[ORAL ARGUMENT NOT SCHEDULED]

No. 22-5095

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

CENTER FOR BIOLOGICAL DIVERSITY, *et al.*,

Plaintiffs-Appellants,

v.

U.S. INTERNATIONAL DEVELOPMENT FINANCE CORPORATION,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Center for Biological Diversity, Center for International Environmental Law, and Friends of the Earth were the plaintiffs in the district court and are the appellants in this Court. The defendant in the district court, and now appellee in this Court, is the U.S. International Development Finance Corporation. A brief of amicus curiae in support of plaintiffs-appellants has been filed in this Court by the Accountability Counsel.

B. Rulings Under Review

Plaintiffs-appellants seek review of the district court's opinion and order of February 11, 2022, granting defendant's motion to dismiss. Docket Nos. 13, 14.

C. Related Case

This case has not previously been before this Court or any other court. Counsel is not aware of any related cases currently pending in this Court or in any other court within the meaning of Circuit Rule 28(a)(1)(C).

/s/ Samantha L. Chaifetz
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GLOSSARY

Board	Board of Directors
BUILD Act	Better Utilization of Investments Leading to Development Act of 2018
CEO	Chief Executive Officer
DFC	U.S. International Development Finance Corporation
JA	Joint Appendix
OLC	U.S. Department of Justice's Office of Legal Counsel

INTRODUCTION

In 2018, Congress enacted the Better Utilization of Investments Leading to Development Act of 2018 (BUILD Act), Pub. L. No. 115-254, 132 Stat. 3186 (codified as amended at 22 U.S.C. §§ 9601-9689). The BUILD Act established the U.S. International Development Finance Corporation (DFC or the Corporation) to mobilize private sector capital and skills to assist in the economic development of less developed countries. 22 U.S.C. § 9612. And Congress formed the DFC by consolidating the Overseas Private Investment Corporation and the United States Agency for International Development's Development Credit Authority and transferring their functions to the new wholly owned government corporation. *Id.* § 9683.

Like one of its predecessors, the Overseas Private Investment Corporation, the DFC is headed by a Board of Directors (Board). But, in the BUILD Act, Congress structured the DFC's Board differently—whereas a majority of the Overseas Private Investment Corporation's fifteen board members were appointed to those positions by the President with the advice and consent of the Senate, only a minority of the nine members of the DFC's Board are appointed in this way. *Compare* 22 U.S.C. § 2193(b) (2017) *with id.* § 9613(b)(2)(A)(iii).

As the district court recognized, the new structure of the Board placed the DFC outside the scope of the Government in the Sunshine Act (Sunshine Act),

which applies only to federal agencies that are "headed by a collegial body composed of two or more individual members, a *majority of whom are appointed to such position* by the President with the advice and consent of the Senate." 5 U.S.C. § 552b(a)(1) (emphasis added).

The President appoints only four of the nine board members to their positions on the DFC's Board. 22 U.S.C. § 9613(b)(2)(A)(iii). The other five members of the DFC's Board are government officials, such as the Secretary of State, who are identified in the BUILD Act. *Id*. § 9613(b)(2)(A)(i)-(ii). They sit on the Board by virtue of the other federal positions to which they are appointed and confirmed. And this Court has made clear that such board members, although "appointed to some position by the President with the advice and consent of the Senate," cannot be counted toward a Sunshine Act majority because they are not "so appointed to their *Board* positions." *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 240 (D.C. Cir. 1981).

Plaintiffs concede that this is true for four of the five statutorily-designated board members, but they urge that one of the five—the Chief Executive Officer of the DFC—should be regarded as a direct appointment to the Board by the President, thereby establishing the majority required to render the DFC subject to the Sunshine Act.

The district court properly recognized that that is no basis in law for plaintiffs' position, and, indeed, it is squarely foreclosed by *Symons*. As the court explained, the Chief Executive Officer—like the four other governmental officials placed on the Board by the BUILD Act—simply is not appointed by the President *to a Board position*. Because none of the five ex officio government officials on the Board can be counted toward a Sunshine Act majority, the DFC is not subject to the Sunshine Act's requirements.

STATEMENT OF JURISDICTION

Plaintiffs invoked the district court's jurisdiction under 5 U.S.C. § 552b and 28 U.S.C. § 1331. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

Whether the district court correctly concluded that the U.S. International Development Finance Corporation is not subject to the Sunshine Act because only a minority of its board members are appointed to their board positions by the President with the advice and consent of the Senate.

PERTINENT STATUTES AND REGULATIONS

Pertinent statutes and regulations are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Statutory Framework

1. Government in the Sunshine Act

In enacting the Sunshine Act, Congress sought to strike a balance: promoting transparency while "protecting the rights of individuals and the ability of the Government to carry out its responsibilities." Government in the Sunshine Act, Pub. L. No. 94-409, § 2, 90 Stat. 1241, 1241 (1976). The Sunshine Act requires covered agencies to open their board meetings "to public observation," subject to ten specified exemptions. 5 U.S.C. § 552b(b)-(c); *see also id.* § 552b(a) (defining covered "meetings"). The Sunshine Act also sets other procedural requirements related to such meetings: Advance public notice must be given; and certain procedures must be followed if a meeting (or a portion thereof) is being closed to the public, such as retention by the agency of a transcript, recording, or, in some cases, minutes of closed sessions. *See id.* § 552b(d)-(f).

As part of the balance being struck between transparency, individual rights, and operability, Congress limited the applicability of the Sunshine Act's requirements to certain covered agencies—that is, those meeting the definitional requirements of "an agency" under 5 U.S.C. § 552b(a). *See* S. Rep. No. 94-354, at 9-10 (1975). In contrast with the broader definitions of "agency" under the Administrative Procedure Act, 5 U.S.C. § 551, and Freedom of Information Act,

id. § 552, the Sunshine Act applies only to an "executive branch authority or independent regulatory agency 'headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate,'" *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1182 (D.C. Cir. 2000) (quoting 5 U.S.C. § 552b(a)(1)); *see* 5 U.S.C. § 552(f) (incorporated and narrowed by 5 U.S.C. § 552b(a)(1)). Executive branch authorities with only a minority of their board members appointed "to such position" by the President are not subject to the Sunshine Act. 5 U.S.C. § 552b(a)(1).

Covered agencies are required to promulgate regulations to implement the Sunshine Act's open meeting requirements. 5 U.S.C. § 552b(g) (providing for judicial review of failures to promulgate implementing regulations and challenges to the adequacy of existing regulations).

2. BUILD Act and the U.S. International Development Finance Corporation

The U.S. International Development Finance Corporation was established by Congress in the Better Utilization of Investments Leading to Development Act of 2018 (BUILD Act), Pub. L. No. 115-254, 132 Stat. 3186 (codified as amended at 22 U.S.C. §§ 9601-9689). The BUILD Act transferred the development finance operations of the Overseas Private Investment Corporation and the United States

Agency for International Development's Development Credit Authority to the new entity. *See* 22 U.S.C. § 9683.

The BUILD Act also provided the DFC with a distinct mission and new authorities,[1] and—as relevant here—gave it a new governance structure: The DFC is governed by a nine-member Board of Directors. *See* 22 U.S.C. § 9613(b)(2)(A). Four members are expressly appointed to the Board "by the President with the advice and consent of the Senate," *id.* § 9613(b)(2)(A)(iii), and five members sit on the Board by virtue of another government position they hold, *id.* § 9613(b)(2)(A)(i)-(ii). These five members are the Chief Executive Officer (CEO) of the DFC, the Secretary of State, the Administrator of the United States Agency for International Development, the Secretary of the Treasury, and the Secretary of Commerce. *Id.* § 9613(b)(2)(A)(i), (B)(i).

While the DFC's new Board structure under the BUILD Act implicates the Sunshine Act, Congress directly imposed other transparency, accountability, and public engagement requirements tailored for the DFC. The BUILD Act requires DFC's Board to hold two public hearings, which allow for direct public

[1] *See generally, e.g.*, H.R. Rep. No. 115-814, at 28-30 (2018); Shayerah I. Akhtar & Nick M. Brown, Cong. Research Serv., R47006, *U.S. International Development Finance Corporation: Overview and Issues* 5-6 (2022), https://crsreports.congress.gov/product/pdf/R/R47006 (explaining that the DFC aims to "mobilize private sector investment," "advance U.S. commercial competitiveness," "integrate its efforts with U.S. foreign policy," and "offer an alternative to predatory investments from authoritarian states.").

participation, per year. 22 U.S.C. § 9613(c). *See, e.g.*, 86 Fed. Reg. 24,597 (May 7, 2021) (providing advance notice of a public hearing and inviting attendance, presentations of views, or submission of written comments).[2] Relatedly, the BUILD Act directs the Board to develop, in consultation with interested parties, a policy with respect to hearings and other public engagement "to provide for meaningful public participation." 22 U.S.C. § 9613(b)(1)(C); *see* Bd. of Dirs. of the U.S. Int'l Dev. Fin. Corp, *DFC Board of Directors Policy on Public Engagement* (Dec. 10, 2020), https://perma.cc/2CRL-W6AJ (requiring, for example, public advance notice of board meetings and agendas, as well as public summaries of projects being considered).

Pursuant to the BUILD Act, the DFC also maintains a public database with project-level information, 22 U.S.C. § 9654, and for any project "likely to have significant adverse environmental or social impacts that are sensitive, diverse, or unprecedented," an impact assessment or audit must be completed and made available to the public *before* Board approval. *Id*. § 9671(e)(2).[3]

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[2] Following a transition period, the DFC officially began operations on January 1, 2020, and has held two public hearings annually since then. *See* DFC, *Public Hearings* (2020-2022), https://perma.cc/87AV-3CR5 (hearing notices, agendas, written submissions).

[3] Additionally, the BUILD Act calls for the establishment of "a transparent and independent accountability mechanism." 22 U.S.C. § 9614(a)-(b); *see* Bd. of Dirs. of the U.S. Int'l Dev. Fin. Corp., *Independent Accountability Mechanism for the U.S. International Development Finance Corporation* (Sept. 9, 2020), https://perma.cc/5YKS-2TXN.

B. Regulatory Background

Forty years before Congress enacted the BUILD Act to create the DFC, the Overseas Private Investment Corporation promulgated regulations under the Sunshine Act, as mandated by 5 U.S.C. § 552b(g). *See* 42 Fed. Reg. 13,110 (Mar. 9, 1977) (codified at 22 C.F.R. pt. 708). The Overseas Private Investment Corporation was subject to the Sunshine Act because eight of its fifteen board members were appointed by the President with the advice and consent of the Senate. The remaining seven, including the President of the Corporation, served as board members by virtue of their other government positions. 22 U.S.C. § 2193(b) (2017) (repealed by the BUILD Act, Pub. L. No. 115–254, div. F, tit. VI, § 1464(2), 132 Stat. at 3513); *see* Op. 2-3. The Sunshine Act-implementing regulations described the Overseas Private Investment Corporation's procedures for scheduling meetings, announcing meetings, and holding closed meetings. *See* 22 C.F.R. §§ 708.1-.6 (1977).[4]

[4] As plaintiffs note (Br. 15 n.7), the Sunshine Act includes "many fact-specific exceptions" allowing agency boards to use closed sessions to protect various types of sensitive information. The Overseas Private Investment Corporation's typical board meetings consisted of a 15-minute open session, followed by a closed session, where, *inter alia*, any Board discussion of confidential project proposals occurred. *See, e.g.*, 84 Fed. Reg. 44,341 (Aug. 23, 2019) (announcing 15-minute open session involving an update from the President, tributes to staff, and review of the minutes of the prior open session, followed by closed session to discuss particular projects); 84 Fed. Reg. 6839 (Feb. 28, 2019) (same). Plaintiffs reference past opportunities to comment on project proposals

Continued on next page.

In transferring the functions of the Overseas Private Investment Corporation and Development Credit Authority to the DFC in 2018, Congress included a subchapter of "transitional provisions." 22 U.S.C. §§ 9681-9689; *see id.* § 9683. The savings provision there provided that "[c]ompleted administrative actions," including "rules" and "regulations," of the entities being "transfer[red]" to the DFC "shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside, or revoked in accordance with law … or by operation of law." 22 U.S.C. § 9686(a)(1)-(2). Accordingly, the DFC assumed the Overseas Private Investment Corporation's regulations, including its Sunshine Act regulations. *See* 84 Fed. Reg. 37,751 (Aug. 2, 2019) (explaining that the Overseas Private Investment Corporation's regulations were all "administrative").

As part of the transition, the DFC's Office of the General Counsel reviewed all transferred regulations in light of the "significant differences" between the DFC and the Overseas Private Investment Corporation. 85 Fed. Reg. 20,423, 20,423 (Apr. 13, 2020). The Office of the General Counsel determined that the Sunshine Act is inapplicable because the DFC "does not meet the definition of 'agency' under the Act" as a majority of its board members "hold their [board] position by

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(*e.g.*, Br. 8), so it is important to make clear that was not a function of the Sunshine Act. The Sunshine Act provides for observation of—but not participation in—board meetings. *See* Pls' Br. 17 n.8.

virtue of appointment to a different office," rather than having been appointed to their board positions "solely for the purpose of serving on DFC's Board." *Id.*

Prior to taking any action to remove the regulations, the DFC requested and received an opinion from the U.S. Department of Justice's Office of Legal Counsel on this question. The Office of Legal Counsel agreed that the Sunshine Act does not apply to the DFC, given the make-up of the Board. *See* Pls.' Compl. ¶ 51 (quoting Letter from Liam P. Hardy, Deputy Assistant Att'y Gen., to Kevin L. Turner, Vice President & Gen. Counsel of the DFC (Feb. 25, 2020)).

Based on the legal conclusions of its Office of the General Counsel and of the Department of Justice's Office of Legal Counsel, the DFC issued a rule recognizing the inapplicability of the Sunshine Act and removing the Sunshine Act regulations from the Code of Federal Regulations. *See* 85 Fed. Reg. at 20,423 (removing and reserving 22 C.F.R. §§ 708.1-.6). The rule explained that, under the BUILD Act, only a minority of the DFC's board members "are appointed by the President with the advice and consent of the Senate solely for the purpose of serving on DFC's Board." *Id.*; *see* 22 U.S.C. § 9613(b)(2)(A). The rule concluded that the DFC therefore does not qualify as an "agency" within the meaning of the Sunshine Act and thus is not subject to the Act. 85 Fed. Reg. at 20,423.

C. Prior Proceedings

Plaintiffs brought suit contending that the DFC must be required to comply with the Sunshine Act and challenging the April 2020 rule on procedural grounds because it was not subjected to notice-and-comment rulemaking procedures. *See* Pls.' Compl. ¶¶ 58-71.

The district court dismissed all of plaintiffs' claims. *See* Order 1. The court explained: "At bottom, the plain text of the Sunshine Act provides that the statute applies only if a majority of an agency's board members are 'appointed *to such position* by the President with the advice and consent of the Senate.'" Op. 20 (quoting 5 U.S.C. § 552b(a)(1)). The court concluded that, because the President appoints only four of the nine members to their positions on the DFC's Board, "the Sunshine Act does not apply to the DFC." Op. 21. Citing this Court's decision in *Symons v. Chrysler Corp. Loan Guarantee Board*, 670 F.2d 238, 241 (D.C. Cir. 1981), the court explained that the five other members—including the DFC's Chief Executive Officer—serve on the Board by virtue of other government offices to which they have been nominated and confirmed, not because they were nominated and confirmed as members of the Board. *See* Op. 18-20.

The district court also rejected plaintiffs' contention that the rule should be set aside because the agency did not proceed by notice and comment. Op. 17. The

court held that the absence of such procedures, if error, was harmless. Op. 16-17.[5] The court observed that "the legal conclusion the DFC made" was "compelled by the language of the two statutes at issue and binding D.C. Circuit precedent," so no amount of public comment could alter it. *Id*. (first citing 5 U.S.C. § 552b(a)(1); then citing 22 U.S.C. § 9613(b)(2); and then citing *Symons*, 670 F.2d at 240-41). In short, because the DFC acted to "rescind an outdated rule" in light of clear changes in the law, there was no need for further analysis of plaintiffs' procedural claim. *Id*.

SUMMARY OF ARGUMENT

The district court correctly held that the DFC is not a covered "agency" subject to the Sunshine Act's open meeting requirements. To qualify as such, a majority of the DFC's board members would have to be "appointed to such position by the President with the advice and consent of the Senate." 5 U.S.C. § 552b(a)(1). That is, they would have to nominated *to the position of DFC board member* by the President and confirmed *to the position of DFC board member* by the Senate to satisfy this statutory text.

[5] In light of this, the court did not address whether bringing such a claim under the Administrative Procedure Act is improper given the Sunshine Act's own detailed remedial scheme, *see* 5 U.S.C. § 552b(g)-(h), or resolve whether the Administrative Procedure Act would require notice and comment for the rescission of these procedural regulations under 5 U.S.C. § 553(a)(2).

When Congress created the DFC, it provided that four board members "shall be appointed by the President, by and with the advice and consent of the Senate." 22 U.S.C. § 9613(b)(2)(A)(iii). The other five positions, however, are filled in the manner determined by Congress—by the DFC Chief Executive Officer, Secretary of State, the Secretary of the Treasury, the Secretary of Commerce, and the Administrator of the United States Agency for International Development. 22 U.S.C. § 9613(b)(2)(A)(i), (B)(i).

As the district court explained, this Court has held—based on a plain reading of the Sunshine Act—that board members serving by virtue of their appointment to other government positions, which Congress has determined will sit on a Board of Directors, do *not* count toward the majority required for application of the Sunshine Act. Op. 18-20 (citing *Symons v. Chrysler Corp. Loan Guarantee Bd.*, 670 F.2d 238, 241 (D.C. Cir. 1981)). The board structure established by Congress thus placed the DFC outside of the Sunshine Act.

Plaintiffs concede that the Secretary of State, the Administrator of the United States Agency for International Development, the Secretary of the Treasury, and Secretary of Commerce do not count as board members "appointed to such position" for purposes of the Sunshine Act. Nevertheless, plaintiffs insist that the DFC's Chief Executive Officer must be counted and thereby establishes a

bare majority of board members appointed by the President to their position on the Board.

But, as the district court explained, the Chief Executive Officer of the DFC is appointed by the President to the position of Chief Executive Officer and is *not* appointed by the President as a member of the Board of Directors. In this way, there is no difference between the Chief Executive Officer and the other specified government officials. Contrary to plaintiffs' contention that the DFC "exempted itself from the Sunshine Act," Br. 6, it was Congress that did so.

STANDARD OF REVIEW

This Court reviews de novo the district court's grant of a motion to dismiss. *See King v. Jackson*, 487 F.3d 970, 972 (D.C. Cir. 2007).

ARGUMENT

The District Court Correctly Concluded That The U.S. International Development Finance Corporation Is Not Subject To The Sunshine Act.

A. The U.S. International Development Finance Corporation is not an "agency" within the specific meaning of the Sunshine Act.

1. None of the Sunshine Act's requirements "are triggered unless the governmental entity at issue is an 'agency'" within the meaning of the Act. *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm'n*, 216 F.3d 1180, 1182 (D.C. Cir. 2000). To qualify as such, a federal executive authority must be "headed by a

collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate." 5 U.S.C. § 552b(a)(1).

The DFC is an executive authority headed by a collegial body—a nine-member Board of Directors. *See* 22 U.S.C. § 9613(b)(2)(A)-(B). But, as the district court explained, the DFC is not subject to the Sunshine Act because Congress composed the Board in a manner that does not satisfy the Act's "agency" definition: Only a minority of the board members—four of the nine members—"are appointed to such position by the President with the advice and consent of the Senate" as required by 5 U.S.C. § 552b(a)(1). *See* Op. 20; *see also* 85 Fed. Reg. 20,423.

As plaintiffs acknowledge, the BUILD Act is explicit that four of the DFC's board members "shall be appointed by the President, by and with the advice and consent of the Senate." 22 U.S.C. § 9613(b)(2)(A)(iii), (C) (providing criteria for the President's appointment of these four "nongovernment members"); *see, e.g.*, Pls.' Br. 13 (recognizing that these four board members are "appointed directly to the Board … and count for Sunshine Act purposes" (quoting Op. 18)).

Under the BUILD Act, the five remaining board positions are held by individuals as a result of other government offices to which they have been nominated and confirmed: the DFC's Chief Executive Officer, the Secretary of

State, the Administrator of the United States Agency for International Development, the Secretary of the Treasury, and the Secretary of Commerce. 22 U.S.C. § 9613(b)(2)(A)(i), (ii), (B)(i).

This Court held in *Symons v. Chrysler Corporation Loan Guarantee Board*, 670 F.2d 238 (D.C. Cir. 1981), that board members who fall into this latter category cannot be counted toward the majority needed to satisfy the Sunshine Act's definition of a covered "agency" under 5 U.S.C. § 552b(a)(1). The government explained—and this Court agreed—that they are not "appointed to positions on the 'collegial body' (the Board) by the President as required by the literal terms of the statute." *Symons*, 670 F.2d. at 241 (explaining that the statutory requirement that a majority be "appointed to such position" refers to their positions on the "collegial body"). Instead, the government explained, these "[b]oard members serve ex officio, by virtue of their appointment, concededly by the President with the advice and consent of the Senate, to *other* high government offices." *Id.*[6]

This Court stressed this point: While these officials are "appointed to some position by the President with the advice and consent of the Senate, they were not so appointed to their *Board* positions." *Symons*, 670 F.2d at 240. "Rather, they

[6] *See* Ex Officio, Black's Law Dictionary (11th ed. 2019) (The phrase "ex officio" means "[b]y virtue or because of an office; by virtue of the authority implied by office.").

serve, according to statutory mandate, by virtue of the other offices they hold." *Id.* Applying "the plain meaning of the statute's words," *id.* at 242, the Court held that such board members—who are not appointed "to their *Board* positions" by the President as required by 5 U.S.C. § 552b(a)(1)—cannot be counted toward a Sunshine Act majority, *id.* at 240-41 (finding that the plaintiffs advanced "no convincing argument that the phrase 'to such position' can be given any plausible construction other than the one urged …by the Government").

2. Plaintiffs do not dispute that four of the five board members who serve by virtue of their other offices are *not* appointed to the Board by the President and cannot be counted toward a Sunshine Act majority. *See, e.g.*, Pls' Br. 13 (quoting Op. 18). They urge, however, that the fifth—the DFC's Chief Executive Officer—should be counted as a board member "appointed to such position by the President with the advice and consent of the Senate," thereby establishing a Sunshine Act majority and requiring compliance with the Act.

The plain language of the Sunshine Act and the BUILD Act, as well as this Court's decision in Symons, foreclose this contention. None of the government officials who serve as a result of their statutory designations are appointed "to their *Board* positions" by the President with the advice and consent of the Senate. *Symons*, 670 F.2d at 240; 22 U.S.C. § 9613(b)(2)(A)(i), (ii), (B)(i). Instead, they serve as members of the Board "by virtue of their separate appointments" to other

government positions as specified by Congress in the BUILD Act—and, as explained in *Symons*, do not count for Sunshine Act purposes. Op. 18. The DFC's Chief Executive Officer is indistinguishable for these purposes from the four other board members who serve because they have been appointed and confirmed to other positions.

As the district court recognized, plaintiffs' attempts to distinguish *Symons* are unavailing. Op. 19. *Symons* did not turn, as plaintiffs contend, on the fact that all the board members had been appointed by the President to positions at *other* agencies. It turned on the fact that they had *not* been appointed by the President directly to the Board, and so no Sunshine Act majority could be counted. *See Symons*, 670 F.2d at 241-43. The district court correctly observed that this was the critical "dichotomy" identified in *Symons*, and that it "applies here" with equal force. Op. 19.[7]

[7] Plaintiffs' stress (Br. 24) that *Symons* explained that, on a list of forty-seven agencies initially identified by Congress as covered by the Sunshine Act, "not one … had a majority of ex officio members. Each one had a majority of persons who were appointed by the President to the agency itself." 670 F.2d at 244. While dicta, the intent of this section is clear enough: The Court sought to explain that, from the beginning, Congress understood that the Sunshine Act would not reach authorities with a "majority of ex officio members," *i.e.*, persons who serve on a board by virtue of having been appointed to other positions. *Id*. It offers no basis for declining to apply the holding of *Symons*.

Plaintiffs contend that the nature of the Chief Executive Officer's appointment is distinct because the BUILD Act "provides that one of the principal duties of the CEO is to serve on the agency's Board." Pls.' Br. 13. But the BUILD Act says nothing of the sort. And the provision plaintiffs cite, 22 U.S.C. § 9613(b)(2)(A)(i), simply provides that the Chief Executive Officer will serve as a board member—just the same as the statute provides that other government officials will serve as board members, *see id.* § 9613(a)(2)(A)(ii), (B)(i).[8]

In any event, the question for Sunshine Act purposes is not how important the role of DFC board member is to the Chief Executive Officer, the Secretary of State (who serves as the Chairperson of the Board), the Administrator of the United States Agency for International Development (who serves as the Vice Chairperson), or other officials. *See* 22 U.S.C. § 9613(b)(3)-(4). The only question is the straightforward one addressed above—whether the board position is one to which the individual has been appointed by the President with the advice and consent of the Senate.

[8] In fact, in another subsection, the BUILD Act breaks out the "[a]uthorities and duties" of the Chief Executive Officer, but there it makes no mention of the Chief Executive Officer's role as a board member. 22 U.S.C. § 9613(d)(2) (providing that the CEO is "responsible for the management of the Corporation and shall exercise the powers and discharge the duties of the Corporation subject to the bylaws, rules, regulations, and procedures established by the Board").

Plaintiffs also do not advance their case by pointing out that the DFC's Chief Executive Officer "simultaneously and automatically" becomes a member of the Board when confirmed as Chief Executive Officer by the Senate. Pls.' Br. 14. The President appoints, with the advice and consent of the Senate, an individual to serve as the Chief Executive Officer of the DFC, 22 U.S.C. § 9613(d)(1)—just as the President appoints individuals to serve as the Secretary of State, the Secretary of the Treasury, and the other high-ranking government positions assigned to serve on the DFC's Board in the BUILD Act. Upon appointment to these roles, all of these individuals then "simultaneously and automatically" become members of the DFC's Board, as provided for by Congress. The President does not and cannot separately appoint them to their positions on the DFC's Board. Nor does the President have any power to disassociate their positions on the DFC's Board from their appointments to their other federal offices.[9] In sum, for all five government

[9] There are only four board members for whom the President makes direct appointments. *See* 22 U.S.C. § 9613(b)(2)(A)(iii). *Compare, e.g.*, *Nomination of Scott A. Nathan to be Chief Executive Officer of the U.S. International Development Finance Corporation*, PN1060, 117th Cong. (2022), https://perma.cc/8NDN-YHRG (nominated by the President, and confirmed by the Senate, to the position of Chief Executive Officer), *with Nomination of Deven J. Parekh to be a Member of the Board of Directors of the U.S. International Development Finance Corporation for a Term of Three Years*, PN2063, 116th Cong. (2019), https://www.congress.gov/nomination/116th-congress/2063?s=1&r=67 (nominated by the President, and confirmed by the Senate, as a Member of the Board).

officials—including the DFC's Chief Executive Officer—their board memberships simply do not depend on being "appointed to such position by the President with the advice and consent of the Senate." The district court properly rejected plaintiffs' invitation to override the plain text of the Sunshine Act.

3. In creating the DFC, Congress chose to establish a nine-member Board with five ex officio members—a governing format that is not subject to the Sunshine Act. *See supra* p. 6.

Plaintiffs nevertheless ask this Court to compel the DFC's compliance with the Sunshine Act on the ground that "[n]othing in the legislative language or history [of the BUILD Act] suggests Congress intended to end Sunshine Act compliance when it transferred [existing development finance] functions" to the newly created DFC. Pls.' Br. 14. The district court declined to draw plaintiffs' proposed inference "from this silence given the clarity of the statutory text." Op. 20 (citing *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1143 (2018)).[10] As the court explained, there is no "indication that Congress intended that the DFC

[10] *Cf. Bostock v. Clayton County*, 140 S. Ct. 1731, 1749 (2020) ("[W]hen the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration."); *Symons*, 670 F.2d at 242 ("Drawing inferences as to congressional intent from silence in legislative history is always a precarious business.").

remain covered [by the Sunshine Act] *despite the change to the board's composition*." Op. 20 (emphasis added).

In 2018, when Congress altered the DFC's balance of board members, the effect this would have was known: Since at least 1976, the Justice Department's Office of Legal Counsel has maintained a consistent understanding of the Sunshine Act's definition of covered agencies. *See* 85 Fed. Reg. 20,423; *see also Symons*, 670 F.2d at 243 n.7 (citing 1976 opinion). And in 2013, applying this understanding, the Office of Legal Counsel issued an opinion explaining that the Chief Executive Officer of an agency serving on that agency's Board is not "appointed to such position" and therefore does *not* count toward a Sunshine Act' majority. *Whether the Millennium Challenge Corporation Should Be Considered an "Agency" for Purposes of the Open Meeting Requirements of the Sunshine Act*, 37 Op. O.L.C. 27, 27-28 (2013) (quoting 5 U.S.C. § 552b(a)(1)) (describing the Chief Executive Officer as serving ex officio).

The opinion explained: "Our longstanding position has been that an ex officio board member is not 'appointed *to such position* by the President with the advice and consent of the Senate" under the Sunshine Act." 37 Op. O.L.C. at 28; *see id*. at 29-30 (discussing Symons and addressing the legislative history). And the Office of Legal Counsel expressly considered whether "the CEO … is properly regarded as one of these ex officio members," and concluded affirmatively

"because by statute the CEO is appointed to a separate office and serves on the Board by virtue of that separate office." *Id.* at 32 (citing 22 U.S.C. § 7703(b)(2)(A), (c)(3)(A)). The court also observed: "That the office of the CEO is distinct from the Board is underscored by the fact that the CEO 'shall report to and be under the direct authority of the Board.'" *Id*. (citing 22 U.S.C. § 7703(b)(3)).

All this is true for the DFC's Chief Executive Officer, including the fact that he "shall report to and be under the direct authority of the Board." 22 U.S.C. § 9613(d)(3). Plaintiffs nonetheless contend (Br. 25) that the opinion is "irrelevan[t] to this case" because the Millennium Challenge Corporation's enabling statute identified all the government officials who serve ex officio (including the Chief Executive Officer) in the same paragraph, while the BUILD Act lists the Chief Executive Officer and other government officials in separate subparagraphs. *See* Pls.' Br. 25-26.

This attempt to distinguish the present case is without merit. The paragraph structure was not a factor in the Office of Legal Counsel's analysis, nor could it be. Nothing in the Sunshine Act suggests that it is of any consequence how Congress groups, or declines to group, officials being named to serve ex officio on a board; the Act is concerned only with the question whether the total number of persons appointed directly to the Board by the President comprise a majority.

Most significantly, plaintiffs' argument ignores the fact that the DFC requested and received its own opinion from the Office of Legal Counsel in February 2020. The opinion concluded that, given the board composition established by the BUILD Act, the DFC is *not* subject to the Sunshine Act. *See* Pls.' Compl. ¶ 51 (quoting Letter from Liam P. Hardy, Deputy Assistant Att'y Gen., to Kevin L. Turner, Vice President & Gen. Counsel of the DFC, *supra*); *see also* 85 Fed. Reg. at 20,423 (relying on the opinion proffered by the Office of Legal Counsel).

4. Finally, plaintiffs contend that the DFC should be required to "comply with the Sunshine Act" because three other federal agencies, which plaintiffs suggest are "similarly situated" to the DFC or in "comparable situations," comply with the Act. Pls.' Br. 19, 20. None of these examples advance plaintiffs' case and, taken together, they underscore the extraordinary nature of plaintiffs' effort to override the statutory text.

a. Plaintiffs point to the U.S. Agency for Global Media, formerly called the Broadcasting Board of Governors. *See* Pls.' Br. 19. Congress enacted restructuring legislation in 2016, which called for agency leadership to pass from the Board of the Broadcasting Board of Governors (a collegial body that headed the agency and satisfied the Sunshine Act definition of agency) to a single Chief Executive Officer who would be appointed by the President and confirmed by the Senate. *See* Pub. L.

No. 114-328, § 1288(1), (3), 130 Stat. 2000, 2548-49, 2551 (2016) (codified at 22 U.S.C. §§ 6203, 6205). Separately, the agency's name was changed in 2018 from the Broadcasting Board of Governors to the U.S. Agency for Global Media. 22 U.S.C. § 1464a note.

Plaintiffs claim that Congress restructured the entity so that it no longer satisfied the Sunshine Act's definition of a covered agency, yet "the new agency continued to comply with Sunshine Act requirements," and plaintiffs hypothesize that this was because Congress had "not manifest[ed] any intent" to diminish public access. Pls.' Br. 19 (citing a March 2019 notice of an open meeting).

Plaintiffs are mistaken about the history of the U.S. Agency for Global Media, and its reasons for compliance with the Sunshine Act. Although the restructuring legislation was passed in 2016, the agency's first Senate-confirmed Chief Executive Officer did not take office until June 4, 2020, so it was only then that the Board disbanded. *See* U.S. Agency for Global Media, *The Board*, https://perma.cc/QYV8-PJZ7. Until then, the Board continued to lead the agency,[11] and, accordingly, it remained subject to the Sunshine Act. *See, e.g.*, 84 Fed. Reg. 7016 (Mar. 1, 2019) (notice of an open meeting of the Board of Governors). Since

[11] In light of constitutional considerations (concerning the President's Article II removal authority as it related to the members of the Board, who served until replaced or removed), the statutory provisions establishing the Board as the head of the agency continued in force until the first Senate-confirmed Chief Executive Officer took office.

June 4, 2020, when the Senate-confirmed Chief Executive Officer assumed control and the Board disbanded, the agency has not held any Sunshine Act meetings.

b. Plaintiffs highlight the U.S. Export-Import Bank's Sunshine Act compliance, but this too misses the mark. It is undisputed that a majority of the members of the Board of Directors of the Bank are appointed directly to their positions on the Board, and therefore the Bank is subject to the Sunshine Act. *See* 12 U.S.C. § 635a(b), (c); *see also* 12 C.F.R. pt. 407 (Sunshine Act regulations).

If the Board lacks sufficient members to constitute a quorum for a period of 120 consecutive days, 12 U.S.C. § 635a(c)(6), Congress has directed the creation of a "temporary Board," which includes three additional officials (Secretary of Commerce, Secretary of the Treasury, and U.S. Trade Representative) who serve on the Board by virtue of their other government positions, *id.* § 635a(c)(6)(B). Plaintiffs assert that, even when the presence of these designated board members shifts the balance away from a Sunshine Act majority, "the Bank has continued to lawfully comply with the Sunshine Act." Pls' Br. 21.

Plaintiffs' description of the current state of the Bank's Board is inaccurate.[12] But, in any event, it would be no surprise that a "temporary Board"

[12] In 2019, Congress provided for the creation of a temporary Board if the Board is without a quorum (3 voting members) for more than 120 days. *See* Pub. L. No. 115-94, div. I, title IV, § 409(a), 133 Stat. 3025 (2019). Since then, the Board has sustained a quorum, and therefore the Secretary of Commerce, Secretary

Continued on next page.

"act[ing] in the stead of the Board of Directors" would continue to abide by the agency's valid Sunshine Act regulations. 12 U.S.C. § 635a(c)(6)(B). That result has no bearing on whether the DFC is compelled to comply with the Sunshine Act when the regular composition of its Board, as established by Congress, places it outside the statutory definition of a covered agency.

c. Plaintiffs' discussion of the Neighborhood Reinvestment Corporation makes clear the error of their analysis. As they note, the Corporation's Board is composed "exclusively of members who hold their board positions by virtue of their appointment to other positions within that entity." Pls.' Br. 21-22; *see* 42 U.S.C. § 8103(a), (c). Plaintiffs observe that their Board meetings are conducted in accordance with the Sunshine Act, and they suggest that this means that the DFC also "must comply." Pls.' Br. 22.

What plaintiffs fail to appreciate, however, is that the Corporation's Board meetings are subject to the Sunshine Act only because Congress enacted special legislation to achieve that result: Recognizing that the composition of the Board of the Neighborhood Reinvestment Corporation would *not* qualify it as an agency covered by the Sunshine Act, Congress expressly provided that "all meetings of the board of directors will be conducted in accordance with the provisions of section

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of the Treasury, and U.S. Trade Representative have not been called upon to serve as voting members of any Board of the Bank.

552b of title 5." 42 U.S.C. § 8103(i) (applying, via statute, the Sunshine Act to an agency that otherwise would not be subject to the Act).[13] Absent such an express provision in the BUILD Act, DFC compliance with the Sunshine Act is not legally required.

B. Public comments could not have altered the legal conclusion that the U.S. International Development Finance Corporation is not subject to the Sunshine Act.

In April 2020, the DFC promulgated a final rule that explained that, consistent with the views of the Department of Justice's Office of Legal Counsel and this Court, it found the Sunshine Act to be inapplicable as a matter of law. 85 Fed. Reg. at 20,423. The rule removed the DFC's inherited Sunshine Act regulations from the Code of Federal Regulations. *Id.*

In the final pages of their brief, plaintiffs contend that issuing that rule without public notice and comment was a "procedural 'mistake' … [that] clearly affected the outcome of [the DFC's] decision." Pls.' Br. 29. The district court properly rejected that contention. *See* Op. 16-17. As the district court explained, the conclusion that the DFC "does not meet the definition of an 'agency' in the

[13] Congress took the same approach when it provided that the meetings of the Depository Institutions Deregulation Committee, a body composed entirely of officials serving by virtue of their other government positions, must be conducted in accordance with the Sunshine Act. *See Symons*, 670 F.2d at 245 (finding that "[t]his suggests that when Congress wishes to extend Sunshine coverage to ex officio agencies, it will do so").

Sunshine Act[] … is compelled by the language of the two statutes at issue and binding D.C. Circuit precedent." Op. 16. Accordingly, no amount of public comment could have altered the DFC's correct legal conclusion. *Id.* Because plaintiffs could not demonstrate prejudice, the court properly dismissed their procedural claim because, even assuming the existence of an error,[14] that error was harmless. Op. 17; *see Shinseki v. Sanders*, 556 U.S. 396, 409 (2009) (explaining that the plaintiffs bear the burden of showing an error is harmful); *see, e.g.*, *Association of Am. Physicians & Surgeons v. Sebelius*, 746 F.3d 468, 471-72 (D.C. Cir. 2014) (recognizing that when "all the procedure in the world" cannot change the legal conclusion, failure to provide notice and comment is harmless error); *Hadson Gas Sys., Inc. v. Federal Energy Regulatory Comm'n*, 75 F.3d 680 (D.C. Cir. 1996) (holding that an agency need not go through notice-and-comment rulemaking to remove a regulation that Congress, by enacting a new statute, has rendered obsolete).[15]

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[14] The court did not resolve the government's contention that the lack of notice and comment did not constitute error. *See supra* 12 n.5; *see also* Richard Berg et al., AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 14-16 (2d ed. 2005) (explaining that the Sunshine Act regulations are procedural rules for which the Administrative Procedure Act does not require notice and comment); Richard K. Berg, et al., AN INTERPRETIVE GUIDE TO THE GOVERNMENT IN THE SUNSHINE ACT 82 (1978) (noting Sunshine Act regulations are procedural rules according to the Administrative Conference of the United States).

[15] *Hadson* suggests that, to the extent that plaintiffs' objective would have been to persuade the DFC to voluntarily adopt the same regulatory requirements

Continued on next page.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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under a different statutory authority (*i.e.*, *not* under their original, and now inapplicable, Sunshine Act authority), they might petition the agency to open a new rulemaking under 5 U.S.C. § 553(e). *Hadson Gas Sys., Inc.*, 75 F.3d at 683-85; *see American Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 3-4 (D.C. Cir. 1987) (providing judicial review of the denial of a petition to open a new rulemaking).

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains ____ words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Word for Microsoft 365 in Century Schoolbook 14-point font, a proportionally spaced typeface.

/s/ Samantha L. Chaifetz
SAMANTHA L. CHAIFETZ

CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2022, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit by using the appellate CM/ECF system. Service will be accomplished by the appellate CM/ECF system.

/s/ Samantha L. Chaifetz
SAMANTHA L. CHAIFETZ

ADDENDUM

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5 U.S.C. § 552b

(a) For purposes of this section—

(1)
the term "agency" means any agency, as defined in section 552(e) [1] of this title, headed by a collegial body composed of two or more individual members, a majority of whom are appointed to such position by the President with the advice and consent of the Senate, and any subdivision thereof authorized to act on behalf of the agency;

(2)
the term "meeting" means the deliberations of at least the number of individual agency members required to take action on behalf of the agency where such deliberations determine or result in the joint conduct or disposition of official agency business, but does not include deliberations required or permitted by subsection (d) or (e); and

(3)
the term "member" means an individual who belongs to a collegial body heading an agency.

(b)
Members shall not jointly conduct or dispose of agency business other than in accordance with this section. Except as provided in subsection (c), every portion of every meeting of an agency shall be open to public observation.

(c)
Except in a case where the agency finds that the public interest requires otherwise, the second sentence of subsection (b) shall not apply to any portion of an agency meeting, and the requirements of subsections (d) and (e) shall not apply to any information pertaining to such meeting otherwise required by this section to be disclosed to the public, where the agency properly determines that such portion or portions of its meeting or the disclosure of such information is likely to—

(1)
disclose matters that are (A) specifically authorized under criteria established by an Executive order to be kept secret in the interests of national defense or foreign policy and (B) in fact properly classified pursuant to such Executive order;

(2)
relate solely to the internal personnel rules and practices of an agency;

(3)
disclose matters specifically exempted from disclosure by statute (other than section 552 of this title), provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes 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 (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) 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 an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) 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, on behalf of, or for the use of an agency responsible for the regulation or supervision of financial institutions;
(9)
disclose information the premature disclosure of which would—
(A)
in the case of an agency which regulates currencies, securities, commodities, or financial institutions, be likely to (i) lead to significant financial speculation in currencies, securities, or commodities, or (ii) significantly endanger the stability of any financial institution; or
(B)

in the case of any agency, be likely to significantly frustrate implementation of a proposed agency action,
except that subparagraph (B) shall not apply in any instance where the agency has already disclosed to the public the content or nature of its proposed action, or where the agency is required by law to make such disclosure on its own initiative prior to taking final agency action on such proposal; or

(10)
specifically concern the agency's issuance of a subpena, or the agency's 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 by the agency of a particular case of formal agency adjudication pursuant to the procedures in section 554 of this title or otherwise involving a determination on the record after opportunity for a hearing.

(d)

(1)
Action under subsection (c) shall be taken only when a majority of the entire membership of the agency (as defined in subsection (a)(1)) votes to take such action. A separate vote of the agency members shall be taken with respect to each agency meeting a portion or portions of which are proposed to be closed to the public pursuant to subsection (c), or with respect to any information which is proposed to be withheld under subsection (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 the public, or with respect to any information concerning such series of meetings, so long as each meeting 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. The vote of each agency member participating in such vote shall be recorded and no proxies shall be allowed.

(2)
Whenever any person whose interests may be directly affected by a portion of a meeting requests that the agency close such portion to the public for any of the reasons referred to in paragraph (5), (6), or (7) of subsection (c), the agency, upon request of any one of its members, shall vote by recorded vote whether to close such meeting.

(3)
Within one day of any vote taken pursuant to paragraph (1) or (2), the agency shall make publicly available a written copy of such vote reflecting the vote of each member on the question. If a portion of a meeting is to be closed to the

public, the agency shall, within one day of the vote taken pursuant to paragraph (1) or (2) of this subsection, make publicly available a full written explanation of its action closing the portion together with a list of all persons expected to attend the meeting and their affiliation.

(4)

Any agency, a majority of whose meetings may properly be closed to the public pursuant to paragraph (4), (8), (9)(A), or (10) of subsection (c), or any combination thereof, may provide by regulation for the closing of such meetings or portions thereof in the event that a majority of the members of the agency votes by recorded vote at the beginning of such meeting, or portion thereof, to close the exempt portion or portions of the meeting, and a copy of such vote, reflecting the vote of each member on the question, is made available to the public. The provisions of paragraphs (1), (2), and (3) of this subsection and subsection (e) shall not apply to any portion of a meeting to which such regulations apply: Provided, That the agency shall, except to the extent that such information is exempt from disclosure under the provisions of subsection (c), provide the public with public announcement of the time, place, and subject matter of the meeting and of each portion thereof at the earliest practicable time.

(e)

(1)

In the case of each meeting, the agency shall make public announcement, at least one week before the meeting, of 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 by the agency to respond to requests for information about the meeting. Such announcement shall be made unless a majority of the members of the agency determines by a recorded vote that agency business requires that such meeting be called at an earlier date, in which case the agency shall make public announcement of the time, place, and subject matter of such meeting, and whether open or closed to the public, at the earliest practicable time.

(2)

The time or place of a meeting may be changed following the public announcement required by paragraph (1) only if the agency publicly announces such change at the earliest practicable time. The subject matter of a meeting, or the determination of the agency to open or close a meeting, or portion of a meeting, to the public, may be changed following the public announcement required by this subsection only if (A) a majority of the entire membership of the agency determines by a recorded vote that agency business so requires and

that no earlier announcement of the change was possible, and (B) the agency publicly announces such change and the vote of each member upon such change at the earliest practicable time.

(3)

Immediately following each public announcement required by this subsection, 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, and the name and phone number of the official designated by the agency to respond to requests for information about the meeting, shall also be submitted for publication in the Federal Register.

(f)

(1)

For every meeting closed pursuant to paragraphs (1) through (10) of subsection (c), the General Counsel or chief legal officer of the agency shall publicly certify that, in his or her opinion, the meeting may be closed to the public and shall state each relevant exemptive provision. A copy of such certification, together with a statement from the presiding officer of the meeting setting forth the time and place of the meeting, and the persons present, shall be retained by the agency. The agency shall maintain a complete transcript or electronic recording adequate to record fully the proceedings of each meeting, or portion of a meeting, closed to the public, except that in the case of a meeting, or portion of a meeting, closed to the public pursuant to paragraph (8), (9)(A), or (10) of subsection (c), the agency shall maintain either such a transcript or recording, or a set of minutes. Such minutes shall fully and clearly describe all matters discussed and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflecting the vote of each member on the question). All documents considered in connection with any action shall be identified in such minutes.

(2)

The agency shall make promptly available to the public, in a place easily accessible to the public, the transcript, electronic recording, or minutes (as required by paragraph (1)) of the discussion of any item on the agenda, or of any item of the testimony of any witness received at the meeting, except for such item or items of such discussion or testimony as the agency determines to contain information which may be withheld under subsection (c). Copies of such transcript, or minutes, or a transcription of such recording disclosing the identity of each speaker, shall be furnished to any person at the actual cost of duplication or transcription. The agency shall maintain a complete verbatim

copy of the transcript, a complete copy of the minutes, or a complete electronic recording of each meeting, or portion of a meeting, closed to the public, for a period of at least two years after such meeting, or until one year after the conclusion of any agency proceeding with respect to which the meeting or portion was held, whichever occurs later.

(g)
Each agency subject to the requirements of this section shall, within 180 days after the date of enactment of this section, following consultation with the Office of the Chairman of the Administrative Conference of the United States and published notice in the Federal Register of at least thirty days and opportunity for written comment by any person, promulgate regulations to implement the requirements of subsections (b) through (f) of this section. Any person may bring a proceeding in the United States District Court for the District of Columbia to require an agency to promulgate such regulations if such agency has not promulgated such regulations within the time period specified herein. Subject to any limitations of time provided by law, any person may bring a proceeding in the United States Court of Appeals for the District of Columbia to set aside agency regulations issued pursuant to this subsection that are not in accord with the requirements of subsections (b) through (f) of this section and to require the promulgation of regulations that are in accord with such subsections.

(h)
(1)
The district courts of the United States shall have jurisdiction to enforce the requirements of subsections (b) through (f) of this section by declaratory judgment, injunctive relief, or other relief as may be appropriate. Such actions may be brought by any person against an agency prior to, or within sixty days after, the meeting out of which the violation of this section arises, except that if public announcement of such meeting is not initially provided by the agency in accordance with the requirements of this section, such action may be instituted pursuant to this section at any time prior to sixty days after any public announcement of such meeting. Such actions may be brought in the district court of the United States for the district in which the agency meeting is held or in which the agency in question has its headquarters, or in the District Court for the District of Columbia. In such actions a defendant shall serve his answer within thirty days after the service of the complaint. The burden is on the defendant to sustain his action. In deciding such cases the court may examine in camera any portion of the transcript, electronic recording, or minutes of a meeting closed to the public, and may take such additional evidence as it

deems necessary. The court, having due regard for orderly administration and the public interest, as well as the interests of the parties, may grant such equitable relief as it deems appropriate, including granting an injunction against future violations of this section or ordering the agency to make available to the public such portion of the transcript, recording, or minutes of a meeting as is not authorized to be withheld under subsection (c) of this section.

(2)

Any Federal court otherwise authorized by law to review agency action may, at the application of any person properly participating in the proceeding pursuant to other applicable law, inquire into violations by the agency of the requirements of this section and afford such relief as it deems appropriate. Nothing in this section authorizes any Federal court having jurisdiction solely on the basis of paragraph (1) to set aside, enjoin, or invalidate any agency action (other than an action to close a meeting or to withhold information under this section) taken or discussed at any agency meeting out of which the violation of this section arose.

(i)

The court may assess against any party reasonable attorney fees and other litigation costs reasonably incurred by any other party who substantially prevails in any action brought in accordance with the provisions of subsection (g) or (h) of this section, except that costs may be assessed against the plaintiff only where the court finds that the suit was initiated by the plaintiff primarily for frivolous or dilatory purposes. In the case of assessment of costs against an agency, the costs may be assessed by the court against the United States.

(j) Each agency subject to the requirements of this section shall annually report to the Congress regarding the following:

(1)

The changes in the policies and procedures of the agency under this section that have occurred during the preceding 1-year period.

(2)

A tabulation of the number of meetings held, the exemptions applied to close meetings, and the days of public notice provided to close meetings.

(3)

A brief description of litigation or formal complaints concerning the implementation of this section by the agency.

(4)

A brief explanation of any changes in law that have affected the responsibilities of the agency under this section.

(k)
Nothing herein expands or limits the present rights of any person under section 552 of this title, except that the exemptions set forth in subsection (c) of this section shall govern in the case of any request made pursuant to section 552 to copy or inspect the transcripts, recordings, or minutes described in subsection (f) of this section. The requirements of chapter 33 of title 44, United States Code, shall not apply to the transcripts, recordings, and minutes described in subsection (f) of this section.

(l)
This section does not constitute authority to withhold any information from Congress, and does not authorize the closing of any agency meeting or portion thereof required by any other provision of law to be open.

(m)
Nothing in this section authorizes any agency to withhold from any individual any record, including transcripts, recordings, or minutes required by this section, which is otherwise accessible to such individual under section 552a of this title.

22 U.S.C. § 9613

(a) Structure of Corporation
There shall be in the Corporation a Board of Directors (in this chapter referred to as the "Board"), a Chief Executive Officer, a Deputy Chief Executive Officer, a Chief Risk Officer, a Chief Development Officer, and such other officers as the Board may determine.

(b) Board of Directors
(1) Duties
All powers of the Corporation shall vest in and be exercised by or under the authority of the Board. The Board-
(A) shall perform the functions specified to be carried out by the Board in this chapter;
(B) may prescribe, amend, and repeal bylaws, rules, regulations, policies, and procedures governing the manner in which the business of the Corporation may be conducted and in which the powers granted to the Corporation by law may be exercised; and
(C) shall develop, in consultation with stakeholders, other interested parties, and the appropriate congressional committees, a publicly available policy with respect to consultations, hearings, and other forms of engagement in order to provide for meaningful public participation in the Board's activities.

(2) Membership of Board
(A) In general
The Board shall consist of-
(i) the Chief Executive Officer of the Corporation;
(ii) the officers specified in subparagraph (B); and
(iii) four other individuals who shall be appointed by the President, by and with the advice and consent of the Senate, of which-
(I)
one individual should be appointed from among a list of at least 5 individuals submitted by the majority leader of the Senate after consultation with the chairman of the Committee on Foreign Relations of the Senate;
(II)
one individual should be appointed from among a list of at least 5 individuals submitted by the minority leader of the Senate after consultation with the ranking member of the Committee on Foreign Relations of the Senate;

(III)
one individual should be appointed from among a list of at least 5 individuals submitted by the Speaker of the House of Representatives after consultation with the chairman of the Committee on Foreign Affairs of the House of Representatives; and
(IV)
one individual should be appointed from among a list of at least 5 individuals submitted by the minority leader of the House of Representatives after consultation with the ranking member of the Committee on Foreign Affairs of the House of Representatives.

(B) Officers specified
(i) In general
The officers specified in this subparagraph are the following:
(I) The Secretary of State or a designee of the Secretary.
(II) The Administrator of the United States Agency for International Development or a designee of the Administrator.
(III) The Secretary of the Treasury or a designee of the Secretary.
(IV) The Secretary of Commerce or a designee of the Secretary.

(ii) Requirements for designees
A designee under clause (i) shall be selected from among officers-
(I) appointed by the President, by and with the advice and consent of the Senate;
(II) whose duties relate to the programs of the Corporation; and
(III) who is designated by and serving at the pleasure of the President.

(C) Requirements for nongovernment members
A member of the Board described in subparagraph (A)(iii)-
(i) may not be an officer or employee of the United States Government;
(ii) shall have relevant experience, which may include experience relating to the private sector, the environment, labor organizations, or international development, to carry out the purpose of the Corporation;
(iii) shall be appointed for a term of 3 years and may be reappointed for one additional term;

(iv) shall serve until the member's successor is appointed and confirmed;

(v) shall be compensated at a rate equivalent to that of level IV of the Executive Schedule under section 5315 of title 5 when engaged in the business of the Corporation; and

(vi) may be paid per diem in lieu of subsistence at the applicable rate under the Federal Travel Regulation under subtitle F of title 41, Code of Federal Regulations, from time to time, while away from the home or usual place of business of the member.

(3) Chairperson

The Secretary of State, or the designee of the Secretary under paragraph (2)(B)(i)(I), shall serve as the Chairperson of the Board.

(4) Vice chairperson

The Administrator of the United States Agency for International Development, or the designee of the Administrator under paragraph (2)(B)(i)(II), shall serve as the Vice Chairperson of the Board.

(5) Quorum

Five members of the Board shall constitute a quorum for the transaction of business by the Board.

(c) Public hearings

The Board shall hold at least 2 public hearings each year in order to afford an opportunity for any person to present views with respect to whether-

(1)

the Corporation is carrying out its activities in accordance with this chapter; and

(2)

any support provided by the Corporation under subchapter II of this chapter in any country should be suspended, expanded, or extended.

(d) Chief Executive Officer

(1) Appointment

There shall be in the Corporation a Chief Executive Officer, who shall be appointed by the President, by and with the advice and consent of the Senate, and who shall serve at the pleasure of the President.

(2) Authorities and duties
The Chief Executive Officer shall be responsible for the management of the Corporation and shall exercise the powers and discharge the duties of the Corporation subject to the bylaws, rules, regulations, and procedures established by the Board.

(3) Relationship to Board
The Chief Executive Officer shall report to and be under the direct authority of the Board.

(4) Omitted

(e) Deputy Chief Executive Officer …

(f) Chief Risk Officer …

(g) Chief Development Officer …

(h) Officers and employees ...

(i) Development Advisory Council …

22 U.S.C. § 9683

(a)In general
Effective at the end of the transition period, there shall be transferred to the Corporation the functions, personnel, assets, and liabilities of—

(1) the Overseas Private Investment Corporation, as in existence on the day before October 5, 2018; and
(2) the following elements of the United States Agency for International Development:
(A)The Development Credit Authority.
(B)The existing Legacy Credit portfolio under the Urban Environment Program and any other direct loan programs and non-Development Credit Authority guaranty programs authorized by the Foreign Assistance Act of 1961 (22 U.S.C. 2151 et seq.) or other predecessor Acts, as in existence on October 5, 2018, other than any sovereign loan guaranties.

(b)Additional transfer authority
Effective at the end of the transition period, there is authorized to be transferred to the Corporation, with the concurrence of the Administrator of the United States Agency for International Development, the functions, personnel, assets, and liabilities of the following elements of the United States Agency for International Development:
(1)The Office of Private Capital and Microenterprise.
(2)The enterprise funds.

(c)Sovereign loan guaranty transfer
(1)In general
Effective at the end of the transition period, there is authorized to be transferred to the Corporation or any other appropriate department or agency of the United States Government the loan accounts and the legal rights and responsibilities for the sovereign loan guaranty portfolio held by the United States Agency for International Development as in existence on the day before October 5, 2018.
(2)Inclusion in reorganization plan
The President shall include in the reorganization plan submitted under section 9682 of this title a description of the transfer authorized under paragraph (1).

(d)Bilateral agreements …

(e)Transition
During the transition period, the agencies specified in subsection (a) shall—
(1)continue to administer the assets and obligations of those agencies; and
(2)carry out such programs and activities authorized under this chapter as may be determined by the President.

22 U.S.C. § 9686

(a)Completed administrative actions

(1)In general

Completed administrative actions of an agency shall not be affected by the enactment of this Act or the transfer of such agency to the Corporation under section 9683 of this title, but shall continue in effect according to their terms until amended, modified, superseded, terminated, set aside, or revoked in accordance with law by an officer of the United States or a court of competent jurisdiction, or by operation of law.

(2)Completed administrative action defined

In this subsection, the term "completed administrative action" includes orders, determinations, rules, regulations, personnel actions, permits, agreements, grants, contracts, certificates, policies, licenses, registrations, and privileges.

(b)Pending proceedings

(1)In general

Pending proceedings in an agency, including notices of proposed rulemaking, and applications for licenses, permits, certificates, grants, and financial assistance, shall continue notwithstanding the enactment of this Act or the transfer of the agency to the Corporation, unless discontinued or modified under the same terms and conditions and to the same extent that such discontinuance could have occurred if such enactment or transfer had not occurred.

(2)Orders

Orders issued in proceedings described in paragraph (1), and appeals therefrom, and payments made pursuant to such orders, shall issue in the same manner and on the same terms as if this chapter had not been enacted or the agency had not been transferred, and any such orders shall continue in effect until amended, modified, superseded, terminated, set aside, or revoked by an officer of the United States or a court of competent jurisdiction, or by operation of law.

(c)Pending civil actions

Pending civil actions shall continue notwithstanding the enactment of this Act or the transfer of an agency to the Corporation, and in such civil actions, proceedings shall be had, appeals taken, and judgments rendered and enforced in the same manner and with the same effect as if such enactment or transfer had not occurred.

(d)References
References relating to an agency that is transferred to the Corporation under section 9683 of this title in statutes, Executive orders, rules, regulations, directives, or delegations of authority that precede such transfer or October 5, 2018, shall be deemed to refer, as appropriate, to the Corporation, to its officers, employees, or agents, or to its corresponding organizational units or functions. Statutory reporting requirements that applied in relation to such an agency immediately before the effective date of this chapter shall continue to apply following such transfer if they refer to the agency by name.

(e)Employment provisions

(1)Regulations
The Corporation may, in regulations prescribed jointly with the Director of the Office of Personnel Management, adopt the rules, procedures, terms, and conditions, established by statute, rule, or regulation before October 5, 2018, relating to employment in any agency transferred to the Corporation under section 9683 of this title.

(2)Effect of transfer on conditions of employment
Except as otherwise provided in this chapter, or under authority granted by this chapter, the transfer pursuant to this subchapter of personnel shall not alter the terms and conditions of employment, including compensation, of any employee so transferred.

(f)Statutory reporting requirements
Any statutory reporting requirement that applied to an agency transferred to the Corporation under this subchapter immediately before October 5, 2018, shall continue to apply following that transfer if the statutory requirement refers to the agency by name.