



OFFICE OF GENERAL COUNSEL

20 February 2002

TO: John T. Korsmo
Chairman

FROM: Arnold Intrater /s/
General Counsel (Acting)

SUBJECT: Government in the Sunshine Act (Sunshine Act)

The Office of General Counsel has prepared the attached memorandum discussing when a gathering of the members of the Board of Directors of the Federal Housing Finance Board (Finance Board) is considered a "meeting" for purposes of the Sunshine Act. In short, a gathering of Finance Board directors is a Sunshine Act "meeting" when a quorum of members (three or more) is in attendance and the discussion is "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." Under this standard, casual, general, informational or preliminary discussions that will not effectively predetermine final agency action are not Sunshine Act meetings, such as general background or preliminary briefings by Finance Board staff or outsiders; informal, exploratory discussions of issues likely to face the Finance Board; and wide-ranging discussions of subjects relevant to the Finance Board's responsibilities that do not at the time of the discussion pose specific problems requiring agency action.

Examples of gatherings of a quorum of Finance Board directors that are not subject to the open meeting requirements of the Sunshine Act are discussed in an addendum to the memorandum.

You may address questions about the Sunshine Act to me, John Mantini, or Janice Kaye.

Attachments



OFFICE OF GENERAL COUNSEL

20 February 2002

ISSUE:

When is a gathering of the members of the Board of Directors of the Federal Housing Finance Board (Finance Board) considered a “meeting” for purposes of the Government in the Sunshine Act (Sunshine Act)?

SHORT ANSWER:

A gathering of Finance Board directors is a Sunshine Act “meeting” when a quorum of members (three or more) is in attendance and the discussion is “sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.” Under this standard, which originally was offered by the Administrative Conference of the United States (ACUS)¹ and later adopted by a unanimous United States Supreme Court, casual, general, informational or preliminary discussions that will not effectively predetermine final agency action are not Sunshine Act meetings. Examples of gatherings that usually are not subject to the Sunshine Act include general background or preliminary briefings by Finance Board staff or outsiders; informal, exploratory discussions of issues likely to face the Finance Board; and wide-ranging discussions of subjects relevant to the Finance Board’s responsibilities that do not at the time of the discussion pose specific problems requiring agency action.

INTRODUCTION:

With limited exceptions, the Sunshine Act and the Finance Board’s implementing regulation require meetings of the Board of Directors of the Finance Board to be open to public observation.² According to the ACUS, which in 1978 issued what is still considered the

¹ The mission of the ACUS, which ceased operations on October 31, 1995, was to provide advice and assistance on matters of administrative procedure to agencies and Congress. See 5 U.S.C. §§ 593-596 (West 1996).

² See 5 U.S.C. § 552b; 12 C.F.R. part 912. The Sunshine Act's open meeting requirements include the following:

Meetings must be open: The meeting must be open to public observation unless one of ten enumerated exemptions applies. 5 U.S.C. § 552b(b)-(c); 12 C.F.R. §§ 912.1(b), 912.3, 912.4.

authoritative commentary on the Sunshine Act, "defining the scope of the term 'meeting' is one of the most troublesome problems in interpreting and applying the Sunshine Act." See RICHARD K. BERG & STEPHEN H. KLITZMAN, ADMIN. CONF. OF THE U.S., AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 3 (1978) (ACUS GUIDE). This memorandum is intended to provide guidance about the types of gatherings that constitute a meeting subject to the open meeting requirements of the Sunshine Act.

ANALYSIS:

A. Sunshine Act "Meeting" Defined

For purposes of the Sunshine Act, a "meeting" is defined as "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." 5 U.S.C. § 552b(a)(2). The Finance Board's definition of the term "meeting" in its Sunshine Act regulation is substantially similar to the statutory definition. 12 C.F.R. § 912.2. The first element of the "meeting" definition, "the number of individual agency members required to take action on behalf of the agency", is clear-cut. Under the Finance Board's Sunshine Act regulation, "the number of individual agency members required to take action on behalf of the agency" is three or more, that is, a quorum of Finance Board directors. *Id.* The other elements of the definition are problematic. There currently do not exist dispositive standards to determine whether a discussion among a quorum of Finance Board directors constitutes deliberations that will "determine or result in the joint conduct or disposition of official agency business."

In the most important case discussing the scope of the "meeting" definition, a unanimous United States Supreme Court rejected a broad view of the "meeting" definition that would subject every gathering of a quorum of Finance Board directors that includes a discussion of agency business, no matter how informal or preliminary, to the Sunshine Act's open meeting requirements. See

Meetings must be publicly announced: At least one week before the meeting, the Finance Board must announce publicly the time, place and subject matter of the meeting, and whether the meeting or portions thereof will be open or closed. 5 U.S.C. § 552b(e)(1); 12 C.F.R. § 912.6. The Finance Board announces its meetings by publishing a notice in the *Federal Register* and posting the agenda in the lobby. 12 C.F.R. § 912.6. Seven-day notice is not required if a majority of all Finance Board directors determines, by recorded vote, that Finance Board business requires less notice. 5 U.S.C. § 552b(e)(1); 12 C.F.R. § 912.6(c)(2).

Closing meetings: Closing a meeting, or a portion thereof, requires the affirmative vote of a majority of all Finance Board directors. 5 U.S.C. § 552b(d)(1); 12 C.F.R. § 912.5(a). For every closed meeting, the General Counsel must publicly certify that the closure is legally permissible, and cite the relevant exemption. 5 U.S.C. § 552b(f)(1); 12 C.F.R. § 912.5(d). Within one day of the vote to close a meeting or a portion thereof, the Finance Board must make publicly available the vote, an explanation of its actions, and a list of persons expected to attend the closed session. 5 U.S.C. § 552b(d)(3); 12 C.F.R. § 912.5(a).

Meeting records: The Finance Board must produce and retain a complete transcript or electronic recording of all closed meetings or portions thereof. 5 U.S.C. § 552b(f)(1); 12 C.F.R. § 912.5(c). The Finance Board also produces and maintains transcripts of all open meetings.

Fed. Communications Comm'n v. ITT World Communications, Inc., 466 U.S. 463 (1984) (ITT Case). In the ITT Case, the Supreme Court first discussed the legislative history of the “meeting” definition. The Court pointed out that by narrowing the scope of the term “meeting” through substitution of more precise and limited language in developing the statutory definition, Congress “recognized that the administrative process cannot be conducted entirely in the public eye.” *Id.* at 469-470 (citation omitted). The Supreme Court then concluded that the “meeting” definition includes only discussions “that effectively predetermine official actions”, in other words, discussions that are “sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.” *Id.* at 471 (*citing* ACUS GUIDE at 9). For example, under this standard “informal background discussions that clarify issues and expose varying views” are not meetings for purposes of the Sunshine Act. *Id.* at 469 (citation omitted).

B. When is a Gathering of a Quorum a Sunshine Act Meeting?

The ITT Case provides guidance to collegial agencies on application of the “meeting” definition but does not include objective factors an agency can use to determine in advance of its occurrence whether a particular gathering of a quorum is a Sunshine Act meeting. More than ten years after the ITT Case, a Special Committee of ACUS that convened to review the Sunshine Act said:

... as a practical matter it is extremely difficult for an agency member to make the distinction between actions that actually dispose of agency business and those that merely constitute preliminary discussions. Agency members, and agency general counsel who advise them, are understandably – and appropriately – concerned about engaging in discussions with a quorum of agency members that could be perceived, even arguably, as crossing the line, even though the discussions may, in fact, not dispose of official agency business. And, of course, it is difficult, *a priori*, to know whether a conversation that is anticipated to be preliminary will turn into a conversation that takes on a more definite cast.

Special Committee, Administrative Conference of the U.S., Recent Development, *Reforming the Sunshine Act: Report & Recommendation by the Special Committee to Review the Government in the Sunshine Act*, 49 ADMIN. L. REV. 421, 423 (Spring 1997) (ACUS Report). In order to assist agency members in making that determination, commentators have suggested an analytical model that parses the decision-making process into distinct phases. *See Report on the Government in the Sunshine Act*, 1987 A.B.A. SEC. OF ADMIN. LAW (ABA Report); David A. Barrett, Note, *Facilitating Government Decision Making: Distinguishing Between Meetings and Nonmeetings Under the Federal Sunshine Act*, 66 TEX. L. REV. 1195 (1988) (Note).

The first phase of the decision-making process is the collective inquiry stage, which includes casual, general, informational or preliminary discussions that will not effectively predetermine final agency action. This stage is a broadening function marked by an expansion of knowledge – agency members gather information to clarify issues, develop expertise, and identify a range of solutions without comparing them. Note at 1205; ABA Report at 9-11. Under the standard

espoused in the ITT Case, gatherings that occur during the collective inquiry stage of the decision-making process are outside the scope of the Sunshine Act’s “meeting” definition.

The second phase of the decision-making process is the deliberative or discussion stage, during which agency members confront, weigh and examine the reasons for or against a choice. In the deliberative stage, agency members exchange views, evaluate and narrow choices and options, but do not reach final decisions. The deliberative stage essentially is a narrowing function that advances the decision-making process towards a potential solution for a specific issue. The ACUS suggests that a discussion that does not reach a final decision but “significantly furthers the decisional process by narrowing issues, discarding alternatives etc.” is a meeting subject to the Sunshine Act unless the discussion is “not of a nature to foreclose or narrow discussions at subsequent collegial gatherings.” ACUS GUIDE at 10. Commentators generally agree that a gathering of a quorum during the deliberative stage is a meeting for purposes of the Sunshine Act.³

The final phase of the decision-making process is the decision stage. During this stage, agency members reach a consensus on an issue. The decision stage clearly is subject to the open meeting requirements of the Sunshine Act.

Applying this model, the following gatherings would, except as noted, be outside the scope of the Sunshine Act:

- General background or preliminary briefings by agency staff or outsiders. Several collegial agencies, including the Federal Deposit Insurance Corporation (FDIC) and the former Federal Home Loan Bank Board (FHLBB), have adopted a definition of the term “meeting” for purposes of their agency’s implementing rule that excludes specifically briefings and informal preliminary discussions that clarify issues and expose varying views but do not effectively predetermine official actions.⁴ The ABA Report recommends that agency members “be primarily receptors of information or views and only incidentally exchange views with one another.” ABA Report at 1.
- Informal, exploratory discussions of issues likely to face the agency. The ABA Report would permit such discussions so long as they remain preliminary, there are no pending proposals for agency action, and the merits of any proposed action are open to full consideration at a later time. ABA Report at 2.
- General discussions of subjects relevant to an agency’s responsibilities that do not at the time of the discussion pose specific problems requiring agency action. Subjects might include “big picture” issues like agency performance – successes, failures, challenges, etc.; the

³ See, e.g., *Id.* at 8-9; Note at 1206. Where a function has been delegated to the chair, the ACUS Guide suggests that a gathering of a quorum at which the chair seeks the informal advice of the other members about that function is not a Sunshine Act meeting. ACUS GUIDE at 10-11.

⁴ See 12 C.F.R. § 311.2(b) (FDIC); 12 C.F.R. § 505b.2 (FHLBB) (repealed 1989). See also 49 C.F.R. § 804.3(c) (National Transportation Safety Board); 29 C.F.R. § 2203.2 (Occupational Safety and Health Review Commission); 10 C.F.R. § 1704.2(d)(3)-(5) (Defense Nuclear Facilities Safety Board).

establishment of an agency agenda; the effectiveness of agency offices in meeting the agency's needs; or the relationship between the agency and Congress, the public, regulated entities or other agencies. Through discussion of a variety of issues, agency members can select the topics that should become the subject of more particularized proposals, the discussions of which would be subject to the Sunshine Act.

Because the line between the collective inquiry and deliberative stages of the decision-making process often is vague and the stages even may overlap, commentators suggest that a collegial agency should assure the public that it is operating within the law. Methods by which an agency can provide assurance to the public include either setting an agenda in advance of a private gathering of a quorum or creating a summary after a gathering that includes the date, subject, participants, and a review of the nature of the discussion.⁵ To prevent inadvertent crossings of the "meeting" line, some commentators recommend that the General Counsel or his designee act as a Sunshine traffic cop at gatherings of a quorum that may include discussions of substantive issues. ABA Report at 2.

CONCLUSION:

A gathering of a quorum of Finance Board directors is a meeting under the Sunshine Act if the discussion is "sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency." Under this standard, casual, general, informational or preliminary discussions that will not effectively predetermine final agency action are not Sunshine Act meetings. In order to protect the actions of the Board of Directors and the Finance Board from challenge, each gathering of a quorum of Finance Board directors must be analyzed in light of its particular circumstances and the individual members of the Board of Directors must exercise their own best judgment in these matters. To avoid triggering the open meeting requirements of the Sunshine Act, members must ensure that discussions remain preliminary and do not effectively predetermine official agency actions. Examples of gatherings that usually are not subject to the Sunshine Act include general background or preliminary briefings by Finance Board staff or outsiders; informal, exploratory discussions of issues likely to face the Finance Board; and wide-ranging discussions of subjects relevant to the Finance Board's responsibilities that do not at the time of the discussion pose specific problems requiring agency action.

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⁵ See Note at 1201, 1225-26; ACUS Report at 425 (also suggests that the post-gathering summary be released to the public within five days of the gathering); 64 Fed. Reg. 24936, 24942 (May 10, 1999) and 64 Fed. Reg. 39393, 39394 (July 22, 1999) (implementing a Nuclear Regulatory Commission (NRC) rule, codified at 12 C.F.R. § 9.101(c), that adopted verbatim the Supreme Court standard in the ITT Case the agency's meeting definition) ("As a matter of policy discretion ... the NRC has decided to maintain a record of the date and subject of, and participants in, any scheduled non-Sunshine Act discussions that three or more Commissioners attend ..."). In July 2000, the United States Court of Appeals for the District of Columbia Circuit upheld the NRC rule. See *Natural Resources Defense Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180 (D.C. Cir. 2000).



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ADDENDUM

Preliminary Comments

In order to protect the actions of the Board of Directors and the Federal Housing Finance Board (Finance Board) from challenge, each gathering of a quorum (three or more) of Finance Board directors must be analyzed in light of its particular circumstances and the individual members of the Board of Directors must exercise their own best judgment in these matters. To avoid triggering the open meeting requirements of the Government in the Sunshine Act (Sunshine Act), discussions need to remain preliminary and cannot effectively predetermine official agency actions. While litigation concerning the Sunshine Act is uncommon, criticism by the media or Congress is not. As the gathering moves closer to the line between the collective inquiry and deliberation/discussion stages of the decision-making process (see below), Finance Board directors should consider whether a gathering that might be able to withstand legal challenge nevertheless might elicit public or congressional disapproval.

Application of the Decision-Making Model to the Federal Housing Finance Board

Under the three-phase decision making model -- (1) collective inquiry (2) deliberation/discussion and (3) decision -- discussed in detail in the Sunshine Act memorandum prepared by the Office of General Counsel on 20 February 2002, many gatherings of a quorum of Finance Board Directors are not meetings for purposes of the Sunshine Act. Applying the decision-making model, the following gatherings of a quorum of Finance Board directors would, except as noted, be outside the scope of the Sunshine Act:

- ◆ Briefings by Staff. A staff presentation concerning current issues, such as analysis of Federal Home Loan Bank (FHLBank) capital plans or various options for resolving the multi-district membership issue, is within the collective inquiry stage and therefore not a Sunshine Act meeting. To prevent shifting staff briefings into the deliberative/discussion stage, which is subject to the open meeting requirements of the Sunshine Act, Finance Board directors should confine their remarks to clarifying questions. If Board members discuss the merits of different options and thereby narrow the issues, the gathering then would include deliberations covered by the Sunshine Act.

- ◆ Agenda Meetings. Periodic sessions to discuss the upcoming agency agenda, *e.g.*, issues the Finance Board will face in the next month/quarter, are collective inquiry stage gatherings that are outside the scope of the Sunshine Act.
- ◆ “Big Picture” Meetings. Discussions concerning topics that do not pose specific problems for resolution at the time of the gathering, *e.g.*, overall agency organization or performance, are not Sunshine Act meetings. In order to remain within the collective inquiry stage, the discussion at a “big picture” gathering should remain informal and exploratory.
- ◆ Briefings by Outsiders. Briefings by outsiders, like the multi-district membership roundtable sponsored by several industry associations, also can fall into the collective inquiry stage. However, to avoid transforming outside presentations into meetings may require greater vigilance on the part of the directors particularly:
 - if the presentation does not take place at the Finance Board,
 - if the sponsor, host or presenter is a FHLBank, or
 - if the subject is a matter pending agency action.

For instance, a quorum should not attend a briefing at the offices of a FHLBank on a current issue or an issue that soon may come before the Board of Directors for decision because the opportunity for the FHLBank to advocate for or against particular options -- a narrowing function that is part of the deliberative/discussion stage -- may be too great. An example of a FHLBank presentation that would not raise meeting issues is a briefing on the status or operation of a previously approved program.