

FEDERAL ELECTION COMMISSION

11 CFR Parts 2 and 3

(Notice 1985-111)

Sunshine Act Regulations Scope and Definitions; Meetings

AGENCY: Federal Election Commission.

ACTION: Final rule.

SUMMARY: The Federal Election Commission has revised its regulations implementing the Government in the Sunshine Act, 5 U.S.C. 552b. The revisions are based on the Commission's experience in working with the Sunshine Act and on public comments received in response to the two Notices of Proposed Rulemaking published by the Commission. The revisions consolidate the Sunshine Act regulations into 11 CFR Part 2 and reserve 11 CFR Part 3 for future use. The amended rules also provide a more complete statement of exemptions from the open meeting requirement and clarify the procedures for closing meetings. Finally, the revised regulations provide new procedures for processing requests for transcripts or electronic recordings of closed meetings when the exemptions no longer apply. Further information on these revisions is provided in the supplementary information which follows.

EFFECTIVE DATE: October 31, 1985.

FOR FURTHER INFORMATION CONTACT: Ms. Susan E. Propper, Assistant General Counsel, 1325 K Street, NW., Washington, D.C. 20463, (202) 823-4143 or (800) 424-8530.

SUPPLEMENTARY INFORMATION: On December 19, 1984 the Commission published a Notice of Proposed Rulemaking to revise the Sunshine Act regulations at 11 CFR Parts 2 and 3. 49 FR 49306. Ten comments were received in response to the Notice. Several of the comments suggested that the Commission hold a hearing regarding the proposed rules. The Commission redrafted portions of the proposed rules based on the public comments and the Commission's public discussion of the regulations. The Commission published a Second Notice of Proposed Rulemaking on March 13, 1985 to solicit additional public comment. 50 FR 10086. The Second Notice also announced that a public hearing would be held on April 24, 1985 and invited requests to testify. The hearing was subsequently cancelled because no requests to testify were received. One comment was received in response to the Second Notice.

Having considered the comments made on both versions of the proposed rules, the Commission is now publishing

the final rules together with a statement explaining their basis and purpose in accordance with the Administrative Procedure Act, 5 U.S.C. 553(c). The final rules are the same as the draft rules published in the Second Notice except that 11 CFR 2.6(b)(2) has been modified to indicate that transcripts will be made available to the public through the Commission's Public Records Office. In addition, a statutory reference in 11 CFR 2.8(d) has been clarified.

Basis and Purpose of the Sunshine Act Regulations, 11 CFR Part 2

The rules implementing the Government in the Sunshine Act have been substantially revised and reorganized. The Sunshine Act regulations in 11 CFR Parts 2 and 3 have been consolidated into Part 2, and Part 3 have been set aside for future use. This is intended to remove any confusion regarding the relationship between these two Parts.

Section 2.1 Scope.

A technical amendment has been made in § 2.1 to make clear that 11 CFR Part 2 implements Section 3 of the Government in the Sunshine Act.

Section 2.2 Definitions.

This section consolidates the definitions currently in 11 CFR 2.2, 2.3, 2.4 and 2.8. Paragraph 2.2(a) generally follows current § 2.2. Paragraph 2.2(b) generally follows current § 2.3, but a technical amendment has been made to correct the statutory citation. The definition of "person" in § 2.2(c) generally follows current § 2.4, but has been slightly revised to specifically include employees of the Commission. This change is intended to clarify that Commission employees may invoke the procedures of new § 2.5(a) if appropriate.

The definition of meeting in § 2.2(d) is based on current § 2.8, but has been significantly revised and reorganized. Paragraph (d)(1) clarifies that "joint conduct of official Commission business" does not include situations in which a quorum is physically present but is not conducting agency business as a body. This is intended to exclude situations where, for example, a member of the Commission gives a speech concerning agency business while other members are present in the audience. This example is taken from the legislative history of the Sunshine Act, H.R. Rep. No. 94-880, 94th Cong., 2d Sess. 8 (1976), S. Rep. No. 94-384, 94th Cong., 1st Sess. 18 (1975).

Paragraph (d)(2) explains that the term "meeting" does not include the process of notation voting by circulated

memorandum for the purpose of expediting consideration of routine matters. One comment suggested that the exclusion of notation voting is not consistent with the spirit of the Sunshine Act. The Commission notes that the practice of notation voting is provided for in the legislative history, and has been specifically approved by the U.S. Court of Appeals for the D.C. Circuit, H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 11 (1976); *Common Cause v. Nuclear Regulatory Commission*, 674 F.2d 821, 835 n. 42 (D.C. Cir. 1982); *Committee to Elect Lyndon La Rouché v. Federal Election Commission*, 613 F.2d 834, 847 n. 22 (D.C. Cir. 1979), cert. denied, 444 U.S. 1074 (1980); *Communications System Inc. v. Federal Communications Commission*, 595 F.2d 787, 800 (D.C. Cir. 1978).

Section 2.3 General Rules.

Paragraphs 2.3(a) and (b) generally follow current § 3.1. Paragraph 2.3(c) has been added to explain that Commission meetings are not part of the formal or informal record of decision of the matters discussed therein. Statements made by Commissioners or FEC employees at meetings are not intended to represent final determinations or beliefs and should not be construed as such. Paragraph (c) represents a continuation of past policy in this area.

Paragraph 2.3(d) has been added to provide a statement of Commission policy and practice regarding the use of electronic recording devices by members of the public attending Commission meetings. In response to several comments made on the first version of this provision, it was reworded to clarify that the use of cameras and large electronic recording equipment requires advance notice to and coordination with the Press Officer. One comment expressed concern as to the lack of a policy statement or standards as to how advance notice and coordination with the Press Officer will work. Advance notice and coordination is necessary because there are limitations on the space available to accommodate the media and because there are limitations on the electrical circuits in the Commission's meeting room. This requirement also gives sufficient notice to the Commission as to the type of coverage that can be expected. It is not meant to restrict press access to Commission meetings. When the space limitations of the Commission's meeting room do not permit all members of the press to be accommodated, the Press Officer will try to work out a voluntary pooling arrangement. This is a continuation of

the Commission's past policy of openness and access. Pooling arrangements have worked well informally in the past, and the space available for the Press can be expected to improve once the Commission moves to new, larger quarters. Hence, formal guidelines for the Press Officer are unnecessary and could prove to be overly restrictive.

Section 2.4 Exempted Meetings

This section substantially revises and reorganizes current § 3.2. Section 2.4 provides a more complete list of matters that may be considered in closed Commission meetings, and reorders the exemptions to conform to their placement in the Sunshine Act. The revision also clarifies the distinction between meetings required to be closed by statutes other than the Sunshine Act, and meetings which may be closed under one of the "discretionary" exemptions available under the Sunshine Act. This distinction is significant because the Commission may waive the discretionary exemptions and open up a discussion, whereas the Commission may not waive a statutory requirement of confidentiality. The exemption claimed also affects the manner in which transcripts or tapes of the discussion will be released once the matter loses its exemption. See 11 CFR 2.6(h). However, the type of exemption does not affect the procedures to be used to close the matter to the public, as set out in 11 CFR 2.5.

Paragraph 2.4(a) exempts from public disclosure matters specifically required by statute to be closed. This includes the Federal Election Campaign Act of 1971, as amended ("FECA"), 2 U.S.C. 431 *et seq.* as well as other statutes which may compel closure. The FECA exemption is set out in § 2.4(a)(1). Under 2 U.S.C. 437g(a)(12), the Commission is required to maintain confidentiality for any notification or investigation that a violation of the FECA has occurred. Therefore, the Commission must close discussions of enforcement matters. Paragraph 2.4(a)(2) explains the scope of the FECA exemption. It follows the definition of "notification or investigation" in current § 3.2(a)(2) by including section 437g determinations, issuance of subpoenas, discussions of referrals to the Department of Justice, and any other matters related to the Commission's enforcement activity under 11 CFR Part 111. For example, discussions of audit reports are covered by this exemption whenever they are likely to lead to a compliance action. However, following the format of the Sunshine Act, discussions regarding

civil actions and adjudications are covered by new paragraph § 2.4(b)(7).

In some situations, several exemptions permit closure of a meeting. For example, discussions of enforcement matters that are exempt from disclosure under the § 2.4(a) FECA exemption will also be exempt under § 2.4(b)(1) and (3) whenever there is mention of internal investigative techniques, such as audit thresholds. A waiver of confidentiality by a respondent would not necessarily eliminate the application of § 2.4(a). For example, the presence of other respondents in the case or ambiguity as to the extent of the waiver could require a continued claim of exemption under § 2.4(a). Even in cases where a waiver of confidentiality does appear to be complete, however, other exemptions may still compel closure.

The Commission received several comments that interpreted the first proposed draft of § 2.4(a) to mean that transcripts of enforcement matters would no longer be released. As it was never the intention of the Commission to change its policy of releasing transcripts, the language that created the misperception was deleted from the second draft of § 2.4(a), and from the final rule. Accordingly, transcripts of enforcement matters will continue to be made public on request once the investigation is closed and the matter is no longer entitled to exemption. See § 2.6(b)(3).

Paragraph 2.4(b) contains the remaining Sunshine exemptions that are pertinent to the Commission's activities. They have been reordered from the way they appear in current § 3.2(b) to conform to their placement in the Sunshine Act. In addition, one new exemption has been added and the scope of others has been clarified.

Paragraph 2.4(b)(1) generally follows current § 3.2(b)(1)(i) to exempt matters related solely to the Commission's internal personnel decisions and internal rules and practices. However, § 2.4(b)(1) has been supplemented by examples to make clear how the exemptions may be applied. The examples are based on the legislative history of the Sunshine Act, and recent judicial interpretations of the Freedom of Information Act, which contains an identical exemption. The legislative history of the Sunshine Act indicates that Congress intended judicial interpretations of the FOIA to apply to the Sunshine exemption. H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 15 (1976).

Paragraph (b)(1)(i) provides that the internal personnel rules exemption applies to discussions of materials prepared predominately for internal use

where disclosure would risk circumvention of Commission regulations. This is based on a recent decision in which the U.S. Court of Appeals for the D.C. Circuit held that an agency's training manual for law enforcement personnel was exempt from disclosure under FOIA because it would reveal internal investigatory techniques which, if generally known, would risk circumvention of agency regulations. *Crocker v. Bureau of Alcohol, Tobacco & Firearms*, 670 F.2d 1051, 1073 (D.C. Cir. 1981). The court relied on the intent of Congress to exempt from disclosure "operating rules, guidelines, and manuals of procedure for Government investigators. . . ." *Id.* at 1060, quoting H.R. Rep. No. 80-1497, 80th Cong., 2d Sess. 10 (1968). On the basis of this precedent, the U.S. District Court for the District of Columbia held that the FEC's "threshold requirements for substantial compliance [with the FECA] are exempt from disclosure under FOIA." *Fund for a Conservative Majority v. Federal Election Commission*, Civil Action No. 84-1342, slip op. at 8 (D.D.C. Feb. 28, 1985). The court reasoned that the thresholds for identifying potential audit subjects are predominately internal and disclosure "would enable unscrupulous political committees to tailor their reports to avoid being audited, and ignore statutory reporting requirements that are not central to the internal review procedures." *Id.* at 4-5.

Therefore, Commission discussions of the audit-triggering thresholds, or of any documents revealing the thresholds, or similar materials produced for staff use in enforcement of the FECA requirements are exempt from public disclosure under the Sunshine Act and 11 CFR 2.4(b)(1).

Paragraph 2.4(b)(1)(ii), following current § 3.2(b)(1)(i), explains that the internal personnel exemption does not apply to discussions or materials regarding employees' dealings with the public, such as personnel manuals or Commission directives setting forth job functions or procedures. This provision is taken from the legislative history. H.R. Rep. No. 94-880, 94th Cong., 2d Sess. 9 (1976).

Paragraph 2.4(b)(2) generally follows current § 3.2(b)(1)(iv) in restating the exemption provided by the Sunshine Act for financial or commercial information obtained from any person which is privileged or confidential.

Paragraph 2.4(b)(3) generally follows current § 3.2(b)(1)(ii), which contains the Sunshine exemption for matters involving formal proceedings against a specific person or formal censure of any person. The legislative history indicates

that this exemption covers discussions of crimes or misconduct before the agency. S. Rep. No. 94-354, 94th Cong., 1st Sess. 22 (1975). This exemption also applies generally whenever "opening to the public agency discussions 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." *Id.* This exemption could be invoked, for example, if the Commission wishes to consider a possible ethical violation by a former Commission employee who subsequently represents the subject of an investigation in which the former employee participated. As indicated by this example, there may be situations in which exemption (b)(3) can be invoked in addition to exemptions (b)(4) and (b)(5), concerning personal privacy and investigatory records.

Paragraph 2.4(b)(4) generally follows current § 3.2(b)(1)(iii) to provide an exemption for information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy. This exemption protects the privacy interests of both members of the public and Commission employees. Hence, it overlaps with the personnel exemption to cover a discussion of particular job descriptions and the upgrading of positions if the discussion is likely to involve an identifiable employee in that position.

Paragraph 2.4(b)(5) has been added to incorporate exemption 7 of the Sunshine Act regarding investigatory records compiled for law enforcement purposes where disclosure of these records would, for example, interfere with enforcement proceedings or disclose investigative techniques and procedures. See 5 U.S.C. 552(c)(7). The *Fund for a Conservative Majority* case, discussed above, focused on whether the corresponding FOIA exemption protects internal memoranda that applied the FEC's audit thresholds and review and referral policies in a particular investigation. *Fund for a Conservative Majority v. Federal Election Commission*, Civil Action No. 84-1342, slip op. at 6-8 (D.D.C. Feb. 28, 1985). The court held that the internal memoranda are protected by this exemption because they would reveal investigative techniques by showing which reporting requirements will be focused upon during the investigation. *Id.* Therefore, whenever a Commission discussion of a particular matter is likely to reveal thresholds or discuss their application,

the discussion may be closed to the public.

Paragraph 2.4(b)(6) generally follows current § 3.2(b)(1)(iv) to permit closure of meetings when the premature disclosure of information is likely to have a considerable adverse effect on the implementation of a proposed Commission action, so long as the Commission has not already disclosed the proposed action or is not required by law to disclose it prior to final action. For example, an adverse effect could be expected if discussions concerning contract negotiations were made public before final action was taken.

Paragraph 2.4(b)(7) follows Sunshine Act exemption 10 to permit closure of discussions concerning the Commission's participation in a civil action or proceeding, or an arbitration, or involving a determination on the record after opportunity for a hearing. Paragraph 2.4(b)(7) replaces the litigation and adjudication exemptions in current § 3.2(a)(2). This revision is intended to clarify that discussions of both defensive and offensive litigation are included in the exemption.

Paragraph 2.4(c) revises current § 3.2(b)(2) regarding the Commission's assessment of whether the public interest requires a meeting to be open. The new language more closely conforms to the statutory intent that a meeting must be open if the public interest so requires, regardless of whether it may be technically exempt from disclosure under one or more of the exemptions in § 2.4(b). However, considerations of public interest cannot be used to open meetings closed pursuant to § 2.4(a) because the FECA requires the Commission to maintain confidentiality with regard to enforcement activities.

Section 2.5 Procedure for Closing Meetings.

Paragraph 2.5(a) generally follows current § 3.3(a) except that a new sentence has been added to reflect Congressional intent that each portion of a closed meeting must qualify separately for an exemption and must be considered separately. H.R. Rep. No. 94-1441, 94th Cong., 2d Sess. 17 (1976).

With regard to the General Counsel's certification that the meeting may be closed, § 2.5(b) generally follows current § 3.3(e), except that the certification need not be provided before the meeting is held. This permits the certification to be prepared after the meeting is held in cases where time does not permit its preparation earlier. This paragraph also clarifies that the certification is made with respect to each item on the agenda rather than to the meeting as a whole.

Paragraph 2.5(c) prescribes procedures for voting to close a meeting. This provision restates current § 3.3, with several significant additions.

Paragraph (c)(1) follows current § 3.3(c) in stating that a meeting need not be held to consider closing a meeting. A sentence has been added to clarify that the vote may be taken by means of the Commission's notation vote procedures (presently set forth in FEC Directive No. 82). Paragraph (c)(1)(i) has been added to clarify that a separate vote must be taken for each particular matter to be considered in a closed meeting. However, paragraph (c)(1)(ii), following current § 3.3(b), permits a single vote to be taken if a particular item will be discussed at a series of meetings that are held within a thirty-day period. As the legislative history indicates, this provision releases the Commission from voting repeatedly on whether to close the same discussion which stretches over more than one meeting. S. Rep. No. 94-354, 94th Cong., 1st Sess. 27 (1975). Paragraph (c)(1)(iii) has been added to distinguish the practice of setting meeting dates from the procedures for voting to close particular agenda items. It clarifies that the voting procedures do not restrict the setting of meeting dates more than thirty days in advance.

Paragraph (c)(2) generally follows current § 3.3(c) regarding the recordation of the vote and the prohibition of proxies. The Sunshine Act prohibits a member of the Commission from voting by proxy for another Commissioner or from delegating his or her vote or decision-making authority to any other person such as a staff person. However, a Commissioner may authorize a staff person to sign the Commissioner's name on a circulation vote sheet provided that the Commissioner has given instructions regarding the matter being acted on and the staff member is acting in accordance with those instructions. See FEC Directive No. 82.

Paragraph (c)(3) has been added to provide a procedure under which a Commissioner may object to the discussion of a particular matter in open or closed session. Such an objection will be discussed in the next closed meeting.

Paragraph 2.5(d) generally follows the procedures in current § 3.3(d) regarding the public announcement of a closed meeting. A sentence has been added to paragraph (d)(1)(iii) to provide a simplified method for indicating Commission personnel who will be attending the closed meeting. Under Paragraph (d)(1)(iv), the Commission Secretary signs the public statement rather than "the Commissioner who

presided at the meeting." Although no signature is expressly required by the Sunshine Act, the signature of the Secretary is appropriate because the Secretary records the vote and prepares the statement. Under (d)(2), the original copy of the statement will be maintained by the Commission Secretary and a copy will be posted in the Public Records Office.

Paragraph 2.3(e) has been added to implement the provision of the Sunshine Act that grants members of the public an opportunity to request that a meeting be closed if their interests are directly affected by the discussion. Under paragraph (e) the request must be made in writing and must be directed to the Chairman of the Commission. The requester must specify the particular exemption(s) in § 2.4 that permit the discussion to be closed. Under § 2.3(e), the requester may rely on any of the § 2.4 exemptions, even though the Sunshine Act contemplates reliance on a more limited number of exemptions. A recorded vote on whether to close the meeting shall be taken. The request procedures do not give a person whose interests may be adversely affected by disclosure a right to compel closure. Rather, the Sunshine Act establishes these procedures to insure that agencies do not inadvertently overlook legitimate concerns of personal privacy and confidentiality. S. Rep. No. 94-354, 94th Cong., 1st Sess. 28 (1975). Thus, the request procedures do not grant any additional rights to participate in Commission proceedings, and the requester is not entitled to a hearing on the request.

Section 2.6 Transcripts and Recordings

Paragraph 2.6(a) generally follows current § 3.4(a) in providing that the Commission Secretary shall maintain transcripts or electronic recordings of closed meetings.

Paragraph 3.4(b), which permitted the Commission to maintain a detailed set of minutes in lieu of a complete transcript or electronic recording for certain closed meetings, has been deleted for several reasons. First, its application is limited to discussions of litigation and other matters exempted under 11 CFR 2.4(b)(7). Second, the minutes that would be kept are considerably more detailed than those currently prepared. Finally, the Commission routinely tapes discussions exempted under § 2.4(b)(7). The Commission has not made use of this provision in the past and is not likely to do so in the future. Deletion of this provision will have no effect on future Commission decisions to release any of the minutes it currently keeps.

New paragraph 2.6(b) has been added to more fully explain the Commission's procedures for releasing transcripts or recordings of closed meetings once the relevant exemptions no longer apply. This paragraph was the subject of considerable public comment and has been revised to clarify when and how transcripts or tapes are made public. Paragraph 2.6(b) provides two different sets of procedures for releasing transcripts or tapes, depending on the exemption claimed for a particular matter. The first set of procedures, set out in § 2.6(b)(1) and (2), applies to items for which one of the discretionary exemptions in § 2.4(b) was claimed. Under § 2.6(b)(1), the Commission will determine at the end of the closed meeting whether the exemption still applies. Under § 2.6(b)(2), if the exemption can no longer be claimed, the transcript or tape will be reviewed for remaining exemptions and thereafter made available to the public through the Commission's Public Records Office.

The other set of procedures, found in § 2.6(b)(3), applies to materials for which a § 2.4(a) exemption was claimed. The § 2.4(a) exemption covers matters that are required by statutes other than the Sunshine Act to be kept confidential. Since the Federal Election Campaign Act of 1971, as amended, is one such statute, enforcement actions will be subject to the § 2.6(b)(3) procedures. Thus, transcripts or tapes of these matters will be reviewed and made available on request when the relevant exemptions no longer apply. Several other Federal agencies have also chosen to review transcripts and release materials on request. The Commission has taken this approach because it would be a waste of resources to routinely review each transcript when no one is likely to evince any interest in most of them. The Commission notes that § 2.6(b) does not alter the Commission's past policies regarding the release of transcripts or recordings on enforcement matters. If the subject of an investigation waives confidentiality, the Commission will consider whether the other Sunshine exemptions, the FOIA exemptions or other common law exemptions apply before making the material available.

Paragraph 2.6(b) provides that requests for transcripts or tapes shall be made and processed in accordance with 11 CFR Part 5. Section 5.5 provides for requests to be made through the Public Disclosure Division. Section 5.6 contains the fee schedule for such materials. Several comments suggested that § 2.6(b) should explicitly provide for the waiver or reduction of fees when it is in

the public interest to do so. The Commission has decided not to include such language because it would merely repeat the fee waiver provision in § 5.6(d). That provision is made applicable to Sunshine materials through § 2.6(b)(2).

Several comments expressed concern that § 2.6(b) does not specifically permit access to transcripts or tapes to those who may wish to inspect them but do not desire to obtain a copy. The Commission agrees that requesters do, indeed, have this option. Another concern was that requesters may wish copies of tapes rather than transcripts for cost reasons. It is by no means clear whether edited tapes or transcripts will prove to be the less costly alternative. The Commission will continue to provide public access under a system that is responsive to the needs of the public while taking into account the needs, capabilities, and resources of the Commission.

Paragraph 2.6(c) generally follows current § 3.4(d) regarding the length of time documents and recordings will be kept by the Commission. However, this paragraph has been slightly reworded to indicate that materials will be retained for a minimum of two years, or one year after the conclusion of the matter, whichever is later. Although this is the minimum amount of time required by the Sunshine Act, the Commission's practice has been to maintain an institutional history by retaining such documentation indefinitely.

Section 2.7 Announcement of Meetings and Schedule Changes

Section 2.7 generally follows current § 3.5 concerning public announcement of Commission meetings and subsequent changes in the time, place or subject matter of the meeting. A sentence has been added to § 2.7(a)(1) to indicate that a copy of the public announcement will be posted in the Commission's Public Records Office. Paragraph 2.7(d)(2) has been slightly revised to more closely conform to the language of the Sunshine Act regarding publication of meeting changes.

Section 2.8 Annual Report

Section 2.8 generally follows current § 3.6 except that it more clearly states that the annual report to Congress will reflect the Commission's compliance with the Sunshine Act, and will describe litigation brought against the Commission under the Sunshine Act.