of the Board, respectively.

18. On August 25, 1977, plaintiff requested that defendant provide access to and an opportunity to copy documents referred to during the June 27 and August 12 open meetings of the Board. The June 23 and August 12 memoranda were documents referred to during those open meetings.

19. Defendant partially denied plaintiff's request on September 9 and plaintiff's timely appeal thereafter was denied.

20. Plaintiff has exhausted all administrative remedies and has no adequate remedy at law.

WHEREFORE, plaintiff respectfully requests the Court to grant the following relief:

a. A permanent injunction against the defendant's refusal to promptly make available to plaintiff and other members of the public the memoranda of June 23 and August 12.

b. A declaratory judgment declaring that defendant was and is in violation of the Freedom of Information by refusing to make available to plaintiff the June 23 and August 12 memoranda since the memoranda are not exempted from disclosure under any of the exemptions to the Freedom of Information Act;

c. The costs and disbursements of this action, including reasonable attorneys fees and other litigation costs reasonably incurred by plaintiff; and

d. All other relief that the Court deems necessary and proper.

COUNT III

21. This is a civil action for injunctive and declaratory relief under the Government in the Sunshine Act and Freedom of Information Act against defendant's policy or practice of refusing to grant plaintiff and other members of the public access to the recommendations and proposals to be discussed by the Governors at open meetings of the Board.

22. Plaintiff repeats and reiterates with the same force and effect as if set forth at length here the allegations in paragraphs 2 and 3 above.


24. The Board from time to time holds open meetings pursuant to the Government in the Sunshine Act, 5 U.S.C. § 552b, during which the Governors discuss staff recommendations and proposals for action by the Board.

25. These recommendations and proposals are often developed by the Board's staff and transmitted in writing in memoranda to the Governors prior to the open meetings.

26. The Board has a policy or practice of denying to plaintiff and other members of the public who attended these open meetings access to the recommendations and proposals under discussion and to the staff memoranda. As a result, portions of these open meetings are not, in fact, open to public observation.

27. The foregoing policy or practice violates the Government in the Sunshine Act and the Freedom of Information Act, and plaintiff has no adequate administrative remedy or remedy at law.

WHEREFORE, plaintiff respectfully requests the court to grant the following relief:

a. A permanent injunction against the defendant's refusal to provide plaintiff and other members of the public access to staff recommendations and proposals which are to be the subject of and under discussion at open meeting of the Board;

b. A declaratory judgment declaring the Board's policy or practice of denying plaintiff and other members of the public access to staff recommendations and proposals which are the subject of and under discussion at open meetings of the Board in violation of the Government in the Sunshine Act and the Freedom of Information Act;

c. The costs and disbursements of this action, including reasonable attorneys fees and other litigation costs reasonably incurred by plaintiff; and

d. All other relief that the court deems necessary and proper.

Respectfully submitted.

MARK A. CYMBOT,
ELLEN BROADMAN,
Attorneys for Plaintiff.

EXHIBIT C

United States District Court
for the
District of Columbia
Civil Action File No. 77-1800

CONSUMERS UNION OF THE UNITED STATES, INC., plaintiff v. BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, defendant

Summons

To the above named Defendant:

You are hereby summoned and required to serve upon Mark A. Cymrot and Ellen Broadman, plaintiff's attorneys, whose address is 1714 Massachusetts Avenue, N.W., Washington, D.C. 20036, an answer to the complaint which is herewith served upon you, within 30 days after service of the summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

[SEAL OF COURT]
Date: October 17, 1977.

NOTE.—This summons is issued pursuant to Rule 4 of the Federal Rules of Civil Procedure.

To: Board of Governors.
From: Consumer Affairs Committee.
Date: August 12, 1977.
Subject: Proposed Remedies for Truth in Lending (TIL) Violations.

Action Requested: Establishment of a Federal Reserve position on Truth in Lending enforcement procedures that will be taken to the Interagency Coordinating Committee as it strives toward adoption of uniform practices by the financial institutions enforcement agencies.

Recommendations: The Committee recommends that the Board support the adoption of the four positions discussed below.

Background: Pursuant to an informal agreement between Messrs. Jackson, Heimann, Le Maistre and Marston, Board staff have been working with staffs of the Comptroller of the Currency and the FDIC to develop uniform procedures for enforcing compliance with Regulation Z. This interagency task force has reached substantial agreement on possible remedies in connection with violations of Truth in Lending. Representatives from the other agencies are reporting to their respective agency heads the positions agreed upon by the task force.

The Committee believes that the remedies recommended herein are consistent with the Board’s announced objectives of achieving compliance under TIL for its State member banks. The recommendations are based upon experience to date with the System’s Consumer Affairs examination program and that of other agencies. The System has examined about 100 banks under the new procedures, and the Comptroller has examined about 2,000. Review of the examination reports is still under way, and it is not possible to make even preliminary estimates of the number of violations or amount of overcharges that may be found. Indications are, however, that violations will be found in a substantial number

1 Staffs of the Federal Home Loan Bank Board, the National Credit Union Administration and the Federal Trade Commission also participated in these meetings. What official action, if any, will be taken by these agencies is not known presently.

2 Procedures for enforcing compliance with Regulation B (Equal Credit Opportunity) have also been discussed, but no issues have arisen that seem to require special guidance at this time.
of cases. Because it does not seem practical to defer requiring remedial action until all examinations have been completed and reports reviewed, the Committee agrees with the other agencies that tentative standards should be adopted at this time, subject to being reconsidered in the light of experience. Each agency would closely monitor the effects of any reimbursement program, and the program would be subject to change in the light of experience.

1. Time limit for reimbursement: How far back should a creditor be required to go on making reimbursement for violations? It has become evident through consumer affairs examinations held to date that some creditors have been violating Truth in Lending for a number of years. (The Regulation became effective in 1969). The interagency task force recommends that creditors be required to make reimbursement as far back as their records extend. This policy would have greater financial impact upon creditors who maintain records and favor creditors who did not. To adopt any other time limit for reimbursement, however, lacks support. Staff of the Legal Division concurs with this view.

2. Credit insurance not properly disclosed: How should violations of the requirement that the cost of credit insurance be separately disclosed and agreed to by the consumer be handled? Regulation Z permits certain types of credit insurance premiums to be eliminated from the total finance charge disclosure if certain disclosures are made. To eliminate the premium from the finance charge, the creditor must (1) disclose the voluntary nature of the credit insurance and (2) obtain the customer's approval to acquire the insurance with a dated and signed statement. Staff believes that in situations in which the separate disclosure was not made and the premium was excluded from the disclosed finance charge, a significant violation has occurred. Accordingly, reimbursement of the amount of the overcharges would be necessary since the purchase of the insurance was required.

In addition, a violating may occur when the separate disclosure is made, but the cost of the insurance is not filled in or the consumer fails to sign as required. The interagency task force believes that such violations are of a technical nature. The group recommends that in such instances the creditor should be required to send the consumer a letter (1) asking whether or not the consumer had intended to acquire the insurance and (2) indicating that if the consumer did not intend to acquire the insurance a refund for the amount of the insurance premium would be given. However, if the only discrepancy on the separate credit insurance disclosure statement is a missing date, the group recommends that the creditor only be required to comply in the future.

3. De minimus rule: Should there be reimbursement when the average amount reimbursable is less than some arbitrarily chosen, minimal amount? The interagency staff group agrees that when the actual cost of locating overcharged customers and making adjustments exceeds the amount of the reimbursement, a requirement to reimburse may not be appropriate. These costs may well exceed the basic utility that the reimbursement of overcharges would have for any one particular customer. Thus, the group has developed the following proposed guidelines on a de minimus rule. If an examiner's loan file sample reveals a pattern of overcharges that would represent an average reimbursement amount of less than $1 for overcharged customers, the bank would not be required to search through its records to locate and reimburse all overcharged consumers. However, any individual identified within the examiner's sample who was overcharged $1 or more would be reimbursed.

Whenever the total dollar amount of any potential overcharge is large for a total universe of consumers in a bank (even though the average is less than $1), application of the de minimus rule may not be appropriate. In such cases, agency heads should have discretion to require the bank to conduct an affirmative ac-

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3 TIL overcharges were noted in approximately 35 percent of the State member banks examined. The average overcharge noted in most banks is under $2.500. However, there are significant overcharges in amounts exceeding $100,000 per bank in seven to ten banks examined. Under existing procedures, the Reserve Banks promptly notify DCA staff as such overcharge violations are uncovered. Governor Jackson is notified of cases involving large amounts as soon as the Reserve Banks are able to furnish sufficient data. Four special cases in which overcharges range between $100,000 and $200,000 have been reported to date. Staff is following up on the remaining banks. In addition, staff understands that the Comptroller examiners are finding similar overcharge patterns in national banks. No information is available on FDIC experience.

4 Staff believes that neither the one-year statute of limitations for civil penalties nor the two-year record retention requirement are relevant for this purpose.
tion program, such as an educational effort, that would have the effect of the bank expending funds in amounts by which it would otherwise remain unjustly rewarded for the amount of the overcharges.

If the average overcharge amount was $1 or more for those overcharged consumers found within the examiner’s loan file sample, the creditor would be required to search through it records to locate and reimburse all overcharged consumers. (The de minimus rule would not apply.)

4. Methods of Reimbursement: What method should be used to make reimbursement when annual percentage rates (APR’s) are understated? The thrust of any proposed remedy when an APR is understated to a consumer is to insure that the consumer’s actual credit obligation does not exceed that disclosed. To adjust the credit obligation to the disclosed APR, the interagency group suggests that the following three methods of reimbursement be available:

a. Lump-sum reimbursement for past overcharges and reduction of remaining payment amounts.

b. Reduction in the number of payments the customer has to make to adjust for both past and future overcharges (maturity reduction).

c. Reduction in the future payment amounts to adjust for both past and future overcharges (payment reduction).

This overcharge reimbursement issue has presented substantial difference of opinion on theoretical grounds. Each method would return substantially the same dollar amount to the consumer. In the effort to reach agreement, the task force has endeavored to obtain as much input as possible from those who will be affected, both creditors and consumers.

Five Consumer Advisory Council members ⁵ were contacted by Board staff to solicit views as to the proposed methods of reimbursement. Generally, each member prefers method (a) that would allow for the consumer’s credit obligation to be adjusted immediately for past overcharges. ⁶

In addition, the interagency task force met on August 10, 1977, with representatives from both creditor and consumer groups ⁷ to seek their views on the proposed methods of reimbursement. The representatives were reluctant to commit the groups they represented, in view of the complexities of this issue and the lack of experience as to any impact the imposition of any of these methods will have. The creditor representatives tend to feel, however, that the creditors should be afforded the opportunity to select the best of the methods, while the consumer groups believe that consumers should be given the option. This latter group seems to prefer method (a) (cash advance for past overcharges and reduction in future payments for overcharges that otherwise would occur in the future). The creditor representatives showed some preference for the maturity reduction (method (b)) especially in situations where significant overcharges exist.

For the purpose of presenting the Board’s posture to the Interagency Coordinating Committee, this Committee recommends that the Board adopt the position that the preferred method of reimbursement when APR’s are understated would be to make a lump-sum payment for past overcharges and reduce future payment amounts to reflect the correct payment terms (method (a) ). This method produces an immediate adjustment to the consumer’s account for past overpayments and appears to be the most favorable. However, since this method could be unnecessarily burdensome in some situations, the Committee believes that other methods of reimbursement should be available, subject to approval by the regulating agency. Such situations may occur, for example, when (1) the total dollar amount of any lump-sum payment would jeopardize the financial stability of the bank, or (2) the number of the remaining payments would not justify the administrative costs of reducing the amounts of these payments.

Exhibits A and B may be useful in understanding the application of these reimbursement methods. Exhibit A shows a typical Truth in Lending disclosure violation resulting in customer overcharges. The bank’s failure to include prepaid finance charges in the APR calculation results in an understated APR. Exhibit B shows the effects of the different methods of reimbursement.

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⁵ Bankers Carl Felsenfeld and Richard Wheatley, Consumers Anne Draper and Robert Klein and State Regulator Robert Bullock.
⁶ Mr. Felsenfeld believes that method (b) might be preferable in short-term loan situations.
EXHIBIT A

NOTICE TO CUSTOMER REQUIRED BY LOAN LAW

FEDERAL RESERVE REGULATION Z

The date the note was signed is: August 1, 1977

LOAN NO. 4363

The FINANCE CHARGE on the loan was to be added on August 1, 1977.

The AMOUNT OF THE LOAN is $31,400.

The FINANCE CHARGE was $1,400.

Service Fee: $1,400.

Hazard Insurance: $1,400.

Total: $1,400.

The interest rate is 8.8%.

The FINANCE CHARGE is $1,400.

Interest: $1,400.

TOTAL: $1,400.

The amount for the first month on the note was to be $230.67.

Payment 1st (August 1): $230.67.

Payment 2nd (September 1): $230.67.

Any payment received more than 15 days past due will be assessed $0.50 of the monthly payment.

Debtor agreement, by action with Section 20 of the Code.

No prepayment penalty.

Debtor agreement, by action with Section 20 of the Code.

Rule of 78's

PROPERTY INSURANCE. The borrower or any person on whom the risk may be assigned by borrower through the use of a clause, if the property decreases in value as a result of the clause, the lender shall be responsible for the purchase of the property insurance. The lender cannot assign the insurance and the amount assigned is paid to the borrower.

(3) The amount of each $1000 is $0.50 for the term of the clause.

(4) The amount of each $100 is $0.25 for the term of the clause.

(5) The amount of each $10 is $0.10 for the term of the clause.

(6) The amount of each $1 is $0.05 for the term of the clause.

(7) The amount of each $0.10 is $0.025 for the term of the clause.

I, the Debtor, agree to the above and have received this document.

Debtor Signature: John Doe

Customer Signature: Mary Doe
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EXHIBIT B

EFFECT OF DIFFERENT METHODS OF REIMBURSEMENT

Loan amount: $31,400.
Amount financed: $30,000.
Term: 30 yrs/$360 monthly.
Prepaid charges: $1,400.
Violation discovered after 84 payments made.

<table>
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<th>Annual percentage rate</th>
<th>Amount financed</th>
<th>Monthly payments</th>
<th>Finance charge</th>
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<tr>
<td>Rate actually charged</td>
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<td>$31,400</td>
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<td>$56,500.40</td>
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<tr>
<td>Adjustment at disclosed rate</td>
<td>8.5</td>
<td>30,000</td>
<td>$230.67</td>
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</tr>
</tbody>
</table>

1. Lump Sum Payment for Past Overcharges—Reduction in Amount of Remaining Payments:
   (a) Payments 1–84 of $241.39.
   (b) $1,233.38 lump sum payment for past overcharges.
   (c) Payments 85–360 reduced to $230.67 to adjust for future overpayments.

2. Reduction in Number of Payments (Maturity Reduction):
   (a) Payments 1–84 at $241.39.
   (b) Payments 85–300 at $241.39 (216 additional payments).
   (c) Payment 301 at $185.14.
   (d) Payments 302–360 eliminated.

3. Reduction in Future Payment Amounts to Reflect Past and Future Overcharges:
   (a) Payments 1–84 of $241.39.
   (b) Payments 85–360 reduced to $220.56.

EXHIBIT D

[From Federal Register, Vol. 43, No 11—Jan. 17, 1978]

NOTICES

[6210–01]

FEDERAL RESERVE SYSTEM

Material Scheduled to be Discussed at Open Board Meetings

PROCEDURE FOR PROCESSING REQUESTS

For the information of the public, the Secretary of the Board of Governors of the Federal Reserve System has outlined the following procedures that are in effect at the Board for the processing of requests for copies of memoranda and other material scheduled to be discussed at meetings of the Board that are open to public observation.

As required by law, the Secretary of the Board regularly makes public announcement of the agenda for each open meeting at least one week in advance of the meeting. Members of the public who wish to request copies of materials scheduled to be discussed at such a meeting should make their requests to the Secretary as far in advance of the meeting as possible in accordance with the Board's rules regarding availability of information, 12 CFR Part 261. In any case, the request should be received by the close of business two working days prior to the meeting.

Because such materials may be helpful to the requesting party if they are available for use at the open meeting to which they relate, the Secretary gives such requests priority treatment. Requested materials are made available by the time of the meeting unless there is insufficient opportunity to process the request or a determination is made to invoke an applicable exemption from disclosure.

Requests for materials to be discussed in open meetings should be in writing and addressed to the Secretary. They may be presented during business hours.


THEODORE E. ALLISON,
Secretary of the Board.

[FR Doc. 78-1269 Filed 1-16-78; 8:45 am]

EXHIBIT E

BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM,
DIVISION OF CONSUMER AFFAIRS,

Mr. LEWIS H. GOLDFARE,

DEAR LEW: This responds to your letter of October 13, expressing concern that the Commission's reasons for asking that the Board modify or withdraw staff opinions EC-0007 and EC-0008 were not adequately presented to the Board before it reached its decision at its open meeting on September 28. Since the Board decided to publish for comment a proposal to amend Regulation B in regard to the subject covered by EC-0008, I will only try to answer your concerns about consideration of EC-0007, the 'religious book-seller' question.

First, I am very sorry if you formed the impression at the meeting between the two staffs that the interpretation would definitely be modified. We had no reason to suppose it would not but we should have emphasized once again that staff members can never safely predict what decision seven Governors will make on any given question. I do not believe, however, that you were disadvantaged by failing to repeat in your subsequent letter arguments as to why it might be desirable to narrow the interpretation. Whatever may have been the case when you were with us, under the Board's current procedures all matters to be placed on its agenda are thoroughly discussed in advance by several members so that at least those Governors will be familiar with the subject and able to address it when the matter comes before the Board. Governors Jackson, Partee, and Lilly all received our staff memorandum which set out the arguments in favor of restricting EC-0007. They discussed the reasons pro and con in order to be prepared to speak to them at the Board table. Thus, the discussion in the open meeting on September 28 reflected a considered opinion, arrived at after reviewing the reasons you had put forward in your original letter and in the staff meeting.

It is not correct that Board staff made no effort at the open meeting to explain the implications of EC-007 as to "all other creditors who may request race, religion, or national origin information." I am sorry that you were not yourself at the meeting. Had you been, you would have heard me make precisely that point to the Board. The Board acknowledged that the point had been made but nonetheless arrived at the conclusion that the arguments supporting the letter in its existing form carried more weight.

Thank you again for your letter—I have been very happy about the good understanding and cooperation between our staffs and would not want anything to prevent a continuation of a most helpful relationship.

Sincerely,

JANET HART, Director.

EXHIBIT F

FEDERAL TRADE COMMISSION
BUREAU OF CONSUMER PROTECTION,

JANET HART,
Director, Division of Consumer Affairs, Board of Governors of the Federal Reserve System, Washington, D.C.

DEAR JANET: I have received the Board's response to our request for reconsideration of Staff opinions EC-0007 and EC-0008 and have discussed with my staff the Board's treatment of our request at its open meeting on September 28, 1977. In light of what I consider to be a good working relationship
between our staffs I feel constrained to express my disappointment and concern over staff's presentation of our position before the Board.

I recognize that your staff is placed in the delicate position of having to defend the merits of its official staff opinions while at the same time presenting, in an objective way, the views of other agencies which assert that those opinions are improper and inconsistent with the purposes of the law. Notwithstanding this factor I do feel that our proposals were not given fair treatment before the Board and, as to opinion EC-0007, we were assured that staff would take a position favorable to ours before the Board.

At our meeting of July 22, involving several members of the FTC, the Justice Department and your staff you stated unequivocally that opinion EC-0007, responding to a request from a religious book seller as to whether it could request information on an applicant's religion, was unnecessarily broad and that a second opinion would be published narrowing the coverage of EC-0007 to the facts presented. In light of your statement we did not discuss this issue further and did not address it in our subsequent letter to the Board. We assumed from your statement that EC-0007 would be modified to the satisfaction of all the parties involved.

What happened at the open meeting was quite a different story however. Not only was the question of narrowing the scope of EC-0007 not even discussed before the Board but much to the embarrassment of the several FTC staff members present at the meeting several Board members ridiculed Commission staff for even expressing concern about a religious book seller requesting information on the religion of its customers. Board staff apparently made no effort to explain what was really at issue here, to wit, the implications of this opinion on all other creditors who may request race, religion, or national origin information and the extent to which it contradicts the Board's earlier position on data collection for monitoring purposes. Nor was there any mention of Board staff earlier view that the staff opinion was overly broad and should be narrowed to the facts of the situation. Had we known that Board staff was going to reverse its position on this issue we would have attempted to enlighten the Board as to our legitimate concerns and thereby hopefully inspire some meaningful debate on this issue.

I will not go into the details of the Board's treatment of opinion EC-0008 except to say that, in our view, staff did not present many of the significant points at issue. It appeared that one of the major reasons the Board ultimately agreed to publish the proposed amendments for comment was out of deference to its sister agencies.

Janet, I am sure you are aware that we are not fearful of a religious book seller denying credit on the basis of religion nor do we believe that bank card issuers will intentionally manipulate their security parameters to deny credit at point of sale on a prohibited basis. Our motivation for pursuing these matters so vigorously is based on more fundamental concerns which we expressed in our letters to the Board and at our meetings with you but which apparently were not aired at the open meeting of the Board.

We are concerned that Board's staff has construed its authority under the Equal Credit Opportunity Act as empowering it to make sweeping changes in the law on the basis of a fact situation presented by a single creditor. We believe the interpretation writing authority should be exercised as discreetly and narrowly as possible, strictly limited to the facts presented. This is consistent with the basic rules of statutory interpretation and is particularly appropriate where the process is undertaken outside public scrutiny.

We are concerned that the staff members responsible for drafting official interpretations, who are not involved in the bank examination process, have a limited appreciation of the complex problems confronted in enforcing this law, particularly those faced by enforcement agencies such as the FTC and the Department of Justice which do not have examiners to review the policies of every institution within their jurisdiction. We believe that the concurrence of the Department of Justice as the chief enforcer of this country's civil rights laws and the FTC the principal enforcement agency, should be sought before the issuance of any opinion which would change compliance responsibilities under this civil rights law.

We are concerned with a recurring theme in the Board's and its staff's approach to implementing Equal Credit Opportunity that if there are no significant complaints about a problem in this area then it does not exist. While the "mailbag" approach may be useful in enforcing Truth in Lending it would be folly for ours or any other enforcement agency to implement an enforcement program solely on the basis of letters received from aggrieved individuals. Dis-
crimination, especially discrimination in any aspect of a credit transaction, is often too complex and subtle for consumers to detect and pursue. Detection is now made even more difficult by staff opinion EC-008 which denies credit card customers the right to be told the reasons for denial at point of sale.

We are concerned that Board staff is in a position of irreconcilable conflict in having to defend its own official, non-Board approved interpretations while at the same time presenting the views of the opponents of those interpretations in an objective way. We know that, of necessity, the activities of the Division of Consumer Affairs are not accorded a high priority among the Board's overall responsibilities for this nation's monetary affairs. (When I was employed by the Board I was told that no memorandum longer than three pages would ever receive the scrutiny of the Governors.) The staff's presentation at the table is therefore of critical importance to the Board's full and fair consideration of the issues involved. Without questioning the Board's staff good faith in making its presentation at the table, I must note that some of the major points in support of our position on both interpretations were not covered by the staff.

We are concerned that the Board's staff, in issuing interpretations EC-0007 and EC-0008, have acted in a manner inconsistent with the Board's own regulations which provide that official staff interpretations will only be issued upon those requests that "have no significant policy implications" (12 CFR 202.1(d) (4) (ii)). Clearly, a reversal of the Board's official interpretation of "adverse action" and a new exception to the Regulation B prohibition against the collection of race, religion and national origin data are interpretations which have significant policy implications.

I am expressing these concerns to you out of a sincere belief that many of the important protections which have been incorporated into the law and its Regulation through an open process of public debate and participation are being swiftly eroded through the Board's official staff interpretation" process. I would welcome any suggestions you may have for improving this process.

Sincerely,

LEWIS H. GOLDFARB,
Acting Assistant Director for Special Statutes.

EXHIBIT G

DECEMBER 9, 1977.

To: Bonnie Naradzay, Access Officer for FOIA, BCP;
    Lewis Goldfarb, Special Statutes (506 IND);
    Justin Dingfelder, Special Statutes (502 IND).

From: Karen Kawaguchi Abrams, FOIA Branch.

Subject: FOIA Request No. 77--0570—Federal Reserve Board Staff Opinions EC-0007 & EC-0008.

Attached is a copy of an FOIA request from Ellen Boardman of Consumers Union. I spoke with her today. She is specifically interested in correspondence from Janice Hart of FRB to Mr. Goldfarb.

Please submit your Bureau's determinations to me (through Bonnie Naradzay) with any responsive documents by December 22, 1977.

Thank you.

BARBARA KEEHN,
FOIA Officer,
Federal Trade Commission, Washington, D.C.

DEAR MS. KEEHN: Consumers Union requests to inspect and copy records containing correspondence between the Federal Trade Commission staff and Federal Reserve Board staff concerning the FTC petition for reconsideration of FRB Staff Opinions EC-0007 and EC-0008. This request is submitted pursuant to the Freedom of Information Act, 5 U.S.C. § 522 et seq, as amended, and FTC regulations 16 C.F.R. Part 4.

Please inform me of any copying costs prior to making copies. Thank you for your attention to this matter.

Sincerely,

ELLEN BROADMAN,
Attorney, Washington Office.
EXHIBIT G(1)

DIANE B. COHN,
ATTORNEY AT LAW,


Mr. GRIFFITH L. GARWOOD,
Deputy Secretary of the Board of Governors,
Federal Reserve System, Washington, D.C.

DEAR Mr. GARWOOD: This letter is written on behalf of Marty Rogol, Director of the Public Interest Research Group ("PIRG"). As you know, PIRG represents the views of consumer groups before various federal regulatory agencies. As part of its activities, PIRG monitors those agencies with regulatory responsibilities over financial institutions, including the Federal Reserve Board. As a result, it has studied the Board's implementations of the requirements of the Government in the Sunshine Act and, in particular, its continuing policy of closing meetings, such as that which is to be held on June 3, 1977, when the Board discusses legislative proposals or draft testimony, to be presented to Congress.

It is our view that the Federal Reserve Board's reliance on exception 9(B), 5 U.S.C. § 552b(c) (9) (p) as a basis for closing all such legislative policy discussions is based on an overly broad interpretation of that exemptive provision and that this policy is neither supported by the language of the Sunshine Act nor consistent with its legislative history.

Exemption 9(b) was intended to apply only to those few instances where the premature disclosure of information would "be likely to significantly frustrate implementation of a proposed agency action . . ." (emphasis added). It is difficult to imagine how the Board's ability to submit public testimony on pending legislation or to propose legislation of its own could be rendered ineffective in each instance by providing public access to the decision-making process by which such positions are formulated. In fact, the Board's practice of closing these meetings conflicts with those statements in the legislative history of the Sunshine Act which address this very issue. When Senator Percy raised the Board's concerns during debate on the floor of the Senate, Senator Chiles stated that only where there is a specific Congressional request and a need for secrecy regarding proposed legislative testimony may an agency hold its meetings "in confidence" pursuant to exemption 9(B). 121 Cong. Rec. S19442 (Nov. 6, 1975). Absent some particularized showing that confidentiality is necessary to prevent the frustration of agency action, exemption 9(B) cannot be properly invoked.

If the Sunshine Act is to have its intended effect—that is, to meaningfully advise the public and the Congress of the considerations, alternatives and dissenting opinions which are relevant to the testimony or proposal finally formulated—these meetings must be open to the public. Certainly the practice of closing such meetings cannot be defended on the ground that the Board may choose to make transcripts of these meetings available sometime after the testimony is presented or the legislation enacted. By that time, the opportunity for a complete evaluation of the Board's positions and timely input into the legislative process often has passed. Consequently, strict compliance with the open meeting requirements of the Sunshine Act is crucial.

We therefore urge the Board to reconsider both its specific decision to close the June 1 meeting to the public and its "general practice of denying public access to its legislative policy discussions.

DIANE B. COHN.

EXHIBIT G (2)

August 5, 1977.

Ms. DIANE B. COHN,
ATTORNEY AT LAW,
Washington, D.C.

DEAR Ms. COHN: I am writing in reply to your letter of June 2, 1977 in which, on behalf of Mr. Martin Rogol, Director of the Public Interest Research Group ("PIRG"), you urged the Board to reconsider both its specific decision to close its meeting of June 3rd to the public and its "general practice of denying public access to its legislative policy discussions" under the Government in the Sunshine Act.

With respect to your specific request concerning the June 3rd meeting, I understand that Mr. Griffith Garwood, Deputy Secretary of the Board, spoke with you
concerning this request on the day of the meeting and informed you that due to its late receipt your request unfortunately could not be properly considered by the Board at that time. We further understand that PIRG is principally concerned with what it feels is the Board's general practice of closing its discussion of legislative items in reliance upon exemption 9(B) of the Sunshine Act (5 U.S.C. 552b(o)(9)(B)).

Exemption 9(B) provides that an agency may close a meeting, or portion thereof, when it properly determines that such portion or portions of its meeting is likely to

"disclose information the premature disclosure of which would—

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,

except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal****

The legislative history of the provision demonstrates clearly that it was intended to allow agencies to close their deliberations when premature disclosure of agency intentions would significantly frustrate or even destroy the effectiveness of proposed agency actions. Examples given in the Senate Report include formulation of agency negotiating strategy, as in collective bargaining with employees, and consideration of agency actions which by their very nature need to be implemented without advance public knowledge, as in the imposition of an embargo on the export of goods. The House Report summarizes the exemption's purpose by stating that it "employs a balancing test between the presumption in favor of openness and the need the delay the disclosure of certain information in the interest of proper administration."

As referenced in your letter, since the Act became effective, the Board has had occasion at several of its meetings to consider legislative items requiring formal Board action. In a number of these cases, the Board has closed discussion of those items after determining that exemptions other than 9(B) were applicable and that the public interest did not otherwise require that the items be open. In the majority of cases, however, the Board has closed its discussion of legislative items on the basis of exemption 9(B). Two reasons clearly support closing of such items on the basis of this exemption.

First, when the Board is asked by Congress to transmit its views and recommendations on legislative matters, whether in the form of testimony, comments, or the actual formulation of a legislative proposal, it is often necessary to preserve the effectiveness of its actions by delaying disclosure of its deliberations. Discussion of legislative matters generally involves the consideration of strategy to be pursued in the accomplishment of legislative objectives favored by the Board. For example, the Board may decide to support a particular legislative proposal, but decide at the same time to support alternative "fallback" proposals if such primary proposal should prove unacceptable to the Congress. Premature disclosure of the fact that the Board was willing to support alternative proposals could significantly frustrate the Board's ability to foster support of the primary proposal being considered. In this regard, we think PIRG would agree that the legislative process contains elements of negotiation and compromise, and premature disclosure of positions on legislative matters would significantly frustrate the attainment of primary legislative goals sought by the agency.

Second, the legislative history supports the view that the Congress generally expects that, as a matter of proper agency administration, agency views on legislative matters will first be given to Congress. The important working relationship between Congress and the independent federal agencies would be significantly frustrated if agency views on legislation were prematurely disclosed to the press and interest groups—both public and private. Such premature disclosure could lead to actions being taken by others that could significantly frustrate effective agency compliance with the request or that could significantly reduce the effectiveness of agency views when given. The point to be made is that the closing of agency discussion of legislative matters under exemption 9(B) does not shield forever from public scrutiny the formulation of agency views on legislation; it only delays the release to the public of such agency deliberations.

While the Board's and PIRG's general views on the applicability of exemption 9(B) to legislative matters may be somewhat different, very serious consideration has been given to PIRG's views on the scheduling of such matters. While the
Board feels that its general views of the applicability of exemption 9(B) to legislative matters is supported in the Act and its legislative history, each agenda item is being judged separately. The Board recognizes that reasons for invoking exemption 9(B) may be less compelling in certain situations and outweighed by the public interest in open discussion. In fact, since receiving your letter, the Board has opened to public observation its discussion of Truth-in-Lending simplification legislation and foreign bank legislation because there was a significant public interest and because it felt an open discussion would not significantly frustrate the attainment of its objectives.

The Sunshine Act is, of course, recent legislation as yet uninterpreted by the courts, and the Board and other agencies subject to the Act are, on a daily basis, having to make sometimes difficult judgments on the scope and meaning of its requirements. We appreciate your having provided us with your views.

Very truly yours,

THEODORE E. ALLISON,
Secretary of the Board.

EXHIBIT H (1)

BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM,

Ms. NANCEE SIMONSON,
The Bureau of National Affairs, Inc.,
Washington, D.C.

DEAR Ms. SIMONSON: This is in response to your request under the Freedom of Information Act, 5 U.S.C. § 552 (“Act”), for documents to be discussed at the open meeting of the Board of Governors scheduled for March 6, 1978. In accordance with the Board's expedited procedure pertaining to such requests, the memorandum to be discussed at this meeting will be made available to you immediately before the start of the meeting with the exception noted below.

The draft testimony of Governor Coldwell before the Senate Committee on Banking, Housing and Urban Affairs regarding S. 72, the “Competition in Banking Act of 1977”, consists of staff recommendations and opinions and as such is exempt from disclosure pursuant to section (b) (5) of the Act (5 U.S.C. § 552(b) (5) ), pertaining to internal memoranda not available by law to a party other than an agency in litigation with the agency. However, this document will be made available to you as soon as it is presented to the Congress.

If you believe, contrary to the opinion expressed herein, that you have a legal right to the information that has been withheld, you may appeal this determination in accordance with section 261.4 (e) of the Board's Rules Regarding the Availability of Information, a copy of which is enclosed for your convenience.

Very truly yours,

GRIFFITH L. GARWOOD,
Deputy Secretary of the Board.

EXHIBIT H (2)

* BOARD OF GOVERNORS
OF THE FEDERAL RESERVE SYSTEM,

Ms. NANCEE SIMONSON,
The Bureau of National Affairs, Inc.,
Washington, D.C.

DEAR Ms. SIMONSON: This is in response to your request dated February 1, 1978 copies of staff documents which are to be discussed at the Board’s open meeting scheduled for February 6, 1978. Your request is being processed under the Freedom of Information Act, 5 U.S.C. § 552 (“Act”).

In accordance with the Board’s expedited procedures pertaining to such requests, the requested memorandum for item 1 of the Summary Agenda and portions of the memorandum for item 2 of the Discussion Agenda will be made available to you prior to the start of the Board meeting. The draft statement to be discussed as item 1 of the Discussion Agenda and portions of the document to be discussed as item 2 of that agenda have been withheld because they consist of intra-agency memoranda containing staff opinions and recommendations and are exempt from disclosure pursuant to exemption 5 of the Act. The statement in
item 1 of the Discussion Agenda will be made available to you immediately upon its delivery to the Senate Committee on Banking, Housing and Urban Affairs. Accordingly, your request is substantially granted but denied in part for the reason stated above. If you believe that, contrary to the opinion expressed herein, you have a legal right to the documents determined to be exempt, you may appeal this determination in accordance with the procedures in § 261.4(e) of the Board's Rules Regarding Availability of Information, a copy of which is enclosed.

Very truly yours,

THEODORE E. ALLISON,
Secretary of the Board.

NUCLEAR REGULATORY COMMISSION

Senator Chiles. Our next witness is Dr. Joseph M. Hendrie, Chairman of the Nuclear Regulatory Commission. He has been with the Commission since 1977.

If you could summarize your presentation, to some degree, it would give us more time for questions.

TESTIMONY OF JOSEPH M. HENDRIE, CHAIRMAN, NUCLEAR REGULATORY COMMISSION, ACCOMPANIED BY STEVE OSTRACH AND SAMUEL CHILK

Mr. Hendrie. Thank you very much, Mr. Chairman, and I will try to cut down a little bit on the prepared statement.

I would like to begin by thanking you for the opportunity to discuss the Commission's views and experience on the administration of the Government in the Sunshine Act. In some measure my discussion will draw on the annual report on the administration of the act that the Commission recently issued, and we would like to submit a copy for the record as part of my remarks.

Senator Chiles. We will receive that copy for the record.

[The material referred to follows:]
Introduction

The Nuclear Regulatory Commission (NRC) herewith submits the First Annual Report as required by Subsection (j) of the Government in the Sunshine Act (5 U.S.C. § 552b, P.L. 94-409). This annual report summarizes NRC's compliance with the requirements of the Act. It contains a tabulation of the total number of open and closed meetings of the Commission, the reason for closing meetings, litigation information, and other information relating to this agency's procedures for public notification and understanding of the Commission's meeting activities.

NRC's Statutory Meeting Requirement

The Nuclear Regulatory Commission is a five-member, independent regulatory commission established by the Energy Reorganization Act of 1974 (P.L. 93-408). It is responsible for assuring the protection of the public health and safety through the licensing and regulation of the uses of nuclear materials. The Commission is required by the Energy Reorganization Act to conduct its business in meetings. Section 201.(a)(1) of the Act states that "the Chairman (or the Acting Chairman in the absence of the Chairman) shall preside at all meetings of the Commission and a quorum for the transaction of business shall consist of at least three members present." In compliance with this requirement, principal actions of the Commission are accomplished through the votes of a quorum of members present.
In keeping with its significant and substantial public health and safety responsibilities, this Commission has emphasized the participation of each Commissioner in its decision-making activities. Commission meetings are therefore generally scheduled at times when all Commissioners can be present so that each may participate in and contribute to the deliberations.

Use of Notation Voting

The Commission has interpreted the "presence" provision of the Energy Reorganization Act to mean that actions requiring formal votes of the Commissioners must be handled in the meeting context. Therefore, the Commission only utilizes a very restricted form of notation voting as a mechanism to indicate that certain noncontroversial matters may be scheduled for approval at a voting session without the need for further deliberation at the meeting. These matters involve relatively minor regulatory or adjudicatory activities which represent only a minor extension, modification, or elaboration of existing policy and do not set new precedent or constitute a major departure from existing policy.

Under this procedure, individual Commissioners inform the Secretary of their readiness to approve these matters without staff briefings or other deliberations at a meeting. When the Secretary has received written notification of the Commissioners' wishes, and after due public notice, he schedules a Commission meeting at which the Commissioners may formally register their votes. At these meetings, the staff paper
or subject is briefly described, the staff recommendations are recited, the comments of individual Commissioners are discussed, and a formal vote is taken and recorded by the Secretary. The Secretary's record of these votes is placed in the NRC's Public Document Room.

This procedure has proven awkward and difficult to administer for reasons not associated with the Sunshine Act and the Commission is now considering whether to propose an amendment to Section 201(a)(1) of the Energy Reorganization Act to modify the absolute physical presence requirement for matters now requiring formal meeting affirmation. The difficulties arise in the scheduling process, i.e., sufficient time to affirm the action previously agreed upon, the availability of a quorum of Commissioners and the time required to give ample public notice. As a result, there are occasions on which items that have received the "approval" of all individual Commissioners, may experience unavoidable delays of several days to several weeks prior to formal Commission affirmation and staff implementation. Such delays have severe impact, of course, on matters upon which timing is critical.

For matters which do not involve formal rulemaking, adjudication or licensing activity, the Commission also employs procedures under which individual Commissioners comment on and approve staff actions in writing to the Secretary. These procedures are utilized primarily for the approval of outgoing correspondence by the Chairman, and for noting actions being taken or about to be taken under delegations of authority to the staff.
Meetings Defined by Sunshine Act

With enactment of the Government in the Sunshine Act and in compliance with its provisions, NRC has adopted regulations clearly defining meetings of the Commission which are subject to the announcement and record keeping requirements of the Sunshine Act. In summary, a meeting is defined as the deliberation of at least a quorum of Commissioners where such deliberation determines or results in the joint conduct or disposition of official Commission business. Gatherings of a social or ceremonial nature and certain informational discussions which are conducted without specific reference to any particular matter pending before the Commission are considered exempt from the provisions of the Sunshine Act. A complete definition of the term "meeting" is contained in section 9.101 of NRC's Sunshine regulations which are appended to this report (Appendix D).

For purposes of tabulating meetings in this report, each separate item scheduled for discussion or briefing is counted as a meeting. Additionally, each session at which one or more matters were scheduled for affirmation under the limited notation voting procedure described above is counted as a meeting.

Analysis of Meetings Held During Reporting Period

The Nuclear Regulatory Commission held 326 meetings announced under provisions of the Sunshine Act, during the period March 12, 1977 through March 11, 1978. These meetings are tabulated in Appendix A by month.
Of the 326 meetings, 182 (56%) were conducted open to the public; 143 (44%) were conducted in closed session; one meeting was conducted as a partially open - partially closed meeting.

The tabulation also indicates that the percentage of open meetings has increased from less than 50% during the first three months to over 70% for the final three months.

All closed or partially closed meetings were approved by vote of the Commission to be closed under one or more of the exemptions authorized by subsection (c) of the Sunshine Act. In addition, the General Counsel certified that each meeting was closeable under the specified exemptions. Appendix B contains a tabulation showing the number of instances in which each of the exemptions were used for closing meetings. The tabulation indicates that 70 percent of the meetings (99) were closed because they contained discussions involving personal privacy (Exemption 6), classified information (Exemption 1) or matters under agency adjudication (Exemption 10). An additional 26 meetings which contained discussions regarding proposed legislation and formulation of budget proposals to be submitted to the Office of Management and Budget and eventually to Congress were closed. It is the belief of the Commission that the premature release of these matters might preempt their actions as well as those of the Executive Branch and the Congress.
Consideration of Public Interest in Determining Open/Closed Status

The Commission, in adopting its Sunshine Regulations, explained how it would employ the public interest criterion in exercising agency discretion to open meetings when an exemption is available:

Section 9.104(a) of the rules, like the proposals of several other agencies, gives presumptive but not conclusive force to the determination than an exemption is available in deciding the public interest question. The fact that a meeting does come within a specific provision of § 9.104(a) indicates that the Congress recognized a public interest in closing, not opening, meetings of this character. The Commission staff has been instructed to consider the public interest in recommending to the Commission whether or not to close particular meetings. The Commission believes that this internal procedure and the awareness of the Commissioners themselves and their advisors of public interest concerns will ensure adequate consideration of the public interest before any decision to close a meeting is made, without need for a formal procedure of the type proposed.

42 Fed. Reg. 12876 (March 7, 1977)

In the implementation of its rules, the Commission calls upon the staff to consider the public interest factors in any recommendations to the Commission for closed meeting discussions. The Commissioners review staff's recommendations for closed meetings, consider the advice of the General Counsel as to whether the item is properly closeable, and discuss among themselves the necessity for precluding public attendance, including the interest of the public in the subject matter. Implicit in this procedure is that a vote to close represents the Commission's determination that the public interest does not require an open meeting.
Process for Public Notification of Meetings

Commission regulations provide that each meeting is publicly announced by the following methods:

a. Forwarding to the Federal Register for publication an announcement of the time, date and location of the meeting, the topic(s) to be discussed, whether it is open or closed, and the name and phone number of a contact.

b. Publicly posting in the NRC Public Document Room, 1717 H St., N.W., Washington, D.C. 20555, a copy of the announcement at the time it is sent to the Federal Register.

c. Mailing a copy of the announcement to those persons on a mailing list (currently 48 names and addresses) at the time it is sent to the Federal Register.

d. Submittal of a copy of the Federal Register Notice to the news media (AP, UPI, Energy Daily, Nucleonics Week, the Washington Post, Washington Star, and Nuclear Industry Magazine) at the time it is sent to the Federal Register.

Appendix C contains a tabulation of the number of days notice for NRC meetings. In summary, more than two-thirds of all meetings (three-fourths of the open meetings) were announced with seven or more days notice. The remaining meetings (43 open and 61 closed) were held with less than seven days notice.
Meetings held with less than seven days notice are generally scheduled for the following reasons:

a. for consideration of subjects which by nature require immediate discussion and prompt action by the Commission, such as emergency consideration of problems concerning operating reactors, short-notice scheduling of Congressional hearings at which Commission testimony is requested, and items which have expiration dates not under control by the Commission (about 70%);

b. for administrative reasons, such as the scheduling of a continuation meeting because of the need for extended discussion of the items, or the rescheduling of meetings previously announced with due public notice to accommodate discussions of more urgent matters or late shifts in Commissioners' schedules (about 30%).

The Commission takes quite seriously the need to assure that short-notice meetings are held to a minimum. In all cases the urgent nature of the need for the meeting is considered by all Commissioners, and in the instances summarized above, all were scheduled with the unanimous agreement of the Commissioners. In instances where the Commission approves the short-notice scheduling of a public meeting, staff makes special efforts to release as rapidly as possible the mailed announcements, to notify press representatives of the meeting, and to telephone any parties who have a specific interest in the matter to be discussed.
Procedure for Public Request to Change Status of Closed Meetings

The Commission's rules describe the procedure to be followed by a person who wishes to request a change in the status of a closed meeting. 10 CFR 9.106(b) and (c) provide that "any person" may ask the Commission to reconsider its decision to close a meeting by filing a petition for reconsideration within seven days after the date of the decision to close and before the meeting in question is held. Any such petition must specifically state the grounds on which the petitioner believes the Commission decision is erroneous, and the public interest in opening the meeting. Filing such a petition does not automatically act to stay the effectiveness of the Commission decision or to postpone the meeting in question.

The Commission has received no requests for a change in the status of a closed meeting.

Steps Taken to Assist Public Understanding of Open Meeting Deliberations

The Commission has taken a number of significant steps to facilitate public understanding of open meeting deliberations. Specifically:

a. The Commission has constructed an entirely new meeting room expanding the seating capacity for the viewing audience from a maximum of 60 to 154. A second, smaller conference room, with a maximum seating capacity of 30,
also was constructed to be used in the event the number of meeting attendees exceeded the available seating capacity in the main meeting room. Both rooms are provided with multiple overhead speakers and with a closed circuit television system to ensure that every person desiring to attend a meeting can see and hear as well as any other attendee.

b. Copies of any vu-graphs to be used in the course of meetings are made available to meeting attendees at the entrance to the Conference Room prior to the commencement of the meeting.

c. The Commission has recently initiated a procedure for providing copies of the principal unclassified staff paper scheduled to be considered at the meeting to public attendees in the Conference Room. These papers will also be placed in the Public Document Room at the conclusion of the meeting.

d. The Commission has amended its regulations implementing the Sunshine Act to permit public attendees to tape record Commission discussions of open meeting items.

e. On December 2, 1977, the Commission initiated a policy of transcribing all open Commission meetings. These are unofficial transcripts which are not edited by the Commissioners or by the staff and are placed in the Commission's Public Document Room within 48 hours of the conclusion of the meeting.
f. The Commission currently is developing a pamphlet entitled "Guide to NRC Open Meetings". The guide will describe for public attendees the normal seating arrangement for participants at the conference table, the general functional responsibilities of these participants, Commission procedures for voting on agenda items, general rules for public conduct at Commission meetings, and sources of additional information on the Commission and its meetings. Copies of the guide, when published, will be available in the Commissioners' Conference Room and in the Public Document Room.

g. The Office of the Secretary is preparing for placement in the NRC Public Document Room a list of abbreviations and acronyms in an effort to further help the public in understanding the many technical terms discussed in Commission papers.

Use of Cameras and Recording Devices

In conjunction with its decision to provide transcripts of its open meetings to the Public Document Room, the Commission altered its existing rule requiring advance approval by the Secretary of the use of electronic recording devices. At that time, the Commission determined that the use of small electronic sound recorders by persons in attendance at its open meetings would not hinder the conduct of business and might be an additional
step to increasing public understanding of the Commission's actions, but that the use of larger electronic recording equipment and cameras would continue to require the advance written approval of the Secretary of the Commission.

In a separate but related action, the Commission has approved on a trial basis the use of cameras, including television coverage, at open licensing proceedings conducted by NRC's Licensing and Appeal Boards. Experience gained during this trial period may be applicable in evaluating and determining future policy regarding open Commission meetings.

Procedure for Releasing Records of Closed Meetings

The Commission's policy on release of transcripts, recordings, and minutes of closed meetings varies according to the type of meeting held and the method used to record them, as noted below:

a. Closed Meetings Recorded by Transcript

For most of the Commission's closed meetings (except certain meetings closed pursuant to Exemptions 1, 6, and 10 of the Act), a transcript and a backup tape recording are made. The transcript, or portions thereof, are made available to the public unless a determination has been made to withhold the entire text.
The procedure for determining which transcripts, or portions of transcripts, should be publicly disclosed includes three levels of review: 1) by the office presenting the briefing or discussion for a determination of classification and sensitivity of subject matter; 2) by the Office of the General Counsel for review of classification, sensitivity, compliance with Sunshine Act requirements and advising the Commission on ultimate disposition of the transcript; 3) by the Commission for a final determination regarding public disclosure. For the information of the public, a statement is filed in the Public Document Room identifying the portions being withheld and the reason for withholding. To date the Commission has released 16 transcripts in whole or in part; has withheld six in their entirety; has 27 currently in review; and has agreed to release 27 additional transcripts and after appropriate Legislative/Executive Branch actions have been completed.

b. Closed Meetings Recorded by Tape Only

The Commission on occasion conducts meetings on subjects so sensitive that the presence of the staff and a court reporter has been deemed to be inappropriate. These meetings generally involve the exchange of highly classified information with representatives of other agencies not subject to the Government in the Sunshine Act, or highly sensitive discussions of the
Commissioners on personnel organizational matters. The latter discussions involve such matters as the filling of key organizational positions, the performance of key employees, and significant organizational and management alignments. Meetings of this type are recorded for Sunshine Act purposes by magnetic tape only. The Commissioners determine immediately at the conclusion of the meeting whether any portion of the tape should be released. To date, the tapes of the 17 meetings in this category have been withheld. Withheld tapes involving highly classified information are stored in a secure vault maintained by the Division of Security; those involving personnel/organizational matters are retained in the personal possession of the Chairman.

c. Closed Meetings Recorded by Long Form Minutes

Meetings closed to public attendance pursuant to Exemption 10 have been recorded in minutes, as authorized by the Act. To date, 58 minutes have been written. The minutes are prepared by the Office of the Secretary and reviewed by the Office of the General Counsel and by the Commissioners as a matter of policy; they are not released to the public in view of the adjudicative character of these meetings.

Litigation Brought Against the Commission Under 5 U.S.C. § 552b

No litigation has been brought against the Commission under this section during the reporting period.
<table>
<thead>
<tr>
<th>Month</th>
<th>MEETINGS</th>
<th>OPEN</th>
<th>CLOSED</th>
<th>OPEN/CLOSED *</th>
</tr>
</thead>
<tbody>
<tr>
<td>March 1977</td>
<td>17</td>
<td>2</td>
<td>15</td>
<td>0</td>
</tr>
<tr>
<td>April</td>
<td>34</td>
<td>22</td>
<td>12</td>
<td>0</td>
</tr>
<tr>
<td>May</td>
<td>16</td>
<td>9</td>
<td>7</td>
<td>0</td>
</tr>
<tr>
<td>June</td>
<td>49</td>
<td>24 (49%)</td>
<td>25 (51%)</td>
<td>0</td>
</tr>
<tr>
<td>July</td>
<td>3</td>
<td>3</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>August</td>
<td>23</td>
<td>11</td>
<td>12</td>
<td>0</td>
</tr>
<tr>
<td>September</td>
<td>34</td>
<td>11 (42%)</td>
<td>22 (57%)</td>
<td>1</td>
</tr>
<tr>
<td>October</td>
<td>30</td>
<td>21</td>
<td>9</td>
<td>0</td>
</tr>
<tr>
<td>November</td>
<td>28</td>
<td>19</td>
<td>9</td>
<td>0</td>
</tr>
<tr>
<td>December</td>
<td>34</td>
<td>19 (64%)</td>
<td>15 (36%)</td>
<td>0</td>
</tr>
<tr>
<td>January 1978</td>
<td>28</td>
<td>19</td>
<td>9</td>
<td>0</td>
</tr>
<tr>
<td>February</td>
<td>26</td>
<td>20</td>
<td>6</td>
<td>0</td>
</tr>
<tr>
<td>March</td>
<td>4</td>
<td>2 (70%)</td>
<td>2 (30%)</td>
<td>0</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>326</th>
<th>182</th>
<th>143</th>
<th>1</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(56%)</td>
<td>(44%)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* Indicates meeting(s) held partially open and partially closed.
TABULATION OF CLOSED MEETINGS BY EXEMPTION CITED

<table>
<thead>
<tr>
<th>EXEMPTION(S)</th>
<th>REASON</th>
<th>TOTALS</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Classified Information</td>
<td>15</td>
</tr>
<tr>
<td>2</td>
<td>Personnel Rules</td>
<td>0</td>
</tr>
<tr>
<td>3</td>
<td>Other Statutory Exemptions</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>Trade Secrets</td>
<td>2</td>
</tr>
<tr>
<td>5</td>
<td>Accusation of a Crime</td>
<td>0</td>
</tr>
<tr>
<td>6</td>
<td>Personal Information</td>
<td>14</td>
</tr>
<tr>
<td>7</td>
<td>Investigatory Reports</td>
<td>0</td>
</tr>
<tr>
<td>8</td>
<td>Financial Regulation</td>
<td>0</td>
</tr>
<tr>
<td>9</td>
<td>Significant frustration of proposed action</td>
<td>41</td>
</tr>
<tr>
<td>10</td>
<td>Civil Action</td>
<td>39</td>
</tr>
<tr>
<td>1, 4, 10</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>2, 6,</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>1, 6, 9</td>
<td></td>
<td>1</td>
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<tr>
<td>6, 10</td>
<td></td>
<td>4</td>
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<tr>
<td>4, 9</td>
<td></td>
<td>2</td>
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<td>9, 10</td>
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<td>1, 4</td>
<td></td>
<td>3</td>
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<td>1, 9</td>
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<td>1, 10</td>
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</tr>
<tr>
<td>1, 9, 10</td>
<td></td>
<td>1</td>
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</tbody>
</table>

(NOTE: 99 of the 144 meetings (70%) were closed under Exemptions 1, 6 or 10, or combinations thereof)

144

(Includes 1 open/closed)

APPENDIX B
### TABULATION OF MEETINGS BY DAYS NOTICE

<table>
<thead>
<tr>
<th>DAYS NOTICE</th>
<th>OPEN AND CLOSED</th>
<th>OPEN</th>
<th>CLOSED</th>
<th>TOTAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>13</td>
<td>-</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>12</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>11</td>
<td>-</td>
<td>3</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>10</td>
<td>-</td>
<td>4</td>
<td>4</td>
<td>8</td>
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<tr>
<td>9</td>
<td>10</td>
<td>5</td>
<td>15</td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>30</td>
<td>18</td>
<td>48</td>
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<tr>
<td>7</td>
<td>93</td>
<td>51</td>
<td>145</td>
<td></td>
</tr>
<tr>
<td></td>
<td><strong>SUBTOTAL</strong></td>
<td><strong>181</strong></td>
<td><strong>143</strong></td>
<td><strong>325</strong></td>
</tr>
</tbody>
</table>

**APPENDIX C**
NUCLEAR REGULATORY COMMISSION REGULATIONS AS AMENDED IMPLEMENTING
THE SUNSHINE ACT (42 FR 12875, MARCH 7, 1977)

In accordance with section 161 of the Atomic Energy Act
of 1954, as amended, the Energy Reorganization Act of 1974,
as amended, and 5 U.S.C. 552b(g) and 553, 10 CFR Parts 2
and 9 are amended as follows:

1. A new Subpart C is added to 10 CFR Part 9 to read as follows:

Sec.
9.100 Scope of subpart
9.101 Definitions
9.102 General requirement
9.103 General provisions
9.104 Closed meetings
9.105 Commission procedures
9.106 Persons affected and motions for reconsideration
9.107 Public announcement of commission meetings
9.108 Certification, transcripts, recordings and minutes
9.109 Report to Congress

Subpart C - Government in the Sunshine Act Regulations

Sec. 9.100 Scope of Subpart

This subpart prescribes procedures pursuant
to which NRC meetings shall be open to public observation
pursuant to the provisions of 5 U.S.C. Sec. 552b. This
subpart does not affect the procedures pursuant to which

-1-

(Updated 3/28/78)

APPENDIX D
NRC records are made available to the public for inspection and copying which remain governed by subpart A, except that the exemptions set forth in section 9.104(a) shall govern in the case of any request made pursuant to section 9.8 to copy or inspect the transcripts, recordings or minutes described in section 9.108. Access to documents considered at NRC meetings shall continue to be governed by subpart A.

Sec. 9.101 Definitions

As used in this subpart:

(a) "Commission" means the collegial body of five Commissioners or a quorum thereof as provided by section 201 of the Energy Reorganization Act of 1974, or any subdivision of that collegial body authorized to act on its behalf, and shall not mean any body not composed of members of that collegial body.

(b) "Commissioner" means an individual who is a member of the Commission.

(c) "Meeting" means the deliberations of at least a quorum of Commissioners where such deliberations determine or result in the joint conduct or disposition of official Commission business, but does not include deliberations required or permitted by sections 9.105, 9.106, or 9.108(c), gatherings of a social or ceremonial nature, or
briefings of the Commission by representatives of other agencies or departments of the United States government, or representatives of foreign governments or international bodies where such briefings or discussions are informational in nature and are not conducted with specific reference to any particular matter then pending before the Commission.

(d) "Closed meeting" means a meeting of the Commission closed to public observation as provided by subsection 9.104.

(e) "Open meeting" means a meeting of the Commission open to public observation pursuant to this subpart.

(f) "Secretary" means the Secretary to the Commission.

(g) "General Counsel" means the General Counsel of the Commission as provided by section 25(b) of the Atomic Energy Act of 1954 and section 201(f) of the Energy Reorganization Act of 1974, and, until such time as the offices of that officer are in the same location as those of the Commission, any member of his office specially designated in writing by him pursuant to this subsection to carry out his responsibilities under this subpart.

Sec. 9.102 General requirement

Commissioners shall not jointly conduct or dispose of Commission business in Commission meetings other...
than in accordance with this subpart. Except as provided in section 9.104, every portion of every meeting of the Commission shall be open to public observation.

Sec. 9.103 General provisions

The Secretary shall ensure that all open Commission meetings are held in a location such that there is reasonable space, and adequate visibility and acoustics, for public observation. No additional right to participate in Commission meetings is granted to any person by this subpart. An open meeting is not part of the formal or informal record of decision of the matters discussed therein except as otherwise required by law. Statements of views or expressions of opinion made by Commissioners or NRC employees at open meetings are not intended to represent final determinations or beliefs.

No pleading or other paper may be filed with the Commission in any proceeding as the result of or addressed to any oral argument or discussion of any matter during an open meeting except as the Commission shall direct. Members of the public attending open Commission meetings may use small electronic sound recorders to record the meeting, but the use of other electronic recording equipment and cameras requires the advance written approval of the Secretary.

-4- APPENDIX D
Sec. 9.104  **Closed meetings**

(a) Except where the Commission finds that the public interest requires otherwise, Commission meetings shall be closed, and the requirements of sections 9.105 and 9.107 shall not apply to any information pertaining to such meeting otherwise required by this subpart to be disclosed to the public, where the Commission determines in accordance with the procedures of section 9.105 that opening such meetings or portions thereof or disclosing such information, is likely to:

1. disclose matters that are (i) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy, and (ii) in fact properly classified pursuant to such Executive order;

2. relate solely to the internal personnel rules and practices of the Commission;

3. disclose matters specifically exempted from disclosure by statute (other than 5 U.S.C. Sec. 552) provided that such statute (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld;
(4) disclose trade secrets and commercial or financial information obtained from a person and privileged confidential, including such information as defined in section 2.790(d) of the Commission's regulations;

(5) involve accusing any person of a crime, imposing a civil penalty on any person pursuant to 42 U.S.C. sec. 2282 or 42 U.S.C. Sec. 5846, or any revocation of any license pursuant to 42 U.S.C. Sec. 2236, or formally censuring any person;

(6) disclose information of a personal nature here such disclosure would constitute a clearly unwarranted invasion of personal privacy;

(7) disclose investigatory reports compiled for law enforcement purposes, including specifically enforcement of the Atomic Energy Act of 1954, as amended, 42 U.S.C. sec. 2011 et. seq., and the Energy Reorganization Act of 1974, as amended, 42 U.S.C. Sec. 5801 et. seq., or information which if written would be contained in such records, but only to the extent that the production of such records or information would (i) interfere with enforcement proceedings, (ii) deprive a person of a right to a fair trial or an impartial adjudication, (iii) constitute an unwarranted invasion of personal privacy, (iv) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation,
or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (v) disclose investigative techniques and procedures, or (vi) endanger the life or physical safety of law enforcement personnel;

(8) reserved

(9) disclose information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed Commission action, except that this subparagraph shall not apply in any instance where the Commission has already disclosed to the public the content or nature of its proposed action, or where the Commission is required to make such disclosure on its own initiative prior to taking final action on such proposal; or

(10) specifically concern the Commission's issuance of a subpoena, or the Commission's participation in a civil action or proceeding or an action or proceeding before a state or federal administrative agency, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct or disposition by the Commission of a particular case of formal agency adjudication pursuant to 5 U.S.C. Sec. 554 or otherwise involving a determination on the record after an opportunity for a hearing pursuant to part 2 or similar provisions.
(b) Examples of situations in which Commission action may be deemed to be significantly frustrated are (1) if opening any Commission meeting or negotiations would be likely to disclose information provided or requests made to the Commission in confidence by persons outside the Commission and which would not have been provided or made otherwise; (2) if opening a meeting or disclosing any information would reveal legal or other policy advice, public knowledge of which could substantially affect the outcome or conduct of pending or reasonably anticipated litigation or negotiations; or (3) if opening any meeting or disclosing any information would reveal information requested by or testimony or proposals to be given to other agencies of government, including the Congress and the Executive Branch before the requesting agency would receive the information, testimony or proposals. The examples in the above sentence are for illustrative purposes only and are not intended to be exhaustive.

Sec. 9.105 Commission procedures

(a) Action under section 9.104 shall be taken only when a majority of the entire membership of the Commission votes to take such action. A separate vote of the Commissioners shall be taken with respect to each Commission meeting a portion or portions of which are proposed to be
closed to the public pursuant to section 9.104, or with respect to any information which is proposed to be withheld under section 9.105(c). A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, so long as each meeting in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series. The vote of each Commissioner participating in such vote shall be recorded and no proxies shall be allowed.

(b) Within one day of any vote taken pursuant to paragraph (a) of this section, subsection 9.106(a) or subsection 9.108(c) the Secretary shall make publicly available in the Public Document Room a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the public, the Secretary shall, within one day of the vote taken pursuant to paragraph (a) of this section or subsection 9.106(a), make publicly available in the Public Document Room a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.
(c) The notices and lists required by subsection (b) of this section to be made public may be withheld from the public to the extent that the Commission determines that such information itself would be protected against disclosure by section 9.104(a). Any such determinations shall be made independently of the Commission's determination pursuant to paragraph (a) of this section to close a meeting, but in accordance with the procedure of that subsection. Any such determination, including a written explanation for the action and the specific provision or provisions of section 9.104(a) relied upon, must be made publicly available to the extent permitted by the circumstances.

Sec. 9.106 Persons affected and motions for reconsideration
(a) Whenever any person whose interests may be directly affected by a portion of a meeting requests that the Commission close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of section 9.104, the Commission, upon request of any one Commissioner, shall vote by recorded vote whether to close such meeting.

(b) Any person may petition the Commission to reconsider its action under subsection 9.105(a) or subsection (a) of this section by filing a petition for reconsideration with the Commission within seven days after the date of such action and before the meeting in question is held.

-10-
(c) A petition for reconsideration filed pursuant to subsection (b) of this section shall state specifically the grounds on which the Commission action is claimed to be erroneous, and shall set forth, if appropriate, the public interest in the closing or opening of the meeting. The filing of such a petition shall not act to stay the effectiveness of the Commission action or to postpone or delay the meeting in question unless the Commission orders otherwise.

Sec. 9.107 · Public announcement of Commission meetings

(a) In the case of each meeting, the Secretary shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the Commission to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the Commission determines by a recorded vote that Commission business requires that such meeting be called at an earlier date, in which case the Secretary shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(b) The time or place of a meeting may be changed following the public announcement required by subsection (a) of this section only if the Secretary publicly announces
such changes at the earliest practicable time. The subject
matter of a meeting, or the determination of the Commission
to open or close a meeting, or portion of a meeting, to the
public, may be changed following the public announcement
required by this subsection only if (1) a majority of the
entire membership of the Commission determines by a
recorded vote that Commission business so requires and that
no earlier announcement of the change was possible, and
(2) the Secretary publicly announces such change and the
vote of each member upon such change at the earliest
practicable time.

(c) Immediately following each public announcement
required by this section, notice of the time, place, and
subject matter of a meeting, whether the meeting is open
or closed, any change in one of the preceding, and the
name and phone number of the official designated by the
Commission to respond to requests for information about
the meeting, shall also be submitted for publication in
the FEDERAL REGISTER.

(d) The public announcement required by subsection (a)
of this section shall consist of the Secretary -

(1) publicly posting a copy of the document
in the Public Document Room at 1717 H Street, N.W.,
Washington, D.C.; and, to the extent appropriate under
the circumstances.
(2) mailing a copy to all persons whose names are on a mailing list maintained for this purpose;

(3) submitting a copy for possible publication to at least two newspapers of general circulation in the Washington, D.C. metropolitan area;

(4) any other means which the Secretary believes will serve to further inform any persons who might be interested.

(e) Action under the second sentence of subsection (a) or (b) of this section shall be taken only when the Commission finds that the public interest in prompt Commission action or the need to protect the common defense or security or to protect the public health or safety overrides the public interest in having full prior notice of Commission meetings.

Sec. 9.108 Certification, transcripts, recordings and minutes

(a) For every meeting closed pursuant to paragraphs (1) through (10) of subsection 9.104(a) and for every determination pursuant to subsection 9.105(c), the General Counsel shall publicly certify at the time of the public announcement of the meeting, or if there is no public announcement at the earliest practical time, that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision unless the Commission votes pursuant to section 9.105(c) that such certification is protected against disclosure by section 9.104(a). A copy
of such certification, together with a statement from the
presiding officer of the meeting setting forth the time and
place of the meeting, and the persons present, shall be retained
by the Commission. The Commission shall maintain a complete
transcript or electronic recording adequate to record fully
the proceedings of each meeting, or portion of a meeting
closed to the public, except that in the case of a meeting,
or portion of a meeting, closed to the public pursuant to
paragraph (10) of subsection 9.104(c), the Commission shall
maintain such a transcript or recording or a set of minutes.
Such minutes shall fully and clearly describe all matters
discussed and shall provide a full and accurate summary of
any actions taken, and the reasons therefore, including a
description of each of the views expressed on any item and
the record of any rollcall vote (reflecting the vote of
each Commissioner on the question). All documents con-
sidered in connection with any action shall be identified
in such minutes.

(b) The Commission shall make promptly available
to the public, in the Public Document Room, the transcript,
electronic recording, or minutes (as required by subsection
(a) of this section) of the discussion of any item on the
agenda, or of any item of the testimony of any witness
received at the meeting, except for such item or items of
such discussion or testimony as the Commission determines.
pursuant to subsection (c) of this section to contain information which may be withheld under section 9.104 or subsection 9.105(c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person upon payment of the actual cost of duplication or transcription as provided in section 9.104. The Secretary shall maintain a complete verbatim copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any Commission proceeding with respect to which the meeting or portion was held, whichever occurs later.

(c) In the case of any meeting closed pursuant to section 9.104, as the last item of business, the Commission shall determine which, if any, portions of the electronic recording, transcript or minutes and which, if any, items of information withheld pursuant to section 9.105(c) contain information which should be withheld pursuant to section 9.104; provided however, that should the Commission not make such determinations immediately following any such closed meeting, the Secretary of the Commission, upon the advice of the Office of the General Counsel and after consulting with the Commission, shall make such determinations.
(d) If at some later time the Commission determines that there is no further justification for withholding any transcript, recording or other item of information from the public which has previously been withheld, then such information shall be made available.

Sec. 9.109 Report to Congress

The Secretary shall annually report to the Congress regarding the Commission's compliance with the Government in the Sunshine Act, including a tabulation of the total number of open meetings, the total number of closed meetings, the reasons for closing such meetings and a description of any litigation brought against the Commission pursuant to the Government in the Sunshine Act, including any costs assessed against the Commission in such litigation (whether or not paid by the Commission).
Mr. Hendrie. As you know, Senator, the Nuclear Regulatory Commission is a five-member, independent regulatory commission established by the Energy Reorganization Act of 1974. It is responsible for assuring the protection of the public health and safety through the licensing and regulation of the civilian use of nuclear materials. In keeping with our significant public health responsibilities, this Commission has emphasized the participation of each Commissioner in all of its decisionmaking activities. We are possibly unique among agencies in that at the present time our organic statute permits us to take substantive actions only through formal meetings of the Commission and not by notation voting, although legislation to permit limited use of notation voting by unanimous consent is now pending in at times when all Commissioners can be present so that each may participate in and contribute to the deliberations.

My fellow Commissioners and I fully support the purposes of the Sunshine Act. The subject matter of the issues that we deal with is of considerable and legitimate interest to many segments of the public, and each of us feels a continuing responsibility to inform the public about the questions before us and about the reasons for our decisions.

Open sunshine meetings help us meet that responsibility.

An ever-increasing portion of our meetings have been open—for example, over 70 percent of our meetings in our last 3-month recording period were open to the public. Furthermore, in a variety of ways the Commission has voluntarily chosen to go beyond the literal requirements of the act and to adopt policies that advance the purposes of the act by providing maximum information to the public consistent with the administration of the Commission’s business.

In December of last year we began to keep and make publicly available transcripts of our open meetings so that members of the public who could not attend the meeting would be able to keep informed.

Several months ago we began routinely providing public attendees with copies of the staff paper which is the principal subject of discussion at each of our open meetings. We are doing this so that our meetings will be understandable by the general public and not by just a specialized group of insiders.

Furthermore, we have amended our regulations to permit attendees to tape-record open meetings, and we are permitting on a trial basis, and under certain conditions, radio and television coverage of hearings held by our Atomic Safety Licensing Appeal Boards.

Finally, in several recent cases of general interest we have let the public attend adjudicatory sessions that clearly could have been closed under exemption 10.

The essential measure of the Commission’s administration of the act lies in our conduct of the act’s open meeting provision. The key element in our administration has been our regulations, attached as appendix D of the annual report. The regulations were designed to do more than simply repeat the statutory language. We picked up the suggestion in the legislative history of the act that the regulations be used to adapt the general language of the Sunshine Act to the specific categories of business that come before each agency.

In practice, we have found the language of the Sunshine Act to be reasonably workable.
Of course, as with any statute, experience continually gives rise to a number of questions of interpretations. I discussed two such minor problems that have surfaced in the Commission’s experience under the act in my April 12 letter to you, and I shall only mention them here.

One problem which arises in some meetings closed under exemption 1 is caused by the creation of a transcript containing extremely sensitive classified information—information so sensitive that it would not be written down in any form were it not for the transcript requirement. Adding exemption 1 meetings to the class of meetings for which subsection (f) (1) of the act permits minutes to be used in lieu of transcripts would solve the problem. The other area of potential concern involves Commission meetings with Member of Congress. These meetings might have to be held outside the Commission’s control and, therefore, we might be unable to insure we are in compliance with the act.

Another minor problem which I have not previously mentioned, deals with exemption 2 of the act. It provides for closure of meetings dealing only with “internal personnel rules and practices.” Occasionally matters come before us dealing with reorganization of Commission offices or redistribution of functions among Commission branches. These are normally matter of little, if any, interest to the public. However, it is possible that some employees might be inhibited about discussing agency structural problems at a meeting open to public attendance and open to other employees. This problem would be solved if the exemption were not limited to meetings concerning “personnel” rules and practices, but applied to any agency meeting limited to discussion of internal personnel or organizational rules and practices.

I would think for the most part we hesitate to hold open meetings on them because when we are talking about reorganizing branches of the agency, it is often just as well not to lead that discussion too far with regard to disclosure to agency staff.

If exemption 2 was broadened a bit, it could be applied to agency meetings limited to discussion of the internal personnel or organization rules and practices, so we think that would solve that problem.

The Sunshine Act has caused some problems in our handling of day-to-day administrative matters. Few if any of these administrative issues are of an “emergency” nature, so routine use of the short-notice provision is section (e) (1) of the act is inappropriate. However, the questions I have in mind are of a scale such that interposition of a week’s delay between the time an issue arises and the time the Commission can deal with it has the practical effect of preventing the Commission from having any significant control over the matter. Fortunately, we believe there is a simple solution to this problem which is fully consistent with the spirit of the act and which would aid us in carrying out our administrative duties. That solution would be to permit use of meeting announcements stating that a meeting will consider general administrative questions before the Commission. The announcement would be issued at least 1 week before the meeting and would name the specific administrative items that would definitely be on the agenda. However, it would also provide that other administrative issues that arose during the week might also be discussed. The open/closed status of the meeting would depend upon the specific items discussed, although normally such meetings would be open.
Day-to-day administrative matters, only a few of these have the aspect of urgent emergency matters, so that I don’t feel that using a short-notice provision is generally justified. On the other hand, the sort of things that I have in mind are often such that imposition of a week or more delay, to allow the regular noticing for the meeting to really——

Senator CHILES. Those meetings that you are talking about closing involve administrative matters, is that right?

Mr. HENDRIE. No, no. What I have got in mind, and we believe that this is acceptable, and I cited it to see your reaction to it, in fact, is if we could use meeting announcements for meetings that would in almost all cases be open, which would list a number of general administrative questions that I have got working for the Commission to focus upon, we would issue the notice on a regular 1 week previous notice schedule. The notice would also provide that perhaps other administrative matters that arose during the week might be discussed, and then we would be able to have sort of a weekly administrative nuts-and-bolts meeting at that time. I say it would typically be open, and would be closed only if one of the nuts and bolts would fall clearly under an exemption, probably the classified one. Such meeting it seems to me would be helpful and give us a chance to a roundtable discussion of this kind of administrative thing. I think it would be useful for the public to see us carrying that kind of thing out.

Senator CHILES. I don’t see any problem with that if you are thinking about that being an open meeting. You are citing that as one of the provisions opposing——

Mr. HENDRIE. It would not be a basis at all for closing. Any basis for closing would have to fall under the exemptions already in the act.

The way I handle it now is that I circulate the 11th floor at 1717 H Street, going to Commissioner after Commissioner with a list of these nut-and-bolt items. By the time I have gone around the circle—I generally have to make two complete revolutions of the floor before I get them cleaned up—it is a nuisance in terms just of the time it takes.

Well, I did want to comment in closing that one of the aspects that we found in our implementation of the Sunshine Act is that as we gained experience in working under the act, we became more comfortable in doing our work in the open. We are turning increasingly to open meetings where we might have been able to close meetings due to the subject matter. I also would comment that while we had great concern about the effect of making transcripts of all our meetings, open as well as closed ones, what effect that might have on the discussion, I think we have pretty well solved that problem.

Senator CHILES. You don’t think that’s now really hindering free and full discussion?

Mr. HENDRIE. No. I don’t think it hampers or has impeded people. I think the essential element that we have adopted, Senator, and it might be useful to have it noted here, is that we make these transcripts as unedited reporters’ best efforts to transcribe what goes on; and I, for one, make a very specific choice not to review those transcripts, so they go in the public document room in 24 hours, as soon as they are transcribed, with a notice on the front saying, this is just a reporter’s best effort to put down what was said. It is not a Commission authorized or reviewed document. And please don’t take things out of this unre-
viewed transcript and use them as a basis for litigation or, in fact, we said specifically, the things that are said in that way and recorded in that form are not the basis to come into the Commission’s own adjudicatory proceedings and attempt to raise contentions because Commissioner So-and-So made a remark in the meeting.

Now, I think that protection or that aspect of treating the transcript is very important, and I say that because if each Commissioner had to review each of those open meeting transcripts and iterate back and forth between us until we were all perfectly satisfied that the language was just right for a formal Commission pronouncement, we would not do anything but review transcripts.

MEETING DEFINITIONS FAULTED

Senator CHILES. I note that you define the term “meeting” in your Sunshine regulations by basically tracking the statute. Then you embellish it when you exclude briefings of the Commission by representatives of other agencies or the Departments of the U.S. Government or representatives of foreign governments or international bodies where such briefings or discussions are informal in nature, not conducted with specific reference to any particular matter then pending before the Commission. The Justice Department has interpreted “meeting” broadly to include such briefings.

Informal briefings or discussions are important to the whole decisionmaking process. The information received or discussed at such sessions affect agency decisions in some part. Even if the information doesn’t directly relate to a pending matter, if it relates in any way to matters within your jurisdiction it would certainly lay the informational groundwork for later actions.

Those briefings interest me. It seems that even if you just sit there and let the outside parties do most of the talking, I would like to know what kind of information the Commissioners are being given, at least to be informed that a meeting is taking place and is on the record.

It seems that by excluding those sessions from your definition of “meeting” you manage to take them outside the operation of the act and the public has no notice. And that appears to me to be contrary to the act itself.

How have you justified that kind of definition?

Mr. HENDRIE. Well, Mr. Chairman, I point out that the provision comes from the Commission’s regulations implementing the Sunshine Act at a time before my arrival here. It was adopted because, perhaps it is not entirely true, but it may be that we are unique among the regulatory agencies because we have need through our nuclear export responsibilities to have access to some of the most sensitive classified information which is available in the Government.

Senator CHILES. I understand that, and we want to protect you, or allow you to protect that.

Mr. HENDRIE. And I think in part this provision was drafted with an eye toward allowing the most sensitive sorts of intelligence briefings to be classed as nonmeetings, and thus avoid the record requirements of the Sunshine Act where a closed meeting is held.

Now, I have concluded—the General Counsel, when I came aboard, and I had some discussions about it—and I have concluded that it is
very hard for a quorum of Commissioners, that is three or more Com­
misioners to sit in a room and hear someone tell you things that are
of interest to you and important to the business of the Commission,
and be sure the Commissioners won’t ask questions and discuss things
a little bit. That is, I just find it hard to envision those briefings as
being clearly nonmeetings and I have decided earlier, after I came
down, that under my chairmanship we would not be having briefings
of that kind that were labeled nonmeetings.

Now, that, in turn, I think is consistent with the way we would
both like to see the Sunshine Act interpreted.

Senator CHILES. I think it is.

Mr. HENDRIE. But it also makes for me a certain problem in deal­
ing with some of the classified information.

Some of this stuff is in the intelligence area where people simply
don’t like to have it written down at all, and the requirement to make
a record of a closed meeting, even though we classify it and so on, was
potentially a very severe impediment, but then Admiral Turner was
very kind and helped us work out a more forthcoming attitude on
the part of our principal information supplier in that area, and they
are now willing to come and talk at closed and carefully protected
meetings, classified at the highest level and held in appropriate and
secure places.

I must say there is the residual question, for which the intelligence
agencies assure us that it is not a problem, but there is a problem. Are
we, in fact, getting, then, in that form where we make those briefings,
everything that the intelligence agencies would tell us if there were
not a tape being made? I have to go on the assurance that they are
telling us everything but I have no way of knowing that that in fact
is the case. And there have been a couple of occasions when informa­tion
has been of a nature that they simply cannot stand, even
under the arrangements we have for very carefully classifying and
taking these briefs, they simply will not come and talk. In those cases
we arrange for the information to be given to Commissioners in
groups of one or two, that is, less than the formal quorum of the Com­
mision, and thus not a meeting by virtue of the quorum definition
of the meeting.

But I recognize, and I make no bones about it here, that that’s a way
of dealing with a difficult area in order to get the Commission the in­
formation it needs to do its business.

Senator CHILES. Well, I note that you were also having a problem
concerning Commission meetings with Members of the Congress?

Mr. HENDRIE. Well, there was just one occasion when the Com­
mission was getting ready last year to lose a quorum and one of our
oversight chairmen said, would you fellows, before you stop being
a Commission, would you please come down here and let us discuss
how we are going to keep the business of the Government working
in your agency, and so the three sitting Commissioners went and it
was decided that since there were three of them there and they were
going to talk about the business of the agency there was a meeting
under the definition of a meeting, and so a suitable record was made.

Senator CHILES. Well, I would think that should be. If we in Con­
gress didn’t see fit to except that when we were having you down
I think it should be an open meeting.
Mr. HENDRIE. Well, there might be occasions when Members of Congress might want to meet with more than two Commissioners, that is three or more, and where it may be unhandy to be able to make a record, get the reporter in and make a tape record. But I must say, if the Congress chooses not to make a specific exemption here why we will continue to regard three Commissioners and a Congressman as a meeting unless it is in a forum like this.

Now, if my colleagues came with me today, we wouldn’t hesitate to sit here in a row and we feel this is a public meeting, a record is being made.

Senator CHILES. We have a reporter to cover you today.

Are you familiar with the President’s memo to the agencies with regard to the sunshine law?

Mr. HENDRIE. Yes; in general terms.

PRESIDENT’S MEMO

Senator CHILES. What is your reaction in regard to his directive to the Attorney General regarding the defense of the sunshine lawsuits?

Mr. HENDRIE. Well, I think it is a clear admonition to us that in our practices, that if we attempt to polish the fine print, if there is any in the Sunshine Act, too closely and find those things where there is question and so on, that we may just get ourselves into court. The Justice Department isn’t going to come and help out. So the admonition is to interpret these things and treat them in a forthcoming way and stay away from boundary lines, and I think that’s fair.

Senator CHILES. Your agency does not have the statutory authority to litigate its own Sunshine suits?

Mr. HENDRIE. No, sir, we don’t. We go to the Justice Department.

Senator CHILES. What impact would you say that the President’s directive has upon your agency and its sunshine policies?

Mr. HENDRIE. I think there our inclination was to try and stay away from borderline sorts of cases anyway. I didn’t feel that it indicated—certainly after I came aboard I didn’t feel it indicated any changes in the sort of directions I was taking.

Senator CHILES. Do you think the directive does put the President squarely behind the public purpose of Sunshine for openness wherever possible?

Mr. HENDRIE. Absolutely.

CHANGING TREND

Senator CHILES. Although the Nuclear Regulatory Commission has closed a lot of meetings over the past year, I am pleased to see that the trend has been changing recently. I am happy to see that you are now opening about 70 percent of your meetings as opposed to under 50 percent in your first few months under sunshine. Your report went up through March of this year. What percentage of meetings have you opened in the 4 months since then, for April, May, June, and July? Do you have those meetings?

Mr. HENDRIE. Yes; I have it here as soon as I get to the right spot.

The last one which would be reported there, I believe, would be January to March in our annual report. The report actually closed as of March 12. If one goes through to the end of March, there would have
been 63 meetings, 73 percent of them would have been open and 27 percent closed.

For the next quarter, which would be the 1st of April through the end of June 1978, there were 84 meetings, 73 percent open, 27 percent closed.

In July, for just a month, there have been 34 meetings and the percentage of open has dropped to 53 percent and 47 percent closed, and the reason for that is that my colleagues—I have disqualified myself from the case—have been adjudicating the nuclear powerplant in New Hampshire and meeting for a couple of weeks there, very, very frequently, so we have a large block of Seabrook adjudicatory sessions of the Commission that were closed. There were also four budget meetings, I believe, that were closed.

**AFFIRMATION VOTES—\* FORM OF NOTATION VOTING**

Senator Chiles. Well, that's a very good trend that we see there, and we are delighted to see it.

I notice that each affirmation item is counted as a separate meeting. Affirmation items, as I understand it, involve a pro forma meeting, as these items were really disposed of by circulating memos. On one day I note that you had three open meetings, two or which were allotted only 10 minutes. My concern—I just hope it is not an accounting method causing these affirmation meetings, to cause these figures to turn around.

Mr. Hendrie. Let me check and make sure of each affirmation item.

Mr. Chiles. Each affirmation session is counted as one meeting even though we may affirm five or six papers.

Senator Chiles. Thank you. That relieves me a little bit.

Mr. Hendrie. And this is one of the results of the fact that we do not have statutory authority to do notational voting, Mr. Chairman. These are, for the most part, matters that the Commission has been briefed upon in an open meeting or they are minor matters that just don’t deserve a briefing. The Commissioners have indicated their decision and we then have to meet at a session once a week where we take formal collegial note of the fact that we are all in agreement on that.

Senator Chiles. I would like to just ask you a little bit about these affirmation votes. I realize that you engage in them because of the provision of the Energy Reorganization Act, and although this act requires formal votes of the Commissioners in a meeting session, some matters are really decided before the actual meeting where a pro forma recording takes place. That means it is really in the form of a notation proceeding with the final vote being in public.

Mr. Hendrie. Yes; that’s quite right. There is no discussion at the affirmation discussion.

Senator Chiles. The purpose of Sunshine is to require that the entire decisionmaking process takes place in public. This increases public understanding of the policy. Your affirmation procedure allows the public to witness just the final vote and not the decisionmaking process. Those individual decisions are basically arrived at on the basis of written material and not through collegial discussions. I understand as a practical matter this may be necessary for routine, noncontroversial matters. The act does not expressly prohibit it. I am concerned, however, with the frequency of its use and the types of issues disposed of in
this way. You could dispose of some very controversial matters and never have a public discussion. How much of your agency's business is decided by affirmation voting?

Mr. HENDRIE. I wouldn't know what sort of fraction to guess about that. I would comment, Senator, that if we talk about items where the final Commission action is by an affirmation vote after circulating to each Commission, and we exclude from that category matters where there has been at least one open Commission meeting where somebody briefed or discussed the matter, and what's happening here is that votes are coming later in the notational form to be affirmed at this session, it's small.

I really think that's a situation where you have a chance to get the matter out on the table, and perhaps the particular language of the Commission's final order is being worked out and iterated between the offices, and that's the thing that comes through, but if you exclude from this category the matters where there has been a previous open Commission meeting for discussion of the item, briefing, or what have you, then I think it comes down to a fairly routine matter, and I don't think all that great a volume.

The Secretary of the Commission is here, Mr. Samuel Chilk. I would be glad to have him comment.

Mr. CHILK. I would certainly support the chairman's views that all or a very large majority of the affirmations which previously have been brought before the Commission either in the form of a briefing or in the form of previous policy discussions are aired and generally resolved in these public sessions.

The Commissioners' later vote on those papers and their vote is affirmed at a public session as an administrative matter.

Senator CHILES. Well, rather than quelling my fears, you have raised them a little bit more.

If it is an item of magnitude in order, it is not the kind of routine, little checkoff, simple matter. If it is a matter that you actually discussed at a meeting or at a briefing, then it seems like when you use affirmation voting or notation voting, isn't there certainly all kinds of room for discussion that's going to take place off the record, not in the public meeting, about how people are going to vote? And normally you just wouldn't have somebody walking around getting votes. It would seem to me that it would be back-and-forth discussion: "Well, how are you going to vote on this thing we discussed the other day?" "Well, I have got my list here and I am thinking about checking it off 'yes'; what do you think?" That would appear to me to be right where the critical decisionmaking is going on, and if it is already done and you just affirm that in a meeting, I don't see how you are going to have that happen without a real discussion or some discussion taking place.

Mr. HENDRIE. Well, whatever discussions the Commissioners have, or horse trading that gets done in the offices is not done on a collegial basis, in the same sense that you can't get three of them together, otherwise that's a meeting that has to be public and noticed and everything else.

Senator CHILES. But it appears to me this is a way of seeing that it isn't done on a collegial basis so that you have a public meeting.

Mr. HENDRIE. Well, if you go in the direction that you seem to be heading, what you are saying is it—
Senator CHILES. I am trying to find out where you all have been heading.

Mr. HENDRIE. You seem to be saying that two Commissioners aren’t allowed to talk to each other unless they are on the public record someplace.

Senator CHILES. What we are saying and what I think the act says, is that we are trying to allow the public to see what takes place in the decisionmaking process and those items leading up to a vote. But if you sit down and have all the discussion and have an open meeting for that and say, all right, we are going to hear from everybody and listen to what everybody has to say, and then we are going to adjourn the meeting and we are going to go back, and then through interoffice circulation—and whether that be up and down the hall or whether that be through passing memos—and then we are going to go through the process of how we are going to come to a vote. And then we are going to come back to an open meeting and we are going to say, all right, we are going to check off on this notation voting that has already taken place. What you have done is you have effectively removed from the public the ability to see what really took place in regard to how that decision was reached. They got to see the briefing. They got to see the final product. But they don’t get to see how that decision was made. And I think that’s the express intent of Sunshine, to try to open that up.

Mr. HENDRIE. I just don’t think it is practical, Senator Chiles, to have five Commissioners sit in a room at a session and deal in only that forum and that forum only with the volume of administrative and team paperwork. It is quite hard for the policy matters to come through the agency.

Senator CHILES. That’s why I was trying to ask you the nature of the business that you were doing in this category. Now, if you told me that what we are dealing with, or if your regulations said on those kind of routine matters, noncontroversial matters, that we are dealing with we are going to have to deal with them on this kind of basis, fine. But on those kinds of matters where it appears to take collegial decisions, I don’t see the difference. In having all that briefing there, a man is going to have to spend some time in saying at the end of all that briefing, all right, let’s go through and go to item 1, item 2, item 3, if they were matters that really are there, and that there is going to need to be some discussion, but I think that ought to be done in public.

Now, if we are talking about housekeeping and routine matters, that’s why we didn’t expressly prohibit this, because we didn’t want to be so nitpicky to handicap people where they couldn’t have some checkoff voting. But certainly we were trying to get to those matters where there was going to be discussion leading up to that vote, that those matters would be covered.

Mr. HENDRIE. Sam, do you care to comment on the sort of thing that comes through and we process? I must say I deal with probably three or four consent papers an evening. I think the Commission is just incapable of processing that volume of business in collegial sessions. We are hardly able to process it otherwise.

Mr. CHILK. I would say that most of the affirmation items are of such a routine nature that our procedure of simply affirming these matters in open session is not in conflict, I don’t believe, with the requirements of the Sunshine Act.
We do from time to time, as the chairman has indicated, have matters which may be scheduled for public briefings or policy discussion on more than one occasion. Once issues have been aired, the remaining action is the process of recording a vote. This final outcome is handled by an affirmation session in which I will, in the presence of the public, summarize the paper and remind the Commissioners how many times they have previously met on this subject. I then indicate what the Commission votes were during the consent process and ask them to affirm their votes in the public session. However, the large majority of affirmations, in my judgment, are not matters of this type—they are routine administrative matters.

Senator Chiles. That's where I think you are really in the gray area in the coverage of the act, because those matters in which collegial discussions are taking place, interoffice or otherwise, I think you are going around the purpose of the act.

Mr. Chilk. I don't think it is a matter necessarily of interoffice discussions, but we would certainly be pleased to look at it again.

**Availability of Staff Memos**

Senator Chiles. I would like to have our staff go over those kinds of items with you.

And I want to say that I want to compliment the Commission on making some of the staff memos available to the public. I think that's very possible and certainly helps understanding, and I think you are to be complimented on that.

It would seem to me that, again if there are additional staff memos that are circulating on these notation lists that the public doesn't see, maybe those could be made available, too, at the time you are talking about your affirmation process. But I need to understand this a little bit better, so I would like to go into it further with the staff.

Public observation of a meeting implies a meaningful observation, and it is useless if no one in the audience can understand what's going on. We have encountered several problems in this area.

I understand that you have supplied unclassified papers at meetings scheduled, and I think that's a great process and a good practice and shows your commitment to Sunshine. Are these staff papers available at every open meeting?

**Notice Problems**

Mr. Chilk. Yes; together with a briefing outline.

Senator Chiles. Providing the public with accurate advance notice of agency meetings is also an utmost requirement. Careless treatment of notice requirements can reduce the effectiveness of the Sunshine Act. The meetings are not of any use to anyone if people don't know about them. I am glad to note that “the Commission takes quite seriously,“ and I am quoting from your report, “the need to assure that short-notice meetings are held to a minimum.”

However, when I see that 30 percent of your meetings are held with less than 7 days’ notice and 32 meetings with less than 1 day’s notice, I am very concerned. Is there any way that you can reduce those numbers of short-notice meetings?

Mr. Hendrie. Well, let me give you an example, Mr. Chairman. At 10:30 or so this morning, the Administrator of the EPA announced the
Seabrook decision. The Commission will want to move on that and move rapidly. There are some hundreds of millions of dollars sitting idle. There are 4,000 construction workers sitting around wondering where a paycheck will come from. The Commission will certainly have a short-notice meeting on Seabrook, I hope, although, as I say, I don’t sit on it and I am simply encouraging my colleagues to act expeditiously. There simply are urgent things that come along that require us to put our heads together. We get a letter from Congress, for instance, and if we would put our heads together, we could see what direction we would work on the answer, what direction we will go, and so on, petitions occasionally from people that require urgent action. I try to keep these things to a minimum and deliberately try not to schedule short-notice meetings, but I think there is always going to be an irreducible number of these things coming through.

USE OF CAMERAS AND RECORDING DEVICES

Senator Chiles. Well, I hope you will continue your efforts in that regard.

The Justice Department has urged all the agencies to permit the use of cameras and tape recordings in open meetings. You permit the use of tape recordings but not cameras absent the advance written approval. Do you really think requiring advance written approval serves any significant purpose? It seems like other agencies have permitted cameras with no disruption of agency proceedings, and I note that you have allowed the use of cameras in your Licensing and Appeal Boards. Have you had any bad experiences with that?

Mr. Hendrie. So far the experience is good. We have put in some provisions in connection with that trial policy that I think are helpful. One of them is, what we have in mind, primarily, are television cameras and movie cameras that would film proceedings, and we have said that they have to operate on existing light to avoid the floodlit hearing room problem and its high temperature and this sort of atmosphere, and also the camera has to occupy a fixed location so you don't have cameramen wandering around the room.

I think a chief concern in initiating that policy was for our Boards—and wouldn’t apply to the Commission—for our Boards was that we might lose the use of Federal courtrooms as our Boards go out of town and have to find places to meet. A number of Federal chief judges in the district take a dim view of cameras in their courtrooms and won’t let the cameramen in if we are using a courtroom, and we didn’t want to be shut out of using those Federal facilities because they are very useful for our hearings, but we haven’t had any negative results that I have heard, and I think in due time we will probably adopt that policy.

At the moment we are simply observing how it comes out with the Licensing Board.

PUBLIC INTEREST

Senator Chiles. Well, I hope you would look at that. I really don’t see anything to be gained if it is an open meeting by requiring written notice or a written request.

In your annual reports you describe how the Nuclear Regulatory Commission employs the public interest criteria. You draw the con-
clusion that providing exemptions Congress—and I am quoting now—“recognized the public interest in closing and not opening the meetings falling under an exemption.” I don’t think this conclusion is correctly drawn.

We acknowledge that there may be instances where a discussion of some specific sensitive matter should be conducted in a closed meeting, but I don’t think Congress ever intended that as a rule meetings with an exemption should be closed. We merely wanted to allow for the closure if it were absolutely necessary.

In what form does the staff submit to you its recommendations concerning the public interest? Is there always a discussion among the Commissioners themselves of the public interest consideration? In other words, where an exemption will lie, how do you determine if the public interest consideration outweighs that exemption? What kind of discussion is that? Does the staff make that decision?

Mr. Hendrie. The Commission votes to close all of the meetings, and the Secretary, when we have a Commission agenda session to look ahead and take whatever votes to close that may be necessary, the Secretary will point out the nature of a given item for which closing might be considered, on classified matters or personnel privacy. As Chairman, I am generally pretty well informed on what the Commission is going to hear in the next week or so, at least if we can schedule ahead of time, and the recommendations are then made to the Commission. If it is judged as appropriate, it may be closed and there may be some discussion, depending on the item—at times the Commissioner will be familiar with the item and the background—it generally isn’t an extended discussion.

Senator Chiles. Another thing that troubles me about your regulations is that they state that “Except where the Commission finds that the public interest requires otherwise, the Commission meeting shall be closed, where the Commission finds that the meeting falls within one of the exemptions.” The Sunshine Act itself does not require that you close any meetings. It allows for closure under certain restricted cases.

This regulation appears to me to detract from the presumption of openness contained in the act. I hoped your regulation would be more positive than this. It seems to me you could revise this to merely allow for the closure and not mandate it. The way that the regulation now reads the Commission’s meetings shall be closed unless you make a positive finding that the public interest demands otherwise. I think the act itself says you may close the meeting for one of these exemptions, but even with one of these exemptions you must determine that there is not an overwhelming public interest. Your regulations appear to reverse that and say they shall be closed where one of the exemptions lies, unless you find an overriding public interest to the contrary. It is all in the emphasis, maybe, but what we are dealing with is the emphasis, and I think Congress is trying to say that the Government policy of this country now is that we want meetings to be open unless there is an overriding reason to close them.

Mr. Hendrie. I have been joined by Steve Ostrach who will assist me in answering that. I am glad he is here so he can have this point called to his attention.

Do you want to make a comment on the point, Steve?
Mr. OSTRACH. Briefly, I believe the language that the Commission has in section 104 of the regulations is basically a repeat of the language that is contained in section C of the Sunshine Act, 552 b (C). In the Commission meetings at which these regulations were discussed, there was no intent to vary the language whatsoever when that material was presented to the Commission. It was intended to be virtually a rehashing of the statutory language.

Mr. HENDRIE. Let me comment. Since I don't regard myself as much of an expert scanner of legal language, we will take your comment well in mind, Senator, and have the counsel examine it.

Senator CHILES. We thank you very much for your appearance here and for your actions under sunshine.

Mr. HENDRIE. Thank you, Senator.

[The prepared statement of Mr. Hendrie follows:]

Testimony of Chairman Joseph M. Hendrie

Mr. Chairman and members of the Subcommittee, I am Joseph M. Hendrie, Chairman of the Nuclear Regulatory Commission and with me are several members of the Commission staff. I would like to begin by thanking you for the opportunity to discuss my views and experiences on the administration of the Government in the Sunshine Act. In some measure my discussion will draw upon the Annual Report on the Administration of the Sunshine Act that the Commission recently issued and I would like to submit a copy of that report to be included in the record as part of my remarks.

The Nuclear Regulatory Commission is a five-member, independent regulatory commission established by the Energy Reorganization Act of 1974 (P.L. 93-408). It is responsible for assuring the protection of the public health and safety through the licensing and regulation of the civilian use of nuclear materials. In keeping with our significant public health responsibilities, this Commission has emphasized the participation of each Commissioner in all of its decisionmaking activities. We are possibly unique among agencies in that at the present time our organic statute permits us to take substantive actions only through formal meetings of the Commission and not by notation voting, although legislation to permit limited use of notation voting by unanimous consent is now pending in Congress, H.R. 12928. Therefore, our meetings are generally scheduled at times when all Commissioners can be present so that each may participate in the contribute to the deliberations.

My fellow Commissioners and I fully support the purposes of the Sunshine Act. The subject matter of the issues that we deal with is of considerable and legitimate interest to many segments of the public and each of us feels a continuing responsibility to inform the public about the questions before us and about the reasons for our decisions. Open Sunshine meetings help us meet that responsibility. An ever increasing portion of our meetings have been open—for example, over 70 percent of our meetings in our last three-month recording period were open to the public. Furthermore, in a variety of ways the Commission has voluntarily chosen to go beyond the literal requirements of the Act and to adopt policies that advance the purposes of the Act by providing maximum information to the public consistent with the administration of the Commission's business. In December of last year we began to keep and make publicly available transcripts of our open meetings so that members of the public who could not attend the meeting would be able to keep informed.

Several months ago we began routinely providing public attendees with copies of the staff paper which is the principal subject of discussion at each of our open meetings. We are doing this so that our meetings will be understandable by the general public and not by just a specialized group of insiders. Furthermore, we have amended our regulations to permit attendees to tape record open meetings, and we are permitting on a trial basis, and under certain conditions, radio and television coverage of hearings held by our Atomic Safety Licensing and Licensing Appeal Boards. Finally, in several recent cases of general interest we have let the public attend adjudicatory sessions that clearly could have been closed under exemption 10.
Of course the essential measure of the Commission's administration of the Act lies in our conduct of the Act's open meeting provision. The key element in our administration has been our regulations, attached as Appendix D of the Annual Report. The regulations were designed to do more than simply repeat the statutory language. We picked up the suggestion in the legislative history of the Act that the regulations be used to adapt the general language of the Sunshine Act to the specific categories of business that come before each agency. For example our regulation based on exemption 5 of the Act not only lists the statutory provisions involving accusations of crimes or formal censures, but also mentions two specific Commission functions that we feel come within the legislative intent—imposition of civil monetary penalties and license revocation proceedings. We believe that each agency covered by the Sunshine Act is obligated to examine the general categories of business it conducts and, to the extent practical, make clear in its Sunshine regulations how meetings involving those categories will be treated for Sunshine purposes.

In practice we have found the language of the Sunshine Act to be reasonably workable. The Act sets out sufficiently clear guidelines so that the path of proper compliance is well marked, but the drafters of the Act also built in sufficient flexibility so that 50 agencies with a wide variety of missions and procedures would not be forced into a Procrustean bed of conformity. The best example of this flexibility is the definition of "meeting" in section (a) (2) of the Act. The inclusive intent of the provision is clear and not so narrowly defined as to give a loop-hole hunter much chance of success. But that language is not so overbroad as to force every agency to publish a Federal Register notice about its annual Christmas party.

Of course, as with any statute, experience continually gives rise to a number of questions of interpretations. I discussed two such minor problems that have surfaced in the Commission's experience under the Act in my April 12 letter to you and I shall only mention them here. One problem which arises is caused by the creation of a transcript containing extremely sensitive classified information—information so sensitive that it would not be written down in any form were it not for the transcript requirement. Adding exemption 1 meetings to the class of meetings for which subsection (f) (1) of the Act permits minutes to be used in lieu of transcripts would solve the problem. The other area of potential concern involves Commission meetings with members of Congress. These meetings might have to be held outside the Commission's control and therefore we might be unable to ensure we are in compliance with the Act.

Another minor problem which I have not previously mentioned deals with exemption 2 of the Act. It provides for closure of meetings dealing only with "internal personnel rules and practices." Occasionally matters come before us dealing with Commission officer and redistribution of functions among Commission branches. These are normally matters of little, if any, interest to the public. However, it is possible that some employees might be inhibited about discussing agency structural problems at a meeting open to public attendance and open to other employees. This problem would be solved if the exemption were not limited to meetings concerning "personnel" rules and practices, but applied to any agency meeting limited to discussion of internal personnel or organizational rules and practices.

I would also like to mention three minor ambiguities in the Act as examples of the kinds of issues that arise in the course of implementation of the Act. Sunshine transcripts contain minor errors introduced by the transcriber's unfamiliarity with agency jargon or names. We have adopted a policy of permitting any speaker to correct such errors in the transcripts of his statements, but only by marking the transcript so that the raw version can still be read and by initializing each change. We believe this proper under the Act, but we are investigating how other agencies have handled the issue.

Another area that is still not entirely resolved is the treatment of postponed or continued meetings. For example, we normally have a separate vote to hold a "short notice" meeting when a meeting which had been scheduled for Tuesday, and which had been properly noticed more than a week in advance, was rescheduled for Thursday. We believe that in such circumstances short notice votes are not required by the Act, but out of caution, we have continued to take them. We believe that, at least in this area, the best way to implement the Act is to accept the procedural burden of probably unnecessary votes.
Another example of a troubling open question is a minor, but substantive issue that we may someday have to face. Exemption 10 permits an agency to close meetings dealing with its participation in a number of forums including, for example, court and international tribunals. One forum not mentioned however is a case of formal adjudication before another agency. Recently the Commission has been involved in a formal proceeding before an administrative law judge of the ICC. Although the issues presented by that case never have been discussed in a Commission meeting, in other cases such participation might be of concern to the Commission. Virtually all of the reasons that underlie exemption 10 also would support closing such a meeting, yet the Act does not specifically provide for such closure. In this case we believe that the proper course is to follow the evident purpose of the Act and not to adopt an overly narrow reading of the exemption.

The Sunshine Act has caused some problems in our handling of day-to-day administrative matters. Few if any of these administrative issues are of an “emergency” nature, so routine use of the short notice provision is section (e) (1) of the Act is inappropriate. However, the questions I have in mind are of a scale such that interposition of a week’s delay between the time an issue arises and the time the Commission can deal with it has the practical effect of preventing the Commission from having any significant control over the matter. Fortunately, we believe there is a simple solution to this problem which is fully consistent with the spirit of the Act and which would aid us in carrying out our administrative duties. That solution would be to permit use of meeting announcements stating that a meeting will consider general administrative questions before the Commission. The announcement would be issued at least one week before the meeting and would name the specific administrative items that would definitely be on the agenda. However, it would also provide that other administrative issues that arose during the week might also be discussed. The open/closed status of the meeting would depend upon the specific items discussed, although normally such meetings would be open.

As I said above, the Commission does not now hold the sort of general roundtable discussions about administrative matters that would be the subject of a general announcement. If the Sunshine Act permitted us to, I believe we would. That would assist us in carrying out our administrative and supervisory duties. Furthermore, by giving the public a window on an important aspect of the Commission’s work which it does not now have, we would be furthering the principal purposes of the Act.

One not unexpected aspect of Sunshine Act implementation is that we have found that, as we gain experience working under the literal requirements of the Act, we have become more comfortable in doing our work in the open. This in turn has led us increasingly to employ our discretion to open meetings that could have been closed. The statistics given above demonstrate the extent to which we have been doing this.

Thank you for your time this morning. I would be glad to try to answer any questions you might have.

[Subsequent to the hearing the following letter was received:]
August 31, 1978

The Honorable Lawton Chiles, Chairman
Subcommittee on Federal Spending Practices
and Open Government
Committee on Governmental Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

In testimony before the Subcommittee on Federal Spending Practices and Open Government of the Committee on Governmental Affairs on August 4, 1978, I inadvertently erred in providing you with information regarding the Nuclear Regulatory Commission's affirmation votes. In my testimony I indicated that I thought the majority of affirmation votes occurred on items on which the Commission had been previously briefed publicly. However, in reviewing our records, I found that in fact, a significant majority of affirmation votes occurred on items on which the Commission had not been briefed publicly.

In order to correct my testimony, I hereby request that this letter be made a part of the record. I regret any misunderstanding this error may have caused.

Sincerely,

Joseph M. Hendrie
Chairman

SEP 06 1978
Senator Chiles. Our next witness is the Honorable Harold M. Williams, Chairman of the Securities and Exchange Commission. The SEC protects the interest of the public and investors against malpractices in the securities and financial market. Mr. Williams has been Chairman of the SEC since April of 1977.

We are happy to have you with us today, Mr. Williams. We will have you share with us your views on sunshine, and your statement in full will be inserted in the record, and any summary remarks that you can make on that will be appreciated.

TESTIMONY OF HAROLD M. WILLIAMS, CHAIRMAN, U.S. SECURITIES AND EXCHANGE COMMISSION, ACCOMPANIED BY HARVEY L. PITT, GENERAL COUNSEL

Mr. Williams. Thank you very much, Mr. Chairman. I am pleased to have the opportunity to be here with you this morning and review certain aspects of the Commission’s recent experiences under the Government in the Sunshine Act.

I have with me Harvey L. Pitt, the Commission’s General Counsel, who has been interested and involved in the Sunshine Act since it was under consideration in the Congress, and he has had a key role in assuring our compliance with the act.

Congress intended the Sunshine Act to insure to the fullest practicable extent, public access to “information regarding the decisionmaking process of the Federal Government.” Thus, the act provides as a general rule, that, “every portion of every meeting of an agency shall be open to public observation.” As the Federal agency charged with responsibility for administering the laws designed by the Congress to provide full and fair disclosure to investors, the Securities and Exchange Commission is sensitive to the statutory objectives of the Sunshine Act and the importance of accurate public understanding of governmental processes and decisions.

During the legislative process, we expressed our support for the act’s objectives, but also our concern that certain of the burdens of compliance might outweigh the benefits to the public. We knew, and the Congress recognized, that most of our meetings could not be open to the public, in view of the Commission’s broad-ranging law enforcement and quasi-judicial responsibilities and of the fact that even our consideration of rulemaking proposals must often include discussions of active enforcement cases.

Nevertheless, our experience has been that the Commission has been able to consider a substantial number of its agenda items in meetings that are open to the public. Since the Commission, before the Sunshine Act, had conducted almost all of its meetings in private session, the act has truly worked significant changes in the manner in which the Commission conducts its business.

As noted by Commissioner Evans during this subcommittee’s earlier oversight hearings on the administration of the act, we have certain concerns about the operation of the Sunshine Act in practice. We are concerned that the ability of the Commission to perform its statutory mission should not be impeded for the sale of inflexible procedural
requirements which, while theoretically designed to assure the public access to information about its Government, do not in fact perform this function. We are concerned that pressure is being applied to require the Commission to go far beyond the requirements of the act, and to expose the internal deliberative processes of the Commission to public view, something we feel would be very counterproductive. I feel that the Commission would be remiss if it did not report to you these concerns.

As Commissioner Evans also pointed out in his testimony, many of the comments we have received about our public meetings indicate that observers are impressed by the depth of discussion and the consideration afforded to opposing viewpoints of major issues, as well as by the overall competence and fairness of the Commission’s deliberations.

Our experience since Commissioner Evans’ remarks has generally been consistent with his report. But, as the public’s experience with our meetings broadens, an increased demand is evolving, particularly on the part of the press, for supplementary measures, beyond those required by the act itself, in order to make our meetings more informative and understandable. I think this can be a healthy process, and we are always ready to consider suggestions for improving our procedures. We have been making some changes in the way we conduct our meetings and, in general, improving the level of understanding the Commission’s meetings.

As you are aware, the Congress intended that the public’s access to the decisionmaking processes of the Federal Government, as implemented by the Sunshine Act, be balanced against the need to protect the ability of Government to carry out its responsibilities. In the case of the Commission, of course, our principal responsibility is to administer and enforce the Federal securities laws. I think this can be a healthy process.

Senator CHILES. Not to interrupt you very much, but let me just say I think it is very healthy, too, if the press is showing some appreciation for the fact that open meetings are taking place and that they want to find some information.

The greatest problem that I have noted in trying to do something about sunshine is in the lack of interest on the part of the press. Both lack of support where we were trying to get the act passed, and lack of interest, really, in trying to see that the agencies are going along and enforcing the act or opening under the act the way they should.

To me, coming from Florida where we are sort of the Sunshine State, the press took the leadership and carefully followed the implementation. In first passing the act, every time as a member of the State legislature I went into a closed meeting they would take my picture or they would note my name. Every time the legislature had a closed meeting the response of the press was “they would be hauled bodily out of that meeting.” Through that constant sort of operation they made me a convert. I guess they made a lot of other people converts of Sunshine and ultimately opened up the process.

Up here I will have to say on a national press level there has been almost a complete absence and lack of interest. I think they are too used to dealing with their sources or operating the way it has in the past. So, I am very heartened by your saying that you are finding
the press is wanting more information, and wanting further openness. I think that's very helpful.

Mr. Williams. By and large we react the same way to it, and we are and have been, in part, using the response of the people who observe our sessions, and the kinds of questions raised by the public as a result of our meetings as a kind of barometer of whether our meetings are understandable. We then try other ways of increasing, at a reasonable cost and effort to the Commission, public understanding of our open meetings.

For the past 16 months, as we have worked with the Sunshine Act, which, incidentally, is about the same period of time as I have been Chairman and during which I have also been involved in learning how to be Chairman, we have become increasingly aware of the difficulties involved in following the discussions at our meetings. For example, as you might expect, the more complex the matter under discussion, the more detailed the Commission discussion of that matter becomes. It is in these situations that we recognized, even before certain recent criticism of our open meeting procedures, a need for improvements in our procedures.

In his testimony before you last November, Commissioner Evans informed you that, in order to facilitate a better understanding of the discussions at our open meetings, the Commission had begun to distribute to attendees at these meetings summaries of relevant background information pertaining to agenda items. Nevertheless, the Commission has recently received some responsible criticism with regard to the conduct of its open meetings and, in your letter dated June 10, 1978, you requested our views "in light of recent complaints about the cryptic nature of some of your open meetings."

These complaints, which originated with some members of the press who regularly cover the Commission's meetings, indicated to us that the discussions between the Commission and staff that occur during our open meetings are not always fully understood by those who attend our open meetings.

In my prepared testimony, I set forth in some detail relevant information concerning the two particular meetings in which this type of problem arose: in order to preserve time, I will not now detail that for you, Mr. Chairman, but I do want to point out that these were both very difficult meetings for the Commission as well as the public, and involved very complex issues which did not lend themselves readily to simplification.

In essence, what I am saying is that we did make a sincere and honest effort to aid those who wanted to understand what was going on, and I would say, judging from the fullness and accuracy of the published reports of those meetings, that I think we were rather successful.

Complaints about open meetings are serious to us, not only because these complaints indicate that the benefits of the Sunshine Act are not being fully realized, but beyond that, because they imply that the quality of public understanding of what the Commission is doing and the press attendant coverage is less than it could be.

On the other hand, there is a limit to the amount of educating we can do. The Commission's meetings are primarily business meetings, not classrooms, and, as Commissioner Karmel pointed out recently, "The public has a right to know what we are doing, but also has a right
to have us get our work done.” This is the balance with which we have, in good faith, been struggling.

Despite these reservations, Mr. Chairman, I believe that there are several steps that we can take, and are taking, to try to make more useful information available to the public.

As I indicated, the Commission does prepare summaries of items discussed at open meetings to help the public follow the Commission’s open meetings. Many of the items we discuss are relatively simple and understandable. Our problems arise, however, principally in connection with those agenda items in which there is great public interest involving complicated questions of fact and law, where some knowledge is required for a full understanding of the commission discussion. It is primarily in these situations, where it is reasonable to expect that the discussion will be complicated, that the Commission must direct its efforts to assure that members of the public and the press are able to follow our deliberations.

I think it is through continued experimentation that we will learn how to deal most effectively with this problem. There are, however, some specific things we are already doing. First, where complex items are to be discussed, or where a matter has an involved procedural history, or where the Commission discussion of an agenda item embraces staff memorandums which are, in turn, predicated on a voluminous record, we are providing a more detailed summary of the matter to those attending the open meeting. These summaries furnish both relevant background information and identify the issues to be discussed by the commission. The format of the summary may, of course, vary, depending upon the nature of the matter. We will continue these efforts in this area. In addition, as I have indicated, at times I have found it useful to make a statement at the beginning of the meeting summarizing the issues expected to be discussed, and we will be doing this more frequently in the future, as appropriate.

Moreover, we will continue to make staff members available to answer press interviews regarding the issues, and we may well consider, although we haven’t done so yet, holding press briefings in advance of meetings were considerable public interest is anticipated. I believe that the feedback we receive from these efforts will let us know whether we are being more successful than we have been in the past in communicating to the public the information necessary to allow them to follow our meetings. On the other hand, if it becomes apparent that we need to do more in this regard, we should be able to determine what additional corrective measures are in order.

Finally, I should say that both the Commission and the staff are very sensitive to the difficulties inherent in following a complex discussion. I know that right from the Chairman on down, we often get deeply immersed in the intricacies of the matter under consideration and sometimes lose sight of the fact that, to some of our observers, aspects of our discussion are sometimes difficult to follow. We do know that we are speaking to a new audience which is relatively unsophisticated about the areas of Commission regulations, but we are conscious of our responsibilities under the Sunshine Act; and I believe that, with the steps we are now taking, we will enhance the ability of our audience to follow the Commission’s deliberations.
I hope that these comments are responsible to the concerns of the subcommittee.

The act has been in effect only since March 1977, and the agency practice under it is still developing. As I indicated earlier, the Commission’s chairmanship changed at about the same time. The dynamics of open Commission meetings are rather unique, and the ability to conduct our meetings in a manner most beneficial to the public is a skill we are still developing. We will try to insure that the public better understands the Commission’s open meetings and these efforts are a reflection of our understanding of the purpose our open meetings fulfill.

I can assure you that the Commission intends to make every reasonable effort to live up to the spirit as well as the letter of the Sunshine Act.

Thank you, Mr. Chairman.

Senator Chiles. Thank you, Mr. Chairman.

THE PUBLIC DISCLOSURE AGENCY?

I find that it is very interesting to think about SEC and its overall purpose to protect the public, and I think back to the earliest concept of how SEC was going to do that, the Securities and Exchange Commission, and the underlying rationale and principle was blue sky. We are going to allow the businessman to basically go into any kind of scheme that he wants to as long as he, in that prospectus, tells exactly what it is going to be and what the proposition is going to be, and what the limits are going to be, so that the public can read that prospectus and try to understand what’s going on. That has been part of the purpose of the SEC, as I understand it, since the earliest time that it originated.

I represented some clients before that were in the tangles of the SEC as to whether they had performed properly that blue sky purpose. I have seen the diligence with which the whole agency works in that regard.

I then look in your statement today and I see where you are talking about this new provision, that this Commission see whether to develop a number of rulemaking procedures to remove existing impediments to shareholder communications and participation in the corporate electoral process, and to improve the quality of information available to investors regarding corporate management, as well as to stimulate voluntary changes in the structures and procedures of corporate boards of directors. In order to facilitate Commission discussion of these issues, the Division forwarded to the Commission a staff report setting forth 36 preliminary recommendations.

Well, you are trying to allow those stockholders to determine what the directors have been up to and so you are going to say that there has got to be adequate information made to those stockholders. Our stockholders are the public. That’s my stockholder and I think it is yours.

Mr. Williams. Yes.

Senator Chiles. It is the Commission’s ultimate stockholder.

And here we are talking about a corporate stockholder who is going to buy a piece of stock and we are going to protect him, or your agency is, and you are going to make the board of directors get all this in-
formation. I am trying to get you to give some information to your stockholders and to my stockholders as to what you are doing to protect them ultimately and how you are completing that.

I am trying to get you, in addition to sunshine, to give some blue sky, and I think that’s what the act is all about. When I see that you operate or have been operating through memoranda, where you are talking about paragraph 1 and section 2, there is no way that your stockholders can understand what’s going on in that discussion. I believe if that were a corporate annual meeting you all would be down on them as quick as you could be and say, you can’t do that. A stockholder can’t understand that. You have got to do it so that he can understand.

But we have got to somehow enable your stockholders and my stockholders to understand.

Mr. Williams. Mr. Chairman, if our meetings were closed we would not have this problem, but we strive to comply with the spirit of the Sunshine Act.

The incident that you are referring to was one where the Commission was attempting to order its agenda. We were not trying to be cryptic.

Senator Chiles. Well, I don’t mean to take any one instance, and I don’t mean to take any one particular meeting. I mean to try to look at them, really, in regard to what is going on in your meetings every day.

Mr. Williams. Your criticism is well taken. I wasn’t rejecting your criticism. It is valid.

Senator Chiles. And to try to see that the general public can understand. If not, we really haven’t done anything by passing the Sunshine Act. You might have the proposition that what they didn’t know before didn’t hurt them, other than the fact that people had a general mistrust when you closed meetings maybe in the SEC. They might have been less concerned in the past than they might be now. It seems that from what I can understand, the summaries of the staff memorandum are very, very cryptic. You give very little information with regard to what really might be in the memo itself.

Now, I can see Commissioner Karmel’s admonition, or her problem, that you have got to conduct your meetings. I think the government has got to work. If it doesn’t work then we are not doing anything for anyone. But I think you have got to provide the other people with the tools if they want to avail themselves of the tools so that they can follow your meetings. Based on what we have been seeing, what you are releasing so far, even if I want to try to follow your meeting and try to understand it and am willing to spend some time, based on what you are giving me, I couldn’t follow it. So I think that takes away from what he is saying.

It is not our job to spoonfeed them. You have got to take it one way or the other. You have either got to spoonfeed them or you have got to give them that material that you are using so that they can get all the information themselves. If you don’t want to give them all the material then you are going to have to provide some kind of spoon feeding so that they can understand your meetings.

Mr. Williams. I believe, Mr. Chairman, at least in terms of our self-assessment, it speaks both to the ability of the press to cover our meet-
ings and our efforts to provide to the public, in the aggregate, a reasonable understanding of Commission deliberations. If we look at the actual press coverage, of the two meetings for which we have been particularly criticized that coverage was accurate and dealt with the substance of what took place at these meetings.

Senator Chiles. You think they finally got the information in spite of what happened?

Mr. Williams. I wouldn’t say that the press obtained information “in spite of” what took place. I think the combination of listening to the discussion at these meetings, my commentary during the course of the meetings, and the press briefing that followed the meetings, all resulted in good reporting of the substance of these meetings.

Senator Chiles. Well, I am glad that you approve of what came out of the reporting.

Mr. Williams. One of the press accounts of one of these meetings was particularly interesting. In that newspaper, there were two articles side by side. One criticized the cryptic nature of the Commission’s meeting in question and, literally, right next to that criticism was a very fine article covering the substance of what took place at the meeting.

Senator Chiles. Well, I will have to say that some of the complaints we have received have not been on the basis of just two meetings, but have been on the basis of general procedures.

I want to say I think your statement is positive in that you reflect in that statement that you are sensitive to this criticism and that you are working to try to do something about it.

Mr. Williams. Yes, we are.

Senator Chiles. But I think there certainly is room for something to be done about the criticism. Again, as I say, particularly in an agency that requires full disclosure.

Mr. Williams. I am hard put to argue with you.

Senator Chiles. I am enjoying this, you understand. I told you I have been before your agency regarding full disclosure. This is my day in court, perhaps.

Well, I look forward to the opportunity of our staff to have some chance to work with your staff in trying to see how you come up with procedures, and I assure you again, we don’t want to see you not able to complete your job. We understand the sensitive area in which the SEC works, and we tried to cover that as best we possibly could and take those problems that your staff and the agency raise as being of particular concern in regard to allowing you provisions to close those meetings. We think that it is very necessary, and I think overall the SEC does an outstanding job in trying to police the securities field. I think again that it is all the more reason that we need to see that the agency works in an exemplary fashion in regard to the provisions of sunshine as well.

I note that your public affairs officer was quoted by one journalist as saying, “We vote in public, and that’s all the law requires.”

Mr. Williams. That is not the Commission’s position, or its interpretation of the Sunshine Act, Mr. Chairman.

Senator Chiles. I am delighted to hear that.

One person recently visited your agency in search of some sunshine material and described the SEC as being the most intimidating of the
agencies. The reception that he received from your personnel at the public information room led him to believe that there was no Sunshine Act for SEC. No one seemed to know anything about sunshine materials. No one could offer him any advice as to where to obtain information. Basically, he was given the runaround and sent from one floor to another, and finally reached your secretary, Mr. Fitzsimmons, who told him that there were no files, transcripts, or minutes to be examined. He didn't even get an example of a set of minutes. Mr. Fitzsimmons finally told him that as far as he was concerned, the benefit of sunshine to the public was far outweighed by the burden to the agency.

Mr. Chairman, for these reasons and the other complaints that we have received, it appears to us that there is some way the Commission's views, as expressed by yourself and in earlier letters, don't seem to have been conveyed down to your staff at all. It seems that there is a need for your staff to try to help the public understand the sunshine procedure that you all have adopted. It seem to me that the public shouldn't have to go through a frustrating experience like that in trying to exercise its rights under the act.

Mr. Williams. I am not familiar with the instance, but I will look into it.

Senator Chiles. Excuse me for a moment. I am going to have to run. [Brief recess.]

AVAILABILITY OF BACKGROUND MEMORANDUMS

Senator Chiles. Back on the record.

In your full statement you expressed concern that the availability of background memorandums could present to the public a misleading or inaccurate view of Commission policy. It would seem to me that not releasing these materials may be a greater cause for confusion or misinformation, especially on the basis of the press that's trying to cover those meetings.

We have heard this morning that the Federal Reserve Board and the Nuclear Regulatory Commission were releasing staff memorandums to the public to help the coverage of their meetings. Is that something that the SEC is considering doing in the future?

Mr. Williams. No, Senator, we are not considering releasing our internal staff memoranda. I haven't looked at the nature of the staff memorandums released by these other agencies, or the extent to which subsequent formal action of these agencies operates as a confirmation of the recommendations of the staff contained in these memorandums. But, from our perspective, at least, there are a number of problems implicit in engaging in a release of such memorandums by our staff. I can discuss some of the reasons briefly.

First, there are portions of those memorandums that often relate to ongoing enforcement activities. In addition, portions of these memorandums often provide the staff's assessment of the pros and cons, legal strengths and weaknesses, or detail the implications of the financial effect on various aspects of the industry, which might result should the Commission follow various courses of action, whether suggested by the staff, or not. This is, obviously the kind of information that the Commission should have before it in arriving at its determination, but
clearly is not the kind of information that should be publicly disseminated.

At the same time, very often the determination of the Commission is significantly different from the recommendations of the staff. Thus, what is communicated to the public often is worded substantially differently from the original staff recommendation, with some subtle, and some not so subtle, differences and emphases than those that are put forth to the Commission in the staff memorandum. The publication of staff memorandums under these circumstances would not help clarify the matter for the public and, indeed, I think would both confuse the public and, in some cases, undermine public understanding of the final Commission determination.

Senator CHILES. Well, it would seem if those memorandums come within any of the exemptions, certainly that gives you the right to strike that portion of that memorandum or not make that available. I think the question is really as to whether these memos lose their protective status when they are discussed or referred to at an open meeting.

Now, in passing the Sunshine Act, Congress has cast a whole new light on the sanctity of the decisionmaking process. The courts have made their decisions regarding such memos without the guidance of the Sunshine Act. The new situation of open meetings I think has changed the agency operations. I think sunshine clearly represents the later expression of congressional policy and intent.

I note in your testimony you also state that you are concerned about the effect of public exposure on the staff. Congress really rejected that so-called chilling effect argument. That was one of the major arguments that the Boards themselves had to make against having their processes opened up, Fed and the SEC and others. Members of Congress even discussed it one time when talking about opening up our markup sessions. We rejected that chilling effect argument. Even if that is the effect, the right of the public to be informed is more important.

I think this whole issue of a staff memorandum, as they are used at an open meeting, is one that you really need to look at, because I think that they are well within the provisions of sunshine. I can envision, where through the use of memorandums, you can get around entirely the whole purpose of the meeting being open by passing all of the information back and forth, or having it contained in the memorandum. Especially, again, where we found in some of the meetings earlier that people were checking off paragraph 3, or saying I agree with that, or I don't agree with paragraph 4, and talking in those kind of cryptic terms. When you put together the cryptic terms and the information that you can put in memorandums, you see how easy it is to really evade completely the purpose of the Sunshine Act. That appears to be the basis of the suit that was brought against the Fed. That suit was settled, so we don't have any idea what the courts would say in that regard.

Mr. PITT. If I may respond, Senator, the concern you express is one that the Commission shares. The Sunshine Act itself, of course, indicates in subsection (k) that it was not intended to amend or change the Freedom of Information Act, and its governance of the opportunity of the public to obtain agency documents and access to agency memorandums would continue to be governed by the Freedom of Information Act.
The difficulty stems, I think, from the fact that the Commission’s meetings are, to a large extent, very free wheeling. The issues that are raised are not preplanned or prediscussed. The staff covers a wide range of options and alternatives and includes within the integrated text of its memorandums not only enforcement matters but often provides the Commission with specific recommendations to show the Commission the limits of its authority with respect to matters under consideration. These are not the kinds of matters that would come up normally in discussion, but rather are provided to offset the discussion in terms of the Commission’s own ability to consider whatever recommendations have been made, and to enable the Commission to provide the staff with specific instructions as to the action that it wants taken. In most cases, therefore, the staff’s memorandums constitute integrated documents which include heavy reliance on materials that normally would not be made publicly available, even though the meeting itself may be open and the matter under discussion is one which is appropriate for public observation.

Senator CHILES. Well, I am not sure I understand what you said exactly, but I think when you get in court on this question and if you don’t make memorandums available, I am just going to bet you are going to get in court on it. I think it is going to be interesting as to whether that judge is going to say you can’t have an open meeting unless those tools and those materials that you are using in the discussion of that open meeting are available to the public. And if the court doesn’t come down that way I am going to be very surprised.

And it may be that you are going to have to change your memorandum some and you are going to have to delete those parts that contain truly sensitive points that are covered by the exemptions. You may have to change some of your procedures a little bit, but I don’t think you can go in there and use all kinds of written memorandums, circulate those all freely back and forth, and not have that be available to the public and call that an open in the sunshine meeting.

Mr. PRATT. One situation that you alluded to—where an agency deliberately uses memorandums numbered in a way to obfuscate conversation—might create for an agency precisely these kinds of problems with courts. But, I think Chairman Williams’ statement pointed out that, in the meetings that have attracted some criticism, the Commission was not trying to deliberately obfuscate its discussion. Rather, the Commission was attempting to order its discussion. There may well be differences in what agencies are required to do, depending upon the situation presented, but the act itself requires that a balancing be made. When an agency holds its meeting with full public observation, and where the public receives a full understanding of the meeting by the briefings and the kinds of things the Commission is now undertaking, the Commission should not be deprived of the candor reflected in the staff memorandums that it now receives.

Senator CHILES. Well, I would just say again if that balance is going to be obtained, that’s going to be obtained before the lawsuit comes to its fruition. That’s going to be obtained by the general public and press being satisfied with what they are receiving. I don’t think you have that situation at all now.

And I think that after you go to the confrontation of a lawsuit, you may find that it is too late to have that kind of balancing proce-
dure because the judicial order may do what I think it should and will do, and what I would advise my client of what I think that judicial order would do regarding whether these documents would be made available if they did not come within one of the express sunshine exemptions and they are used in that open meeting.

Mr. Chairman, are you familiar with the President's memorandum to the agencies with regard to the Sunshine Act?

Mr. Williams. Yes; I am.

Senator Chiles. I know that you have the statutory authority to litigate your own suits, and that will cover the Sunshine suits, too. What impact has the President's directive had upon your agency and its Sunshine policy?

Mr. Williams. Well, the underscoring by the memorandum of the importance of our substantive compliance with the Sunshine Act is an admonition we take seriously. What may be exempted from public observation relates to the securities laws we enforce and administer.

Senator Chiles. As a matter of Federal policy do you have an opinion as to whether there should be a single litigator for a Government-wide statute like Sunshine to provide for a uniformly applied law and interpretation? Again, the situation I foresee is where there might be a half dozen different interpretations of the act, or of a definition of a meeting under the act. That would certainly damage the effectiveness of the statute.

Mr. Williams. From our standpoint our perception is that, since the appropriate interpretation or, if you will, defense, of the agency under the Sunshine Act does relate so directly and so integrally with the substance of the laws we enforce and administer, for example, our judgment as to whether the public disclosure of information would endanger the stability of financial markets, that this concern should override the possibility that courts might give multiple interpretations to the provisions of the Sunshine Act. Accordingly, we believe that the Commission should be responsible for its own defense.

Senator Chiles. Chairman Miller, of the Federal Reserve, did not seem to have any problem with the Federal Reserve being represented by the Attorney General in regard to Sunshine suits, but you do have a problem with the Security and Exchange Commission being represented by the Attorney General.

Mr. Williams. Yes; on two grounds. One, we are an independent agency and not part of the executive branch.

Senator Chiles. Neither was the Federal Reserve the last time I looked.

Mr. Williams. You are right, of course, but we are nevertheless different in terms of our precise responsibilities and our relationships with the executive branch. The Commission, unlike the Federal Reserve Board, has extensive enforcement responsibilities.

The other point to be made here is that we may not both deal with the same kind of factual concerns or not. We have not focused on what similarities or differences might exist between the two agencies.

Mr. Pitt. In addition, the responsibility for Government litigation has been the subject of a recent study by the Office of Management and Budget. A number of the independent agencies do not have the kind of litigating capacity that the Securities and Exchange Commission has developed over the last 40 some years.
Senator Chiles. You are not including the Fed as one of those agencies that doesn’t have a litigating capacity?

Mr. Prtr. We have a greater litigating capacity than most agencies, even with respect to statutory provisions administered by the Federal Reserve Board. The Federal Reserve Board establishes rules under section 7 of the Securities and Exchange Act relating to margin requirements, but it is the Securities and Exchange Commission that enforces those requirements and not the Federal Reserve Board. In part, an agency’s litigating capacity is simply a function of how effectively the agency has utilized in the past its litigating potential and where it has placed its regulatory focus, of course, there are a number of agencies that have the same approach that the Securities and Exchange Commission does with respect to its litigating authority.

Senator Chiles. Well, one of the problems and confusions that seem to have developed in regard to the interpretation of the Freedom of Information Act has been the fact that agencies have tried to make their own interpretations as to what the act means and what particular statements say and that, I think, in itself has caused concern. I see the same possibility of that happening to the Sunshine Act if you don’t have some standard that’s going to set the uniform policy.

Mr. Prtr. The agencies with independent litigating authority have not been insensitive to the possibility of conflicting positions. There have been two approaches to this issue that have made it a nonproblem. First, the general counsels in each of the independent agencies have attempted to coordinate and apprise each other of their litigating posture. And second, with respect to the Freedom of Information Act and Sunshine Act, there has been very effective coordination with the Department of Justice and the Administrative Conference. We consider the position of both the Justice Department as well as the NLRB before we advise the Commission as to the disposition of Freedom of Information Act matters; and, the Commission, in making its own determination as to whether to pursue a particular litigation theory. We do this to be certain as to what potential effects may be of our posture on the Freedom of Information Act with respect to Government agencies other than ourselves.

USE OF CAMERAS AND RECORDING DEVICES AT THE SEC

Senator Chiles. I note that your regulations require any person desiring to record or photograph any meeting to apply to the Commission secretary for permission to do so, setting forth the requestor’s interest in the matter and the reasons why the requestor desires to record or photograph the SEC proceedings. I find those requirements to be rather intimidating. I think having to explain one’s interest and reasons for desiring to record or photograph to deter someone from even applying. Those burdens appear to me to act only to restrict and limit public observation. Why do you require reasons and explanations of interest before you permit an activity that the Attorney General has clearly said is permissible? What benefits do you derive from that kind of restrictive regulation?

Mr. Williams. Well, in partial response, we do not tape or record our open meetings. We are simply interested in knowing if the meeting is being taped, so that we can make our own judgment as to whether
there is any reason for the Commission, under those circumstances, either to maintain its own record of the proceeding or if there appears to be great enough interest, to transcribe the meeting ourselves and simply make the transcription publicly available.

Insofar as photographing our meetings is concerned, we are primarily concerned with simply knowing what is going on in our Commission room that might interfere with our proceedings.

Senator CHILES. Well, again, it just looks to me that if the meeting is open, I should not be required to tell you why I want to come to your open meeting or whether I am going to be there at all. The Attorney General has expressly said that where these activities do not cause a commotion or do not disrupt things, they should be allowed.

It would seem like any kind of reasonable rules or regulations to see that there is not a disruption would be proper, but when you ask somebody to give the reason why he or she wants to tape or photograph this meeting it acts to intimidate and inhibit the person. Indeed, this has a true chilling effect on a person's right to observe. I think clearly it would cause people to feel that they could not use that procedure.

Mr. WILLIAMS. We will take a look at that. I am not aware of our having intimated anyone, but if we have intimidated them to the point where they don't request permission, I wouldn't know about that. We will take a look at it.

AVAILABILITY OF MEETING RECORDS

Senator CHILES. I agree, you wouldn't know it.

The legislative history makes clear that agencies are expected to make meeting records promptly available to the public. It places the burden on the agency to determine what can be released. That burden is consistent with the burden placed on the agency to justify closed meetings and withholding any information. Your regulations require the transcript, recording, or minutes be released within 20 days, excluding weekends and legal holidays, of receipt by the SEC's freedom of information officer of a written request. Now, the act permits an individual to bring an action against an agency prior to or within 60 days after the meeting out of which the violation exists. Twenty days excluding weekends and holidays isn't exactly the prompt availability that the act contemplated and it would seem that it would certainly make it difficult for someone to act within the statute of limitations. Most of your meetings seem to fall within the expedited closing provision which permit you to keep minutes rather than worry about transcripts. It seems to me that the 20-day requirement could be reduced by routinely evaluating minutes or transcripts right after the meeting to determine what could be released.

How and when is the review presently handled?

Mr. PITTR. First, with respect to when the statute of limitations begins to run, I think that you have raised a matter of legitimate concern. But, the event triggering the statute of limitations would, in my view, be the failure by the agency to turn over the transcript and, prior to that time, the statute probably would not run.

Senator CHILES. Not necessarily. That might be one of the reasons but that certainly would not be the—
Mr. Pitt. Conceivably, you may be correct. A court might hold otherwise, but, insofar as this Commission is concerned, we certainly did not contemplate that the statute would run until someone requests the transcript and we finally deny the request.

The 20-day period you referred to is patterned after the comparable Freedom of Information Act provisions.

The way the review procedures are now patterned is a reflection of both the number and the kinds of matters the Commission considers. In a 4- or 5-month period, we estimate that the Commission considers between 600 and 700 matters. The tapes of the Commission's consideration of those matters can run anywhere from 20 minutes to 2 or 3 hours, which is extensive.

Most of the closed meetings involve matters of a law enforcement nature and, therefore, based on our understanding of the act, the materials would not be available for public inspection because they are subject to an appropriate exemption in their entirety. But where somebody makes a request for a transcript we do have the capacity to prepare a transcript promptly and to have it edited, if editing is appropriate, or to prepare a statement of reasons that would indicate why we are withholding the requested material, similar to that we prepare now under the Freedom of Information Act. This statement of reasons would be necessary, of course, so that a firm basis for seeking judicial review would be available for someone who felt we were improperly withholding the transcript. The effort is really an attempt both to comply with the spirit of the act and to manage the inordinate number of tapes that the Commission has in its possession virtually all of which would be completely exempt from disclosure, even on a word-by-word basis.

Mr. Williams. Also, if I am not mistaken, we have not received any requests for transcripts.

Senator Chiles. You have not.

Mr. Williams. And under these circumstances, I would be reluctant to expend much in the way of Commission resources to anticipate a request. But on the question of if there is a statute of limitations—

Senator Chiles. If you say 20 days, excluding weekends, you, in effect, are talking about 4 weeks, so you are talking about 28 days there. You are talking about then making the written request to the Freedom of Information officer and then waiting to get the material back. It looks to me like a person who wants to look at a transcript and then determine whether the meeting was properly closed or not will not have much time left to do this. I might well have that record 5 or 10 days before the statute of limitations is going to run. It might prompt me to go on and feel that I have got to file a suit to protect myself, just to stop the statute from running. We are talking about a very short statute of limitations of 60 days. We set the time limit so as not to leave these matters open for months or years. That was Congress decision to try to do that.

So I am glad to hear that you haven't received those requests, and that there aren't a lot of requests, but it still appears to me that the procedure is bad. If it is going to take me 45 or 50 days to actually obtain that transcript, it would leave me very little time to try to protect my rights under the statute.
Mr. Pitt. I think the only response is that fairness would dictate that the statute should not run until we have finally denied a request; and second, I think if the request asserted that there was an immediate need for the transcript, such as immediate litigation, it has not been our practice in litigation to try and stretch our time periods to deprive people of their rights.

As long as requests for our transcripts aren't received on a regular basis, which is the concern of the Chairman, we have the capacity to prepare the transcript in less than the 20 days specified by our rule, but the 20-day period was predicated on the same kinds of considerations that went into the time limitation now contained in the Freedom of Information Act for agency review. When drafting our regulations on this point, we did not pick the 20 day number at random. We based the time period available for agency reviews on something that the Congress seemed to have suggested for a fair time period in an analysis situation.

EXPANDING THE ACT'S EXEMPTIONS BY RULE?

Senator Chiles. In your regulations you seem to go into considerable detail expanding upon the statutory exemptions. For example, with regard to exemption 9-B, you permit a meeting to be closed if opening it would disclose information, the premature disclosure of which would be likely to significantly frustrate the implementation, or the proposed implementation, of action by the Commission, any other Federal or State governmental authority or agency, or any securities industry self-regulatory agency. When I read 9-B, I see reference only to the frustration of the proposed agency action. The legislative history clearly indicates that this exemption applies only to the agency's own actions. It seems to me that your regulations have created a new exemption to Sunshine that goes beyond the clear meaning and intent of the act. How do you justify regulations which go to that extent in broadening the act?

Mr. Pitt. Our intent in drafting that regulation was not to extend, but rather to explain, of the exemptions as it applies to our agency. In fact, our agency takes a very narrow construction of section 9-B, and the Commission has made a concerted effort not to read the exemption broadly. But it basically covers a number of situations which do involve other agencies, and, although we are not the initiating agency, the situations do involve our agency as well.

For example, the Department of Justice may request that we refer files to them for possible criminal prosecution. That is a Justice Department-initiated action, and yet the more public knowledge that the Justice Department asked us to refer our files, and that we have done so, would frustrate agency action. A similar situation exists with respect to the request by securities industry self-regulatory organizations for a referral of files. These organizations may make requests of us for information which may be of assistance to them in connection with their disciplinary proceedings or other statutory responsibilities. We have also utilized the 9-B exemption where settlement discussions of pending litigation exist, as well in situations where the mere knowledge that an issue was set on the commission's agenda would very clearly frustrate the agency's actions.
Our rule was drafted to be appropriately reflective of the kinds of practices in which our agency, in fact, is engaged.

Senator CHILES. Well, is that, in fact, going to cover those other agencies, or are you saying it is just going to cover your actions?

Mr. PITT. The Commission, for example, may be asked by a State securities commissioner to furnish files to it for possible State prosecution or State investigation. At the time the request comes in, of course, we do not know whether the Commission will honor the request or if the Commission may determine that there are some circumstances that might warrant the Commission’s withholding the information at that time. The mere publication of another agency’s request for files is not yet our agency’s action. The Commission takes action when it decides whether to refer the requested material, and under what circumstances it will do so. Exemption 9-B as implemented by Commission regulation was drafted to cover this situation. We do not intend in any way to go beyond either the spirit or the letter of section 9-B as contained in the act.

Senator CHILES. Well, we are concerned about 9-B to start with because it is becoming the catchall exemption. When you start broadening the catchall exemption and expanding it, then that really gives us problems. I would think that it should be construed very narrowly, and that’s what we intended.

Mr. PITT. That has been, virtually in literal terms, what the instructions to our staff have been.

Senator CHILES. Chairman Williams, again we want to thank you for your appearance here today, and we look forward to continuing progress on the part of the Securities and Exchange Commission. Thank you.

Mr. WILLIAMS. We certainly will. Thank you.

[The prepared statement with exhibits of Mr. Williams, follows:]
Mr. Chairman, Members of the Subcommittee:

I am pleased to have the opportunity to review with you today certain aspects of the Commission's recent experience under the Government in the Sunshine Act. With me is Harvey L. Pitt, the Commission's General Counsel, who has been interested in the Sunshine Act since it was under consideration in the Congress, and who has had a key role in assuring our compliance with the Act.

Congress intended the Sunshine Act to ensure, to the fullest practicable extent, public access to "information regarding the decision making process of the federal government." Thus, the Act provides, as a general rule, that, "every portion of every meeting of an agency shall be open to public observation." As the federal agency charged with responsibility for administering the laws designed by the Congress to provide full and fair disclosure to investors, the Securities and Exchange Commission is sensitive to the statutory objectives of the Sunshine Act and the importance of accurate public understanding of governmental processes and decisions.

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1/ 5 U.S.C. 552b, note.
2/ 5 U.S.C. 552b(b).
During the legislative process, we expressed our support for the Act's objectives, but also our concern that certain of the burdens of compliance might outweigh the benefits to the public. We knew, and the Congress recognized, that most of our meetings could not be open to the public, in view of the Commission's broad-ranging law enforcement and quasi-judicial responsibilities and of the fact that even our consideration of rule-making proposals must often include discussions of active enforcement cases.

Nevertheless, our experience has been that the Commission has been able to consider a substantial number of its agenda items in meetings that are open to the public. Since the Commission had, before the Sunshine Act, conducted almost all of its meetings in private session, the Act has truly worked significant changes in the manner in which the Commission conducts its business.

As noted by Commissioner Evans during this Subcommittee's earlier oversight hearings on the administration of the Act, we have certain concerns about the operation of the Sunshine Act in practice. We are concerned that the ability of the Commission to perform its statutory mission should not be impeded for the sake of inflexible procedural requirements which, while theoretically designed to assure the public access to information about its government, do not in fact perform this function. 3/ We are concerned that pressure is being applied to require the Commission to go far beyond the requirements of the Act, and to

expose the internal deliberative processes of the Commission to public view, something we feel would be very counterproductive. I feel that the Commission would be remiss if it did not report to you these concerns.

As Commissioner Evans also pointed out in his testimony, many of the comments we have received about our public meetings indicate that observers are impressed by the depth of discussion and the consideration afforded to opposing viewpoints on major issues, as well as by the overall competence and fairness of the Commission's deliberations. 4/ Our experience since Commissioner Evans' remarks has generally been consistent with his report. But, as the public's experience with our meetings broadens, an increased demand is evolving, particularly on the part of the press, for supplementary measures, beyond those required by the Act itself, in order to make our meetings more informative and understandable. I think this can be a healthy process, and we are always ready to consider suggestions for improving our procedures. We have been making some changes in the way we conduct our meetings and, in general, improving the level of understanding of the Commission's meetings.

As you are aware, the Congress intended that the public's access to the decision-making processes of the federal government, as implemented by the Sunshine Act, be balanced against the need to protect the ability of government to carry out its responsibilities. In the case of the Commission, of course, our principal responsibility is to administer and enforce the federal securities laws. In my tenure as Chairman over the past 15 months, however, I have become increasingly aware of the

4/ Id. at 3.
difficulties involved in following the discussions at our meetings. For example, as you might expect, the more complex the matter under discussion, the more detailed the Commission discussion of that matter becomes. It is in these situations that we recognized, even before certain recent criticism of our open meeting procedures, a need for improvements in our procedures.

In his testimony before you last November, Commissioner Evans informed you that, in order to facilitate a better understanding of the discussions at our open meetings, the Commission had begun to distribute summaries of relevant background information pertaining to agenda items to attendees at these meetings. Nevertheless, the Commission has recently received some responsible criticism with regard to the conduct of its open meetings, and in your letter dated June 10, 1978, you requested our views "in light of recent complaints about the cryptic nature of some of [our] open meetings." These complaints, which originated with some members of the press who regularly cover the Commission's meetings, indicated to us that the discussions between the Commission and staff that occur during our open meetings are not always fully understood by those who attend our open meetings. Today, I would like to discuss with you those recent criticisms that have been made concerning the Commission's open meetings, and indicate the ways in which we are responding to the suggestions we have received,

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5/ Id., p. 7. We submitted at that time a number of these summaries to your staff for the Subcommittee's information.

6/ Letter to Chairman Williams, dated June 30, 1978. By letter of the same date, I noted that the Commission's testimony would be directed "to the subject of the Commission's policy regarding dissemination of staff memoranda and other documents in connection with open meetings."
I am aware of two Commission meetings that have been particularly criticized. First, on June 7, 1978, the Commission considered certain staff recommendations regarding the re-examination of the Commission's rules relating to shareholder communications, shareholder participation in the corporate electoral process and matters generally concerning corporate governance. The second meeting concerned the Commission's consideration of a staff report to Congress entitled "The Accounting Profession and the Commission's Oversight Role." This meeting was held on June 28, 1978.

These complaints are serious ones because we know that if observers do not understand what is being discussed at a Commission meeting, the intent of the Sunshine Act may not be fully realized. On the other hand, I must candidly acknowledge my own belief that there is a limit to the amount of educating we can do at our public meetings. Agency meetings are primarily business meetings, not classrooms. As recently pointed out by Commissioner Karmel, "The public has a right to know what we are doing but it also has a right to have us get our work done." 7/ Those who want to follow our meetings have available to them the resources that will permit them to do this; but they must do their own homework.

Despite these reservations, Mr. Chairman, I believe that there are several steps that we can take, and are taking, to try to make useful information available. Before discussing these steps, I would first like to describe the two particular meetings which have primarily engendered criticisms by the press.

The Commission's Meeting on Corporate Governance

On April 28, 1977, the Commission announced its intention to conduct a broad re-examination of its rules relating to communications to shareholders, shareholder participation in the corporate electoral process, and corporate governance generally. The Commission indicated that the decision to undertake the study was based, in part, on the fact that recent events, such as numerous corporate disclosures concerning questionable and illegal payments, had served to focus public attention on the subject of corporate accountability, and had raised questions about the adequacy of existing checks and balances.

To prepare for public hearings, the Commission solicited written comments on a number of issues relating to—

(1) the adequacy of existing avenues of communications between shareholders and corporations, and particularly, whether shareholders should be provided with more information than they receive today with respect to socially significant matters affecting their corporations;

(2) whether the Commission's rules regarding shareholder proposals should be amended to facilitate the presentation of shareholder views and concerns in the corporate proxy materials;

(3) the role of shareholders in the corporate electoral process, and whether the Commission should amend its proxy rules to provide shareholders greater access to the corporate proxy

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mechanism for the purpose of nominating persons of their choice to serve on boards of directors; and

(4) whether additional disclosure relevant to an assessment of the quality and integrity of management should be required.

The Commission also raised general questions concerning the need for legislation relating to federal minimum standards for corporations or the federal chartering of corporations, the role of the stock exchanges and self-regulatory organizations in improving corporate governance, and the costs and benefits associated with various regulatory approaches.

On August 29, 1977, the Commission published a second release 9/ announcing the schedule for public hearings, and, reflecting the extraordinarily complicated nature of this undertaking, restated the issues to be considered based on those comments which had already been received.

The public hearings began in Washington on September 29, 1977, and continued for five and a half weeks, with additional hearings held in Los Angeles, New York and Chicago. More than three hundred persons and organizations, including corporations, business associations, government officials, public interest and religious groups, law firms, bar associations, financial analysts, professors, accountants, and other individuals, submitted written comments or testified during the proceedings, producing a file of over 10,000 pages. All of these comments are, of course, available for public inspection, and the Commission recently released, in the exercise of its discretion, a summary of the comments. 10/ As that summary reflects, this


proceeding generated a multitude of views on a large number of issues, ranging from narrow technical matters arising under existing proxy rules to broad philosophical approaches to the problem of how corporations can be made more responsive to shareholders and the public at large.

Based on this voluminous record, the Commission's Division of Corporation Finance recommended that the Commission authorize the Division to develop a number of rulemaking proposals for further Commission consideration. These rules were to be designed to remove existing impediments to shareholder communications and participation in the corporate electoral process, and to improve the quality of information available to investors regarding corporate management, as well as to stimulate voluntary changes in the structures and procedures of corporate boards of directors. In order to facilitate Commission discussion of those issues, the Division forwarded to the Commission a staff report setting forth 36 preliminary recommendations. These preliminary recommendations were the subject of discussion at the open Commission meeting held on June 7, 1978.

The basic purpose of this meeting was to formulate, with greater specificity, broad policy with respect to various corporate governance matters. Because the staff was only at the stage of requesting authority to develop rule proposals, the Commission did not have before it specific, fully developed proposals. We were primarily concerned with the kinds

11/ With respect to a number of other issues, in particular, the role of self-regulatory organizations in improving corporate governance and the need for new federal legislation, the Division was not prepared to make specific recommendations and suggested that the Commission defer its consideration of these questions to permit the staff additional time to formulate specific recommendations.
of effects various types of rules might have, and the substantive dis-
cussion was, therefore, necessarily general in tone.

Looking at this meeting in retrospect, I can understand how our
discussions might have engendered some misunderstanding. There was, indeed,
some confusion, even on the part of those participating in the discus-
sion. While we did try to minimize the confusion, the expansive subject
matter and the wide-ranging nature of the staff's recommendations, together
with the fact that this was a preliminary discussion, not designed to lead
to a decision as to any discrete question, all tended to make our discussion
rather difficult to follow.

A summary of relevant background information had been prepared for
distribution to those attending this meeting, 12/ and, at the beginning
of the meeting, I made an opening statement, in which I summarized the
principal issues we expected to discuss. Initially, the best way to proceed
appeared to be to discuss the staff recommendations in the order in which
they were presented. After a while, however, because there was so much
material presented to the Commission and so little time in which to conduct
a full review of the Division's recommendations, I suggested that it might
be better to turn to a discussion of those recommendations which could
be implemented by the end of 1978, in time for the next proxy season.
The staff then indicated that those recommendations pertaining to the
Division's request for authority to issue proposed disclosure rules re-
lying to the composition and structure of corporate boards of directors
would be a useful point at which to begin the more limited discussion.

12/ This summary is attached to my written statement as Exhibit A.
The Commission agreed that this was a reasonable approach, and determined to defer consideration of certain other staff proposals.

Admittedly, this procedure was awkward and, as we attempted to revise the agenda by sorting out those recommendations which we had determined to consider immediately and those which we had agreed to defer, there were some confusing references to certain recommendations by number. Our references to recommendations by number were not meant to conceal substantive information from the public, however, but simply to enable us to determine, as quickly as possible, which recommendations could be considered for prompt implementation before next year's proxy season.

As to those recommendations which the Commission did discuss, the staff extensively described the proposal and the reasons favoring its adoption. There were numerous questions and comments by the Commission, and a full discussion followed with respect to each recommendation which the Commission considered. I firmly believe that this discussion was comprehensible to those attending the meeting with some general knowledge of the subject matter.

On the whole, the meeting was a success from the Commission's standpoint, since we were able to develop our policy and to set some standards and guidelines for further staff development. 13/ Following the meeting, 

13/ Subsequent to the June 7 Commission meeting, on July 19, 1978, the Commission issued, 15 SEC Docket 291 (Aug. 1, 1978), Securities Exchange Act Release No. 34-14970 in which the Commission indicated its intention to address, in stages, certain issues related to corporate governance in more detail. Stage one includes rulemaking proposals to provide investors with expanded information on certain matters, including the structure, composition and functioning of the boards of directors of companies

(continued)
knowledgeable members of the Commission's staff answered reporters' questions about what the Commission had considered and decided at its meeting. I think it is interesting that, in spite of the complaints we received about the difficulties those in attendance experienced, we found the press accounts of the meeting to be quite full and accurate. 14/

The Meeting at which the Commission’s Report on the Accounting Profession was Considered

On June 28, 1978, the Commission considered and approved the publication of a report, entitled "The Accounting Profession and the Commission’s Oversight Role." This report was the result of a commitment I made to the late Senator Lee Metcalf before a Senate Subcommittee during my testimony in June 1977 on the accounting profession. At that time, I stated that the Commission would undertake to report periodically to Congress on the response of the accounting profession to the challenges which Congress and others had placed before it and on the Commission's own initiatives in this area. As you may know, the central question in the debate over the future of the accounting profession is whether the registered with the Commission. Stage two will involve the publication of a comprehensive staff report relating to corporate governance, and the means by which corporations can best account to shareholders and the public. After publication of this report, the Commission will consider, in the third stage, what further action, if any, is appropriate with respect to shareholder communications and shareholder participation in the corporate electoral process, and will determine whether to publish additional rulemaking proposals, or whether to recommend new legislation that would affect corporate governance.

14/ A number of these newspaper accounts are attached to my written statement (Exhibit B).
profession should continue to be primarily self-disciplined and self-regulated, or whether the federal government should become more directly involved in its regulation and in the development of the accounting principles and auditing standards under which the profession operates.

In order to give a comprehensive, and comprehensible, picture of developments in this complex field, the report was divided into three parts: first, the Commission's conclusions concerning the profession's progress during the past year and its expectations concerning the objectives toward which the profession must work in the coming months; second, a staff's description and analysis of the profession's progress in three broad areas—independence, regulation and oversight, and the development of accounting and auditing standards; and, finally, a volume of exhibits containing documentary materials relevant to the analysis. This report, which was over 1300 pages long, was delivered to Congress on July 5, 1978, and, at the same time, it was also made public in full.

The Commission prepared and distributed to those who attended this meeting a summary setting forth relevant background information; 15/ and, as I had done at the Commission meeting on corporate governance, I opened the meeting by summarizing the background and purpose of the report and the scope of the investigation into the matters selected for inquiry. Discussions then ensued on the draft report. Like the corporate governance meeting, this meeting concerned an expansive subject, and one that was of a rather complex and technical nature.

15/ This summary is attached to my written remarks as Exhibit C.
Mr. Chairman, in your letter to me dated June 30, 1978, you make reference to the "cryptic nature of some of [our] open meetings." I can understand how this criticism might have been made with respect to our June 28 meeting on the accounting profession. In fact, at one point in the discussion of this matter, I recall having apologized to those in attendance for the Commission's use of "cryptic" phrases. This was intended as a reference to technical accounting terms which we necessarily had to use in the course of the Commission's discussion. Because the subject matter of this meeting was so complex, certain portions of the Commission and staff discussion might not have been very clear to observers who either had not previously had an extensive exposure to or knowledge of accounting matters, or who had not followed this issue closely in recent months. I believe, however, that members of the public with some background knowledge of accounting matters who were generally familiar with the nature and purpose of the Commission's inquiry into the accounting profession should have been able to follow the Commission's discussion with little trouble. In any event, Mr. Chairman, we did what we could to present the meeting in a comprehensible fashion, and it is certainly not the case that the Commission's discussion was couched in technical jargon in an attempt to obfuscate or to withhold information from the public.

Following the Commission's meeting, I announced that the full report would be available on July 5, 1978, 16/ and that members of the staff

16/ The Commission's report was completed by July 1, 1978; over the July 4th weekend it was reproduced and bound for distribution to the public.
of the Office of the Chief Accountant and I would hold a press conference to answer questions and further discuss matters raised in the Commission's report. In addition, I summarized the major conclusions of the report, and this summary was widely and accurately cited in the press accounts of the Commission's meeting. Again, judging from the accuracy and completeness of the press reports of the meeting that were published, I believe that the Commission was quite successful in presenting the matter to the public in an understandable fashion.

**Recent Developments**

In taking steps to enhance the public's understanding of Commission meetings, those responsible for these matters at the Commission have spoken and met with representatives of the press, and this has produced a number of helpful and constructive suggestions. We have already taken some steps to implement certain of these, and other measures will be considered in the future. I believe that, through continuous efforts, we will be able to assist the public, and particularly the press, better to understand the discussions at open Commission meetings.

Although some have requested it, the Commission is, however, generally reluctant to disclose to the public internal, pre-decisional memoranda. We believe that the systematic disclosure of internal working papers would be counterproductive, and would tend to interfere with the Commission's internal processes. These considerations have long been recognized by the Congress; the legislative history of Exemption 5 of

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17/ These are attached to my written statement (Exhibit D).
the Freedom of Information Act, as well as the many court decisions that have considered that provision, including several Supreme Court decisions, all recognize that the disclosure of internal memoranda often runs the unacceptable risk that the free exchange of ideas between the Commissioners and the staff would be inhibited.

I share this view. I believe that the routine public exposure of working documents written by the staff would tend to make these documents more formalistic, and less communicative, than they now are. In my opinion, this would result in further slowing down an administrative process that often is already too slow. Because of the possibility of public exposure, the staff would be more reluctant to send tentative positions or preliminary views to the Commission, and, at least in some instances, reluctant to express disagreement with positions taken by fellow staff members or members of the Commission. Further, if Commission attorneys knew that their opinions would be disclosed to potential adversaries in litigation, they would be much less willing to flag potential weaknesses in proposals under consideration by the Commission, or to point out alternative methods of accomplishing desired objectives. Under the present system, premature or apparently ill-advised proposals can simply be sent back to the originating division or office by the Commission for further consideration. By considering such matters, however, the Commission often receives valuable guidance as to the staff's thinking, and is better able to shape the

development of policy. Finally, I am concerned that the availability of our internal, pre-decisional memoranda could present to the public a misleading or inaccurate view of the Commission policy with respect to a matter, where the Commission's final decisions differs from the staff recommendation.

In addition, where the matter under consideration by the Commission is the publication of a release, or some other public statement, I am very reluctant to distribute draft copies in advance of Commission consideration and approval. As a group, we are a Commission which tends to go over our public communications rather carefully and thoroughly; with very few exceptions, each is reviewed by the Commissioners and their legal aides, and it is very often the case that significant changes in the draft are made before it is issued. Moreover, when the Commission is considering the approval of a document to be sent to Congress, as was the case in our consideration of the accounting report, I believe it would be inappropriate to release the document to the press before it is transmitted to Congress.

There is, however, more that we can do to promote public understanding of Commission meetings. As I indicated, the Commission does prepare summaries of the items discussed at open meetings, and I believe in most instances these summaries provide the background information which interested observers need in order to follow the ensuing Commission discussion. Of course, many of the items we discuss at open meetings are relatively simple matters requiring little discussion. Our problems have principally arisen, in connection with those matters in which there is great public
interest, which involve complicated questions of fact and law, and where some knowledge of a large record is required for full understanding. It is primarily in these situations, where it is reasonable to expect that the discussion will be complicated, that the Commission must direct its efforts to assure that members of the public and press are able to follow the Commission's discussions. I believe it is only through continuous experimentation that we will learn how to deal most effectively with this problem, and I want to outline, briefly, some of the steps we are taking.

First, where unusually complex matters are to be discussed, where the matter has an involved procedural history, or where the matter requires the consideration of lengthy staff memoranda which, as in the corporate governance area, are predicated on a voluminous record, we will provide a more detailed summary to those attending the open meeting. These summaries can both provide relevant background information and identify the issues that the Commission will be discussing, without disclosing specific internal recommendations or opinions. The format of the summary may, of course, vary, depending on the nature of the matter. We have already attempted to expand the information contained in these summaries, and I think we can continue our efforts to improve in this area. In addition, I have, as I indicated, at times found it useful to make an oral statement at the beginning of a meeting, summarizing the issues to be discussed by the Commission. I plan to do this more frequently, when it appears appropriate to do so.

19/ An example of a summary of agenda items distributed at one of our more recent meetings is attached to my written statement (Exhibit E).
Second, because no interest is served by inaccurate press accounts, the Commission will endeavor to make publicly available, within one business day, copies of the Commission's minutes of open meetings, formally reflecting the action that the Commission took.

Third, as we did after the meetings at which corporate governance and the accounting report were considered, we will continue to make Commission staff members available to answer press inquiries regarding open meetings. In addition, a press briefing may be scheduled in advance of a meeting where considerable public interest is reasonably anticipated. The feedback we obtain from our participation in these press conferences will, I believe, let us know when we are not successful in communicating with the public, and will enable us to take prompt corrective measures.

Finally, both the members of the Commission and the staff must develop a greater sensitivity to the difficulties involved in following a complex and technical discussion. For example, in the corporate governance meeting, a great deal of confusion and misunderstanding probably could have been averted if I had made it clearer that references to recommendations by number were only for the purpose of ordering our agenda, and not for the purpose of substantive discussion. If we all will recognize that we are speaking to a new audience, and take into consideration the need to communicate with members of the public who attend our meetings, I believe our ability to put our ideas across to this audience can only improve.

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I hope that these comments have been responsive to the concerns of the Subcommittee. The Sunshine Act has, of course, been in effect
only since March 1977, and agency practice under it is still developing. In addition, the Commission's chairmanship changed very shortly after the effective date of the Sunshine Act, when I assumed the post in April 1977. The dynamics of open Commission meetings, I think it is fair to state, is rather unique, and conducting our meetings in a manner most useful for public observation is a skill which requires some practice. But, as I said, we have been experimenting, and our efforts are intended to assure that the public better understands Commission and staff discussions at the Commission's open meetings. These efforts are a reflection of our concern that the purposes of the Act be fulfilled. What combination of approaches will work best for us I do not yet know. But, Mr. Chairman, I can assure you that the Commission intends to make every reasonable effort to live up to the spirit, as well as the letter, of the Sunshine Act.
SECURITIES AND EXCHANGE COMMISSION

OPEN MEETING AGENDA, WEDNESDAY, JUNE 7, 1978, 10 A.M.

1. Item: Proposed rule 15c3-4 and the amendment of rule 15c3-3 concerning the borrowing and lending of customer securities by brokers and dealers.
   Office: Division of Market Regulation.
   Staff: Katherine H. Hayes.

2. Item: Proposed rule change filed by the Chicago Board Options Exchange, Inc. concerning restrictions on writing of uncovered discount call options during registered underwritten offerings of underlying securities.
   Office: Division of Market Regulation.
   Staff: Jeffrey D. Saper.

3. Item: Proposed adoption of rule 13f-1 and related form 13F concerning the implementation of the Commission's institutional disclosure program.
   Office: Division of Investment Management.
   Staff: Lee B. Spencer, Richard W. Grant, Dennis M. Gurtz, Michael S. Lichtenthal.

4. Item: Discussion concerning the re-examination of rules related to shareholder communications, shareholder participation in the corporate electoral process and corporate governance generally.
   Office: Division of Corporation Finance.
   Staff: Richard Rowe, Barbara Leventhal, Richard Nesson, Jennifer Sullivan.

5. Item: Proposed exemption from certain rules of the Commissioner's conduct regulations for temporary employee.
   Office: Office of General Counsel.
   Staff: Paul Gonson, Myrna Siegel.

1. Proposed rule 15c3-4 and the amendment of rule 15c3-3 concerning the borrowing and lending of customer securities by brokers and dealers.
   Background: The Commission will consider requesting public comment on proposals to amend rules to permit a broker-dealer, under restricted conditions, to borrow, lend, and arrange for the lending of fully-paid and excess margin securities carried for the account of a customer, where the lending customer consents in writing to the transaction and holds full collateral for the securities lent.

2. Item: Proposed rule change filed by the Chicago Board Options Exchange, Inc. concerning restrictions on writing of uncovered discount call options during registered underwritten offerings of underlying securities.
   Background: On October 26, 1977, the Chicago Board Options Exchange, Inc. ("CBOE") filed with the Commission copies of a proposed rule change, which was supplemented by additional material on February 9, 1978 and on March 27, 1978. The substance of the proposals filed provides for the imposition of trading restrictions on certain member transactions involving the writing of opening uncovered discount call options during the pendency of underwritten distributions of securities underlying call options traded on the CBOE.

3. Item: Proposed adoption of rule 13f-1 and related form 13F concerning the implementation of the Commission's institutional disclosure program.
   Background: The Commission will consider the adoption of Rule 13f-1 and related Form 13F under the Securities Exchange Act of 1934, which would govern the reporting requirements of institutional investment managers exercising investment discretion over accounts having in the aggregate more than $100,000,000 in exchange-traded or NASDAQ-quoted equity securities. Under the proposed rule, such managers would be required to file a report within a specified time after the end of each calendar year, identifying those securities, the aggregate amounts held, the nature of such investment discretion and any voting authority. The Commission will also consider soliciting comments on the usefulness and burdens associated with quarterly reporting.

4. Item: Re-examination of rules related to shareholder communications, shareholder participation in the corporate electoral process and corporate governance generally.
   Background: On April 28, 1977, the Commission announced its intention to conduct a broad re-examination of rules relating to shareholder communications, shareholder participation in the corporate electoral process and corporate governance generally. The release indicated the decision to undertake the study was based, in part, on the fact that recent events, such as the numerous corporate disclosures concerning questionable and illegal payments, had served to focus...
public attention on the subject of corporate accountability, and raised questions about the adequacy of existing checks and balances on corporate management.

Preparatory to hearings, the Commission solicited written comments on a number of questions concerning these and related issues. Hearings commenced on September 29, 1977 in Washington, D.C. and continued for five and a half weeks, with sessions held in Los Angeles, New York and Chicago. In total more than three hundred persons and organizations including corporations, business associations, government officials, public interest and religious groups, law firms, bar associations, financial analysts, academics, accountants, and other individuals submitted written comments or testified during the proceedings.

Since the close of public hearing and comment process, the Division of Corporation Finance has engaged in summarizing and analyzing the various views that were submitted and has developed a series of preliminary recommendations responding to some of the specific questions raised in the Commission's releases concerning the hearings. These preliminary recommendations address specific questions, primarily in the context of the Commission's existing rules and do not attempt to address certain broader issues raised in the hearings such as, for example, whether additional legislation is necessary or appropriate with respect to corporate accountability or what the proper balance should be between government and the private sector in implementing initiatives to stimulate corporate accountability.

The preliminary recommendations of the Division of Corporation Finance cover four major areas: (1) rules designed to remove existing impediments to shareholder communications, including an evaluation of the procedural requirements and criteria for excludability of shareholder proposals in Rule 14a-8; (2) increased opportunities for shareholder participation in the corporate electoral process; (3) changes relating to matters to be discussed in proxy statements, including disclosure of committees and management compensation; and (4) changes in the format of proxies.

5. Item: Proposed exemption from certain rules of the Commission's conduct regulations for temporary employee.

Background: The Commission will consider the exemption of Bruce Alan Mann, Esq. from certain requirements of the Commission's Conduct Regulations, so as to permit him to continue as a partner of his law firm; retain a margin account; and exempt the filing of certain detailed statements of financial interests.

Mr. Mann, while on leave from his private law practice, will act as a consultant to the Commission during the fall of 1978, on methods of improving the process of raising capital for small business firms and other matters.

EXHIBIT B

NEW DISCLOSURE RULES BEING MAPPED BY SEC

[From the Washington Star, June 8, 1978]

(By Stephen M. Aug, Washington Star Staff Writer)

The Securities and Exchange Commission has ordered its staff to develop new rules that would force corporations to disclose a wide variety of information designed to help shareholders cast their votes on corporate matters more intelligently.

At the same time, the commissioners decided to require financial institutions—principally mutual funds and bank holding companies—under SEC jurisdiction to disclose to their shareholders how they exercise voting power through their huge holdings of shares in other corporations.

The proposed rule to disclose institutional voting practices would be accompanied by a recommendation to institutions beyond the SEC's authority—principally banks—to make the same disclosures voluntarily.

The Commission took the actions during a public meeting yesterday at which its staff began presenting recommendations resulting from a year-long examination of shareholder participation in the way corporations are governed.

SEC Chairman Harold M. Williams, who has called for improvements in the way corporations are governed almost since he joined the agency more than a year ago, said in opening the discussions that he wanted to concentrate on changes that could be put into effect before next spring, when most companies will be holding annual elections.

Williams said he was most interested in recommendations that improve the functioning of boards of directors, those that enhance the ability of shareholders to participate in the corporate election process, those relating to disclosures in annual proxy statements and those involving shareholders in the process of nominating directors.

The commissioners appeared agreed that the agency needed a rule to replace what had been known as the 1 percent rule which it dropped about a year ago. That regulation provided that a corporation could leave out of its proxy material shareholder proposals that dealt with matters that affected less than 1 percent of a corporation's business.

The Regulation was adopted in an apparent attempt to discourage the growth of purely social issues that some shareholders were trying to have placed on corporate ballots. In many cases these social issues—such as demands to have corporations stop doing business in South Africa, or encouragement of birth control—had little to do with the activities of the corporation. In some cases, corporate managements have been asked to make public pay schedules and benefits for workers they employ in other countries.

Barbara Leventhal, a lawyer in the division of corporation finance, who directed the staff study, said testimony during hearings on corporate governance indicated that corporations often voluntarily provide information sought by shareholder groups when the request is backed by a vote of 5 to 10 percent of shareholders.

The disclosure of institutional share voting provoked some discussion by the commissioners. Williams suggested it should be included in proxy material that mutual funds, for example, send to shareholders.

Commissioner Irving Pollack said an increasingly large number of directors of institutions believe the way in which shares they hold are voted is becoming a more important part of their job.

Earlier in the meeting the commissioners decided to require institutional investment managers who have control of more than $100 million in stocks to file quarterly reports with the SEC identifying those securities and the voting authority they may exercise over them.

This regulation is viewed as important information not only by brokerage firms that deal in large blocks of stocks—trying to match up buyers and sellers of large blocks—but also by corporations that want to know who are the large holders of their securities. The identity of institutional owners is sometimes shielded because the stocks are held in "street names."

Williams pointed out that the trend of institutional trading activity is important information for the marketplace because "there are such massive" amounts of securities held by institutions.

The commissioners also asked the staff to draft a rule that would make certain that shareholders proposing a matter on which stockholders will vote are given an opportunity to review corporate management's statement in opposition to the proposal.

The staff recommendations were not made available to the public before or during the meeting, but Levenson summarized for reporters after the meeting the recommendations the commissioners accepted.

Among the principal regulations the SEC ordered its staff to develop in time for issuance next month are:

- Financial institutions will have to disclose their voting practices for shares they hold.
- Corporations will have to disclose the composition and functions of any of four committees that they may have on their boards of directors: Nominations committee, executive compensation committee, audit committee and conflict-of-interest committee.
- Proxy statements would have to disclose the existence of business or personal relations between directors or nominees for board seats. The proposed rule would define directors in probably three groups: Those also in corporate management, those not in management but affiliated through personal or business relationships with management, and those who have no affiliation whatever. This is designed to indicate to shareholders the extent to which so-called "independent" directors—those from outside corporate management—are truly independent.
Shareholders would have to be told the number of board and board committee meetings are held each year and the percentage of absences by members who miss meetings.

Disclosure would be required in the event a director resigns over a disagreement on business policy matters.

Proxy statements would have to have some form of disclosure indicating the amount of time directors may devote to the affairs of the company. This might require disclosure of the number of boards and other business activities in which each director is involved. Further, it would require disclosure of potential conflicts of interest in connection with board memberships or other affiliations.

Fees paid for directors' meetings and committee meetings directors attend would have to be disclosed.

Corporations would have to disclose the terms of settlement of corporate proxy battles.

The Securities and Exchange Commission authorized its staff yesterday to draft new disclosure rules that would give shareholders a wide variety of information that is currently unavailable.

The staff will draw up rules concerning the existence, composition and functions of nominating, compensation and auditing committees. The SEC also has asked for rules disclosing the existence of business and personal relationships between Board members and company management; the number of company board meetings; the reasons for resignations by company directors; the fees paid to directors and the number of other directorships that they hold.

New rules would identify possible conflicts of interest among persons holding directorships in several businesses and would require management to show shareholders favoring a proxy proposal a copy of management's opposition statement before it is printed.

Consideration of issues concerning changes in shareholder authority to nominate directors, the format of proxy materials and the need for federal legislation in the corporate area were deferred.

The staff intends to complete drafting the rules in time to publish them by July 1, making them effective for next year's annual meeting season.

SEC Acts To Require Disclosures By Firms On Directors, But Delays Other Decisions

Washington—The Securities and Exchange Commission took the first steps toward requiring companies to disclose a wide variety of information about what their directors do for them.

But the commission put on the back burner most of the fundamental issues raised last year in hearings that delved into the question of how corporations are governed. Among the issues temporarily deferred are the questions of whether further federal legislation regulating companies is needed, whether shareholders should have a greater role in nominating directors, and whether the format of proxy statements should be changed.

The agency put off decisions on those more complicated issues and told its staff to write disclosure rules that could be published by July 1 and put in place for next year's proxy season, "This was just the smallest first step," said Barbara Leventhal, special counsel to the SEC's Division of Corporation Finance. A staff report containing the recommendations on the broader issues is expected to be sent to the commission in the fall.

The rules to be drafted will require the disclosure of:

- The existence, composition and function of committees of directors that nominate other directors and executives, set pay, oversee the company's financial records or perform similar functions.

- The existence of personal or business relationships between directors and management. Directors would have to be classified as management directors,
affiliated nonmanagement directors, such as the company's outside lawyer, and unaffiliated nonmanagement directors, that is, someone who doesn't have anything to do with the company.

—The reason a director resigns if it is a result of a policy dispute. Such a rule would give "an important tool to outside directors," Mrs. Leventhal told the commission. The rule is intended to encourage directors to air such matters as illegal corporate activities.

—Information about attendance at board meetings, possibly by identifying directors who don't attend a certain percentage of meetings.

—The total number of directorships held by directors, as well as identification of directorships that may pose a conflict of interest.

—Fees to directors.

—The terms of settlement of proxy contests. The cost of one recent proxy fight and settlement exceeded a company's gross profit for the year, Mrs. Leventhal said. The report due in the fall will address the use of a company's treasury by management for proxy fights, she said.

Some of the disclosures will have to be in the proxy statements sent to shareholders, while other may have to be included in a report to the commission such as the annual report.

The SEC's move to revise its disclosure rules comes in response to scandals involving questionable payments and other irregularities that raised questions about how corporations can be called to account.

The commission's response was expected to be limited because a majority of the commissioners believes that additional federal government regulation of business, such as federal chartering of companies, is unwise.

The commissioners would prefer that companies take on the "reform" task themselves by such actions as appointing more independent directors and establishing independent audit committees.

Some SEC officials believe that if companies are required to disclose the existence of such committees, it will induce companies that don't have them to establish them.

The commission also told the staff to draft a rule that would allow proponents of a shareholder resolution to review management's statement in opposition to the resolution before it is published. Currently management can review shareholder proposals and the accompanying statements, but shareholders don't have access to the opposing statement to check it for accuracy.

In a related matter, the SEC asked the staff to come up with some guidelines for determining what shareholder proposals are "significantly related" to the company's business and have to be included in the proxy materials. The commission recently eliminated its "1% rule," under which a shareholder proposal dealing with less than 1% of a company's business wasn't considered significantly related and could be excluded by management. The commission clearly wanted some sort of guidelines as a substitute.

Chairman Harold Williams suggested that the 1% rule be reinstituted with allowance for exemptions. He said he questioned the commission's "ability on an ongoing basis to make value judgments" about what is significantly related to the company's business.

Commissioner John Evans said numerical rules wouldn't work because they don't allow for "differences in what society believes (is significant) at different times."

[From the New York Times, June 8, 1978]
SERIES OF PROPOSALS

At a public meeting, the commission directed its staff to draft a series of proposals to require publicly held corporations to disclose, among other things:

- The existence, composition and function of director committees for auditing, board nominations, executive compensation and conflict-of-interest questions.
- Which directors are truly independent of management.
- Director fees, and attendance at board meetings.
- Directors who resign because of “policy” differences with the board.
- Directors who have conflicts of interest.
- The terms of settlement and cost of corporate proxy fights.

In addition, the commission asked its staff to draft a rule that would require companies to submit responses to shareholder resolutions on proxy statements to the resolutions’ proponents before the company response is printed and mailed to shareholders. The requirement would enable shareholders who present resolutions for proxy voting to review the accuracy of the company’s response, and challenge it if they desire, before proxies are mailed to shareholders.

The commission will also propose a rule requiring large institutions it regulates to disclose their voting practices with respect to shareholder resolutions and other corporate electoral issues. The commission decided to require more information in view of the large equity holdings controlled by institutional investors, such as mutual funds, insurance companies and bank holding companies.

DRAFT DUE JULY 1

All of the rule proposals are to be drafted by July 1, to enable the commission to consider them further and include them after public comment, in time for next year’s proxy season.

The commission, however, temporarily deferred action on the controversial issue of how the S.E.C. determines whether a shareholder resolution is significantly related to a company’s business, and, hence, should be included on proxy cards for shareholder consideration.

Last year, the commission ruled that some social issues, such as investment in South Africa, are so significant to investors that even if the issue affects less than 1 percent of a company’s business transactions—the informal standard previously used by the commission—such resolutions should be considered by company stockholders.

Today, the commission reiterated its discomfort with the lack of a quantitative standard for evaluating which resolutions should be considered by companies, but directed its staff to draft some standards that would be clear and objective, but not rigid or purely quantitative.

“There must be room for qualitative judgments because such decisions should reflect changes in what a society believes,” Commissioner John Evans said today.

STAFF REPORT PENDING

In addition, the commission deferred action on a wide-ranging set of staff proposals concerning shareholder “communication” with management and changes in proxy cards that would afford investors opportunities to play a more active role in corporate decision-making. These and other issues, such as whether new Federal legislation is needed in this area, will be discussed at length in a report now being prepared by the S.E.C. staff.

Today’s actions are the result of the commission’s long and controversial hearings last year on the relationship between shareholders and corporate management and directors, generally known as “corporate governance. More than 300 witnesses testified.

The decision to draft increased disclosure rules is not final. The commission will review the proposals and then publish them for public comment. Controversial proposals have often been altered in the wake of widespread public opposition.

In addition, the commission left open several significant questions. For instance, it did not decide whether descriptions of director committee functions should be included in proxy statements or in annual reports.

KARMEI VOICES SKEPTICISM

Commissioner Roberta Karmel expressed repeated skepticism about many of the disclosure proposals, arguing that the cost to corporations would be unduly onerous, and that the disclosures would “clutter up” proxy statements.
In general, the commission did not share Mrs. Karmel's concerns and voiced strong support for the increased disclosure. However, the commissioners rejected a plea by Theodore Levine, of the enforcement division, to require small companies to reveal more detailed information about how their boards function.

Mr. Williams argued that such explanations would lead to pro forma responses that would not enlighten investors.

Barbara L. Leventhal, a staff attorney who has played a primary role in the corporate governance debate, described the commission's actions today as the "small first step in the very long process" of finding ways to enhance shareholder participation.

EXHIBIT C
SEcurities AND EXCHANGE COMMISSION
OPEN MEETING AGENDA, WEDNESDAY, JUNE 28, 1978, 9:00 A.M.

Item: Consideration of proposed report to Congress concerning the accounting profession and the Commission's oversight role.
Office: Office of the Chief Accountant.
Staff: A. Clarence Sampson, Steven J. Golub.
Background: The incidence of significant unexpected failures by major corporations and the disclosure of widespread questionable payments and illegal acts in the 1970's have raised concerns about the integrity and creditability of financial controls and reporting of publicly-owned companies and, consequently, the credibility of the accounting profession has come under careful scrutiny.

These events have led, among other things, to a broad examination of the nature and structure of the accounting profession. That examination began in 1976 by the report of the Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce, chaired by Congressman John Moss. It was continued by the Subcommittee on Reports, Accounting and Management of the Committee on Government Affairs, chaired by the late Senate Metcalf, which held public hearings concerning the accounting profession. Those hearings were preceded by the staff report of the Subcommittee and were followed by the Subcommittee report issued in November, 1977.

The Subcommittee on Oversight and Investigations of the House Committee on Interstate and Foreign Commerce held public hearings in February and March, 1978 on the accounting profession's efforts to develop a self-regulatory program. Congressman John Moss has introduced legislation proposing to create a self-regulatory organization for accountants patterned after the National Association of Securities Dealers ("NASD").

The responsibilities of the Senate Subcommittee have been transferred to a new subcommittee, chaired by Senator Thomas Eagleton, who has informed Chairman Williams that he intends to continue the work begun under Senator Metcalf's direction and to expand it to include various other related areas.

The Metcalf hearings conveyed a sense of expectancy for the profession and the Commission to take action which will result in public confidence in the independence of accountants, the profession's resolve and ability to develop and maintain a viable system of self-regulation and self-discipline and the processes by which accounting and auditing standards are promulgated.

EXHIBIT D

[From the Wall Street Journal, June 29, 1978]

ACCOUNTANTS' STRIDES IN SELF-REGULATION REFLECTED IN SEC STUDY, CHAIRMAN SAYS

(Washington.-A Securities and Exchange Commission report to Congress on the accounting profession shows that the profession has taken significant strides in regulating itself, SEC Chairman Harold Williams said.

While he didn't give details of the report, slated to be released next Wednesday, Mr. Williams said at a public SEC meeting that the study reflects an "enormous amount of activity on the part of the profession and the commission" in the past year.
The 1,300-page report indicates that there is a “basis for being encouraged” and that there isn’t any reason to believe “self-regulation won’t work,” Mr. Williams said.

NASD TYPE BODY URGED

The accounting profession has come under heavy criticism from Congress in the wake of unexpected failures by major corporations and the disclosure of widespread questionable payments and illegal corporate acts that critics say accountants should have spotted. In a background paper prepared for yesterday’s SEC meeting, the commission said the disclosures “raised concerns about the integrity and credibility of financial controls and reporting of publicly owned companies and, consequently, the credibility of the accounting profession has come under careful scrutiny.”

These concerns led Rep. John Moss (D., Calif.), chairman of a House Commerce subcommittee, to introduce legislation that would create a self-regulatory organization for accountants patterned after the National Association of Securities Dealers, the self-regulatory organization for the over-the-counter securities markets.

In response to the criticism, the American Institute of Certified Public Accountants took a number of steps, including the establishment of a division of accountants who practice before the SEC and the creation of a public board to monitor those accountants’ performance.

The SEC report discusses these moves, lumping them into three broad categories.

THREE CATEGORIES

Mr. Williams said these are the independence of outside auditors, including the use of audit committees by boards of directors and the appropriate scope of nonaudit services performed by the outside auditor, regulation and the role of the public monitoring board, and the setting of accounting and auditing standards.

Mr. Williams said that although the commission has a “number of reservations, doubts and concerns” about the moves the accounting profession has taken, the agency believes the profession and the commission are “still basically on a constructive course.”

The SEC’s chief accountant, Clarence Sampson, said that “The next couple of months will be critical,” a reference to decisions the accounting institute still must make on such issues as peer review and the scope of services that auditors can perform for companies they audit.

[From the New York Times, June 29, 1978]

SEC’S OPTIMISTIC ACCOUNTING REPORT

(By Philip H. Wiggins)

The Securities and Exchange Commission announced yesterday that its five commissioners had given final approval to a report on the accounting profession that says that substantial progress has been made in remedying some of problems of the profession.

The S.E.C. will release the full text of the voluminous, 1,300-page “Report to Congress on the Accounting Profession and the Commission’s Oversight Role” on July 5. The agency said that because of “difficulties in duplicating and the intervening holiday weekend, the report will not be available until Wednesday.”

The report was prepared for House and Senate subcommittees investigating the accounting profession that had questioned the accounting profession’s credibility after the disclosure in the early 1970’s of widespread corporate payoffs and questionable payments.

“BASIS FOR BEING ENCOURAGED”

At a gathering announcing the report, Harold M. Williams, chairman of the S.E.C., said the report indicated that substantial progress had been made since last September to make the S.E.C. “supportive of allowing the process additional time to develop.” He said that there was “a sufficient basis for being encouraged” and that there was no reason to believe that self-regulation would not work in the accounting industry.
He said the commission had “a number of reservations, doubts and concerns” about the accounting profession’s response to criticism, but that he believed “we’re still basically on a constructive course.”

The report, which took five months to prepare deals with the independence of outside auditors’ regulations and oversight of the profession and with the process of setting accounting standards.

The report was prepared for House Commerce Committee Subcommittee on Oversight and Investigation and the Subcommittee on Reports, Accounting and Management of the Senate Government Operations Committee. Both bodies had questioned the accounting profession’s credibility after the disclosure in the early 1970’s of widespread corporate payoffs and questionable payments.

[From the Washington Post, July 6, 1978]

ACCOUNTING FIRMS LAUNDED, WARNED

(By Nancy L. Ross)

The Securities and Exchange Commission yesterday patted the accounting industry on the back with one hand while holding a regulatory gun to its head with the other.

Chairman Harold M. Williams said the industry had made enough progress toward self-regulation during the past 10 months that legislation was not necessary at this time. However, he warned that “if the profession’s initiative is not successful, a legislative alternative may well be required.”

The SEC would leave control in the hands of the American Institute of Certified Public Accountants, a trade organization. The AICPA recently formed an “SEC Practice Section”, or self policing entity, which Williams singled out as “the primary basis for the commission’s conclusion that there is promise for successful voluntary self-regulation.”

An AICPA spokesman said yesterday the organization was “very pleased” by the SEC recommendations. At Senate hearings last year the industry appeared divided on the issue of government regulation. Walter E. Hanson, senior partner of Peat, Marwick, Mitchell & Co., testified against it, while John C. Biegler, senior partner at Price Waterhouse & Co., third largest, proposed that all accountants with publicly owned clients should come under the supervision of the SEC.

The role and responsibility of accountants has come under public scrutiny and criticism in recent years as the result of major business failures and scandals involving bribes or questionable payments. Fortune magazine for example, reports that Peat, Marwick, Mitchell & Co., the nation’s largest accounting firm, has lost a significant number of clients because of its role in auditing the books of Penn Central, National Student Marketing, Republic National Life Insurance and Stirling Homex. It also mentions a “barrage of suits” against accountants, including a $30 million negligence judgment against Touche Ross, eighth largest of the Big Eight firms.

Moreover, as competition grows among these and other companies, many accountants have branched out into other services like tax preparation and management consulting, feasibility studies and financial forecasting. This has led not only to charges of conflict of interest, but in some cases to sloppy accounting work due to time pressures, according to the Cohen Commission, a blue ribbon panel that studied accountants 18 month ago.

Earlier this year Rep. John Moss (D-Cal.), chairman of the House Subcommittee on Oversight and Investigations, declared that the American public was “painfully aware” of illegal payments and slush funds that were “artfully concealed under the rubric of ‘generally accepted accounting principles’.”

Last month he introduced a bill to create an independent self-regulatory body for the accounting industry on the model of the non-government National Association of Securities Dealers which oversees the over-the-counter market.

Yesterday Moss called the SEC decision “wholly unsupported and even contradicted by the report’s critical findings. It makes the SEC appear to be completely confused and disoriented,” he said. He cited a June 2 letter from Williams in which the chairman wrote that the profession’s self-regulatory program “now stands perilously close to being reduced to a self-serving effort conducted behind closed doors.”
In its 14-pound report to Congress, the SEC stressed the needs for professional independence, active oversight and standard accounting procedures. The single most important aspects of AICPA's self-regulatory program is peer review possibly firm-on-firm review. Also under study are the questions of disciplinary action against firms by the SEC, public access to the results of the peer review program, and the extent to which it could perform outside the United States.

The SEC recommends the formation of audit committees by public companies. Composed of independent directors, they are intended to provide a buffer between management and outside auditors.

Chairman Williams was asked at a press conference if these and other measures would prevent or detect an Equity Funding situation at an early age. (Equity Funding boosted the price of its stock by programming its computer to show non-existent life insurance policies.) Williams replied that it wouldn't necessarily act as an early warning system, but added, "We can't conclude from an audit failure that self-regulation won't work."

Williams declined to set any deadlines for accomplishing the proposed reforms. But he said the AICPA is aiming at completing a full cycle of peer reviews within three years.

[From the Wall Street Journal, 7/6/78]

ACCOUNTANTS' SELF-REGULATORY EFFORTS GET SEC PRAISE, BUT FURTHER STEPS ARE URGED

(By Charles N. Stabler, Staff Reporter of the Wall Street Journal)

WASHINGTON—The Securities and Exchange Commission gave the accounting profession two cheers for its efforts toward tightening self-regulation but warned that much more remains to be done.

The evaluation came in a 1,300-page report to Congress on the profession and on SEC's oversight role in setting accounting and auditing standards. The study was prompted by congressional hearings that highlighted widespread dissatisfaction with the auditors' track record on ferreting out corporate fraud, illegal acts and questionable payments.

The SEC said it wasn't "wholly satisfied with the profession's efforts at self-regulation and it is too early to assess whether those efforts will prove effective over the long run." On the basis of developments toward reform in the past year, however, the agency said it "believes the profession's initiatives show sufficient promise to be permitted to continue to evolve."

The commission said it hasn't concluded, "at the present time, that comprehensive direct government regulation would be a superior means of ensuring that accountants discharge their professional responsibilities."

The auditing profession has been under fire since the mid-1970s, following the unexpected failure of some large corporations and the disclosure of questionable accounting practices by others. Recently, Rep. John E. Moss, D. Calif., a persistent critic of the auditors, introduced legislation to bring the profession under control of a quasi-governmental body patterned on the National Association of Securities Dealers.

"GOOD BEGINNING

While the massive SEC report didn't support such legislation, it was made clear in a news conference by Harold M. Williams, SEC chairman, and Clarence Sampson, the agency's acting chief accountant, that the accountants' feet still are being held to the fire. The profession, said Mr. Williams, has "made a good beginning but a lot remains to be achieved, achieved over a very short future."

One specific key areas singled out by the report involves a quality control system called "peer review" that is being developed by the American Institute of Certified Public Accountants, the auditors professional association. Under peer review, a firm that has SEC-registered corporations as clients would have to undergo a periodic examination by outside auditors.

They would probe the firm's control systems and performance and report the results to an outside watchdog body named the Public Oversight Board. This is a new, five-member unit, headed by John McCloy, which is supposed to monitor the effectiveness of the self-regulatory program of the SEC practice section of the accountants' institute.
WILLIAMS’ CONCERN

The SEC said, “The single most important element in the institute’s self-regulatory initiative is the proposed peer review program.” But it indicated it has serious doubts about how the program is being shaped and warned that a failure in this area “would compel the commission to withdraw its support for the profession’s program.”

In a letter to Mr. McCloy, dated June 2, which is one of many exhibits in the report, Mr. Williams spelled out the commission’s concern in strong language. The peer review program, he said, “now stands perilously close to being reduced to a self-serving effort behind closed doors.” And he warned that the status of the program as of May 25 made the possibility of withdrawal of commission support “a very real one.”

Subsequently, the exhibits show, Mr. McCloy wrote Mr. Williams attempting to reassure him that the accountants “are trying sincerely . . . to develop a peer review program which will be efficient and at the same time provide independence and objectivity.” Specific revisions of the proposed peer review program will be submitted to the executive committee of the institute’s SEC practice section this month, Mr. McCloy said.

One specific area where the SEC wants changes involves the publication of the recommendations for improvements in a firm’s systems by a reviewing team. The current plan is to keep this confidential, but the SEC said this would hurt the credibility of the process.

Commenting on this, Donald J. Schneeman, general counsel of the institute, said it should be sufficient to disclose the recommendations to the Public Oversight Board, “the representatives of the public.”

The report also gives a high priority to the establishment of audit committees of corporate boards of directors, composed of directors who aren’t employees of the company and who are otherwise independent.

Mr. Schneeman and other representatives of the profession endorsed the report’s findings that they should be given more time to restructure their self-regulatory program. For example, Walter E. Hanson, chairman of Peat, Marwick, Mitchell & Co. and of the institute’s SEC practice, said: “We are extremely pleased with the SEC’s overall support for our self-regulatory program and are mindful of their areas of concern. With additional time, I am sure we can prove the strength of our program.”

However, Rep. Moss said the conclusion of the SEC “is wholly unsupported and contradicted by the findings” of the report. Describing the SEC as “confused and disoriented,” he said he would consider holding hearings on the report.

The continuing weaknesses in control described by the report, he said, “underscore the need for federal legislation.”

[From the New York Times, July 6, 1978]

FULL SEC ACCOUNTING REPORT OUT

(By Judith Miller, Special for the New York Times)

WASHINGTON, July 5—The Securities and Exchange Commission urged Congress today not to impose direct Government regulations on the accounting profession at this time. Instead, the agency recommended that auditors be permitted to continue their efforts towards self-regulation, accompanied by active commission oversight.

The S.E.C. recommendation, the gist of which was announced last week is the major conclusion contained in a 1,300-page report to Congress—the first of its kind—on the accounting profession’s attempts to devise a system to govern itself and on the commission’s oversight role. Release of the full report had been delayed by printing problems over the long holiday weekend.

While the report lauded the profession’s progress to date, the agency was critical of several key initiatives in the auditors’ self-regulatory scheme. The commission warned the industry that unless corrective steps were taken to allay its concerns, the S.E.C. or the Congress would be forced to require changes.

The report received a cool reception in the Senate, and a hostile response from Representative John E. Moss, Democrat of California, and chairman of the
Subcommittee on Oversight and Investigations, which oversees accounting matters.

REP. MOSS SEES CONTRADICTIONS

Mr. Moss said the report's conclusion that auditors' progress toward self-regulation has been sufficient to warrant continuation of their efforts "is wholly unsupported and even contradicted" by the report's critical findings.

The conclusions of the "three-volume, three-pound study" are so at odds with the study's own critique and previous commission statements, "it makes the S.E.C. appear to be completely confused and disoriented," Mr. Moss said.

Meanwhile, the report was warmly received by industry representatives. Walter E. Hanson, chairman of Peat, Marwick, Mitchell & Co., and chairman of the American Institute of Certified Public Accounts' S.E.C. Practice Section, the key component in the self-regulation scheme, said he was "extremely pleased" with the S.E.C.'s "overall support for our self-regulatory progress, and are mindful of their areas of concern."

"With additional time, I am sure we can prove the strength of our program," Mr. Hanson said.

MOST COMPREHENSIVE SURVEY TO DATE

While the report contained few surprises, it constituted the most comprehensive survey to date of the accounting profession's yearlong effort to create a self-regulatory mechanism that would allay Congressional and public anxiety over auditor's competence and integrity.

Serious questions about both were raised in the early 1970's by the unexpected failure of several large corporations and the disclosure of widespread corporate political payoffs, bribes and other questionable payments.

The disclosures touched off hearings in the House and Senate, and a long Senate report last November listing a series of recommendations was unanimously approved by the Subcommittee on Reports Accounting and Management.

REGULATION LEGISLATION INTRODUCED

Recently, Representative Moss introduced legislation to create a self-regulatory organization for accountants patterned after the National Association of Securities Dealers, the self-regulatory organization for the over-the-counter securities markets.

The report evaluates, and in large part, praises, the industry's response to mounting criticism. The Institute of Certified Public Accountants established a division of accountants who practice before the S.E.C.—the so-called Practice Section—and a public board was created to monitor those accountants performance.

AGENCY WARNINGS

The agency warns, however, that the structure and operations of the Practice Section, which it terms the "primary basis for the commission's conclusion that there is promise for successful voluntary self-regulation," contain "serious limitations."

Specifically, the S.E.C. chides the Public Oversight Board, which monitors accountants' performance, because it does not have any direct authority over the activities of the Practice Section.

"If the Section is not responsive to the Board's recommendations, the commission will be forced to conclude that the self-regulatory effort should be modified or terminated," the study warns.

PEER REVIEW SYSTEM QUESTIONED

The commission also expresses reservations about the fact that membership in the Practice Section is voluntary, rather than mandatory, and cautions that the group's disciplinary mechanism and sanctioning powers are still untested.

In addition, the study raises serious questions about the planned peer review system. It states the commission favors a system that is comprehensive, available to the public and unbiased. Failure to develop such a regular examination and evaluation system "would compel the Commission to withdraw its support for the profession's program," the report warns.
The report sheds little light on two highly controversial topics in the industry: management consulting frequently done by accounting firms, and accountant liability for auditing mistakes.

A recent Senate report on accounting recommended that accountants should be liable for negligent mistakes, but the S.E.C. report did not address this issue. As for the question of whether management consulting adversely affects an auditor's independence from the company whose books and records the firm audits, the S.E.C. report stated only that the Public Oversight Board planned hearings on that question this summer and that the "Board should be given an opportunity to add its views to the deliberative process."

DISCLOSURE OF NONAUDITING SERVICES

Last month, the commission adopted a rule requiring disclosure of the kinds of nonauditing services auditors render, the percentage relationship of the fees for the nonaudit services to the audit fee, and whether the audit committee, or board of directors, has approved all services provided by the auditors, giving appropriate consideration to the impact of those services on auditor independence.

Senator Thomas F. Eagleton, Democrat of Missouri, who now heads the subcommittee chaired by the late Senator Lee Metcalf, could not be reached for comment on the report.

Representative Moss, who will not run again for office, directed his staff to review the report and "consider the possible need for holding hearings" on the study.

EXHIBIT E

SECURITIES AND EXCHANGE COMMISSION

OPEN MEETING AGENDA, WEDNESDAY, JULY 26, 1978, 10 A.M.

1. Item: Re-entry application of Carrol P. Teig.
   Office: Division of Enforcement.
   Staff: Michael F. Perlis, David P. Tennant.

2. Item: Proposed release requesting comments on lost and stolen securities program and related matters.
   Office: Division of Market Regulation.
   Staff: Gregory C. Yadley.

3. Item: Proposed amendments to uniform net capital rule, rule 15c3-1, concerning transactions in municipal securities.
   Office: Division of Market Regulation.
   Staff: James G. Moody.

4. Item: Submission of proposed bylaw changes by the Securities Investor Protection Corporation.
   Office: Division of Market Regulation.
   Staff: Linda Kurjan.

5. Item: Proposed release requesting comments on amendments to management remuneration disclosure provisions.
   Staff: Richard H. Rowe, Mary E. T. Beach, Francis T. Vincent, J. Rowland Cook, Joseph G. Connolly, Jr.

6. Item: Proposed adoption of amendment to regulations S-K, the uniform disclosure regulation.
   Office: Division of Corporation Finance.
   Staff: Richard H. Rowe, Mary E. T. Beach, J. Rowland Cook, Steven J. Pagglioli.

7. Item: Proposed release requesting comments on present annual report form, form 10-K, and revised format suggested by Advisory Committee on Corporate Disclosure.
   Office: Division of Corporation Finance.

8. Item: Proposed extension of comment period concerning amendments to the uniform system of accounts for mutual and subsidiary service companies.
   Office: Division of Corporate Regulation.
   Staff: Leon C. Rubin, Robert P. Wason.
**Commission Consideration of Temporary Approval, Pursuant to Section 11A(a) (8)(B), of Consolidated Quotation Association Joint Plan to Implement Rule 11Ac1-1**

This item, previously scheduled for Commission consideration at today's open meeting, has been postponed to the emergency open meeting scheduled for 10:00 a.m. tomorrow, Thursday, July 27. The postponement was necessitated in order to afford the staff sufficient time to review the joint plan which was only recently filed by the participating self-regulatory organizations. In addition, the Commission will also consider at tomorrow's meeting whether to grant requests for exemption from certain provisions of Rule 11Ac1-1 submitted by Intermountain, Spokane, Cincinnati, and Philadelphia Stock Exchanges.

The Commission regrets any inconvenience caused by this scheduling change.

**Item No. 1: Re-entry Application of Carrol P. Teig**

By Order of the Commission dated September 17, 1976, Mr. Teig was barred from association with any broker or dealer with the provision that, after four months, he could apply to the Commission to become again so associated in a non-proprietary, non-supervisory capacity.

The Commission will consider an application for re-entry filed concerning Mr. Teig, for permission to become associated with a broker-dealer.

For further information, contact Michael F. Perlis at (202) 755-1650.

**Item No. 2: Lost and Stolen Securities Program**

The Commission will consider whether to issue a release soliciting comments on various aspects of its pilot Lost and Stolen Securities Program. Section 17(f) (1) of the Securities Exchange Act, as amended, directed the Commission to adopt procedures for reporting securities thefts and losses and verifying securities which come into the possession of broker-dealers, banks, transfer agents, and clearing agencies. Rule 17f-1 (17 CFR 240.17f-1), promulgated thereunder, was published in its final, amended version on August 12, 1977 (42 FR 41022).

In order to facilitate the implementation of the rule and the Lost and Stolen Securities Program, the Commission determined to initiate the program on a pilot basis, through December 31, 1978. The Commission also determined to designate another person, as provided for by the Act, to receive and process reports and inquiries concerning missing, lost, stolen, or counterfeit securities on behalf of the Commission. The Securities Information Center, Inc. ("SIC") was designated for purposes of the pilot program after analysis of plans submitted by interested persons. The pilot year of the program and SIC's term of designation will expire on December 31, 1978. The Commission will consider whether to solicit public comment at this time on the various provisions of Rule 17f-1 and the operation of the Lost and Stolen Securities Program.

Issues that might arise during the Commission discussion include whether to request comment on: the operation of the program to date; the appropriateness of the Commission's redesignation of SIC; the classes of financial institutions subject to Rule 17f-1 and the type of securities covered by the rule; the role of the Federal Reserve Banks and SIC in receiving amounts and inquiries on U.S. Government and Agency securities; the fee structure and schedule of fees for operation of the program; the design and continued operation of the processing system by SIC or another designee; and the date by which comments must be received.

For further information, contact Gregory C. Yadley at (202) 775-8129.

**Item No. 3: Uniform Net Capital Rule; Municipal Securities**

The Commission will consider whether to authorize concurrent issuance of two releases dealing with the uniform net capital rule (17 CFR 240.15c3-1). The first release would propose, and request comments on, certain changes to presently-effective temporary amendments to the uniform net capital rule with respect to specific receivables and undue concentration deductions relating to transactions in municipal securities. The second release would extend the applicability of the temporary amendments, which are due to expire on August 1, 1978, until January 1, 1979.

Rule 15c3-1 generally requires that good faith deposits arising in connection with an underwriting, and outstanding longer than eleven business days, be deducted from net worth. In addition, profits derived from participation in an underwriting syndicate are treated as unsecured receivables which, pursuant to
Rule 15c3–1, are also dedicated from net worth. Under the temporary amendments to Rule 15c3–1, broker-dealers are permitted to include in net worth, for ninety (90) days after settlement of an underwriting with the issuer, good faith deposits and receivables arising from participation in municipal securities underwritings. The Commission will consider whether to propose reducing the ninety (90) days after settlement of an underwriting with the issuer, good faith good faith deposits in net worth. The reduced time period would be consistent with the requirements of the Municipal Securities Rulemaking Board.

Under the temporary amendments to Rule 15c3–1, municipal securities are exempt from the undue concentration provisions of Rule 15c8–1 which generally require that a broker-dealer take a deduction from net worth equal to half the applicable “haircut” (required deduction of a specified percentage of market value) against long or short positions in the securities of an issuer of a single class or series, the market value of which positions exceed ten percent of tentative net capital.

For further information, contact Nelson S. Kibler at (202) 376–8131 or Jim Moody at (202) 376–8126.

Item No. 4: Proposed SIPC Bylaw Changes

The Commission will consider revisions to the bylaws of the Securities Investor Protection Corporation ("SIPC"), which SIPC adopted and submitted to the Commission pursuant to Sections 3(b)(3) and 3(e)(1) of the recently amended Securities Investor Protection Act of 1970 ("SIPC Act"). The proposed bylaw changes will take effect July 31, 1978, unless the Commission disapproves them.

Among those bylaws which were changed, SIPC has deleted assessment requirements based on gross revenues. In addition, SIPC has proposed an assessment of $25 per year upon each member, starting in 1979. Further, SIPC has shortened the official explanatory statement which members may use in their advertisements.

SIPC has also proposed two new bylaws. One delegates to the Chairman of SIPC authority to initiate, or discontinue, a direct payment procedure pursuant to Section 10 of the amended SIPC Act. The other provides for indemnification of SIPC's directors, officers and employees in accordance with the standard set forth in Section 3(b)(3)(B) of the SIPC Act.

Issues which might arise during the Commission discussion include: possible revisions of the proposed indemnification provision, and the possibility of inviting SIPC to comment on a change to the indemnification provision which would require the question of indemnification to be referred to independent counsel in any case when a quorum of disinterested directors is not available to consider the question.

For further information, contact Linda Kurjan at (202) 376–7470.

Item No. 5: Management Remuneration

The Commission will consider whether to propose amendments to the disclosure requirements relating to management remuneration. The proposed amendments would revise Item 4 of Regulation S–K which governs the disclosures required in certain registration statements, periodic reports and proxy and information statements filed under the 1933 and 1934 Acts.1

The Commission's action in considering proposed amendments is based on several factors: First, management remuneration packages have become more diverse and complex over recent years, and the disclosure practices in many Commission filings results in certain forms of remuneration being excluded from the table and disclosed, instead, in footnotes or text following the table. Since the same forms of remuneration may be disclosed differently, there is concern that revised disclosure requirements are necessary to promote investor understanding and consistency of disclosure. Also, at the recent Corporate Governance Hearings, certain witnesses urged that shareholders be afforded more complete information concerning their company's management, including its remuneration.

Another basis for the Commission's consideration of this subject relates to 2 recent releases on the subject of management perquisites. The first, Release No. 33–5856 (August 18, 1977), stated the Commission's view that the existing

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1 At the July 26th meeting, the Commission is also considering the adoption of Item 4 of Regulation S–K, which would integrate into Regulation S–K (the Commission's uniform disclosure regulation) the existing disclosure requirements concerning management remuneration as they appear in the present proxy rules.
disclosure provisions require registrants to include perquisites in aggregate remuneration; the second, Release No. 33-5904 (February 6, 1978), set forth staff views in question-and-answer form concerning the disclosure of perquisites. The application of these releases during the 1978 proxy season indicated that certain fundamental issues relating to the disclosure of perquisites could be the subject of a rule; these include: (i) the basis for valuing a perquisite; (ii) whether separate disclosure of perquisites should be required; and (iii) how to deal with expenses when it is unclear whether they are personal rather than business related.

The proposed amendments require that the remuneration table reflect all remuneration received by individual members of management during a fiscal year. Accordingly, the proposed amendments would require inclusion in the table of all amounts actually received as remuneration during the fiscal year by specified persons, as well as all amounts expended or otherwise accrued for financial reporting purposes by the registrant or its subsidiaries, during the fiscal year, for the account of such persons. This approach generally would require inclusion in the remuneration table of all amounts relating to salaries, bonuses, commissions, pensions, or retirement plans, stock options, including stock appreciation rights, insurance, perquisites and performance plans.

Among the other issues which may arise during the course of the Commission's discussion are the following:

1. Whether to propose revisions to change the present requirement that remuneration data be furnished, on an individual, named basis, as to each director of the issuer and each of the three highest paid officers of the issuer whose aggregate direct remuneration exceeded $40,000;
2. Whether personal benefits in the nature of perquisites may be excluded from the table under specified conditions;
3. Whether personal benefits should be valued based on the registrant's incremental costs;
4. Whether to raise the issue of requiring additional disclosures of (i) the total cost of maintaining any corporate facility or equipment used by management for personal purposes; and (ii) the total cost of maintaining the office of the chief executive, without proposing rules for comment at this time.

Since the Commission hopes to be in a position to adopt any amendments on this subject in time to apply them to the 1979 proxy season, the release, if approved will request that comments be received by September 29, 1978.

For further information, contact Rowland Cook at (202) 755-1750.

**Item No. 6: Uniform and Integrated Reporting Requirements, Management Background, Remuneration, Legal Proceedings, and Security Ownership of Certain Beneficial Owners and Management**

The Commission will consider whether to adopt four new items of Regulation S-K, the uniform disclosure regulation. Regulation S-K is intended to improve, simplify, and integrate the disclosure process by standardizing the disclosure which is required by various reports, registration forms, and schedules pertaining to the same category of information into one uniform regulation, thereby eliminating immaterial differences among disclosure documents. The four items which will be considered set forth uniform instructions for disclosure of information regarding Directors and Executive Officers, Management Remuneration and Transactions, Legal Proceedings, and Security Ownership of Certain Beneficial Owners and Management. Registration Forms S-1, S-11, and 10, Annual Report Form 10-K, and Proxy Statement Instructions in Schedule 14A would be amended so as to reference the uniform Regulation S-K Items.

The substance of these amendments was originally proposed in Securities Act Release No. 5758 (November 2, 1976), and generally the amendments do not impose new disclosure requirements except in the following respects:

1. The time period for which certain material events in the background of executive officers and directors (e.g., bankruptcy petitions or criminal proceedings) must be described is reduced from ten to five years.
2. Injunctions prohibiting any director or executive officer from engaging in any type of business practice, injunctions and consent decrees prohibiting future violations of federal or state securities laws, and private civil actions in which any such person was found to have violated any federal or state securities laws are specified as litigation which must be disclosed unless the registrant establishes that such information is not material to an evaluation of such person's ability and integrity.
Another issue which may arise during the course of the Commission discussion is whether the Commission should require disclosure of all directorships held by each nominee or incumbent director in any public company, as previously proposed in Securities Act Release No. 5758.

Further further information contact Steve Paggioli at (202) 376-8090.

**Item Number 7: Revised Form 10-K**

The Committee will consider whether to issue a concept release soliciting comment on issues related to Form 10-K disclosure. The Report of the Advisory Committee on Corporate Disclosure, published November 3, 1977, recommended in Chapter XV the adoption of a revised Form 10-K which would differ from the existing Form 10-K in format, approach, and content. (The Form 10-K is the annual report form required to be filed by most publicly owned companies).

In Section 9, “Reporting Requirements under the Exchange Act,” of Securities Act Release No. 5906 (February 15, 1978), “Preliminary Response of the Commission to the Recommendations of the Advisory Committee on Corporate Disclosure,” the Commission indicated that the Division of Corporate Finance would act upon this recommendation by preparing a release requesting comments upon both the existing Form 10-K and the Advisory Committee's Form 10-K. The Division is not at this time recommending that any specific revisions of Form 10-K be proposed for comment, but rather intends to develop specific proposals upon review of comments received in response to the release.

The most significant new features of the Advisory Committee’s Form 10-K are: (1) a five-part format designed to group data in order that the user can turn directly to the information which interests him; (2) an approach which gives management more discretion to determine what risks and particular characteristics of the business should be discussed; (3) the encouragement of disclosure of forward-looking information; and (4) a revised version of “Management’s Discussion and Analysis of the Summary of Operations.”

The release which the Commission will consider is a detailed version of a “concept release.” In Section 2, “The Commission’s Rulemaking and Monitoring Practices”, of the above-mentioned Release, No. 5906, the Commission indicated that it hopes to improve the operation of the concept release approach by posing specific questions. ... It also would attempt to help commentators focus on specific issues by describing the particular changes recommended by the Advisory Committee and by asking a series of questions requesting comments on these features.

For further information, contact William Carter at (202) 376-8090.

**Attachment: The Advisory Committee’s Form 10-K.**

**FORM 10-K RECOMMENDED BY THE ADVISORY COMMITTEE ON CORPORATE DISCLOSURE**

Note: Instructions only appear where necessary to explain modifications proposed and are not inclusive of all instructions in the revised form. A number of existing instructions would be carried over into the new form.

**PART I: FACT SHEET**

**Item 1. Capsule Financial Data**

(a) Present in comparative columnar form the following financial data for the registrant and its subsidiaries (if any) consolidated for each of the last five fiscal years of the registrant (or for the life of the registrant and its predecessors if less): Net sales, income from continuing operations, income, working capital, cash flow, total assets, total indebtedness, and shareholders' equity.

(b) Present in tabular form for at least the two most recent fiscal years any operating statistics called for by appropriate Industry Guide(s).

**Item 2. Products and Services**

Present a list of all business segments identifying principal classes of products and services within each segment. For each reportable industry and geographic segment state for the registrant's last five fiscal years the approximate amount of percentage of (i) total sales and revenues, (ii) income (or loss) before income taxes and extraordinary items, and (iii) identifiable assets attributable to each industry segment.
Instruction: Definitions of “reportable business segments,” "principal classes of products and services," "identifiable assets" etc. would be included. The definitions set forth in Appendix A “Definitions and Guidelines for Compliance with Industry and Homogeneous Geographic Segment Reporting Requirements" to the Commission's Release on Segment Reporting (Securities Act Release No. 5826) would provide an appropriate reference.1

Item 3. Market for the Registrant's Securities
(a) State the approximate number of holders of record as of the end of the period for which the report is filed and the number of shares outstanding of each class of equity securities of the registrant and the average weekly trading volume during the previous fiscal year.
(b) Furnish the following information, as of the most recent practicable date, with respect to any person (including any “group" as that term is used in Section 13(d) (3) of the Securities Exchange Act of 1934) who is known to the registrant to be the beneficial owner of more than five percent of any class of the registrant's voting securities: (i) the title of class of securities owned, (ii) name of owner, (iii) the total number of shares beneficially owned, and (iv) the percent of class so owned. Of the number of shares owned, indicate by footnote or otherwise, the amount known to be shares with respect to which such listed beneficial owner has the right to acquire beneficial ownership, as specified in Rule 13d--3 (d) (1) under the Exchange Act.

Item 4. Properties
If applicable, identify by appropriate unit or class of units manufactured the registrant's productive capacity by segment and the extent of utilization thereof.

Instruction: The location and general character of the principal plants, mines, and other materially important physical properties of the registrant or its subsidiaries shall be filed as an exhibit to this report. A list of all subsidiaries should also be filed.

Item 5. Pending Legal Proceedings
Briefly describe any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject. Include the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought. Include similar information as to any such proceedings known to be contemplated by governmental authorities.

Instruction: Registrants are encouraged to incorporate by reference any discussion of legal proceedings appearing in the footnotes to the financial statements; however, that discussion should be supplemented by any information required by the item but not appearing in the information incorporated by reference.

Item 6. Executive Officers and Directors of the Registrant
(a) List the names and ages of all executive officers and directors of the registrant who did not hold their current office with the registrant prior to the beginning of the period reported.
(b) Give a brief account of the business experience during the past five years of each executive officer named in (a) including his principal occupations and employment during the most recent five year period and the name and principal business of any corporation or other organization in which such occupations and employment were carried on.
(c) List the names and positions held of all officers and directors who terminated their employment with the registrant during the previous year.

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1 The proposals contained in Release No. 33--5826 were adopted in a modified form in Securities Act Release No. 5895. (December 23, 1977) 42 FR 65194. Under Release No. 38--5848, the revenue, profit and asset information relating to each of the registrant's industry segments for which such information is presented in the financial statements is also required to be furnished in response to the Description of Business Item of Form 10--K. Accordingly, the definitions set forth in Appendix A of Release No. 33--5826 were not expressly incorporated into the disclosure requirements of Form 10--K and appropriate conforming modifications would be necessary to the above instruction.
PART II

Item 7. Information Concerning Special Risks or Uncertainties

Describe by business segment those factors, if any, which cause investment in the company securities to be high risk or highly speculative in nature. Examples of appropriate factors which might be discussed include the absence of an operating history of the registrant, an absence of profitable operations in recent periods, the financial condition of the registrant (including recent adverse changes therein), lack of management experience and the speculative nature of the business in which the registrant is engaged or proposes to engage.

Item 8. Information Concerning Special or Distinctive Features of the Registrant’s Operations or Industry

Describe by business segment those distinctive or special characteristics of the registrant’s operations or industry which may have a material impact upon the registrant’s future financial performance. Examples of factors which might be discussed include dependence on one or a few major customers or suppliers (including suppliers of the materials or financing), existing or probably governmental regulation, expiration of material labor contracts or patents, trademarks, licenses, franchises, concessions or royalty agreements, unusual competitive conditions in industry, cyclicity of the industry and anticipated raw material or energy shortages to the extent management may not be able to secure a continuing source of supply.

Instruction: This paragraph is intended to provide the investor with background information about the industry and company environment in which he or she has invested to the extent that information is distinctive or unique to either the industry or the company.

PART III

Item 9. Management Analysis of the Financial Statements and Forward Looking Information

Provide an analysis for each business segment of the reported financial statements which (1) will enable investors to understand and evaluate material periodic changes in the various items of the reported financial statements, and (2) will enable investors to relate the reported financial statements to assessments of the amounts, timing and uncertainties of future cash flows for the reporting entity.

Instruction: 1. The analysis of material periodic changes (a) should explain material increases or decreases in discretionary items such as research and development costs, advertising expenses, and maintenance and repair expenses, and (b) should break down variances into components, such as the amounts by which changes in prices and changes in volume resulted in a material change in sales.

2. The analysis should focus on facts and contingencies known to management which would cause reported financial statements to be not indicative of future operating results or of future financial condition. This would include description and amounts of (a) matters which will have an impact on future operations or financial condition and have not had an impact in the past, and (b) matters which have had an impact on reported financial statements and are not expected to have an impact upon future operations or financial condition.

The form and content of disclosures pursuant to this item will necessarily vary among registrants and will change from period to period for the same registrant as circumstances change. In general, the disclosures should be similar to that which the chief executive officer might prepare for the board of directors of a company. Both quantitative analysis and narrative discussions are important.

3. Voluntary disclosures or projections of future economic performance and of future financial condition, and voluntary disclosure of . . . Since management's projections, and plans and objectives will inevitably reflect some amount of management's biases, it would be desirable to disclose the major assumptions which were made in developing such projections, and plans and objectives; however, disclosure of assumption is not required in conjunction with voluntary disclosure of projections or of management's plans and objectives.

4. Registrants are encouraged, but not required, to furnish for each business segment a description of planned capital expenditures and financing for (1) the current fiscal year and (2) the succeeding four year period. If this information
is furnished, it would be desirable to disclose the amounts related to environmental control facilities and the expected effects upon production capacity, and to furnish an analysis of differences for the most recent fiscal year between previously disclosed budgets and actual capital expenditures.

PART IV: PART II OF CURRENT FORM 10-K

PART V: FINANCIAL STATEMENTS

Senator Chiles. We will adjourn our hearings now.
[Whereupon, at 12:55 p.m., the hearing was adjourned.]
[Additional material supplied for the record follows:]

PREPARED STATEMENT OF MICHAEL PERTSCHUK, CHAIRMAN, FTC

Mr. Chairman, members of the Subcommittee, I welcome this opportunity to discuss the Federal Trade Commission's experience with the Government in the Sunshine Act. The Commission has implemented this important law in a manner which we believe complies fully with its letter and spirit, and which has not imposed too many logistical burdens on the agency. After giving a brief overview of the Commission's experience under the Act, I will be happy to answer specific questions about our Sunshine procedures with the assistance of the Commission's General Counsel, Mr. Michael Sohn, who is with me today.

Before I begin that discussion, I want to confirm the FTC's strong commitment to openness. Openness in government produces better policymaking and more effectiveness accountability, and we therefore encourage as much public scrutiny of FTC activities as is feasible. Our general policy of openness goes beyond adherence to the requirements of the Sunshine Act. For example, as a general rule as Chairman I do not participate in any non-government meetings—at the Commission or elsewhere—that are closed to the public.

In addition, the Commission makes a special effort to publicize specific regulatory proposals to a wide range of interested citizens and to solicit their views; it has adopted a rule limiting outside communications with Commissioners concerning a pending Magnuson-Moss rulemaking proceeding; it has adopted a rule to facilitate public comment on consent orders before they become final; and it has initiated several programs aimed at informing the public on an ongoing basis of FTC activities. I'll return to these efforts to increase openness after discussing the Sunshine Act and its direct impact on the Commission.

Our overall experience with the Sunshine Act has been positive. In 1977, approximately one third of our meetings were entirely open to the public, and another 20 percent were open in part. The largest category of open meetings concerned procedural and substantive rules. Since rulemaking is currently about the most controversial activity of the Commission, it is especially important that we discuss, shape, and explain our rules in public meetings. For example, the Commission decided in open session to propose the issuance and terms of trade regulation rules governing proprietary vocational and home study schools, ophthalmic goods and services, business opportunity ventures, and, most recently, advertising directed at children. Major questions related to the Commission's procedural rules of practice—for example, rules controlling discovery and protection of confidential business information or the appearance of former employees before the agency—have also been taken up in open meetings.

The Commission also holds Monthly Policy Reviews, where we review the full range of Commission plans and programs in given substantive areas such as food and nutrition. Review of broad policy criteria and rulemaking plans takes place in the open; investigative and prosecutorial matters are then discussed at a separate closed session.

Open meetings can be significant to the public, of course, only to the extent that the discussions are comprehensible, that the media can cover them adequately and that the public is effectively given the chance to attend.

The Commission is particularly concerned that its open meeting discussions be understandable and meaningful to members of the public. For that reason, we have tried to cut down on the use of technical terms unfamiliar to the public. In addition, we added a specific provision to our rules of practice to make background material relating to each matter available to the public before the meet-

2 Parts IV and V would remain substantially the same as in the current Form 10-K.
ing, in the Commission's Public Reference Room a day before the meeting, and outside the meeting room an hour before an open meeting begins.\*\*1

This material may consist of a summary, staff or Commission memos, excerpts from them, or other explanatory materials. Where a proposed rule is to be discussed, the text of the proposal is usually available. At the recent meeting to discuss the children's advertising rulemaking, the materials released beforehand included the staff's proposals and report to the Commission, a synopsis of that report, statements by the Commissioners and relevant correspondence. Because those materials were quite voluminous, they were released substantially in advance of the meeting to enable observers to digest them in order to comprehend the Commission's deliberations.

We have also recently amended our rules to make public the minutes of all open Commission meetings.\*\*2

As for press coverage and other observation of our meetings, the Commission's specific guidelines for use of cameras and recording equipment by the media and by members of the public are well publicized and are set out in our annual Sunshine report. Those guidelines permit the freest possible coverage and observation of Commission open meetings without causing undue disruption.

Finally, the Commission uses four methods to notify the public about its meetings, both open and closed. Meeting notices are posted outside the Commission's Public Reference Room and the Commissioner's Conference Room. They are submitted for publication in the Federal Register, except for meetings closed under the streamlined procedures permitted by section (d) (4) of the Sunshine Act. Meeting information is also listed in the Commission's Weekly Calendar, which is mailed to all persons on the Commission's general mailing list. Finally, to ensure that the most current information can be easily obtained, meeting information is available from a recorded telephone message which is updated as changes occur.

I have one additional comment about the Sunshine Act's requirement that notices be published in the Federal Register. As we have noted in prior correspondence with the Subcommittee, the Commission doubts the practical utility of this requirement. Substantial costs are involved—the rate is $95.00 per column. This cost may not be justified because, first, there is an unavoidable time lag between the scheduling of a meeting and the actual appearance of the notice in the Federal Register, during which the information may change. In addition, it is not clear how many members of the public read the Federal Register regularly—many people may find it simpler to call the phone recording.

I would like to turn now to closed Commission meetings. Most of these meetings were closed because they involved discussions of law enforcement actions or of the initiation or conduct of agency adjudications, and thus fell squarely under exemption 7 (A) or exemption 10 of the Sunshine Act. Our statistics reflect that these two exemptions correlate especially closely with the Commission's day-to-day law enforcement and quasi-judicial activities; in 1977, only 12 of the 162 items considered at closed meetings fell under exemptions other than (or in addition to) 7 (A) and 10.

The Commission has continued to use a system of written circulations and notation voting to dispose of the great volume of routine decisions it must make. It has always been the right of any Commissioner to place any matter on the agenda for discussion at a meeting, so that notation voting has never been a tool to avoid airing Commissioners' differences. Under the Sunshine Act, the entire Commission votes, after receiving advice from the General Counsel, whether a meeting should be open or closed. This change has not chilled our willingness to consider a matter at a meeting rather than by circulation. A comparison of the amount of business conducted by written circulation during four-week periods before and after Sunshine shows about a six percent decrease in the number of matters handled by written circulation. I cannot be certain how representative that four week period is, but it seems to show that there has been no significant change in the way the Commission has handled decisionmaking in the Sunshine.

The votes on many types of matters before the Commission, whether conducted by written circulation or at a meeting, are made public and are available in our Public Reference Room. These include votes on final orders, acceptance of consent agreements, issuance of complaints, closing of investigations, acceptance or rejection of compliance reports, initiation of rulemaking, issuance of final rules, and numerous other matters. And, of course, reports of the votes on certain "Sunshine"


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decisions, such as whether and under what exemptions to close a meeting, are
required to be and are made public, whether arrived at through written circula-
tion or at a meeting.

The Sunshine Act has imposed some costs on the Commission, in the form of
new paperwork—motion forms, meeting notices, and background material—as
well as stenographic services, audio equipment, and the like. But these costs are,
in our view, undoubtedly justified by the public benefits they produce. Although
the nature of much of our law enforcement work has dictated that many of our
meetings be closed, I believe that the Sunshine Act has greatly opened up our
court of the public's business.

Mr. Chairman, our interest in promoting the maximum public scrutiny of FTC
activities goes beyond insuring that Commission meetings are open under the
Sunshine requirements. In areas not covered by Sunshine, we have attempted to
eliminate appearances of "closedness."

For example, the Commission has adopted several important measures to guard
against inappropriate outside communications with Commissioners, to provide for
the maximum public input into Commission decisionmaking, and to keep the
public informed about Commission activities.

a pending Magnuson-Moss trade regulation rule proceeding. If such a communica-
tions, by any person not employed by the Commission, with any Commissioner
or any member of a Commissioner's personal staff, with respect to the merits of
a pending Magnuson-Moss trade regulation rule proceeding. If such a communica-
tion does occur, it must be placed on the public record. This limitation on outside
contacts was established as a matter of policy to insure that the Commission's
extensive comment procedures are not frustrated and to prevent the appearance
of special access.

In November of last year, the Commission adapted a rule governing com-
munications, by any person not employed by the Commission, with any Com-
missioner or any member of a Commissioner's personal staff, with respect to the
merits of a pending Magnuson-Moss trade regulation rule proceeding. If such a communication does occur, it must be placed on the public record. This limitation on outside contacts was established as a matter of policy to insure that the Commission's extensive comment procedures are not frustrated and to prevent the appearance of special access.

In addition, we make a special effort to see that interested members of the
public know about proposed Commission actions and have a chance to present
their views. When the Commission issues a notice of proposed rulemaking, it does
not rely solely on the Federal Register to make the announcement and call for
comment. The staff compiles a list of individuals and groups who are likely to
be concerned about the subject involved, and mails to them special notices and
invitations to comment. We believe that as a result our rules benefit from the
broadest possible range of opinion and information.

Moreover, when a proposed consent order has been submitted in connection
with a matter under investigation or adjudication, the Commission does not
accept or reject the proposal until the public has had a sixty-day period in which
to comment. We are experimenting with making available, in addition, an
explanation of the order and the relief sought, related material submitted to the
Commission by the investigated party (to the extent it would not be exempt
under the Freedom of Information Act), and other information which might
help interested persons to understand the proposed order and identify issues
which may raise controversy.

The Commission has in recent months also injected new life into its efforts
to reach out to consumers and interested persons on an ongoing basis to let them
know what the FTC is doing and how our programs affect them. Since February
of this year, the Bureau of Consumer Protection has been sending out, approxi-
mately once a week, a "fact sheet" with information about FTC rulemaking
proceedings, complaints issued, and other activities. This newsletter is sent to
over five hundred consumer groups, consumer activists, consumer press organiza-
tions, and "public interest" groups who may not have regular access to the trade
publications that cover our activities for industry groups. We are also holding a
series of workshops for particular interest groups with whom the Commission
has not had a great deal of direct contact in the past, including small business
representatives, women in business, and the Hispanic community. To allow access
by citizens who do not have national organizations or resources to maintain a

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3 16 C.F.R. §§ 2.32, 2.35, 3.25(d) and 3.25(f).
Washington "presence," we have made it a practice of setting aside time during periodic visits to the Commission's ten regional offices for open meetings with representatives of citizens' organizations. We explore with them their concerns and views as to Commission activities. Such meetings, which have been lively, vigorous—and occasionally painful—have been held in Cleveland, Seattle, San Francisco, Los Angeles, Boston, Denver, Atlanta, and Chicago.

Finally, the publications we prepare and distribute to educate consumers about their rights and remedies under the laws the FTC administers are now being updated and revamped. These pamphlets cover subjects such as "Warranties: There Ought to be a Law," "The Equal Credit Opportunity Act and Women," "What Truth in Lending Means to You," and the new Fair Debt Collection Practices Act. There are currently 47 titles in all, including 6 Spanish versions. Over a million of these pamphlets were distributed in fiscal 1977, and even more are being requested by members of the public this fiscal year.

In my role as Chairman, I am committed to openness as a condition of my own participation in meetings with groups and individuals outside the government. Members of the public or press observed the meetings I have had with the Grocery Manufacturers of America, the Association of National Advertisers, the American Advertisers Federation, the Sugar Association, various cereal manufacturers and toy manufacturers, and representatives of the Consumer Federation of America, the Hispanic community, the elderly, and Action for Children's Television.

By holding meetings like these in the open, I hope to guarantee that no particular interest group has—or appears to have—special access, and that the integrity of decisionmaking will not be cast in doubt.

As a general rule, I will attend closed meetings with nongovernment persons only when certain criteria are met. The participants must represent a diversity of interests, the discussion must not involve pending Commission matters, comparable information or opportunities for exchange of views must not be otherwise readily available, and it must be clear that the character of the meeting would be detrimentally affected by the presence of the public or press. In addition, I will take steps to assure public awareness of those few meetings which are closed: a written justification for closing the meeting will be prepared, the meeting's purpose and the persons attending will be announced publicly in advance, and any agenda or discussion schedule will be made publicly available. If the members of the Subcommittee have any comments on this approach, or suggestions as to other methods of handling these situations, I would welcome them.

I have also set restrictions on my meetings with individual private parties. First, I am trying to insure that during my tenure as Chairman I achieve a balance in the amount of time spent with representatives of various interests. Our records show approximately equal numbers of meetings, for example, with public interest and industry representatives. Each day a schedule of my meetings for the day is posted publicly at the Commission's press office. In addition, I generally do not meet at all with a private party unless he or she indicates in writing the nature of the meeting sought and the reasons for it. If the meeting is to involve a matter under investigation by the Commission, I will usually refer it to a member of my staff. When I do meet with someone, the responsible staff members will be present.

In sum, at the FTC we are very conscious of the need to expose our work to public scrutiny. I am therefore determined to see that the Commission complies with the mandates of the Sunshine Act in every particular, and carries out the spirit of that law through the practices and programs I have described.

Thank you, Mr. Chairman. I will be glad to answer any questions.
Not all meetings held by these agencies were listed in the Register, since expedited meetings held under 5 USC 552b(d)(4) did not have to be reported.

Difficulties were encountered in compiling the number of meetings and their status because the reporting agencies failed to use a standard format not only to report meetings, but also to report cancellations and agenda alterations. These reporting practices, more fully described below, made it impossible to tabulate the exact number of meetings held and the status of those meetings. Since the agencies possess more exact information than that provided in the notices they submitted to the Register, it is likely that the statistics and status designations in the attached table will differ somewhat from the information that will be provided by the reporting agencies.

**NUMBER OF MEETINGS HELD**

Tabulating difficulties arose when a notice in the Federal Register left vague whether one or more meetings were being held on a single day, or over a period of days. For example, some notices stated that open and/or closed meetings were being held, but failed to specify the number of meetings. One or more items that were to be considered were often listed by hour or hours in the morning and/or afternoon, and they were designated as either open or closed to the general public. In those instances, the number of meetings could be tabulated either by the number of hours cited, the half day or the full day. For this report, they were tabulated by the half day, so that two meetings were tabulated if there were sessions in the morning and the afternoon, but only one meeting was tabulated if there was only a morning or afternoon session, regardless of the number of hours cited.

However, when an agency clearly stated in the notice that one meeting was being held, only one meeting was tabulated even if it lasted all day. Similarly, if an agency noted that a meeting would be carried over to the following day, only one meeting was tabulated unless the second's day session extended to more than half a day. If it did, then two meetings were tabulated.

Obviously, a comparison of the number of meetings held by the various agencies is difficult, if not impossible, under the above circumstances, since some agencies listed several meetings on a given day while others listed only one meeting to cover an entire day's activities. Meaningful comparisons about the number of meetings held can be made only if the different agencies use the same criteria in determining what constitutes a meeting.

A second problem encountered in tabulating meetings resulted from the lack of adequate information given in cancellation notices reported in the Register. In order to properly adjust the tabulated figures, it was necessary to know if the cancelled meeting was open, closed or partially open/closed. However, when the cancellation notice failed to give the day the original notice had appeared or the status of the meeting, it was too time consuming to go back over the Register to find the original notice in order to delete the appropriately designated meeting from the tabulation. In such cases, the cancellation was ignored. However, since such cancellations were infrequent, the figures are not significantly affected.

A final difficulty arose when an agency tentatively scheduled a meeting, noting that it would be cancelled if an agenda was not prepared by the time the meeting was to convene. It was not always clear whether or not the meeting was held. Here again, because of the infrequency of this practice, these meetings were not tabulated.

**DESIGNATION OF THE STATUS OF MEETINGS (OPEN, CLOSED OR PARTIALLY OPEN/CLOSED)**

Notices in the Federal Register designate Sunshine Act meetings as either open, closed or partially open/closed. Open meetings are those that the general public can observe, while closed meetings are those from which it is excluded. Meetings designated “partially open/closed” are those in which only a portion of the meeting is open to the public. Open or closed portions could either be at the beginning, the middle or the last part of the meeting.

The status of all the meetings tabulated in this report could not be determined with 100 percent accuracy from the notices in the Register. First, although an agency reported in the Register that one of its meetings was open, under 5 USC 552b(d)(4) it could nonetheless close all or part of that meeting if it had the authority to close a majority of its meetings under 5 USC 552(b)(c)(4)(8)(9A) or (10) or any combination thereof. Under provision (d)(4), Occupational Safety and Health Review Commission, which listed 37 open meetings in the Register.
closed 31 of those meetings without ever submitting a change of status notice to the Register. OSHRC did note the following after each meeting notice, however: "This meeting is subject to being closed by a vote of the Commissioners taken at the beginning of the meeting." It is likely that other agencies also changed the status of a meeting without reporting it in the Register.

Insufficient information in notices reporting the cancellation or addition of specific items to be considered at a previously scheduled meeting can also cause an inaccurate status designation. For example, the cancellation of an item from an agenda can result in changing a scheduled partially open/closed meeting into a completely open or closed meeting. Similarly, the addition of an item to an agenda can result in changing a scheduled completely open or closed meeting into a partially open/closed one. However, if the cancellation or addition notice fails to give the status of the meeting or the day the original notice appeared in the Register, it is too time consuming to go back over the Register in order to make the correct adjustment in the tabulation. In such cases, the notice of change was ignored. Since it also occurred infrequently, however, the figures have been affected only marginally.

Finally, because of the method used to resolve the question of how many meetings should be tabulated when a notice was vague about the number that were being held on a particular day, it is probable that some meetings an agency might tabulate as completely open or closed will appear in this report as partially open/closed. This is most likely to occur in those instances in which half day sessions were tabulated in this report as only one meeting, but which the reporting agency might tabulate as more than one meeting.

INFORMATION PROVIDED ABOUT PARTIALLY OR COMPLETELY CLOSED MEETINGS

In requiring federal agencies to submit notices to the Federal Register, the Sunshine Act makes only a general reference to "the subject matter of a meeting ...” [5 USC 552b(e) (3)]. As a result, agencies have considerable latitude regarding the amount of information they provide about the subject matter, and this information varies greatly. Some agencies provide a brief description about the subject matter, while others cite only a general subject heading, i.e., personnel, enforcement, market surveillance, etc. In a few instances, agencies fail to provide any information about the subject matter of a meeting.

Some agencies also cite the exemptive provision authorizing them to close all or part of a meeting, although they are not required to do so in their notices to the Register. It should be noted, however, that some of the agencies that did not cite any provision for closing a meeting provided more information about the subject matter in their notices than did some of the agencies that cited such a provision.

No law review articles have been written on the implementation and operation of the Sunshine Act. To supplement the articles sent with the last report, we are enclosing two additional articles: Sunshine—the Administrative Process: Wherein lies the Shade, which appeared in the Summer 1976 edition of the Administrative Law Review, and Government in the Sunshine: Opening Federal Agency Meetings, which appeared in the Fall 1976 edition of the American University Law Review.

SUMMARY OF ACCOMPANYING TABLES

1. 48 agencies held a total of 2,177 Sunshine meetings between March 24, 1977, and March 31, 1978 (Table 1):
   a. 1,049 meetings (48 percent) were completely open;
   b. 1,128 meetings (52 percent) were completely or partially closed: (1) 726 meetings (33 percent) were completely closed and (2) 402 meetings (19 percent) were partially closed.
2. 36 out of 48 agencies held completely or partially closed meetings (Tables 1 and 2):
   a. 15 agencies completely or partially closed 75 percent to 100 percent of their meetings;
   b. 6 agencies completely or partially closed 50 percent to 74 percent of their meetings;
   c. 9 agencies completely or partially closed 25 percent to 49 percent of their meetings;
   d. 6 agencies completely or partially closed 5 percent to 24 percent of their meetings;
e. 12 agencies held only open meetings (10 of these agencies held an average of 5.4 meetings, 1 held 23 meetings and 1 held 40.

3. Relative exemptive provisions [5 USC 552b(c) (1) through (10)] were cited in 375 (33 percent) of the 1,128 notices of partially or completely closed meetings (agencies are not required to cite the exemptive provision in the Federal Register) (Table 1):
   a. 16 of the 36 agencies holding completely or partially closed meetings cited an exemptive provision (Tables 1 & 3).
   b. Provision 10 (civil action or formal agency adjudication) was cited 190 times; provisions 8 (regulation of financial institutions) and 9A (premature disclosure/financial speculation) were each cited 120 times; provision 4 (trade secrets) was cited 106 times; provisions 9A and 9B (premature disclosure/frustrate implementation) combined were cited 198 times; (SEC cited provisions 4, 8, 9A and 10 93 times each) (Tables 1 & 4).
   c. Least frequently cited provisions included: 7, cited once; 5, cited twice; 3 cited five times; and 7, cited six times (Tables 1 & 4).
   d. Provisions listed by the largest number of agencies included: 10, listed by 11 agencies; 9B, listed by 7 agencies; and 2 (internal personnel rules), and 6 (personal privacy), each listed by 6 agencies (Tables 1 & 4).

4. In the period September 12, 1977, through March 31, 1978, of the 1,174 Sunshine meeting notices in the Federal Register, 193 (16 percent) appeared after the meeting had been held:
   a. 95 notices were sent to the Register after the meeting had been held, and 98 were sent before, but appeared after it was held (Table 5).
   b. 24 agencies sent in late notices; one sent them in late 52 percent of the time, another 42 percent, a third 37 percent and a fourth and fifth 30 percent of the time (Table 6).
### TABLE 1.—NUMBER AND STATUS OF SUNSHINE MEETINGS

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<th>Agency</th>
<th>Open</th>
<th>Closed</th>
<th>Partially Closed</th>
<th>Partially Open/Closed</th>
<th>Total Meetings</th>
<th>Number</th>
<th>Percent</th>
<th>Open</th>
<th>Closed</th>
<th>Percent</th>
<th>Open</th>
<th>Partially Closed</th>
<th>Exemptive provisions cited to close a meeting or portion thereof</th>
<th>Number of occasions provision cited</th>
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Mar. 24, 1977–Sept. 9, 1977


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<td></td>
<td>NSB:</td>
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<td>(b)</td>
<td>2</td>
</tr>
<tr>
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<td>2</td>
<td>(c)</td>
<td>2</td>
</tr>
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<td>(d)</td>
<td>4</td>
</tr>
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<td>NTSB:</td>
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</tr>
<tr>
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</tr>
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<td>(9)</td>
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</tr>
<tr>
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<td>(10)</td>
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<tr>
<td>(9b)</td>
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<td></td>
</tr>
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<td>NSB:</td>
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<td></td>
</tr>
<tr>
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<td>(9b)</td>
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<tr>
<td>(10)</td>
<td>3</td>
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</table>

1 Indian Claims Commission.
2 Interstate Commerce Commission.
### TABLE 4.—TIMES EXEMPTIVE PROVISIONS CITED TO CLOSE MEETINGS

<table>
<thead>
<tr>
<th>Provision</th>
<th>Times cited</th>
<th>Agency citing provision</th>
</tr>
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<tbody>
<tr>
<td>5 U.S.C. 552 b:</td>
<td></td>
<td></td>
</tr>
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<td>CFTC/EEOC/FRB.</td>
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<td>CFTC/NRC.</td>
</tr>
<tr>
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<td>21</td>
<td>CAB/FDIC/ICC/I/NRC/PRC/USITC.</td>
</tr>
<tr>
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<td>NRC/USPS.</td>
</tr>
<tr>
<td>(ii)</td>
<td>2</td>
<td>CAB.</td>
</tr>
<tr>
<td>(i)</td>
<td>106</td>
<td>FDIC/NB/NRC/SEC.</td>
</tr>
<tr>
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<td>NRC/USITC.</td>
</tr>
<tr>
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<td>62</td>
<td>FDIC/ICC/I/NRC/USITC/USPC.</td>
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</tr>
<tr>
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</tr>
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</tr>
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<td>NRC/USITC.</td>
</tr>
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<td>FDIC/SEC.</td>
</tr>
<tr>
<td>(ii)</td>
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</tr>
<tr>
<td>(ii)</td>
<td>190</td>
<td>CAB/EEOC/FDIC/ICC/I/NTSB/NRC/PRC/SEC/USITC/USPC.</td>
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</table>

1 Interstate Commerce Commission.

### TABLE 5.—NUMBER OF LATE NOTICES, BY AGENCY (SEPT. 12, 1977 TO MAR. 31, 1978)

<table>
<thead>
<tr>
<th>Agency</th>
<th>Notice filed after meeting</th>
<th>Notice appeared after meeting</th>
<th>Notice appeared on day of meeting</th>
</tr>
</thead>
<tbody>
<tr>
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<td>Open/ closed</td>
</tr>
<tr>
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<td>7</td>
<td>17</td>
</tr>
<tr>
<td>CFTC</td>
<td>7</td>
<td>2</td>
<td>9</td>
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<td>CPSC</td>
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</tr>
<tr>
<td>EEOC</td>
<td>4</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>FCC</td>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>FERC</td>
<td>5</td>
<td>1</td>
<td>6</td>
</tr>
<tr>
<td>FHLBB</td>
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</tr>
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<td>FLMC</td>
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<td>3</td>
<td>6</td>
</tr>
<tr>
<td>FPC</td>
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<td>1</td>
<td>3</td>
</tr>
<tr>
<td>FRS</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>FTC</td>
<td>1</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>ICC</td>
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</tr>
<tr>
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<td>2</td>
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<tr>
<td>NTSB</td>
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</tr>
<tr>
<td>USCCR</td>
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</tr>
<tr>
<td>USITC</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

Total: 36 48 11 95 35 21 5 61 22 7 8 37 193

1 Notice appeared in the Federal Register published the same day as the meeting.
2 8 dealt with telephone conferences.
3 Interstate Commerce Commission.

### TABLE 6.—PERCENT OF LATE NOTICES, BY SELECTED AGENCY, SEPT. 12, 1977 TO MAR. 31, 1978

<table>
<thead>
<tr>
<th>Agency</th>
<th>Total meetings</th>
<th>Number late</th>
<th>Percent</th>
</tr>
</thead>
<tbody>
<tr>
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<td>14</td>
<td>37</td>
</tr>
<tr>
<td>CPSC</td>
<td>40</td>
<td>12</td>
<td>30</td>
</tr>
<tr>
<td>FDIC</td>
<td>47</td>
<td>14</td>
<td>30</td>
</tr>
<tr>
<td>NRC</td>
<td>110</td>
<td>15</td>
<td>14</td>
</tr>
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<td>CFTC</td>
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</tr>
<tr>
<td>SEC</td>
<td>103</td>
<td>12</td>
<td>12</td>
</tr>
</tbody>
</table>

1 8 of these notices dealt with telephone conferences.
# APPENDIX A

**AGENCIES INCLUDED IN THIS STUDY**

1. Civil Aeronautics Board (CAB)
2. Commission on Federal Paperwork (CFP)
3. Commodity Credit Corporation (CCC, USDA)
4. Commodity Futures Trading Commission (CFTC)
6. Copyright Royalty Tribunal (CRT)
7. Council on Environmental Quality (CEQ)
10. Federal Deposit Insurance Corporation (FDIC)
11. Federal Elections Commission (FEC)
12. Federal Energy Regulatory Commission (FERC)
13. Federal Home Loan Bank Board (FHLLBB)
14. Federal Home Loan Mortgage Corporation (FHLMC)
15. Federal Maritime Commission (FMC)
17. Federal Reserve Board, Board of Governors (FRB)
18. Federal Trade Commission (FTC)
19. Harry S. Truman Scholarship Foundation (HSTSF)
20. Indian Claims Commission (ICC)
21. Inter-American Foundation (IAF)
22. Interstate Commerce Commission (ICC)
23. Mississippi River Commission (MRC)
24. National Commission on Electronic Fund Transfers (NCEFT)
25. National Commission on Libraries and Information Service (NCLIS)
27. National Labor Relations Board (NLRB)
28. National Mediation Board (NMB)
29. National Museum Services Board (NMSB)
30. National Railroad Passenger Corporation (NPC)
31. National Science Board (NSB)
32. National Transportation Safety Board (NTSB)
33. Nuclear Regulatory Commission (NRC)
34. Occupational Safety and Health Review Commission (OSHRC)
35. Overseas Private Investment Corporation (OPIC)
36. Postal Rate Commission (PRC)
37. Railroad Retirement Board (RRB)
38. Renegotiation Board (RB)
40. Tennessee Valley Authority (TVA)
41. Uniformed Services University of the Health Sciences (USUHS)
42. United States Civil Service Commission (USCSC)
43. United States Commission on Civil Rights (USCCR)
44. United States Foreign Claims Settlement Commission (USFCSC)
45. United States International Trade Commission (USITC)
46. United States Parole Service (USPS)
47. United States Postal Service (USPS)
48. United States Railway Association (USRA)

# APPENDIX B

**PERTINENT SUNSHINE ACT PROVISIONS**

Under 5 USC 552b(c), unless the agencies find that the public interest requires otherwise, meetings may be closed if they relate to one of the following exempt categories:

1. national security matters that are specifically authorized and properly classified;
2. internal personnel rules and practices;
3. matters specifically exempted from disclosure by statute;
(4) trade secrets and commercial or financial information obtained from a person and privileged or confidential;
(5) formal censure and accusation of a crime;
(6) clearly unwarranted invasion of personal privacy;
(7) law enforcement investigatory records or information;
(8) information contained in or related to reports used by agencies responsible for the regulation or supervision of financial institutions;
(9) information the premature disclosure of which would: (a) lead to financial speculation or significantly endanger the stability of any financial institution; or (b) significantly frustrate implementation of a proposed agency action; or
(10) issuance of a subpoena; participation in a civil action or proceeding; or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication made on the record.

Under 5 USC 552b(d)(4) an agency that is authorized to close a majority of its meetings under exemption (4), (8), (9A), or (10), can close a meeting at any time and need not submit a notice to the Federal Register.

Under 5 USC 552b(e)(3), agencies are required to submit to the Federal Register for publication “notice of the time, place, and subject matter of a meeting, whether the meeting is open or closed, any change in one of the proceeding, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting.” (Subsection (d)(4) exempts some agencies from this provision.)
Mr. James L. Kelley  
Acting General Counsel  
United States Nuclear Regulatory Commission  
Washington, D. C. 20555

Dear Mr. Kelley:

This responds to your July 1, 1977 letter requesting my view on a question of interpretation of the Government and Sunshine Act that you recently considered.

Your inquiry asks whether a session of a quorum of the Commission, which otherwise meets the definition of a "meeting", under the Sunshine Act (5 U.S.C. § 552b(a)(2)), remains a meeting although it is convened at the request of a Senator and is held at the Senator's office. You previously read the statutory language to encompass such a meeting.

I agree with your construction. In my opinion, your construction fits both the letter and spirit of the Sunshine Act. Moreover, a contrary construction would have the anomalous effect of avoiding application of the Sunshine Act's procedural and substantive provisions whenever a majority of the Commission is invited to a Senator's office and requested that the Commissioners conduct agency business at the office. This "loophole" would be large and unrestricted. I do not believe the Congress intended any such result.

Very truly yours,

BARBARA ALLEN BABCOCK  
Assistant Attorney General