

### C. Matters Resolved by Notational Voting<sup>71</sup>

The Commission makes most of its decisions by means of written notational voting, without conducting a Commission meeting.<sup>72</sup> Each such motion is circulated on a **non-agenda nonadjudicative** basis (using a **green** circulation form); on a **walk-around nonadjudicative** basis (using a **pink** circulation form); or on an **adjudicative** basis (**non-agenda** or **walk-around**) (using a **blue** circulation form). A Commissioner is free to formulate any motion on any matter at any time, using whatever language he or she prefers. The act of making a written motion is separate and distinct from the act of voting on that motion. Thus, for example, a Commissioner could, at least theoretically, make a motion on a notational voting basis and then vote "no" on that motion. Similarly, the moving Commissioner may withdraw a motion at any time before voting on the motion is completed.

When the voting on a particular motion is completed, all original documents (circulations, staff memoranda, and action documents) are assembled by the Minutes Section. The date the Commission takes action -- the "date of issuance" -- is defined as the date on which voting on the motion at issue is completed. Thereafter, the Minutes Section prepares a minute recording the Commission's decision; notifies the appropriate Commission staff of the Commission action; and forwards the action documents to the Secretary for review, verification,

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<sup>71</sup> On September 15, 1983, the Commission formally approved a number of rules governing the notational voting process. *See* Commission Minutes, Volume 140, at 194-97 (hereinafter 1983 Minute). In May 1984 the Commission informally approved a Protocol for Notation Voting (hereinafter 1984 Protocol) that reaffirmed, with some modifications, the 1983 procedures. Although the Commission did not expressly vote on the 1984 Protocol, the May 21, 1984 transmittal memorandum from Secretary Emily H. Rock to Chairman Miller and Commissioners Pertschuk, Bailey, Douglas, and Calvani (hereinafter 1984 Transmittal Memorandum) indicates, at page 1, that "the Commissioners have adjusted the procedures originally voted on in order to assure that each Commissioner has a fair opportunity to record votes on written circulations."

On April 7, 1994, the Commission formally approved two additional sets of procedures, respectively entitled (1) "Modifications in Assignment and Voting Procedures," and (2) "Procedures to Govern the Preparation of Final Orders and Opinions in Adjudicative Proceedings." Copies of the public documents embodying these two sets of procedures are attached as Appendix D, although most of the provisions of the second set of procedures have been superseded by recent changes in the rules governing the preparation of Commission Opinions and Final Orders.

<sup>72</sup> Thus, for example, if the Commission staff recommend that the Commission simultaneously approve both an administrative or federal district court complaint and an accompanying consent agreement or decree, motions relating to such a recommendation are typically made on a notational voting basis.

and signature. Thereafter, the Front Office forwards the documents to the Document Processing Section for service, or to appropriate members of the Commission staff for further processing.

**1. Voting Mechanics** -- The votes on any given motion are registered on a voting grid on the back of the original of the motion. Both the date and the time each vote on such a motion is registered should be recorded on the voting grid.<sup>73</sup>

The language used in the motion determines the significance of each vote, **except** to the extent that the vote is otherwise explained by the voting Commissioner. For example, an affirmative vote for a motion to send a letter to a Congressional Committee providing the agency's views on a particular issue is assumed to constitute approval of the substantive views expressed, unless the Commissioner indicates otherwise. By contrast, an affirmative vote on a motion to authorize the Commission staff to present a comment to a state legislature is not assumed to mean that the Commissioner necessarily agrees with the views expressed in the comment.<sup>74</sup> If a motion includes more than one part, an affirmative vote is assumed to be an affirmative vote on each part -- and a negative vote is assumed to be a negative vote on each part -- unless the Commissioner indicates otherwise.

A Commissioner can explain any vote by means of (1) a nonpublic notation on the voting grid; (2) an internal memorandum; and/or (3) in matters of public record, a separate public statement and an explanation in the accompanying press release. If a Commissioner intends to issue a separate statement, that fact should be noted on the voting grid, and the circulation of the separate statement itself should indicate whether the statement is to be placed on the public record.

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<sup>73</sup> See 1984 Protocol at 5.

<sup>74</sup> As a consequence, each competition advocacy comment indicates that the views expressed do not necessarily reflect the views of the Commission or of any individual Commissioner. Similarly, each Bureau of Economics staff report indicates that it

has been prepared by staff members of the Bureau of Economics of the Federal Trade Commission. The views expressed do not necessarily reflect the views of the Commission or any individual Commissioner.

**2. Voting Deadlines** -- The formation of a majority either for or against a written motion sets a voting deadline by which the remaining Commissioners must vote. The date stamped by the Minutes Section on the original voting sheet determines when a majority vote has formed for the purpose of establishing deadlines.<sup>75</sup> Whenever such a deadline is established, the Minutes Section will notify the office of each Commissioner who has not yet voted.<sup>76</sup> In addition, the Minutes Section delivers to each Commissioner's office each day a complete Commission Workload Report -- generated by the OSCAR/MMS2 system -- which includes a Voting Deadlines section listing each pending motion on which a deadline has been established.<sup>77</sup> It is important to emphasize that the deadline established by these procedures for a given motion **may not coincide** with an external statutory or other deadline for Commission action. For example, the external 120 day deadline prescribed by the FTC Improvements Act of 1980 for Commission action on petitions to reopen and modify existing Commission orders may expire **before** the internal voting procedure deadline by which votes must be registered. The daily Commission Workload Report also includes a copy of the Target Motion Date Report, which lists the date by which each Commissioner theoretically should make a motion relating to each seven digit and rulemaking matter assigned to him or her.

The basis on which the motion is circulated -- that is, on a non-agenda or walk-around basis -- determines the length of time that nonvoting Commissioners will have to vote after the formation of a majority either for or against the motion. If a Commissioner has not voted by **5:00 p.m.** on the last day of the deadline period, the Secretary is required to record his or her vote as "Not Participating By Minutes [Section]."<sup>78</sup> Any Commissioner, including one who has voted on the motion, may make a motion to extend the deadline for voting on the motion.<sup>79</sup>

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<sup>75</sup> 1984 Protocol at 5. If the original motion, with the requisite majority of votes registered, is delivered to the Minutes Section by 5:00 p.m., the voting deadline is treated as having been set that day. If the original motion is delivered after 5:00 p.m., the voting deadline is treated as having been set the following business day. *Id.*

<sup>76</sup> Specific employees in Commissioners' offices should be designated to receive telephone calls concerning voting deadlines.

<sup>77</sup> Personnel in the Commissioners' offices, in the General Counsel's office, and in OS can also view this report on an on-line basis by accessing the OSCAR system through their personal computers.

<sup>78</sup> 1983 Minute at 195; 1984 Protocol at 1-3. The Rules of Practice provide that 5:00 p.m. is the end of the business day. 16 C.F.R. § 0.3.

<sup>79</sup> 1983 Minute at 195. The deadline will be extended only if such a motion is approved before the expiration of the deadline period on the underlying motion.

A Commissioner may withdraw and change his or her vote on the motion at any time before all votes have been registered.<sup>80</sup> A Commissioner who withdraws or reinstates a vote should inform the other Commissioners of that action. If the withdrawal or changing of one or more votes on the motion eliminates the majority, the voting deadline is tolled.<sup>81</sup> The deadline is reinstated if and when the majority is reestablished, and the length of time remaining when the deadline was previously tolled is used as the amount of time remaining before the new deadline period expires.<sup>82</sup> The Minutes Section will notify the offices of non-voting Commissioners of the new deadline once one is established. After voting on the motion has been completed, no vote may be changed without the approval of the Commission.

**3. Non-Agenda Nonadjudicative Motions** -- Nonadjudicative motions relating to matters on which there are no urgent time constraints are made on a non-agenda basis, using a green circulation form. The original of the motion -- with the voting grid on the back -- is sent to the Minutes Section.<sup>83</sup>

After a majority of participating Commissioners has voted for or against the motion, a voting deadline is created. The office of each nonvoting Commissioner is notified by the Minutes Section that a vote must be registered by **5:00 p.m. on the fourteenth calendar day after the voting deadline is created.**<sup>84</sup>

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<sup>80</sup> A vote must be withdrawn by a dated (including time) written notation on the voting grid on the back of the original motion. 1984 Protocol at 5.

<sup>81</sup> 1983 Minute at 195; 1984 Protocol at 5.

<sup>82</sup> *See* 1984 Transmittal Memorandum at 2-3. These calculations are made using full days until the last day of the deadline period. Thus, for example, if the deadline on a non-agenda nonadjudicative motion is tolled on the eleventh day of the deadline period, eleven days are counted as having elapsed, and if a majority vote is reinstated, three full additional calendar days will remain before the deadline. On the last day of the deadline period, elapsed and remaining time periods are instead calculated in half days, which are treated as ending at 12:30 p.m. and 5:00 p.m. respectively. Thus, for example, if the deadline on a non-agenda nonadjudicative motion is tolled at 4:50 p.m. on the fourteenth day of the deadline, thirteen and one-half days are treated as having elapsed. As a result, if a majority vote is reinstated at 4:55 p.m., the new deadline will be 12:30 p.m. on the next business day. *See id.*

<sup>83</sup> On the morning of the fourth business day after receiving the original of the motion, the Minutes Section delivers it to each Commissioner's office, so that each Commissioner may, if he or she wishes to do so, register a vote. In addition, any Commissioner may ask the Minutes Section to bring any motion up for a vote at any other time.

<sup>84</sup> 1983 Minute at 195; 1984 Protocol at 1. The same deadline procedures apply to the approval of agenda and non-agenda minutes, which are circulated by the Secretary on a non-agenda nonadjudicative basis. Commission Minutes, Volume 141, at 606 (November 4, 1985).



**4. Walk-Around Nonadjudicative Motions** -- A walk-around motion is made when a matter requires expeditious treatment. When it is circulated on a nonadjudicative basis (using a pink circulation form),<sup>85</sup> the circulating Commissioner retains the original of the motion -- containing the voting grid -- and sends the Minutes Section a copy marked "advance." The circulating Commissioner's office "walks around" the original of the motion to the other Commissioners' offices to record votes.

After a majority of participating Commissioners has voted for or against the motion, the original of the motion is delivered to the Minutes Section, and a voting deadline is created. The office of each nonvoting Commissioner is notified by the Minutes Section that a vote must be registered by **(1) 5:00 p.m. on the next business day, or (2) 5:00 p.m. on the fourth business day after the date of the motion, whichever is later.**<sup>86</sup>

**5. Adjudicative Motions** -- Motions in a particular matter are made on an adjudicative basis whenever the matter is in adjudicative status, either because it is in litigation under Part 3 of the Rules of Practice, or because it is the subject of an ongoing order to show cause proceeding under Section 3.72 of the Rules of Practice. Adjudicative motions can be made on either a non-agenda or a walk-around basis.

**(a) Non-Agenda Adjudicative Motions** -- On the same day that the original of the motion is received from the circulating Commissioner, the Minutes Section delivers it to each Commissioner's office, so that each Commissioner may, if he or she wishes to do so, register a vote.<sup>87</sup> After a majority of participating Commissioners has voted for or against the motion, a voting deadline is created.

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<sup>85</sup> Because Sunshine Act motions are walk-around motions unless otherwise noted, they are also governed by the walk-around voting deadline procedures.

<sup>86</sup> 1983 Minute at 195, *as modified by 1984 Protocol* at 2. The 1984 Transmittal Memorandum indicates that "each office agreed that it would be better to use the formula which is stated in the attached protocol; that is, the deadline on a walk-around is one day after the formation of a majority, but not less than 4 days after the date of the circulation" (emphasis in original). After a walk-around circulation has been delivered to the Minutes Section, the office of a Commissioner who wishes to record a vote should ask the Minutes Section to bring up the original circulation for that purpose.

<sup>87</sup> 1984 Protocol at 3.

(1) If the motion is to approve a Final Order and Opinion, the office of each nonvoting Commissioner is notified by the Minutes Section that a vote must be registered by **5:00 p.m. on the thirtieth calendar day after the voting deadline is created.**<sup>88</sup>

(2) If the motion is made for any other reason -- such as to issue any notices that may be needed to resolve *in camera* issues arising from the prospective public issuance of the Final Order and Opinion -- the office of each nonvoting Commissioner is notified by the Minutes Section that a vote must be registered by **5:00 p.m. on the fourteenth calendar day after the voting deadline is created.**<sup>89</sup>

**(b) Walk-Around Adjudicative Motions** -- After a majority of participating Commissioners has voted for or against the motion, and the original of the motion with the voting grid is delivered to the Minutes Section, a voting deadline is created.

(1) If the motion is to approve a Final Order and Opinion, the office of each nonvoting Commissioner is notified by the Minutes Section that a vote must be registered by **5:00 p.m. on the thirtieth calendar day after the voting deadline is created.**<sup>90</sup>

(2) If the motion is made for any other reason, the office of each nonvoting Commissioner is notified by the Minutes Section that a vote must be registered by **(1) 5:00 p.m. on the next business day, or (2) 5:00 p.m. on the fourth business day after the date of the motion, whichever is later.**<sup>91</sup>

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<sup>88</sup> 1983 Minute at 195; 1984 Protocol at 3.

<sup>89</sup> 1983 Minute at 195, *as modified by* 1984 Protocol at 3.

<sup>90</sup> 1983 Minute at 195; 1984 Protocol at 3.

<sup>91</sup> 1983 Minute at 195; 1984 Protocol at 3.

**6. Topping Motions** -- Topping (or substitute) motions constitute a vehicle for amending or supplanting a pending non-agenda or walk-around motion. A topping motion can be presented in any of the forms in which an original motion can be made, and its form need not be the same as that of the underlying motion.

A topping motion cannot become valid until it receives two affirmative votes.<sup>92</sup> At that point, the original of the topping motion -- containing the voting grid -- should be brought to the Minutes Section so that the topping motion and the two votes can be recorded in the OSCAR system. If the deadline on the underlying motion expires -- and the voting therefore closes -- before a second affirmative vote is obtained on the topping motion, the topping motion automatically fails for lack of a second.<sup>93</sup>

A valid topping motion (1) tolls any voting deadline then in effect for the underlying motion, and (2) suspends voting on all underlying motions. Voting on a valid topping motion follows normal voting procedures; after voting is completed, voting on the underlying motion resumes (unless that motion has been mooted or otherwise superseded by approval of the topping motion).<sup>94</sup> The Minutes Section will advise the nonvoting Commissioners of the new voting deadline.

A Commissioner who makes a motion may thereafter effect changes in the motion by means of a **For Information** circulation which (1) is circulated **prior** to the point at which voting on the motion closes; (2) indicates that the Commissioners who have **already voted for** the motion agree with the proposed changes; and (3) indicates, either expressly or implicitly, that **subsequent affirmative votes** will be treated as registered for the motion **as modified** (thereby satisfying the "affirmative concurrence" requirements of Rule 4.14(c)).<sup>95</sup>

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<sup>92</sup> 1983 Minute at 195, 196; 1984 Protocol at 4.

<sup>93</sup> 1984 Protocol at 4.

<sup>94</sup> 1983 Minute at 195; 1984 Protocol at 4. At Commission meetings, by contrast, once the voting on a seconded amending motion is completed, voting on the underlying motion must be completed.

<sup>95</sup> Such a circulation should state, for example, that "With the agreement of the Commissioners who have already voted for the pending motion, the attached version of the compulsory process resolution in this matter should be substituted for the version I circulated on [specify date]."

7. **The One Month Rule** -- When a majority does not form for or against a motion **within one calendar month after the most recent vote cast**, the motion will be recorded as having failed "for lack of a majority [or lack of a second, if only one vote for the motion has been registered], pursuant to the one month rule."<sup>96</sup> Two weeks before the one month period expires, the Minutes Section will inform the circulating Commissioner and those Commissioners who have not yet voted of the date on which the motion will fail.<sup>97</sup> At that point, the motion will also appear on the Voting Deadline report, under the "Expiring Circulations" heading. If the motion fails in this fashion, the matter remains with the assigned Commissioner, and another motion to dispose of the matter should then be made.

#### **D. Public Record Votes**

All votes registered on any particular motion -- whether "yes," "no," "abstain," "not participating [no reason specified]," "not participating by reason of absence," "not participating by reason of recusal," or "not participating by minutes" -- are recorded both in the nonpublic Minute Record of that matter and in the nonpublic OSCAR computer system.

The Commission Rules of Practice establish the standard for determining which of these votes should also be made public. Rule 4.9(b)(ii) provides that "[t]he final votes of each member of the Commission in all matters of public record, including matters of public record decided by notational voting," are part of the public records of the Commission.<sup>98</sup> To that end, all Commissioner votes are reported -- either directly or by implication -- on all Commission orders that are issued pursuant to a vote by the Commission and placed on the public record. If an order reads simply "By the Commission," that phrase means that all members of the Commission voted for the motion to issue the order. In addition, all Commissioner votes are reported -- either directly or by implication -- on all Commission letters that are issued pursuant to a vote by the

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<sup>96</sup> Commission Minutes, Volume \_\_\_, at \_\_\_ (April 7, 1994), *amending* Commission Minutes, Volume 142, at 102-03 (March 24, 1986).

<sup>97</sup> *Id.* The withdrawal of a vote is not a "vote cast," and therefore does not toll a deadline so established.

When an underlying motion fails pursuant to the one month rule, any topping motion which has not yet received two affirmative votes also fails.

<sup>98</sup> 16 C.F.R. § 4.9(b)(ii). The Commission has categorized votes on a large number of different types of matters as public votes, rather than minute record votes. Commission Minutes, Volume 141, at 632 (December 2, 1985). However, the votes on such a matter are not actually disclosed to the public until the decision itself becomes a matter of public record, usually through the issuance of a press release. Thus, for example, the votes on a motion to refer a civil penalty complaint to the Department of Justice for filing are not made public until the complaint is actually filed, either by the Department or by the Commission.

**APPENDIX C**  
**APRIL 7, 1994 PROCEDURES**

B153762

**NOTICE OF FEDERAL TRADE COMMISSION APPROVAL**  
**OF PROCEDURES TO GOVERN THE PREPARATION OF**  
**FINAL ORDERS AND OPINIONS**  
**IN ADJUDICATIVE PROCEEDINGS**

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On April 7, 1994, the Federal Trade Commission -- by a vote of 5-0 -- approved the following procedures to govern the preparation of Final Orders and Opinions in adjudicative proceedings,<sup>1</sup> and determined to place these procedures on the public record:

1. Commissioners should endeavor to express their conclusions on liability at the post oral argument executive session. If no majority forms at the executive session, the commissioners will agree on a date approximately 14 days later on which to reconvene the executive session for further deliberation. If no decision is reached, the commissioners will continue to set the matter for executive session every two weeks until a majority forms.
2. A draft final order and opinion should be prepared within four months after formation of a majority and circulated for comment to the other commissioners and to the general counsel on an "adjudicative for information pending motion" basis. In cases for which the assigned commissioner believes additional time will be needed to complete the draft, he or she -- at the executive session following the oral argument -- may move to revise the schedule created pursuant to paragraph 6 below. If the Commission approves that motion, the schedule will be so revised.
3. The other commissioners should submit comments on the draft final order and opinion to the assigned commissioner within one month after the circulation of the draft. If any commissioner believes that further discussion is warranted, any commissioner may schedule an executive session to consider any remaining issues.

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<sup>1</sup> The Commission Rules of Practice provide that

[a]djudicative proceedings are those formal proceedings conducted under one or more of the statutes administered by the Commission which are required by statute to be determined on the record after opportunity for an agency hearing.

16 C.F.R. § 3.2 (1994). When the Commission reviews an initial decision issued by an Administrative Law Judge in such a proceeding, an oral argument is held before the Commission (unless the Commission otherwise orders). *Id.* § 3.52(i). Immediately following the oral argument, the Commission meets in closed executive session to discuss the proceeding. Thereafter, the Commission issues a final order and opinion.

4. The assigned commissioner should move that the Commission approve a final order and opinion -- and in addition move that the Commission issue any notice that may be required to notify appropriate persons of the impending disclosure of any information submitted for the record and ruled *in camera* pursuant to Section 3.45 of the Rules of Practice, 16 C.F.R. § 3.45 (1994) -- within 45 days after receiving comments from the other commissioners.
5. If one or more commissioners note on the voting sheet that they will have separate statements, the statements shall be circulated within twenty-one calendar days following the date the vote closes. The final order and opinion shall be issued no later than 5:00 p.m. on the thirtieth calendar day following the date the vote closes, or as soon thereafter as practicable.
6. One week prior to each oral argument, the secretary shall prepare and forward to the Commission a schedule for completing a final order and opinion in the matter at issue, based on the foregoing principles. The secretary shall in addition attach a copy of the schedule -- as modified, if at all, at the executive session -- to the computer reports forwarded to each commissioner each week.
7. Whenever the Chairman moves that a discussion of the budget be scheduled for a closed meeting of the Commission, the secretary shall move that each pending adjudicative proceeding be scheduled for an executive session -- to follow the same closed meeting -- provided that the general counsel certifies that the matter may properly be closed to the public under 5 U.S.C. § 552b(c). A "pending adjudicative proceeding" is any adjudicative proceeding -- as defined in section 3.2 of the Commission Rules of Practice, 16 C.F.R. § 3.2 (1994) -- for which (1) an oral argument has been held, but (2) a final order and opinion, or a final order, has not been issued.
8. One year after these procedures are approved, a Commission meeting will be scheduled by the Chairman to consider how they have worked in practice.

By direction of the Commission.

Donald S. Clark  
Secretary

ISSUED: April 7, 1994

**NOTICE OF FEDERAL TRADE COMMISSION APPROVAL**  
**OF MODIFICATIONS IN**  
**ASSIGNMENT AND VOTING PROCEDURES**

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On April 7, 1994, the Federal Trade Commission -- by a vote of 5-0 -- approved the following modifications in its assignment and voting procedures, and determined to place these procedures on the public record:

1. With respect to (1) nonadjudicative investigation (seven numeric digits) and rulemaking ® plus six numeric digits) assignments in which a Bureau recommends that the Commission approve a course of action,<sup>2</sup> and (2) adjudicative motions to withdraw from adjudication matters pending before the Commission,

the Secretary shall forward to each Commissioner a copy of each such matter, at the time the matter is assigned to a Commissioner. If the assigned Commissioner does not make a Sunshine Act or other motion relating to the matter within 45 calendar days after the date of assignment, the Secretary shall reassign the matter to another Commissioner in the regular rotation.<sup>3</sup> Another Commissioner may, at that time, request the reassignment. The matter shall then be assigned to that Commissioner. If more than one Commissioner requests reassignment, reassignment shall be made to the requesting Commissioner who would be the next in line to receive an assignment in the regular rotation.

2. With respect to any unresolved agenda nonadjudicative matter, defined as any matter that has been the subject of a Commission meeting, but for which a motion other than a Sunshine Act motion has not been made,

whenever a Commissioner moves that a matter be scheduled for a closed meeting of the Commission -- on a date not previously scheduled -- the Secretary shall move that each unresolved agenda nonadjudicative matter be scheduled for the same closed meeting, provided that the General Counsel certifies that the matter may properly be closed to the public under 5 U.S.C. § 552b(c).<sup>4</sup>

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<sup>2</sup> Because they do not require the approval of the Commission, once compulsory process has been authorized, Part 2 subpoenas and civil investigative demands are not covered by this procedure.

<sup>3</sup> Under current procedures, Commissioners have agreed to circulate assignments within one month of receipt from the Office of the Secretary, either with a motion or on a "for information" basis. *Commission Minutes*, Volume 140, at 196 (September 15, 1983).

<sup>4</sup> Under current procedures, whenever the Commissioner assigned a particular matter believes that it should be discussed at a closed Commission meeting -- and the General Counsel

3. With respect to the three month rule -- which currently provides that when a motion has been circulated but does not achieve a majority within three calendar months of the most recent vote cast, it is recorded as having failed for lack of a second or lack of a majority<sup>5</sup> -- the phrase "three calendar months" shall be replaced with the phrase "one calendar month."

By direction of the Commission.

Donald S. Clark  
Secretary

ISSUED: April 7, 1994

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certifies that the matter may be discussed at such a meeting -- the assigned Commissioner moves that the matter be scheduled for a closed meeting of the Commission, as permitted by the Sunshine Act.

<sup>5</sup> *Commission Minutes*, Volume 142, at 102-03 (March 24, 1986).