(2) Totaling the eligible cwt (not to exceed 26,000 cwt) of milk marketed commercially during the base period from all approved applications; and

(3) Dividing the amount available for Dairy Market Loss Assistance Program by the total eligible cwt submitted and approved for payment.

(b) Each dairy operation payment will be calculated by multiplying the payment rate determined in paragraph (a) (3) of this section by the dairy operation's eligible production.

(c) In the event that approval of all eligible applications would result in expenditures in excess of the amount available, CCC shall reduce the payment rate in such manner as CCC, in its sole discretion, finds fair and reasonable.

§ 1430.507 Misrepresentation and scheme or device.

(a) A dairy operation shall be ineligible to receive assistance under this program if it is determined by the State committee or the county committee to have:

(1) Adopted any scheme or device which tends to defeat the purpose of this program;

(2) Made any fraudulent representation; or

(3) Misrepresented any fact affecting a program determination.

(b) Any funds disbursed pursuant to this part to a dairy operation engaged in a misrepresentation, scheme, or device, or to any other person as a result of the dairy operation's actions, shall be refunded with interest together with such other sums as may become due. Any dairy operation or person engaged in acts prohibited by this section and any dairy operation or person receiving payment under this subpart shall be jointly and severally liable for any refund due under this section and for related charges. The remedies provided in this subpart shall be in addition to other civil, criminal, or administrative remedies which may apply.

§ 1430.508 Maintaining records.

Dairy operations making application for benefits under this program must maintain accurate records and accounts that will document that they meet all eligibility requirements specified in this subpart and the pounds of milk marketed commercially during the fourth quarter of 1998 and the base period. Such records and accounts must be retained for at least three years after the date of the cash payment to dairy operations under this program.

§ 1430.509 Refunds; joint and several liability.

(a) In the event there is a failure to comply with any term, requirement, or condition for payment arising under the application, or this subpart, and if any refund of a payment to CCC shall otherwise become due in connection with the application, or this subpart, all payments made under this subpart to any dairy operation shall be refunded to CCC together with interest as determined in accordance with paragraph (c) of this section and late-payment charges as provided for in part 1403 of this chapter.

(b) All persons listed on a dairy operation's application shall be jointly and severally liable for any refund, including related charges, which is determined to be due for any reason under the terms and conditions of the application or this subpart.

(c) Interest shall be applicable to refunds required of the dairy operation if CCC determines that payments or other assistance were provided to the producer was not eligible for such assistance. Such interest shall be charged at the rate of interest which the United States Treasury charges CCC for funds, as of the date CCC made such benefits available. Such interest shall accrue from the date such benefits were made available to the date of repayment or the date interest increases as determined in accordance with applicable regulations. CCC may waive the accrual of interest if CCC determines that the cause of the erroneous determination was not due to any action of the dairy operation.

(d) Interest determined in accordance with paragraph (c) of this section may be waived by CCC with respect to refunds required of the dairy operation because of unintentional misaction on the part of the dairy operation, as determined by CCC.

(e) Late payment interest shall be assessed on all refunds in accordance with the provisions of, and subject to the rates prescribed in 7 CFR part 1403.

(f) Dairy operations must refund to CCC any excess payments made by CCC with respect to such application.

(g) In the event that a benefit under this subpart was provided as the result of erroneous information provided by any person, the benefit must be repaid with any applicable interest.

Signed at Washington, D.C., on April 30, 1999.

Keith Kelly,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 99–11596 Filed 5–7–99; 8:45 am]

BILLING CODE 3410–05–P

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

RIN 3150–AB94

Government in the Sunshine Act Regulations

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule: Notice of intent to implement currently effective rule and request for comments.

SUMMARY: The Nuclear Regulatory Commission (Commission) is announcing its intent to implement a final rule, published and made effective in 1985, that amended its regulations applying the Government in the Sunshine Act. The Commission is taking this action to provide an opportunity for public comment on its intent because of the time that has passed since the Commission last addressed this issue. This action is necessary to complete resolution of this issue.

DATES: The May 21, 1985, interim rule became effective May 21, 1985. Submit comments by June 9, 1999. Unless the Commission takes further action, non-Sunshine Act discussions may be held beginning June 1, 1999.

ADDRESSES: Submit written comments to: Secretary, U.S. Nuclear Regulatory Commission, Washington, DC 20555–0001, ATTN: Rulemakings and Adjudications Staff.

FOR FURTHER INFORMATION CONTACT: Trip Rothschild, Assistant General Counsel, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, (301) 415–1607.

SUPPLEMENTARY INFORMATION: The Commission, through this notice of the Commission's intent to implement a rule published and made effective in 1985, seeks to bring closure to a rulemaking that amended the NRC's regulations applying the Government in the Sunshine Act. Because of the years that have elapsed, the Commission is providing this notice of its intent to implement this rule and is providing an opportunity for additional public comment on the Commission's proposal to implement.

The purpose of the rule is to bring the NRC's Sunshine Act regulations, and the way they are applied by NRC, into closer conformity with Congressional intent, as set forth in the legislative history of the Sunshine Act and as clarified in a unanimous Supreme Court decision, *FCC* v. *ITT World*

Communications, 466 U.S. 463 (1984). The NRC's original Sunshine Act regulations, adopted in 1977, treated every discussion of agency business by three or more Commissioners, no matter how informal or preliminary it might be, as a "meeting" for Sunshine Act purposes. As the 1984 Supreme Court decision made clear, however, "meetings," to which the Act's procedural requirements apply, were never intended to include casual, general, informational, or preliminary discussions, so long as the discussions do not effectively predetermine final agency action. These kinds of "non-Sunshine Act discussions," which can be an important part of the work of a multi-member agency, had been foreclosed at NRC since 1977 by the agency's unduly restrictive interpretation of the Sunshine Act.

In response to the Supreme Court's clarification of the law, the Commission in 1985 issued an immediately effective rule that revised the definition of "meeting" in the NRC's Sunshine Act regulations. To ensure strict conformity with the law, the new NRC rule incorporated verbatim the Supreme Court's definition of "meeting." The rule change drew criticism, however, much of it directed at the fact that it was made immediately effective, with an opportunity to comment only after the fact. To address some of the concerns raised, the NRC informed the Congress that it would not implement the rule until procedures were in place to monitor and keep minutes of all non-Sunshine Act discussions among three or more Commissioners. No such procedures were ever adopted, however, nor was the rule itself implemented, and the issue remained pending from 1985 on.

The Commission believes that it is time to bring the issue of the NRC's Sunshine Act rules to a resolution. As noted, because of the many years that have passed since the Commission last addressed this issue, the NRC is providing this notice of its intent finally to implement and use the 1985 rule, and providing 30 days for public comment on the Commission's proposal to implement. The Commission will not modify its current practices, under which no non-Sunshine Act discussions take place, until it has had the opportunity to consider any comments received.

I. Background

On April 30, 1984, the United States Supreme Court issued its first decision interpreting the Government in the Sunshine Act, *Federal Communications Commission* v. *ITT World Communications*, 466 U.S. 463. Though the case could have been decided on narrow, fact-specific grounds, the Court used the opportunity to offer guidance on what leading commentators have described as "one of the most troublesome problems in interpreting the Sunshine Act": the definition of "meeting" as that term is used in the Act. R. Berg and S. Klitzman, An Interpretive Guide to the Government in the Sunshine Act (1978), at 3. The Court rejected the broad view of the term "meeting" that the U.S. Court of Appeals for the District of Columbia Circuit had taken. It declared that the statutory definition of a "meeting" contemplated "discussions that 'effectively predetermine official actions.'" The Court went on:

> 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.

The Court reviewed the legislative history, demonstrating how in the process of revising the original bill, Congress had narrowed the Act's scope. In the Court's words, "the intent of the revision clearly was to permit preliminary discussion among agency members." *Id.* at 471, n.7. The Court explained Congress's reasons for limiting the reach of the Sunshine Act:

> Congress in drafting the Act's definition of "meeting" recognized that the administrative process cannot be conducted entirely in the public eye. "[I]nformal background discussions [that] clarify issues and expose varying views" are a necessary part of an agency's work. [Citation omitted.] The Act's procedural requirements effectively would prevent such discussions and thereby impair normal agency operations without achieving significant public benefit. Section 552b(a)(2) therefore limits the Act's application. * * *

Id. at 469–70.

At the time the Supreme Court handed down the ITT decision, the Nuclear Regulatory Commission had for almost eight years applied the Government in the Sunshine Act as though it required every discussion of agency business to be conducted as a "meeting." Recognizing that the Supreme Court's guidance indicated that the NRC's interpretation of "meeting" had been unduly broad, the NRC's Office of the General Counsel (OGC) advised the Commissioners in May 1984 that the decision seemed significant: the decision was unanimous and it was the first time that the Supreme Court had addressed the Act. OGC suggested that revisions in the NRC's regulations might be appropriate to bring the NRC into line with Congressional intent.

Soon after that, in August 1984, the Administrative Conference of the United States (a body, since abolished, to which the Sunshine Act assigned a special role in the implementation of the Act by federal agencies) issued Recommendation 84–3, based upon an extensive study of the Sunshine Act. The Administrative Conference was troubled by what it saw as one harmful effect of the Act on the functioning of the multi-member agencies. Commenting that "one of the clearest and most significant results of the Government in the Sunshine Act is to diminish the collegial character of the agency decision making process," the Administrative Conference recommended that Congress consider whether the Act should be revised. The Conference observed:

> Although the legislative history indicates Congress believed that, after the initial period of adjustment, Sunshine would not have a significant inhibiting effect on collegial exchanges, unfortunately this has not been the case.

If Congress decided that revisions were in order, the Conference said, it recommended that agency members be permitted to discuss "the broad outlines of agency policies and priorities" in closed meetings. The Administrative Conference did not address the distinction between "meetings" and those discussions that are outside the scope of the Act.

II. The NRC's 1985 Rule

On May 21, 1985 (50 FR 20889), the Nuclear Regulatory Commission issued new regulations implementing the Government in the Sunshine Act. As a legal matter, the NRC could have continued to use the language of its existing regulations, and reinterpreted them in accordance with the Supreme Court's decision. However, the NRC decided that in the interest of openness, it should declare explicitly that its view of the Act's requirements had changed in light of the Court's ruling.

The revised rule conforms the definition of "meeting" in the Commission's rules to the guidance provided by the Supreme Court by incorporating the very language of the Court's decision into its revised definition. Specifically, it provides, at 10 CFR 9.101(c):

> 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. Deliberations required or permitted by §§ 9.105. 9.106, or 9.108(c) do not constitute "meetings" within this definition.

Under the rule, which was adopted as an immediately effective "interim" rule (it was characterized as "interim" to reflect the fact that it was being made effective before any comments were received and addressed), with an opportunity for public comment, briefings were excluded from the category of "meetings." In the NRC's pre-1985 regulations, by contrast, briefings were treated as meetings, as a matter of policy.

The NRC's 1985 rule proved controversial. In response to Congressional criticism, much of it directed at the Commission's decision to make the rule immediately effective, the Commission assured the Congress that it would conduct no non-Sunshine Act discussions until procedures were in place to govern such discussions.

In December 1985, the NRC's Office of the General Counsel forwarded a final rulemaking paper in which comments on the interim rule were analyzed and responded to. However, by the time that the Commission was briefed on the comments, the American Bar Association had announced its intention to address Sunshine Act issues, including matters directly related to the NRC's rulemaking. The Commission therefore decided to withhold action on the matter and to defer actual implementation and use of the 1985 rule pending receipt of the ABA's views.

III. The American Bar Association Acts

In the fall of 1985, William Murane, Chairman of the Administrative Law Section of the American Bar Association, announced that the Council of the Administrative Law Section had decided to involve itself in the controversy over the Sunshine Act and its effect on the collegial character of agency decision making. Administrative Law Review, Fall 1985, Vol. 37, No. 4, at p. v. The Task Force established by the Administrative Law Section ultimately focused on a single issue: the definition of "meeting" under the Sunshine Act. Its report and recommendations were accepted by the Administrative Law Section in April 1986 and by the full American Bar Association in February 1987.

The ABA's recommendation and report confirmed that the Commission's reading of the Sunshine Act, as interpreted by the Supreme Court in the ITT decision, was legally correct. Moreover, the legal standard set forth in the ABA recommendation incorporated the identical language from the Supreme Court opinion which the NRC had included in its 1985 rule: i.e., the provision stating that for a discussion to be exempt from the definition of "meeting," it must be "[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 arise before the agency." Subject to that qualification, the ABA guidelines provide that 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. [1]

The ABA report disposed of the suggestion, advanced by some critics of the NRC's interim rule, "that the Supreme Court's opinion should be limited to the facts before the Court." While it recognized that the case could have been decided on fact-specific grounds, the report observed that:

[I]t cannot be assumed that the Supreme Court got carried away or that it was unaware that the definition of "meeting" was controversial and "one of the most troublesome problems in interpreting the Sunshine Act." [Interpretive Guide 3.] We concluded therefore, that the Supreme Court meant what it said in ITT World Communications, and that it intended to provide guidance to agencies and the courts in applying the definition of "meeting." Report at 7.

The ABA report also rejected the argument that because of the "difficulty of specifying in advance those characteristics of a particular discussion which will cause it to fall short of becoming a meeting," the Supreme Court's view of the Act should not become part of agency practice. [Emphasis in the original.] The logic of this argument, said the ABA report, would permit no discussion whatever of agency business except in "meetings," a result which "seems clearly to us not to have been intended by Congress." Report at 8. The report noted that this argument in essence was a claim that agencies should apply a different standard from the one specified by Congress for distinguishing "meetings" from discussions that are not "meetings." The ABA explained:

* * * Congress can hardly have gone to such pains to articulate a narrower standard had it not expected the agencies to use the leeway such a standard provides, and if they are to do so, they must attempt to set out in advance, whether by regulation or internal guidelines, the elements or characteristics of a discussion which will cause it to fall short of being a meeting. Report at 8, fn. 9.

The ABA report's conclusion was a measured endorsement of the value of non-Sunshine Act discussions. After stressing that its purpose was not to urge agencies to close discussions now held in open session, the report made clear that its focus, rather, was on the discussions which, because of the Sunshine Act, are never initiated in the first place. It said:

But the fact is that the Sunshine Act has had an inhibiting effect on the initiation of discussions among agency members. This is the conclusion of the Welborn report [to the Administrative Conference], and it is confirmed by our meeting with agency general counsels * * * [T]he Act has made difficult if not impossible the maintenance of close day-to-day working relationships in [five-member and three-member] agencies. * * * We believe that a sensible and sensitive application of the principles announced in the ITT case can ease the somewhat stilted relationships that exist in some agencies. Report at 11–12. [Emphasis in the original.]

The ABA report made clear that it did not regard the opportunity for non-Sunshine Act discussions as a panacea for the Sunshine-caused loss of collegiality which the Administrative Conference had identified, and which the ABA's own inquiry had confirmed. The Report concluded that the impact of loosened restrictions was likely to be "slight," though it saw "some tendency to increase collegiality * * * to the extent that it would contribute to more normal interpersonal relationships among agency members." Report at 12. The Report also observed that collegiality is most important in group decision-making sessions, where the Act's "meeting" requirements clearly apply.

The ABA report recommended that agencies follow procedures for the monitoring and memorialization of non-Sunshine Act discussions to give assurance to the public that they are staying within the law. The ABA made clear that this was a policy recommendation, not a matter of legal obligation. (The report noted at one

[1] A fuller description of the types of discussions fitting in these four categories may be found at pages 9 to 11 of the ABA report.

point that if a discussion "is not a meeting," no announcement or procedures are required because the Act has no application." Report at 6.) The ABA recommended that General Counsels brief agency members in advance on the requirements of the law, to assure their familiarity with the restrictions on non-Sunshine Act discussions, and that non-Sunshine Act discussions (other than "spontaneous casual discussions of a subject of common interest") be monitored, either by the General Counsel or other agency representatives, and memorialized through notes, minutes, or recordings.

IV. Further Developments

On August 5, 1987, an amendment was offered to the NRC authorization bill to bar the Commission from using any funds in fiscal year 1988 or 1989 "to hold any Nuclear Regulatory Commission meeting in accordance with the interim [Sunshine Act] rule [published in] the **Federal Register** on May 21, 1985." 133 Cong. Rec. H7178 (Aug. 5. 1987).[2] As Chairman Philip Sharp of the Subcommittee on Energy and Power of the House Committee on Energy and Commerce explained, the amendment "simply neutralizes a rule change." The amendment, passed by a voice vote, was not passed by the Senate and thus was not enacted into law.

The Commission took no further action regarding the Sunshine Act after 1985, and the issue was allowed to become dormant. While the "interim" rule of 1985 has remained in effect and on the books, at 10 Code of Federal Regulations, Part 9, the Commission has continued to apply its pre-1985 rules. Accordingly, all discussions of business by three or more Commissioners have continued to be treated as "meetings," whether formal or informal, deliberative or informational, decision-oriented or preliminary, planned or spontaneous. No non-Sunshine Act discussions of any kind have been held. In the meantime, some other agencies adopted and implemented rules that permit informal discussions that clarify issues and expose varying views but do not effectively predetermine official actions, discussions of the sort that the Court's ITT decision said are a "necessary part of an agency's work." 466 U.S. at 469–70. See, for example, the Occupational Safety and Health Review Commission's (OSHRC) and Defense Nuclear Facility Safety Board's (DNFSB) definitions of "meeting", at 29 CFR 2203.2(d) (50 FR 51679; 1985) and 10 CFR 1704.2(d)(5) (56 FR 9609; 1991), respectively.

In February 1995, Commissioner Steven M.H. Wallman of the Securities and Exchange Commission, joined by twelve other Commissioners or former Commissioners of four independent regulatory agencies (the Securities and Exchange Commission, Federal Communications Commission, Commodity Futures Trading Commission, Federal Trade Commission), wrote to the Administrative Conference of the United States to urge a reevaluation of the Sunshine Act. The group expressed strong support for the Act's objective of ensuring greater public access to agency decision-making, but questioned whether the Act, as currently structured and interpreted, was achieving those goals. The group said that the Act has a "chilling effect on the willingness and ability of agency members to engage in an open and creative discussion of issues." It continued:

> In almost all cases, agency members operating under the Act come to a conclusion about a matter * * * without the benefit of any collective deliberations. [Footnote omitted.] This is directly in conflict with the free exchange of views that we believe is necessary to enable an agency member to fulfill adequately his or her delegated duties, and to be held accountable for his or her actions.
>
> We are also of the view that the Act is at odds with the underlying principles of multi-headed agencies. These agencies were created to provide a number of benefits, including collegial decision making where the collective thought process of a number of tenured, independent appointees would be better than one. Unfortunately, the Act often turns that goal on its head, resulting in greater miscommunication and poorer decision making by precluding, as a matter of fact, the members from engaging in decision making in a collegial way. As a result, the Act inadvertently transforms multi-headed agencies into bodies headed by a number of individually acting members. [Footnote omitted.]

The group identified as one problem the issue confronted by the NRC's 1985 rulemaking: that "many agencies" avoided the problem of distinguishing between "preliminary conversations, which are outside of the Act, and deliberations, which trigger the Act," by a blanket prohibition, as a matter of general policy, against any conversation among a quorum of agency members, except in "meetings" under the Sunshine Act. While such bright-line policies were easy to apply and effective, the letter said, they were often over-inclusive, barring discussion of even the most preliminary views and often impeding the process of agency decision-making.

The Administrative Conference, then soon to be abolished, took up the group's challenge, assembled a special committee to study the Sunshine Act, and convened a meeting in September, 1995, to discuss the Act, its problems, and possible remedies. The Conference appeared to be looking for some compromise, acceptable both to the Federal agencies and to representatives of the media, that would acknowledge the Act's impairment of the collegial process and try to remedy that by giving greater flexibility to agencies in applying the Act. No consensus developed, however. The Administrative Conference, apparently recognizing that there would be no meeting of the minds between critics and defenders of the Sunshine Act, did not pursue its efforts to find common ground.

V. Conclusions

The Commission has taken into account information from a number of quarters, as well as its own experience in implementing the Sunshine Act. It has considered, among other things, the language of the statute and its legislative history; the Supreme Court's decision in the ITT case; Recommendation 84–3 of the Administrative Conference of the United States; the findings of the American Bar Association; actual practice at other federal agencies, including the DNFSB and OSHRC; and the advice letter from numerous Commissioners and former Commissioners of four other independent regulatory agencies.

Based on all of these, the Commission believes that while the Sunshine Act's objectives, which include increasing agency openness and fostering public understanding of how the multi-member agencies do business, are laudable, it is important to recognize exactly what it was that Congress legislated. The legislative history, as the Supreme Court explained, shows that Congress carefully weighed the competing considerations involved: the public's right of access to significant information, on the one hand, and the agencies' need to be able to function in an efficient and collegial manner on the other. Congress struck a balance: it did not legislate openness to the maximum extent possible, nor did it provide unfettered discretion to agencies to offer only as much public access as they might choose. Rather, it crafted a system in which the Sunshine Act would apply only to "meetings," a term carefully defined to exclude preliminary, informal, and informational discussions, and then provided a series of exemptions to permit closure of certain

[2] The text of the amendment and the colloquy surrounding its adoption by the House of Representatives are also reprinted in full in SECY–88–25.

categories of "meetings." Unfortunately, in part because of advice from the Justice Department in 1977 that later proved to be erroneous, the Commission's original Sunshine Act regulations did not give due recognition to the balance contemplated by Congress. Rather, the regulations mistakenly took the approach that every discussion among three or more Commissioners, no matter how far removed from being "discussions that effectively predetermine official actions," in the Supreme Court's words, should be considered a "meeting." 466 U.S. at 471.

At the time that the Commission changed its Sunshine Act rules in 1985, many of its critics appeared to believe that if the rule change were implemented, numerous discussions currently held in public session would instead be held behind closed doors. This was a misapprehension. Indeed, if there is one point that needs to be emphasized above any other, it is that the objective of the 1985 rule is not that discussions heretofore held in public session should become non-Sunshine Act discussions; rather, the focus of the 1985 rule is on the discussions that currently do not take place at all. This was also the focus of the American Bar Association and the authors of the 1995 letter to the Administrative Conference.

The Commission believes that non-Sunshine Act discussions can benefit the agency and thereby benefit the public which the NRC serves. This view did not originate with the Commission by any means. On the contrary, as described above, the starting point of the Commission's analysis is Congress's recognition that " 'informal background discussions [that] clarify issues and expose varying views' are a necessary part of an agency's work," and that to apply the Act's requirements to them would, in the words of the Supreme Court, "impair normal agency operations without achieving significant public benefit." 466 U.S. 463, 469.

For convenience, the currently effective (but not implemented) 1985 rule is included in this notice and the Commission is providing 30 days for public comment on its stated intent to implement the 1985 rule. No non-Sunshine Act discussions will be held during the period for public comment and for a 21-day period following close of the comment period to allow the Commission to consider the public comments. Absent further action by the Commission, non-Sunshine Act discussions may be held commencing 21 days after the close of the comment period.

From previous comments, the following are possible questions about the 1985 rule, and the Commission's responses to those questions.

1. What types of discussions does the Commission have in mind, and what does it seek to accomplish with this rule?

Answer: First and foremost, the Commission would like to be able to get together as a body with no fixed agenda other than to ask such questions as: "How is the Commission functioning as an agency? How has it performed over the past year? What have been its major successes and failures? What do we see coming in the next year? In the next five years, and ten years? How well are our components serving us? Are we getting our message to the industry we regulate and to the public? Are we working effectively with the Congress?" This kind of "big picture" discussion can be invaluable. One of the regrettable effects of the Sunshine Act, as documented as long ago as 1984, in Administrative Conference Recommendation 84–3, has been the loss of collective responsibility at the agencies, and the shift of authority from Presidentially appointed and accountable agency members to the agencies' staffs. The Commission believes that "big picture" discussions served a valuable function in pre-Sunshine Act days at NRC and can do so again, helping to assure that the Commissioners serve the public with maximum effectiveness and accountability.

The Commission believes that some kinds of general, exploratory discussions can be useful in generating ideas. Such ideas, if developed into more specific proposals, will become the subject of subsequent "meetings." The Commission recognizes that it would be incumbent on the participants in such non-Sunshine Act discussions to assure that they remain preliminary and do not effectively predetermine final agency action. The Commission believes that the guidelines proposed by the American Bar Association are the most suitable criteria for assuring compliance with the Act's requirements.

The Commission also believes that spontaneous casual discussions of matters of mutual interest—for example, a recent news story relating to nuclear regulation—can be beneficial, helping both to ensure that Commissioners are informed of matters relevant to their duties and to promote sound working relationships among Commissioners.

2. Is it really clear that the law permits non-Sunshine Act discussions?

Answer: Yes, beyond any reasonable doubt. Congress so provided, a unanimous Supreme Court has so found, the American Bar Association Task Force on the Sunshine Act agreed, the Council of the Administrative Law Section of the American Bar Association adopted the Task Force's views, and the ABA's full House of Delegates accepted the Administrative Law Section's report and recommendation.

3. Didn't the ITT case involve a trip to Europe by less than a quorum of FCC members, and couldn't the case be viewed as relating to those specific facts?

Answer: The case was resolved on two separate grounds. Although the Supreme Court did not have to reach the issue of what constitutes a "meeting" under the Sunshine Act, it did so, in order (so the ABA report concluded) to provide guidance to agencies and the courts on a difficult aspect of Sunshine Act law. In addressing the ambiguity in the definition of "meeting" and thus the uncertainty as to the Act's scope, the Supreme Court was acting to resolve a problem that had been apparent literally from the day of its enactment into law, as President Ford's statement in signing the bill, on September 13, 1976, makes clear. He wrote:

> I wholeheartedly support the objective of government in the sunshine. I am concerned, however, that in a few instances unnecessarily ambiguous and perhaps harmful provisions were included in S.5. * * * The ambiguous definition of the meetings covered by this act, the unnecessary rigidity of the act's procedures, and the potentially burdensome requirement for the maintenance of transcripts are provisions which may require modification. Government in the Sunshine Act—S.5 (P.L. 94–409), Source Book: Legislative History, Text, and Other Documents (1976), at 832.

4. On the meaning of "meeting" as used in the Sunshine Act, aren't the views of Congressional sponsors of the legislation entitled to consideration?

Answer: Yes, when they appear in the pre-enactment legislative history. In the present case, for example, the Supreme Court cited the remarks of the House sponsor of the Sunshine Act, Representative Dante Fascell, who introduced the report of the Conference Committee to the House. He explained to his colleagues that the conferees had narrowed the Senate's definition of "meeting" in order "to permit casual discussions between agency members that might invoke the bill's requirements" under the Senate's approach. 122 Cong. Rec. 28474 (1976), cited at 466 U.S. 463, 470 n.7. Likewise, Senator Chiles, the Senate sponsor of the bill, described the definition of "meeting" in the final bill as a "compromise version." 122 Cong. Rec. S15043 (Aug. 31, 1976), reprinted in

vernment in the Sunshine Act Source book. In any case, however, once the Supreme Court has declared what the law requires, federal agencies are bound to follow its guidance.

5. Is there any basis in the legislative history for the notion that non-Sunshine Act discussions are not only permissible, but useful?

Answer: Yes. The point was made forcefully by Professor Jerre Williams (subsequently a judge on the Fifth Circuit Court of Appeals), presenting the views of the American Bar Association. He testified, in Congressional hearings on the bill:

> One of the most critical facets of the American Bar Association view has to do with the definition of "meeting." The ABA firmly agrees that policy must not be determined by informal closed-door caucuses in advance of open meetings. On the other hand, however, the ABA believes it important that "chance encounters and informational or exploratory discussions" by agency members should not constitute meetings unless such discussions are "relatively formal" and "predetermine" agency action.
>
> It should be a matter of concern to all those interested in good government that agency members be allowed to engage in informal work sessions at which they may "brainstorm" and discuss various innovative proposals without public evaluation or censorship of their search for new and creative solutions in important policy areas.
>
> All persons who have engaged in policymaking have participated in such informal sessions. Sometimes outlandish suggestions are advanced, hopefully humorous suggestions abound. But out of all this may come a new, creative, important idea. There is time enough to expose that idea to public scrutiny once it has been adequately evaluated as a viable alternative which ought to be seriously considered. [Emphasis added.] Hearings Before a Subcommittee of the Committee on Government Operations, House of Representatives, 94th Cong., First Session (Nov. 6 and 12, 1975), at 114–15.

6. Why is the NRC paying so much attention to the ITT case and ignoring the Philadelphia Newspapers case which dealt specifically with NRC?

Answer: First of all, the ITT case dealt with the issue of what is a "meeting," whereas *Philadelphia Newspapers, Inc.* v. *NRC*, 727 F.2d 1195 (D.C. Cir. 1984). dealt with an unrelated issue: whether a particular "meeting" could be closed under the Sunshine Act. Secondly, the ITT case was decided by the Supreme Court, and as such would be entitled to greater weight than the decision of one panel of a Court of Appeals, even if they were on the same issue. Thirdly, the full D.C. Circuit, sitting *en banc*, has severely criticized the Philadelphia Newspapers decision for digressing from Congressional intent and thereby reaching an "untoward result." *Clark-Cowlitz Joint Operating Agency* v. *FERC*, 798 F.2d 499, 503 n.5 (D.C. Cir. 1984).

7. If it is so clear that non-Sunshine Act discussions are permissible, why did the NRC interpret the Act differently for so many years?

Answer: In part, the answer lies in the fact that the Justice Department, in the years 1977 to 1981, took an expansive view of the definition of "meeting." (See the letter from Assistant Attorney General Barbara A. Babcock reprinted in the Interpretive Guide at p. 120.) In contrast, Berg and Klitzman, the authors of the Interpretive Guide, believed that Congress had consciously narrowed the definition. (See the Interpretive Guide at 6–7.) Because the Justice Department defends Sunshine Act suits in the courts, its view of the law's requirements carried considerable weight. The Supreme Court's decision in the ITT case resolved the issue definitively.

8. Didn't the NRC acknowledge in its 1977 rulemaking that it was going beyond the law's requirements in the interest of the Act's "presumption in favor of opening agency business to public observation"? Why isn't that rationale still applicable today?

Answer: There are at least three factors today that were not present in 1977: (1) the Supreme Court's ITT decision, which makes clear that Congress gave the agencies authority to hold such discussions because it thought they were an important part of doing the public's business; (2) the Administrative Conference recommendation stating that the Sunshine Act has had a much more deleterious effect on the collegial nature of agency decision making than had been foreseen; and (3) the American Bar Association report stating that Congress gave the agencies the latitude to hold non-Sunshine Act discussions in the expectation they would use it, and suggesting that the use of such discussions might help alleviate some of the problems caused by the Sunshine Act. Moreover, the Commission has had the benefit of its own and other agencies' experience under the Act. It should be emphasized that the Commission, by implementing this rule, is not implicitly or explicitly urging that the Sunshine Act be altered; rather, it is saying that the Sunshine Act should not be applied even more restrictively than Congress intended when it enacted the statute.

9. Why does the NRC put such reliance on the ABA report, when the ABA made a point of saying that it was not urging the closing of any meetings now open?

Answer: The question misses the point of the ABA comment. In the context in which the comment appears in the ABA report, it is clear that the ABA was expressing its concern for the discussions that currently do not happen at all, either in open or in closed session, because the Sunshine Act inhibits the initiation of discussions. Its point was similar to that made by Professor Williams in the hearings on the bill in 1975, when he urged that agency members not be deprived of the opportunity to generate ideas in "brainstorming sessions"—ideas which may subsequently be the subject of "meetings" if they turn out to warrant formal consideration. As we have emphasized above, the Commission is not proposing to close any meetings currently held as open public meetings.

10. How does the Commission intend to differentiate between "meetings" and "non-Sunshine Act discussions"?

Answer: The Commission intends to abide by the guidance provided by the Court in *FCC* v. *ITT World Communications* and contained in our regulations, in differentiating between "meetings" and non-Sunshine Act discussions. Applying this guidance, the Commission may consider conducting a non-Sunshine Act discussion when the discussion will be casual, general, informational, or preliminary, so long as the discussion will not effectively predetermine final agency action. Whenever the Commission anticipates that a discussion seems likely to be "sufficiently focused on discreet proposals or issues as to cause the individual participating members to form reasonably firm positions regarding matters pending or likely to arise before the agency," the Commission will treat those discussions as "meetings." See id. at 471.

Further, to ensure that we appropriately implement the Supreme Court guidance in differentiating between non-Sunshine Act discussions and meetings, the Commission will consider the ABA's remarks on the seriousness of this task. For instance, the ABA cautioned that a non-Sunshine Act discussion "does not pose specific problems for agency resolution" and agency "members are not deliberating in the sense of confronting and weighing choices." Report at 9–11.

Some specific examples of the kinds of topics that might be the subject of non-Sunshine Act discussions would include generalized "big picture" discussions on such matters as the following: "How well is the agency functioning, what are our successes and

failures, what do we see as major challenges in the next five and ten years, what is the state of our relations with the public, industry, Congress, the press?'

Preliminary, exploratory discussions that generate ideas might include, for example, "Is there more that we could be doing through the Internet to inform the public and receive public input? How does our use of the Internet compare with what other agencies are doing?" Such ideas, if followed up with specific proposals, would become the subject of later "meetings" within the meaning of the Sunshine Act.

Spontaneous, casual discussions of matters of mutual interest could include discussions of a recent news story relating to NRC-licensed activities, or a Commissioner's insights and personal impressions from a visit to a licensed facility or other travel. Under this heading, three Commissioners would be permitted to have a cup of coffee together and to talk informally about matters that include business-related topics. Under the Commission's pre-1985 rule, such informal get-togethers were precluded.

Briefings in which Commissioners are provided information but do not themselves deliberate on any proposal for action could include routine status updates from the staff.

Discussions of business-related matters not linked to any particular proposal for Commission action might include an upcoming Congressional oversight hearing or a planned all-hands meeting for employees.

11. Apart from the issue of the definition of "meeting," are there other changes that the interested public should be aware of?

Answer: Yes, one minor procedural point. The 1985 rule includes a provision stating that transcripts of closed Commission meetings will be reviewed for releasability only when there is a request from a member of the public for the transcript. Reviewing transcripts for releasability when no one is interested in reading them would be a waste of agency resources and thus of the public's money.

12. Will the Commission adopt any particular internal procedures for its non-Sunshine Act discussions?

Answer: For an initial 6-month period of non-Sunshine Act discussions, the Commission will maintain a record of the date and subject of, and participants in, any scheduled non-Sunshine Act discussions that three or more Commissioners attend. After the six-month period, the Commission will revisit the usefulness of the record-keeping practice.

List of Subjects in 10 CFR Part 9

Criminal penalties, Freedom of information, Privacy, Reporting and recordkeeping requirements, Sunshine Act.

The May 21, 1985 (50 FR 20863), rule is currently effective but has never been implemented. For the convenience of the reader, the Commission is republishing the text of that rule.

PART 9—PUBLIC RECORDS

1. The authority citation for part 9 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); sec. 201, 88 Stat. 1242, as amended (42 U.S.C. 5841).

Subpart A is also issued 5 U.S.C. ; 31 U.S.C 9701; Pub. L. 99–570. Subpart B is also issued under 5 U.S.C. 552a. Subpart C is also issued under 5 U.S.C. 552b.

2. In § 9.101, paragraph (c) is republished for the convenience of the reader as follows:

§ 9.101 Definitions.

* * * * *

(c) 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. Deliberations required or permitted by §§ 9.105, 9.106, or 9.108(c), do not constitute "meetings" within this definition.

* * * * *

3. In § 9.108, paragraph (c) is republished for the convenience of the reader as follows:

§ 9.108 Certification, transcripts, recordings and minutes

* * * * *

(c) In the case of any meeting closed pursuant to § 9.104, the Secretary of the Commission, upon the advice of the General Counsel and after consultation with the Commission, shall determine which, if any, portions of the electronic recording, transcript or minutes and which, if any, items of information withheld pursuant to § 9.105(c) contain information which should be withheld pursuant to § 9.104, in the event that a request for the recording, transcript, or minutes is received within the period during which the recording, transcript, or minutes must be retained, under paragraph (b) of this section.

* * * * *

Dated at Rockville, Maryland, this 4th day of May, 1999.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 99–11669 Filed 5–7–99; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF COMMERCE

Bureau of the Census

15 CFR Part 30

[Docket No. 990416099–9099–01]

RIN 0607–AA32

New Canadian Province Import Code for Territory of Nunavut

AGENCY: Bureau of the Census, Commerce.

ACTION: Final rule.

SUMMARY: The Bureau of the Census is amending the Foreign Trade Statistics Regulations (FTSR), to add a new Canadian Province/Territory code for the Territory of Nunavut. This Canadian Territory code is being added to the existing Canadian Province/Territory codes used for reporting Canadian Province of Origin information on Customs Entry Records.

EFFECTIVE DATE: The provisions of this rule are effective April 1, 1999.

FOR FURTHER INFORMATION CONTACT: C. Harvey Monk, Jr., Chief, Foreign Trade Division, Bureau of the Census, Room 2104, Federal Building 3, Washington, DC 20233–6700, by telephone on (301) 457–2255, by fax on (301) 457–2645, or by e-mail at c.h.monk.jr@ccmail.census.gov. For information on the specific Customs reporting requirements contact: Dave Kahne, U.S. Customs Service, Room 5.2C, 1300 Pennsylvania Avenue, NW, Washington, DC 20229, by telephone on (202) 927–0159 or by fax on (202) 927–1096.

SUPPLEMENTARY INFORMATION:

Background Information

On November 29, 1996, the U.S. Bureau of the Census (Census Bureau), Department of Commerce, and the U.S. Customs Service (Customs), Department of the Treasury, announced the implementation of the requirements for collecting Canadian Province of Origin information on Customs Entry Records in the **Federal Register** (61 FR 60531). The Supplementary Information contained in that notice fully recounts the development of the program for collecting Canadian Province of Origin information on Customs import

Rules and Regulations

Federal Register
Vol. 64, No. 140
Thursday, July 22, 1999

NUCLEAR REGULATORY COMMISSION

10 CFR Part 9

RIN 3150–AB94

Government in the Sunshine Act Regulations

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule: Notice of intent to implement currently effective rule; response to comments.

SUMMARY: The Nuclear Regulatory Commission, having considered the comments received on the May 10, 1999, document declaring its intent to begin implementing a final rule published and made effective in 1985, has decided to proceed with implementation of the rule, 30 days from the date of publication of this document.

DATES: The May 21, 1985, interim rule became effective May 21, 1985. The Commission will begin holding non-Sunshine Act discussions no sooner than August 23, 1999.

FOR FURTHER INFORMATION CONTACT: Peter Crane, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, (301) 415–1622.

SUPPLEMENTARY INFORMATION: On May 10, 1999 (64 FR 24936), the Nuclear Regulatory Commission noticed in the **Federal Register** of its intention to begin implementing its regulations, promulgated in 1985, applying the Government in the Sunshine Act. The Commission provided a period for public comment, ending June 9, 1999, and stated that no non-Sunshine Act discussions would be held before July 1, 1999, to give the Commission an opportunity to consider the comments. The Commission stated that non-Sunshine Act discussions could begin on July 1, unless it took further action. Finding that the comments do in fact warrant discussion, the Commission provides this additional document that responds to the issues raised by the commenters. During the period of its review of the comments, the Commission has not held any non-Sunshine Act discussions and has decided not to hold any such discussions until, at the earliest, 30 days from the date of publication of this document.

Nine comments were received on the May 10 notice, all but one of which expressed disapproval of the NRC's action. (The lone exception was a comment from a nuclear industry group, the Nuclear Energy Institute, which said that it endorsed the NRC's action for the reasons stated in the May 10, 1999, document.) Of the critical comments received, the most detailed came from a Member of the United States House of Representatives, Edward J. Markey, and from two public interest organizations, the Natural Resources Defense Council and Public Citizen. The negative comments were mostly (but as will be seen, not exclusively) along the lines that the Commission had tried to anticipate in its detailed document of May 10.

The comments were both on legal and policy grounds. The primarily legal arguments included the following:

(a) The legislative history of the Sunshine Act makes clear Congress's intent that there should be openness to the maximum extent practicable;

(b) The Commission's action is thus antithetical to the letter and spirit of the Act;

(c) The Supreme Court's decision in *FCC* v. *ITT World Communications*, 466 U.S. 463 (1984), involved unique circumstances and is not relevant to the issue before the NRC;

(d) The Commission disregarded such court decisions as that of the U.S. Court of Appeals for the D.C. Circuit in *Philadelphia Newspapers* v. *NRC*, 727 F.2d 1195 (1984);

(e) The criteria adopted by the Commission are too vague to be workable, inasmuch as they require the Commission to predict the course that discussions will take; and

(f) The Commission's action, by providing for minimal recordkeeping, possibly to be discontinued after six months, will preclude meaningful judicial review.

Policy arguments included these:

(a) Even if the rule can be justified legally, it represents a retreat from openness and will diminish public confidence in the Commission;

(b) The NRC has failed to show that collegiality has been impaired by the Sunshine Act;

(c) The examples of topics that the Commission has cited as examples of possible non-Sunshine Act discussions are too trivial to warrant changing a rule that has served well for 20 years;

(d) The Commission failed to follow the recommendations of the American Bar Association with respect to record keeping;

(e) No harm could come to the Commission's processes if general background briefings were held in open session;

(f) The NRC's role as regulator of a technically complex industry calls for maximum openness; and

(g) Nothing in the rule prevents the Commission from holding off-the-record discussions with representatives of the regulated industry.

In the interest of clarity, we will address the comments in a comment-and-response format. Some comments were dealt with in sufficient detail in the May 10, 1999, document that it would serve no useful purpose to repeat here the Commission's position with regard to them.

A. *Comment:* One of the critical commenters quoted at length from the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *Philadelphia Newspapers* v. *NRC*, 727 F.2d 1195 (1984), in which the court declared that "Government should conduct the public's business in public." The commenter opined that Congress undoubtedly intended that the Government in the Sunshine Act "would guarantee public accountability" on the safety of nuclear power.

Response: Undeniably, the *Philadelphia Newspapers* decision represented an expansive view of the Sunshine Act on the part of that panel of the D.C. Circuit. Only a few months later, however, the Supreme Court provided sharply different guidance in the first (and to date only) Government in the Sunshine Act case to reach the Court: *FCC* v. *ITT World*

Communications, 466 U.S. 463 (1984). *ITT World Communications* resembled *Philadelphia Newspapers* in that it also involved an expansive interpretation of the Sunshine Act by the D.C. Circuit. Resoundingly, in a unanimous decision, the Supreme Court overturned the D.C. Circuit's ruling, and it used the opportunity to give guidance on the proper interpretation of the Sunshine Act. It said, among other things:

> Congress in drafting the Act's definition of "meeting" recognized that the administrative process cannot be conducted entirely in the public eye. "(I)nformal background discussions (that) clarify issues and expose varying views" are a necessary part of an agency's work. (Citation omitted.) The Act's procedural requirements effectively would prevent such discussions and thereby impair normal agency operations without achieving significant public benefit. Section 552b(a)(2) therefore limits the Act's application. * * *

Id. at 469–70.

The Commission's rulemaking has been grounded from the start in this definitive Supreme Court guidance. The rule itself includes a definition of "meeting" taken verbatim from the Court's opinion. The American Bar Association confirmed that the NRC's approach was consistent with Congressional intent and the Supreme Court's interpretation. To the extent that the commenter was urging the NRC to follow the approach of the Court of Appeals and disregard the contrary guidance of the Supreme Court, the NRC cannot agree. Even if the Commission believed as a matter of policy that such a course was desirable, the NRC is not at liberty to ignore Supreme Court decisions interpreting the statutes that govern its operations.[1]

[1] It is worth noting that on the precise legal point in dispute here—the definition of a "meeting" under the Sunshine Act—one D.C. Circuit decision held that an agency is legally prohibited from interpreting the law more restrictively than Congress provided. In *WATCH* v. *FCC*, 665 F.2d 1264 (D.C. Cir. 1981), the court sharply chastised an agency which had adopted a definition of "meeting" that included types of discussions that Congress had not included within the statutory scope. The court declared that the agency was "supposed to track" the statutory definition when it defined a "meeting" in its regulations. Because it had failed to do so, and instead included types of discussions not intended by Congress to fall within the statutory scope, the agency had written an "impermissibly broad" definition which could not legally be sustained. The court said:

> Indeed, we are unable to discern any reason for the breadth of the agency's definition of "meeting"—apart from shoddy draftsmanship, perhaps. While we recognize that an agency generally is free to shoulder burdens more onerous than those specifically imposed by statute, the regulation at issue here is in excess of the Commission's rulemaking discretion under 47 U.S.C. 154(1) (1976). Consequently, we set it aside to the extent that its definition of "meeting" is more inclusive than the one contained in the Sunshine Act. 665 F.2d 1264, 1272.

B. *Comment:* The NRC's action, even if some legal arguments could be made for it, is contrary to the Congress's intent, documented in the legislative history, that Federal agencies were intended to practice openness to the maximum extent possible.

Response: Congress made a deliberate decision to limit the applicability of the Sunshine Act to "meetings." As the Supreme Court explained in detail, the definition of "meeting" was an issue to which Congress paid extremely close attention, with changes introduced late in the process. The bill in its final form therefore differed significantly from what some of its supporters (including its chief sponsor, the late Senator Lawton Chiles) desired. As a result, Committee reports describing earlier, more expansive versions of the legislation bills are of slight significance compared to the Supreme Court's parsing of the statute that Congress actually passed. Some commenters are in effect asking the NRC to join in rewriting history so that the narrowing of the scope of "meetings"—proposed by then-Representative Pete McCloskey, enacted over the opposition of Senator Chiles and others, and elucidated by the Supreme Court—is made to disappear from the record. The reality, contrary to the views of some commenters, is that the Sunshine Act did not decree openness to the maximum extent practicable. Instead, it struck a balance between the public's right to know and the agencies' need to function efficiently in order to get the public's business done.

C. *Comment:* A commenter asserted that the NRC had failed to offer examples of the types of "non-Sunshine Act discussions" that it contemplated holding.

Response: The commenter is in error, as may be seen from the section of the NRC's May 10, 1999, document on page 24942 that begins, "Some specific examples of the kinds of topics that might be the subject of non-Sunshine Act discussions would include. * * *" Nor was this the first time that the NRC had offered such examples. It has done so repeatedly, beginning in 1985. Indeed, the American Bar Association task force that studied the Sunshine Act quoted, with approval and at considerable length, the examples of possible non-Sunshine Act discussions included in a memorandum to the Commission from the NRC General Counsel.

D. *Comment:* A commenter asserted that "no detailed analysis or specific example has been provided of problems with the current rule or of the need for changes."

Response: The Commission disagrees with this comment. As long ago as 1984, the Administrative Conference of the United States, in Recommendation 84–3, was commenting that the Sunshine Act had had the unintended effect of diminishing collegiality at multi-member agencies and shifting power from the collegium to the Chairman and staff. Analyses by the NRC, the American Bar Association, and the Administrative Conference all provide factual support for the proposition that there are problems associated with the Act. Again, this topic was covered in detail in the Commission's May 10, 1999, document.

E. *Comment:* One commenter observed that "[t]here is no apparent requirement to keep any tape or transcript of non-Sunshine Act discussions."

Response: This comment is correct, for that is the way that Congress enacted the statute. (The May 10, 1999, document quoted the legal judgment reflected in the ABA report that if a discussion "is not a 'meeting,' no announcement or procedures are required because the Act has no application.") As a matter of policy discretion, however, the NRC has decided to maintain a record of the date and subject of, and participants in, any scheduled non-Sunshine Act discussions that three or more Commissioners attend, for *at least* the initial six-month period of implementing the rule. This will assist the Commission in determining whether thereafter, recordkeeping should be maintained, increased, or eliminated. No final decision has been made at this time. The Commission will not discontinue its practice of keeping such records without advance notice to the public.

F. *Comment:* The NRC should make clear whether or not it intends that discussions now held as "meetings" can henceforth be held as non-Sunshine Act discussions. The Commissioners whose proposal initiated the Commission's action seem to have contemplated transforming current "meetings" into non-Sunshine Act discussions, but the Commission's May 10, 1999, document denies this intent.

Response: The May 10, 1999, document made clear that the objective is not to turn discussions now held as "meetings" into non-Sunshine Act discussions, but rather to enable the Commission to hold, as non-Sunshine Act discussions, the kind of informal, preliminary, and "big picture" discussions that currently are not held at all. As is sometimes the case, the final Commission action differed in this

instance from the proposal that set the action in motion.

G. *Comment:* The memorandum from two Commissioners that initiated the Commission's action said that one reason to act was that the primary opponent of the Commission's 1985 action was no longer in Congress. This suggests that the Commission's action was motivated by political considerations, rather than actual need.

Response: The cited memorandum did indeed include an allusion to a former Representative. Read fairly and in its totality, it makes clear that the two Commissioners' proposal was motivated by concerns of good government and legal correctness, not politics. At the same time, they offered their candid view that concern about the proposal might be less intense than it had been in 1985. There was nothing inappropriate about making this observation. The Commission's decision to take action with regard to the Sunshine Act was a reflection of its longstanding efforts to increase the collegiality of the Commission process, to ensure that its procedures and practices are in conformity with current law, and to reach closure on outstanding items.

H. *Comment:* The May 10, 1999, document is not clear as to whether there is anything in the rule that would prevent the full Commission from meeting off-the-record with representatives of a licensee or the Nuclear Energy Institute in non-Sunshine Act discussions.

Response: The commenter's point is well taken; the notice did not address this question. The Commission's intent is that non-Sunshine Act discussions would be limited to NRC or other federal agency personnel, with limited exceptions for persons (e.g. representatives of the regulatory body of a foreign nation, or a state regulator) who would not be regulated entities or who could not be considered interested parties to Commission adjudicatory or rulemaking proceedings. The Commission is committed to implementing this intent; the non-Sunshine Act discussions will not include discussions with representatives of licensees or of organizations who could be considered interested parties to NRC adjudications, rulemakings, or development of guidance.

I. *Comment:* The NRC's standards for determining when a discussion can be held as a non-Sunshine Act discussion is impermissibly vague, requiring "divination" on the part of the participants.

Response: The standards for determining what is a non-Sunshine Act discussion were taken verbatim from the decision of a unanimous Supreme Court. Moreover, it is not correct to say that the standard requires "divination" of what will happen in a discussion. Rather, what the rule envisions is that if a discussion begins to evolve from the preliminary exchange of views that the Commission contemplated into something so particularized that it may "effectively predetermine" agency action if it continues, the Commission will cease the discussion.[2]

J. *Comment:* Because of the special sensitivity and public interest in issues of nuclear safety, the NRC should continue to apply the law more stringently than is required.

Response: That argument may have some force, but it cuts both ways. By the same token, it can be argued that the special sensitivity and public interest in issues of nuclear safety make it essential that the Commission remove barriers to efficiency and collegiality, so as to maximize the quality of Commission decision-making, and that the Congressional balance between openness and efficiency should therefore be adhered to strictly. The NRC believes that the latter interest should predominate.

K. *Comment:* Whether or not legally justifiable, the NRC's action will diminish public confidence in the Commission.

Response: The Commission was aware of this possibility at the time it issued the May 10, 1999, document, but it believes that the legal and policy reasons for its action—compliance with the Supreme Court's guidance, and the expected benefits in collegiality and efficiency, make this a desirable course of action, even if—despite the Commission's best efforts to explain its reasoning—some persons misunderstand or disapprove of the Commission's action. It is also possible that the potential enhancement of collegiality and the potential improvement in Commission decision-making that may result from non-Sunshine Act discussions will ultimately increase the public's confidence in the Commission's actions.

[2] Every Commissioner who meets one-on-one with an interested party to a matter before the Commission has to be prepared to cut off discussions that threaten to stray into impermissible areas, as provided, for example, by the NRC's *ex parte* rules. There seems no reason why Commissioners could not equally well halt discussions among themselves that seem likely to cross the line separating non-Sunshine Act discussions from "meetings."

L. *Comment:* The NRC did not follow the recordkeeping recommendations of the American Bar Association.

Response: It is true that the Commission did not follow the American Bar Association's recommendations with respect to recordkeeping. However, those recommendations were prudential, not based on legal requirements. The ABA recognized that as a legal matter, if a discussion is not a "meeting," no procedural requirements apply at all. The Commission's May 10, 1999, document reflected a judgment that Congress would not have given agencies latitude to hold this type of discussion free of elaborate and burdensome procedures if it had not viewed such procedures as undesirable. Nonetheless, as described in the response to Comment E above, the Commission has decided to maintain a record of the date, participants in, and subject matter of all non-Sunshine Act discussions for at least the first six months in which the rule is implemented, and it will not discontinue the practice thereafter without advance notice to the public.

M. *Comment:* No harm could result from holding briefings in public session, and doing so would benefit public understanding.

Response: On this point, arguments can go either way. At the time that the Commission first put its Sunshine Act rules into place, it acknowledged that briefings might be exempt from the Sunshine Act's scope, but said that the Commission did so much of its important work in briefings that as a policy matter, it believed these should be open to the public. This argument is not insubstantial. In part for that reason, the Commission affirms once again what it said in its May 10, 1999, document and earlier in this present document, namely, that its objective is not to turn discussions now held as "meetings" into non-Sunshine Act discussions. Rather, the intent is to ensure that the Commission is not categorically required to apply the Sunshine Act's procedural requirements to *every* briefing, including such things as routine status updates, where the benefit to the public would be small compared to the administrative burden and loss of efficiency in doing day-to-day business.

In sum, the NRC believes, based on its review of the comments received on the May 10, 1999, document, that the general approach taken by the Commission in that notice remains a desirable course of action. Accordingly, the NRC intends to implement its 1985 Sunshine Act rules and to begin holding non-Sunshine Act discussions, subject

to the conditions outlined in the May 10, 1999, document, and as further clarified in the present document, 30 days from the date of this notice.

Dated at Rockville, Md., this 16th day of July, 1999.

For the Nuclear Regulatory Commission.

Annette Vietti-Cook,

Secretary of the Commission.

[FR Doc. 99–18724 Filed 7–21–99; 8:45 am]

BILLING CODE 7590–01–P

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 98–NM–350–AD; Amendment 39–11232; AD 99–15–12]

RIN 2120–AA64

Airworthiness Directives; Saab Model SAAB 2000 Series Airplanes

AGENCY: Federal Aviation Administration, DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD), applicable to certain Saab Model SAAB 2000 series airplanes. This action requires repetitive detailed inspections to detect looseness or gap of the press fit bushing installation of the actuator fittings of the aileron trim tabs, and eventual replacement of the bushings with new, staked bushings. Accomplishment of such replacement terminates the repetitive inspections. This action also provides for an optional temporary preventive action, which, if accomplished, would terminate the repetitive inspections until the terminating action is accomplished. This amendment is prompted by issuance of mandatory continuing airworthiness information by a foreign civil airworthiness authority. The actions specified in this AD are intended to prevent looseness or gap of the bushings. In the event of failure of the redundant trim tab actuator, such looseness or gap of the bushings could lead to trim tab flutter and consequent structural failure of the trim tab and reduced controllability of the airplane.

DATES: Effective August 6, 1999.

The incorporation by reference of certain publications listed in the regulations is approved by the Director of the Federal Register as of August 6, 1999.

Comments for inclusion in the Rules Docket must be received on or before August 23, 1999.

ADDRESSES: Submit comments in triplicate to the Federal Aviation Administration (FAA), Transport Airplane Directorate, ANM–114, Attention: Rules Docket No. 98–NM–350–AD, 1601 Lind Avenue, SW., Renton, Washington 98055–4056.

The service information referenced in this AD may be obtained from Saab Aircraft AB, SAAB Aircraft Product Support, S–581.88, Linköping, Sweden. This information may be examined at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Norman B. Martenson, Manager, International Branch, ANM–116, FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington 98055–4056; telephone (425) 227–2110; fax (425) 227–1149.

SUPPLEMENTARY INFORMATION:

Discussion

The Luftfartsverket (LFV), which is the airworthiness authority for Sweden, notified the FAA that an unsafe condition may exist on certain Saab Model SAAB 2000 series airplanes. The LFV advises that a failure of a bushing of the flap support fitting occurred during a fatigue test. The bushing installation of the flap support fitting is similar to the bushing installation of the actuator fittings of the aileron trim tabs. In the event of failure of the redundant trim tab actuator, such a failure of the bushing could lead to trim tab flutter and consequent structural failure of the trim tab and reduced controllability of the airplane.

Explanation of Relevant Service Information

Saab has issued Service Bulletin 2000–57–011, dated October 1, 1998, which describes procedures for repetitive visual inspections to detect looseness or gap of the press fit bushing installation of the actuation fittings of the aileron trim tabs. In addition, the service bulletin describes procedures for eventual replacement of existing bushings with new, staked bushings in the fittings. Such replacement when accomplished, eliminates the need for the repetitive inspections. The service bulletin also describes procedures for an optional temporary preventive action that involves the installation of washers on the bushings of the actuator fittings of the aileron trim tabs. Accomplishment of the actions specified in the service bulletin is intended to adequately address the identified unsafe condition.

The LFV classified this service bulletin as mandatory and issued Swedish airworthiness directive (SAD) No. 1–132, dated October 8, 1998, in order to assure the continued airworthiness of these airplanes in Sweden.

FAA's Conclusions

This airplane model is manufactured in Sweden and is type certificated for operation in the United States under the provisions of section 21.29 of the Federal Aviation Regulations (14 CFR 21.19) and the applicable bilateral airworthiness agreement. Pursuant to this bilateral airworthiness agreement, the LFV has kept the FAA informed of the situation described above. The FAA has examined the findings of the LFV, reviewed all available information, and determined that AD action is necessary for products of this type design that are certificated for operation in the United States.

Explanation of Requirements of the Rule

Since an unsafe condition has been identified that is likely to exist or develop on other airplanes of the same type design registered in the United States, this AD is being issued to prevent looseness or gap of the press fit bushing installation of the actuator fittings of the aileron trim tabs. This AD requires accomplishment of the actions specified in the service bulletin described previously, except as discussed below.

Differences Between this AD and Service Bulletin

Operators should note that, although the service bulletin specifies that the manufacturer may be contacted for disposition of a certain repair condition, this AD requires the repair of that condition to be accomplished in accordance with a method approved by the FAA, or the LFV (or its delegated agent).

Cost Impact

None of the airplanes affected by this action are on the U.S. Register. All airplanes included in the applicability of this rule currently are operated by non-U.S. operators under foreign registry; therefore, they are not directly affected by this AD action. However, the FAA considers that this rule is necessary to ensure that the unsafe condition is addressed in the event that any of these subject airplanes are imported and placed on the U.S. Register in the future.