

OFFICE OF  
INSPECTOR GENERAL

*Report of Inspection*

**FCA's ADHERENCE TO  
THE GOVERNMENT IN THE  
SUNSHINE ACT**

**I-10-02**

**JULY 26, 2010**



FARM CREDIT ADMINISTRATION

Farm Credit Administration

Office of Inspector General  
1501 Farm Credit Drive  
McLean, Virginia 22102-5090



July 26, 2010

The Honorable Leland A. Strom  
Chairman of the Board  
Farm Credit Administration  
1501 Farm Credit Drive  
McLean, Virginia 22102-5090

Dear Chairman Strom:

The Office of Inspector General (OIG) completed an inspection of the Farm Credit Administration's Adherence to the Government in the Sunshine Act.

We performed this inspection in accordance with the Council of the Inspectors General on Integrity and Efficiency "Quality Standards for Inspections." We conducted fieldwork beginning March 3, 2010. The OIG provided a discussion draft of the report to senior management on July 1 and a final draft report on July 14.

During this inspection, senior management agreed with the OIG's findings and to our proposed recommendation. As a result, the recommendation has been changed to an agreed-upon action as follows:

- The Office of General Counsel will develop scenarios to provide examples of practical application of the Government in the Sunshine Act. Through use of case law and hypothetical examples, the scenarios will seek to provide the Board an enhanced understanding of situations both within and beyond the intent and parameters of the Sunshine Act.

If you have any questions about this report, I would be pleased to meet with you at your convenience.

Respectfully,

A handwritten signature in cursive script that reads 'Carl A. Clinefelter'.

Carl A. Clinefelter  
Inspector General

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## BACKGROUND

The Farm Credit Administration (FCA or Agency) is an executive branch, independent Federal financial regulatory agency. FCA has regulatory, examination, and supervisory responsibilities for the Farm Credit System (FCS) banks, associations, and related institutions.

### THE FCA BOARD

The FCA Board (Board), established by the Farm Credit Act of 1971, as amended (Act), is the governing entity of the FCA. The Board is composed of three full-time members, appointed by the President, by and with the advice and consent of the U.S. Senate. The Act defines a quorum shall consist of two members of the Board and business may be transacted provided a quorum exists. The Act also provides that the Board shall hold at least one meeting each month and such additional meetings at such times and places as the Board may fix and determine.

### THE GOVERNMENT IN THE SUNSHINE ACT

During the 1970s, partially in response to the Watergate scandal, Congress enacted the Government in the Sunshine Act (Sunshine Act), Pub. L. No. 94-409, 90 Stat. 1241 (1976), along with the Freedom of Information Act and other anti-secrecy legislation. The intent of the Sunshine Act was to open government deliberation to the public. The Sunshine Act applies to agencies “headed by a collegial body composed of two or more individual members... and covers approximately 50 Federal agencies, including the FCA.<sup>1</sup>” A board whose members are not appointed by the President is not an agency subject to the Sunshine Act.<sup>2</sup>

### MEETINGS

Defining “meetings” and “deliberation” are vital to understanding and complying with the Sunshine Act. During the legislative process and through case law, various reports and legal decisions addressed the statutory meaning.

For example, the Senate Report explains that: “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 ... are not intended to be merely reruns staged for the public after agency

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<sup>1</sup> 5 U.S.C. 552b(a)

<sup>2</sup> *Hunt v. Nuclear Regulatory Commission*, 611 F.2d 332, 335 (10<sup>th</sup> Cir. 1979).

members have discussed the issue in private and predetermined their views. The whole decision-making process, not merely its results must be exposed to public scrutiny.” S. Rep. 94-No.354 at 18 (1975). Similarly, the House Report states “meetings” include not only sessions at which formal action is taken, but also those at which a quorum of members deliberates regarding the conduct or disposition of agency business. H.R. Rep. 94-880(I), at 3 (1976). Unlike a board composed of many members, this can be more constraining when, as at FCA, the quorum of the Board consists of any two of three Members.

Further, the Conference Report also made clear that the definition of “meetings” included conference calls if they involve the requisite number of members and otherwise come within the definition. Conf. Rep. No. 94-1178, at 11 (1976).

The Supreme Court addressed the term “meetings.” “This statutory language contemplates discussions that effectively predetermine official actions. Such discussions must be 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.” *FCC v. ITT World Communications, Inc.* 466 U.S. 463, 471(1984).

The definition of “meetings,” however, does not include a meeting to discuss the scheduling of future meetings. *Washington Association for Television & Children v. FCC*, 665 F. 2d 1264, 1272 (D.C. Cir. 1981).

The Sunshine Act requires “every portion of every meeting of an agency shall be open to public observation” with ten narrow exemptions related to:

- (1) National Defense and foreign policy;
- (2) Internal personnel rules and practices;
- (3) Statutory exemptions;
- (4) Proprietary information;
- (5) Accusation of crime or formal censure;
- (6) Personal privacy;
- (7) Investigatory records;
- (8) Financial institution reports;
- (9) (a) Financial speculation and stability;  
(b) Frustration of proposed agency action; and
- (10) Issuance of subpoena, participation in civil action or proceeding, or formal agency adjudications.<sup>3</sup>

These ten exemptions allow for closed meetings or closed portions of an otherwise open meeting.

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<sup>3</sup> 5 U.S.C. 552b (c)

There are procedural requirements if an agency meets for either an open or a closed session. First, at least one week prior to each meeting, the agency must make a public announcement regarding the time, place, and subject matter of the meeting, the name and phone number of the designated official (at FCA it is the Secretary to the Board), and whether the meeting is to be open or closed.

To close all or a portion of a meeting, an agency must vote to do so and make publically available a written copy of the vote and "full written explanation of its action closing the portion." Also, for a closed meeting, the agency's General Counsel must publicly certify that the meeting may be closed under one of the Sunshine Act's exemptions. FCA has invoked "expedited procedures" to close meetings primarily because of the Agency's financial regulatory role. The expedited procedures are set forth in regulation 12 C.F.R. § 604.430. The regulation permits closing a meeting or portion of a meeting by recorded vote of the majority of its members at the beginning of the meeting, or portion of the meeting.

All agencies subject to the Sunshine Act must also report to Congress annually on: any changes in the agency's policies and procedures under the Sunshine Act; a tabulation of the number of meetings held, exemptions applied, and the days of public notice provided to close a meeting; a brief description of litigation or formal complaints concerning the implementation of the Sunshine Act; and any changes in law that have affected the open-meeting responsibilities of the agency.

## OBJECTIVE AND SCOPE

The objectives of this inspection were to determine whether FCA adheres to the Government in the Sunshine Act and whether improvement is warranted. The inspection was performed in accordance with "Quality Standards for Inspections."

To conduct this inspection, we reviewed the Government in the Sunshine Act; FCA regulations; interviewed staff; reviewed meeting records, documents and announcements and listened to DVD recordings of four (4) closed meetings to determine that the subject matter was consistent with the exemptions to the open meeting mandate of the Sunshine Act. We selected a number of open and closed meetings conducted during calendar years 2007 through 2009 and verified adherence to the requirements as set forth in the Sunshine Act and FCA regulations. We also reviewed the annual reports prepared during 2007-2009.

## FINDINGS AND RECOMMENDATIONS

There is an evident intent and overriding effort at FCA to comply with the Sunshine Act. The Sunshine Act Officer, who is also the Secretary to the Board to both the FCA and the Farm Credit System Insurance Corporation, has undertaken significant measures to streamline and ensure compliance with the letter and intent of the law. The Sunshine Act Officer is diligent in documenting processes and procedures and has prepared detailed manuals and guidance. His efforts will afford his successor a firm basis for continuity.

Board meetings are routinely held the second Thursday of each month. The Sunshine Act requires the Agency to make a public announcement of each meeting at least one week before a Board meeting. FCA Regulation 604.425(c), and the policy concerning the transaction of business by the FCA Board, further specifies that the public notification shall be made not later than 8 days before the beginning of a meeting. Publication is posted within the Agency, on the FCA website, and in the Federal Register.

This inspection verified the accuracy of the Board Secretary Procedure Manual which states: “[T]he business of an FCA board meeting typically includes such matters as: promulgation of regulations; prior approval of requests from System institutions; items that pertain to the conduct of business of the Agency, and periodic reports on FCA operations by Agency staff.”

It also correctly states: “FCA Board Meeting closed session matters falling within the exemptions identified in the Sunshine Act may include: presentations by staff on matters pertinent to the examination and supervision of the Farmer Mac by the Office of Secondary Market Oversight; examination and supervisory matters pertinent to FCS institutions; proprietary information of FCS institutions and/or the System; Agency personnel matters; and executive sessions with the Inspector General.”

The specific exemption for the closed session must be certified in writing and made part of the official records and minutes. We found that the exemption for each closed session was certified in writing and made part of the official records and minutes.

If the agenda for any meeting of the Board is amended to include a closed session, public notice must take place as soon as practicable after the meeting. During the time period reviewed for this inspection, we did not find any such instances when the agenda was amended to include a closed session following publication of the initial notice.

The Sunshine Act requires agencies to maintain a complete transcript or electronic recording of the proceedings of each meeting, or portion of a meeting, closed to the public. Transcripts, recordings, and minutes must disclose the identity of each speaker. An agency is required to maintain a complete verbatim copy of each transcript, a copy of each set of minutes, and a complete copy of each electronic recording or a meeting or

portion of a meeting, closed to the public, for at least 2 years, or until 1 year after the conclusion of an agency proceeding with respect to which the meeting or portion was held, whichever is later. 5 U.S.C. § 552b(k). At FCA, the records for the time period covered within the scope of this inspection were complete and have been kept beyond the required time. There have not been any requests from the public for transcripts or recordings under the Freedom of Information Act.

Each agency must report annually to Congress with respect to its compliance with the Sunshine Act. §552b(j). The report is to include changes to agency policy and procedures, as well as a “tabulation of the number of meetings held, the exemptions applied to close meetings, and the days of public notice provided to close meetings,” descriptions of litigation and complaints concerning agency implementation of the Sunshine Act; and explanations of any changes in the law affecting agency Sunshine responsibilities.” *Id.* As in all Sunshine Act processes at FCA, the Sunshine Officer has a system to collect the information for the annual report. During the fieldwork of the inspection, we pointed out that the days of public notice provided to close meetings should be included in the report to Congress. The Sunshine Officer immediately made the change to the formatting of the report for 2010 to include a column identifying the number of days of public notice provided to close meetings. Other than that detail, the reports have been complete and timely.

## **ORIENTATION, EDUCATION and TRANSPARENCY**

During interviews with the FCA Board members, the Sunshine Act Official, the General Counsel and the Deputy General Counsel, we discussed whether orientation and education regarding the requirements of the Sunshine Act was sufficient. It was agreed by all interviewed that the education is thorough and ongoing from the time a Board member is confirmed and continuing throughout each member’s term. Some Board members were previously acquainted and familiar with working within the parameters. Others felt the requirements were pervasive, forcing an unnatural focus on balancing collegiality with transparency. All interviewed agreed that those involved in adherence to the Sunshine Act’s requirements are diligent and conscientious.

Precautions are routinely taken to avoid any possible transgression from a preliminary discussion becoming a deliberation. When two Board members meet, there is a staff member, knowledgeable and focused on preserving all aspects of the Sunshine Act, present to observe the discussion and witness its preliminary or factual nature. However, not all situations when two Board members gather are potentially problematic.

In discussing where the boundaries exist to distinguish preliminary or factual discussion from pre-deliberation or deliberation, it was agreed that Board members may benefit from the development of sample scenarios that exemplify practical application. This exercise, agreed to by the General Counsel, will afford the Board an update in access law and

provide examples of reasoned situational experiences and exemptions pertinent to the Sunshine Act.

In another respect, the Board, as a collegial body, recognizes its role of balancing independent decision making and public interest in viewing decision making. Although it is entirely appropriate to use notational voting to transact Agency business, there is an initiative to make notational votes more open to the public view either through inclusion in open meetings or providing public notice. There is an ongoing effort to use opportunities to enhance transparency.

**Agreed-Upon Action**

1. The Office of General Counsel will develop scenarios to provide examples of practical application of the Government in the Sunshine Act. Through use of case law and hypothetical examples, the scenarios will seek to provide the Board an enhanced understanding of situations both within and beyond the intent and parameters of the Sunshine Act.

# R E P O R T

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