

## FEDERAL ELECTION COMMISSION

## 11 CFR Parts 2 and 3

(Notice 1985-11)

## 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) 523-4143 or (800) 424-9530.

## 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 10066. 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 2.5. 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(e) if appropriate.

The definition of meeting in § 2.2(d) is based on current § 2.5, 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. 94-354, 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 921, 935 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 797, 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(b). 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 (5) 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. *Crooker 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. 89-1497, 89th Cong., 2d Sess. 10 (1966). 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 6 (D.D.C. Feb. 26, 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. 26, 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 the 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. 52). 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. 52.

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 2.5(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 § 2.5(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.

#### *List of Subjects in 11 CFR Part 2*

Administrative practice and procedure. Sunshine Act.

11 CFR Chapter I is amended as follows:

**PART 3—[REMOVED]**

1. Part 3 is removed.
2. Part 2 is revised to read as follows:

**PART 2—SUNSHINE REGULATIONS; MEETINGS**

Sec.

- 2.1 Scope.
- 2.2 Definitions.
- 2.3 General rules.
- 2.4 Exempted meetings.
- 2.5 Procedures for closing meetings.
- 2.6 Transcripts and recordings.
- 2.7 Announcement of meetings and schedule changes.
- 2.8 Annual report.

Authority: Sec. 3(a), Pub. L. 94-409, 5 U.S.C. 552b.

**§ 2.1 Scope.**

These regulations are promulgated pursuant to the directive of 5 U.S.C. 552b(g) which was added by section 3(a) of Pub. L. 94-409, the Government in the Sunshine Act, and specifically implement section 3 of that Act.

**§ 2.2 Definitions.**

(a) *Commission*. "Commission" means the Federal Election Commission, 1325 K Street, NW., Washington, D.C. 20463.

(b) *Commissioner or Member*. "Commissioner" or "Member" means an individual appointed to the Federal Election Commission pursuant to 2 U.S.C. 437c and section 101(e) of Pub. L. 94-283 and shall also include ex-officio non-voting Commissioners or Members, the Secretary of the Senate and the Clerk of the House, but does not include a proxy or other designated representative of a Commissioner.

(c) *Person*. "Person" means an individual, including employees of the Commission, partnership, corporation, association, or public or private organization, other than an agency of the United States Government.

(d) *Meeting*. (1) "Meeting" means the deliberation of at least four voting members of the Commission in collegia where such deliberations determine or result in the joint conduct or disposition of official Commission business. For the purpose of this section, "joint conduct" does not include, for example, situations where the requisite number of members is physically present in one place but not conducting agency business as a body (e.g., at a meeting at which one member is giving a speech while a number of other members are present in the audience). A deliberation conducted through telephone or similar communications equipment by means of which all persons participating can hear

each other will be considered a "meeting" under this section.

(2) The term "meeting" does not include the process of notation voting by circulated memorandum for the purpose of expediting consideration of routine matters. It also does not include deliberations to schedule a meeting, to take action to open or close a meeting, or to release or withhold information, or to change the subject matter of a meeting under 11 CFR 2.5, 2.6 and 2.7.

**§ 2.3 General rules.**

(a) Commissioners shall not jointly conduct, determine or dispose of Commission business other than in accordance with this Part.

(b) Except as provided in 11 CFR 2.4, every portion of every Commission meeting shall be open to public observation.

(c) No additional right to participate in Commission meetings is granted to any person by this Part. A 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 opinions made by Commissioners or FEC employees at meetings are not intended to represent final determinations or beliefs.

(d) 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 advance notice to and coordination with the Commission's Press Officer.

**§ 2.4 Exempted meetings.**

(a) *Meetings Required by Statute to be Closed*. Meetings concerning matters specifically exempted from disclosure by statutes which require public withholding in such a manner as to leave no discretion for the Commission on the issue, or which establish particular types of matters to be withheld, shall be closed to public observation in accordance with the procedures of 11 CFR 2.5.

(1) As required by 2 U.S.C. 437g(a)(12), all Commission meetings, or portions of meetings, pertaining to any notification or investigation that a violation of the Act has occurred, shall be closed to the public.

(2) For the purpose of this section, "any notification or investigation that a violation of the Act has occurred" includes, but is not limited to, determinations pursuant to 2 U.S.C. 437g, the issuance of subpoenas, discussion of referrals to the Department of Justice, or consideration of any other matter related to the

Commission's enforcement activity, as set forth in 11 CFR Part 111.

(b) *Meetings Closed by Commission Determination*. Except as provided in 11 CFR 2.4(c), the requirement of open meetings will not apply where the Commission finds, in accordance with 11 CFR 2.5, that an open meeting or the release of information is likely to result in the disclosure of:

(1) Matters that relate solely to the Commission's internal personnel decisions, or internal rules and practices.

(i) This provision includes, but is not limited to, matters relating to Commission policies on working conditions, or materials prepared predominantly for internal use, the disclosure of which would risk circumvention of Commission regulations; but

(ii) This provision does not include discussions or materials regarding employees' dealings with the public, such as personnel manuals or Commission directives setting forth job functions or procedures;

(2) Financial or commercial information obtained from any person which is privileged or confidential;

(3) Matters which involve the consideration of a proceeding of a formal nature by the Commission against a specific person or the formal censure of any person;

(4) Information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(5) 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:

(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,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

(6) Information the premature disclosure of which would be likely to have a considerable adverse effect on the implementation of a proposed Commission action, as long as the Commission has not already disclosed the content or nature of its proposed action, or is not required by law to disclose it prior to final action; or

(7) Matters that specifically concern 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.

(c) Notwithstanding the applicability of any exemptions set forth in 11 CFR 2.4(b), the Commission may determine that the public interest requires a meeting to be open.

#### § 2.5 Procedures for closing meetings.

(a) *General.* No meeting or portion of a meeting may be closed to the public observation under this section unless a majority of the Commissioners (not including ex officio non-voting Commissioners) votes to take such action. The closing of one portion of a meeting shall not justify closing any other portion of a meeting.

(b) *Certification.* Each time the Commission votes to close a meeting, the General Counsel shall publicly certify that, in his or her opinion, each item on the agenda may properly be closed to public observation. The certification shall state each relevant exemption provision. The original copy of the certification shall be attached to, and preserved with, the statement required by 11 CFR 2.5(d).

(c) *Voting Procedures.* (1) No meeting need be held to consider closing a meeting. The Commission may vote to close a meeting or any portion thereof by using its notation vote procedures.

(i) A separate vote shall be taken with respect to each item on an agenda proposed to be closed in whole or in part pursuant to 11 CFR 2.4, or with respect to any information proposed to be withheld under 11 CFR 2.4.

(ii) A single vote may be taken with respect to a particular matter to be discussed in a series of closed meetings, or with respect to any information concerning such series of meetings, so long as each meeting in the series is scheduled to be held no more than 30 days after the initial meeting.

(iii) This section shall not affect the Commission's practice of setting dates for closed meetings more than 30 days in advance of such meetings.

(2) The Commission Secretary shall record the vote of each Commissioner participating in the vote. No proxies, written or otherwise, shall be counted.

(3)(i) A Commissioner may object to a recommendation to close the discussion of a particular matter or may assert a claim of exemption for a matter scheduled to be discussed in an open meeting. Such objection or assertion will be discussed by the Commission at the next scheduled closed meeting, to determine whether the matter in

question should be discussed in a closed meeting.

(ii) An "objection for the record only" will not cause the objection to be placed on any agenda.

(d) *Public Statement of Vote.* (1) If the Commission votes to close a meeting, or any portion thereof, under this section, it shall make publicly available within 24 hours a written statement of the vote. The written statement shall contain:

(i) A citation to the provision(s) of 11 CFR 2.4 under which the meeting was closed to public observation and an explanation of why the specific discussion comes within the cited exemption(s);

(ii) The vote of each Commissioner participating in the vote;

(iii) A list of the names of all persons expected to attend the closed meeting and their affiliation. For purposes of this section, affiliation means title or position, and name of employer, and in the case of a representative, the name of the person represented. In the case of Commission employees, the statement will reflect, through the use of titles rather than individual names, that the Commissioners, specified division heads and their staff will attend; and

(iv) The signature of the Commission Secretary.

(2) The original copy of the statement shall be maintained by the Commission Secretary. A copy shall be posted on a public bulletin board located in the Commission's Public Records Office.

(e) *Public Request to Close a Meeting.* A person whose interests may be directly affected by a portion of a meeting may request that the Commission close that portion to the public for any of the reasons referred to in 11 CFR 2.4. The following procedures shall apply to such requests:

(1) The request must be made in writing and shall be directed to the Chairman of the Commission.

(2) The request shall identify the provisions of 11 CFR 2.4 under which the requestor seeks to close all or a portion of the meeting.

(3) A recorded vote to close the meeting or a portion thereof shall be taken.

(4) Requests made under this section shall become part of the official record of the underlying matter and shall be disclosed in accordance with 11 CFR 2.6 on completion of the matter.

(5) If the Commission decides to approve a request to close, the Commission will then follow the procedures for closing a meeting set forth in 11 CFR 2.5 (a) through (d).

#### § 2.6 Transcripts and recordings.

(a) The Commission 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 public observation. An electronic recording of a meeting shall be coded, or other records shall be kept in a manner adequate to identify each speaker.

(b)(1) In the case of any meeting closed pursuant to 11 CFR 2.4(b), as the last item of business, the Commission will determine which, if any, portions of the electronic recording or transcript and which if any, items of information withheld under 11 CFR 2.5 contain information which should be withheld pursuant to 11 CFR 2.4.

(2) Portions of transcripts or recordings determined to be outside the scope of any exemptions under 11 CFR 2.6(b)(1) shall be promptly made available to the public through the Commission's Public Records Office at a cost sufficient to cover the Commission's actual cost of duplication or transcription. Requests for such copies shall be made and processed in accordance with the provisions of 11 CFR Part 5.

(3) Portions of transcripts or electronic recordings not made available immediately pursuant to 11 CFR 2.6(b)(1), and portions of transcripts or recordings withheld pursuant to 11 CFR 2.4(a), will be made available on request when the relevant exemptions no longer apply. Such materials shall be requested and processed under the provisions of 11 CFR 2.6(b)(2).

(c) A complete verbatim copy of the transcript or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, shall be maintained by the Commission Secretary in confidential files of the Commission, for a minimum of two years subsequent to such meeting, or a minimum of one year after the conclusion of any agency proceeding with respect to which the meeting, or portion of the meeting was held, whichever occurs later.

#### § 2.7 Announcement of meetings and schedule changes.

(a)(1) In the case of each meeting, the Commission shall publicly announce and shall submit such announcement for publication in the *Federal Register* at least seven days prior to the day on which the meeting is to be called to order. The Commission Secretary shall also forward a copy of such announcement for posting in the Commission's Public Records Office.

(2) Announcements made under this section shall contain the following information:

- (i) The date of the meeting;
- (ii) The place of the meeting;
- (iii) The subject matter of the meeting;
- (iv) Whether the meeting is to be open or closed to the public; and
- (v) The name and telephone number of the official designated by the agency to respond to requests for information about the meeting.

(b) The public announcement and submission for publication shall be made when required by 11 CFR 2.7(a) in the case of every Commission meeting unless a majority of the Commissioners decide by recorded vote that Commission business requires that the meeting be called at an earlier date, in which case the Commission shall make at the earliest practicable time, the announcement required by this section and a concurrent submission for publication of that announcement in the *Federal Register*.

(c) The time or place of a meeting may be changed following the public announcement required by 11 CFR 2.7 (a) or (b) only if the Commission announces the change at the earliest practicable time.

(d) The subject matter of a meeting, or the determination of the Commission to open or close a meeting, or portions of a meeting, to the public may be changed following the public announcement required by 11 CFR 2.7 (a) or (b) only if:

- (1) A majority of the entire membership of the Commission determines by recorded vote that Commission business so requires and that no earlier announcement of the change was possible; and
- (2) The Commission publicly announces the change and the vote of each member upon the change at the earliest practicable time. Immediately following this announcement, the Commission shall submit for publication in the *Federal Register* a notice containing the information required by 11 CFR 2.7(a)(2), including a description of any change from the earlier published notice.

#### § 2.8 Annual report.

The Commission shall report annually to Congress regarding its compliance with the requirements of the Government in the Sunshine Act and of this Part, including:

- (a) A tabulation of the total number of Commission meetings open to the public;
- (b) The total number of such meetings closed to the public;
- (c) The reasons for closing such meetings; and

(d) A description of any litigation brought against the Commission under the Sunshine Act, including any costs assessed against the Commission in such litigation (whether or not paid by the Commission).

Dated: September 26, 1985.  
John Warren McGarry,  
*Chairman.*  
[FR Doc. 85-23388 Filed 9-30-85; 8:45 am]  
BILLING CODE 6715-01-M

## FEDERAL RESERVE SYSTEM

### 12 CFR Part 211

[Docket No. R-0520]

#### Regulation K; International Banking Operations

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Final rule.

**SUMMARY:** The Board has reviewed and revised its regulations governing the operations of Edge corporations. The revisions concern certain U.S. activities of Edge corporations, lending limits and investment and change in control procedures applicable to Edge corporations. Some proposals dealing with foreign banking organizations operating in the United States have also been adopted.

**EFFECTIVE DATE:** October 24, 1985, except in the use of the provisions in section 211.5(c), which are effective immediately.

**FOR FURTHER INFORMATION CONTACT:** Frederick R. Dahl, Associate Director (202/452-2726); James S. Keller, Manager, International Banking Applications (202/452-2523), Division of Banking Supervision and Regulation; Ricki Rhodamer Tigert, Assistant General Counsel (202/452-3428); Kathleen M. O'Day, Senior Counsel (202/452-3786), Legal Division; or Joy W. O'Connell, Telecommunication Device for the Deaf (TDD), (202/452-3244), Board of Governors of the Federal Reserve System.

**SUPPLEMENTARY INFORMATION:** In June 1984, the Board published for comment proposed revisions to Regulation K. The proposals were made pursuant to the directive in the International Banking Act of 1978 ("IBA") that the Board review and revise its regulations governing Edge corporations every five years in order to ensure that the purposes of the Edge Act are being served in light of prevailing economic conditions.

The Board proposed major revisions in four areas: (1) Activities of Edge

corporations in the United States; (2) capitalization requirements and lending limits of Edge corporations; (3) procedures to permit Board review of a proposed change in control of Edge corporations, and (4) limits on investments in other organizations. In addition, various changes were proposed to other parts of the regulation.

The Board received 56 public comments on the proposal. The final revisions to the regulation and the reasons for the Board's action are outlined below. Some of the proposed revisions did not receive substantial comment and were adopted as proposed. In addition to the revisions described below, a number of technical and clarifying changes were also made.

#### Activities of Edge Corporations in the United States

Edge corporations are international banking and financial vehicles through which U.S. banking organizations can offer international banking services and through which they may compete with similar foreign-owned institutions in the United States and abroad. An Edge corporation is limited by statute to engaging only in activities in the United States that are "incidental" to international or foreign business. The Board, however, has broad discretionary authority to determine what U.S. activities are incidental to international or foreign business of an Edge corporation. The Board has interpreted this provision to require that all deposits accepted by Edge corporations from domestic residents must be related to or for the purpose of carrying out international transactions, and that all credit and other transactions with domestic residents must be related to identifiable international transactions. This approach, designed to assure the international character of Edge corporations and prevent their use to circumvent limitations on interstate banking, imposes fairly stringent constraints on the operations of Edge corporations in the United States.

In its 1984 proposal for comment, the Board suggested several possible modifications to this transaction-by-transaction approach. The Board requested comment on the feasibility of these proposals and whether they would maintain the necessary linkage with international or foreign business required by statute. The proposals were as follows:

1. Allow Edge corporations to provide full banking services (deposits, loans and other services) to a limited class of companies that are restricted charters or