

The Government in the Sunshine Act in the 21<sup>st</sup> Century

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## INTRODUCTION

In the late 1960s and early 1970s, an era characterized by the Watergate scandal, the Vietnam War, and other high-profile events that eroded the confidence of the American public in the good faith of their elected leaders, Congress passed a series of transparency laws designed to bring greater accountability to the federal government. The first such law, the Freedom of Information Act (FOIA),<sup>2</sup> requires government agencies to provide access to agency documents upon public request so long as one of a series of exceptions (protecting documents related to national defense, trade secrets, and internal deliberative matters, amongst other things) is not met.<sup>3</sup> The second, the Federal Advisory Committee Act (FACA), applies to groups of individuals including at least one non-federal employee that the President or agencies may convene in order to obtain advice on substantive matters.<sup>4</sup> FACA requires agencies to open meetings to public attendance, to permit members of the public to submit written comments and/or offer oral statements at committee meetings, and to make committee documents available to members of the public upon request.<sup>5</sup> The third, the Government in the Sunshine Act (Sunshine Act), requires that meetings of multi-member agencies be held publicly.<sup>6</sup>

Though considerable ink has been spilt in the academic literature analyzing FOIA and the question of public access to federal agency documents more generally, FACA and the Sunshine Act have received relatively scant attention in scholarly writings.<sup>7</sup> In 2011, the author of the present report analyzed FACA and offered a series of recommendations for improving the Act,<sup>8</sup> which formed the basis for Recommendation 2011-7, approved by the Administrative Conference of the United States at its December 2011 Plenary Session. The Administrative Conference also has undertaken a study of FOIA, focusing upon reducing FOIA litigation through alternative dispute resolution techniques, the research for which is currently ongoing.<sup>9</sup> The present report and its associated recommendations focus upon the Sunshine Act, seeking to

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<sup>2</sup> Pub. L. No. 89-487, 80 Stat. 250 (1966) (codified at 5 U.S.C. § 552).

<sup>3</sup> *Id.* Importantly, if one of the various FOIA exceptions covers a particular requested document, the agency is permitted to withhold it, but it is not required to do so and may voluntarily choose to release it nevertheless. *Chrysler Corp. v. Brown*, 441 U.S. 281, 293-94 (1979).

<sup>4</sup> Pub. L. No. 92-463, 86 Stat. 770 (1972) (codified at 5 U.S.C. app.).

<sup>5</sup> *See generally id.*; 41 C.F.R. § 102-3.

<sup>6</sup> Pub. L. No. 94-409, 90 Stat. 1241 (1976) (5 U.S.C. § 552b).

<sup>7</sup> According to a Lexis search conducted by Administrative Conference summer intern Arjun Ravi, since 1995, 348 law review articles have mentioned the Government in the Sunshine Act, 440 mentioned the Federal Advisory Committee Act, and 7032 mentioned the Freedom of Information Act.

<sup>8</sup> Reeve T. Bull, *The Federal Advisory Committee Act: Issues and Proposed Reforms* (Sept. 12, 2012), available at <http://www.acus.gov/sites/default/files/documents/COCG-Reeve-Bull-Draft-FACA-Report-9-12-11.pdf>.

<sup>9</sup> Administrative Conference of the United States, *Reducing FOIA Litigation through Targeted ADR Strategies*, available at <http://www.acus.gov/research-projects/reducing-foia-litigation-through-targeted-adr-strategies>.

highlight best practices that can enhance the transparency of multi-member agencies without burdening those agencies' ability to meet efficiently and expeditiously.

Like FOIA and FACA, the Sunshine Act has fostered widespread public expectations that government agencies must operate with perfect openness and transparency, an ideal that often outstrips reality. Though the transparency laws create a default in favor of disclosure of governmental documents and openness in high-level government meetings, agencies carefully rely upon the various interstices and exceptions in the laws.<sup>10</sup> In this light, advocates of transparency have accused government agencies of circumventing the relevant laws by over-exploiting the various exceptions and applying a hyper-technical reading of the applicable statutes.<sup>11</sup> Government agencies, in turn, have contended that expecting perfect transparency is unrealistic and often counterproductive, chilling discussion and hamstringing agencies' efforts to conduct their work efficiently.<sup>12</sup> President Obama has committed his Administration to an "unprecedented level of openness in Government,"<sup>13</sup> yet the memorandum announcing this policy speaks in sweeping, general terms and does not provide specific directives to ensure that agencies comply with both the spirit and the letter of the various transparency laws.

This report seeks to improve the transparency of open meetings conducted under the Sunshine Act by highlighting opportunities created by new technologies. It does not propose any amendment to current law but rather identifies mechanisms by which agencies can promote greater transparency without expending excessive agency resources or introducing inefficiencies into the decisionmaking process. Though many have called for substantial reforms to the Sunshine Act, ranging from shelving the law entirely to strengthening it to compel agencies to conduct much more of their business in the public gaze, any such overhaul of existing legislation necessarily requires a careful balance of competing interests and can result in unforeseen

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<sup>10</sup> In fiscal year 2010, 72% of the meetings subject to FACA were either completely or partially closed pursuant to one of the FACA exceptions. Bull, *supra* note 8, at 29 n.181. The surveys conducted for the present project indicate that only 17 of 37 responding multi-member agencies fully opened 50% or more of their meetings to public attendance in the period from 2007–10. See Appendix A (General Counsel Survey) at 9–10.

<sup>11</sup> See, e.g., Lucy Dalglish, Society of Professional Journalists, National Freedom of Information Committee, Statement at a Hearing of the Special Committee to Review the Government in the Sunshine Act (Sept. 12, 1995) ("[W]e strongly urge that the people who are covered by the law don't change the law to accommodate the people who may be offended or intimidated by its intent. Public knowledge is essentially to the democratic process. Information is knowledge and knowledge is power."); William B. Ketter, American Society of Newspaper Editors, Statement at a Hearing of the Special Committee to Review the Government in the Sunshine Act (Sept. 12, 1995) ("In our view it is not the Act itself that has stifled the deliberative process, rather the blame lies with the agencies themselves for their willful refusal to embrace the clear intent of the Sunshine Act.").

<sup>12</sup> See, e.g., Steven M.H. Wallman, SEC Commissioner, Statement at a Hearing of the Special Committee to Review the Government in the Sunshine Act (Sept. 12, 1995) ("I believe the Act has had the unintended and adverse effect of substantially reducing the ability—some might say the willingness . . .—of agency members to deliberate jointly in a full and appropriate manner.").

<sup>13</sup> Barack H. Obama, Memorandum for the Heads of Executive Departments and Agencies re Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 26, 2009).

consequences that arise from disturbing an existing equilibrium. The research undergirding this report suggests that, though the existing law creates frustrations for both multi-member agencies and members of the public alike, it more or less strikes a reasonable balance between openness and efficiency that has promoted increased transparency without hobbling agencies in their efforts to conduct agency business expeditiously. Nevertheless, the research has also identified a series of relatively modest innovations agencies can implement to ensure that they fully exploit new media technologies, innovations that can significantly enhance the ability of the public to track and participate in agencies' work while imposing minimal burdens on the agencies themselves.

The report is divided into three sections. In the first section, it provides an exceedingly brief overview of the Act, drawing heavily from *An Interpretive Guide to the Government in the Sunshine Act*.<sup>14</sup> In the second section, it offers an overview of three streams of research that undergird the report: (a) the work of the Special Committee to Review the Government in the Sunshine Act that the Administrative Conference convened in 1995; (b) surveys conducted by Professor Bernard Bell in 2011–12 on behalf of the Conference; and (c) the results of an informal survey that the author circulated to members of the Council of Independent Regulatory Agencies (a body of independent regulatory agency representatives chaired by the Conference, most of which are structured as multi-member boards or commissions subject to the Act). It concludes that the Sunshine Act, though it has created certain inefficiencies for agencies while disappointing advocates of enhanced government transparency, nevertheless strikes a reasonable balance between competing desiderata. In the third and final section, the report offers a set of recommendations designed to promote the optimal use of new media by multi-member agencies, identifying relatively low-cost innovations that significantly enhance transparency.

When Louis Brandeis uttered his famous remark that “sunlight is said to be the best of disinfectants,”<sup>15</sup> he perhaps did not foresee the complex ramifications that result from exposing government operations to the “sunlight” of public and media scrutiny. To carry the analogy a bit further, so long as the whole of a given area is not perfectly illuminated, bringing sunlight to one region may simply push activity into the shadows, a phenomenon illustrated by agencies' heavy use of the various Sunshine Act exemptions. Further, though sunlight may indeed be a powerful disinfectant, it also can cause injury if focused too intensely, and achieving perfect transparency is likely neither feasible nor desirable. For instance, forcing agency heads to conduct preliminary discussions or brainstorming sessions publicly may chill conversation insofar as officials are reluctant to offer tentative observations for fear of appearing uninformed or indecisive. Extending Brandeis's exceptional metaphor one step more (and focusing upon

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<sup>14</sup> RICHARD K. BERG ET AL., *AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT* (2d ed. 2005). This treatise offers a comprehensive, detailed overview of the Act, and the author would commend it to those who seek a more extensive analysis of the Act.

<sup>15</sup> Louis D. Brandeis, *What Publicity Can Do*, *HARPER'S WEEKLY*, Dec. 20, 1913, at 10.

artificial rather than natural lighting), the reforms in this recommendation can be thought of as replacing incandescent light bulbs with more modern, efficient fluorescent lamps. It does not seek to readjust the balance between illuminated and abumbrated regions but rather focuses upon ensuring that lighted areas are irradiated in the most efficient manner possible. By exploiting new technologies, agencies can ensure that they are meeting the 21<sup>st</sup> century expectations of stakeholders while imposing a negligible burden upon their operations (and, in some cases, likely capturing cost savings and greatly improving the efficiency of their efforts).

## I. OVERVIEW OF THE GOVERNMENT IN THE SUNSHINE ACT

The Government in the Sunshine Act requires that meetings of multi-member agencies be announced to the public in advance and that members of the public be permitted to attend such meetings.<sup>16</sup> Notwithstanding its relatively straightforward language, the statute has given rise to a number of interpretive issues, the resolution of which has defined the impact of the Act. This section analyzes several of the major questions that have arisen in the interpretation of the Sunshine Act, focusing particularly on activities that fall outside of the reach of the statute (e.g., notational voting, seriatim meetings, staff-level meetings).

### A. Definition of “Agency”

The Sunshine Act applies to every agency “headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency.”<sup>17</sup> As an initial matter, the statutory drafters’ decision to limit the Act’s applicability to multi-member agencies merits some scrutiny: Brandeis’s insight regarding the salubrious effects of “sunshine” is presumably not limited only to agencies headed by a board or commission rather than a single chairperson. Nevertheless, though the chairperson of an agency not subject to the Act may meet with his or her staff prior to reaching a conclusion, the ultimate decisionmaking authority ultimately lies exclusively with the chairperson rather than with a panel of individuals. Multi-member agencies, by contrast, make decisions in a more collaborative manner, and the statutory framers felt that members of the public should be able to observe this decisionmaking process.

Though the definition of “agency” provided in the Act is relatively straightforward and resolves most ambiguities, a handful of agencies have leadership structures that are not easily characterized for purposes of determining the Act’s applicability. For instance, the Court of Appeals for the District of Columbia Circuit has held that agencies whose sole function is to

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<sup>16</sup> 5 U.S.C. § 552b.

<sup>17</sup> *Id.* § 552b(a)(1).

advise and assist the President are not subject to the Act.<sup>18</sup> Agencies headed by individuals who serve on the agency at issue in an *ex officio* capacity as a corollary to their service in another agency (to which they have been appointed by the President and confirmed by the Senate) also are not subject to the Act.<sup>19</sup> Finally, in some instances Congress has specifically directed certain agencies that do not otherwise meet the statutory definition of “agency” to comply with the Act,<sup>20</sup> and a handful of otherwise exempt agencies voluntarily comply with some or all of the provisions of the Act.<sup>21</sup>

Though the Act itself does not enumerate the various agencies to which it applies, Richard Berg, Stephen Klitzman, and Gary Edles have compiled such a list of agencies in *An Interpretive Guide to the Government in the Sunshine Act*.<sup>22</sup> This list is likely the most comprehensive enumeration of agencies subject to the Act that is available to practitioners, though certain agencies subject to the Act may have arisen after the most recent update to the list.

#### B. Definition of “Meeting”

Likely no interpretive issue related to the Sunshine Act has proven more contentious than the definition of the term “meeting.” The Act itself provides some guidance, defining “meeting” 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.”<sup>23</sup> Numerous interpretive issues have arisen from this ostensibly straightforward definition. First, though the Act does not explicitly provide for a quorum requirement, the Senate Report accompanying the Act provides that any agency action subject to the Act must be taken by a group that includes a sufficiently large number of members to obligate the agency.<sup>24</sup> Agency quorum requirements are ordinarily established in the agency’s statute; in the absence of a statutory provision, quorum requirements can be set by agency

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<sup>18</sup> *Rushforth v. Council of Econ. Advisers*, 762 F.2d 1038, 1043 (D.C. Cir. 1985).

<sup>19</sup> *Symons v. Chrysler Loan Guar. Bd.*, 670 F.2d 238 (D.C. Cir. 1981) (holding that the Loan Guarantee Board, whose voting members included the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, and the Comptroller General, was not subject to the Sunshine Act).

<sup>20</sup> *See* 42 U.S.C. § 8103(i) (extending the Sunshine Act to the Neighborhood Reinvestment Corporation).

<sup>21</sup> BERG, *supra* note 14, at 2 (noting that the Federal Open Market Committee and the U.S. Commission on Civil Rights voluntarily comply with all provisions of the Sunshine Act).

<sup>22</sup> *Id.* at Appendix C (compiling the Sunshine Act regulations for those agencies subject to the Act); *see also* DAVID E. LEWIS & JENNIFER L. SELIN, *SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 127* (1st ed., 2d printing 2013) (providing a list of agencies subject to the Sunshine Act in Table 17).

<sup>23</sup> 5 U.S.C. § 552b(a)(2).

<sup>24</sup> S. REP. NO. 94-354, at 19 (1975).

regulation.<sup>25</sup> Some agencies have statutory authority to delegate decisional responsibility to an individual or unit smaller than a quorum of the agency itself.<sup>26</sup>

Determining the type of gathering of a quorum of board or commission members that implicates the Sunshine Act is a far more difficult exercise. One can envision two extremes. At one end of the spectrum, the law could provide that any event in which a quorum of members convenes to discuss any issue (whether gathering in-person or via electronic means such as telephone or web forum) triggers the Act. At the other extreme, the law could be that a “meeting” subject to the Act arises only when a quorum of members actually votes on agency business (with any pre-meeting discussions being exempt so long as they do not obligate the agency to any course of action). Ultimately, the legislative history and case law interpreting the Act draw the line somewhere between those Manichean alternatives, though the resulting standard is not free of ambiguity and has created some uncertainty for agencies attempting to comply with the Act.

The legislative history of the Sunshine Act provides a series of broad-brush principles that help define the scope of the covered “meetings,” which can be summarized as follows:

- A quorum of agency members must interact as a group; a monologue in which one board or commission member merely states his or her views to others does not trigger the Act, even if a quorum of agency members is present.<sup>27</sup>
- A meeting in which a quorum of agency members discusses procedural issues, casual topics, or any other matter that does not concern the substance of the agency’s business is not subject to the Act. As the Senate Report provides, “[t]he words ‘deliberation’ and ‘conduct’ were carefully chosen to indicate that some degree of formality is required before a gathering is considered a meeting for purposes of this section.”<sup>28</sup>
- On the other hand, agency members need not necessarily vote on official agency business for a gathering to qualify as a “meeting” under the Act. The Senate Report states that “[t]he meetings open by [the Sunshine Act] are not intended to be merely reruns staged for the public after agency members have discussed the

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<sup>25</sup> Fed. Trade Comm’n v. Flotill Products, 389 U.S. 171, 181–82 (1967).

<sup>26</sup> 5 U.S.C. § 552b(a)(1) (stating that the Act applies to “any subdivision [of the board or commission] authorized to act on behalf of the agency”); *New Process Steel, L.P. v. Nat’l Labor Relations Bd.*, 560 U.S. 674, 679–83 (2010).

<sup>27</sup> S. Rep. No. 94-354, at 18 (1975). In this sense, the Sunshine Act is quite similar to the Federal Advisory Committee Act (FACA). Under the so-called “individual advice” exemption to FACA, an advisory committee need not conduct its meetings openly so long as each member simply states his or her views individually and the committee does not engage in broader group interactions. *Ass’n of Am. Physicians & Surgeons, Inc. v. Clinton*, 997 F.2d 898, 913 (D.C. Cir. 1993).

<sup>28</sup> S. Rep. No. 94-354, at 18 (1975).

issue in private and predetermined their views. The whole decisionmaking process, not merely its results, must be exposed to public scrutiny.”<sup>29</sup>

Though the legislative history draws a somewhat clear line of demarcation between activities that clearly implicate the Act (e.g., a quorum of members’ discussing and voting upon official agency decisions) and those that clearly do not (e.g., discussing when to schedule the next open meeting), certain agency member interactions fall into a nebulous intermediate area that does not clearly lie within or outside of the ambit of the Act. For instance, the legislative history does not clearly address whether a “brainstorming” session in which a quorum of agency members tentatively debates potential ideas without committing the agency to any course of action would fall under the Act. On one hand, such a meeting clearly does not dispose of agency business insofar as at least one or more additional meetings would be required to act upon the preliminary ideas discussed. On the other hand, the session indubitably advances the substantive business of the agency, and it therefore arguably should fall within the scope of the Act.

The Supreme Court confronted a similar question in *FCC v. ITT World Communications, Inc.*,<sup>30</sup> the only Supreme Court decision to address the scope of the Sunshine Act. A group of commissioners of the Federal Communications Commission (which did not constitute a full quorum of the agency but did comprise a quorum of a specific committee) met to discuss pro-competitive licensing policy and cooperation between the agency and its overseas counterparts.<sup>31</sup> The United States Court of Appeals for the District of Columbia Circuit held that such meetings fell under the Act,<sup>32</sup> but the Supreme Court unanimously reversed.<sup>33</sup> Since these preliminary discussions did not “effectively predetermine official actions” of the agency, they did not trigger the Act.<sup>34</sup>

In light of *ITT World*, “preliminary” discussions that do not lead immediately to formal decisions of the agency are not subject to the Act. Unfortunately, the decision does not provide much additional guidance, beyond that contained in the statutory text and the legislative history, for determining precisely when an exempt “preliminary” discussion evolves into an exchange designed to dispose of agency business. As a consequence, as will be explored in Section II, many agencies have taken a highly cautious approach to arranging discussions that will include a quorum of agency members. To build upon the aforementioned hypothetical, a “brainstorming” session perhaps falls outside the scope of the Act under the authority of *ITT World* insofar as it,

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<sup>29</sup> *Id.*

<sup>30</sup> 466 U.S. 463 (1984).

<sup>31</sup> *Id.* at 465.

<sup>32</sup> *ITT World Commc’ns v. Fed. Commc’ns Comm’n*, 699 F.2d 1219, 1249 (D.C. Cir. 1983).

<sup>33</sup> *ITT World*, 466 U.S. at 474.

<sup>34</sup> *Id.* at 471.

like the preliminary exchanges between agency members relating to international coordination at issue in the case, does not “effectively predetermine official actions” of the agency.<sup>35</sup>

Nevertheless, this conclusion does not follow ineluctably from the case law or the statute (one could certainly contend that a session wherein members debate ideas is the first step in the decisionmaking process of the agency). More importantly, even though a tentative discussion of ideas probably is exempt,<sup>36</sup> such a meeting may evolve organically into a session wherein members weigh the merits and drawbacks of the strongest ideas and perhaps even commit the agency to pursue some of the more promising proposals, which almost certainly would trigger the Act. To avoid this potentiality, agencies may choose simply to avoid holding such sessions.

### C. Notational Voting, Staff Meetings, and Seriatim Meetings

In light of the exceedingly vague definition of “meetings” that emerges from the Sunshine Act, its legislative history, and interpreting case law, agencies have understandably sought “safe harbors” that permit members to conduct business without the haunting suspicion that any given interaction may run afoul of the Sunshine Act. As a general matter, these “safe harbors” take advantage of the quorum requirement under the Act: so long as any given interaction involves less than a quorum of members engaging in group consideration of a substantive issue, the Sunshine Act is not triggered.

The first such “safe harbor” is the use of so-called notational voting. In *Communications Systems, Inc. v. Federal Communications Commission*,<sup>37</sup> a case that emerged shortly after the passage of the Sunshine Act, the United States Court of Appeals for the District of Columbia Circuit examined the Act’s legislative history to conclude that an agency does not violate the statute when its members receive written materials, review the same, and then provide their votes in writing.<sup>38</sup> Specifically, the relevant conference committee report provided that the Act “does

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<sup>35</sup> *Id.*

<sup>36</sup> In February 1987, the American Bar Association House of Delegates approved a recommendation that provided that the following exchanges amongst agency members should generally be exempt from the Sunshine Act (unless if they become “sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating (agency) members to form reasonably firm positions regarding matters pending or likely to arise before the agency”): “(a) spontaneous casual discussions among agency members of a subject of common interest; (b) briefings of agency members by staff or outsiders; . . . (c) general discussions of subjects which are relevant to an agency’s responsibilities but which do not pose specific problems for agency resolution; and (d) exploratory discussions, so long as they are preliminary in nature, there are no pending proposals for agency action, and the merits of any proposed action would be open to full consideration at a later time.” American Bar Association, Report and Recommendation on the Government in the Sunshine Act 1 (Feb. 1987). These general conclusions are virtually beyond cavil in light of *ITT World*, but agencies may encounter significant difficulties in attempting to determine whether specific interactions fall under the rather nebulous headings “spontaneous casual discussions,” “briefings,” “general discussions,” and “exploratory discussions.”

<sup>37</sup> 595 F.2d 797 (D.C. Cir. 1978).

<sup>38</sup> *Id.* at 798–99, 801.

not prevent agency members from considering individual business that is circulated to them sequentially in writing.”<sup>39</sup> Since this time, federal courts have repeatedly rejected challenges to agencies’ usage of the notational voting procedure.<sup>40</sup>

In theory, the notational voting “exception” could practically swallow the “rule” of openness created by the Sunshine Act. So long as agency members are willing to sacrifice whatever synergies may arise from conducting in-person meetings and the collegiality that develops from regularly convening board or commission members, an agency could presumably dispose of all business via written vote. In practice, many agencies permit any member to require an open meeting if he or she feels that a particular issue is sufficiently important to be discussed publicly rather than being addressed via notational voting.<sup>41</sup> This procedure diminishes the risk that an agency would rely exclusively on notational voting, for any one commissioner or board member can elevate any matter that he or she deems worthy of public discussion. Nevertheless, so long as all members accede in the use of notational voting, the Act itself does not prohibit agencies from deploying such procedures to address even substantive matters.

Another “safe harbor” that avoids triggering the Act is the disposition of agency business through staff-level meetings. Each member of a multi-member agency typically has a personal staff (with chairpersons of such agencies typically having a larger staff),<sup>42</sup> and different members’ staff can meet with one another to discuss substantive issues outside of an open meeting under the Sunshine Act.<sup>43</sup> The staff representatives can then report to their respective members and thereby share the views expressed by other members’ staff. Again, this process creates a potentially glaring loophole that permits agencies to circumvent the Act in virtually all cases. So long as each member trusts his or her staff members to faithfully and effectively advocate his or her views, members could effectively deputize staff members to act as their agents in discussing potential agency business and could then ratify the conclusions reached by the staff members after-the-fact through notational vote, all without triggering the Sunshine Act. As will be discussed in section II, the research conducted in connection with this project does not

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<sup>39</sup> H.R. Rep. 94-1441, 94th Cong. (1976); *see also* *Commc’ns Sys.*, 595 F.2d at 800 (quoting the conference committee report as well as a statement by Congressman Flowers to the same effect).

<sup>40</sup> BERG ET AL., *supra* note 14, at 32–33 (citing various circuit court decisions upholding the use of notational voting).

<sup>41</sup> *See, e.g.*, 17 C.F.R. § 200.42(b) (SEC); 39 C.F.R. § 6.7(c) (USPS).

<sup>42</sup> *See, e.g.*, FCC LEADERSHIP, <http://www.fcc.gov/leadership> (last visited July 31, 2013) (listing a higher number of personal staff for agency chairmen than for other commissioners); COMMISSION MEMBERS, <https://www.ferc.gov/about/com-mem.asp> (last visited July 31, 2013) (same); THE COMMISSION, <http://www.nrc.gov/about-nrc/organization/commfuncdesc.html> (last visited July 31, 2013) (same).

<sup>43</sup> *Trans World Airlines, Inc. v. Nat’l Mediation Bd.*, 81-0823, 1982 WL 2077, at \*5 (D.D.C. July 30, 1982) (“[T]he Act does not require the Board to convene to transact business which is routinely conducted on staff initiative without board advice.”); Richard J. Pierce, Jr. et al., *Administrative Law and Process* 479 (3d ed. 1999).

suggest that agencies are undermining the spirit of the Act by overreliance upon staff-level exchanges; though important exchanges do occur amongst staff representatives, agency survey respondents indicate that those communications merely provide additional information for board or commission members who retain all decisionmaking powers. Nevertheless, the mere existence of this potentially significant gap in the coverage of the Act has raised concerns on the part of government transparency advocates.<sup>44</sup>

A final “safe harbor” under the Act consists of a series of meetings between small groups of commissioners or board members, none of which involves a sufficiently large number of participants to comprise a quorum. This “exemption” is absolutely *sine qua non* for the smooth functioning of multi-member agencies; if every discussion between two or more members could potentially trigger the Act, members would effectively be required to insulate themselves from any interactions with their colleagues or ensure that any conversations they held were completely unrelated to the work of the agency.<sup>45</sup> Nevertheless, like the other “safe harbors,” it potentially opens the door to abuses. Specifically, members could merely hold a series of sub-quorum meetings to resolve all substantive agency business, obviating the need to hold any open meeting.<sup>46</sup> Of course, this mechanism of decisionmaking is exceedingly inefficient. For instance, in a hypothetical five-member board that defines a quorum as three members, the members would need to hold a series of 10 meetings in order for each member to meet with each other member at least once.<sup>47</sup> In this light, agencies likely would gain very little benefit from holding such “serial meetings,” and the research conducted in connection with this report provided no evidence that agencies abused the ability to hold sub-quorum discussions.<sup>48</sup>

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<sup>44</sup> See, e.g., Fred Wszolek, *Dark Clouds Over the Sunshine Act*, WORKFORCE FAIRNESS INSTITUTE (July 18, 2011), <http://www.biglaborbailout.com/2011/07/18/dark-clouds-over-the-sunshine-act/>.

<sup>45</sup> Unfortunately, agencies led by a three member board frequently confront precisely this scenario. So long as the agency defines a quorum as a group consisting of a majority of voting members, any meeting of two commissioners comprises a quorum. In the research Professor Bell conducted in support of this project, several survey respondents proposed amendments to the Act to provide special considerations for three member boards in order to facilitate one-on-one interactions by board members. Appendix A (Member Survey) at 12, 14; Appendix B (General Counsel Survey) at 13–16.

<sup>46</sup> Administrative Conference of the United States, Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act, 49 ADMIN. L. REV. 421, 423 (1997).

<sup>47</sup> *Id.* Specifically, if the members are labeled A–E, each of the following meetings would need to occur: A-B, A-C, A-D, A-E, B-C, B-D, B-E, C-D- C-E, D-E. If any additional issue or set of issues emerged in subsequent one-on-one meetings, then pairs of members that had previously met would need to hold one or more additional meetings, thereby significantly increasing the total number of meetings to be held.

<sup>48</sup> See *infra* section II.

## D. Opportunities and Challenges Created by “New Media”

Since the enactment of the Government in the Sunshine Act in 1976, a number of developments in the field of telecommunications have fundamentally altered both the traditional modes of interpersonal communication and the expectations of the general public concerning the availability of information.<sup>49</sup> These innovations create both opportunities and potential minefields for agencies subject to the Act. On one hand, the use of technologies such as email, discussion boards, blogs, social media (including Facebook and Twitter), and “apps” for mobile Internet can significantly enhance agency members’ ability to communicate both with one another and with the broader public. On the other hand, the novel technologies create two salient risks. First, members may inadvertently violate the Sunshine Act by exchanging substantive information in an electronic forum that is inaccessible to the general public. Second, the public has come to expect a certain level of media sophistication from public institutions, and agencies that fail to exploit technological developments and engage the public via the communication methods upon which they regularly rely risk alienating stakeholders and the public more broadly.

Though by no means exhaustive, the following list catalogues some of the Sunshine Act-related difficulties agencies may encounter in attempting to adapt their operations to the rise of 21<sup>st</sup> century telecommunications technology:

- *Email communication*: Using the “reply all” feature of most modern email programs, agency members can easily communicate with several or all of their colleagues simultaneously. If the email exchange takes place over an extended period of time (e.g., several days), it is closely analogous to notational voting, which falls outside of the Act’s open meeting requirements.<sup>50</sup> If, on the other hand, the members engage in a relatively rapid exchange of messages (e.g., one email reply sent every several seconds), then the interchange perhaps qualifies as a “virtual meeting” that would be subject to the Act.<sup>51</sup>
- *Chat and Online Discussion Boards*: Were a quorum of agency members to convene via a private chat room, any substantive discussion that disposed of agency business would almost certainly run afoul of the Sunshine Act. An alternative may be to hold such a discussion via a publicly accessible online discussion board, but the virtual meeting would need to be announced in advance via the Federal Register. Section III will explore possible mechanisms for expanding the use of such public electronic discussions.

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<sup>49</sup> See, e.g., Transparency & Open Government, 74 Fed. Reg. 4685, 4685 (Jan. 26, 2009) (Obama memorandum promising to create “an unprecedented level of openness in government”).

<sup>50</sup> *Commc’ns Sys., Inc. v. Fed. Commc’ns Comm’n*, 595 F.2d 797, 801 (D.C. Cir. 1978).

<sup>51</sup> BERGET AL., *supra* note 14, at 26–28 (noting that most state courts that have confronted the issue of simultaneous electronic exchanges have held that such activities fall under the state sunshine laws, but also observing that few federal agencies reported that the Sunshine Act inhibited their use of email).

- *Posting Meeting Documents on the Web*: Given its vintage, the Sunshine Act does not contain any requirement that agencies post meeting related documents on the web.<sup>52</sup> Nevertheless, the general public has come to expect agencies to post all relevant information concerning agency business online. To meet these expectations, many agencies have created webpages that describe their meeting processes and provide especially germane documents associated with those meetings.<sup>53</sup> Notwithstanding these innovations, agencies often face certain challenges that may create a disconnect between public expectations and what the agency can practicably provide. For instance, interested members of the public may expect advanced copies of documents to be considered at open meetings, but those documents may not always be finalized in time to permit pre-meeting promulgation on the website. Similarly, there is a balance between providing the most pertinent materials and drowning the public in a deluge of documents, many of which may be only tangentially related to the matter at hand.
- *Webcasting Open Meetings*: Since the rise of “YouTube,” “Livestream,” and other web-based video streaming platforms, the public has increasingly come to expect the ability to view even relatively minor official governmental meetings either in real-time or at least in an archived video made available on the web after-the-fact.<sup>54</sup> Nevertheless, webcasting agency meetings is not so simple as placing an inexpensive webcam at the back of the room and posting the product to YouTube. Under the Section 508 Amendment to the Rehabilitation Act of 1973,<sup>55</sup> federal agencies must ensure that the electronic information they provide is accessible to persons with disabilities. Thus, a web video must generally include captions to facilitate access by hearing-impaired individuals,<sup>56</sup> and the

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<sup>52</sup> Indeed, unlike the Federal Advisory Committee Act, which at least requires that committee documents be made publicly available upon request (though obviously does not address electronic availability of such documents, given that the statute predates the Sunshine Act), 5 U.S.C. App. § 10(b), the Sunshine Act does not even address the public availability of meeting documents, other than requiring that the minutes of a closed meeting identify the documents considered at said meeting. 5 U.S.C. § 552b(f)(1).

<sup>53</sup> See, e.g., Nuclear Regulatory Commission, *Commission Meetings, Agendas, Slides, Transcripts, Meeting SRMs, and Full Written Explanation for Closed Meetings for 2013*, available at <http://www.nrc.gov/reading-rm/doc-collections/commission/tr/2013/> (last updated June 17, 2013); Federal Communications Commission, *Open Meetings*, available at <http://www.fcc.gov/open-meetings> (last visited June 25, 2013).

<sup>54</sup> Undoubtedly, the rise of C-SPAN contributed to the general public expectation of access to deliberations of governmental bodies, but the traditional medium of cable television limited the availability of such broadcasts to the most significant events (focusing largely upon sessions of Congress and committee hearings). Web video, by contrast, expands available bandwidth by multiple orders of magnitude, and even relatively minor governmental meetings (e.g., state or local legislative sessions, meetings of federal agencies and advisory committees) can now be inexpensively broadcast.

<sup>55</sup> Workforce Investment Act of 1998, Pub. L. No. 105-222, 112 Stat. 936 (codified at 29 U.S.C. § 794d).

<sup>56</sup> 36 C.F.R. § 1194.24(c); United States Access Board, *Video and Multimedia Products (1194.24)*, available at <http://www.access-board.gov/guidelines-and-standards/communications-a-it/about-the-section-508-standards/guide->

cost of transcribing such a video is not insubstantial. Thus, many agencies have exhibited reluctance to fully embrace the possibilities for expanded public access that web-video services have created.

In Section III, this report will grapple with some of the issues raised by these new media advances. By proceeding circumspectly while nevertheless seeking to stay abreast of technological developments and exploit the opportunities they create, agencies can both improve the efficiency of their operations and satisfy reasonable expectations of members of the public who seek greater involvement in the agencies' work.

#### E. Past ACUS Recommendations

The Administrative Conference has examined the Government in the Sunshine Act twice in its history, resulting in one formal Conference recommendation and one recommendation of a special committee convened to consider improvements to the Act (that was issued merely weeks before the Conference closed its doors and therefore was never voted on by the Assembly). The first Conference project to consider the Act resulted in Administrative Conference Recommendation 84-3. Though it emerged only 8 years after the enactment of the Sunshine Act, Recommendation 84-3 identified two of the most salient issues related to the implementation of the Act that have continued to vex both agencies and their stakeholders for the last thirty years: (a) the open meeting requirement has the potential effect of diminishing collegiality amongst board or commission members, especially as “[i]n some agencies the pattern of decisionmaking has shifted from collegial exchanges to one-on-one encounters, transmission of views through staff, and exchanges of memoranda or notation procedure”<sup>57</sup> and (b) discussions that occur in open meetings are often relatively pro forma (likely due in part to the extensive use of notational voting and other procedures to dispose of many issues prior to open meetings), and the public often lacks access to relevant documents and other background information required to fully comprehend the proceedings.<sup>58</sup>

In response to these concerns, the Conference offered two recommendations designed to mitigate or eliminate these issues. First, it urged agencies to invoke the exemptions to the Act only when “there is a substantial reason to do so” and to provide relevant background information needed for public attendees to understand discussions at open meetings.<sup>59</sup> Second, it encouraged Congress to consider whether the existing Act strikes the optimal balance between transparency and collegiality, and it suggested that “agency members be permitted some

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to-the-section-508-standards/video-and-multimedia-products-1194-24 (last visited Aug. 1, 2013) (“Video and multimedia products that ‘support the agency’s mission’ are generally required to be captioned. . .”).

<sup>57</sup> Administrative Conference of the United States, Recommendation 84-3, 49 Fed. Reg. 29942 (July 25, 1984).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* ¶ 1.

opportunity to discuss the broad outlines of agency policies and priorities . . . in closed meetings, when the discussions are preliminary in nature or pertain to matters . . . which are to be considered in a public forum prior to final action.”<sup>60</sup>

In 1995, the Conference built upon the second recommendation in 84-3 by exploring the circumstances under which agencies subject to the Act might be permitted to close certain meetings.<sup>61</sup> The Conference convened a special committee to address this issue, and it held a series of open meetings and a public hearing at which it received input both from agency officials and public advocates for government transparency.<sup>62</sup> After reviewing this input, the special committee concluded that the Act imposes a substantial burden on multi-member agencies’ ability to dispose of agency business in an efficient manner, finding that:

While it may be permissible pursuant to a literal interpretation of “meeting” for a quorum of agency members to conduct preliminary discussions on an issue, 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.<sup>63</sup>

As a consequence, agencies have made extensive use of “safe harbors” such as notational voting to avoid inadvertently triggering the Act, and open meetings have largely devolved into sessions for issuing formal statements concerning matters that have already been resolved in other venues.<sup>64</sup> Further, the Act has the perverse effect of actually discouraging informal discussions amongst members of agencies (for fear that such discussions may ultimately develop into a covered “meeting”), which undermines the very collegial, deliberative decisionmaking process that is the *raison d’etre* of multi-member agencies.<sup>65</sup>

In order to resolve this dilemma, the special committee proposed a compromise solution designed to improve the efficiency of agency decisionmaking while also improving upon the transparency of the existing regime. Specifically, the committee recommended that Congress

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<sup>60</sup> *Id.* ¶ 2.

<sup>61</sup> The impetus for the 1995 project arose largely from a letter to the Chairperson of the Administrative Conference signed by over a dozen current or former commissioners of agencies subject to the Sunshine Act and a second letter from the members of the Federal Trade Commission, both urging the Conference to review the effectiveness of the Act. Administrative Conference of the United States, Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act, 49 ADMIN. L. REV. 421, 421 (1997).

<sup>62</sup> *Id.* at 422.

<sup>63</sup> *Id.* at 423.

<sup>64</sup> *See id.* (“Although there obviously are exceptions, and open meetings held under the current Act are valuable in that they allow an agency to explain publicly the results of its prior decisionmaking, the Committee believes that, generally, true collective decisionmaking does not occur at agency public meetings.”).

<sup>65</sup> *Id.* at 424–25.

establish a pilot program (lasting from five to seven years) that would allow members to meet privately so long as they provide a detailed summary of the meeting no later than 5 days after it has occurred.<sup>66</sup> In exchange, pilot program participants would agree to refrain from using notational voting on “important substantive matters” to the extent practicable, instead addressing those issues in open meetings, and would “hold open public meetings, to the extent practicable, at regular intervals, at which it would be in order for members to address issues discussed in private sessions or items disposed of by notation.”<sup>67</sup> If such a pilot program proved to be successful, then the committee urged Congress to consider amending the Act accordingly.<sup>68</sup>

In addition to the pilot program, the special committee’s recommendation also contained a handful of additional proposals for improving the administration of the Act. These included (amongst other things): (a) proposing that Congress statutorily direct agencies to develop and publish rules on the use of notational voting; (b) urging agencies to achieve greater transparency, including publicizing information about upcoming meetings, releasing non-privileged documents connected with meetings, and offering closed-circuit television coverage of meetings where appropriate (which in today’s world would be on the Internet); and (c) encouraging Congress to clarify that a separately noticed meeting is not required to continue to discuss matters initially examined in a meeting closed under exemption 10 (which covers information related to an agency’s participation in various adjudicative matters).<sup>69</sup>

The special committee issued its report and recommendation on October 10, 1995, and the Administrative Conference was disbanded only three weeks later, after having last funding from Congress. As a consequence, the full Assembly of the Conference did not have an opportunity to consider the committee’s recommendation in Plenary Session (the biannual Plenary Sessions typically occur in June and December), and the recommendation was therefore never considered by the Conference.

## II. SUMMARY AND ANALYSIS OF PROJECT RESEARCH

The research for this project occurred in two separate phases. In the first phase, Professor Bernard Bell of the Rutgers-Newark School of Law conducted two surveys, the first amongst board or commission members at agencies subject to the Sunshine Act and the second amongst general counsels at those agencies. In the second phase, I conducted a shorter survey distributed

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<sup>66</sup> *Id.* at 427 (the meeting summary “would indicate the date, time, participants, [and] subject matters discussed, and [would contain] a review of the nature of the discussion”).

<sup>67</sup> *Id.* at 427–28.

<sup>68</sup> *Id.* at 428.

<sup>69</sup> *Id.*

to the members of the Council of Independent Regulatory Agencies (CIRA)<sup>70</sup> and spoke with a number of representatives from these agencies. This section analyzes the compiled research data and presents broader conclusions to be drawn therefrom. In particular, it highlights innovations related to new media identified by survey respondents. Section III then builds upon those innovations by offering recommendations for all agencies to consider in their activities subject to the Sunshine Act.

#### A. The Bell Surveys

Over the course of 2011 and 2012, Professor Bell circulated two sets of online surveys to representatives from agencies subject to the Sunshine Act. He distributed the first survey to the board or commission members at each agency covered by the Act. He sent the second to the general counsel at each of those agencies. Of the 67 agencies subject to the Act, 56 members representing at least 24 different agencies responded to the first survey.<sup>71</sup> General counsels from 40 agencies responded to the second survey.<sup>72</sup> In this subsection, I highlight several of the most salient conclusions to be drawn from both surveys (compiling data from the separate surveys as relevant to any given topic, rather than examining each survey separately). A more detailed summary of the results is available in the appendices to the report: Appendix A presents the findings of the member survey, and Appendix B does the same for the general counsel survey.

On the whole, the results of the Bell surveys support four overarching conclusions: (1) agencies place relatively little emphasis on meetings of board members, whether those meetings are conducted openly or are closed pursuant to one of the Sunshine Act exceptions; (2) agencies find somewhat greater value in interactions that occur outside of such meetings, including informal discussions amongst board or commission members and conferences between such members and staff; (3) agencies have more or less reconciled themselves to the existence of the Sunshine Act and do not generally recommend repealing or fundamentally altering it; and (4) notwithstanding the lack of any overarching objections to the Act, agencies do have a number of specific complaints and suggestions for improving the Act.

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<sup>70</sup> CIRA is a council for leaders of independent regulatory agencies that is chaired by the Administrative Conference. Administrative Conference of the United States, Council of Independent Regulatory Agencies, <http://www.acus.gov/CIRA>. It was first convened by Administrative Conference Chairman Loren A. Smith in 1982, and it currently includes 21 member agencies (most of whom are subject to the Sunshine Act). *Id.* CIRA meets on a quarterly basis to discuss issues of mutual concern to independent regulatory agencies and to disseminate best practices.

<sup>71</sup> The precise number of responding agencies is unknown because 4 respondents did not provide an agency affiliation; as such, the actual number may be as small as 24 or as large as 28.

<sup>72</sup> Berg et al., *supra* note 14, at 259–63 (enumerating all agencies subject to the Act).

(1) *Open/Closed Agency Meetings*: Of the board or commission members who responded to the second Bell survey, 53.7% considered open agency meetings to comprise an “important” or “very important” source of information about the views and positions of fellow board or commission members.<sup>73</sup> A slightly higher percentage, 60.7% of respondents, asserted that closed meetings were “important” or “very important” for achieving that purpose.<sup>74</sup> By contrast, a significantly higher percentage of board or commission members found conversations amongst groups of members short of a full quorum (81.9%) and conversations with personal (69.6%) or agency staff (78.2%) to comprise “important” or “very important” sources of such information.<sup>75</sup> Similarly, for purposes of achieving compromises amongst board or commission members, respondents considered meetings of members short of a quorum (69.1% described this as “important” or “very important”), inter-member email exchanges (56.2%), exchange of written materials (46.2%), and meetings amongst staff member (75.4%) more significant than open (36.8%) or closed (41.8%) meetings.<sup>76</sup>

When asked whether discussions at open meetings changed their views on issues before the agency, 62.5% of members responded that such discussions “seldom” or “never” did so, as contrasted with 26.8% of respondents who indicated that such discussions “frequently” or “occasion[ally]” did so.<sup>77</sup> The percentage of members influenced was similar for closed meetings (46.5% responded “seldom” or “never”; 25% responded “frequently” or “on a number of occasions”).<sup>78</sup> Similarly, when asked whether statements they made at open meetings influenced other board or commission members, 64.3% responded “seldom” or “never,” as contrasted with 23.2% who responded “frequently” or “occasion[ally].”<sup>79</sup> Again, the numbers were substantially similar with respect to closed meetings (49.2% responded “seldom” or “never”; 21.5% responded “frequently” or “on a number of occasions”).<sup>80</sup>

These results support several conclusions. First, roughly two-thirds of members do not consider open meetings conducted pursuant to the Sunshine Act to be a particularly effective forum for persuading other members of a position or for being influenced by other members. The results also do not suggest that closed meetings are much more effective than open meetings

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<sup>73</sup> Appendix A (Member Survey) at 2 (Question 5).

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Appendix A (Member Survey) at 4 (Question 8).

<sup>77</sup> Appendix A (Member Survey) at 1 (Questions 1 and 3).

<sup>78</sup> *Id.* The lower overall percentages are a function of the much larger number of respondents who answered “not applicable” for this question.

<sup>79</sup> Appendix A (Member Survey) at 1 (Questions 2 and 4).

<sup>80</sup> *Id.* The lower overall percentages are a function of the much larger number of respondents who answered “not applicable” for this question.

for this purpose: only about 25% of respondents indicated that they either persuaded others or were influenced by colleagues at open or closed meetings. Second, though more than half of respondents considered both open and closed meetings to be fairly important for purposes of learning other members' positions, much larger percentages considered interactions such as meetings with staff and informal discussions to comprise a significant source of information. In summary, the results suggest that open meetings are not an insignificant source of information and deliberation, but they are relatively less important than other exchanges that fall beyond the purview of the Act. Further, closed meetings appear to be only marginally more effective than open meetings, and interchanges outside of formal meetings seem to be more valuable than both.

(2) *Non-Meeting Exchanges*: As explored in the previous subsection, agency members considered non-meeting discussions such as meetings with staff members and informal interactions amongst groups of members short of a full quorum to be more significant than either open or closed meetings for purposes of exchanging views and engaging in compromises. Several other findings of both surveys bolster this conclusion. Most significantly, board and commission members indicate that they frequently use notational voting to dispose of agency business. Roughly three quarters (75.4%) of board and commissioner member respondents stated that their agency uses notational voting, and 60.5% noted that their agency “almost always” or “frequently” uses that procedure even when disagreement amongst members exists (though 64.3% asserted that their agency “infrequently” or “almost never” uses notational voting to address “novel matters of policy or novel issues of fact or law”).<sup>81</sup>

Interestingly, the general counsel survey revealed a fairly stark dichotomy in agencies' use of notational voting: many disposed of all or nearly all agency business by notational voting, and many disposed of no or almost no agency business via the procedure, but relatively few agencies disposed of a moderate amount of agency business by that mechanism. Specifically, of 32 general counsels who estimated the percentage of agency business addressed by notational voting, 15 provided a figure of 10% or less (46.8%),<sup>82</sup> 12 provided a figure of 90% or more (37.5%),<sup>83</sup> and 5 provided a figure between 10.1% and 89.9% (15.6%).<sup>84</sup>

In short, the results suggest that the vast majority of agencies use notational voting, though many use it very sparingly. Significantly, roughly one-third of agencies handle virtually (or literally) all agency business via notational voting. Thus, regardless of the normative arguments that can be posited for retaining or eliminating notational voting, it is beyond

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<sup>81</sup> Appendix A (Member Survey) at 6 (Questions 11–13).

<sup>82</sup> Appendix B (General Counsel Survey) at 2–3 (Question 4). Ten respondents (31.2%) indicated that their agencies never use notational voting. *Id.*

<sup>83</sup> *Id.* Five respondents (15.6%) indicated that their agencies dispose of 100% of agency business via notational voting. *Id.*

<sup>84</sup> *Id.*

peradventure that eliminating or curtailing the use of the procedure would be massively disruptive for those agencies that have come to heavily rely upon it.

(3) *Agency Accommodation to the Sunshine Act*: Though it is somewhat perilous to draw sweeping conclusions from specific data points, the overall gestalt of the survey responses suggests that agencies more or less have adjusted to the requirements created by the Act and have devised efficient mechanisms for conducting agency business while ensuring full compliance with the letter (though arguably not the spirit) of the law. Though no single response leads ineluctably to this conclusion, the following data points strongly support it:

- Roughly two-thirds of board and commission member respondents indicated that they had “adequate opportunities” “to learn about the views and positions of other Commissioners/Board Members” (72.7%), “to convince other Commissioners/Board Members of your position on issues” (71.4%), and “to work out compromises between their positions or narrow the issues in dispute” (71.9%) under the current law.<sup>85</sup>
- Over 80% of board and commission member respondents stated that notational voting is used “just about the right amount” of time.<sup>86</sup>
- When asked if they found it difficult to determine whether holding closed briefing sessions would run afoul of the Act, 57.2% of board and commissioner respondents indicated that doing so would be “very easy” or “easy,” as contrasted with 18.4% who felt it would be “difficult or “very difficult.”<sup>87</sup>
- The board and commission member surveys produced little evidence that commission or board members avoided discussion of certain issues in open meetings or were otherwise chilled in their interactions as a result of the Act. When asked how often they discuss their positions or views in open meetings, 80.3% of board and commission member respondents indicated that they did so “almost always,” “frequently, or “on a number of occasions.”<sup>88</sup> Only 19.7% averred that they “seldom or “never” did so.<sup>89</sup> Further, of the individuals who provided the response “seldom” or “never,” very few indicated that they were particularly concerned about “making an erroneous or inaccurate statement,” causing confusion, or misleading regulated entities or the public.<sup>90</sup>

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<sup>85</sup> Appendix A (Member Survey) at 3 (Questions 6–7, 9).

<sup>86</sup> *Id.* at 7 (Question 14). Approximately fourteen percent of respondents felt notational voting was used “too frequently,” and roughly five percent thought it was used “not frequently enough.” *Id.*

<sup>87</sup> *Id.* at 9 (Question 20).

<sup>88</sup> *Id.* at 9 (Question 21).

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

In short, though the data indicate that agencies deem it entirely appropriate to rely upon procedures such as notational voting that do not implicate the Act's open meeting requirements, it appears that agencies have effectively learned to live with the Act and have more or less adjusted to the balance that it strikes between open meeting requirements and preserving the ability to conduct certain business privately. Though the data obviously cannot support a normative conclusion concerning whether this is the "right" balance, it does imply that the current system neither cripples agencies in conducting their day-to-day business nor creates such massive loopholes that the Act is effectively a dead letter. At the same time, both board and commission members and general counsels raise a number of complaints concerning the existing state of affairs, which the next subsection will explore.

(4) *Agency Complaints concerning the Sunshine Act*: Notwithstanding the overarching conclusion that agencies have essentially learned to live with the Sunshine Act, the surveys also reveal a number of criticisms of the Act. Indeed, when asked directly whether they would support amendments to the Sunshine Act, roughly two-thirds of board and commission member respondents (62.3%) replied "yes."<sup>91</sup> Some of the proposed reforms emerging from both surveys include the following:

- Several respondents noted the problems that the Sunshine Act creates for three member boards and commissions, given that any assemblage of two members constitutes a quorum under the Act.<sup>92</sup> None of the respondents offered a particularly detailed solution to this problem, other than indicating that members of agencies should be able to hold one-on-one meetings without fear of violating the Act.
- Multiple member respondents indicated that agencies should be able to hold brainstorming sessions or general discussions without triggering the Act.<sup>93</sup>
- Numerous respondents proposed that agencies that conduct adjudications should be permitted to discuss pending cases in closed session (much as judges sitting on

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<sup>91</sup> *Id.* at 11 (Question 25). The substantial number of affirmative responses to this question arguably calls the conclusion of the previous subsection into doubt. Nevertheless, the question merely asks whether board or commission members would amend the Act, not how substantially they would alter it or whether or not they believe it is feasible to do so. Further, as the subsequent discussion will reveal, the responses did not overwhelmingly identify any specific problem as requiring reform, and many of the proposed amendments (e.g., clarifying the definition of "meeting" under the Act) do not admit of straightforward solutions.

<sup>92</sup> Appendix A (Member Survey) at 12–15 (Question 25); Appendix B (General Counsel Survey) at 13, 15 (Questions 15, 17).

<sup>93</sup> Appendix A (Member Survey) at 12–15 (Question 25).

a federal appellate court would privately discuss the resolution of a pending case).<sup>94</sup>

- Several general counsel respondents called for greater clarity in the definition of “meeting” under the Act, though none indicated precisely how the definition should be amended or supplemented.<sup>95</sup>
- Two general counsel respondents suggested that the requirements for announcing open meetings were overly burdensome.<sup>96</sup>

Other than the last suggestion, which addresses a rather minor ministerial detail associated with the Act, the other proposed amendments all effectively concern the scope of “meetings” covered by the Sunshine Act. Some deal with defining the ambit separating meetings subject to the Act from those that are exempt, whereas others address re-defining activities currently subject to the Act (e.g., a substantive discussion amongst two members of a three-member board) as exempt. The problem of separating exempt “preliminary discussions” from covered “disposition of agency business” is an exceedingly nettlesome issue that has vexed courts and agencies for decades, and these complaints are therefore not terribly surprising. Satisfactorily resolving that issue is, of course, an ambitious task, a fact evidenced by the dearth of proposed solutions in the various responses.

#### B. CIRA Discussions and Survey

After the completion of the Bell surveys, CIRA held a series of meetings (led by ACUS Chairman Paul Verkuil) to discuss the results of the survey and collect agency input on potential recommendations for improving the Act and/or enhancing agencies’ compliance therewith. The first such meeting took place on September 7, 2012; roughly 20 representatives from various independent regulatory agencies attended the meeting. At that meeting, I summarized the results of the Bell survey. The discussion focused upon two primary topics: (1) whether to recommend legislative amendments to the Sunshine Act (including resurrecting the 1995 Administrative Conference recommendation concerning a pilot program permitting expanded use of private meetings) and (2) potential agency “best practices” under the existing law.

As a general matter, participants expressed far more interest in recommendations relating to “best practices” than in urging Congress to amend the Act. With respect to the 1995 Administrative Conference recommendation, several participants indicated that expanding the sets of circumstances under which agencies can hold private meetings would not be especially valuable, given that agencies consider alternative mechanisms of exchanging views and

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<sup>94</sup> Appendix A (Member Survey) at 12–15 (Question 25); Appendix B (General Counsel Survey) at 13, 15 (Questions 15, 17).

<sup>95</sup> Appendix B (General Counsel Survey) at 13, 15 (Questions 15, 17).

<sup>96</sup> Appendix B (General Counsel Survey) at 13 (Question 15).

information more significant than either open or closed meetings, a conclusion bolstered by the responses to Bell's board and commission member survey.<sup>97</sup> Similarly, participants were not terribly sanguine concerning the prospect of passing legislation designed to reform the Act, given the lack of evidence of fundamental flaws in the current regime. As such, the participants encouraged the Conference to focus upon "best practices" under the existing Act.

On June 14, 2013, CIRA held a second meeting to discuss potential "best practices" under the Act; roughly 20 representatives from numerous agencies subject to the Act attended. Administrative Conference intern Arjun Ravi reviewed the Sunshine Act regulations of roughly 20 agencies to identify provisions related to notational voting, staff meetings, and serial meetings, and I presented his findings to the CIRA attendees. In addition, I proposed two potential sets of "best practices" drawn from the Bell surveys: (1) common guidance concerning when agencies should use notational voting, staff meetings, sub-quorum discussions, and other mechanisms for disposing of agency business that do not trigger the Act and (2) examination of issues raised by novel technologies and proposals for how agencies can successfully navigate the "new media" landscape.

As a general matter, participants suggested that the latter option sounded more promising than the former. Agency practices related to member interactions outside of formal meetings vary significantly, and attempting to weld the diverse policies into a common, "one-size-fits-all" approach would likely be an unproductive exercise, resulting either in an exceedingly vague pronouncement that blesses almost all existing practices or a somewhat more strict formulation that forecloses agency innovations. By contrast, fewer agencies have grappled with the problems posed by electronic communications, and many felt that a series of recommendations concerning "best practices" for exploiting such technologies while ensuring scrupulous compliance with the Act would be quite beneficial.

In connection with the second meeting, I prepared a brief series of survey questions concerning "best practices" under the Act and potential statutory reforms, which I circulated to CIRA participants in advance of the meeting. I have highlighted a few of the responses below (focusing on common themes rather than details concerning how individual agencies handle notational voting, staff meetings, etc.):

- Several agencies provide a publicly available document (generally posted on the agency website) describing its procedures for conducting open or closed meetings and offering an overview of how the agency conducts business more generally.

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<sup>97</sup> See *supra* section II.A.1.

- Many agencies announce the result of notational voting on the website and send electronic notification to interested parties (e.g., via an email distribution list to which members of the public can subscribe).
- Several respondents indicated that a nearly simultaneous exchange amongst a quorum of members via email or any other electronic communication mechanism could qualify as a “meeting” under the Act. As such, many agencies caution members against such exchanges to avoid inadvertently violating the Act.
- Many agencies maintain webpages related to open meetings, including calendars that announce the dates of such meetings and online libraries containing documents to be considered during meetings.
- Several agencies webcast open meetings (none of the responses discussed the problem of section 508 compliance).

The results suggest that a number of agencies have pioneered innovative policies for exploiting technological advances, which promise both to improve the transparency of agency decisionmaking processes and enhance the efficiency of agency operations. The next section highlights the most promising advances and offers a series of recommendations that encourage other agencies to adopt these innovations as appropriate.

### III. RECOMMENDED “BEST PRACTICES” UNDER THE SUNSHINE ACT

From its inception, the Government in the Sunshine Act has sought to balance two competing policies. The Act arose as a result of concerns regarding excessive secrecy in the operation of government agencies: by subjecting multi-member agencies, which operate via group deliberation, to an open meeting requirement, Congress attempted to ensure that the media and the public more broadly could monitor the work of such agencies.<sup>98</sup> Nevertheless, from the outset, Congress realized that imposing excessively onerous openness requirements would hamstring the work of agencies by formalizing all interactions of agency members and potentially undermining the collegiality that is the hallmark of multi-member boards and commissions.<sup>99</sup> The Act itself attempts to achieve a balance by providing a series of exceptions to the open meeting requirements,<sup>100</sup> and agencies and courts have interpreted the Act not to apply to certain interactions such as meetings amongst members’ staff and notational voting.

The research conducted in connection with the project did not necessarily demonstrate that the existing regime strikes the ideal balance between openness and efficiency. Indeed, the

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<sup>98</sup> S. REP. NO. 94-354, at 1–2 (1975).

<sup>99</sup> Kathy Bradley, *Do You Feel the Sunshine? Government in the Sunshine Act: Its Objectives, Goals, and Effect on the FCC and You*, 49 FED. COMM. L.J. 473, 482–83 (1997).

<sup>100</sup> 5 U.S.C. § 552b(c).

Bell surveys indicated that roughly two-thirds of agency members support amendments to the Act and revealed a number of proposed revisions thereto.<sup>101</sup> Further, advocates of governmental transparency also have criticized the existing system, contending that many agencies fail to comply with the spirit of the law.<sup>102</sup> In his testimony before the special committee the Administrative Conference convened to study the Act in 1995, William B. Ketter, then President of the American Society of Newspaper Editors, observed that “[i]n our view it is not the Act itself that has stifled the deliberative process, rather the blame lies with agencies themselves for their willful refusal to embrace the clear intent of the Sunshine Act.”<sup>103</sup>

Nevertheless, the survey responses indicate that, though the existing regime perhaps does not strike the optimal balance between the competing considerations, it achieves some level of transparency without hobbling agency operations. Further, given the compelling considerations on both sides, any fundamental revision to the Act would likely prove enormously controversial and would perhaps garner insufficient support to achieve passage in Congress. Indeed, the CIRA representatives expressed some reluctance to propose legislative amendments to the Act, including a pilot program along the lines of the 1995 recommendation of the Administrative Conference special committee allowing for private meetings, and instead encouraged the Conference to analyze potential best practices under the Act.

In that light, the following recommendations seek to highlight best practices identified by the Bell and CIRA surveys. None would require an amendment to the Sunshine Act or a reinterpretation of existing case law. The recommendations are not intended as a one-size-fits all approach, and several of the recommendations may not apply to specific multi-member agencies. Rather, they are designed to identify several innovations and urge other agencies subject to the Sunshine Act to consider adopting or adapting such practices as appropriate. The recommendations are attuned to the need to balance enhanced transparency against ensuring the efficiency and cost-effectiveness of agency operations, and they are designed to impose minimal costs on agencies (or even achieve cost savings) while greatly improving the transparency of agency operations.

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<sup>101</sup> See *supra* section II.A.

<sup>102</sup> Administrative Conference of the United States, Report and Recommendation by the Special Committee to Review the Government in the Sunshine Act, 49 ADMIN. L. REV. 421, 424 (1997) (“It should be noted that the [special ACUS committee to review the Sunshine Act] also heard from representatives of several major press-related organizations who, while not disputing the view that agency members are generally reluctant to have substantive discussions in public meetings, expressed the view that such public officials should change their behavior and admonished them to do so.”).

<sup>103</sup> Administrative Conference of the United States, Special Committee to Review the Government in the Sunshine Act, Transcript of Public Hearing, Statement of William B. Ketter, President of the American Society of Newspaper Editors 24–25 (Sept. 12, 1995).

*Recommendation 1: Each multi-member agency should develop a succinct, public-facing document that discusses the mechanisms for attending and participating in open meetings and discloses the agency's procedures for closing meetings and the Sunshine Act exceptions upon which the agency typically relies. It should also describe the types of business the agency conducts outside of open meetings (including via notational voting) and how the results are revealed to the public. Each such agency should post a copy of this document on its website and in other places in which it can be accessed by interested members of the public.*

To stakeholders and members of the general public who may be interested in the work of a multi-member agency, the intricacies of the Sunshine Act and the process by which each agency goes about complying therewith can seem inordinately complex. In particular, based upon its rather colloquial and ambitious title, members of the public may assume that the Act mandates that all federal agencies (including those headed by a single chairperson) must conduct all agency business in public. Many may be unaware of the various exceptions that permit agencies to close meetings, and few individuals other than agency general counsels are likely familiar with the subtle nuances that separate preliminary discussions from “meetings” subject to the Act. As such, by making an upfront investment of time in developing a document describing the agency's Sunshine Act procedures in a manner that is comprehensible to members of the public, a multi-member agency not only improves the transparency of its operations but also likely preempts complaints from stakeholders who may not otherwise fully understand the legal landscape or the particular policies implemented by the agency.

The Board of Governors of the Federal Reserve System (FRS) has developed a very succinct document that provides such general information in plain language.<sup>104</sup> Amongst other things, FRS's Sunshine Act memorandum provides the following information:

- A description of when open meetings are generally held, how to receive notice of upcoming open meetings and to attend said meetings, and how to obtain information connected with such meetings (e.g., meeting agendas, documents considered at meetings, recordings of meetings).
- A description of agency procedures for announcing closed meetings and an overview of the types of matters frequently examined in such meetings.
- A brief notification that the agency utilizes notational voting and that the full board sometimes delegates authority to individual board members or agency staff.
- An enumeration of Sunshine Act exemptions.

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<sup>104</sup> Board of Governors of the Federal Reserve System, Government in the Sunshine Act Memorandum: A Guide to Meetings of the Board of Governors of the Federal Reserve System, available at <http://www.federalreserve.gov/aboutthefed/boardmeetings/sunshine.htm>; see also BERG, *supra* note 14, at 321–28 (Appendix L).

- A description of other matters relevant to the agency's Sunshine Act compliance efforts.

The Nuclear Regulatory Commission (NRC) also offers a brief overview of the Sunshine Act as it relates to commission meetings in a lengthier document describing opportunities for citizen engagement with the NRC's work.<sup>105</sup> Specifically, the NRC notifies the public that they are typically entitled to attend commission meetings unless if a Sunshine Act exemption applies, and it enumerates the exemptions that it frequently invokes.<sup>106</sup> It describes the avenues for learning about upcoming NRC meetings (including Federal Register notices, website notification, and email distribution lists).<sup>107</sup> It also notes that documents associated with meetings are typically made available on the agency website, and it indicates that most meetings involve live webcasts.<sup>108</sup> Though the description of meeting policies is considerably less detailed than that offered by the FRS (occupying less than a page in a much longer document), it provides a succinct summary of the agency's policies that should prove beneficial to members of the public interested in viewing open meetings.

Of course, the contents of such a document may vary significantly from agency to agency. For instance, the instances in which an agency closes a meeting may vary significantly from case to case, and the agency may be unable to announce a specific set of subject matters typically discussed in closed meetings. Some agencies may not use notational voting procedures, in which case a description is unnecessary. Other agencies may make quite heavy use of notational voting, and they should provide a more elaborate description of the procedure. For instance, such an agency should provide examples of matters addressed by notational voting, offer an overview of how the notation procedure operates, and notify the public of the process by which the agency discloses the results of matters subject to notational voting. With respect to the exceptions, an agency may wish to list only those that routinely arise in its work (e.g., the National Council on the Arts is unlikely to invoke the exception for matters accusing an individual of a crime<sup>109</sup>), and it may want to elaborate upon those exceptions that it frequently invokes (e.g., providing examples of the sorts of matters that typically qualify for each exception).

At a minimum, such a document should include the following elements: (a) a description of procedures for public participation in open meetings, including an overview of the process by

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<sup>105</sup> Nuclear Regulatory Commission, Citizen's Guide to U.S. Nuclear Regulatory Commission Information, available at <http://www.nrc.gov/reading-rm/doc-collections/nuregs/brochures/br0010/br0010v4.pdf> (last visited Aug. 19, 2013).

<sup>106</sup> *Id.* at 28.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> 5 U.S.C. § 552b(c)(5).

which the agency provides notice of meetings, the frequency with which meetings are convened (if held periodically), the typical location of meetings, any remote participation options, and any opportunities for providing input for consideration by agency members; (b) an overview of the types of documents that an agency typically releases in connection with open meetings (e.g., agendas, agency reports), when they are made available, and where to obtain them; (c) a description of the procedures the agency follows for closing meetings and an enumeration of the Sunshine Act exceptions the agency frequently invokes; and (d) an overview of the types of business the agency frequently conducts outside of open meetings (including via notational voting) and how the agency reveals the results reached via such decisionmaking mechanisms. The document also should describe any other features unique to the agency's decisionmaking processes that would be of interest to stakeholders and the general public. The document should eschew "legalese" or other technical terms that may be incomprehensible to the broader public (e.g., describing the process of taking a vote via memoranda circulated to board and commission members is preferable to using the term of art "notational voting"). The agency should post this document prominently on the segment of its website dedicated to agency meetings.

Drafting and posting such a document is likely to involve a very minimal expenditure of effort (though the agency's general counsel should closely review the final product to ensure that the proposed meeting procedures fully accord with the Sunshine Act and that the agency does not overcommit to supplemental procedures that may prove difficult to satisfy [e.g., promising to post all relevant documents one week in advance of an open meeting]), yet the potential benefits for both the public and the agency are substantial. For the public, such a document would significantly clarify procedures that may otherwise seem arcane and would provide a clear roadmap for following the work of the agency. For the agency, such a document would hopefully preempt a number of inquiries that agency staff would otherwise have to field, and, ideally, it would disabuse members of the public of unrealistic notions concerning the level of transparency the Sunshine Act creates. If clearly informed of the types of business handled in open meetings and the types handled in closed meetings or in internal deliberations, as well as the legal and policy justifications for the latter, interested citizens are perhaps less likely to complain about agency procedures or assail the work of the agency as non-transparent.

*Recommendation 2: For open meetings, multi-member agencies should post a meeting agenda and, to the extent permitted under relevant agency policies, all documents to be considered during the course of the meeting on the agency website as far in advance of the meeting as possible. In the event that the agency does not post meeting documents in advance, it should do so not later than the start of the meeting or in a timely manner after the meeting has occurred.*

Though the Sunshine Act provides that “every portion of every meeting of an agency shall be open to public observation,”<sup>110</sup> it does not, as a general matter, address the availability of documents associated with agency meetings (other than a few minor provisions that deal with matters such as releasing recordings or minutes from closed meetings).<sup>111</sup> In this sense, it differs from another major transparency law, the Federal Advisory Committee Act (FACA), which provides that, subject to the Freedom of Information Act exceptions, “the records, transcripts, minutes, appendixes, working papers, drafts, studies, agenda, or other documents which were made available to or prepared for or by each advisory committee shall be available for public inspection and copying.”<sup>112</sup> In 2011, the Administrative Conference issued a recommendation that built upon this disclosure requirement in FACA, urging agencies with advisory committees “to post documents relevant to upcoming meetings (e.g., draft reports, recommendations, or meeting agendas) [on the agency website] as early as possible in advance of the meeting to which they relate and other materials that document the events of past meetings (e.g., minutes or transcripts) as quickly after the meeting as possible.”<sup>113</sup>

In the research supporting the FACA recommendation (for which I also served as an in-house researcher), I interviewed numerous agency representatives, and they supported the posting of committee documents on the website as a simple, cost-effective means of ensuring that stakeholders can follow the work of their advisory committees.<sup>114</sup> Similarly, in connection with the instant project, I surveyed CIRA members to obtain input on “best practices” under the Sunshine Act, and many pointed to the electronic posting of agency documents relevant to open meetings as a worthwhile innovation. Documents that agencies post in connection with open meetings include the following: meeting notices (including Federal Register notices announcing upcoming meetings), press releases, meeting agendas, staff memoranda to be considered at meetings, meeting transcripts and/or minutes, public comments received by the agency, and background documents needed to comprehend the meeting discussions (e.g., briefs and copies of relevant past decisions for an adjudication undertaken by a multi-member agency).

The act of actually converting relevant documents to electronic files (if they are not already digitized) and posting them on an agency website should, as a general matter, impose a *de minimis* cost on agencies, and it significantly expands the information available to the public and greatly enhances stakeholders’ ability to participate meaningfully in the work of an agency. Nevertheless, the act of selecting the documents that the agency will post and ensuring that they

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<sup>110</sup> *Id.* § 552b(b).

<sup>111</sup> *Id.* § 552b(f).

<sup>112</sup> 5 U.S.C. App. § 10(b).

<sup>113</sup> Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 9, 77 Fed. Reg. 2257, 2264 (Jan. 17, 2012).

<sup>114</sup> Bull, *supra* note 8, at 56.

are ready to be posted prior to the meetings to which they pertain is a far more challenging endeavor. As such, agencies should develop internal policies examining the types of documents they will post in connection with open meetings and the timeline by which they will release those documents.<sup>115</sup> Meeting notices and meeting agendas should be posted prior to open meetings. Meeting transcripts obviously must be posted after open meetings, preferably shortly after the meeting has occurred. Ideally, staff memoranda, public comments, and other background documents that may be beneficial for stakeholders and interested members of the public who wish to study the matters to be addressed at the meeting should be released in advance of the meeting, preferably providing interested parties sufficient time to review the materials and analyze the issues to be addressed at the meeting. This may not always comply with the agency's policy concerning the release of "draft" documents or otherwise prove practicable, however, and the agency should at least post relevant documents on its website at the start of the meeting at which they are considered, if possible, or shortly after the meeting has occurred, at the latest.

The *sine qua non* of a successful document disclosure program is managing the expectations of stakeholders and the general public. If executed successfully, the agency can preempt public inquiries and complaints and thereby preserve time and resources that would otherwise be spent responding to questions. If executed poorly, the agency can create or reinforce unrealistic expectations on the part of the public and actually increase the likelihood of such inquiries and complaints. As such, the document describing the agency's meeting policies discussed in recommendation 1 should contain as much detail as possible concerning the types of documents the agency generally releases and the schedule on which such documents are provided without committing the agency to an unrealistic timeline. For instance, if the agency typically provides materials to be addressed at upcoming meetings one week in advance but is uncertain of its ability to adhere unfailingly to that deadline, the meeting policy may state "the agency will strive to provide documents for consideration at upcoming meetings in a timely manner; to the extent a document is not available in advance of a meeting, the agency will release it at the start of the meeting or as soon thereafter as possible."

*Recommendation 3: Multi-member agencies should create listservs that allow interested stakeholders and members of the public to obtain meeting notices and other announcements relevant to upcoming open meetings.*

At least one week prior to any open meeting, the Sunshine Act requires each multi-member agency to "make public announcement . . . of the time, place, and subject matter of the

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<sup>115</sup> To the extent that the agency feels comfortable doing so, in accordance with recommendation 1, the agency may describe these document-posting policies in the public-facing description of agency meeting procedures posted to the agency's website. Nevertheless, if agencies cannot pre-commit to posting certain types of documents or to releasing them within a certain timeframe, it may be preferable to provide a general statement such as "the agency will strive to post all relevant documents in a timely manner."

meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting.”<sup>116</sup> “[I]mmediately following each public announcement,” such information “shall also be submitted for publication in the Federal Register.”<sup>117</sup> Given the fact that the Act was enacted in 1976, the statute obviously does not address electronic notification of upcoming meetings.

This report will not address the question of whether the Congress should revise the Sunshine Act to replace the Federal Register requirement with a more modern method of pre-meeting notice. On one hand, subscriptions to the print Federal Register have eroded considerably over the past several decades,<sup>118</sup> and several agency general counsels who responded to the Bell survey indicated that the existing notice requirements are overly burdensome.<sup>119</sup> On the other hand, the so-called “digital divide” remains a salient issue,<sup>120</sup> and authorizing agencies to rely exclusively upon electronic notice would necessarily exclude certain members of the public who lack familiarity with or meaningful access to computer technology from receiving notifications. Though internet access will likely become sufficiently pervasive to obviate any need for a written notice requirement at some point in the near future, this report will not opine upon whether that stage has been reached.

The report does, however, advocate a multi-faceted approach to providing notices of open meetings. In recommendation 2, the report proposed that agencies should post meeting information on the agency website. In addition to the Federal Register and website notices, agencies should also create email listservs through which the agency can circulate meeting notices, agendas, documents slated for discussion, and other relevant materials to interested stakeholders.<sup>121</sup> Creating and maintaining such a listserv creates minimal administrative costs for the agency: interested members of the public can simply subscribe by sending an email to a

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<sup>116</sup> 5 U.S.C. § 552b(e)(1).

<sup>117</sup> *Id.* § 552b(e)(3).

<sup>118</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-04-830, GOVERNMENT PRINTING OFFICE: ACTIONS TO STRENGTHEN AND SUSTAIN GPO'S TRANSFORMATION 12 (2004).

<sup>119</sup> Appendix B (General Counsel Survey) at 13 (Question 15). In addition to the investiture of time required to prepare and submit a notice, the cost of publishing in the Federal Register is not insubstantial, with publication costs running \$159 per column of text (and typical meeting notices requiring at least one or two columns). Gov't Printing Office, Circulate Letter No. 851 (June 8, 2012), available at <http://www.gpo.gov/pdfs/customers/cir851.pdf>.

<sup>120</sup> Amir Hatem Ali, *The Power of Social Media in Developing Nations: New Tools for Closing the Global Digital Divide & Beyond*, 24 HARV. HUM. RTS. J. 185, 189–90 (2011).

<sup>121</sup> See, e.g., Federal Election Commission, Commission Meetings, <http://www.fec.gov/agenda/agendas.shtml#archive> (permitting the use to subscribe to a listserv providing notices of document postings); Nuclear Regulatory Commission, Subscribe to Email Updates, <http://www.nrc.gov/public-involve/listserver.html> (same); Federal Energy Regulatory Commission, eSubscription, <http://www.ferc.gov/docs-filing/esubscription.asp> (same).

designated address or submitting a subscription request via the agency website,<sup>122</sup> and they can remove their name from the listserv via reply email. At the same time, such listservs greatly enhance public access to the work of the agency by eliminating the need for interested parties to periodically review the agency's website or the Federal Register to obtain notice of upcoming meetings.

*Recommendation 4: Multi-member agencies should consider providing webcasts of open meetings. If practicable and cost-effective, the agency should consider providing real-time streaming video of ongoing meetings, but, if this does not prove viable, the agency should consider providing an archived webcast after the meeting has occurred.*

Prior to the rise of the internet and inexpensive webcasting programs, open meetings subject to the Sunshine Act, though technically available to all members of the public interested in participating, were effectively unavailable to all but a handful of individuals in close geographic proximity to the agency. In the last several years, webcasting has become sufficiently cost-effective that agencies can, in theory, reach a nationwide audience by simply posting a webcast on the agency website.<sup>123</sup> Indeed, platforms such as YouTube and UStream offer free services permitting users to post videos to the internet, and webcasting hardware has become exceedingly inexpensive (with a simple web camera costing less than \$100).

Unfortunately, in practice, webcasting open meetings of multi-member agencies is not so simple as placing a webcam in the meeting room and uploading the video to YouTube. In particular, agencies must consider the access provisions for persons with disabilities imposed by section 508 of the Rehabilitation Act.<sup>124</sup> Though agencies are not formally required to webcast open meetings, any video that they make available must comply fully with section 508. Section 508 requires that any publicly facing application "using electronic or information technology" must ensure that "individuals with disabilities . . . have access to and use of information and data that is comparable to" that available to persons without disabilities, unless doing so would impose an "undue burden" on the agency.<sup>125</sup> The Architectural and Transportation Barriers

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<sup>122</sup> For instance, the Administrative Conference website allows members of the public to subscribe to listservs covering the work of the Conference more generally, all projects of any of the six Conference committees (each of which handles multiple projects), or any given project of any one of the committees. *See, e.g.*, Administrative Conference of the United States, Government in the Sunshine Act, <http://www.acus.gov/research-projects/government-sunshine-act> (including a section titled "Get Project Notifications" that allows a user to submit his or her name and email address and thereby subscribe to the listserv for the instant project).

<sup>123</sup> *See* Reeve T. Bull, Ongoing Web Forum Meetings of Federal Advisory Committees: A Proposed Use of "New Media" under the Federal Advisory Committee Act 6 (Mar. 17, 2011), *available at* [http://www.acus.gov/sites/default/files/documents/FACA-Web-Forum-Memo-3-17-2011-2\\_.pdf](http://www.acus.gov/sites/default/files/documents/FACA-Web-Forum-Memo-3-17-2011-2_.pdf) (stating, in reference to webcasting meetings of federal advisory committees, that "a meeting by web forum holds the promise of substantially enhancing the possibility for public attendance at advisory committee meetings").

<sup>124</sup> 29 U.S.C. § 794d.

<sup>125</sup> *Id.* § 794d(a)(1).

Compliance Board, which is charged with promulgating regulations under section 508,<sup>126</sup> has issued a rule providing that “[a]ll training and informational video and multimedia productions which support the agency’s mission, regardless of format, that contain speech or other audio information necessary for the comprehension of the content, shall be open or closed captioned.”<sup>127</sup> Thus, when an agency elects to make a webcast available, it must provide captioning to ensure access by persons with hearing impairments.

The requirement to provide textual captions can create significant additional costs for agencies, for hiring a reporter to provide simultaneous captioning can cost on the order of several thousand dollars. A somewhat more economical (though still potentially cost-prohibitive) alternative would be submitting the webcast to a transcription company that can then prepare a set of captions after the fact (usually within a matter of several days); such services typically cost on the order of several hundred dollars, with the price depending upon the length of the meeting. Software developers have also produced various voice-recognition programs that provide real-time captioning of live events, though the accuracy of such captions can vary considerably from case to case and greatly depends upon the clarity and crispness of the associated audio file.<sup>128</sup>

Federal agencies also have developed programs for broadcasting meetings. Most notably, the Department of Homeland Security (DHS) has created a program titled the Homeland Security Information Network (HSIN), which essentially is a webcasting program that allows users to post videos for private or public viewing.<sup>129</sup> DHS describes the program as follows:

[HSIN] provides various capabilities including file sharing, audio and video broadcasting, screen sharing, and instant messaging for virtual briefings, discussions, training, or reports[.] HSIN Connect can handle persistent meetings—such as daily threat briefings, daily incident management coordination meetings, weekly reports or monthly training sessions—or meetings scheduled on-the-go when participants are unable to meet in person.<sup>130</sup>

Per my discussions with Sarah Schwettman, a HSIN Program Analyst in DHS’s Office of Applied Technology, HSIN also provides a live captioning service to ensure section 508

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<sup>126</sup> *Id.* § 794d(a)(2).

<sup>127</sup> 36 F.F.R. § 1194.24(c).

<sup>128</sup> See Streaming Learning Center, <http://www.streaminglearningcenter.com/articles/closed-captioning-for-streaming-media.html> (last visited Aug. 7, 2013) (describing various low-cost options for captioning streaming video).

<sup>129</sup> See generally U.S. Department of Homeland Security, Office of Operations Coordination and Planning, HSIN Connect User Policy (Jan. 11, 2013).

<sup>130</sup> *Id.* at 1–2.

compliance. Essentially, the program includes voice-recognition software that will convert audio input into textual output in near real-time.

The HSIN system, however, is not necessarily universally available for use by federal agencies that wish to webcast their meetings. Technically, the stated mission of the HSIN system is “to improve the management, discovery, fusing, sharing, delivery of, and collaboration around terrorism-related information to enhance national security and help keep our people safe.”<sup>131</sup> Though the HSIN Program Office can authorize federal agency users whose mission is not necessarily related to homeland security, one must specifically apply for an exception, and mission-related uses will receive priority.<sup>132</sup> The HSIN system also is not necessarily designed to accommodate a particularly large number of participants or to permit simultaneous use by a number of different agencies. For instance, a user must obtain special permission to host a session with more than 400 participants.<sup>133</sup> Thus, though agencies might consider using HSIN as a free service to webcast open meetings under the Sunshine Act, the system is not designed to serve as the primary webcasting forum for all governmental users. Furthermore, agencies cannot necessarily anticipate whether 400 or more members of the public will log on to view any given meeting (though past attendance statistics likely provide a fairly reliable predictive metric for future attendance), and HSIN therefore may not be a viable option for agencies that host meetings likely to garner significant public interest.

In short, current technology does not provide an ideal solution permitting agencies to provide high-quality, section 508-compliant webcasts at a reasonable cost. As webcasting programs evolve and cloud-computing becomes more pervasive, the costs are likely to diminish. Nevertheless, at the present, with the exception of agencies that can consistently utilize the HSIN system for all meetings, the cost of webcasting is likely to be on the order of several hundreds of dollars per meeting, a non-trivial expense in a constrained budget environment. As such, any “one-size-fits-all” solution is unlikely. Instead, each agency should assess whether the benefits of webcasting committee meetings, which include enhanced transparency and fostering greater public participation, justify the costs, which include both the monetary expenses entailed in purchasing webcasting equipment, web storage, and captioning services and the staff resources required to arrange and conduct the webcast. Some agencies may conclude that the costs outweigh the benefits and forego the use of webcasting (at least until technological advancement decreases the net costs); other agencies may determine to provide exceedingly inexpensive webcasting that relies upon HSIN or a free service such as YouTube coupled with low-cost voice recognition software for captioning; and still other agencies may elect to purchase a higher end webcasting system and pay for professional captioning services to ensure a high-quality product.

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<sup>131</sup> *Id.* at 2.

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 3.

In short, each agency should consider the options outlined above and select a solution that takes into account its resource constraints, the interest of the agency's stakeholder community in viewing meeting webcasts, and the ability to dedicate staff resources to providing such webcasts.

*Recommendation 5: Consistent with legal obligations and agency policies concerning the protection of confidential information, multi-member agencies should provide a complete description of all substantive agency business conducted outside of open meetings, including matters disposed of in closed meetings, via notational voting, or through a series of one-on-one meetings of board or commission members.*

The Sunshine Act specifically addresses the problem of announcing closed meetings and retaining a record of business transacted therein. It provides that “[i]n the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place, and subject matter of the meeting, *whether it is to be open or closed to the public*, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting.”<sup>134</sup> The Act further provides that “[t]he agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each [closed] meeting” or, in the case of a meeting closed under exceptions 8, 9(a), or 10, “either such a transcript or recording, or a set of minutes.”<sup>135</sup> After a closed meeting has occurred, the agency must make the record memorializing the meeting “promptly available to the public,” though it can withhold or redact any information relating to matters that fall under one of the various Sunshine Act exceptions.<sup>136</sup>

With respect to business transacted via notational voting or serial meetings of sub-quorum groups of members, no similar requirement exists. The agency is required neither to announce the outcome of such deliberations nor even to disclose the fact that they have occurred. When the agency disposes of routine matters via such procedures, the absence of a disclosure requirement is entirely appropriate: the public has no legitimate interest in learning of the process by which an agency decided upon a date and time for an open meeting or addressed any other quotidian, administrative matters inherent to the day-to-day functioning of the agency. If, on the other hand, the agency transacts substantive business via such mechanisms (and the matters discussed are not confidential), a norm of public disclosure is far more appropriate.

Notwithstanding the lack of any formal disclosure requirement relating to agency business addressed outside of meetings, many agencies have voluntarily implemented procedures for describing matters disposed of via non-public decisionmaking processes. In response to a

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<sup>134</sup> 5 U.S.C. § 552b(e)(1) (emphasis added).

<sup>135</sup> *Id.* § 552b(f)(1).

<sup>136</sup> *Id.* § 552b(f)(2).

question concerning disclosure of matters addressed via notational voting in the CIRA member survey, several agencies indicated that they both publicly announced the result of such votes and provided an opportunity for board and commission members to explain their decisions. Such disclosures are generally less common for matters discussed via a series of meetings between groups of board or commission members smaller than a quorum, since those discussions are much less likely to result in the official disposition of agency business. Nevertheless, when the agency makes a decision on a substantive matter via such processes, it should publicly announce its determination and, where practicable and appropriate, provide an explanation of the key considerations in reaching that conclusion.

In addition, with respect to closed meetings, an agency may wish to provide a more comprehensive description than that required by the Act. Though the Act requires the agency to “promptly” release the transcript, recording, or minutes associated with a closed meeting after it has occurred, the agency can withhold or redact any information that falls under one or more of the various exceptions.<sup>137</sup> For many matters, the agency may withhold certain information indefinitely: trade secrets, criminal accusations, personal information, and law enforcement investigations are likely to remain sensitive even after a closed meeting has occurred.<sup>138</sup> Other matters, however, may involve information of evanescent sensitivity, and the agency may later wish to disclose such information. For instance, exception 9 covers matters likely to lead to financial speculation or to endanger the stability of a financial institution and matters likely to frustrate implementation of a proposed agency action.<sup>139</sup> Once an agency has already implemented a proposed program, the necessity of protecting this information expires, and the agency therefore should consider releasing meeting materials as appropriate.

In short, each agency should adopt a norm of disclosure, voluntarily releasing information and providing descriptions of substantive decisions that are neither confidential nor too trivial to be of particular interest to stakeholders or the general public. Though adhering to these norms is not costless, since the agency must devote resources to identify information to be disclosed and produce summaries of matters addressed via non-public procedures, the countervailing transparency gains are substantial. Further, as with recommendation 1, the agency is likely to reap significant benefits from investing the resources required to adhere to this recommendation. Stakeholders and members of the public are presumably less likely to assail agency decisionmaking procedures or resort to alternative mechanisms for procuring information, such as filing a Freedom of Information Act request, if they can easily follow the work of agencies and obtain timely access to relevant non-confidential information chronicling the work of the agency.

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<sup>137</sup> *Id.*

<sup>138</sup> *Id.* § 552b(c).

<sup>139</sup> *Id.* § 552b(c)(9).

*Recommendation 6: Board and commission members of multi-member agencies should avoid email or other electronic exchanges in which the entire group can engage in an iterative exchange of messages. Email exchanges involving a substantive discussion over a relatively short period of time should be limited to groups of members smaller than a quorum. If the members actually intend to hold a “virtual meeting” via a series of electronic exchanges, they should consider using the web forum developed by the Administrative Conference for hosting such meetings.*

Perhaps no issue has proven so nettlesome for multi-member agencies in the “digital age” as the question of whether email exchanges amongst a quorum of board or commission members fall under the Sunshine Act. On one hand, ignoring the velocity of exchange, a series of emails seems almost perfectly analogous to notational voting: board and commission members engage in a series of written exchanges and potentially resolve an issue via a written vote.<sup>140</sup> On the other hand, given the fact that email discussions can effectively include a large group of persons in a real-time exchange of views, email communication amongst members is perhaps more analogous to a teleconference, which certainly would trigger the Act.<sup>141</sup> Though many would contend that a nearly simultaneous email exchange would be subject to the Act,<sup>142</sup> the precise degree of synchronicity required is completely unclear. At the risk of speculation, an online “chat” amongst board or commission members (using an instant messaging program) or an email exchange in which replies are spaced apart by only a few minutes would likely comprise a “virtual meeting” subject to the Act. By contrast, an email chain in which replies are spaced apart by several hours much more closely resembles notational voting and is likely exempt.<sup>143</sup> The “cutoff” between these two somewhat extreme examples is completely unclear; for instance, a relatively active email exchange amongst members in which a new reply occurs approximately every 15 minutes may or may not trigger the Act.

In the absence of any clear delineation between subject and exempt email exchanges, agencies likely would be wise to pursue a prophylactic approach by which they curtail or eliminate the use of chain email exchanges by board or commission members. Of course, eliminating the use of member-to-member email entirely would be quite counterproductive given the ubiquity of electronic communications. Such a draconian solution would also be

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<sup>140</sup> *Commc’ns Sys., Inc. v. Fed. Comm’cns Comm’n*, 595 F.2d 797, 801 (D.C. Cir. 1978).

<sup>141</sup> S. REP. NO. 94-354, at 18–19 (1975) (“Conference telephone calls . . . are equally subject to the bill if they discuss agency business and otherwise meet the requirements of [the Act].”).

<sup>142</sup> BERG ET AL., *supra* note 14, at 26 (“As technology enhances the possibilities for agency members in remote locations to engage in simultaneous or near-simultaneous exchanges of views through electronic means, it seems clear that the definition of ‘meeting’ cannot reasonably be limited to face-to-face encounters in the same room.”).

<sup>143</sup> *Id.* (“In our view, the mere exchange of e-mails, even among a quorum, would not, in itself, constitute a meeting. Despite the ease and swiftness of transmission, an e-mail is a written communication, and in the agency context more akin to an inter- or intra-office memorandum than to a face-to-face exchange of views.”).

unnecessary, for agencies can pursue a variety of mechanisms to avoid inadvertently creating a “virtual meeting.” One potential solution would be for board and commission members to strive to ensure that email chains never include a quorum of members. Of course, this solution is less than ideal insofar as some exchanges would likely be relevant to all agency members.<sup>144</sup> Nevertheless, it is an attractive option for individual members who want to communicate with one or a small number (short of a full quorum) of colleagues. An alternative solution would be for any member who intends to communicate with other members to use the “bcc” feature (which prevents other members from immediately responding by using the “reply all” function) and for the other members to refrain from immediately sending a separate email on the same subject to the entire group.<sup>145</sup> This would not trigger the Act insofar as it does not involve a real-time electronic exchange; it is almost perfectly analogous to a single member’s sending a written memorandum to other members. By using these two approaches, board and commission members should be able to make relatively effective use of email while avoiding any transgressions under the Act.

In some instances, however, a multi-member agency may actually wish to hold an open meeting via a series of short-term electronic exchanges. Indeed, conducting such a meeting is an exceedingly cost-effective and transparent method of disposing of agency business in full compliance with the Sunshine Act. In my research for the Administrative Conference’s FACA project, I examined the possibility of advisory committees’ holding such “virtual meetings” via web forum. Like the Sunshine Act, FACA contains a number of transparency requirements with which all meetings, electronic or otherwise, must comply. For instance, all meetings must be announced in advance in the Federal Register<sup>146</sup> and must permit attendance by interested members of the public.<sup>147</sup> Though neither FACA nor its implementing regulations specifically addresses the problem of meetings held via web forum,<sup>148</sup> a meeting conducted on a discussion

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<sup>144</sup> The agency could partially circumvent the problem by creating a series of smaller sub-quorum groups. For instance, at a hypothetical agency with nine members and a five member quorum requirement, the membership could be divided into three member sub-groups, and each group could be headed by one member. Labeling the sub-group heads A, B, and C for purposes of the hypothetical, A, B, and C could exchange information via an initial email exchange (which would not involve a quorum), and each of them could then communicate to the two other members in his or her group (which also would not involve a quorum). This is, of course, far less efficient than simply allowing all members to communicate via “reply all” emails.

<sup>145</sup> Of course, the “bcc” feature prevents the recipient from determining the individuals included on the email, and this may not prove practicable in situations in which the sender wishes to convey that information.

<sup>146</sup> 41 C.F.R. § 102-3.150.

<sup>147</sup> 5 U.S.C. App. § 10(a)(1); 41 C.F.R. § 102-3.140.

<sup>148</sup> The implementing regulations do state that “[a]ny advisory committee meeting conducted in whole or part by a teleconference, videoconference, the Internet, or other electronic medium meets the requirements of this subpart,” 41 C.F.R. § 102-3.140(e), but they do not characterize the sorts of virtual exchanges that are encompassed within “Internet” and “other electronic” meetings.

board would meet all of the FACA requirements.<sup>149</sup> For instance, the committee could announce the opening of the web forum in advance in the Federal Register, and members of the public would be permitted to view postings of committee members and submit comments for the committee's consideration.<sup>150</sup> In this light, in the FACA recommendation, the Conference urged the General Services Administration to update the FACA implementing regulations to announce explicitly that such web forum meetings are permissible and encouraged agencies that host advisory committees to consider the use of such meetings.<sup>151</sup>

By the same token, multi-member agencies may be interested in hosting “virtual meetings” by web forum, and such agencies can relatively easily satisfy the requirements of the Sunshine Act. Specifically, the agency could issue a Federal Register notice seven days in advance of the web discussion announcing the time during which it will occur and the website at which it will proceed.<sup>152</sup> At the meeting, agency members would be permitted to post publicly available comments to the discussion forum; the agency could also invite specific stakeholders to submit comments or even open the forum to comments from members of the public, though it need not necessarily do so (given the lack of any formal public comment provision in the Sunshine Act). The forum would proceed on a publicly available website, thereby satisfying the public access provisions of the Act.<sup>153</sup> The benefits of such a “virtual meeting” are multitudinous. First, it is exceedingly cost-effective insofar as arranging a web forum is generally much less costly than convening a quorum of board or commission members at a specific geographic location. Second, it provides greater flexibility for members of agencies; the discussion could presumably proceed over the course of several days or even weeks. Finally, using such a web forum greatly increases the transparency of the process. Individuals from disparate parts of the nation who may not otherwise be able to attend an agency meeting would be permitted to review the proceedings remotely (and can do so at their own leisure rather than viewing the event at a specific time). In addition, such a web forum could serve as an alternative to notational voting in those instances when the agency is comfortable analyzing an issue in a public forum and feels that the problem is sufficiently important to generate public interest. In short, web forum meetings promise to significantly enhance the efficiency of agency operations while greatly improving the transparency of the process.<sup>154</sup>

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<sup>149</sup> See generally Reeve T. Bull, Ongoing Web Forum Meetings of Federal Advisory Committees: A Proposed Use of “New Media” under the Federal Advisory Committee Act (Mar. 17, 2011), available at [http://www.acus.gov/sites/default/files/documents/FACA-Web-Forum-Memo-3-17-2011-2\\_.pdf](http://www.acus.gov/sites/default/files/documents/FACA-Web-Forum-Memo-3-17-2011-2_.pdf) (explaining how a web forum meeting can meet each of the various FACA requirements).

<sup>150</sup> *Id.* at 5–8.

<sup>151</sup> Administrative Conference of the United States, Recommendation 2011-7, *The Federal Advisory Committee Act—Issues and Proposed Reforms*, ¶ 6, 77 Fed. Reg. 2257, 2263 (Jan. 17, 2012).

<sup>152</sup> 5 U.S.C. § 552b(e).

<sup>153</sup> *Id.* § 552b(b).

<sup>154</sup> Of course, the agency would not necessarily wish to rely exclusively or even primarily upon web forum meetings. For certain matters, holding an in-person discussion may be critical to promote a deliberative process, and

In connection with the FACA project, the Administrative Conference customized an open source internet discussion board to enable the user to conduct “virtual advisory committee meetings” in which both committee members and members of the general public can offer comments. The Conference successfully held such a “virtual meeting” in connection with its Science in the Administrative Process project.<sup>155</sup> A number of open source programs offering various features are available on the Internet, and agencies can easily tailor these programs to allow board and commission members (and, if desired, members of the public) to post comments in connection with such a web forum meeting.

### CONCLUSION

In its nearly 40 years of existence, the Government in the Sunshine Act has attempted to bring increased openness and transparency to the operations of multi-member agencies. In that time, it has come under attack both from agencies subject to its strictures, some of which contend that it drives interactions underground and otherwise reduces the collegiality of multi-member boards and commissions, and from governmental transparency advocates, who assert that the Act contains major loopholes and that agencies regularly flout the spirit of the law by exploiting these gaps. Prior Administrative Conference projects and research conducted in connection with this project suggest that both sets of concerns are legitimate, but the findings also suggest that the existing regime maintains a reasonable, if not ideal, balance between efficiency and transparency and that a major legislative overhaul of the law is unlikely. As such, this report offers a series of “best practices” related to improving agency administration of the Act to respond to “new media” advances. These proposals would generally improve the efficiency of agency operations while simultaneously producing transparency gains. Though one can debate the optimal intensity of “sunshine” needed to illuminate the work of agencies without desiccating agency operations in withering heat, the recommendations ensure that the method of lighting is up-to-date such that both agencies and members of the public benefit from the win-win scenarios made possible by new technologies.

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web fora should generally not displace traditional meetings. Nevertheless, adding web forum discussions to the arsenal of potential meeting mechanisms should improve agency operations, particularly in instances in which a matter that otherwise would have been addressed via private email exchange or notational voting can be analyzed in a publicly available forum.

<sup>155</sup> See Administrative Conference of the United States, Science in the Administrative Process, Science Project Virtual Meeting Transcript, <http://www.acus.gov/sites/default/files/documents/Virtual-Forum-COR-Science-Project-Discussion-COMBINED-PDF.pdf> (reprinting all posts received in connection with the “virtual meeting” for the Science in the Administrative Process project).

Appendix A (Member Survey)

Board/Commission Member Survey Questions & Responses

**Background Information Given:** In this survey, an open meeting is a meeting that is open to the public (or the open portion of a partially open/partially closed meeting). A closed meeting is a meeting of a quorum of the commission or board that is closed pursuant to a Sunshine Act exemption (or the closed portion of a partially open/partially closed meeting).

**Questions 1 & 3:** How often has a discussion among Commission/Board members at an open (closed) Sunshine Act meeting changed your views on a particular issue?

	Frequently	On a number of occasions	Seldom	Never	Not Applicable
<b>Q1. Open</b>	1.8% (1)	25% (14)	41.1% (23)	21.4% (12)	10.7% (6)
<b>Q3. Closed</b>	5.4% (3)	19.6% (11)	41.1% (23)	5.4% (3)	28.6% (16)
<b>answered question</b>					<b>56</b>
<b>skipped question</b>					<b>2</b>

- Board Members more often than not reported that their views are *Never* or *Seldom* changed when a meeting is open. When the *Not Applicable* individuals are removed, the percentage of *Never* respondents is 24% for *Open* and 7.5% for *Closed*.

**Questions 2 & 4:** How often do you think you have changed the mind of another Commission/Board member by any comments you made at an open (closed) Sunshine Act meeting?

	Frequently	On a number of occasions	Seldom	Never	Not Applicable
<b>Q2. Open</b>	0.0% (0)	23.2% (13)	42.9% (24)	21.4% (12)	12.5% (7)
<b>Q4. Closed</b>	3.6% (2)	17.9% (10)	41.1% (23)	7.1% (4)	30.4% (17)
<b>answered question</b>					<b>56</b>
<b>skipped question</b>					<b>2</b>

- Board Members more often than not believe that they *Never* or *Seldom* change another’s views when a meeting is *Open*. When the *Not Applicable* individuals are removed, the percentage of *Never* respondents is 24.5% for *Open* and 10.3% for *Closed*.

**Question 5:** How significant is each of the following sources in providing information about the views and positions of other members of your Commission/Board on issues before the Commission/Board? (You may identify sources not mentioned by using the "other sources" slot below.)

Answer Options	Very Important	Important	Not Important	Not Applicable	Response Count
Discussions at “open” Sunshine Act meetings	20.4% (11)	33.3% (18)	35.2% (19)	11.1% (6)	54
Discussions at “closed” Sunshine Act meetings	26.8% (15)	33.9% (19)	12.5% (7)	26.8% (15)	56
Conversations with the Chairperson of your Commission/Board	26.8% (15)	33.9% (19)	12.5% (7)	26.8% (15)	56
Conversations with one or more Commissioners/Board members where the total number of participants does not constitute a quorum	45.5% (25)	36.4% (20)	3.6% (2)	14.5% (8)	55
Emails from other Commission/Board members	10.7% (6)	55.4% (31)	21.4% (12)	12.5% (7)	56
Memos or other written materials (excluding emails) from other Commission/Board members	18.25 (10)	47.3% (26)	20.4% (11)	14.5% (8)	55
Conversations with your personal staff	62.5% (35)	7.1% (4)	10.7% (6)	20.4% (11)	56
Conversations with agency staff	60.0% (33)	18.2% (10)	20.4% (11)	1.8% (1)	55
Reviewing notations made as a part of notational/seriatim votes	16.1% (9)	25.0% (14)	45.5% (25)	14.5% (8)	56
Reviewing speeches or other communications of Commission/Board members to third parties	3.6% (2)	29.1% (16)	54.5% (30)	12.5% (7)	55
Other Sources					13
<b>answered question</b>					<b>56</b>
<b>skipped question</b>					<b>2</b>

- Open meetings seem to be thought of as less important than closed meetings, but it is difficult to draw any strong conclusions when comparing open and closed meetings. However, it is clear that Board Members think their conversations with personal staff and agency staff are very important and that Board Members also value conversations with other Board Members when there is not a quorum.

**Question 6:** Do you believe you have adequate opportunities to learn about the views and positions of other Commissioners/Board Members?

Response	Response Percent	Response Count
Yes	72.7%	40
No	27.3%	15
<b>answered question</b>		<b>55</b>
<b>skipped question</b>		<b>3</b>

- Generally, Board Members believe that they have adequate opportunities to learn about the views of other Board Members.

**Question 7:** Do you believe you have adequate opportunities to convince other Commissioners/board members of your position on issues before the Commission/Board?

Response	Response Percent	Response Count
Yes	71.4%	40
No	28.6%	16
<b>answered question</b>		<b>56</b>
<b>skipped question</b>		<b>2</b>

- Generally, Board Members believe that they have adequate opportunities to convince other Board Members of their positions.

**Question 9:** Do you believe that Commissioners/Board members have adequate opportunities to work out compromises between their positions or narrow the issues in dispute?

Response	Response Percent	Response Count
Yes	71.9%	41
No	28.1%	16
<b>answered question</b>		<b>57</b>
<b>skipped question</b>		<b>1</b>

- Generally, Board Members believe that they have adequate opportunities to work out compromises on positions or narrow issues in dispute.

**Question 8:** How important is each of the following in terms of Commissioners'/Board Members' opportunity to work out compromises between their positions or narrow issues in dispute?

Answer Options	Very Important	Important	Not Important	Not Applicable	Response Count
Open Sunshine Act meetings	10.5% (6)	26.3% (15)	50.9% (29)	12.3% (7)	57
Closed Sunshine Act meetings	20.0% (11)	21.8% (12)	29.1% (16)	29.1% (16)	55
Series of meetings between groups of Commissioners/Board Members where the total number of participants does not constitute a quorum	49.1% (27)	20.0% (11)	12.7% (7)	18.2% (10)	55
Email exchanges	5.3% (3)	50.9% (29)	31.6% (18)	12.3% (7)	57
Memos or other written materials (excluding emails) from other Commission/Board members	15.8% (9)	40.4% (23)	31.6% (18)	12.3% (7)	57
Meetings between staff members of various Commissioners/Board Members	52.6% (30)	22.8% (13)	15.8% (9)	8.8% (5)	57
<b>answered question</b>					<b>57</b>
<b>skipped question</b>					<b>1</b>

- Though it is somewhat difficult to compare the importance of open and closed meetings due to the *Not Applicable* responses, it is clear that Board Members believe meetings with other Board Members where there is no quorum and meetings with other Board Members' staffs are very valuable opportunities to work out compromises.

**Question 8:** Excluding *Not Applicable* response

Answer Options	Very Important	Important	Not Important	Response Count
Open Sunshine Act meetings	12% (6)	30% (15)	58% (29)	<b>50</b>
Closed Sunshine Act meetings	28.2% (11)	30.8% (12)	41% (16)	<b>39</b>

- After removing the *Not Applicable* responses, a larger percentage of Board Members who have closed meetings believe they are *Important* or *Very Important* as compared to open meetings.

**Question 10:** What, if any, influence do the views and positions of the following individuals have on your decision on issues before your Commission/Board?

Answer Options	Very influential	Substantially Influential	Little Influence	No influence at all	Not Applicable	Response Count
Other Commissioners/Board Members	21.1% (12)	64.9% (37)	8.8% (5)	5.3% (3)	0	57
Chairperson of your Commission/Board	17.5% (10)	47.4% (27)	7.0% (4)	5.3% (3)	22.8% (13)	57
Members of your personal staff	35.1% (20)	35.1% (20)	1.8% (1)	8.8% (5)	19.3% (11)	57
Members of agency staff	35.1% (20)	54.5% (31)	7.0% (4)	3.5% (2)	0	57
<b>answered questions</b>						<b>57</b>
<b>skipped questions</b>						<b>1</b>

**Question 10:** Excluding *Not Applicable* responses

Answer Options	Very influential	Substantially Influential	Little Influence	No influence at all	Total Responses
Other Commissioners/Board Members	21.2% (12)	64.9% (37)	8.8% (5)	5.3% (3)	<b>57</b>
Chairperson of your Commission/Board	22.7% (10)	61.4% (27)	9.1% (4)	6.8% (3)	<b>44</b>
Members of your personal staff	43.5% (20)	43.5% (20)	2.2% (1)	10.9% (5)	<b>46</b>
Members of agency staff	35.1% (20)	54.4% (31)	7.0% (4)	3.5% (2)	<b>57</b>

- Even after removing the *Not Applicable* responses, more Board Members seem to think that personal and agency staff are *Very Influential* as compared to other Board Members and the Chairperson.

**Background Information Given:** Notational voting, also known as "sequential" or "seriatim" voting, involves circulation of an action item and supporting materials to each Commissioner/Board Member for him or her to vote on the matter.

**Question 11:** Does your Commission/Board engage in notational voting?

Answer Options	Response Percent	Response Count
Yes	75.4%	43
No	24.6%	14
<b>answered question</b>		<b>57</b>
<b>skipped question</b>		<b>1</b>

- The majority of Boards use notational voting.

**Question 12:** How frequently is a decision made by notational vote without a follow-up meeting when there is disagreement on the Commission/Board (as evidenced by conflicting notational votes, i.e. one or more yeas and one or more nays)?

Answer Options	Response Percent	Response Count
Almost always	32.6%	14
Frequently	27.9%	12
Infrequently	16.3%	7
Almost never	23.3%	10
<b>answered question</b>		<b>43</b>
<b>skipped question</b>		<b>15</b>

- More responding Boards seem to at least *Frequently* make decisions by notational vote when there is disagreement without a follow-up meeting than *Infrequently* or *Almost Never*.

**Question 13:** How frequently is the decision made by notational vote without a follow up meeting on novel matters of policy or novel issues of fact or law?

Answer Options	Response Percent	Response Count
Almost always	21.4%	9
Frequently	14.3%	6
Infrequently	35.7%	15
Almost never	28.6%	12
<b>answered question</b>		<b>42</b>
<b>skipped question</b>		<b>16</b>

- As compared to Question 12, it seems that the responding Boards are less likely to make a decision with notational voting without a meeting, when the issues are matters of policy or novel issues.

**Question 14:** Do you believe notational voting is used too frequently or not frequently enough by your Commission/Board?

Answer Options	Response Percent	Response Count
Too frequently	14.3%	6
Just about the right amount	81.0%	34
Not frequently enough	4.8%	2
<b>answered question</b>		<b>42</b>
<b>skipped question</b>		<b>16</b>

- A large majority of Board Members believe they use notational voting the right amount.

**Background Information Given:** Background: Some have advocated that Commissions/Boards have sessions that are not focused on a particular issue before the board, but that are general brainstorming sessions, either (1) to come up with lines of inquiry or options for further consideration, or (2) to give the Commission/Board an opportunity to assess trends or discuss how the agency is performing in general. Please answer the questions below regarding brainstorming sessions.

**Question 15:** Does your Commission/Board have brainstorming sessions such as those described above?

Answer Options	Response Percent	Response Count
Yes	35.1%	20
No	64.9%	37
<b>answered question</b>		<b>57</b>
<b>skipped question</b>		<b>1</b>

- More Board Members do not have “brainstorming sessions” than do.

**Question 16:** Are the brainstorming sessions [at your agency] held as open Sunshine Act meetings?

Answer Options	Response Percent	Response Count
Almost always unless an exemption applies	20.0%	4
Sometimes	20.0%	4
Never	60.0%	12
<b>answered question</b>		<b>20</b>
<b>skipped question</b>		<b>38</b>

- These “brainstorming sessions” are usually not open Sunshine Act meetings.

**Question 17:** Regardless of whether your Commission/Board has brainstorming sessions, how important do you feel it is to have such sessions for the following purposes:

Answer Options	Very important	Somewhat important	Not important
Development of lines of inquiry or options for further consideration	67.3% (37)	21.8% (12)	10.9% (6)
Assessment of trends	60.0% (33)	30.9% (17)	9.1% (5)
Discussions on the agency's performance	62.5% (35)	33.9% (19)	3.6% (2)
<b>answered question</b>			<b>56</b>
<b>skipped question</b>			<b>2</b>

- Even Board Members who do not have “brainstorming sessions” seem to believe they are important for several different reasons.

**Background Information Given:** Background: Some have thought that being able to have closed staff briefings on general matters (such as basic concepts, legal doctrines, or trends relevant to the agency's responsibilities) is significant. Answer the questions below regarding staff briefings.

**Question 18:** Does your Commission/Board have either open or closed meetings to receive briefings?

Answer Options	Response Percent	Response Count
Yes	77.2%	44
No	22.8%	13
<b>answered question</b>		<b>57</b>
<b>skipped question</b>		<b>1</b>

- The majority of responding Boards have meetings to receive briefings.

**Question 19:** If yes, are the meetings to receive briefings open to the public?

Answer Options	Response Percent	Response Count
All are	8.9%	4
Most are	31.1%	14
The number of closed and open meetings are about equal	15.6%	7
Most are not	22.2%	10
None are	22.2%	10
<b>answered question</b>		<b>45</b>
<b>skipped question</b>		<b>13</b>

- Boards vary in whether these meetings are mostly open or mostly closed; though 10 Boards never hold open briefing meetings.

**Question 20:** Some Commissions/Boards have closed briefings that they do not consider subject to the Sunshine Act. (Such sessions might be referred to as “gatherings.”) If your Commission/Board has such closed briefings how easy or difficult is it for you to determine which comments or questions are consistent with the principle that Commissioners/Board Members cannot "deliberate" in closed briefing sessions?

Answer Options	Response Percent	Response Count
Very easy	14.3%	7
Easy	42.9%	21
Difficult	8.2%	4
Very difficult	10.2%	5
Not applicable, I am unaware of such a principle.	24.5%	12
<b>answered question</b>		<b>49</b>
<b>skipped question</b>		<b>9</b>

- The majority of respondents (57.14%) who were aware of such principles believed it was at least *Easy* to determine which comments or questions were consistent with the principle that Board Members cannot “deliberate” at “gatherings.”

**Question 21:** How often do you discuss or explain your position or views at “open” Sunshine meetings?

Answer Options	Response Percent	Response Count
Almost always	37.5%	21
Frequently	21.4%	12
On a number of occasions	21.4%	12
Seldom	3.6%	2
Never	16.1%	9
<b>answered question</b>		<b>56</b>
<b>skipped question</b>		<b>2</b>

- A majority of Board Members *Frequently* or *Almost Always* explained their positions or views at “open” Sunshine meetings.

**Question 22:** If your answer to the question above is "seldom" or "never," please answer the following question. How important a factor, if at all, is each of the following in your decision not to speak more often? (You may mention other reasons for speaking infrequently by using the "other reasons" slot below.)

Answer Options	Very Important	Important	Slightly Important	Not a factor at all	Response Count
I do not feel the need to speak more often.	2	0	2	7	11
I feel any such statement will have no effect on other members.	0	0	2	9	11
I am concerned about making an erroneous or inaccurate statement.	0	0	5	6	11
I feel that any such statement, even if factually accurate and correct, may cause confusion or mislead either regulated entities or the public.	1	2	0	8	11
I am following Commission/Board custom of not speaking extensively at open meetings.	0	2	2	7	11
Other Reasons					8
<b>answered question</b>					<b>11</b>
<b>skipped question</b>					<b>47</b>

- Only 11 Board Members did not frequently share opinions at “open” meetings, and none of the above rationales for their failure to do so appears to be predominant.

**Question 23:** How often do the partisan affiliations of Commissioners/Board Members significantly inhibit the ability of the Commission/Board to work together?

Answer Options	Response Percent
Almost always	5.5% (3)
Frequently	9.1% (5)
On a number of occasions	18.2% (10)
Seldom	27.3% (15)
Never	29.1% (16)
No political balance requirement	10.9% (6)
<b>answered question</b>	<b>55</b>
<b>skipped question</b>	<b>3</b>

- Board Members do not generally believe that political affiliations inhibit the ability of the Board to work together.

**Question 24:** Given the way your Commission/Board operates, do you think the quality of decisions would be better, worse, or about the same if they were made by an individual agency head rather than a Commission/Board?

Answer Options	Response Percent	Response Count
Better	12.5%	7
About the same	16.1%	9
Worse	71.4%	40
<b>answered question</b>		<b>56</b>
<b>skipped question</b>		<b>2</b>

- The majority of Board Members believe that the agency would be worse if it was run by an individual head rather than a Board. Of the 13 Chairs that answered this question, only one believed the agency would be better if run by an individual, and only four believed it would be about the same.

**Question 25:** Do you think the Sunshine Act should be modified?

Answer Options	Response Percent	Response Count
Yes	62.3%	33
No	37.7%	20
<b>answered question</b>		<b>53</b>
<b>skipped question</b>		<b>5</b>

- The majority of Board Members believed the Sunshine Act should be modified, though 20 Board Members did not believe that it should be modified.

**Question 25:** Do you think the Sunshine Act should be modified?<sup>156</sup>

- 32 respondents that believed the Sunshine Act should be modified provided comments:
  - Almost all of these comments are legislative suggestions.
- I believe the limitation on three or more Board members talking together (especially about rulemaking issues) is a real liability. Meetings on cases should be closed but not for rule making discussions. The procedural requirements for closing a meeting should also be simplified -- e.g., publishing in advance in the Federal Register or closing the meeting formally and then recording the meeting seem to serve no purpose. (Legislative)
  
- If the Board cannot meet except in public, why can the President of the United States have a private dinner with the CEOs of a dozen major corporations (Apple, Google, etc), along with his senior policy advisors (Jarrett, et al), when all of the corporations have business before the US government, and all of the attendees are major contributors to political arm of the administration? And yet this meeting can be closed to the public, and only an "official" White House photo released. This very meeting happened in early 2011, and I'm sure many times before and after. Any yet, a board with a budget of \$400 million has to take care to make sure that there are no deliberations or decisions except in public. If the Sunshine Act is meaningful and effective, it has to apply to the big dogs as well as the little dogs. Given the brazen disregard of it by the White House, it apparently does not apply to the sort of meeting I have described. To that extent, the Act should be modified or scrapped. (Legislative)
  
- I am not in a position to advocate for or against modifications to the Sunshine Act. However, to the extent the Sunshine Act could be modified in ways that are consistent with its purpose of increasing the transparency of government action, while addressing some of the inefficiencies that result from [its operation], I think that such modifications would be worthy of consideration. (Legislative)
  
- It [the Sunshine Act] needs to allow for more opportunity to discuss matters and reach decisions in closed session.
  
- It is positively insane to bar spontaneous conversations about agency issues -- budget, personnel, strategy, priorities, and pending cases. These discussions provide real time engagement and help formulate common understandings about what the agency should do. Note that these agencies function as adjudicatory bodies, as well. Executive sessions cannot be held without elaborate notice and clearance processes. No appellate tribunal in our courts works this way. At a minimum, the Act should be modified to allow quorum-level or quorum-plus discussions about pending agency enforcement matters. (Legislative)
  
- [The Act is] too proscriptive regarding number of members who can engage in discussions.

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<sup>156</sup> The following entries include excerpts from various Board Member responses. Some of the responses have been edited to remove grammatical and spelling errors.

- Quasi-judicial agency proceedings should be excluded from the Sunshine Act, so that agency members can deliberate together prior to making decisions, just as members of a multi-member court would do. (Legislative)
  
- There should be [clarification and modification] to the statute's language to permit more "non-deliberative" meeting[s] with Commission members that are not subject to full "sunshine." There should be adequate notice to all Commission members, so as to avoid a "gang of three" excluding the minority, and there can be a provision for a summary disclosure of the topic that was discussed, without disclosing the points of view or substance of the discussions. Obviously, all voting would still be in public. Look at the model that the Judicial branch of our government uses. All Courts of Appeal and the Supreme Court meet AND deliberate in 100% private meetings. They then vote in public. I doubt that you could find anyone who would argue that those judicial closed door meetings should be subject to the Sunshine Act with either "open" or "closed" meeting provisions. The five Commission members should be allowed to meet as a group, with or without either personal counsel or agency counsel, and fully discuss views, positions, policies and agency matters. (Legislative)
  
- The Sunshine Act was not crafted with bipartisan, independent agencies in mind. There needs to be a modification of the law to reflect the realities of such agencies. (Legislative)
  
- In general, I support the goals of the Sunshine Act and believe that it is important for public officials, including members of Commissions and Boards, to conduct their business in a manner that is transparent to the public. However, it can be difficult to foster collegiality when opportunities for the full body to gather and interact socially are restricted so severely. To avoid the appearance of impropriety, our full Commission rarely interacts as a body in social contexts. It would be helpful to have an allowance for occasional social interaction of the entire body, and on a bipartisan body, the requirement that the entire membership of the Commission be invited and participate in such activity should reduce the likelihood of improper deliberation by a quorum that excludes members of a minority party. (Legislative)
  
- [The Act should] allow for greater interaction as a body to engage in informal discussions, cognizant of prohibition on voting agreements on a particular issue, [and this would] satisfy the intent of Sunshine Act. Here, voting should, of course, be restricted to an open meeting, after the public has an opportunity to engage on an issue. A strict interpretation of the Sunshine Act often results in restricting interaction among Commissioners with regard to paramount public policy issues. (Legislative)
  
- The Sunshine Act, while well intended, should be amended because decisions are often (functionally) made outside of its auspices, even as the law hampers the regular course of business by prohibiting any meetings of more than two Commissioners. Commissioners are forced to rely upon discussions among their staffs. This can be time consuming and leads to miscommunication. A way for more than two Commissioners to exchange views without violating the Sunshine Act would improve the functioning of the Commission. (Legislative)

- Matters concerning non-investigative issues should not be open to the public. It inhibits discussion and results in "gaming" of the issues. (Legislative)
- I don't really know whether the Sunshine Act itself should be modified, or whether the Commission's interpretation of it is overly restrictive. It seems to me that the Commission, as a quasi-judicial body, should be able to have closed conferences to discuss cases, as appellate courts do. In terms of our deliberations being open to the public, I don't understand why Commissioners are able to communicate with each other as a group without restriction by email (which, as I understand it, are not subject to FOIA), but closed meetings to discuss cases are frowned upon. Our counsels can talk together but Commissioners can't. It doesn't make much sense to me.
- The Act should permit group brainstorming sessions that do not lead to an ultimate conclusion, but that merely explore the key issues, as long as the ultimate decision is reached in a public session. (Legislative)
- Flexibility needs to be given for non-public discussions of general policy issues unrelated to a specific case or cases. For meetings called for the purpose of discussing particular case(s), I cannot conceive of any reason for not holding the meeting in the open. (Legislative)
- Although it is by no means certain, our process would likely be more efficient if we could meet in larger groups (in the manner of multi-member appellate courts) to discuss pending case adjudications. (Legislative)
- Addition of an explicit provision for closed briefing meetings with published agendas. Publication of such notices on an agency website should be permitted rather than a requirement to publish them in the Federal Register. (Legislative)
- In the case of three member boards, it would be more effective to make policy decisions if board members could talk to each other directly. (Legislative)
- Since the vast majority of the Board's deliberations involve individual cases, quasi-judicial entities should be exempt from the Sunshine Act. (Legislative)
- I suggest more authority for closed meetings.
- Our chief problems with the Sunshine Act have been in hiring our chief executive and in strategic planning. We have managed to work around these, but given that they are not really core concerns of the Act, there should be exemptions built in. First, although job interviews are going to be closed no matter what, there needs to be a more explicit acknowledgement that Search Committees are not bound by the Act, so we can rapidly schedule meetings at which a candid assessment of the candidates will occur. Second, the Act needs to be updated to allow us to discuss long-term, strategic issues and retrospective assessments outside of the reach of the Sunshine Act. The Act is designed so that immediate issues affecting the public or the public's money (regulations, budgeting, and so forth) are [handled] in a transparent way. That's fine, as

these delimited issues don't lend themselves to creative solutions, while public interest is high and public input often useful. But an agency needs to have to opportunity to self-examine in a more creative and macroscopic way, and encourage policymakers to think "outside the box" on occasion. At some point, public input should be called for; but not at every point -- an initial planning and deliberation session that generates a nonfinal document, itself subject to notice, disclosure and public comment, should be free of Sunshine Act requirements. (Legislative)

- Commissioners must have additional flexibility to share views and information in private to prepare for final votes at public meetings. (Legislative)
  
- More flexibility to have quorum level gatherings, without the fear of having an open meeting. (Legislative)
  
- Meetings between more than two Commissioners should be permitted. (Legislative)
  
- More personnel matters should be clearly excluded from Sunshine, e.g. performance reviews.
  
- Based on my experience, I think it would be better to carve out some background discussions that could [be] held without an open meeting. (Legislative)
  
- Need to address need for smaller agencies to negotiate positions. (Legislative)
  
- I think Commissions should be able to meet to discuss and deliberate issues in closed sessions so long as they then cast their votes and discuss their reasons for doing so in public sessions. That's actually what most agencies do now, but through closed staff deliberations rather than closed Commission deliberations. In other words, very little actual deliberation occurs in open Commission sessions. Instead, we see arguments in public about positions already developed, but almost no deliberation, negotiation, or compromise. (Legislative)

Agency Affiliation	
Agency	Number of Respondents
Chemical Safety Board (CSB)	2
U.S. Civil Rights Commission (USCRC)	1
U.S. Consumer Product Safety Commission (CPSC)	2
Equal Employment Opportunity Commission (EEOC)	3
Federal Communications Commission (FCC)	1
Federal Election Commission (FEC)	1
Federal Energy Regulatory Commission (FERC)	3
Federal Labor Relations Authority (FLRA)	1
Federal Maritime Commission (FMC)	4
Federal Mine Safety & Health Review Commission (FMSC)	2
Federal Trade Commission (FTC)	2
U.S. International Trade Commission (ITC)	3
Legal Services Corporation (LSC)	6
National Credit Union Administration (NCUA)	1
National Labor Relations Board	1
National Science Board (NSB)	5
National Transportation Safety Board (NTSB)	2
Nuclear Regulatory Commission (NRC)	1
U.S. Nuclear Waste Technical Review Board (NWTRB)	3
Occupational Safety Health & Review Commission (OSHRC)	2
Postal Regulatory Commission (PRC)	1
Securities and Exchange Commission (SEC)	2
Surface Transportation Board (STB)	2
U.S. Postal Service (USPS)	1
Unidentified	4
<b>Total</b>	<b>56</b>

**Appendix B (General Counsel Survey)**

**General Counsel Survey Questions & Responses**

**Question 3:** Do you have practices or guidance regarding Sunshine Act matters that are not reflected in your Sunshine Act regulations? If so, how are any such practices or guidance documented? *(For instance you may have an internal commission procedures manual that discusses Sunshine Act matters.)* **Note:** *Such guidance or practices would include any general guidance to Commission/Board members (or to such members’ staffs or other agency employees) regarding actions that are permitted or prohibited by the Sunshine Act (or the agency’s Sunshine Act regulations). For instance, you might have provided guidance on any limitations on email communications involving more than one Commission/Board member.*

- 20 of the 40 (50%) responding General Counsels answered that they do have such guidance.
- Most of these agencies maintain internal documents, such as memorandums, orders, and manuals that address Sunshine Act procedures.

**Question 4:** Does your agency use notational voting to resolve matters before it? Please estimate the percentage of matters that are resolved by notational voting as opposed to voting at meetings of the agency.

Percentage Notational Voting	Agencies with Percentage of Notational Voting
0%	10
1-10%	5
11-24%	0
25-49%	1
50-74%	2
75-89%	2
90-99%	7
100%	5

- 8 of the 40 General Counsels (20%) reported that the Board did not use notational voting at all.

**Question 4(a):** Does your agency use notational voting to resolve matters before it? Please estimate the percentage of matters that are resolved by notational voting as opposed to voting at meetings of the agency.

A. Why does your agency use notational voting?<sup>157</sup>

Reasons for Notational Voting <sup>158</sup>	Number of Times Used For
Adjudicatory	8
Administrative	7
Confidential Business	1
In Conjunction with a Meeting	3
Procedural	4
Routine	14
Timely / Deadlines	14

Reasons for Notational Voting	Number of Times Used For
Procedural <sup>159</sup>	39
Substantive	12

<sup>157</sup> Note that all agencies that used notational voting provided a reason for its use.

<sup>158</sup> *Adjudicatory* refers to notational voting related to resolving adjudications or investigations; *Administrative* refers to any notational vote having to do with administrative matters; *Confidential Business* refers to notational voting that may involve confidential business transactions; *In Conjunction with a Meeting* refers to notational voting that is used in conjunction with a discussion of a matter that occurred at a meeting; *Procedural* refers to all notational voting addressing procedural matters; *Routine* refers to noncontroversial, everyday notational voting; and *Timely/Deadlines* refers to notational voting held to meet time or meeting constraints, or other deadlines or to promote efficiency.

<sup>159</sup> In this chart *Procedural* refers to any notational voting under the following categories: Administrative, Procedural, Routine, and Timely/Deadlines. *Substantive* refers to any notational voting under the following categories: Adjudicatory, Confidential Business, and In Conjunction with a Meeting.

**Question 4(b):** Are there any guidelines for determining when notational voting is appropriate? If so, please include a copy of such guidelines or a Code of Federal Regulations (“CFR”) citation (if your rules for notational voting are included in the CFR).

- 19 of the 32 (59.38%) General Counsels that reported that the Board uses notational voting also reported that they had either internal guidelines or guidelines published in the C.F.R. regarding notational voting.<sup>160</sup>

Agency	Location of Guidelines
Commodity Futures Trading Commission (CFTC)	17 C.F.R. § 140.12.
U.S. Consumer Product Safety Commission (CPSC)	Internal Guidelines
Election Assistance Commission (EAC)	Internal Guidelines
Farm Credit Administration (FCA)	Internal Policy Statement
Federal Deposit Insurance Corporation (FDIC)	12 C.F.R. § 311.2(b)(3)) & Bylaw Sections
Federal Election Commission (FEC)	Internal Directive
Federal Maritime Commission (FMC)	Internal Commission Order
Federal Reserve Board (FRB)	Small Reference in Website “Government in the Sunshine Act” Memorandum
Federal Retirement Thrift Investment Board (FRTIB)	5 C.F.R. § 1632.2 (c)
Federal Trade Commission (FTC)	16 C.F.R. § 4.14 & Commission Rule
U.S. International Trade Commission (ITC)	19 C.F.R. § 201.34(a)(2) & Internal Directive <sup>161</sup>
National Credit Union Administration (NCU)	12 C.F.R § 791.4(b)(1)
National Transportation Safety Board (NTSB)	Board Order, 49 C.F.R. Parts 821 and 825; 49 U.S.C. § 1133
Occupational Safety Health & Review Commission (OSHRC)	CFR Sections
Railroad Retirement Board (RRB)	Board Order 97-233
Securities and Exchange Commission (SEC)	17 C.F.R. § 200.42
Tennessee Valley Authority (TVA)	Bylaw Sections
U.S. Parole Commission (USPC)	28 C.F.R. § 16.201
U.S. Postal Service (USPS)	39 C.F.R. § 6.7

<sup>160</sup> Two agencies did not respond to this question.

<sup>161</sup> This directive describes the ITC’s practice of circulating Action Jackets. “An Action Jacket is a form of sequential notational voting. The use of Action Jackets allows the ITC Commissioners to act on agency matters individually, instead of deliberating and voting as a group during an open agency session.” *Elkems Metal. Co. v. United States*, Slip Op. 00-166, United States Court of International Trade (2000).

**Question 4(c):** Is there a publicly available list of actions taken by notational voting? If so, where? (If it is one your website, you may simply provide the URL.)

- 16 of the 32 (50%) General Counsels that reported using notational voting indicated they notify the public in some way of the notational vote.
- Some agencies include the vote in the minutes of the next meeting, some agencies file a media report about the vote, some agencies only maintain an internal list that can be accessed through FOIA, and some agencies maintain a list on their website.

Agency	Practice
Commodity Futures Trading Commission (CFTC)	Announcement of action generally included in press release
U.S. Consumer Product Safety Commission (CPSC)	Maintained online at FOIA reading Room
Election Assistance Commission (EAC)	Yearly report online in Election Resource Library
Equal Employment Opportunity Commission (EEOC)	Votes are announced at next meeting and included in transcripts posted on website
Farm Credit Administration (FCA)	Press releases after each meeting that include notational votes
Federal Communications Commission (FCC)	Online updated weekly list and Daily Digest
Federal Mine Safety & Health Review Commission (FMSHR)	Publishes default cases, which are decided by notational vote, in Blue Books
Federal Reserve Board (FRB)	Weekly publication of all actions (not confidential) on website
Federal Retirement Thrift Investment Board (FRTIB)	Sunshine Act notices reflect the decision to close a meeting, which often means that a notational vote occurred
Millennium Challenge Corporation (MCC)	Press release after voting complete
National Transportation Safety Board (NTSB)	Searchable index of certain cases online
Nuclear Regulatory Commission (NRC)	Public decisions posted in online reading room
Overseas Private Investment Corporation (OPIC)	Public list of all Board actions posted online
Railroad Retirement Board (RRB)	Maintains an internal list that is available through a FOIA request
Tennessee Valley Authority (TVA)	Information filed with minutes of next meeting
U.S. Postal Service (USPS)	Maintains an internal list of all records that is available through a FOIA request

**Question 5:** How, if at all, do the Sunshine Act or the agency's regulations or written practices and guidance limit Commission/Board member use of e-mail, text-messaging, and similar means of communication to communicate with other Commission/Board members on official business?

- Only 3 of the 40 (7.5%) General Counsels responded that the Sunshine Act affected member use of e-mail, text-messaging, and similar means of communication.

**Question 6:** The U.S. Supreme Court has held, and at least one influential set of authors has asserted, that not all discussions among a quorum of a multi-member agency constitute a "meeting" that must either be open to the public or fit into one of the Sunshine Act exemptions. See *FCC v. ITT World Communications*, 466 U.S. 463 (1984); Richard Berg, et al., AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 14-15 (2d ed. 2005). In particular, these authorities state, discussions among commission or board members need not be considered meetings if they are "informal background discussions that clarify and expose varying views" rather than discussions "focused on discrete proposals or issues that will cause or are likely to cause individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency."

A. Does your agency hold any sessions attended by a quorum of the Commission/Board that your agency does not consider to be "meetings" based on the above reasoning? If so, what sorts of subjects are discussed at such meetings? (Please exclude meetings to determine whether to hold a meeting, whether to close a meeting, and whether to change a meeting agenda.)

- 33 of the 40 (82.5%) agency General Counsels responded that they **do not** consider a quorum dispositive for a meeting.

**Question 7:** Does your Commission/Board ever have *open* meetings to discuss questions such as: “*How is the Commission/Board functioning as an agency? How has it performed over the past year? What have been its major successes and failures? What do we see coming in the next year, the next five years, or the next ten years? How well are our components serving us? Are we getting our message out to the industry we regulate and to the public? Are we working effectively with the Congress?*” Is so, what questions are discussed, how frequently does the Commission/Board have such discussions, and what constraints are placed on such discussions out of concern for compliance with the Sunshine Act?

- 17 of the 38 (44.74%) responding General Counsels reported that their Board does have such meetings.

**Question 8:** Does your Commission/Board ever hold *open* meetings that are briefings by staff or experts on a subject matter that is relevant to an agency's responsibilities but which do not pose specific problems for agency resolution? Is so, what questions are discussed, how frequently does the Commission/Board have such discussions, and what constraints are placed on such discussions out of concern for compliance with the Sunshine Act?

- 31 of the 40 (77.50%) responding General Counsels reported that they do have such meetings.

**Question 12 (A):** For each of the past three fiscal years, 2009-2010, 2008-2009, 2007-2008, what percentage of meetings were (a) open in their entirety, (b) closed in their entirety pursuant to the exceptions in the Sunshine Act, (c) open in part and closed in part pursuant to the exceptions in the Sunshine Act? (If such percentage figures are misleading, you should *also* provide your estimate of the percentage of meeting time during which the meeting is closed or the percentage of matters that are considered in closed session.)<sup>162</sup>

- 17 of the 37 (45.95%) responding General Counsels reported that at least 50% of their meetings were *open* meetings. 14 of the 37 (37.84%) reported that at least 50% of their meetings were *closed* meetings. The remaining 6 (16.22%) reported that at least 50% of their meetings were *partially open* and *partially closed*.

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<sup>162</sup> The percentages are averages of self-reported data for 2008, 2009, and 2010.

**Question 12 (B):** What are the three Sunshine Act exceptions most frequently invoked by your agency?<sup>163</sup>

Exemption	Number of Agencies Invoking Exemption
<b>1:</b> Classified Information	3
<b>2:</b> Personnel Policies	4
<b>3:</b> Other Statutes Mandate Confidentiality	6
<b>4:</b> Proprietary Information	7
<b>5:</b> Considering Criminal or Censurable Conduct	2
<b>6:</b> Privacy	5
<b>7:</b> Law Enforcement	6
<b>8:</b> Financial Reports	4
<b>9:</b> Market Stability/Precluding Frustration of Agency Action	11 <sup>164</sup>
<b>10:</b> Litigation/Adjudication <sup>165</sup>	13

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<sup>163</sup> Some agencies provided more than three exceptions.

<sup>164</sup> One of the General Counsels noted that they use 9(A), five General Counsels noted that they use 9(B), one General Counsel noted that they use 9(A) and 9(B), and three General Counsels did not specify what section of exception 9 they use.

<sup>165</sup> Note that this is not the entirety of exemption 10, which is quite broad.

**Question 15:** What legal, administrative, or practical problems has your agency encountered or have you perceived in the implementation of the Sunshine Act? How, if at all, have you sought to address those issues? Has your agency proposed or supported legislation to amend the Sunshine Act? If so, please identify the proposed legislation and briefly summarize it. *(Instead of a summary, you could provide congressional testimony or other communications that described the proposal.)*

- 17 of the 40 (42.5%) General Counsels encountered problems implementing the Act:

Reason Had Trouble Implementing Sunshine Act	Number of Agencies Citing Reason
Was uncertain about definition of meeting	4
Struggled with the inability to deliberate on cases in private	2
Had difficulty maintaining privileged or deliberative documents used at meetings	1
Believed the Sunshine Act isolates members of three-person boards	1
Had difficulty because of joint boards	1
Found the notice requirements of meetings administratively burdensome	1
Had difficulty with member attendance at conferences	1
Struggled with notice requirements during economic crises	1
Desired greater flexibility when discussing adjudication and litigation	1
Believed the Sunshine Act inhibits open discussion and adds administrative burdens with notice requirements	1
Responded that there is not enough case law on exemptions	1
Believed the Sunshine Act inhibits brainstorming and harms private industries' ability to advise the Commission of plans and problems	1
Believed the Sunshine Act inhibits adjudicatory functions and isolates three-member boards	1

**Question 16:** Do you have any recommendations regarding Sunshine Act procedures that other agencies might find useful? If so, what are they?

- 8 of the 38 (21.05%) responding General Counsels provided recommendations to other agencies:

Recommendation	Type
Suggested making open meetings available to the public through online streaming video	Best Practices
Suggested other agencies take advantage of new technologies when providing notice of open meetings	Best Practices
Noted that they have provided internal procedure guidelines and examples of their notices and notice procedures to other agencies for examples	Best Practices
Noted that making background information and documents publicly available online before an open meeting had been useful	Best Practices
Noted that making sure a legal counsel was present at all meetings helped them meet the Sunshine Act requirements	Best Practices
Noted that they provide notice of meetings online and in a news digest and that maintaining internal procedures on what constitutes business that can be conducted seriatim was beneficial	Best Practices
Suggested exemptions for adjudication and litigation strategy meetings and alterations to the requirements for three-member boards	Legislative
Suggested maintaining internal documents providing guidance on Sunshine Act procedures	Best Practices

**Question 17:** Do you have any recommendations for Sunshine Act reforms?

- 9 of the 34 (26.47%) responding General Counsels suggested Sunshine Act reforms.

Reform	Type
Would like a deliberative process exemption for matters that are sensitive or complex in nature	Legislative
Would like a better definition of “meetings” and “public;” Would like the definition of “public” to exclude staff	Legislative
Would like a quorum to not always require open meetings for joint boards (Boards that consist of three commissioners and other state representatives)	Legislative
Do not want a majority vote to be required for changes to subject matter/agenda; Would like a better definition of “meeting” so that it excludes preliminary discussions	Legislative / Best Practices
Would like clearer guidance of requirements for conferences, and the “widely attended gatherings” exception	Legislative / Best Practices
Would like a delay to be allowed in extenuating circumstances such as a financial crisis	Legislative
Previously suggested an exemption for adjudicatory and litigation strategy matters, as well as sensitive matters	Legislative
Would like more guidance (court interpretation) of the exemptions	Best Practices
Did not believe that the 1995 ACUS study reforms would be enough; would like to be exempt from open meeting requirements for several topics: antidumping and countervailing duty investigations, safeguard investigations and intellectual property-based import investigations	Legislative

**Question 18:** In your view, is there a need for additional exemptions permitting meeting closure or an expansion of current exemptions permitting closure? Are some of the exemptions unnecessary or excessively broad?

- 11 of the 33 (33.33%) responding agencies suggested additional exemptions or alterations to current exemptions.

Exemption Reform	Type
Would like a deliberative process exemption for matters that are sensitive or complex in nature	Legislative
Would like the “majority of meetings” requirement to be eliminated from the exemptions, particularly from exemption 10	Legislative
Would like closed meetings to be allowed for continuity of operations plans (COOP)	Legislative
Would like preliminary discussions to be exempt from the requirements for multi-member boards	Legislative
Would like an exemption clearly covering deliberative process that is parallel to Exemption 5 of the FOIA	Legislative
Would like an exemption of notice requirements during extenuating circumstances	Legislative
In 1995 ACUS report, the agency suggested an exemption for adjudication and litigation strategy meetings	Legislative
Believed the current exemptions are overly broad	Legislative
Would like brainstorming sessions (to develop ideas that may be further discussed) to be exempted	Legislative
Would like exemptions for adjudicatory meetings and alterations for three member boards	Legislative
Would like exemption 10 to be expanded to cover investigations not covered by the APA	Legislative

**Appendix C (Responses to the CIRA Sunshine Act Survey)**

**Question 1:** Please describe the type of business your agency conducts through notational voting. How is the result of a vote taken by that procedure announced (e.g., description in the next meeting's minutes, press release, website notification)?

- Of the five responding agencies, four of them seem to use notational voting for substantive matters or all matters while only one restricts notational voting to routine noncontroversial matters. The methods for releasing the results of the voting vary by agency, as summarized below:

Methods Used to Announce Voting Results	Number of Responding Agencies Using this Method
1: Results Announced on an Electronic Calendar or on the Website	4
2: Press Release	3
3: Issued Statement or Publication	3
4: Noted in the Public Record	1
5: Results Accessible by FOIA Request	1
6: Results Available in a Public Reading Room	1
7: Email Notification to Subscribers	1
8: Public Notification at the Next Meeting	1

**Question 2:** Please describe the type of business your agency conducts through staff-level discussions (without any formal meeting of board or commission members).

- The type of business conducted by staff-level discussion varies between the responding agencies. One agency allows staff to address issues previously considered by the board that do not raise novel issues of policy. Some agencies do not allow for any type of agency action to be taken through staff level discussions. It did not seem that any responding agencies delegate substantive decisionmaking to staff.

**Question 3:** Please describe the type of business your agency conducts through serial meetings (i.e., a series of meetings, none of which involves a sufficient number of members to constitute a quorum).

- One responding agency has a committee structure involving a group of board members smaller than a quorum that decides when something is ready to be presented to the full board. None of the other responding agencies conduct such meetings.

**Question 4:** Under what circumstances (if ever) might an email exchange amongst agency members comprise a “virtual meeting” subject to the Sunshine Act?

- An email exchange, under the Act, might be a “virtual meeting” if it involves more or less simultaneous communications, comparable to a conference call, among a quorum of

Commissioners. The responding agencies all choose not to engage in what could be considered a “virtual meeting.”

**Question 5:** Please describe the circumstances under which members of your agency hold preliminary discussions outside of a formal Sunshine Act meeting (e.g., brainstorming sessions or briefing meetings).

- Some responding agencies have meetings involving board members, while others have no meetings involving board members. Meetings are most often held to brief board members. One agency holds private briefings for members focused on reports from staff, bankers, economists, or consumer advocates concerning the state of the economy. They conclude that these briefings are exempt insofar as they do not involve decision-making or the consideration of policy options.

**Question 6:** Please describe any “best practices” your agency has undertaken to increase the transparency of open meetings under the Sunshine Act (e.g., posting meeting notices and relevant documents online or providing online streaming video of meetings).

- Agencies use a variety of “best practices” to increase the transparency of open meetings under the Sunshine Act. Responding agencies use notice of meetings posted to their website, meeting materials posted to their website, press releases, documents that serve as a guide to meetings generally, a webcast video of open Board meetings, and a transcript of open Board meetings available on the internet. One agency broadcasts its meetings on local television and via phone bridge.

**Question 7:** Please describe any other “best practices” that your agency has developed in its efforts to conduct business in compliance with the Sunshine Act that you would commend to other agencies.

- One agency indicated that it publishes a “Guide to the Meetings” in *An Interpretive Guide to the Government in the Sunshine Act*. The agency also published sample board meeting transcripts.

**Question 8:** Should the definition of “meeting” under the Sunshine Act be revised to make it clear that brainstorming sessions and other preliminary discussions fall outside the purview of the Act? If so, does your agency have any proposals for what an improved definition of “meeting” should include?

- Only one agency responded to this question. The one responding agency felt that it should be made clear that briefings of the nature described in Question 5, where information is provided without deliberation and no decision is made, are not “meetings” under the Sunshine Act.

**Question 9:** Should the Sunshine Act be amended to permit members of three-member boards or commissions who cannot engage in seriatim meetings without triggering the Act to hold one-on-

one discussions outside the purview of the Act? If so, what types of discussions should be exempt from the Act in three-member boards and commissions?

- One agency responded to this question. Their response was that seriatim one-on-one discussions among Commissioners, if not more or less simultaneous, are unlikely to trigger the Act. With respect to one-on-one discussions of three-member boards or commissions, it seems desirable to permit this in some fashion, but the Commission's staff has no specific recommendations on this point.

**Question 10:** Should Congress modify the procedures required to close a meeting under the Sunshine Act (e.g., permit a website notification in lieu of a Federal Register notice)? If so, what procedural modifications would your agency propose?

- Two agencies responded to this question. Both agencies seemed to favor modifying the procedure to close a meeting by posting a website notification in lieu of a Federal Register notice.

**Question 11:** Would you propose any other legislative amendments to the Sunshine Act in order to facilitate the work of multi-member boards and commissions? If so, what legislative amendments would your agency propose?

- Two responding agencies had proposals in order to facilitate the work of multi-member boards and commissions. One agency suggested that when the Sunshine Act currently permits closure of a meeting, such as a meeting involving particular law enforcement matters, the agency should not be required to announce the meeting in advance. The second responding agency proposed that they be permitted to delay the announcement of closed board meetings in extenuating circumstances.

**Appendix D (List of Agencies Subject to the Sunshine Act)**

1. Advisory Board for Cuba Broadcasting
2. African Development Foundation
3. Barry Goldwater Scholarship and Excellence in Education Foundation
4. Broadcasting Board of Governors
5. Chemical Safety and Hazard Investigation Board
6. Commission of Fine Arts
7. Commodity Credit Corporation (Board of Directors)
8. Commodity Futures Trading Commission
9. Consumer Product Safety Commission
10. Copyright Office, Library of Congress (Copyright Arbitration Royalty Panels)
11. Corporation for National and Community Service
12. Council on Environmental Quality
13. Delaware River Basin Commission
14. Defense Nuclear Facilities Safety Board
15. Equal Employment Opportunity Commission
16. Export-Import Bank of the United States (Board of Directors)
17. Farm Credit Administration (Office of the Board)
18. Federal Communications Commission
19. Federal Deposit Insurance Corporation (Board of Directors)
20. Federal Election Commission
21. Federal Energy Regulatory Commission
22. Federal Housing Finance Board
23. Federal Labor Relations Authority
24. Federal Maritime Commission
25. Federal Mine Safety and Health Review Commission
26. Federal Open Market Committee
27. Federal Reserve System (Board of Governors)
28. Federal Retirement Thrift Investment Board
29. Federal Trade Commission
30. Foreign Claims Settlement Commission
31. Foreign Service Labor Relations Board
32. Harry S. Truman Scholarship Foundation (Board of Trustees)
33. Inter-American Foundation
34. Legal Services Corporation
35. Marine Mammal Commission
36. Merit Systems Protection Board
37. Millennium Challenge Corporation
38. Mississippi River Commission

39. National Commission on Libraries and Information Science
40. National Council on Disability
41. National Council on the Arts
42. National Credit Union Administration
43. National Labor Relations Board
44. National Mediation Board
45. National Museum Services Board
46. National Science Foundation (National Science Board)
47. National Transportation Safety Board
48. Neighborhood Reinvestment Corporation (Board of Directors)
49. Nuclear Regulatory Commission
50. Occupational Safety and Health Review Commission
51. Overseas Private Investment Corporation (Board of Directors)
52. Pacific Northwest Electric Power and Conservation Planning Council
53. Postal Rate Commission
54. Railroad Retirement Board
55. Rural Telephone Bank
56. Securities and Exchange Commission
57. State Justice Institute
58. Surface Transportation Board
59. Susquehanna River Basin Commission
60. Tennessee Valley Authority (Board of Directors)
61. Uniformed Services University of the Health Sciences (Board of Regents)
62. United States Institute of Peace
63. United States Postal Service (Board of Governors)
64. U.S. Commission on Civil Rights
65. U.S. Election Assistance Commission
66. U.S. International Trade Commission
67. U.S. Parole Commission