

## MEMORANDUM

To:  
From: T. Jeremy Gunn  
Date:  
Re: ARRB Internal Procedural Rules Relating to Quorum and Voting Requirements  
File:

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The JFK Act does not establish any requirements related to quorum or voting requirements for Board meetings.<sup>1</sup> The Administrative Procedures Act, which regulates agency rulemaking and establishes notice and publication requirements, does not establish rules governing agencies' internal rulemaking and voting requirements.<sup>2</sup> Similarly, Executive Order 12,866 (Sept. 30, 1993), exempts from reporting requirements rules that “are limited to agency organization, management, or personnel matters . . . .”<sup>3</sup> Accordingly, the sole legal restriction on the Board's internal voting procedures, quorum requirements, and other internal operating procedures, is that they be reasonable and rational.<sup>4</sup>

Although the law does not require the formal establishment of voting and quorum requirements, it would probably be advisable for the Board to establish such rules (subject to later revision or amendment) and to make the rules and procedures available for public inspection in the Reading Room.

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<sup>1</sup>The sole relevant guidance from the Act is its repeated statement that it *presumes* disclosure, which suggests that a *majority* of the members of the Board would need to vote *for a postponement* (rather than requiring a majority to vote for a release) in order for the postponement to be sustained.

<sup>2</sup>The relevant portion of the Administrative Procedure Act provides that the reporting requirements that pertain to most federal rulemaking procedures do not apply to an agency's “interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice . . . .” 5 U.S.C. 553(b)(A). [**ACUS Rulemaking/Attorney General's Manual on the APA (1947).**]

<sup>3</sup>Exec. Order No. 12,866, 3 C.F.R. \_\_\_\_ (1993) *reprinted* 3 U.S.C. § \_\_\_\_ [if not in CFR, \_\_\_\_ Fed. Reg. \_\_\_\_ (1993) [published in F.R. October 4, 1993]].

<sup>4</sup>*See, e.g., Idaho v. ICC*, 939 F.2d 784, 788 (9th Cir. 1991) (“In the absence of Congress' explicit direction, the [Interstate Commerce] Commission is empowered to prescribe regulations and procedures to carry out [its obligations under its enabling statute]. We need only satisfy ourselves that the Commission set forth a rational basis for its notational vote counting policy.”)

To the extent that the Board wishes to deliberate on the procedural rules that it will follow, it should deliberate on the rules at an open meeting that has been noticed properly. The Board may wish to discuss its procedural rules at its next open meeting in New Orleans. (Note: an “open meeting” is not the same as a “hearing.”)

It would presumably be the Board's preference to Because the  
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he Board has had the opportunity to deliberate on the question at its next open meeting, the Staff recommends that the following voting procedures be adopted by notation voting as an interim measure.

1. Three Board members shall constitute a quorum.
2. Board meetings can be held only when a quorum is present.
3. Board meetings can be held only as permitted by federal law (including the Sunshine Act)
4. The affirmative vote of a simple majority of the Board (three members) shall be sufficient to constitute a Board decision, except with respect to a vote whether to release or postpone information.
5. Because the JFK Act presumes the disclosure of information, every postponement will be released in full unless three Board members vote to sustain the postponement.
6. No vote on a postponement (or record) shall be made prior to the time that all Board members will have had an adequate opportunity to review the postponement (or record).
7. Board members may vote by proxy on all issues *except* as otherwise provided by law (*e.g.*, Board members may not vote by proxy to close a meeting).
8. The votes of all Board members shall be separately recorded for all votes.
9. The Board may vote by notational voting or by telephone voting. However, no notational voting or telephone polling may be conducted in violation of the Sunshine Act.
10. The Board may delegate to two or more members the authority to make preliminary decisions with respect to the release of postponed records. However, the preliminary decisions must be ratified in a meeting, *provided that* no portion of any record can be postponed unless three Board members have voted to postpone the record.

- Example 1: Subcommittee of two makes preliminary decision to release record. Three person quorum unanimously accepts recommendation. Record is released.
- Example 2: Subcommittee of two makes preliminary decision to release record. Four person quorum evenly divided on question to release record. Record is released.
- Example 3: Subcommittee of two makes preliminary decision to postpone record. Three person quorum unanimously agrees to release record. Record is released.
- Example 4: Subcommittee of two makes preliminary decision to release record. Four person quorum votes 3-1 to postpone. Record is postponed.
- Example 5: Subcommittee of two evenly split on decision to postpone. Quorum of four is split 2-2 on decision to postpone, but the person on the subcommittee who voted to postpone is not present at final meeting. Because three Board members have voted to postpone, the record is postponed.