STATEMENT OF THE HONORABLE JOHN R. EVANS, COMMISSIONER,

UNITED STATES SECURITIES AND EXCHANGE COMMISSION, BEFORE

THE SUBCOMMITTEE ON FEDERAL SPENDING PRACTICES AND OPEN

GOVERNMENT OF THE SENATE COMMITTEE ON GOVERNMENT OPERATIONS,

ON THE IMPACT OF THE GOVERNMENT IN THE SUNSHINE ACT.

November 29, 1977

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Mr. Chairman, Members of the Subcommittee:

I am pleased to have this opportunity to review with you the Commission's experience over the last six months in administering the Government in the Sunshine Act. With me today is Harvey L. Pitt, the Commission's General Counsel, who has had a key role in assuring our compliance with the Act and is very knowledgeable with respect to the details of our experience. As the Subcommittee is aware, the Act was adopted to ensure, to the fullest practicable extent, public access to "information regarding the decision making process of the federal government." */ The Act recognizes, however, that the desireability of public access to this information must be balanced against the need to "[protect] the rights of individuals" and to assure "the ability of the government to carry out its responsibilities." **/

In order to allow the public the fullest possible access to the decision making processes of government, subsection (b) of the Act, 5 U.S.C. 552b(b), provides, as a general rule, that, "every portion of every meeting of an agency shall be open to public observation." This general rule is subject to ten exemptive provisions, set forth in subsection (c), which defines those agency deliberations that may occur at a closed meeting.

The other sections of the Act provide the procedural framework which, in theory, is designed to promote the objectives of the Act by imposing upon agencies certain requirements which must be followed, with respect to both "open" and "closed" agency meetings. Immediately following the adoption of the Government in the Sunshine Act in September 1976, our Office of General Counsel

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*/ 5 U.S.C. 552b, note.

**/ 5 U.S.C. 522b, note.

began the process of developing new rules and amending existing rules to carry out the purposes of the Act.

During the legislative process, we had expressed our support for the Act's objectives but also our concern that certain of the burdens of compliance might outweigh the benefits to the public. We knew that most of our meetings could not be open to the public given our broad ranging prosecutorial and quasi-adjudicative responsibilities and the fact that even our rule-making decisions often include discussions of active enforcement cases. Nevertheless, we were determined to comply not only with the letter of the new law, but also its spirit.

During the last three months of 1976, our Office of General Counsel prepared an analysis of our meetings and found that an overwhelming number of them contained matters that would be closeable under the Sunshine Act. We then began a trial period during which members of the Commission were advised by the General Counsel's Office which matters on the Commission's agenda would be required to be open to the public by the Act. Staff members were not advised of this experiment in order that discussions would continue just as before. In this way, we could see what problems might arise if the meetings were public. After several weeks, this process was opened up to the staff so that we could all gain experience before the Act became effective. On the basis of that experience, we approved rules that we believe fully implement both the letter and spirit of the Sunshine Act, and at the same time protect the Commission's need, in order to discharge its responsibilities properly and fairly under the federal securities laws, to prevent improper public disclosure of exempt information.

To carry out the objectives of the Sunshine Act, each member of the Commission, and the General Counsel, personally devotes a substantial amount of his time to ensure compliance with the Act. Our General Counsel will not certify that a meeting may be closed unless the matter is clearly within the contem-

plation of one of the exemptions. On occasion, he has refused to certify a meeting as closed, despite some strong views to the contrary, because of our commitment to implement the Act fairly. On the other hand, even though our General Counsel has been prepared to certify that a meeting could be closed as a matter of law, we have voted to open a number of meetings where we did not not believe that a closed meeting was necessary.

Since the Act became effective on March 12, 1977, the Commission has held 150 meetings. We have been able to hold 60 of these, or 40 percent of the total, open to the public. I believe the open meetings have been beneficial not only to the public, but also to the Commission. I say this because the comments we have received about our public meetings indicate that the observers have often been impressed by the depth of discussion and the consideration afforded to opposing viewpoints on major issues by the Commission as well as the overall competence and fairness of the Commission's deliberations.

In this regard, I believe it is appropriate briefly to comment on a report prepared by the Congressional Research Service of the Library of Congress on "Sunshine Act Meetings" for the Senate Subcommittee on Federal Spending Practices and Open Government, concerning which an article appeared in the Washington Star on November 21, 1977. According to the author of that article, the report of the Library of Congress showed that the Securities and Exchange Commission was the agency that made the "most use of closed meetings" and that the "SEC gave valid reasons for closing the meetings in only 43 [of 64] instances * * *" This article also appeared to suggest that federal agencies such as this Commission are "by and large * * * ignoring the new Government-in-the-Sunshine law."

I do not believe that the report prepared by the Library of Congress supports all of the conclusions in the newspaper article. However, apart from

that reservation, I do wish to call the following facts to the Subcommittee's attention concerning the statistics compiled by the Library of Congress.

First, while it may be true that the Securities and Exchange Commission has more "closed" meetings than other agencies, this is primarily because the Commission has apparently held substantially more meetings than other agencies. Even the incomplete data upon which this report is based indicates that out of 46 agencies whose compliance with the Sunshine Act was evaluated, the Securities and Exchange Commission held the most meetings between March 24, 1977 and September 9, 1977, the time period under study.

Moreover, the fact that a majority of Commission meetings was closed is, I am sure, no surprise to the Congressional committees in which the Sunshine Act legislation was developed. Indeed, the Senate Report accompanying the Government in the Sunshine Act noted this fact, in connection with its discussion of the provision allowing certain agencies to close their meetings by rule, pursuant to the modified procedure set forth in subsection (d)(4) of the Act, if a majority of that agency's meetings could be closed pursuant to certain of the exemptive provisions. It stated that subsection (d)(4) "will largely apply to agencies which regulate financial institutions, securities, or commodities, and which will often have to conduct their sensitive business in private, and on short notice * * *" The report further indicated that the Securities and Exchange Commission was among those agencies which would be permitted to issue regulations pursuant to these provisions, because a majority of its meetings were expected to be closed. S. Rep. No. 94-354, 94th Cong., 1st Sess. (1975) at 28-29. The Committee's expectation at the time it considered this legislation has been verified by our subsequent experience.

In addition, the Library report implies that for 21 of our closed Commission meetings held between March 24 and September 9, 1977, valid reasons for closing

these meetings were not provided. Although we cannot be certain as to the methods used by the Library in compiling its statistics, it appears that the Library's analysis is based on a survey of the notices sent to the Federal Register, for publication pursuant to subsection (e)(1) of the Act, 5 U.S.C. 552b(e)(1). The Commission supplements its regular weekly notices with amending notices whenever necessary, such as when the previously announced time or date of a meeting is changed. Usually, these short amendatory notices simply set forth the change, and refer the reader back to the initial notice for additional details, including the Sunshine Act exemptions which the Commission had invoked.

We have reviewed our records and have found that there have now been 34 of these notices which contained no citations to exemptive provisions of the Sunshine Act. Virtually all of these notices were for schedule changes made after the regular weekly notices had been sent, and involved either a change in date for consideration of a matter scheduled earlier, a deletion of a scheduled item, or notice of an emergency matter that could not have been scheduled earlier. Our tabulation of the notices, the dates of the meetings, and a general description of the items considered is available to the Subcommittee if you desire. In any event, although we should have cited the exemptive provisions in these amendatory notices, as well as in the initial notices, I categorically assure the Subcommittee that no matter is ever considered by the Commission, regardless of whether it is scheduled for an open or closed Commission meeting, without its first having been reviewed by the General Counsel for compliance with the Act. No meeting is closed unless we are certain that one or more of the exemptions is applicable, and that it is in the public interest to close the meeting in question.

Before I leave this subject, I would also like to call to the attention of the Subcommittee the fact that a review of the Library's report indicates that a number of agencies have a higher percentage of closed meetings than we

do. I believe that, since the passage of the Sunshine Act, the Commission has endeavored, successfully in large measure, to open a significant number of its meetings to the public, in keeping with the Act's philosophy that, as a general rule, government business should be conducted in the open.

Inasmuch as this Subcommittee is holding oversight hearings on the administration of the Act for the first time, we have been asked to bring to the attention of the Subcommittee those problems—technical, procedural and substantive—which seem to us to call for some modification of the Act.

Because a primary responsibility of the Commission is to assure appropriate disclosure of material facts by those persons to whom the investing public entrusts its capital, we are naturally sympathetic to the principal objective of the Act, to bring the fullest practicable information to the public regarding the decision making processes of the federal government. Nonetheless, we also have a responsibility, imposed by the Congress, to protect the investing public, and we believe that we must maintain our ability to meet that responsibility. Whenever the ability of the Commission to act is impeded for the sake of inflexible procedural requirements which, while theoretically designed to assure the public access to information about its government, do not in fact perform this function, the Commission would be remiss if it did not report to you its concerns.

Subsection (e)(1) of the Act, 5 U.S.C. 552b(e)(1), provides for the scheduling and public notification of agency meetings. It states:

> "In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of the time, place and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject

matter of such meeting, and whether open or closed to the public, at the earliest practicable time."

Subsection (e)(3) of the Act provides for publication in the Federal Register of the notice required by subsection (c)(1). In general, our rules require that notices of prospective open meetings be posted on the public information board in the lobby of the Securities and Exchange Commission at least one week prior to the consideration of any matter listed therein. These notices are also submitted at that time to the Federal Register for publication. This announcement contains a brief description of the subject matter to be discussed, the date, place and time at which the Commission will consider the matter, whether the meeting, or any portion of it, will be open or closed, and the name and telephone number of a Commission official designated to respond to requests for information concerning the meeting at which the matter will be discussed. Should the Commission determine, by recorded vote, that earlier consideration of any matter not previously posted is necessary, a public announcement is made, posted in the lobby, and submitted to the Federal Register at the earliest practicable time.

In addition, the Wednesday edition of the Commission's daily publication, the "SEC News Digest," contains announcements of Commission meetings, both open and closed, for the following week, and revises that information as soon as practicable when changes in the previously announced schedule are made. The "SEC News Digest" has a current circulation of over 3,000, and is subscribed to by many persons who regularly follow the Commission's activities. Moreover, in order to allow the public to understand better the discussion at open meetings, the Commission has informally begun to distribute summaries of relevant background information pertaining to agenda items to attendees at these meetings. We have previously submitted a number of these summaries to your staff for the Subcommittee's information.

In spite of these efforts, if the extent to which members of the public attend open Commission meetings is any measure of how successful the notice and dissemination provisions of the Act have been in involving the general public in the work of the Commission, then we must conclude that they are not working as expected. Based on a review of the affiliations of persons who attend Commission meetings, it is apparent that it is the representatives of vested and regulated interests who regularly attend Commission meetings and who are, therefore, the primary beneficiaries of the Act. */ We do not think that this problem can be solved merely by increasing the time between the publication of the notice and the meeting. In fact, because our investor constituency is located throughout the United States and because these people do not, for the most part, have the resources to come to Washington whenever the Commission discusses a matter in which they have an interest, it is doubtful that significant numbers of investors would attend agency meetings regardless of how much advance notice was provided.

The effects of this are unfortunate. Those persons who attend our meetings are persons who will be subject to the regulations or other agency actions we often discuss at open meetings. The information gained at these meetings often amounts to little more than the Commission inquiring into the legal authority available to it to protect the public interest. Questions may be posed, or doubts expressed, for the sake of discussion. There is no exemption available for such discussions, and yet, those present at our meetings may seek to utilize such candid discourse in seeking to vitiate our efforts to protect the public. We believe that, at a minimum, therefore, the Act should make clear what the law already is—that comments by individual Commissioners or staff members may not be used against the agency; only the agency's prepared explanation of its action should serve as the basis for any judicial challenge to the agency's action.

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*/ All persons attending open Commission meetings register at the reception desk in the lobby of the Commission's building, where they receive a building pass. These persons are requested to state, inter alia, their professional affiliation, if any.

In the Commission's view, the procedural requirements of the Act relating to closed Commission meetings place too great a burden on the Commission, when compared with the public benefits received.

One of the principal reasons for the difficulties created for the Commission by the Act relates to the treatment required to be accorded matters exempt from the open meeting requirements of the Act. As discussed above, a large percentage of our work involves investigatory and enforcement matters which often require prompt action. While subsection (d)(4) of the Act, 5 U.S.C. 552b(d)(4), eliminates some of the procedural hurdles attendant upon the consideration of enforcement matters, the Act has nevertheless significantly hampered the Commission's ability to deal with some emergency enforcement problems. */

For example, frequently the Commission must consider the issuance of a subpoena, the filing of a complaint to enjoin an ongoing fraud, or the commencement of a federal investigation upon very short notice because of the nature

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*/ Because the Commission is an agency a majority of whose meetings may properly be closed pursuant to Exemptions 4, 8, 9(A) or 10, it need not follow the full procedural requirements of subsections (d)(1), (2), and (3) and subsection (e).

See 5 U.S.C. 552b(d)(4), which provides:

> "Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time."

The Commission has implemented rules as authorized by this subsection. See 17 CFR 200.405.

and volatility of the matter involved. The requirement of the Sunshine Act that a notice be published, a vote held, and the General Counsel's certification obtained in order to engage in such deliberations often entails procedural steps which seem to do little to further the Act's goals. Since the Commission must delete all identifying details from the public certification and public notice concerning meetings in this category, the notices which are released afford the public little, if any, real knowledge with respect to the Commission's deliberations concerning law enforcement matters.

Even when no emergency attends the Commission's consideration of a law enforcement matter, the procedural requirements of the Act appear to make little sense from the vantage point of the general public, since identifying characteristics must be deleted from the public notices. The problem is compounded should the Commission need to change its schedule for any reason. The procedural steps necessary to effect a Commission vote to modify an earlier Commission vote, and to publish a notice superceding a previously published notice in the Federal Register and in the Commission's "News Digest," appear pointless when little of substance is revealed to the public in any event.

The Commission believes that its business could be facilitated, with no attendant interference with the goals of the Sunshine Act, if subsection (d)(4) of the Act, 5 U.S.C. 552b(d)(4), were amended to permit agencies to close deliberations within the exemptions set forth in that subsection solely by rule and without the public notice requirements presently set forth in the proviso to subsection (d)(4). As noted above, since most law enforcement matters fall within these exemptions, the notice requirements burden the Commission but do not appear to assist the public in any meaningful way.

Moreover, in the Commission's experience, it would better serve the apparent purposes of Exemption 4 if it were dropped from the list of those exemptions included in subsection (d)(4) and if it were replaced by Exemption 5. Exemption 4 concerns the disclosure of "* * * trade secrets and commercial or financial

information obtained from a person and privileged or confidential." The legislative history indicates that,

> "This paragraph applies to meetings which disclose trade secrets or financial or commercial information obtained from any person where such trade
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> secrets or other information could not be obtained by the agency without a pledge of confidentiality or where such information must be withheld from the public in order to prevent substantial injury to the competitive position of the person to whom the information relates."

S. Rep. No. 94-354, 95th Cong., 1st Sess. at p. 23. Exemption 5, on the other hand,

> "covers meetings which accuse an individual or corporation of a crime, or formally censure such person. An agency regulating financial or security [sic] matters may wish to censure a firm for failing to live up to its professional responsibilities, or an agency may consider whether to formally censure an attorney for his conduct in an agency proceeding. Opening to the public agency discussion of such matters could irreparably harm the person's reputation. If the agency decides not to accuse the person of a crime, or not to censure him, the harm done to the person's reputation by the open meeting could be very unfair."

S. Rep. 94-354, supra, at 22. Insofar as the Commission's experiences is concerned, we believe that Exemption 5 bears a closer relationship to the other exemptions enumerated in subsection (d)(4) and should replace Exemption 4 in that provision.

We also suggest that the requirement of subsection (f)(1) of the Act, 5 U.S.C. 552b(f)(1) — that a verbatim transcript or recording be made of Comission meetings closed pursuant to subsection (d)(4), 5 U.S.C. 552b(d)(4) — ought to be eliminated, or at least modified. Not only does this requirement add significantly to the cost of these meetings but, in addition, it exposes agencies to the threat of burdensome litigation designed to afford the target of a Commission investigation some delay, even if it is extremely unlikely to result in the release of any significant information to the public. There is

also some danger of frivolous and dilatory litigation seeking, for purposes unrelated to the Sunshine Act, to obtain these transcripts or recordings in order to frustrate law enforcement actions. */ On the other hand, the detailed requirements prescribed by subsection (f)(1) of the Act, 5 U.S.C. 552b(f)(1), with respect to minutes of agency meetings as a substitute for transcripts (in the case of meetings closed pursuant to Exemptions 8, 9A, or 10) make it entirely impractical to maintain minutes. Accordingly, at the present time, we feel we have no real alternative but to prepare a verbatim recording of all closed Commission meetings. As we previously indicated to the subcommittee, these problems could be resolved if the fourth sentence of subsection (f)(1) were amended to read:

> "Such minutes shall fully and clearly describe all agenda items discussed and shall provide a full and accurate summary of all actions taken and the record of any roll-call vote, reflecting the vote of each member on the question.

Similarly, if this suggestion is adopted, we urge that the use of minutes be expanded to include discussion exempt from public observation pursuant to Exemption 5 of the Act. Alternatively, we suggest that the statute should make it clear that under no circumstances should access to any transcript required to be maintained by the Act be provided to those who are the subjects of actual or potential law enforcement activity. Agency action should be justified by reference to what the agency as a whole has done and what reasons the agency has stated to support its action. This has always been the law, and it would not be appropriate for an off-hand remark or comment by any individual Commissioner or member

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*/ The Commission's experience under the Freedom of Information Act has been that suits under that Act have occasionally been instituted to enjoin Commission investigations or enforcement action until insubstantial claims under the FOIA are finally resolved by the courts. While we have not yet had any lawsuits filed against us under the Sunshine Act, and do not anticipate massive litigation arising under it, we are concerned that at least some parties may attempt to use the Act to delay or im;pede the effectiveness of particular Commission decisions.

of the staff to be used against the Commission as a whole.

In addition, the Commission is concerned that the failure of subsection (f)(1) expressly to provide that, in addition to the agency's General Counsel or chief legal officer, his or the agency's designee may result in a legal challenge to agency action taken at a meeting held in circumstances where the General Counsel was himself unable to provide the certification required by the Act.

While we agree that the power to certify that an agency meeting may be closed should be restricted to responsible legal officers of the agency, we do not believe it was Congress' intention that agency work cease unless it could be shown that the the General Counsel was on business or on vacation. The Commission has implemented a procedure pursuant to which the next senior member of the General Counsel's staff performs the certifications when the General Counsel is physically absent from the Office. Beyond this, the rule provides for a chain of command by rank and seniority. See 17 CFR 200.21. But, we recommend to the Subcommittee that the statute be amended to provide specifically for a similar procedure to be employed when the General Counsel's time can be spent more profitably on matters of significant importance to the public, thus ensuring that the statute does not inadvertantly create technical grounds for objecting to agency action which the Congress clearly never intended.

The Commission also believes that the requirement of subsection (d)(5) of the Act, 5 U.S.C. 552b(d)(5) — that "a full written explanation" of the agency action to close a meeting dealing with enforcement related matters be provided — is impractical, particularly in light of the statute's recognition an explanation should not include any exempt information. As a practical matter, there would appear to be little which can be said by way of explanation, beyond citation to the particular exemption involved, which

would not reveal exempt information. Accordingly, subsection (d)(5) would appear to serve little useful purpose with respect to law enforcement related matters and we suggest it should be eliminated.

Finally, we understand that the Federal Reserve Board has recommended that the Act be amended to provide a specific exemptive provision to permit agencies to close meetings at which discussions of pending or proposed legislation will occur. We concur in that recommendation. We believe the public interest is best served by full and frank discussions on the many legislative proposals that are referred to us for comment. Such discussions may not occur in a public meeting for fear that one's statements may, at a later time, be used against the agency in some other context.

We hope that these comments will be helpful to the Subcommittee in its efforts to provide more meaningful information to the public about the workings of its government while not adversely affecting the ability of the government to carry out its responsibilities. This is a goal which the Commission wholeheartedly supports. Mr. Pitt and I will be pleased to attempt to respond to any questions the members of the Subcommittee may have.