

ANNUAL REPORT

Government in the Sunshine Act

1. AGENCY NAME: Federal Trade Commission

2. CALENDAR YEAR: 2002

3. MEETINGS:

|    |                                       |    |
|----|---------------------------------------|----|
| A. | Total Number of Open.....             | 1  |
| B. | Total Number of Closed.....           | 24 |
| C. | Total Number of Partially Closed..... | 0  |
|    | Total Number of Meetings.....         | 25 |

4. REASONS FOR CLOSING OR PARTIALLY CLOSING MEETINGS:

A. The number of times specific exemptions were cited alone or in combination with other exemptions, as the basis for closing or partially closing meetings

|                                    |    |
|------------------------------------|----|
| Exemption 10.....                  | 1  |
| Exemption 4, 10 .....              | 0  |
| Exemptions 7(A) and 10.....        | 4  |
| Exemptions 3, 7(A) and 10 .....    | 1  |
| Exemptions 3, 4, 7(A), and 10..... | 18 |
| Total.....                         | 24 |

As a rule, the Commission decides on the status under the Sunshine Act of individual agenda items (e.g., consideration of a proposed consent agreement, etc.) rather than on the status under the Sunshine Act of entire meetings. Exceptions are meetings that discuss proposed budgets. However, for purposes of preparing statistics about "meetings" for this report, the Sunshine Act status of the meeting as a whole has been considered and reported.

B. An explanation of the agency's policy regarding

(1) Budget Meetings

The Commission held one budget meeting during 2002.

(2) Meetings discussing Congressional testimony

The Commission held no meetings to discuss Congressional testimony in 2002.

(3) Briefings of agency members by staff

The Commission staff conducted no briefings of a voting majority of agency members in 2002 apart from staff participation in meetings convened to discuss and resolve pending case recommendations.

5. DESCRIPTION OF LITIGATION

No lawsuits seeking disclosure of FTC Sunshine Act minutes were filed in 2002.

6. NOTATIONAL VOTING

A. Procedures

The Commission's system of notational voting using written circulations is as follows: As provided in Commission Rule 4.14(a),<sup>1</sup> the Commission may resolve matters either at a meeting under Rule 4.15, or by written circulation. The Commissioner responsible for a matter initially decides whether the matter should be handled at a Commission meeting or by a written circulation (either "non-agenda" or "walk around"). Under both the "non-agenda" and "walk-around" methods, the matter is circulated with a written motion by the assigned Commissioner. "Walk-around" written circulations are generally used only for matters requiring immediate action.

In 1983, the Commission amended its "notational" voting procedures to expedite the notational voting process. Most of these changes concern the imposition of time limits on the notational voting process to expedite Commission action. On April 7, 1994, the Commission adopted additional changes in its voting procedures to expedite further its consideration of adjudicative and nonadjudicative matters.

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<sup>1</sup> A copy of each of the Commission rules referred to in this report is attached.

B. Availability to the Public of

- (1) A record of notational votes;
- (2) The circulated written materials; and
- (3) Any other methods used to explain the agency's reasoning to the public.

Rule 4.9 requires votes by Commissioners to be placed on the public record in "matters of public record, including matters of public record decided by notational voting". Commission Rule 4.9(b)(1)(ii). The Commission has also issued a policy statement identifying the Commissioners' votes that are routinely made public. See 52 Fed. Reg. 29568 (1987).

No special procedures apply to the written materials circulated as part of the notational voting process. The underlying materials, like all other internal Commission documents, are subject to the requirements of the Freedom of Information Act ("FOIA"). Similarly, no special procedures govern explanation to the public of decisions reached by notational voting. When Commission decisions include public explanation of their rationale, this explanation is made public whether the decision was reached at a meeting or by notational voting.

7. PUBLIC OBSERVATION

- A. Agency steps to ensure that the public attendees are able to understand the substance of the items discussed at open meetings;
- B. Availability of staff papers, reports and other background information;
- C. Specific procedures for making such background or working papers available to the public.

The Commission seeks to make its meetings meaningful for public observers in several ways. The agency's Sunshine rules delegate to the Commissioner assigned to present an agenda item at an open meeting the authority to make public, before the meeting, material "sufficient to inform the public of the issues likely to be discussed in connection with that matter." Commission Rule 4.15(b)(3). The material made available has included the texts of proposed rules and Federal Register notices, summaries of the agenda item, statements of Commissioners, and other documents. When the Commission is considering a draft proposed rule, the text of the proposed rule is usually made available. Staff memoranda are usually not made public, except where the staff recommendation was otherwise expected to be made public or has already been placed on the public record.

The material made public under this rule is available to the public outside the Commission's meeting room one hour before an open meeting begins, and in the Commission's Public Reference Room beginning the day before an open meeting.

In addition, the Commission and Commission staff participating in open meeting discussions attempt to discuss matters familiar to them in a manner that makes these matters understandable to the general public.

D. Agency policy with respect to use of cameras and recording devices by public observers at open meetings

The Commission permits tape recorders and cameras at open meetings, so long as they do not disrupt the meeting. The Commission occasionally has allowed non-disruptive artificial lighting at open meetings.

8. PUBLIC NOTICE

A. Process and methods of notifying the public and public locations of meeting notices

As provided in Section 4.15(a)(5) of the Commission's Rules, meeting notices are posted outside the Commission's Public Reference Room and the Commission's meeting room, and, except for meetings closed pursuant to 5 U.S.C. §§ 552b(c)(10) and (d)(4) [see Rule 4.15(c)(2)], are published in the Federal Register. In addition, meeting notices issued a week in advance of the meeting are mailed to all persons on the Commission's general mailing list. Also, current information concerning meeting notices is recorded and made available to the public on the Commission's automatic telephone news line at (202) 326-2711 and can be found as well on the Commission's Web site at <http://www.ftc.gov>.

B. Tabulation of number of days' notice given for all of the agency's meetings

The number of days' notice given for all Commission meetings during 2002 is provided in Table I, attached. Table I also provides the number of days' notice given for the addition and deletion of individual agenda items for each meeting scheduled in 2002.

C. Number of times less than seven days' notice has been given to the public

The number of times less than seven days' notice was given to the public concerning Commission meetings is summarized below. The information, taken from Table I, is provided both for meetings and for the addition and deletion of individual agenda items:

|    |   |                 |
|----|---|-----------------|
| 1. | Open meetings:  | 0               |
| 2. | Open/closed meetings:   | 0               |
| 3. | Closed meetings pursuant to 5 U.S.C. §§ 552b(c)(10) and (d)(4):                                       | 6 <sup>2</sup>  |
| 4. | Additions to open meeting agendas:  | 0               |
| 5. | Additions to closed meeting agendas of items closed pursuant to 5 U.S.C. §§ 552b(c)(10) and (d)(4):   | 12 <sup>3</sup> |
| 6. | Additions to closed meeting agendas of items closed pursuant to other exemptions:                     | 0               |
| 7. | Deletions from open meeting agendas:  | 0               |
| 8. | Deletions from closed meeting agendas of items closed pursuant to 5 U.S.C. §§ 552b(c)(10) and (d)(4): | 5 <sup>4</sup>  |
| 9. | Deletions from closed meeting agendas of items closed pursuant to other exemptions:                   | 0               |

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<sup>2</sup> Each of these meetings was closed pursuant to Section (d)(4) of the Sunshine Act, which permits the Commission to close a meeting with less than the normal seven days' notice if the Commission has issued regulations for expedited procedures. See 5 U.S.C. § 552b(d)(4). Since the Commission has issued such regulations for meetings or portions of meetings closed under Exemption 10, see Commission Rule 4.15(c)(2), each of these meetings could properly be closed with less than seven days' notice.

<sup>3</sup> See note 2.

<sup>4</sup> Although the Sunshine Act does not specifically address the notice required for deleting an item from the agenda of a meeting closed under Exemption 10 of the Act, the Act does contemplate that changes in a meeting's agenda may occur after public notice has been provided. Since the addition of an agenda item "closed" under Exemption 10 may be made with less than seven days' notice, logic would suggest that deletion of the same item would be permissible with less than seven days' notice.

## 9. PUBLIC INTEREST

The Sunshine Act provides that a meeting may be closed if one of the exemptions in 5 U.S.C. § 552b(c) applies, unless "the agency finds that the public interest requires otherwise." The members of the Commission consider the public interest in each vote concerning the open or closed status of a meeting. Considering a motion that a meeting be held in closed session includes assessing whether the public interest requires the discussion to be open.

As the statistics on page 1 show, all of the Commission's closed meetings during 2002 were closed under Exemption 10 and one or more of Exemptions 3, 4, and 7(A). Although each Commissioner's vote to close an individual agenda item is decided in light of the facts of that case, generally the strong policies behind the applicable exemption(s) outweigh the benefits of opening the meeting, especially when the Commission closes the meeting under Exemption 10 to consider an agenda item relating to its law enforcement, litigation, or adjudicative functions.

The frequent use of Exemption 3 is necessitated by the special confidentiality provisions in the FTC Act and the Clayton Act. Exemption 3(A) permits closing a meeting to protect materials and information that are exempt from disclosure by a statute that prohibits discretionary release. At meetings, the Commission often discusses information or material that the agency has obtained in a law enforcement investigation pursuant to compulsory process. Under Section 21(b) of the FTC Act, 15 U.S.C. § 57b-2(b), the Commission is prohibited from publicly disclosing this information. This information would, therefore, be exempt from disclosure under Sunshine Act Exemption 3(A).

In addition, the Commission may discuss information from a submitter that involves trade secrets or commercial or financial information that is privileged or confidential. Section 6(f) of the FTC Act, 15 U.S.C. § 46(f), prohibits the agency from disclosing this kind of information. Since the Commission has no discretion to release this information, closure of a meeting to protect the information from public disclosure is permitted under Sunshine Act Exemption 3(A). Discussion of such confidential commercial or financial information is also protected from disclosure under Sunshine Act Exemption 4.

Exemption 3(A) also covers information discussed at Commission meetings concerning mergers or acquisitions when the information was obtained under the Hart-Scott-Rodino (HSR) provisions of the Clayton Act. Section 7A(h) of the Clayton Act, 15 U.S.C. § 18a(h), prohibits the Commission from disclosing this information publicly except as may be relevant to an administrative or judicial action or proceeding. Since the Commission has no discretion to release this information, it is within the scope of Sunshine Act Exemption 3(A). In addition, by virtue of its status as confidential commercial or financial information, the information is also exempt from disclosure under Sunshine Act Exemption 4.

Sunshine Act Exemption 3(B) covers materials that are exempted from disclosure by a statute that establishes criteria for withholding the information, or refers to particular types of matters to be withheld. Section 21(f) of the FTC Act, 15 U.S.C. § 57b-2(f), permits, but does not

require, the Commission to withhold information submitted in a law enforcement investigation when the information has been submitted pursuant to compulsory process or voluntarily in lieu of compulsory process. The Commission protects all information submitted pursuant to process.<sup>5</sup> Further, the Commission has, through the adoption of one of its operating rules, waived its discretion to release information submitted voluntarily in place of compulsory process if the submitter has designated it as confidential. See Rule 4.10(d) of the Commission's Rules of Practice, 16 C.F.R. § 4.10(d).

Closed meeting minutes or transcripts must be placed on the public record, except for material falling within 5 U.S.C. § 552b(c). Authority to decide which portions of most closed meeting minutes and transcripts will be placed on the public record has been delegated to the Commission's General Counsel. The General Counsel considers the nature and current status of each matter discussed, and determines whether, in light of these facts, the public interest warrants the disclosure of otherwise exempt information. The only exception from this treatment applies to minutes for the Commission's executive sessions, such as those following oral arguments. Such minutes are reviewed by the Commission itself to determine proper treatment under the Sunshine Act.

10. RELEASE OF TRANSCRIPTS, RECORDINGS, AND MINUTES OF CLOSED MEETINGS

Pursuant to 5 U.S.C. § 552b(f)(1), the Commission prepares minutes, rather than transcripts, of most meetings closed under Exemption 10. The portions of closed meeting minutes and transcripts that have been placed on the public record are arranged by meeting date and are available for inspection and copying in the Commission's Public Reference Room.

A. Procedures to make available to the public transcripts, recordings, and minutes

As noted in response to Question 9, the Commission has delegated to its General Counsel the authority to review minutes or transcripts of most closed meetings and determine which portions should be placed on the public record. The General Counsel may, in unusual or difficult cases, refer a question of release to the Commission.

In reviewing the portions of nonadjudicative minutes or transcripts to be placed on the public record, the General Counsel determines, as of the time of review, whether one or more of the Sunshine Act exemptions apply. If the material falls within an exemption, the General Counsel further determines whether the public interest nevertheless requires release. The

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<sup>5</sup> As noted earlier, Section 21(b) of the FTC Act, 15 U.S.C. § 57b-2(b), prohibits the agency from publicly releasing any information submitted in a law enforcement investigation pursuant to compulsory process.

General Counsel's final determination is transmitted to the Commission's Secretary, who places the released material on the public record.

B. Periodic review of continued application of an exemption to transcripts, recordings, and minutes

The Commission does not undertake a periodic review of its transcripts and minutes to determine the continued application of an exemption. A formal request for minutes or transcripts of a closed meeting will be handled under FOIA procedures and, at the initial level, the material released will be limited to portions that are on the public record. However, where an appeal under the FOIA is filed and the minutes or transcripts have not been recently reviewed, the minutes or transcripts will be reviewed again by the General Counsel.

C. Indexing of closed and open meeting minutes and transcripts

The minutes or transcripts of closed Commission meetings are filed chronologically in redacted form on the public record, and may be located by date. There is no additional index of these minutes. The Commission also prepares minutes of its open meetings. These are maintained chronologically in a general binder that includes open meeting minutes, advisory opinions, and speeches with no additional index.

D. Requests for transcripts and minutes; tabulation of requests and number granted and denied; review procedures; length of time

Requests for minutes or transcripts of closed meetings may be considered in two groups. First, because redacted minutes or transcripts of closed meetings that are on the public record are routinely available in the Commission's Public Reference Room, no formal request of any type for this material need be made. The Commission therefore has no information as to how many of these minutes and transcripts have been reviewed.

Second, formal requests may be made for minutes or transcripts in two situations: (1) where the review process has not been completed, or (2) where the requester seeks access to portions that were redacted when they were placed on the public record. No such formal requests were received during 2002.

Procedurally, all formal requests for minutes and transcripts are handled under the Commission's Rules that apply to FOIA requests. Commission Rule 4.11(a). Requests by Congressional committees and subcommittees, however, are handled under Commission Rule 4.11(b), which governs Congressional committee and subcommittee requests for disclosure of records. Requests from state and federal law enforcement agencies are handled under Commission Rule 4.11(c). Requests for material withheld from minutes or transcripts of closed meetings are determined in accordance with the Sunshine Act exemptions, as required by 5 U.S.C. § 552b(k).



The review process for formal requests depends on whether the material has previously received processing under the Sunshine Act. Initial requests for minutes or transcripts whose nonexempt portions have already been placed on the public record are handled by the Freedom of Information Act/Privacy Act Section of the Commission's Office of the General Counsel, which provides the public record portions of these documents to the requester. Requests for minutes or transcripts whose review has not yet been completed by the agency are handled by the General Counsel under the procedures outlined above. The General Counsel also handles appeals from initial access request denials. Requests by Congressional committees and subcommittees are referred by the General Counsel for presentation to the Commission, subject to the FOIA and Sunshine Act provisions that these statutes are not authority to withhold information from Congress.

#### 11. REQUESTS TO OPEN

While the Commission would consider a request that an agency meeting be open, the Commission has no rule specifically setting out procedures for such a request.

One comment received during the 30-day comment period on the Commission's original (1977) Sunshine rules suggested that the Commission provide a rule permitting it to consider requests from the public to hold open meetings. These requests, for all intents and purposes, amount to requests to reconsider a prior Commission determination to close a meeting. The Commission decided not to adopt a procedure to consider such requests because of the potential for delay such procedures would engender. In rejecting this comment, the Commission noted that the General Counsel has the responsibility for certifying motions to close a meeting after reviewing the proposed discussion in light of the Sunshine Act exemptions, and the Commission votes to close a meeting with the expectation that exempt information will be discussed. Thus, it is unlikely that a meeting would be closed without full consideration of the Sunshine Act exemptions and of the public interest in making as much information as possible available to the public.

#### 12. FORMAL COMPLAINTS

The Commission received no formal complaints about its Sunshine procedures and practices.

#### 13. EX PARTE COMMUNICATIONS

The Commission's rules governing ex parte contacts in adjudicative matters are set out in Commission Rule 4.7. The Commission also has rules governing ex parte communications made by persons not employed by the Commission to Commissioners or advisors to the Commissioners in rulemaking proceedings. These regulations, which implement Section 18(k) of the FTC Act, as amended by the FTC Improvements Act of 1980, are set out in Commission Rules 1.18(c) and 1.26(b)(5). Procedures governing communications pertaining to proposed divestitures and acquisitions that require prior approval by the Commission are set out in Rule 2.41(f).

**Table I**

**NUMBER OF DAYS' NOTICE GIVEN FOR COMMISSION MEETINGS**

|  | Number of Days' Notice |   |   |   |   |   |   |   |   |   |    | Other <sup>7</sup>   |
|--|------------------------|---|---|---|---|---|---|---|---|---|----|--|
|  | 0 <sup>6</sup>         | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 |  |
| <b>1. Meetings</b>                                   |                        |   |   |   |   |   |   |   |   |   |    |  |
| a. Open  |                        |   |   |   |   |   |   |   |   |   |    | 1(18)  |
| b. Open/Closed                                       |                        |   |   |   |   |   |   |   |   |   |    |  |
| c. Closed  |                        | 1 |   |   | 2 | 2 | 1 | 1 | 1 |   |    | 2(11), 1(12), 4(13), 1(15), 2(17), 1(18), 1(22), 1(25), 1(26), 1(89) |
| <b>2. Additions to agenda (by item)</b>              |                        |   |   |   |   |   |   |   |   |   |    |  |
| a. Open  |                        |   |   |   |   |   |   |   |   |   |    |  |
| b. Closed pursuant to 5 U.S.C. 552b©)(10) and (d)(4) | 2                      | 3 |   |   | 1 | 1 | 5 | 2 | 6 |   |    | 6(11), 31(13), 1(14), 1(15), 1(19), 1(20), 9(22)                     |
| c. Closed pursuant to other exemptions               |                        |   |   |   |   |   |   |   |   |   |    |  |
| <b>3. Deletions from agenda</b>                      |                        |   |   |   |   |   |   |   |   |   |    |  |
| a. Open  |                        |   |   |   |   |   |   |   |   |   |    |  |
| b. Closed pursuant to 5 U.S.C. 552b©)(10) and (d)(4) | 3                      |   | 1 | 1 |   |   |   |   | 1 |   |    |  |
| c. Closed pursuant to other exemptions               |                        |   |   |   |   |   |   |   |   |   |    |  |

<sup>6</sup> A zero means that the notice was given the same day as the meeting.

<sup>7</sup> "Other" indicates those situations where the Commission provided either more than ten days' notice of a meeting or notice after the meeting was held. The numbers inside the parentheses indicate the number of days of advance notice for a particular agenda item, or, in the case of a negative number, notice that was given after the meeting was held. The numbers in front of the parentheticals indicate the number of instances in which the advance notice indicated in the parentheses was provided.