

the National Archives and Records Administration (NARA) or other NARA-approved records retention schedule.

(b) Materials that are identified as responsive to a FOIA request will not be disposed of or destroyed while the request or a related appeal of lawsuit is pending. This is true even if they would otherwise be authorized for disposition under the Board's General Records Schedule of NARA or other NARA-approved records schedule.

[82 FR 24828, May 31, 2017]

Subpart B—Production in Response to Subpoenas or Demands of Courts or Other Authorities

SOURCE: 85 FR 67266, Oct. 22, 2020.

AUTHORITY: 5 U.S.C. 301, 522, and 8474(b).

§ 1631.30 Applicability.

This subpart applies to demands and requests to a Board employee for factual or expert testimony relating to official information, or for production of official records or information, in legal proceedings in which neither the Board or nor the Board employee is a named party. However, it does not apply to:

(a) Demands upon, or requests for, a current Board employee to testify as to facts or events that are unrelated to his or her official duties or that are unrelated to the functions of the Board;

(b) Requests for the release of records under the Freedom of Information Act, 5 U.S.C. 552, or the Privacy Act, 5 U.S.C. 552(a); and

(c) Congressional demands and requests for testimony of records.

§ 1631.31 Definitions.

Demand means a subpoena, or an order or other command of a court or other competent authority, for the production, disclosure, or release of records or for the appearance and testimony of a Board employee that is issued in a legal proceeding.

General Counsel means the General Counsel of the Board or his or her delegatee.

Legal proceeding means any matter before a court of law, administrative board or tribunal, commission, admin-

istrative law judge, hearing officer, or other body that conducts a legal or administrative proceeding. Legal proceeding includes all phases of litigation.

Board employee or employee means:

(1) Any current or former officer or employee of the Board;

(2) Any other individual hired through contractual agreement by or on behalf of the Board or who has performed or is performing services under such an agreement for the Board; and

(3) Any individual who served or is serving in any consulting or advisory capacity to the Board, whether formal or informal.

(4) Provided, that this definition does not include persons who are no longer employed by the Board and who are retained or hired as expert witnesses or who agree to testify about general matters available to the public, or matters with which they had no specific involvement or responsibility during their employment with the Board.

Records or official records and information mean:

(1) All documents and materials which are Board records under the Freedom of Information Act, 5 U.S.C. 552;

(2) All other documents and materials contained in Board files; and

(3) All other information or materials acquired by a Board employee in the performance of his or her official duties or because of his or her official status.

Request means any informal request, by whatever method, for the production of records and information or for testimony which has not been ordered by a court or other competent authority.

Testimony means any written or oral statements, including depositions, answers to interrogatories, affidavits, declarations, recorded interviews, and statements made by an individual in connection with a legal proceeding.

§ 1631.32 General prohibition.

No employee may produce official records and information or provide any testimony relating to official information in response to a demand or request without the prior, written approval of the General Counsel.

§ 1631.33 Factors the General Counsel will consider.

(a) The General Counsel, in his or her sole discretion, may grant an employee permission to testify on matters relating to official information, or produce official records and information, in response to an appropriate demand or request. Among the relevant factors that the General Counsel may consider in making this decision are whether:

- (1) Allowing such testimony or production of records would assist or hinder the Board in performing its statutory duties or use Board resources in a way that will interfere with the ability of Board employees to do their regular work;
- (2) Allowing such testimony or production of records would be in the best interest of Thrift Savings Plan participants and beneficiaries;
- (3) The records or testimony can be obtained from other sources;
- (4) The Board has an interest in the decision that may be rendered in the legal proceeding;
- (5) The demand improperly seeks to compel a Board employee to serve as an expert witness for a private interest;
- (6) The demand improperly seeks to compel a Board employee to testify as to a matter of law;
- (7) Disclosure would result in the Board appearing to favor one private litigant over another private litigant;
- (8) Disclosure relates to documents that were produced by another government agency; and
- (9) The demand or request is unduly burdensome or otherwise inappropriate under the applicable rules of discovery or the rules of procedure governing the case or matter in which the demand or request arose.

(b) The factors listed in paragraph (a) of this section are illustrative and not exhaustive.

§ 1631.34 Filing requirements for demands or requests for testimony.

You must comply with the following requirements whenever you send a demand or request for testimony to the Board or a Board employee. If you serve a subpoena on the Board or a Board employee that is not accompanied by a written request that com-

plies with the requirements in this section, the General Counsel may oppose the subpoena on grounds that your request was not submitted in accordance with this subpart.

(a) Your request must be in writing and must contain the following information:

- (1) The caption of the legal proceeding, docket number, and name and address of the court or other authority involved.
- (2) A copy of the complaint or equivalent document setting forth the assertions in the case and any other pleading or document necessary to show relevance;
- (3) A specific description of the substance of the testimony sought;
- (4) A statement indicating that the information sought is not available from another source, from other persons or entities, or from the testimony of someone other than a Board employee, such as a retained expert;
- (5) An explanation as to why no document could be provided and used in lieu of testimony;
- (6) If oral testimony is sought, an explanation as to why a written declaration or affidavit cannot be used in lieu of oral testimony;
- (7) A description of all prior decisions, orders, or pending motions in the case that bear upon the relevance of the requested testimony;
- (8) The name, address, and telephone number of counsel to each party in the case; and
- (9) An estimate of the amount of time that the requester and other parties will require with each Board employee for time spent by the employee to prepare for testimony, in travel, and for attendance in the legal proceeding.

(b) The Board reserves the right to require additional information to complete your request where appropriate.

(c) Your request should be submitted at least 45 days before the date that the testimony is required. Requests submitted in less than 45 days before testimony is required must be accompanied by a written explanation stating the reasons for the late request and the reasons for requesting expedited processing.

(d) Failure to cooperate in good faith to enable the General Counsel to make

an informed decision may serve as the basis for a determination not to comply with your request.

§ 1631.35 Certification (authentication) of copies of records.

The Board may certify that copies of records are true copies in order to facilitate their use as evidence. The records custodian or other qualified individual shall certify copies of books, records, papers, writings, and documents by attaching a written declaration that complies with current Federal Rules of Evidence. No seal or notarization shall be required.

§ 1631.36 Fees.

(a) *Generally.* The Board may condition the production, disclosure, or release of records or the appearance and testimony of a Board employee upon advance payment of a reasonable estimate of the costs to the Board.

(b) *Fees for records.* Fees for the production, disclosure, or release of records are the same as those charged by the Board in its Freedom of Information Act regulations in subpart A of this part.

(c) *Fees for oral testimony.* Fees for attendance by a witness will include fees, expenses, and allowances prescribed by the court's rules. If no such fees are prescribed, witness fees will be determined based upon the rule of the Federal district court closest to the location where the witness will appear. Such fees will include cost of time spent by the witness to prepare for testimony, in travel, and for attendance in the legal proceeding.

(d) *Fees for written testimony.* For time spent by each employee preparing affidavits or declarations (including declarations to authenticate records), the Board may assess charges at the rate described in § 1631.14(a).

Subpart C—Administrative Subpoenas

AUTHORITY: 5 U.S.C. 8480.

SOURCE: 75 FR 8796, Feb. 26, 2010, unless otherwise noted.

§ 1631.40 Subpoena authority.

The Executive Director or General Counsel may issue subpoenas pursuant to 5 U.S.C. 8480. The General Counsel may delegate this authority to a Deputy General Counsel, Associate General Counsel, or Assistant General Counsel.

§ 1631.41 Production of records.

A subpoena may require the production of designated books, documents, records, electronically stored information, or tangible materials in the possession or control of the subpoenaed party when the individual signing the subpoena has determined that production is necessary to carry out any of the Agency's functions.

§ 1631.42 Service.

(a) *Return of service.* Each subpoena shall be accompanied by a Return of Service certificate stating the date and manner of service and the names of the persons served.

(b) *Methods of service.* Subpoenas shall be served by one of the following methods:

(1) Certified or registered mail, return receipt requested to the principal place of business or the last known residential address of the subpoenaed party.

(2) Fax or electronic transmission to the subpoenaed party or the subpoenaed party's counsel, provided the subpoenaed party gives prior approval.

(3) Personal delivery at the principal place of business or residence of the subpoenaed party during normal business hours.

§ 1631.43 Enforcement.

Upon the failure of any party to comply with a subpoena, the General Counsel shall request that the Attorney General seek enforcement of the subpoena in the appropriate United States district court.

PART 1632—RULES REGARDING PUBLIC OBSERVATION OF MEETINGS

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AUTHORITY: 5 U.S.C. 552b and 5 U.S.C. 8474.

SOURCE: 53 FR 36777, Sept. 22, 1988, unless otherwise noted.

§ 1632.1 Purpose and scope.

This part is issued by the Federal Retirement Thrift Investment Board (Board) under section 552b of title 5 of the United States Code, the Government in the Sunshine Act, to carry out the policy of the Act that the public is entitled to the fullest practicable information regarding the decision making processes of the Board while at the same time preserving the rights of individuals and the ability of the Board to carry out its responsibilities. These regulations fulfill the requirement of subsection (g) of the Act that each agency subject to the provisions of the Act shall promulgate regulations to implement the open meeting requirements of subsections (b) through (f) of the Act.

§ 1632.2 Definitions.

For purposes of this part, the following definitions shall apply:

(a) The term *Act* means the Government in the Sunshine Act, 5 U.S.C. 552b.

(b) The term *Board* means the Federal Retirement Thrift Investment Board and subdivisions thereof.

(c) The term *meeting* means the deliberations of at least the number of individual agency members required to take action on behalf of the Board where such deliberations determine or result in the joint conduct or disposition of official Board business. However, this term does not include—

(1) Deliberations required or permitted by subsection (d) or (e) of the Act (relating to decisions to close all or a portion of a meeting, or to decisions on the timing or content of an announcement of a meeting), or

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(2) The conduct or disposition of official agency business by circulating written material to individual members.

(d) The term *number of individual agency members required to take action on behalf of the agency* means three members.

(e) The term *member* means a member of the Board appointed under section 101 of the Federal Employees' Retirement System Act of 1986, 5 U.S.C. 8472.

(f) The term *public observation* means that the public shall have the right to listen and observe but not the right to participate in the meeting or to record any of the meeting by means of cameras or electronic or other recording devices unless approval in advance is obtained from the Secretary of the Board.

§ 1632.3 Conduct of agency business.

Members shall not jointly conduct or dispose of official Board business other than in accordance with this part.

§ 1632.4 Meetings open to public observation.

(a) Except as provided in §1632.5 of this part, every portion of every meeting of the agency shall be open to public observation.

(b) The Freedom of Information Act, 5 U.S.C. 552, and the Board's implementing regulations, 5 CFR part 1611, shall govern the availability to the public of copies of documents considered in connection with the Board's discussion of agenda items for a meeting that is open to public observation.

(c) The annual Board meeting schedule will be maintained on *frtib.gov*. In addition, agency announcements of meetings open to public observation will be published in the FEDERAL REGISTER. Requests for announcements may be made by telephoning or by writing to the Office of External Affairs, Federal Retirement Thrift Investment Board, 77 K Street NE, Suite 1000, Washington, DC 20002.

[53 FR 36777, Sept. 22, 1988, as amended at 59 FR 55331, Nov. 7, 1994; 77 FR 11384, Feb. 27, 2012; 85 FR 12432, Mar. 3, 2020]

§ 1632.5 Exemptions.

(a) Except in a case where the Board finds that the public interest requires

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otherwise, the Board may close a meeting or a portion or portions of a meeting under the procedures specified in § 1632.7 or § 1632.8 of this part, and withhold information under the provisions of §§ 1632.6, 1632.7, 1632.8, or 1632.11 of this part, where the Board properly determines that such meeting or portion of its meeting or the disclosure of such information is likely to:

(1) Disclose matters that are:

(i) Specifically authorized under criteria established by an Executive Order to be kept secret in the interests of national defense or foreign policy, and

(ii) In fact properly classified pursuant to such Executive Order;

(2) Relate solely to internal personnel rules and practices;

(3) Disclose matters specifically exempted from disclosure by statute (other than section 552 of title 5 of the United States Code), provided that such statute:

(i) Requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or

(ii) Established particular criteria for withholding or refers to particular types of matters to be withheld;

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

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

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

(7) Disclose investigatory records compiled for law enforcement purposes, or information which if written would be contained in such records, but only to the extent that the production of such records or information would:

(i) Interfere with enforcement proceedings,

(ii) Deprive a person of a right to a fair trial or an impartial adjudication,

(iii) Constitute an unwarranted invasion of personal privacy,

(iv) Disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by a Federal

agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source,

(v) Disclose investigative techniques and procedures, or

(vi) Endanger the life or physical safety of law enforcement personnel;

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

(9) Disclose information the premature disclosure of which would:

(i) Be likely to (A) lead to significant speculation in currencies, securities, or commodities, or (B) significantly endanger the stability of any financial institution; or

(ii) Be likely to significantly frustrate implementation of a proposed action except that paragraph (a)(9)(ii) of this section shall not apply in any instance where the Board has already disclosed to the public the content or nature of its proposed action, or where the Board is required by law to make such disclosure on its own initiative prior to taking final action on such proposal; or

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

(b) [Reserved]

§ 1632.6 Public announcement of meetings.

(a) Except as otherwise provided by the Act, public announcement of meetings open to public observation and meetings to be partially or completely closed to public observation pursuant to § 1632.7 of this part will be made at least one week in advance of the meeting. Except to the extent such information is determined to be exempt from disclosure under § 1632.5 of this part,

each such public announcement will state the time, place and subject matter of the meeting, whether it is to be open or closed to the public, and the name and phone number of the official designated to respond to requests for information about the meeting.

(b) If a majority of the members of the Board determines by a recorded vote that Board business requires that a meeting covered by paragraph (a) of this section be called at a date earlier than that specified in paragraph (a) of this section, the Board shall make a public announcement of the information specified in paragraph (a) of this section at the earliest practicable time.

(c) Changes in the subject matter of a publicly announced meeting, or in the determination to open or close a publicly announced meeting or any portion of a publicly announced meeting to public observation, or in the time or place of a publicly announced meeting made in accordance with the procedures specified in §1632.9 of this part, will be publicly announced at the earliest practicable time.

(d) Public announcements required by this section will be posted at the Board's External Affairs Office and may be made available by other means or at other locations as may be desirable.

(e) Immediately following each public announcement required by this section, notice of the time, place and subject matter of a meeting, whether the meeting is open or closed, any change in one of the preceding announcements and the name and telephone number of the official designated by the Board to respond to requests about the meeting, shall also be submitted for publication in the FEDERAL REGISTER.

§ 1632.7 Meetings closed to public observation.

(a) A meeting or a portion of a meeting will be closed to public observation, or information as to such meeting or portion of a meeting will be withheld, only by recorded vote of a majority of the Members of the Board when it is determined that the meeting or the portion of the meeting or the withholding of information qualifies for ex-

emption under §1632.5. Votes by proxy are not allowed.

(b) Except as provided in paragraph (c) of this section, a separate vote of the Members of the Board will be taken with respect to the closing or the withholding of information as to each meeting or portion thereof which is proposed to be closed to public observation or with respect to which information is proposed to be withheld pursuant to this section.

(c) A single vote may be taken with respect to a series of meetings, a portion or portions of which are proposed to be closed to public observation or with respect to any information concerning such series of meetings proposed to be withheld, so long as each meeting or portion thereof in such series involves the same particular matters and is scheduled to be held no more than thirty days after the initial meeting in such series.

(d) Whenever any person's interests may be directly affected by a portion of the meeting for any of the reasons referred to in exemption (a)(5), (a)(6) or (a)(7) of §1632.5 of this part, such person may request in writing to the Secretary of the Board that such portion of the meeting be closed to public observation. The Secretary, or in his or her absence, the Acting Secretary of the Board, shall transmit the request to the members and upon the request of any one of them a recorded vote shall be taken whether to close such meeting to public observation.

(e) Within one day of any vote taken pursuant to paragraphs (a) through (d) of this section, the agency will make publicly available at the Board's External Affairs Office a written copy of such vote reflecting the vote of each member on the question. If a meeting or a portion of a meeting is to be closed to public observation, the Board, within one day of the vote taken pursuant to paragraphs (a) through (d) of this section, will make publicly available at the Board's External Affairs Office a full written explanation of its action closing the meeting or portion of the meeting together with a list of all persons expected to attend the meeting and their affiliation, except to the extent such information is determined by the Board to be exempt from disclosure