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BOARD OF GOVERNORS
OF THE
FEDERAL RESERVE SYSTEM
WASHINGTON, D. C. 20551

February 8, 1977

STRICTLY CONFIDENTIAL (FR)
CLASS I FOMC

TO: Federal Open Market Committee

FROM: Arthur L. Broida

Attached is a memorandum from the Committee's General Counsel dated today, and entitled "Government in the Sunshine Act--Issue of its applicability to the FOMC."

It is contemplated that this memorandum will be discussed at the forthcoming meeting of the Committee.

Attachment

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To: Federal Open Market Committee

From: Thomas J. O'Connell

Subject: Government in the Sunshine Act--Issue of its applicability to the FOMC.

Issue

This memorandum addresses the issue of whether the Federal Open Market Committee ("FOMC") is covered by the Government in the Sunshine Act ("Sunshine Act").

Conclusion and Recommended Action

Based upon a review of factors in support of and against a position of coverage, it is my opinion that the FOMC does not come within the definition of "agency" contained in the Sunshine Act. It is my further belief that the FOMC's present procedures and disclosure policy are already conducted in accordance with the spirit of the Sunshine Act, as that Act would apply to deliberations of the nature engaged in by the FOMC. Accordingly, it is recommended that the FOMC adopt a position of non-coverage by the Sunshine Act and issue a policy statement that informs the public of this position and of the FOMC's compliance with the spirit of the Act.

Discussion

(1) The statutory definition of "agency"

(a) The General Definition

Under section (a)(1) of the Sunshine Act (see Attachment A for a copy of the Act), an "agency" is defined to mean--

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> ". . .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 (emphasis added) by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency."1/

It is obvious that there are really two separate definitions in this section, as an agency is covered if it either meets the general definition of agency or is a subdivision of a covered agency. With respect to the general definition, a combination of three factors are applied in determining coverage of an agency under the Act. First, the agency must be an "agency" as defined in 5 U.S.C. 522(e) (the Freedom of Information Act). The FOMC is such an agency.[2/] Second, the agency must be headed by a collegial body composed of two or more members. The FOMC, as a collegial body composed of 12 members, meets this standard. Third, a majority of the agency members must have been appointed to such position by the President with the advice and consent of the Senate. For the reasons hereinafter discussed, the FOMC does not meet this third test because members of the FOMC are not appointed to their position on the FOMC by the President with the advice and consent of the Senate.

1/ 5 U.S.C. 552b(a)(1)

2/ The FOMC has, in the past, considered itself to be within this definition and has published regulations implementing the Freedom of Information Act with respect to its records (12 CFR 271).

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The Federal Reserve System is composed of the Board of Governors ("Board"), 12 regional Federal Reserve Banks, the FOMC, the Federal Advisory Council, and commercial banks that are members of the System. The Board of Governors consists of seven members who are appointed by the President to their position on the Board and confirmed by the Senate for 14-year terms.[3/] The Board itself meets all of the tests under the general definition of agency found in the Act. The FOMC, which was created by the Banking Act of 1933 and restructured in its present form by the Banking Act of 1935 and subsequent legislation in 1942, is a separate statutory body composed of the seven members of the Board of Governors and five representatives of the Reserve Banks selected annually in accordance with the procedure set out in §12A of the Federal Reserve Act.[4/] Members of the Board serve *ex officio* on the FOMC by reason of their being members of the Board. They are not appointed by the President to positions on the FOMC, nor are their *ex officio* positions on the FOMC subject to the advice and consent of the Senate. Reserve Bank representatives on the FOMC (five such at any one time) are neither appointed to the FOMC by the President, nor is their appointment subject to the advice and consent of the Senate. Literally, then, the FOMC fails to meet the third test for coverage by the Sunshine Act.

3/ 12 U.S.C. 241 (1970).

4/ 12 U.S.C. 263(a) (1970).

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The significance and impact of an agency's members meeting the "appointed to such position" test may not be minimized or disregarded. The impact of the phrase assigned by the principals urging the passage of this Act was clearly demonstrated during hearings before the House Judiciary Committee:

> "Mr. Kindness. Thank you, Mr. Chairman. Ms. Abzug, in this area of what the coverage of the act may be, I recall that when the Administrative Procedure Act was first enacted, there was litigation about what its coverage was, and there will be with this, too.
>
> But would you care to state an opinion as to whether the National Security Council is covered by the bill? . . .
>
> Ms. Abzug. No, I don't think they are because they're not appointed to that position by the President.
>
> You see, I think that the answer to that is that they are appointed to other positions and that they are ex officio members and that the NSC is not a subsidiary of a covered agency. And I'm looking at section 552b(b) which gives us the definition. . .the term 'agency' means '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.'
>
> I think the definition itself is clear. I mean, I had to stop and think for a minute. I think the definition gives you an answer for almost any agency that you have. I don't think there's any problem with the generic definition.
>
> Mr. Kindness. In that specific case, the reasoning there would be that the people who serve on that Council, the National Security Council, are appointed by the President--

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Ms. Abzug. They serve their--they are appointed to another office. And they serve here as ex officio.

Mr. Kindness. And not appointed to such positions?

Ms. Abzug. That's correct.

Mr. Kindness. I submit there may be some room for questions there. But the Domestic Council and the Council on Environmental Quality fall in about the same category, I think, then.

Ms. Abzug. We would simply take the definition of 'appointment' and see how they're appointed."5/

From this exchange it seems clear that the phrase "appointed to such position" was recognized as excluding from coverage of the Act those collegial bodies that are composed of

5/ Hearings on H.R. 11656 before the Subcommittee on Administrative Law and Government Relations of the House Committee on the Judiciary, 94th Cong., 2d. Sess., 11, 15-16 (1976).

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Presidential appointees who serve on such collegial body solely by reason of their appointment to other positions in the Federal government.[6/]

6/ The counter to this argument would be of a twofold nature: First, it would be contended that a Board Member is appointed by the President simultaneously to both the Board and the FOMC. A new Board Member's views on open market operations are of great concern to both the President and the Senate and service on the FOMC is part of a Board Member's statutorily defined responsibilities as a Member of the Board. It is believed this argument can be successfully discounted in view of the statutory provisions contained in Sections 10 and 12A of the Federal Reserve Act and the FOMC's legislative history. The thesis that Board Members do not meet the "appointed to such position" test has also been opined by the American Law Division of the Library of Congress, in communication with the Senate Government Operations Committee. Similar rationale is expected to be utilized by the Emergency Loan Guarantee Board, and other collegial bodies such as the National Security Council, in adopting a position of non-coverage under the Act. Second, it might be argued that the "appointed to such position" test was intended to exclude collegial bodies such as the National Security Council whose *ex officio* members are heads of single-headed agencies otherwise not covered by the Act. A majority of the FOMC's members, in contrast, serve in an *ex officio* capacity on the FOMC but are statutorily appointed by the President, with Senate confirmation, to a multi-member agency, the Board. Proponents of this argument could point to the omission of the term "appointed to such position" in the Senate Government Operations Committee Report : "to be subject to the. . . open meeting provisions, the collegial body comprising the agency must consist of two or more individual members, a majority of whom are appointed by the President with the advice and consent of the Senate." S. Rpt. No. 94-354, 94th Cong., 1st Sess. 15 (1975). *See also* H.R. Rpt. No. 94-880, Part I, 94th Cong., 2d Sess. 7 (1976). While a court might adopt this rationale, it is believed that reliance upon the "appointed to such position" test is a legally sound interpretation of clear statutory language.

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(b) Subdivision of an Agency

The definition of "agency" contained within the Act makes clear that "any subdivision. . .authorized to act on behalf of [an] agency"[7/] would be covered by the Act. The FOMC clearly cannot be defined as a "subdivision" of the Board for purposes of the Act's definition of "agency" since the FOMC is not "authorized to act on behalf of" the Board. The FOMC has independent authority derived from Section 12A of the Federal Reserve Act[8/] and neither derives its authority from the Board nor acts on behalf of the Board. In fact, both the composition of the FOMC and its independent statutory authority to direct open market operations reflect a decision by the Congress in the Banking Act of 1935 to reject a proposal that would have placed final authority for open market operations in the Board.[9/] Decisional (not advisory) authority[10/] was placed in a separate body, the FOMC, which was to be composed of both Board Members and representatives of the Reserve Banks.

7/ 5 U.S.C. 552b(a)(1).

8/ 12 U.S.C. 263(a) (1970).

9/ The bill originally passed by the House in 1935 would have amended Section 12A of the Federal Reserve Act to vest final authority for open market operations in the Board. H.R. Rep. No. 742, 74th Cong., 1st Sess. 9-10 (1935).

10/ 12 U.S.C. §263 (1970) (as amended by Banking Act of 1935, §205, 49 Stat. 706) (Reserve Banks were henceforth prohibited from engaging in or declining to engage in open market operations except as directed by FOMC).

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Further, it is believed that the term "subdivision" was placed in the statutory definition of "agency" in order to deal with situations in which less than a quorum of agency members were acting on an agency's behalf, rather than a situation where members of an agency were serving in an ex officio capacity on another body.[11/]

(2) Legislative History

A review of a statute's legislative history usually commences with analysis of the House and Senate Committee reports, since these documents are the most widely accepted sources of legislative history.[12/] It is significant to note that in the case of the Sunshine Act none of these reports makes reference to the FOMC as an "agency" for purposes of the Sunshine Act. While the Senate Government Operations Committee Report specifically listed 47 agencies intended to be covered by the Act, including the Board, it did not list the FOMC.[13/] Further, the Report made

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11/ For example, the Senate Report exemplifies what was intended by the term "subdivision" by the statement that "to be a subdivision of an agency covered by the [Act a] panel need not have authority to take agency action which is final in nature. Panels or boards composed of two or more agency members and authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency, are required by the [Act] to open their meetings to the public." S. Rep. No. 94-354, 94th Cong., 1st Sess. 17 (1975).

12/ See SUTHERLAND STATUTORY CONSTRUCTION §48.06 (4th ed., D. Sands 1973) (Hereinafter referred to as SUTHERLAND).

13/ S. Rep. No. 94-354, 94th Cong. 1st Sess. 15-16 (1975). The Conference Committee Report also made no mention of the FOMC. S. Conf. Rep. No. 94-1178, 94th Cong., 2d Sess. (1976).

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clear that questions of coverage of the Act were to be resolved by resort to the generic definition of "agency" contained in the Act--under which, as previously discussed, the FOMC is not covered. The relevant formal Senate and House hearings contain no references to the FOMC, although frequent allusions were made to the assumed status of the Board as a covered agency.

A remaining source of legislative history--debates on the Senate and House floors--is traditionally the most unreliable source for statutory interpretation because the comments made are "expressive of the views and motives of individual members and are not a safe guide. . ."[14/] to total legislative intent. Despite the limited "legislative history value" to be attributed to remarks made during debates, it is possible that some such remarks might be argued to evidence a Congressional intent to cover the FOMC under the Act. It is believed, however, that the better view is that these statements do not support a position of the FOMC's coverage.

With respect to instances in debates or, in one case, a Committee session, wherein specific references are made to the FOMC, it should be noted that these references do not relate to the issue of whether the FOMC is in fact subject to the Act; rather, they assume that the FOMC is covered for the purpose of

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14/ SUTHERLAND, §48.13 n.2, citing Pitney, J. in Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921).

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discussing a different issue under the statute. For example, on the assumption that the FOMC was a covered agency, a Congressman expressed serious concern regarding the ability of the FOMC to close meetings involving discussion of open market operations. Assurance was given by a sponsor of the legislation to the effect that ". . .every single operation of the Federal Reserve can be properly closed under the exemption contained in the bill. . .."[15/]

In another instance, one of the principal sponsors of the legislation specifically referred to the FOMC as a covered "agency" in her explanation of the term "member":

> "Subsection (a)(3) defines 'member' as an individual who belongs to a collegial body heading an agency. If a majority of the members of an agency or subdivision are appointed by the President and confirmed by

15/ Transcript of Hearings before the Committee on Government Operations, House of Representatives, Business Meeting, Feb. 26, 1976, at p. 20-21 (remarks of Rep. Fascell). Congresswoman Abzug also referred to the FOMC in the context of a discussion concerning the impact of the Act's transcript provisions:

> "A number of questions have been raised regarding the requirement that a transcript or electronic recording be kept of meetings closed under the bill, particularly as that provision impacts upon the Federal Reserve Board of Governors and the Federal Reserve's Open Market Committee. . . (The Act's) broad exemptions are more than sufficient to permit the Federal Reserve to close any meeting that deals with sensitive information."

122 Cong. Rec. H6676 (daily ed. June 24, 1976)(remarks by Rep. Abzug).

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> the Senate, then any member of the body in question is covered by the bill. For example, the Federal Open Market Committee, which sets our monetary policy, has 12 members, seven of whom are appointed by the President and confirmed by the Senate and five of whom are not. Since the FOMC is an 'agency' under the legislation, all 12 individuals are 'members'."16/

This statement at most, demonstrates one Congresswoman's belief that the FOMC was covered by the Act. Viewed more realistically, the remarks are directed to the meaning of the term "member", rather than "agency", and fail to take into account earlier testimony by the same Congresswoman which, most fairly read, would exclude the FOMC from the Act's coverage.17/

Many of the foregoing references to the Sunshine Act's legislative history have been included in an effort to enable the FOMC to have as balanced a basis of judgment as possible on the issue of the Act's applicability to the FOMC. However, it is submitted that the legislative history's extracts dealing directly with the definition of "agency" should constitute the controlling consideration on the issue before the FOMC. This leaves, in my judgment, but one rationale conclusion--the FOMC is not a covered "agency" under the Act.

16/ 122 Cong. Rec. H7867 (daily ed. July 28, 1976)(remarks of Rep. Abzug).

17/ See remarks of Rep. Abzug, Hearings on H.R. 11656, _supra_ at 4-5 and note 5.

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Bearing upon the reasonableness of FOMC action adopting the position that the FOMC is not an "agency" under the Act is the realization that if the FOMC were covered, all of its meetings could be closed pursuant to the "closed meeting exemptions" contained in the Act. Such closings would occur principally in reliance upon exemption 552b(c)(9)(A)(i) (p. 2, Attachment A) which authorizes closing of an agency meeting where discussion would involve 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." Further, the deliberations of such closed meetings could be recorded in the form of minutes, as set forth in Section 552b(f)(1) of the Act. Assurance against premature public disclosure of minutes of FOMC meetings would be achieved by applying to them the same exemption standards as utilized in closing the meetings. Thus, minutes, or portions thereof, could be withheld from the public for weeks, months or possibly years depending on their subject matter. It may therefore reasonably be concluded that the FOMC's procedures "outside" coverage of the Sunshine Act afford more prompt and more full disclosure to the public (via 30-day release of the Record of Policy Actions) than would reasonably be anticipated under the minutes procedures of a meeting closed under the Sunshine Act.

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On the basis of the foregoing analysis, it is recommended that the FOMC adopt the position that its meetings are not covered by or subject to the provisions of the Sunshine Act. Should such position be adopted, it is further recommended that the FOMC promulgate a statement of its determined position, thus avoiding the flood of inquiries that could be anticipated if no statement of FOMC position were published. Attached for FOMC consideration is a draft "Policy Regarding the Government in the Sunshine Act" which summarizes the basic rationale upon which a "non-coverage position" might be taken and expresses the FOMC's judgment that its present mode of operations constitutes essential compliance with the spirit of the Sunshine Act.

Note: There has been prepared by Mr. Gary Welsh of the Board's Legal Division a more full "pro and con" analysis of the coverage of the FOMC under the Sunshine Act. This memorandum, which is supportive of my recommended position, is available on request.

Attachments

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Attachment A

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".

Government in the Sunshine Act. 5 USC 552b note.

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.

5 USC 552b note.

OPEN MEETINGS

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

"§ 552b. Open meetings

5 USC 552b.

"(a) For purposes of this section—

Definitions.

"(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;

5 USC 552.

"(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

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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;

5 USC 552.

"(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 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;

"(8) 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;

"(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 subpena, 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.

5 USC 554.

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"(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.

Recorded voting.

"(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 (5), (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.

Copies, availability.

"(4) 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.

Meeting closure, regulation.

Public announcement.

"(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.

Scheduling, public announcement.

"(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. The

Scheduling changes, public announcement.

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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.

Scheduling notice, publication in Federal Register.

"(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 designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

Closed meetings, certification.

"(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 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 agency. The agency 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 (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.

Transcripts, recordings or minutes.

Public availability.

"(2) The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, 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 discussion 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 identity 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 meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

Retention.

Regulations. Notice, publication in Federal Register.

"(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.

Judicial proceeding.

"(h)(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 any 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, or 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, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

Jurisdiction.

Civil actions.

Relief.

"(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.

Inquiry.

"(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 plantiff only where the court finds that the suit was initiated by the plantiff 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.

Litigation costs, assessment.

"(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

Report to Congress.

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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.

5 USC 552.

44 USC 3301.

"(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.".

5 USC 552a.

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

5 USC prec. 500.

"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:

"(d)(1) 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 the 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 the 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

Applicability.

"(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 551 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:

"Ex parte communication."

"(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.".

5 USC 557.

CONFORMING AMENDMENTS

SEC. 5. (a) Section 410(b)(1) of title 39, United States Code, is amended by inserting 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

5 USC app. I.

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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

5 USC 552b note.

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. I 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.
Vol. 122 (1976): July 28, considered and passed House, amended, in lieu of H.R. 11656.
Aug. 31, House and Senate agreed to conference report.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS:
Vol. 12, No. 38 (1976): Sept. 13, Presidential statement.

GPO [illegible]

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DRAFT

Attachment B

FEDERAL RESERVE SYSTEM

SUBCHAPTER B--FEDERAL OPEN MARKET COMMITTEE

PART 281--STATEMENT OF POLICY

281.2 Policy Regarding the Government in the Sunshine Act (Pub. L. No. 94-409, 90 Stat. 1241)

On September 13, 1976, there was enacted into law the Government in the Sunshine Act, Pub. L. No. 94-409, 90 Stat. 1241 ("Sunshine Act"), established for the purpose of providing the public with the "fullest practicable information regarding the decisionmaking processes of the Federal Government . . . while protecting the rights of individuals and the ability of the Government to carry out its responsibilities."[1/] The Sunshine Act applies only to those Federal agencies that are defined in Section 552(e) of Title 5 of the United States Code and "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. . . ."[2/]

The Federal Open Market Committee ("FOMC") is a separate statutory body within the Federal Reserve System that was originally established by the Banking Act of 1933 and restructured in its

1/ Government in the Sunshine Act, Pub. L. No. 94-490, §2, 90 Stat. 1241 (1976).

2/ Government in the Sunshine Act, Pub. L. No. 94-409, §3(a), 90 Stat. 1241 (1976).

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present form by the Banking Act of 1935 and subsequent legislation in 1942 (generally see 12 U.S.C. §263(a)). The FOMC's membership is composed of the seven members of the Board of Governors of the Federal Reserve System ("Board of Governors") and five representatives of the Federal Reserve Banks who are selected annually in accordance with the procedures set forth in Section 12A of the Federal Reserve Act, 12 U.S.C. §263(a). Members of the Board of Governors serve in an *ex officio* capacity on the FOMC by reason of their appointment as Members of the Board of Governors, not as a result of an appointment "to such position" (the FOMC) by the President. Representatives of the Reserve Banks serve on the FOMC not as a result of an appointment "to such position" by the President, but rather by virtue of their positions with the Reserve Banks and their selection pursuant to Section 12A of the Federal Reserve Act. It is clear therefore that the FOMC does not meet the definition of "agency" contained in the Sunshine Act and consequently is not subject to the provisions of that Act.

As explained below, the Act would not require the FOMC to hold its meetings in open session even if the FOMC were covered by the Act. However, despite the conclusion reached that the Sunshine Act does not apply to the FOMC, the FOMC has determined that its procedures and timing of public disclosure already are conducted in accordance with the spirit of the Sunshine Act, as that Act would apply to deliberations of the nature engaged in by the FOMC.

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In the foregoing regard, the FOMC has noted that while the Act calls generally for open meetings of multi-member Federal agencies, 10 specific exemptions from the open meeting requirement are provided to assure the ability of the Government to carry out its responsibilities. Among the exemptions provided is that which authorizes any agency operating under the Act to conduct closed meetings where the subject of a meeting involves information "the premature disclosure of which would--in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to lead to significant financial speculation in currencies, securities, or commodities."[3/]

As to meetings closed under such exemption, the Act requires the maintenance of either a transcript, electronic recording or minutes and sets forth specified, detailed requirements as to the contents and timing of disclosure of certain portions or all of such minutes. The Act permits the withholding from the public of the minutes where disclosure would be likely to produce adverse consequences of the nature described in the relevant exemptions.

The FOMC has reviewed the agenda of its monthly meetings for the past three years and has determined that all such meetings could have been closed pursuant to the exemption dealing with financial speculation or other exemptions set forth in the Sunshine Act. The FOMC has further determined that virtually all of its substantive deliberations could have been preserved pursuant to the Act's minutes

3/ Government in the Sunshine Act, Pub. L. No. 94-409, §3(a), 90 Stat. 1242 (1976).

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requirements and that such minutes could similarly have been protected against premature disclosure under the provisions of the Act.

The FOMC's deliberations are currently reported by means of a document entitled "Record of Policy Actions" which is released to the public approximately one month after the meeting to which it relates. The Record of Policy Actions complies with the Act's minutes requirements in that it contains a full and accurate report of all matters of policy discussed and views presented, clearly sets forth all policy actions taken by the FOMC and the reasons therefor, and includes the votes by individual members on each policy action. The timing of release of the Record of Policy Actions is fully consistent with the Act's provisions assuring against premature release of any item of discussion in an agency's minutes that contains information of a sensitive financial nature. In fact, by releasing the comprehensive Record of Policy Actions to the public approximately a month after each meeting, the FOMC exceeds the publication requirements that would be mandated by the letter of the Sunshine Act.

Recognizing the Congressional purpose underlying enactment of the Sunshine Act, the FOMC has determined to continue its current practice and timing of public disclosures in the conviction that its operations thus conducted are consistent with the intent and spirit of the Sunshine Act.