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SUPPLEMENTAL VIEWS OF HON. JOHN CONYERS

We think that this is an excellent bill, though we regret certain weakening amendments made by the Administrative Law and Governmental Relations Subcommittee and adopted by the full Judiciary Committee. We believe that one such change is of particular importance, and it is to this change that our supplemental views are specifically addressed.

The bill, as originally considered by the Committee on Government Operations and its Government Operations and Individual Rights Subcommittee, required that when a deletion of exempt material was made from a meeting transcript, the agency was to explain the reason and statutory authority for the deletion and provide a summary or paraphrase of the deleted material. The Government Information and Individual Rights Subcommittee, in a compromise move, dropped the requirement of a summary or paraphrase, leaving only the requirement that a statement of the reason and the statutory basis for the deletion be set forth.

Our Subcommittee on Administrative Law and Governmental Relations further amended the bill by dropping even the requirement for a statement of the reason and statutory authority for the deletion, and the full Judiciary Committee concurred in this amendment. The effect of this change is to leave only a blank space where material is deleted, providing not even a hint of what has been removed, or by what authority.

This would leave a citizen interested in what had occurred at a meeting entirely in the dark about what has been deleted. To provide the reason and the applicable statute would impose no significant burden upon the administrative agency, while supplying—as is generally required with respect to agency decisions—the reason for the agency action. We note that a similar explanation is required under the Federal Advisory Committee Act. The absence of even this simple explanation is likely to generate unnecessary litigation from citizens who do not know the reason for the deletion, thus wasting the taxpayers' time and money in defending needless actions.

We believe that the people's right to know, as expressed in this legislation, includes the right to be given the reason why they are prevented from having information about agency action. We believe that the compromise version of this provision that was adopted by the Committee on Government Operations properly balanced the right to know against the need to keep certain matters secret and urge that the compromise language be reinstated.

JOHN CONYERS.

HOUSE CONFERENCE REPORT NO. 94-1441

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JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the House to the bill (S. 5) to provide that meetings of Government agencies shall be open to the public, and for other purposes, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The House amendment to the text of the bill struck out all of the Senate bill after the enacting clause and inserted a substitute text.

The Senate recedes from its disagreement to the amendment of the House with an amendment which is a complete substitute for the House amendment, and the House agrees to the same. The differences among the Senate bill, the House amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

SHORT TITLE

The Senate bill, the House amendment, and the conference substitute provide that this legislation may be cited as the "Government in the Sunshine Act".

DECLARATION OF POLICY

The Senate bill, the House amendment, and the conference substitute provide in section 2 that it is the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government, and that it is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

Open Meetings

CODIFICATION

Senate bill

The Senate bill did not make its open meeting provisions a part of title 5, United States Code.

House amendment

The House amendment enacted its open meeting provisions as a new section 552b of title 5, United States Code.

Conference substitute

The conference substitute is the same as the House amendment.

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DEFINITIONS

Senate bill

Section 3 of the Senate bill defined the term "person" to include an individual partnership, corporation, association, or public or private organization other than an agency.

Section 4(a) of the Senate bill made section 4 applicable to the Federal Election Commission and to any agency, as defined in section 551(1) of title 5, United States Code, where the collegial body comprising the agency consists of two or more individual members, at least a majority of whom are appointed to such position by the President with the advice and consent of the Senate.

Section 4(a) of the Senate bill also provided that for purposes of section 4, a 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 concern the joint conduct or disposition of official agency business.

The Senate bill did not contain a definition of the term "member".

House amendment

The House amendment, subsection (a) of the proposed new section 552b of title 5, United States Code, contained no definition of the term "person", since the proposed section 552b would automatically be subject to the definition of "person" continued in 5 U.S.C. 551(2) (which is identical to the definition contained in the Senate bill).

The House amendment defined the term "agency" as the Federal Election Commission and any agency, as defined in section 552(e) of title 5, United States Code, headed by a collegial body composed of two or more individuals, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, including any subdivision thereof authorized to act on behalf of the agency.

The House amendment defined the term "meeting' as a gathering to jointly conduct or dispose of agency business by two or more, but at least the number of individual agency members required to take action on behalf of the agency, but not including gatherings held to take action required or permitted by subsection (d) of section 552b.

The House amendment defined the term "member" as an individual who belongs to a collegial body heading an agency.

Conference substitute

The conference substitute is subsection (a) of new section 552b. It is the same as the House amendment, except as follows:

1. The separate reference to the Federal Election Commission in the definition of "agency" is eliminated, since that body now falls within the bill's generic definition of the term uuder the provisions of Public Law 94-283.

2. Although the language of the House amendment referring to a covered agency as "headed by a collegial body" is used in the substitute instead of the reference in the Senate bill to "the collegial body comprising the agency", the intent and understanding of the conferees regarding this provision is that meetings of a collegial body governing an agency whose day-to-day management may be under the authority of a single individual (such as the United States Postal Service and the National

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Railroad Passenger Corporation (Amtrak)) are included within the definition of agency.

3. The substitute defines the term "meeting" as the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such de-

liberations determine or result in the joint conduct or disposition of agency business, but not including deliberations to take action to open or close a meeting, or to release or withhold information under subsection (d) or (e) of this section. This is the Senate definition, as explained in the Senate report, except that the word "concern" is replaced by the words "determine or result in". This definition will include conference telephone calls if they involve the requisite number of members and otherwise come within the definition.

PROHIBITION ON CONDUCT OF BUSINESS OTHER THAN AS PROVIDED IN THIS SECTION

Senate bill

The Senate bill contained no express prohibition on the conduct of agency business other than as provided in the bill.

House amendment

Section (b)(1) of new section 552b, as included in the House amendment, provided that members, as described in subsection (a)(2), shall not jointly conduct or dispose of agency business without complying with subsections (b) through (g).

Conference substitute

The conference substitute provides that members shall not jointly conduct or dispose of agency business in a meeting other than in accordance with new section 552b. This prohibition does not prevent agency members from considering individually business that is circulated to them sequentially in writing.

OPEN MEETING REQUIREMENT

Senate bill

Subsection 4(a) of the Senate bill provided that, except as provided in subsection 4(b), all meetings of a collegial body comprising an agency, or of a subdivision thereof authorized to take action on behalf of the agency, shall be open to the public.

House amendment

The House amendment provided, in subsection (b)(2) of new section 552b, that except as provided in subsection (c), every portion of every meeting of an agency (including a subdivision) shall be open to public observation.

Conference substitute

The conference substitute is the same as the House amendment. The phrase "open to public observation" is intended to guarantee that ample space, sufficient visibility, and adequate acoustics will be provided.

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EXEMPTIONS FROM OPEN MEETING REQUIREMENT

Senate bill

Section 4(b) of the Senate bill provided that, except where the agency finds that the public interest requires otherwise, (1) the open meeting requirement of subsection 4(a) shall not apply to any meeting, or portion thereof, of an agency or a subdivision of an agency author-

ized to take action on behalf of the agency, and (2) the informational and disclosure requirements of subsections 4 (c) and (d) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency or subdivision in question properly determines that such portion or portions of the meeting, or such information, can be reasonably expected to—

(1) disclose matters (A) specifically authorized under criteria by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive order;

(2) relate solely to the agency's own internal personnel rules and practices;

(3) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(4) involve accusing any person of a crime, or formally censuring any person;

(5) disclose information contained in investigatory records compiled for law enforcement purposes, but only to the extent that the disclosure would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source, (E) in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation disclose confidential information furnished only by the confidential source, (F) disclose investigative techniques and procedures, or (G) endanger the life or physical safety of law enforcement personnel;

(6) disclose trade secrets, or financial or commercial information obtained from any person, where such trade 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 such information relates;

(7) disclose information which must be withheld from the public in order to avoid premature disclosure of an action or a proposed action by—

(A) an agency which regulates currencies, securities, commodities, or financial institutions where such disclosure would (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution;

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(B) any agency where such disclosure would significantly frustrate implementation of the proposed agency action, or private action contingent thereon; or

(C) any agency relating to the purchase by such agency of real property.

This exemption would not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make

such disclosure on its own initiative prior to taking final agency action on such proposal;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) specifically concern the agency's participation in a civil action in Federal or State court, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing; or

(10) disclose information required to be withheld from the public by any other statute establishing particular criteria or referring to particular types of information.

House amendment

Subsection (c) of 5 U.S.C. 552b, as included in the House amendment, provided that except in a case where the agency finds that the public interest requires otherwise, the open meeting requirement of subsection (b) shall not apply to any portion of an agency meeting, and the informational and disclosure requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1) disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2) relate solely to the internal personnel rules and practices of an agency;

(3) disclose matters specifically exempted from disclosure by statute (other than section 552 of title 5, United States Code), provided that such statute (A) requires that the matters be withheld from the public, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

(4) disclose trade secrets and commercial or financial information obtained from a person and privileged or confidential;

(5) involve accusing any person of a crime, or formally censuring any person;

(6) disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

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(7) disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation,

or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel;

(8) disclose information contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;

(9) disclose information the premature disclosure of which would—

(A) in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation, or (ii) significantly endanger the stability of any financial institution; or

(B) in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action, except that exemption (9)(B) would not apply in any instance after the content or nature of the proposed agency action has been disclosed to the public by the agency; unless the agency is required by law to make such disclosure prior to taking final agency action on such proposal or after the agency publishes or serves a substantive rule pursuant to section 553(d) of title 5, United States Code; or

(10) specifically concern the agency's issuance of a subpena, or the agency's participation in a civil action or proceeding, an action in a foreign court or international tribunal, or an arbitration, or the initiation, conduct, or disposition by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of title 5, United States Code, or otherwise involving a determination on the record after opportunity for a hearing.

Conference substitute

The conference substitute is the same as the House amendment, except that the third exemption, incorporating by reference exemptions contained in other statutes, applies only to statutes that either (a) require that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establish particular criteria for withholding or refer to particular types of information to be withheld. The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S. 255 (1975)[9], which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306).

9. 95 S.Ct. 2140, 45 L.Ed.2d 164.

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The conferees' understanding and intention with respect to subsection (c) is as follows:

1. The conferees understand the word "likely" to mean that it is more likely than not that the event or result in question will occur.

2. The conferees intend the inclusion in the seventh exemption (law enforcement material) of non-written information, such as

oral information imparted by a confidential informant, to cover only information that if written would be included in investigatory records compiled for law enforcement purposes.

3. The language of the House amendment regarding trade secrets and confidential financial or commercial information is identical to the analogous exemption in the Freedom of Information Act, 5 U.S.C. 522(b)(4), and the conferees have agreed to this language with recognition of judicial interpretations of that exemption.

4. The limitation on the second part of the ninth exemption (information whose disclosure would significantly frustrate a proposed agency action) provides that it shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on the proposal. Disclosure of the information other than by the agency, such as by an unauthorized "leak", would not render it ineligible for the protection of this exemption.

5. In an appropriate instance, an agency discussion of the possible purchase of real property would fall within the second part of the ninth exemption.

6. The House version of the personnel exemption is agreed to with recognition of the Supreme Court's interpretation of the analogous Freedom of Information Act exemption in *Department of the Air Force* v. *Rose*, — *U.S.* —, 44 U.S.L.W. 4503. (April 21, 1976)[10].

PROCEDURE FOR CLOSING MEETINGS

Senate bill

Subsection 4(c)(1) of the Senate bill provided that action to close a meeting or to withhold information under subsection 4(b) shall be taken only when a majority of the entire membership of the agency or subdivision concerned votes to take such action. A separate vote is to be taken with respect to each meeting (or portion thereof) proposed to be closed, or any information proposed to be withheld, except that a single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to the public, or with respect to any information concerning such series of meetings, if each meeting in the series involves the same particular matters and is scheduled to be held no more than 30 days after the initial meeting in the series.

The vote of each agency member is to be recorded and proxies are not permitted.

Whenever any person whose interests might be directly affected by a meeting requests that the agency close a portion or portions of the meeting under the exemptions relating to personal privacy,

10. 96 S.Ct. 1592, 48 L.Ed.2d 11.

criminal accusation, or law enforcement information, the agency, upon the request of any one of its members, is required to vote whether to close such meeting.

Within one day of any vote taken pursuant to this paragraph, the agency is required to make public a written copy of the vote.

Subsection 4(c)(2) of the Senate bill provided that if a meeting (or portion thereof) is closed, the agency must, within one day of the vote taken under paragraph (c)(1), make public a full written explanation of its action closing the meeting, together with a list containing the names and affiliations of all persons expected to attend the meeting.

Subsection 4(c)(3) of the Senate bill provided a special procedure whereby any agency, a majority of whose meetings will properly be closed to the public pursuant to the exemptions for trade secrets, information that might lead to financial speculation, bank condition reports, or adjudicatory proceedings or civil actions, may provide by regulation for the closing of such meetings or portions, so long as a majority of the members of the agency vote at the beginning of the meeting or portion to close the meeting and a copy of the vote is made public.

The closing procedures of paragraphs (c)(1) and (2), and the announcement procedures of subsection (d), do not apply to any meeting closed under these regulations, but the agency is required to make a public announcement of the date, place, and subject matter of the meeting at the earliest practicable opportunity (except to the extent that to do so would disclose information exempt under subsection 4(b)).

House amendment

Subsection (d)(1) of new section 552b, as set forth in the House amendment, provided that action to close a meeting (or portion thereof) may be taken only when a majority of the entire membership of the agency votes to take such action. A separate vote of the agency members is to be taken with respect to each meeting a portion or portions of which are proposed to be closed, except that a single vote may be taken with respect to a series of portions of meetings proposed to be closed if each portion in such series involves the same particular matters and is scheduled to be held no more than 30 days after the initial portion of a meeting in the series.

The vote of each agency member is required to be recorded and proxies are not permitted.

Subsection (d)(2) of section 552b provided that whenever any person whose interests might be directly affected by a portion of a meeting requests that the agency close such portion to the public under the exemptions relating to personal privacy, criminal accusation, or law enforcement information, the agency, upon the request of any one of its members, is required to vote by recorded vote whether to close such meeting.

Subsection (d)(3) of section 552b required the agency to make public a written copy of any vote taken pursuant to paragraphs (d)(1) or (2), reflecting the vote of each member on the question, within one day after the vote. If the vote is to close the meeting (or a portion thereof), the agency is also required to make public within one day a full written explanation of its action closing the portion and a list of the names and affiliations of all persons expected to attend the meeting.

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Subsection (d)(4) of section 552b provided a special procedure whereby any agency, a majority of whose meetings may properly be closed pursuant to the exemptions for trade secrets, information that might lead to financial speculation, bank condition reports, or adjudi-

catory proceedings or civil actions, may provide by regulation for the closing of such meetings or portions in the event that a majority of the members of the agency vote by recorded vote at the beginning of the meeting or portion to close the exempt portions thereof and a copy of the vote, reflecting the vote of each member on the question, is made public.

The closing procedures of paragraphs (d)(1), (2) and (3), and the announcement procedures of subsection (e), do not apply to any portion of a meeting closed under these regulations, but the agency is required to make a public announcement of the date, place, and subject matter of the meeting (and each portion thereof) at the earliest practicable time and in no case later than the commencement of the meeting or portion (except to the extent that to do so would disclose information exempt under subsection (d)).

Conference substitute

The conference substitute is the same as the Senate bill, except as follows:

1. The reference to an agency subdivision in paragraph (1) is eliminated, since the definition of "agency" in subparagraph (a)(1) of section 552b includes any subdivision thereof authorized to act on behalf of the agency. The reference to the definition of "agency" in this instance is intended to make clear that when a subdivision is authorized to act on behalf of the agency, a majority of the entire membership of the subdivision is necessary to close a meeting.
2. Any vote to close a meeting upon the request of an affected person, or using the special procedure under paragraph (d)(4), must be recorded. When such vote is published, the vote of each individual member shall be set forth.
3. While the public announcement required when a meeting is closed using the special procedure under paragraph (d)(4) need only be made at the earliest practicable time, the conferees intend that such announcements be made as soon as possible, which should in few, if any, instances be later than the commencement of the meeting or portion in question.
4. The fact that one portion of a meeting may be closed does not justify the closing of any other portion.

ANNOUNCEMENT OF MEETINGS

Senate bill

Section 4(d) of the Senate bill required that the agency publicly announce, at least one week before a meeting, the following:

1. the date of the meeting;
2. the place of the meeting;
3. the subject matter of the meeting;
4. whether the meeting is open or closed to the public; and
5. the name and telephone number of the official designated by the agency to respond to requests for information about the meeting.

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This seven day period may be reduced if the majority of the members of the agency or subdivision determine by vote that the agency business so requires, in which case public announcement of the date,

place, and subject matter of the meeting, and whether it is open or closed, is to be made at the earliest practicable opportunity.

The subject matter or closed/open determination for a meeting may be changed following the initial public announcement if (1) a majority of the entire membership of the agency or subdivision determines by vote that the agency business so requires and that no earlier announcement of the change was possible, and (2) the change is announced at the earliest practicable opportunity.

Notice of any public announcement required by this subsection is to be submitted for publication in the Federal Register immediately after its release.

House amendment

Subsection (e) of new section 552b, as added by the House amendment, required that the agency publicly announce, at least one week before a meeting, the following:

1. the date of the meeting;
2. the place of the meeting;
3. the subject matter of the meeting;
4. whether the meeting is to be open or closed to the public; and
5. the name and telephone number of the official designated by the agency to respond to requests for information about the meeting.

This seven day period may be reduced if the majority of the members of the agency determines by recorded vote that the agency business so requires, in which case public announcement of the date, place, and subject matter of the meeting, and whether it was open or closed to the public, is to be made at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

The time, place, or subject matter of a meeting, or the determination whether a meeting should be open or closed, may be changed following the initial public announcement if (1) a majority of the entire membership of the agency determines by recorded vote that the agency business so requires and that no earlier announcement of the change was possible, and (2) the change and the vote of each member thereon is announced at the earliest practicable time and in no case later than the commencement of the meeting or portion in question.

Conference substitute

The conference substitute is the same as the House amendment, except as follows:

1. While the public announcement required when a meeting is announced on less than seven days' notice, or when the time, place or subject matter of a meeting, or the determination whether to open or close a meeting is changed following the initial public announcement, need only be made at the earliest practicable time, the conferees intend that such announcements be made as soon as possible, which should in few, if any, instances be later than the commencement of the meeting or portion in question.
2. A change in the time or place of a meeting made subsequent to the initial announcement need not be voted upon by the agency members, but must be announced at the earliest practicable time.

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3. The bill requires that reasonable means be used to assure that the public is fully informed of public announcements pursu-

ant to this section. Such means include posting notices on the agency's public notice boards, publishing them in publications whose readers may have an interest in the agency's, operations, and sending them to the persons on the agency's general mailing list or a mailing list maintained for those who desire to receive such material.

Notice of a public announcement pursuant to this subsection must also be submitted immediately for publication in the Federal Register.

TRANSCRIPTS, RECORDINGS, AND MINUTES OF MEETINGS

Senate bill

Section 4(e) of the Senate bill required that a verbatim transcript or electronic recording be made of each meeting or portion closed to the public, except for a meeting or portion closed under the exemption for adjudicatory proceedings and civil actions. The transcript or recording of each item on the agenda is to be made available to the public promptly, in a place easily accessible to the public, where no significant portion of such item contains any information falling within one of the the exemptions in section 4(b).

Copies of the transcript (or a transcription of the recording disclosing the identity of each speaker) are to be furnished to any person at the actual cost of duplication or transcription.

The complete transcript or recording is to be maintained by the agency for at least two years after the meeting or one year after the conclusion of the agency proceeding which was the subject of the meeting, whichever occurred later.

House amendment

Subsection (f)(1) of new section 552b, as contained in the House amendment, required that for every meeting closed under the section, the General Counsel or chief legal officer of the agency certify that, in his opinion, the meeting may properly be closed and state the relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the date, time, and place of the meeting, the persons present, the generic subject matter of the discussion at the meeting, and the actions taken, is to be incorporated into minutes retained by the agency.

Subsection (f)(2) of section 552b required that written minutes be kept of any meeting or portion which is open and promptly be made available to the public in a location easily accessible to the public. The minutes are to be maintained for a period of at least two years after the meeting, and copies are to be furnished to any person at no greater than the actual cost of duplication (or, if in the public interest, at no cost).

Conference substitute

Subsection (f)(1) of the conference substitute requires that before a meeting may be closed, the General Counsel or chief legal officer of the agency must certify that, in his or her opinion, the meeting may properly be closed and state each relevant exemptive provision. A copy

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of such certification, together with a statement from the presiding officer of the meeting setting forth the date, time, and place of the

meeting, and the persons present, shall be retained by the agency as part of the transcript, recording, or minutes of the meeting.

The agency shall make a verbatim transcript or electronic recording of each meeting or portion closed to the public, except that for a meeting closed under exemptions (8) (bank reports), (9)(A) (information likely to lead to financial speculation), and (10) (adjudicatory proceedings or civil actions), the agency may elect to make either a transcript, a recording, or minutes. If minutes are kept, they must fully and clearly describe all matters discussed, provide a full and accurate summary of any actions taken and the reasons expressed therefor, and include a description of each of the views expressed on any item. The minutes must also reflect the vote of each member on any roll call vote taken during the proceedings and must identify all documents considered at the meeting.

Subsection (f)(2) of the conference substitute requires that the transcript, recording, or minutes made pursuant to paragraph (f)(1) as to each item on the agenda must be made promptly available to the public, except for agenda items or items of the discussion or testimony that the agency determines to contain information exempt under subsection (c).

Copies of the nonexempt portions of the transcript, or minutes, or a transcription of the recording disclosing the identity of each speaker, must be furnished to any person at the actual cost of duplication or transcription.

The complete transcript, minutes, or recording of a closed meeting is to be maintained by the agency for at least two years after the meeting or one year after the conclusion of the agency proceeding which was the subject of the meeting, whichever occurs later.

AGENCY REGULATIONS

Senate bill

Section 4(f) of the Senate bill required each agency subject to the requirements of section 4 to promulgate implementing regulations within 180 days after the enactment of the Act, following consultation with the Office of the Chairman of the Administrative Conference of the United States, published notice in the Federal Register of at least 30 days and opportunity for any person to make written comment thereon.

The Senate provision permitted any person to bring a proceeding in the United States District Court for the District of Columbia to require the promulgation of such regulations if not promulgated within the 180-day period, and also permitted any person to bring a proceeding in the United States Court of Appeals for the District of Columbia Circuit to set aside any such regulations not in accord with the requirements of subsections (a) through (e) of section 4 and to require the promulgation of regulations in accord with those provisions.

House amendment

The House amendment, subsection (g) of new section 552b, was the same as the Senate bill, except that the right to bring a proceeding in the Court of Appeals to challenge agency regulations promulgated

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under the Act is subject to "any limitations of time therefor provided by law."

Conference substitute

The conference substitute is the same as the House amendment, except that the right to bring a proceeding in the Court of Appeals to challenge agency regulations promulgated under the Act is subject to "any limitations of time provided by law."

JUDICIAL REVIEW

Senate bill

Section 4(g) of the Senate bill vested in the United States District Courts jurisdiction to enforce subsections (a) through (e) of section 4 by declaratory judgment, injunctive relief, or other appropriate relief. An action may be brought by any person prior to, or within 60 days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within 60 days after such announcement is made.

The Senate provision required a potential plaintiff to notify the agency before instituting suit and to allow it a reasonable period of time (not to exceed 10 days or, if notification is made prior to the meeting, not to exceed two days) to correct the violation.

An action may be brought where the plaintiff resides or has his principal place of business, or where the agency has its headquarters. The defendant is required to serve his answer within 20 days after the service of the complaint, and the burden is on the defendant to sustain his action.

In deciding such an action the court may examine in camera any portion of the transcript or recording of a closed meeting and may take any additional evidence it deems necessary. The court, having due regard for orderly administration, the public interest, and the interests of the party, may grant such equitable relief as it deems appropriate, including enjoining future violations or ordering the agency to make public the transcript or recording of any portion of a meeting improperly closed to the public.

Subsection 4(g) provided that, except as provided in subsection 4(h), nothing in section 4 confers jurisdiction upon any district court to set aside or invalidate any agency action taken or discussed at a meeting out of which a violation of this section arose.

Subsection 4(h) of the Senate bill provided that any Federal court otherwise authorized by law to review agency action may, at the request of any person properly participating in such a review proceeding, inquire into violations of section 4 by the agency and afford any such relief as it deems appropriate.

House amendment

In the House amendment, subsection (h) of new section 552b vested in the United States District Courts jurisdiction to enforce subsections (b) through (f) of section 552b. An action may be brought by any person prior to, or within 60 days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within 60 days after such announcement is made.

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The House amendment permitted an action to be brought where the meeting was held, where the agency has its headquarters, or in the District of Columbia. The defendant is required to serve his answer

within 20 days after the service of the complaint, but the court may extend that time limit for up to 20 additional days upon a showing of good cause for an extension. The burden is on the defendant to sustain his action.

In deciding such an action the court may examine in camera any portion of the minutes of a closed meeting and may take any additional evidence it deemed necessary. The court, having due regard for orderly administration, the public interest, and the interests of the party, may grant such equitable relief as it deems appropriate, including enjoining future violations or ordering the agency to make public such portion of the minutes as was not exempt under subsection (c) of section 552b.

Subsection (h) further provided that nothing in section 552b confers jurisdiction on a district court acting solely under subsection (h) to set aside, enjoin, or invalidate any agency action taken or discussed at a meeting out of which a violation of section 552b arose.

Conference substitute

The conference substitute vests in the United States District Courts jurisdiction to enforce subsections (b) through (f) of section 552b by declaratory judgment, injunctive relief, or other relief as may be appropriate. An action may be brought by any person prior to, or within 60 days after the meeting in question, except that if proper public announcement of the meeting is not made, the action may be instituted at any time within 60 days after such announcement is made.

The conference substitute does not contain the requirement of the Senate bill that a potential plaintiff formally notify the agency before commencing an action under this subsection because the conferees expect and encourage potential plaintiffs or their attorneys to communicate informally with the agency before bringing suit.

An action under subsection (h)(1) may be brought where the agency meeting was or is to be held, where the agency has its headquarters, or in the District of Columbia. The defendant must serve his answer within 30 days after the service of the complaint, and the court is not given discretion by the substitute to extend that time limit. The burden is upon the defendant to substain his action.

In deciding such an action the court may examine in camera any portion of the transcript, recording, or minutes of a closed meeting and may take any additional evidence it deems necessary. The court, having due regard for orderly administration, the public interest, and the interests of the party, may grant such equitable relief as it deems appropriate, including enjoining future violations or ordering the agency to make public such portion of the transcript, recording, or minutes as is not exempt under subsection (c) of section 552b.

Subsection (h)(2) of section 552b, as contained in the conference substitute, provides that any Federal court otherwise authorized to review action (under provisions such as chapter 7 of title 5, U.S. Code, or chapter 158 of title 28, U.S. Code) may, on the application of any person properly participating in the review proceeding, inquire into violations of section 552b by the agency and afford such relief as it deems appropriate. Nothing in section 552b authorizes any

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Federal court having jurisdiction solely on the basis of subsection (h)(1) to set aside, enjoin, or invalidate any agency action (other

than an action, such as to close a meeting, or withhold a portion of a transcript, recording, minutes, or other information, taken pursuant to section 552b) taken or discussed at a meeting out of which a violation of section 552b arose.

The conferees do not intend the authority granted to the Federal courts by the first sentence of subsection (h)(2) to be employed to set aside agency action taken other than under section 552b solely because of a violation of section 552b in any case where the violation is unintentional and not prejudicial to the rights of any person participating in the review proceeding. Agency action should not be set aside for a violation of section 552b unless that violation is of a serious nature.

ATTORNEY FEES AND LITIGATION COSTS

Senate bill

Section 4(i) of the Senate bill authorized the court hearing an action under subsection (f), (g), or (h) of that section to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in the action. Costs may be assessed against an individual member of an agency only where the court finds that he has intentionally and repeatedly violated section 4, and against a plaintiff where the court finds that he initiated the suit for frivolous or dilatory purposes. In the case of apportionment of fees or costs against any agency, the fees or costs may be assessed against the United States.

House amendment

Subsection (i) of new section 552b, as contained in the House amendment, authorized the court hearing an action under subsection (g) or (h) of section 552b to assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in the action. Costs may be assessed against a plaintiff only where the court finds that he initiated the suit primarily for frivolous or dilatory purposes. In the case of assessment of fees or costs against an agency, they may be assessed against the United States.

Conference substitute

The conference substitute is the same as the House amendment.

ANNUAL REPORT TO CONGRESS

Senate bill

Section 4(j) of the Senate bill required the agencies subject to the requirements of section 4 to report annually to Congress regarding their compliance, including the total number of meetings open to the public, the total number closed to the public, the reasons for the closings, and a description of any litigation brought against the agency under section 4.

House amendment

Subsection (j) of new section 552b of the House amendment required each agency subject to the requirements of the section to report annually to Congress regarding its compliance, including the total number of meetings open to the public, the total number closed to the

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public, the reasons for the closings, and a description of any litigation brought against the agency under section 552b (including any fees or

costs assessed against the agency in such litigation, whether or not paid by the agency).

Conference substitute

The conference substitute is the same as the House amendment.

RELATIONSHIP TO THE FREEDOM OF INFORMATION ACT, 5 U.S.C. 552

Senate bill

Section 6(a) of the Senate bill provided that except as specifically provided in section 4, nothing in section 4 confers any additional rights on any person or limits the existing rights of any person to inspect or copy, under 5 U.S.C. 552, any documents or written material within the possession of any agency. In the case of any request made pursuant to 5 U.S.C. 552 to copy or inspect the transcripts or recordings described in section 4(e) of the Senate bill, the provisions of this Act govern whether the transcripts or recordings are to be made available in response to the request.

Section 6(a) also makes the requirements of chapter 33 of title 44, United States Code, inapplicable to the transcripts and recordings described in section 4(e) of the Senate bill.

The Senate bill contained no provision amending the third exemption set forth in 5 U.S.C. 552(b).

House amendment

Subsection (k) of new section 552b, as included in the House amendment, provided that other than as specifically provided in section 552b, nothing in section 552b expands or limits the existing rights of any person under 5 U.S.C. 552, except that the provisions of this act govern in the case of any request made pursuant to 5 U.S.C. 552 to copy or inspect the minutes described in subsection (f) of new section 552b.

Subsection (k) also makes the requirements of chapter 33 of title 44, United States Code, inapplicable to the minutes described in subsection (f) of section 552b.

Section 5(b) of the House amendment amended the third exemption set forth in 5 U.S.C. 552(b) to include matters specifically exempted from disclosure by statute (other than the new section 552b), if the statute either requires that the matters be withheld from the public or establishes particular criteria for withholding or refers to particular types of matters to be withheld.

Conference substitute

The conference substitute provides that nothing in section 552b expands or limits the existing rights of any person under 5 U.S.C. 552, except that the exemptions in subsection (c) of section 552b shall govern in the case of any request made pursuant to 5 U.S.C. 552 to copy or inspect the transcripts, recordings or minutes described in subsection (f) of section 552b.

The conference substitute further provides that the requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of section 552b.

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Section 5(b) of the conference substitute amends the third exemption in 5 U.S.C. 552(b) to include information specifically exempted

from disclosure by statute (other than new section 552b), if the statute either (a) requires that the information be withheld from the public in such a manner as to leave no discretion on the issue, or (b) establishes particular criteria for withholding or refers to particular types of information to be withheld. The conferees intend this language to overrule the decision of the Supreme Court in *Administrator, FAA* v. *Robertson*, 422 U.S.255 (1975)[11], which dealt with section 1104 of the Federal Aviation Act of 1958 (49 U.S.C. 1504). Another example of a statute whose terms do not bring it within this exemption is section 1106 of the Social Security Act (42 U.S.C. 1306).

AUTHORITY TO WITHHOLD INFORMATION FROM CONGRESS

Section 6(a) of the Senate bill, subsection (*l*) of new section 552b of the House amendment, and subsection (*l*) of section 552b in the conference substitute all provide that the open meeting provisions of the legislation (section 552b of the conference substitute) do not constitute authority to withhold information from Congress.

CLOSING OF MEETINGS OTHERWISE REQUIRED TO BE OPEN

Senate bill

No comparable provision.

House amendment

Subsection (*l*) of new section 552b, as contained in the House amendment, provides that section 552b does not authorize the closing of any agency meeting otherwise required by law to be open.

Conference substitute

The conference substitute is the same as the House amendment.

RELATIONSHIP TO THE PRIVACY ACT OF 1974, 5 U.S.C. 552A

The Senate bill, the House amendment, and the conference substitute all provide that nothing in the open meeting provisions of this legislation (section 552b of the conference substitute) authorizes any agency to withhold from any individual any record, including the transcripts, recordings, and minutes required by these provisions, which is otherwise accessible to that individual under 5 U.S.C. 552a.

RELATIONSHIP TO FEDERAL ADVISORY COMMITTEE ACT, 5 U.S.C. APP. I

Senate bill

No comparable provisions.

House amendment

Subsection (n) of new section 552b of the House amendment provided that in the event that any meeting is subject to the provisions of the Federal Advisory Committee Act (5 U.S.C. App. I) as well as the provisions of section 552b, the meeting is governed by the provisions of section 552b.

11. 95 S.Ct. 2140, 45 L.Ed.2d 164.

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Subsection 5(c) of the House amendment amended the Federal Advisory Committee Act to make advisory committee meetings sub-

ject to the exemptions contained in the new 5 U.S.C. 552b (enacted by this act), rather than to the exemptions contained in 5 U.S.C. 552.

This provision in the House bill is addressed to a problem that has arisen in administration of the Federal Advisory Committee Act, enacted in 1972. In establishing a requirement in that Act that meeting, of Executive Branch advisory committee should be open to the public, Congress adopted the exemption provisions set forth in the Freedom of Information Act (FOIA) to describe the few types of meetings that might properly be closed. Unfortunately, this approach has not been entirely satisfactory, largely because those exemptions were designed to deal with documents rather than meetings, and some agencies have closed advisory committee meetings for reasons not contemplated by Congress. The chief concern in this regard has been application of exemption 5, a provision intended to protect the confidentiality of purely *internal* governmental deliberations, as a basis for closing discussions with and among *outside* advisers. One court has given approval to the use of exemption 5 to close advisory committee meetings, *Aviation Consumer Action Project* v. *Washburn*, 535 F.2d 101 (D.C. Cir. 1976).

The House provision which was unanimously approved, is intended to cure this and similar problems by replacing the nine FOIA exemptions presently incorporated in the Federal Advisory Committee Act with the new exemptions of the Sunshine Act that have been expressly designed to govern meetings, as opposed to documents. This provision thus overrules the *Washburn* case and is intended to end agency reliance upon the "full and frank" discussion rationale for closing advisory committee meetings. Under this provision, portions of federal, advisory committee meetings may be, but are not required to be closed when they fall within one of the disclosure exemptions that are created for meetings of collegial bodies under section 552b of title 5, United States Code.

Conference substitute

Subsection 5(c) of the conference substitute amends the Federal Advisory Committee Act (5 U.S.C. App. I) to make advisory committee meetings subject to the exemptions contained in 5 U.S.C. 552b (enacted by this act).

The Conference substitute is the same as the House provision. The conferees, however, are concerned about the possible effect of this amendment upon the peer review and clinical trial preliminary data review systems of the National Institutes of Health. The conferees thus wish to state as clearly as possible that personal data, such as individual medical information, is especially sensitive and should be given appropriate protection to prevent clearly unwarranted invasions of individual privacy. While the conferees are sympathetic to the concerns expressed by NIH regarding its committees' funding recommendations and analysis of preliminary data, the conferees are equally sympathetic to concerns expressed by citizens' groups that important fiscal and health-related information not be unnecessarily withheld from the public.

With these competing interests in mind, the conferees have secured assurances that the appropriate House and Senate committees will

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review the unique problems of NIH under the new standards. Indeed, it is noted that the Subcommittee on Reports, Accounting and

Management of the Senate Government Operations Committee has already held three days of hearings on this matter and plans to continue with further inquiry at an early date.

Ex Parte Communications

PROHIBITION

Senate bill

Section 5(a) of the Senate bill added a new subsection (d) to 5 U.S.C. 557. Subsection (d) provided that in any agency proceeding subject to 5 U.S.C. 557(a), except as required for the disposition of ex parte matters as authorized by law—

(1) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relevant to the merits of the proceeding;

(2) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding shall make or knowingly cause to be made to an interested person outside the agency an ex parte communication relevant to the merits of the proceeding;

(3) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes, a communication in violation of subsection (d), shall place on the public record of the proceeding:

(A) written communications transmitted in violation of subsection (d);

(B) memorandums stating the substance of all oral communications occurring in violation of subsection (d); and

(C) responses to the materials described in the two preceding paragraphs;

(4) upon receipt of a communication knowingly made by a party, or which was knowingly caused to be made by a party in violation of subsection (d), the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected by virtue of such violation;

(5) the prohibitions of subsection (d) shall apply at such time as the agency might designate, but in no case later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it will be noticed, in which case the prohibitions shall apply at the time of his acquisition of such knowledge.

Section 6(a) of the Senate bill provided that the act does not authorize any information to be withheld from Congress.

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House amendment

Section 4(a) of the House amendment added a new subsection (d) to 5 U.S.C. 557. Subsection (d) provided that in any agency proceeding subject to 5 U.S.C. 557(a), except as required for the disposition of ex parte matters as authorized by law—

(1) no interested person outside the agency shall make or cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an ex parte communication relative to the merits of the proceeding;

(2) no member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be, involved in the decisional process of the proceeding, may make or cause to be made to any interested person outside the agency an ex parte communication relative to the merits of the proceeding;

(3) a member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of such proceeding who receives, or who makes or caused to be made, a communication prohibited by subsection (d) shall place on the public record of the proceedings:

(A) all such written communications;

(B) memoranda stating the substance of all such oral communications; and

(C) all written responses, and memoranda stating the substance of all oral responses, to the materials described in the two preceding paragraphs;

(4) in the event of a communication prohibited by this subsection and made or caused to be made by a party or interested person, the agency, administrative law judge, or other employee presiding at the hearing may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the person or party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded, or otherwise adversely affected on account of such violation; and

(5) the prohibitions of subsection (d) shall apply beginning at such time as the agency may designate, but in no case later than the time at which a proceeding is noticed for hearing unless the person responsible for the communication has knowledge that it would be noticed, in which case the prohibitions shall apply beginning at the time of his acquisition of such knowledge.

Subsection (d)(2), as added by the House amendment, provided that subsection (d) does not constitute authority to withhold information from Congress.

Conference substitute

The conference substitute is the same as the Senate bill, except as follows:

1. The requirement of placing material on the public record applies to an agency decisionmaking official who knowingly causes an ex parte communication to be made, as well as to one who receives or makes such a communication.

2. The conference substitute clarifies the time at which the prohibition on ex parte communications begins to apply.

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3. The provision that subsection (d) is not authority to withhold information from Congress is included in the subsection as paragraph (2).

4. Although the conference substitute does not contain express provision for sanctions against an interested person (who is not a party) who makes a prohibited communication, the conferees intend that such a person be subject to all sanctions provided in the bill if he later becomes a party to the proceeding.

The word "relevant" is not used in the strict evidentiary sense, but is intended to apply to communications bearing on the merits or affecting the merits.

DEFINITION OF "EX PARTE COMMUNICATION"

Senate bill

Section 5(b) of the Senate bill defined an ex parte communication as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given.

House amendment

Section 4(b) of the House amendment defined an ex parte communication as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. The definition expressly excluded requests for information on or status reports relative to any matter or proceeding covered by subchapter II of chapter 5 of title 5, United States Code.

Conference substitute

The conference substitute defines an ex parte communication as an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given. The definition contained in the conference substitute expressly excludes requests for status reports on any matter or proceeding covered by subchapter II of chapter 5 of title 5, United States Code.

The conferees wish to note the fact that this provision and the ex parte provisions of new section 557(d) (as added by this act) in no way prohibit—

1. any communication with an agency decisionmaking official if not involving a formal adjudicatory proceeding (and a few formal rulemaking proceedings); or

2. any communication with a decisionmaking official is not relevant to the merits of a covered proceeding; or

3. any communication with a decisionmaking official in any proceeding at any time if it involves only a request for the status of the proceeding and is not intended to affect the merits; or

4. any communication at any time with an agency official not involved in the decisional process.

SANCTIONS

Senate bill

Section 5(c) of the Senate bill amended 5 U.S.C. 556(d) to permit an agency, to the extent consistent with the interests of justice and the

policy of the underlying statutes administered by the agency, to consider a violation of 5 U.S.C. 557(d), as added by this act, sufficient grounds for a decision on the merits adverse to a party who has knowingly committed or caused the violation.

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House amendment

Section 4(c) of the House amendment amended 5 U.S.C. 556(d) to permit an agency, to the extent consistent with the interests of justice and the policy of the underlying statutes administered by the agency, to consider a violation of 5 U.S.C. 557(d), as added by this act, sufficient grounds for a decision on the merits adverse to a person or party who has committed or caused the violation.

Conference substitute

The conference substitute is the same as the Senate bill.

Conforming Amendment and Effective Dates

U.S. Postal Service

Senate bill

No comparable provision.

House amendment

Section 5(a) of the House amendment amended 39 U.S.C. 410(b)(1) to make clear the fact that new section 552b and the Privacy Act of 1974 (5 U.S.C. 552a) apply to the United States Postal Service.

Conference substitute

The conference substitute is the same as the House amendment.

Effective Dates

The Senate bill, the House amendment, and the conference substitute all provide that this act shall take effect 180 days after the date of its enactment, except that the provision requiring the promulgation of agency regulations to implement the open meeting provisions (new section 552b(g)), as contained in the conference substitute, shall take effect upon enactment.

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