Chapter 1

SECTION 552b(a)
DEFINITIONS

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(1) the term “agency” means any agency, as defined in section 552(e) of this title, 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 author-
ized to act on behalf of the agency;

“AGENCY”

The definition of “agency” is the one used in the 1974 amendments
to the Freedom of Information Act (FOIA), except that it is limited to
those entities that are headed by a collegial body of two or more mem-
ers, a majority of whom are appointed to such positions by the Presi-
dent with the advice and consent of the Senate. So the case law and
other authorities under the FOIA will control. See Energy Research Foun-
dation v. Defense Nuclear Facilities Safety Board, 917 F.2d 581 (D.C.
Cir. 1990) (hereafter Energy Research); Soucie v. David, 448 F.2d 1087,
1073-75 (D.C. Cir. 1971) (hereafter Soucie). The Senate and House
Committee Reports contain lists of agencies that appeared to the respec-
tive committees to be covered, but both reports specified that it was the
statutory definition and not the lists that would govern. S. Rep., 15-18; H. Rep. II, 13-14.¹

Congress has on occasion extended the Sunshine Act to governmental bodies that do not meet the statutory definition, for example, the Neighborhood Reinvestment Corporation. See 42 U.S.C. § 8103(i). Certain other agencies not subject to the Act also voluntarily comply with its provisions, for example, the Federal Open Market Committee and the U.S. Commission on Civil Rights.² In at least one instance, Congress has directed a regional agency, the Pacific Northwest Electric Power and Conservation Planning Council, established pursuant to federal statute, to comply with the Sunshine Act “to the extent appropriate.” See 16 U.S.C. § 839b(a)(4).

The only noteworthy dispute involving the definition of “agency” has been over whether certain entities whose functions are primarily or exclusively advisory are agencies. In Pacific Legal Foundation v. Council on Environmental Quality (hereafter Pacific Legal Foundation), 636 F.2d 1259 (D.C. Cir. 1980), the CEQ’s functions included advising the President on environmental policy and overseeing and coordinating federal programs relating to environmental quality. CEQ conceded that it was an agency subject to the Sunshine Act, but it sought to place its function of advising the President outside the Act’s coverage. CEQ contended that it did not function as an agency

¹. For a list of 67 federal agencies that have open meeting regulations, or voluntarily open their meetings to the public, see Appendix C, infra. This is an increase of 17 agencies from the 50 agencies listed in Appendix B of the 1978 Guide.

². See policy statement of the Federal Open Market Committee, 12 C.F.R. § 281.2 (“. . . despite the conclusion . . . that the Sunshine Act does not apply to the FOMC, the FOMC has determined that its procedures and timing of public discourse already are conducted in accordance with the spirit of the Sunshine Act”); and regulations of the U.S. Commission on Civil Rights, 45 C.F.R. § 702.50 et seq., 67 Fed. Reg. 70,482, 70,487 (Oct. 22, 2002). A majority of the members of the Open Market Committee serve ex officio by reason of their appointment as members of the Federal Reserve Board, and consequently the Committee is not within the scope of the Act’s definition of “agency”; see text at note 6, infra. The members of the Commission on Civil Rights are appointed by the President, the President pro tempore of the Senate, and the Speaker of the House of Representatives; however, none are advice-and-consent appointees. See 42 U.S.C. § 1975.
in advising the President and that, consequently, formulating such advice was not “official agency business.” The court disagreed and held that once an organizational unit meets the FOIA/Sunshine Act definition of an agency, its status as such does not vary with the nature of the function it performs. The court concluded that the Sunshine Act covered the CEQ’s advisory function, although it held out the possibility that meetings to consider such advice might be eligible for closure.3

Five years later the court reached a different conclusion with respect to the Council of Economic Advisers (CEA) in Rushforth v. Council of Economic Advisers, 762 F.2d 1038 (D.C. Cir. 1985) (hereafter Rushforth). The court found that CEA’s functions were exclusively to advise and assist the President and did not include the program coordination and oversight responsibilities possessed by the Council on Environmental Quality. Therefore, the court concluded that the CEA was not an agency under either the Freedom of Information Act (FOIA) or the Sunshine Act. The court added that even if CEA were an agency under the FOIA, it would not be covered by the Sunshine Act because it does not operate as a collegial body, inasmuch as administration of the Council is centralized in the chairman.4

Finally, in Energy Research, supra, the court held that the Defense Nuclear Facilities Safety Board, whose functions are to evaluate Department of Energy standards for defense nuclear facilities, to investigate practices affecting safety at such facilities, and to make

3. Although the Council on Environmental Quality (CEQ) was established by the National Environmental Policy Act, 42 U.S.C. § 4342, as a three-member agency, appropriations legislation since fiscal year 1998 has reduced CEQ to a single member, and consequently it no longer qualifies as a Sunshine agency. Letter from Dinah Bear, General Counsel of CEQ, to Stephen Klitzman (July 25, 2001).

recommendations to the Department of Energy, was an agency under the Sunshine Act. The court rejected the Board’s argument that because its statute evidenced a congressional intention that meetings to make recommendations to the Department of Energy should be closed, the Board should not be considered an agency. The court concluded that the Board’s investigative and evaluative responsibilities were sufficient to make it an “agency” under the Soucie and Pacific Legal Foundation opinions, and it indicated further that the principle of Rushforth would be limited to entities whose “sole function” was providing advice to the President.5

An agency whose members serve *ex officio* by virtue of their appointment with advice and consent to another position is not covered by the Sunshine Act. In *Symons v. Chrysler Loan Guarantee Board*, 670 F.2d 238 (D.C. Cir. 1981), the court held that the Board, whose membership consisted of the Secretary of the Treasury, the Chairman of the Board of Governors of the Federal Reserve System, and the Comptroller General (the Secretaries of Labor and Transportation were non-voting members), was not a Sunshine agency because the members were not appointed “to such position by the President with the advice and consent of the Senate.” The court relied on the statutory language and legislative history, and on a ruling by the Department of Justice shortly after enactment of the statute.6

“SUBDIVISION”

The open meeting requirements apply not only to meetings of the full collegial body but also to meetings of “any subdivision thereof

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5. 917 F.2d at 584.
6. 670 F.2d at 242-43, n.7, *citing* letter of Oct. 27, 1976, from Deputy Assistant Attorney General Leon Ulman, Office of Legal Counsel, to Harold Kessler, Acting Executive Director, Federal Labor Relations Council, concluding that the Council, which consisted of the Chairman of the Civil Service Commission, the Secretary of Labor, and the Director of the Office of Management and Budget, all serving *ex officio*, was not an agency for purposes of the Sunshine Act. *See also* letter of Dec. 28, 1976, from Deputy Assistant Attorney General Mary G. Lawton to Henry Rose, General Counsel, Pension Benefit Guaranty Corporation (PBGC), concluding that the Board of Directors of the PBGC, consisting of the Secretaries of Commerce, Labor and Treasury, all serving *ex officio*, also was not a Sunshine Act agency.
authorized to act on behalf of the agency.” Legislative history indicates that “authorized to act on behalf of the agency” should be interpreted broadly and not in the relatively narrow sense of taking agency action as defined in the Administrative Procedure Act, 5 U.S.C. § 551(13). Thus, the report of the House Government Operations Committee states that “panels or boards authorized to submit recommendations, preliminary decisions, or the like to the full commission, or to conduct hearings on behalf of the agency” are included within the meaning of subdivision. H. Rep. I, 7. On the other hand, where a committee of members has been directed to draw up and submit an informal recommendation to the full collegial body, which recommendation is then open to full consideration by the body, it is hard to regard such an assignment as an authorization to act on behalf of the agency in any meaningful sense. At a minimum, a subdivision must have a specified membership and fixed responsibilities; an informal working group authorized to report back to the body is not a subdivision.7

Furthermore, the subdivision must be considering matters within its formally delegated authority. In Federal Communications Commission v. ITT World Communications, 466 U.S. 463 (1984), three members of the FCC’s Telecommunications Committee attended an international conference at which FCC policy was discussed. The three members constituted a quorum of the Telecommunications Committee, but not of the full Commission (at that time a seven-member body). Citing the 1978 Guide, the Supreme Court, in its only Sunshine Act opinion to date, held that the discussions in which the members participated did not constitute a meeting subject to the Act because, inter alia, the discussions related to decisions already reached by the full Commission and not to the disposition of applications for common carrier certifications, the only matters within the subdivision’s formally delegated authority.8

7. Id. A subdivision must have a specified membership in order to permit a determination as to the presence of a quorum. A gathering of less than a quorum of the full body does not become a subdivision merely because it is preparing a recommendation for the full body.
8. 466 U.S. at 472-73. See discussion of ITT World Communications case, infra at pp. 17-22.
It should be noted that “subdivision thereof” refers back to “collegial body,” not to “agency.” Subdivisions made up entirely of employees other than members of the collegial body are not covered by the Act, even though they may be authorized to act on behalf of the agency. The basis for excluding subdivisions made up of agency employees is well stated in the Senate Report:

The agency heads are high public officials, having been selected and confirmed through a process very different from that used for staff members. Their deliberative process can be appropriately exposed to public scrutiny in order to give citizens an awareness of the process and rationale of decisionmaking.

S. Rep., 17.

Where a collegial subdivision is made up in part of agency members and in part of staff, the answer is unclear. Where agency members make up a majority of the members of the subdivision, the subdivision would appear to be a subdivision of the collegial body. Where staff make up a majority of the subdivision, assuming that the relationship among the members of the subdivision is truly collegial, we doubt that the Act applies.

“MEETING”

(2) the term “meeting” means 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, but does not include deliberations required or permitted by subsection (d) or (e);

Defining the scope of the term “meeting” is one of the most troublesome problems in interpreting and applying the Sunshine Act. The definition was revised frequently in the course of the legislative process, sometimes for obscure reasons, and the legislative history is not completely consistent. The definition of “meeting” consists of a number of distinct elements. First, the “meeting” must be of at least the number of agency members required to take action on behalf of the agency—that is, enough to constitute a quorum. S. Rep., 19. A gathering of less than a quorum does not ever constitute a “meeting” under the Act. S. Rep., 2-3. The size of a quorum is ordinarily established by the agency’s statute or by regulation. See FTC v. Flotill Products, 389 U.S. 179, 181-82 (1967) (hereafter Flotill Products). Where the stat-

10. See Appendix D, infra, for a chronological chart of the definition of “meeting” as it evolved through the legislative history of the Sunshine Act.

11. Nothing in the Act or its legislative history suggests that an agency may not adopt its own rules for determining a quorum in particular circumstances. For example, there is no explicit quorum requirement in the organic legislation for the Securities and Exchange Commission, but the agency is authorized to “make such rules and regulations as may be necessary or appropriate to implement the provisions of this chapter,” 15 U.S.C. § 78w(a)(1). In 1995 the Commission adopted a regulation providing that three of the five statutory members constitute a quorum unless the number of members in office is fewer than three, in which case the quorum consists of the number of members actually in office. The regulation further provides that if, on any matter of business, the number of members in office minus the number of members who are disqualified to consider the matter is two, then those two members constitute a quorum for purposes of that specific matter. The D.C. Circuit upheld the validity of the Commission’s quorum rule in Falcon Trading Group, Ltd. v. SEC, 102 F.3d 579, 582 (D.C. Cir. (continued on next page)
ute and the regulations are silent, a majority of the membership constitutes a quorum. *Flotill Products* at 183; *Ho Chang Tsao v. INS*, 538 F.2d 667, 669 (5th Cir. 1976). Where a subdivision is involved, a quorum of the subdivision is necessary to constitute a meeting. Where a collegial body, whether agency or subdivision, consists in part of advice-and-consent appointees and in part of members otherwise selected, all members would be treated alike for purposes of determining the presence of a quorum (unless the rules applicable to the body itself made some distinction among members in defining a quorum).\(^\text{12}\)

Second, the requisite number of members must be in a position to exchange views. They must at least be potentially involved in the discussion. The use of the word “joint” is intended to exclude instances

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1996), and at least one agency, the Chemical Safety and Hazard Investigation Board, has followed the SEC’s example. *See* 68 Fed. Reg. 65,403 (2003), 40 C.F.R. § 1600.5.

When the Federal Trade Commission, ordinarily a five-member agency, was reduced to three members by unfilled vacancies, it adopted a resolution stating that “when the Commission is comprised of three members, two of those members can act for the Commission, one member not participating, so long as all members are aware of the proposed action and are afforded an opportunity to participate.” *See* 41 Fed. Reg. 25,036. Could it be argued that under such a rule, where two members meet without notice to the third, no quorum is present and consequently there is no “meeting?” We do not believe so. The statutory reference is not to a “quorum,” but to “the number of . . . members required to take action on behalf of the agency.” This means the number necessary to constitute a quorum at a properly called meeting. Whether the same number of members is authorized to act at the particular gathering in question is not determinative. For a general discussion of quorum and voting requirements, *see* Marshall J. Breger & Gary J. Edles, *Established by Practice: The Theory and Operation of Independent Federal Agencies*, 52 ADMIN. L. REV. 1111, 1182-87 (2000). *See also* Railroad Yardmasters of America v. Harris, 721 F. 2d 1332 (D.C. Cir. 1983). (A single member of a three-member National Mediation Board may act for Board pursuant to a validly issued delegation order that is narrowly tailored to prevent temporary occurrence of two vacancies from completely disabling the Board.)

12. When the Federal Election Commission had non-voting members, its regulation, former 11 C.F.R. § 2.2(d), counted only voting members to determine the presence of a quorum. *See* p. 28, *infra.*
where one or more agency members give a speech concerning agency business, and other members are in the audience. S. Rep., 18. On the other hand, a physical presence is not required. A conference telephone call or possibly a series of two-party calls would qualify as a meeting if the other requirements are met. Conf. Rep., 11; H. Rep. I, 8.

Third, the meeting must consist of “deliberations [which] determine or result in the joint conduct or disposition of official agency business.” This is a complicated, somewhat ambiguous concept, and much attention was devoted in the legislative process to attempting to define when conversations among agency members rise to the level of a “meeting.” At one end of the spectrum it is clear that not every reference to agency business turns a gathering of members into a meeting. The Senate Report pointed out:

To be a meeting the discussion must be of some substance. Brief references to agency business where the commission members do not give serious attention to the matter do not constitute a meeting. A chance encounter where passing reference is made to agency business, such as setting a time or place for the agency heads to meet, would not be a meeting. A luncheon attended by a majority of the Commissioners would not be a meeting subject to the bill simply because one Commissioner made a brief, casual remark about an agency matter which did not elicit substantial further comment. The 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.


It is likewise clear that the term “meeting” includes more than the session at which the collegial body formally disposes of a matter. Congress was specific in its desire to rule out any possibility that open meetings might be merely a forum for ratifying decisions previously arrived at in closed sessions:

The definition of meetings includes the conduct, as well as the disposition, of official agency matters. It is not sufficient for the purposes of open government to merely have the public witness
final agency votes. The meetings opened by section 201(a) are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views. The whole decisionmaking process, not merely its results, must be exposed to public scrutiny.


Thus, at a minimum, “meeting” includes any gathering of the requisite number of members where a serious exchange of views achieves a consensus on a matter of official agency business.

But what of the intermediate points on the spectrum? Briefings to the members by staff or outsiders, which are accompanied by limited exchanges among the members? Discussions among the members that are serious but tentative and exploratory, not calculated or intended to lead to an immediate commitment by the agency to any course of action? Discussions that attempt to reach but do not achieve a consensus? Given the great variety of possible fact situations, articulating a practical test of a “meeting” to apply in this twilight zone has been a challenge for Congress, the agencies, and the courts.

Legislative History

The problem of defining the threshold for a “meeting” was a matter of continuing concern during Congress’s consideration of the Sunshine legislation. In discussing the peculiar problems of agencies in which two members constitute a quorum, the Senate Report said:

It is not the intent of the bill to prevent any two agency members, regardless of agency size, from engaging in informal background discussions which clarify issues and expose varying views. . . . When two members constitute a quorum, however, the agency must be careful not to cross over the line and engage in discussions which effectively predetermine official actions. Members of such agencies must use their judgment in these situations, again with the awareness that this bill carries a presumption of openness. Their discussions
should remain informal and preliminary to avoid the open meeting requirement.

S. Rep., 19 (emphasis added).

This passage is the most serious effort in the legislative history to mark out a line of distinction between those casual and informal discussions of agency business that do not qualify as “meetings” and those more “formal” gatherings that do.\textsuperscript{13} While the reference is to the situation in which two members constitute a quorum, the passage necessarily has broader application, since there is nothing in the statute that supports a special definition of “meeting” for agencies where two members make up a quorum.\textsuperscript{14} The quoted passage indicates that the controlling distinction is between discussions that “effectively predetermine official actions” and those that do not. It would follow that briefings and exploratory or tentative discussions would not fall within the definition of “meeting.” On the other hand, the report of the House Government Operations Committee, in discussing its definition of “meeting,” which

\textsuperscript{13} It is clear that some such distinction was intended. “The 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.” S. REP., 18. “Formality,” however, seems an unfortunate choice of word, since it is clear that it is the content of the discussion rather than the outward form that determines whether there is a meeting.

\textsuperscript{14} For the specific concerns of such small agencies where two members always make up a quorum, see Letter to Thomasina V. Rogers, Chair, Administrative Conference of the United States, from Marsha Martin, Chairman, Farm Credit Administration, Sept. 8, 1995. In her letter, Chairman Martin noted that:

the Sunshine Act . . . is extremely burdensome in an organization such as FCA which has just three full-time Board members. . . . Because the Sunshine Act effectively prohibits any two Board members from discussing any issue which is before the Board, most of the substantive discussion takes place between executive assistants and agency staff who are not subject to the Act’s restrictions. Board leadership and control is weakened considerably, since communication between Board members is secondhand. My personal experience is that staff members many times make significant policy decisions in facilitating Board actions. In addition, lack of one-on-one communication between Board members creates suspicions, misunderstandings, and needless disruptions in the decisionmaking process. . . .
was almost identical to that in the Senate bill, said, “[t]he conduct of
agency business is intended to include not just the formal decisionmaking
or voting, but all discussion relating to the business of the agency.” H.
Rep. I, 8. To the extent the committee reports disagree over the interpre-
tation of “meeting,” the Senate Report should be viewed as the more
authoritative because the Conference Report stated that the Senate’s defi-
nition of meeting “as explained in the Senate Report” (emphasis added)
was the basis for the final language. Conf. Rep., 11.

Both reports, quoted above, refer to substantially the same language
of the definition, “deliberations where such deliberations concern
the joint conduct or disposition of [official] agency business” (emphasis
added). This language was changed to its present form in the Senate-
House Conference. Conf. Rep., 11. Although the purpose of the change
was not explained in the report, it can only be interpreted as intending
some limiting and narrowing effect. That effect seems, most plausibly,
to be to exclude from the definition, or to emphasize the previous exclu-

15. The definition of “meeting” in S. 5, as reported by the Senate Government
Operations Committee and as passed by the Senate, was as follows:

[A] meeting means the deliberations of at least the number of indi-
vidual agency members required to take action on behalf of the
agency where such deliberations concern the joint conduct or dispo-
sition of official agency business.

The definition in the bill reported by the House Government Operations
Committee was identical except that the word “official” was omitted.

16. The change was to substitute for “concern,” “determine or result in.” A test
based on whether deliberations “determine or result in . . . disposition of
official agency business” is very close to that suggested in the Senate re-
port, whether the discussions “effectively predetermine official actions.”
Rep. Fascell, a member of the Conference Committee, explained the change
as follows:

On the issue of the definition of a “meeting,” the conference report
accepts the Senate wording except that deliberations would have to
“determine or result in” the joint conduct or disposition of agency
business, rather than merely “concern” such activities. This language
is intended to permit casual discussions between agency members
that might invoke the bill’s requirements under the less formal “con-
cern” standard. 122 CONG. REC. H9260 (daily ed. Aug. 31, 1976); SOURCE
BOOK, p. 818.

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sion of, those deliberations that “concern” agency business, yet are so
general and tentative as not to “determine or result in” the adoption of
firm positions regarding future agency action by the participating mem-
bers. In this category might be placed briefings to and even exploratory
talks among agency members.17 Such treatment is consistent with the
suggestion in the Senate Report that the test is whether the discussion
“predetermine[s] official action,” and obviously it has much to recom-
mend it in terms of the practical problems of the day-to-day operations
of an agency.18

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The phrase “deliberations [which] determine or result in the joint con-
duct . . . of official agency business” is puzzling and essentially circular
because the meeting itself is joint conduct of agency business. Evidently,
“result in” is being used in the sense of “amount to” and is intended to
underline the Conference’s rejection of the “purpose” test adopted in the
House. See text at note 22, infra. But to say that the test of a meeting is what
occurs does not tell much about what must occur in order to constitute a
meeting.

17. See, e.g., regulations of the Federal Deposit Insurance Corporation, 12 C.F.R.
§ 311.2(b), the National Transportation Safety Board, 49 C.F.R. § 804.3(c),
and the Occupational Safety and Health Review Commission, 29 C.F.R. §
2203.2(d). See also p. 23 note 40, infra.

18. The practical need for exempting casual and tentative discussions was well
set forth in the House hearings by Prof. Jerre Williams, testifying on behalf
of the American Bar Association:

Obviously, one of the critical facets of this legislation, and what we
have been talking about today, is the definition of meeting.

The ABA takes the position that there is a need for balance here.
There is a need for exempting from the legislation chance encounters
and informational and exploratory discussions as long as they do not
predetermine agency action.

The informal and casual work session is included. Outlandish sug-
gestions come out of those sessions. Hopefully, humorous sugges-
tions come out of those sessions, but once in a while the brainstorming
matters will lead to a new and creative and important idea.

The ABA takes the position that the open meetings requirement
does not apply until the brainstorming gets to the point that ideas
need to be adequately evaluated as a viable alternative which ought
to be seriously considered.

See House Government Operations Hearings, 102. See also House Judi-
ciary Oversight Hearing, 5-6.
The 1978 Sunshine Guide

On the basis of the legislative history cited above, the 1978 Guide concluded that the definition of meeting does not cover “tentative” or “exploratory” discussions, and it sought to devise an operational distinction between such discussions and those discussions that are so immediately related to the process of determining agency action as to fall on the other side of the line. The test suggested in the Senate Report is whether the discussion “predetermines” official action. Certainly, where deliberation focused on a fairly specific proposal before the agency achieves a consensus among the participants on the agency’s proper course of action, such a deliberation determines the disposition of the business within the meaning of the definition, notwithstanding that no formal action is taken and that the members are free to change their minds.19 Where a consensus is not achieved because of the members’ differing views, a harder case is presented. Because no agreement has been reached, it might be said that the discussion has not predetermined official action. Yet the process by which the members reach their individual conclusions through exchange of views with their colleagues appears to be within the drafters’ contemplation of “joint conduct” of agency business.20

Accordingly, the 1978 Guide concluded that the proper test is the nature of the discussion and not whether it achieves a specific extent of agreement. A discussion sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency is a meeting,

19. We do not suggest that the agency’s decision need relate to an “agency action,” as that term is used in the Administrative Procedure Act, 5 U.S.C. § 551(13). The agency’s decision-making must relate to “official agency business,” which may or may not be “agency action.” Cf. Nat’l Ornamental and El. Light Xmas Assn. v. CPSC, 526 F.2d 1368, 1372-73 (2d Cir. 1975).
20. “The definition of meetings includes the conduct, as well as the disposition, of official agency matters. . . . The [open] meetings . . . are not intended to be merely reruns staged for the public after agency members have discussed the issue in private and predetermined their views.” S. Rep., at 18.
while a discussion that is merely informational or exploratory is not.\(^{21}\)

The conclusion of the 1978 Guide on this point represented a revision of the position taken in the first draft version of the 1978 Guide that the test of a meeting was whether a consensus was actually achieved. On reconsideration in the light of agency and public comments, the authors concluded that the tentative version relied on a somewhat mechanical application of the “predetermine official action” test. While the test is relevant and probably decisive, the 1978 Guide concluded that it refers to the nature of the discussion, rather than the actual result. In other words, the question is whether the discussion is decision-oriented or whether the members are merely familiarizing themselves with the subject, exchanging preliminary observations, canvassing possibilities, or brainstorming.

A number of factors may be relevant in assessing the nature of the discussion, for example, its length, the circumstances in which it was initiated, whether all the members were present or had an opportunity to attend. It is helpful to bear in mind that the purpose of the Sunshine Act is to open to the public those collegial exchanges that are a part of the decision-making process, in the interest of enhancing public awareness of that process and the accountability of the agency members. S. Rep., 17-18. A discussion that significantly furthers the decisional process by narrowing issues, discarding alternatives, etc., should be treated as a meeting even though it does not and is not expected to achieve a complete resolution. On the other hand, those exchanges of views that are not of a nature to foreclose or narrow discussion at subsequent collegial gatherings might be treated as outside the definition without loss to the values the Sunshine Act seeks to achieve.

Whether given deliberations will achieve a consensus or even lead individual members to make up their minds is, of course, a question that may not be possible to answer in advance. Obviously, the more specific the subject under consideration and the more immediate its relationship to prospective agency actions, the more difficult it will be to keep the discussion tentative and informal. The difficulties of defining “meeting” in terms of what actually happens rather than the pur-

\(^{21}\) But see Department of Justice Letter to Covered Agencies, April 19, 1977, Appendix E, which espoused a broader interpretation of “meeting.” Cf. pp.43-44, infra, for discussion of present status of 1977 DOJ letter.
pose in calling it were much discussed in the House of Representatives, and at one point a “purpose” test was adopted. However, the language in the final version seems to make the test what actually happened. In effect, this forces the agency to try to meet both tests. It must treat as a meeting prospectively every gathering that is either intended to or likely to result in the members reaching firm decisions. Conversely, if a gathering has not been treated as a meeting because of the tentative and informal nature of the anticipated discussion, the agency members have a duty under subsection (b) to see that the discussion remains tentative and informal. This line of distinction is not only a fine one, but one that assumes a certain predictability about the course of such informal discussions. To administer it consistently with the spirit and even the letter of the Act requires vigilance on the part of officials who preside and restraint on the part of those who participate, to the end that discussions do not move into an area properly reserved for meetings. Indeed, it is no doubt frequently desirable to conduct briefings and exploratory discussions under the procedures required for meetings so as to avoid the somewhat artificial restraints that the distinction appears to require.

Still another element in the definition of “meeting,” and one that is difficult to separate from the question of what degree of formality is necessary to constitute “deliberations” or “joint conduct,” is the concept of “official agency business.” The legislative history is unhelpful. The bill passed by the House used the term “agency business,” but there is no indication in the Conference Report that the decision to accept the Senate’s phraseology reflected a judgment that “official agency business” is a narrower term. Whether “official agency business” is interpreted narrowly, as fairly well-defined pending or anticipated matters, or broadly, as any subject matter relevant to the work of the agency, will, obviously, affect the treatment to be accorded briefings and general or exploratory discussions. An argument in favor of the more narrow definition is that the phrase “joint conduct or disposition” at the least implies a matter that is before the agency or in some way susceptible of disposition by the agency.

Where a function has been vested in the agency chairman or in an individual member, as by a delegation from the agency, or in a statute or reorganization plan, a gathering at which the chairman or member seeks the informal advice of his colleagues on the carrying out of that function would not be a meeting.  

**FCC v. ITT World Communications**

The definition of “meeting” was squarely at issue in *FCC v. ITT World Communications, Inc. (ITT World).* The case involved the participation by three members of the Federal Communications Commission in a series of conferences with their foreign counterparts, in a so-called “consultative process,” to exchange information on regulatory policies. The three commissioners did not constitute a quorum of the then seven-member Commission, but they did constitute a quorum of the Telecommunications Committee, a subdivision of the Commission. Plaintiff ITT challenged the members’ participation in these conferences, which were closed to the public, as violative of the Sunshine Act.

At the conferences the members of the Telecommunications Committee explained the pro-competitive licensing policy of the Commission and encouraged cooperation from their foreign counterparts. The Commission itself characterized the conferences as “informal talks” designed “to improve foreign understanding of the bases for and the nature of our pro-competition policies. . . .” The Commission maintained that the conferences were not meetings because (1) no quorum of the full Commission was present and there had been no delegation to the Committee to act on behalf of the Commission at the conferences, and (2) the informal exchanges were not deliberations or the joint conduct or disposition of official agency business.

The Court of Appeals for the District of Columbia Circuit disagreed and held that the conferences were meetings under the Sunshine Act. On the quorum issue, the court held that since the members attended the conferences in their official capacities and were authorized to do

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what in fact they did, they were acting on behalf of the Commission within the meaning of section 552b(a)(1). As to whether the members’ actions met the definition of meetings, the court agreed this was a more difficult question. While the court was willing to concede that the Act did not reach “informal background discussions” among agency members, it discerned in the legislative history a presumption that exchanges between the agency and outside parties should be open. “If we did not apply the narrowest of interpretations to [informal background discussions], it would readily swallow up the requirement of open ‘hearings’ and ‘meetings with the public.’"26 The court also rejected the distinction, urged by the Commission, between predecisional activities and postdecisional activities intended to interpret and implement the agency’s decisions.

On review, the Supreme Court unanimously reversed the Court of Appeals decision. It ruled that the members’ participation in the Consultative Process did not constitute a “meeting” as defined by section 552b(a)(2), nor was it a “meeting of the agency” under section 552b(b). The Court’s reasoning warrants close analysis.

First, the Court read the legislative history to demonstrate an intent that the Act not reach informal background discussions that clarify issues and expose varying views. Construing the Act to reach such discussions would prevent them and would “impair normal agency operations without achieving significant public benefit.”27 Therefore, the Act must be read to apply only where a quorum of members conducts or disposes of official agency business. The members attending the “consultative process” conferences were a quorum of the Telecommunications Committee, but the delegation to that Committee was only to pass upon certain common carrier applications. This delegation, in the Court’s view, defined the Committee’s official business.28

26. 699 F.2d at 1244.
27. 466 U.S. at 470.
28. “[The Sunshine Act] applies only where a subdivision of the agency deliberates upon matters that are within that subdivision’s formally delegated authority to take official action for the agency.” 466 U.S. at 472. Thus, the Court held that these consultative process “sessions were not ‘meetings’ within the meaning of the Sunshine Act,” since the “Telecommunications Committee at the Consultative Process sessions did not consider or act upon applications (continued on next page)
The discussions in which the members participated were not discussions that “effectively predetermine[d] official actions” of the Committee. On this point the Supreme Court cited with approval the test set forth in the 1978 Guide.29 The conferences merely provided the members background information and permitted them to exchange views with their foreign counterparts respecting implementation of decisions reached by the Commission. Such discussions are not reached by the Sunshine Act.

Finally, the Court offered an additional and apparently independent ground for its holding:

The Consultative Process was not convened by the FCC, and its procedures were not subject to the FCC’s unilateral control. The sessions of the Consultative Process therefore are not meetings “of an agency” within the meaning of § 552b(b). The Act prescribes procedures for the agency to follow when it holds meetings and particularly when it chooses to close a meeting. . . . These provisions presuppose that the Act applies only to meetings that the agency has the power to conduct according to these procedures. And application of the Act to meetings not under agency control would restrict the types of meetings that agency members could attend. It is apparent that Congress, in enacting requirements for the agency’s conduct of its own meetings, did not contemplate as well such a broad substantive restraint upon agency processes. 466 U.S. at 473-74.

(continued from previous page)

for common carrier certification—its only formally delegated authority. . . .” Id. at 473. But see a commentary on this case which has noted that “the Court’s narrow, hypertechnical interpretation of the scope of the Act and of the scope of the meetings in [the] ITT [case] almost certainly was influenced by its belief that foreign agencies would be reluctant to engage in coordinated policymaking with U.S. agencies if all meetings for such purposes were required to be open to the public.” See Richard J. Pierce, Jr., 1 Administrative Law Treatise, 4th ed., 295 (Aspen Law & Business, 2002) (hereafter Pierce).

29. Such discussions must be “sufficiently focused on discrete proposals or issues as to cause or be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.” 466 U.S. at 471, citing the 1978 Guide at 9.
The suggestion that the Telecommunications Committee’s lack of unilateral control over the Consultative Process made the Sunshine Act inapplicable had been summarily rejected by the Court of Appeals. Nevertheless, the Supreme Court appears to be saying here that even if all the other elements of a “meeting” are present, the fact that the agency does not convene the meeting and lacks the power to conduct it in accordance with the Sunshine Act takes the case out of the Act. On this point the Court may have spoken too broadly. Admittedly, its reading of section 552b(b) comports with the ordinary understanding of the phrase “meeting of an agency.” But the definition of “meeting” was probably the single most controverted issue in the drafting of the Sunshine Act and it seems most unlikely that Congress, after settling on a verbal formulation for coverage, intended to further qualify the term “meeting” by the words “of an agency” in section 552b(b). Furthermore, there is no indication in the legislative history that agency control of the forum is a prerequisite for a covered meeting. Of course, the Act should not be construed to impose impossible requirements. But even if the agency members are not in a position to comply with the procedures of the Act governing the conduct of a meeting, they may be in a position to decline to “jointly conduct or dispose of agency business,” and if so, the first sentence of section 552b(b) arguably requires that they do so.

30. “An agency cannot avoid [the open meeting] requirement through the facile expedient of having an outside party hold the discussion, for the Sunshine Act’s policy that hearings and meetings with the public be open could otherwise be ignored with impunity.” 699 F.2d at 1242.
31. See p. 7, supra.
32. The terms “meeting” and “meeting of an agency” are necessarily coextensive; the Act has no application to meetings other than those of an agency.
33. “Discussions held in the boardroom or the Chairman’s office are not the only gatherings covered. Conference telephone calls and meetings outside the agency are equally subject to the bill if they discuss agency business and otherwise meet the requirements of this subsection.” S. Rep., at 18-19.
34. The Court’s holding that subsection 552b(b) does not reach a meeting that is not a “meeting of an agency” has implications for the permissibility of other procedures for exchanges among agency members that arguably do not rise to the level of a meeting. See text at notes 46-51, infra.
In sum, the Supreme Court in *ITT World,* out of sensitivity to the need to preserve agencies’ authority to participate in international forums and other meetings outside the agencies’ control, appears to have attempted to carve out an exception to the Act to deal with such situations *ex necessitate.* The limits of such an exception are not spelled out in the opinion, but other situations that might call for similar treatment include testimony by agency members at congressional hearings and field trips to agency-run installations.

It may be that the Court’s opinion should be understood as merely providing a gloss on the concept of “joint conduct or disposition,” saying, in effect, that members are not acting jointly simply because they are discussing agency business in the same forum, and that where that forum is one which the agency does not control, the members are presumably acting as individuals. At any rate, the Court’s expressed concern that the Act not be interpreted to restrict the types of meetings that agency members can attend evidences a desire on the part of the Court to apply a “rule of reason” to interpretation of the coverage of the Act.

Indeed, the contrast between the interpretive approaches taken by the Court of Appeals and the Supreme Court could not have been sharper. The Court of Appeals had inferred from a brief reference in the legislative history a presumption that all exchanges between agency members and outsiders should be open to the public, even though the discussions would not have met the statutory threshold if held wholly within the agency. The Supreme Court, on the other hand, took as its point of departure Congress’s manifest intent to exclude “informal background discussions,” and then detailed in a footnote how Congress had sought

35. *But see* NRDC v. Nuclear Regulatory Commission, 216 F.3d 1180, 1188-89 (D.C. Cir. 2000) (hereafter *NRDC*), where the court characterized this portion of the Supreme Court opinion as “a second truly independent ground for the Court’s decision.”

36. We have previously alluded to the passage in the legislative history, “The use of the word ‘joint’ is intended to exclude instances where one or more agency member gives a formal speech concerning agency business, and other members of the commission are in the audience.” S. Rep., at 18. *See also* text at pp. 8-9, supra. Unfortunately, like most of the examples in the legislative history, it does not reach the harder case where the number of members sufficient to constitute a quorum participate in the discussion.
“precisely to define the limited scope of the statute’s requirements.”\textsuperscript{37} The Court also recognized the practical difficulties in extending the Sunshine requirements to informal exchanges with the public and to meetings that the agency does not itself sponsor or control. In short, the Supreme Court gave at least as much interpretive weight to Congress’s efforts to exclude as to Congress’s intention to include and it implicitly rejected any presumption of openness to govern doubtful cases.

**American Bar Association Recommendation\textsuperscript{38}**

As a consequence of the *ITT World* decision, the Nuclear Regulatory Commission (NRC) in 1985 amended the definition of “meeting” in its regulations on an interim basis to incorporate the test set forth in the Court’s opinion.\textsuperscript{39} The NRC’s action set off a round of criticism and debate.

In response to *ITT World*, the NRC’s action, and other developments relating to the Sunshine Act, the Administrative Law Section of the American Bar Association formed a committee to review Sunshine issues. The committee presented a report that reviewed in some detail the Supreme Court decision and attempted to provide a gloss on the statutory definition in the light of the Court’s opinion. On the basis of this report, as forwarded by the Section, the House of Delegates of the ABA, in February 1987, approved the following recommendation:

*Be it Resolved,* That the American Bar Association offers the following guidelines to Federal agencies and courts with respect to the interpretation of the term “meeting” as used in the Government in the Sunshine Act:

1. So long as discussions are not 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

\textsuperscript{37} 466 U.S. 470, n.7.

\textsuperscript{38} See Appendix F for the complete ABA Report and Recommendation.

\textsuperscript{39} See p. 23, *infra.* “In what turned out to be a serious tactical error on NRC’s part, the rule was made immediately effective . . . [A]ny agency which is tempted to engage in rulemaking should make it a point never to deprive the public of its opportunity for prior comment.” See Letter from Peter Crane, attorney, Nuclear Regulatory Commission, to Gary Edles, general counsel, Administrative Conference of the United States, pp. 4, 11 (Feb. 6, 1995).
arise before the agency, the definition of “meeting” does not include: (a) spontaneous casual discussions among agency members of a subject of common interest; (b) briefings of agency members by staff or outsiders; a key element would be that the agency members be primarily receptors of information or views and only incidentally exchange views with one another; (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 agency action would be open to full consideration at a later time.

2. If agencies intend to hold discussions described in subsections (b), (c), and (d), appropriate mechanisms, such as monitoring by general counsel or other agency representatives, should be undertaken to ensure that such discussions do not proceed to the point of becoming “meetings.” In addition, agencies should memorialize such discussions through notes, minutes or recordings as assurance to the public of compliance with the Act.

**NRDC v. Nuclear Regulatory Commission**

Despite the ABA resolution and making the rule immediately effective, the Nuclear Regulatory Commission delayed fully implementing its “interim rule” incorporating the Supreme Court’s definition, meanwhile continuing to apply a more restrictive interpretation of the statutory definition. Finally, in 1999 the Commission, after a further round of notice and comment, issued a final rule reaffirming the definition in the interim rule:\(^\text{40}\)

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40. See NRC rulemaking notices, 64 Fed. Reg. 24,936-42 (May 10, 1999), 64 Fed. Reg. 39,393-96 (July 22, 1999). The May 10 notice includes a detailed chronology of the events from the issuance of the 1985 interim rule, including the congressional response, to the reissuance in 1999. The congressional response included a bill to require the NRC “to adhere to certain procedures in the conduct of its meetings,” i.e., to include preliminary discussions and staff briefings in its definition of “meeting.” See H.R. 2743, the Atomic Energy Accountability Act, 99th Cong., 1st Sess. See also a hearing held on the (continued on next page)
Meeting means the deliberations of at least a quorum of Commissioners where such deliberations determine or result in the joint conduct or disposition of official Commission business, that is, where discussions are sufficiently focused on discrete proposals or issues as to cause or to be likely to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency.


The effect of this language is to exclude from Sunshine Act coverage any staff briefings of agency members, or any preliminary or exploratory discussions among agency members, so long as such briefings or discussions are not “focused on discrete proposals or issues as to cause or to be likely to cause” the agency members to “form reasonably firm positions regarding matters pending or likely to arise before the agency.”

The Natural Resources Defense Council and other public interest groups challenged this NRC rule unsuccessfully in the Court of Appeals for the D.C. Circuit. See NRDC, supra note 35. Petitioners argued that the NRC’s definition was fundamentally inconsistent with the statute and legislative history, and the court acknowledged some sympathy for their position.41 However, the court concluded that inasmuch as the definition was specifically endorsed and applied by the Supreme Court in the *ITT World* case, it was bound to uphold it, and the court rejected NRDC’s efforts to limit the Supreme Court decision to the peculiar facts of the *ITT World* case.42
Summary

The question of the meaning of “meeting” continues to be a source of controversy, but the Supreme Court’s statement of the rule in *ITT World* remains the most authoritative exposition, and despite its unofficial status the ABA’s resolution is a useful additional gloss. While problems of application will remain, we should recall, as the Administrative Law Section report pointed out, “[A] meeting first of all consists of ‘deliberations,’ and ‘deliberation’ is defined as the act of weighing and examining reasons for and against a choice or measure; a discussion and consideration by a number of persons of the reasons for and against a measure. (Webster’s Third International Dictionary.) It is the element of the participants trying to reach a decision (whether or not they do so) which distinguishes deliberations from more ‘casual’ or ‘informal’ discussions.”

Subsection (d) and (e) Deliberations

Excluded from the definition of “meeting” are deliberations under subsections (d) and (e) to determine whether to close a meeting, to withhold information from a meeting notice, to call a meeting on short notice, or to change the time, place, or subject matter of a meeting. The purpose of this exclusion is to avoid an endless chain of meetings to close meetings. Agency deliberations under subsection (f), however, regarding the withholding of portions of the transcript of a closed meeting, are not exempt from the definition of “meeting.” If an agency decides not to delegate the withholding decision, its gathering to discuss the matter would come within the definition.

43. See Appendix F, *infra.*
44. In an unusual case, *Washington Ass’n for Television & Children v. FCC*, 665 F.2d 1264 (D.C. Cir. 1981), the court determined that the FCC’s regulation defining “meeting” was impermissibly broad in failing to exclude meetings excluded from the statutory definition as required or permitted by subsection (e). In response to this decision, the FCC adopted changes in 1983 to its definition of “meeting” to exclude meetings whose only order of business is to decide whether to call a future meeting on shorter notice than seven days. See 93 F.C.C. 2d 565 (1983).
45. See also pp. 161-62, *infra.*
Chapter 1

ELECTRONIC COMMUNICATIONS

The revolution in electronic communication, and, in particular, the development of e-mail, has occurred subsequent to the enactment of the Sunshine Act, and could not have been anticipated by the drafters of the Act. The availability of near-instant communication by e-mail raises the question whether such an exchange of communications among a quorum of agency members constitutes a “meeting” within the meaning of the Sunshine Act.46

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. The use of e-mail may facilitate such exchanges outside of the forum of a meeting, but the same may be said of other devices, such as one-on-one discussions, communicating through staff assistants, or notation procedure.47 However, if we add the element of a “real-time” exchange of views via e-mail, the case becomes harder.

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. Indeed, physical presence in a single location has never been the prerequisite for a covered meeting; the drafters of the Sunshine Act specifically contemplated that conference

46. There is no question that a conference telephone call qualifies as a meeting. See pp. 9, 20 note 33, supra, as well as many agency regulations, e.g., Equal Employment Opportunity Commission, 29 C.F.R. § 1612.2(b); Federal Communications Commission, 47 C.F.R. § 0.601(b); and the Federal Deposit Insurance Corporation, 12 C.F.R. § 311.2(b).

47. Cf. Republic Airlines v. Civil Aeronautics Board, 756 F.2d 1304, 1319 (8th Cir. 1985) (Circulation by staff of draft agency opinion to agency members and discussion between staff and individual agency members does not violate the Sunshine Act.) Nor would discussion among two agency members when a quorum of the agency is three.
telephone calls would be covered. Most significant would seem to be the temporal element. It must be recalled that a key element of a “meeting” is joint conduct—that is, the members are acting together. Are the communications in question made to, or among, a quorum of members more or less simultaneously, and are the members in a position to respond promptly? In other words, is the exchange reasonably “interactive”? If so, and if the subject matter of the exchange otherwise meets the statutory test, we believe such an exchange would constitute a “meeting of the agency.”

If such electronic exchanges of communications are not meetings within the statutory definition, nevertheless, there remains the question whether under any circumstances such exchanges might run afoul of the prohibition in section 552b(b) against joint conduct or disposi-

48. See note 46, supra. “The test is what the discussion involves, not where or how it is conducted.” S. Rep., at 19. It also might be suggested that as writings, these e-mail communications would be subject to the Freedom of Information Act, and that consequently there would be no need to bring them under the Sunshine Act. But as deliberative materials such writings would probably be exempt from disclosure under Exemption 5 of the FOIA.

49. There is a growing body of decisional law dealing with electronic communications under state open meeting laws. The great variation in statutory provisions, as well as in administrative and judicial interpretation, make these state materials of limited value in interpreting the federal Sunshine Act. One article observes that e-mail transmissions are generally treated the same as written documents. See Stephen Schaeffer, Sunshine in Cyberspace? Electronic Deliberation and the Reach of Open Meeting Laws, 48 St. Louis L. J. 755, 770 (2004). However, there appears to be a strong consensus among the administrative and judicial authorities that, at the least, simultaneous electronic exchanges among a quorum of members either constitute a meeting or are a forbidden means of evading open meeting laws. See, e.g., Claxton Enterprises v Evans County Comm’rs, 249 Ga. App. 870, 875-76, 549 S.E.2d 830, 835 (2001); Del Papa v. Bd. of Regents, 114 Nev. 388, 399-400, 956 P.2d 770, 778 (1998). See also Jessica M. Natale, Exploring Virtual Legal Presence: The Present and the Promise, 1 J. High Tech. L. 157, 158 (2002) (“The nuances of virtual presence in relation to open-meeting laws’ presence requirements [are] causing politicians and the public at large to reevaluate what it means to be present, whether a board member is present by telephoning in votes or teleconferencing or whether a meeting truly is accessible and open to the public if it is conducted online.”).
tion of agency business “other than in accordance with this section.” In the second ground of its *ITT World* decision the Supreme Court held, or at least strongly implied, that if there was no “agency meeting,” that was the end of the inquiry. The Court seemed to rule out any possibility that subsection (b) might restrict forms of joint conduct that fell short of the meeting threshold.50

At present the problem seems more theoretical than real. Responding to our survey,51 the overwhelming majority of agencies reported that the Sunshine Act has had no impact on their members’ use of e-mail, although responses from a number of agencies indicated that the Act has had some inhibiting effect. No agency reported, however, any practice of exchanges of views by e-mail among agency members on pending business. Nevertheless, given the manifest advantages of conducting business electronically, it seems inevitable that the problem for the agencies will not be whether a given form of communication constitutes a meeting, but how best to conduct the exchange of communications in compliance with the Sunshine Act.

“**MEMBER**

(3) the term “member” means an individual who belongs to a collegial body heading an agency.

The definition of “member” appears self-explanatory, at least with respect to the great majority of agencies. The Federal Election Commission formerly defined the term to include its two *ex officio* non-voting commissioners, the Secretary of the Senate and the Clerk of the House. (These two positions were abolished after they were declared unconstitutional.)52 However, for purposes of determining the presence of the number of members required to constitute a meeting, the FEC counted only voting members.53

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50. *See* p. 30 note 1, *infra*.
51. *See* Appendix B, *infra*.
53. 11 C.F.R. § 2.2(d).