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ONE HUNDRED ELEVENTH CONGRESS

# Congress of the United States

## House of Representatives

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August 6, 2010

The Honorable Mary Schapiro  
Chairman  
U.S. Securities and Exchange Commission  
100 F Street Northeast  
Washington, D.C. 20549

Dear Chairman Schapiro:

On July 29, 2010 I introduced H.R. 5924, the "SEC Freedom of Information Restoration Act",<sup>1</sup> which would repeal Section 929I of the Dodd-Frank financial regulation legislation ("Dodd-Frank").<sup>2</sup> As has been widely reported, Section 929I includes broad and vague exemptions from the Freedom of Information Act ("FOIA") for information and records related to examinations of financial companies conducted by the Securities and Exchange Commission ("SEC").<sup>3</sup> The provision's repeal is strongly supported by Members of Congress on both sides of the aisle and a range of government transparency advocates who are concerned the SEC will use it as a shield to prevent full transparency and accountability.<sup>4</sup>

In a July 30, 2010 letter addressed to Rep. Barney Frank and Sen. Christopher Dodd, you explained that Section 929I is necessary to encourage regulated firms to

<sup>1</sup> H.R. 5924, introduced July 29, 2010.

<sup>2</sup> Pub. L. No. 111-203 (July 21, 2010).

<sup>3</sup> See, e.g., Dunstan Prial, "SEC Says New Financial Regulation Law Exempts it from Public Disclosure," *FoxBusiness*, July 28, 2010, available at <http://www.foxbusiness.com/markets/2010/07/28/sec-says-new-finreg-law-exempts-public-disclosure/> ("Fox Article") Project on Government Oversight, "Did Congress Just Exempt the SEC from FOIA?," July 29, 2010, available at <http://www.pogo.org/pogo-files/alerts/financial-oversight/fo-fra-20100729.html>.

<sup>4</sup> See Letter from American Library Association, American Association of Law Libraries, Citizens for Ethics and Responsibility in Washington, Essential Information, Government Accountability Project, Liberty Coalition, OMB Watch, OpenTheGovernment.org, Project on Government Oversight, Public Citizen, and Sunlight Foundation to Sen. Christopher Dodd and Rep. Barney Frank, Aug. 3, 2010, available at <http://www.pogo.org/pogo-files/letters/financial-oversight/fo-fra-20100803.html> ("Transparency Organizations' Letter"); see also Daniel Schuman, "Dodd and Frank asked to repeal FinReg FOIA exemption," Sunlight Foundation, Aug. 3, 2010, available at <http://blog.sunlightfoundation.com/2010/08/03/dodd-and-frank-asked-to-repeal-finreg-foia-exemption/>.

comply with SEC requests for “sensitive and proprietary information.”<sup>5</sup> But the SEC’s actions are louder than your words: your agency has already attempted to use Section 929I to avoid disclosure of much broader categories of information. Moreover, you have not adequately supported your claim that FOIA’s existing exemptions were inadequate to protect firms’ genuinely sensitive information. Therefore, I am writing to seek further information and documents to clarify your position and illuminate the SEC’s treatment of its responsibilities under FOIA.

First, your letter asserts that Section 929I “does not provide a ‘blanket’ SEC exemption from FOIA and is not designed to protect the SEC as an agency from public oversight and accountability.”<sup>6</sup> Instead, Section 929I is designed to reassure financial firms and other regulated entities that they may release “highly sensitive and proprietary information” to SEC examiners without worrying that it might eventually become public.<sup>7</sup> Your letter promises that Section 929I will be used “only as it was intended”<sup>8</sup> – to encourage regulated entities to cooperate with SEC examiners by protecting their sensitive information, and for no other purpose.

But this promise is belied by your agency’s first invocations of Section 929I. The SEC’s Office of Compliance Inspections and Examinations (“OCIE”) has already attempted in court to use Section 929I to avoid disclosing broad categories of documents, including information that does not qualify as “sensitive and proprietary” for a financial firm.<sup>9</sup> OCIE’s sweeping interpretation clearly contradicts your assurance that the SEC only intends to use the provision solely to protect regulated entities’ sensitive information from disclosure. Meanwhile, the SEC has cited Section 929I to discourage a news organization’s *future* FOIA requests for information related to the SEC’s failure to stop alleged Ponzi schemers Bernard Madoff and R. Allen Stanford.<sup>10</sup> Of course, there is no

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<sup>5</sup> Letter from Mary L. Schapiro to Barney Frank and Christopher Dodd, July 30, 2010, *available at* <http://voices.washingtonpost.com/market-cop/frank.pdf> and <http://voices.washingtonpost.com/market-cop/frank.pdf> (“Frank / Dodd Letter”); *see also* Zach Goldfarb, “SEC tells Congress new law doesn’t block FOIA,” THE WASHINGTON POST, July 30, 2010, *available at* [http://voices.washingtonpost.com/market-cop/2010/07/sec\\_tells\\_congress\\_new\\_law\\_doe.html](http://voices.washingtonpost.com/market-cop/2010/07/sec_tells_congress_new_law_doe.html).

<sup>6</sup> Frank / Dodd Letter, *supra*, at 2-3.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 3.

<sup>9</sup> In *In the Matter of Morgan Asset Management, Inc., et al.*, SEC File No. 3-13847, an SEC administrative proceeding against financial firms and individuals, the respondents served a subpoena on OCIE seeking “(1) examination or inspection records for [the respondents and their investment funds] ... (2) documents related to OCIE’s examination or review of fair value procedures of the same entities during the same period; (3) documents pertaining to the pricing or valuation of the 389 securities at issue [in the case]; and (4) materials relating to a sweep discussed by a senior Commission official in a newspaper article.” *Morgan*, Order Granting in Part and Denying In Part Motion to Quash Subpoena, July 20, 2010, *available at* <http://www.sec.gov/alj/aljorders/2010/ap658jtk.pdf>, at 1. OCIE attempted to argue that “Section 929I protects from compulsory disclosure *all* the documents sought by Respondents’ subpoena.” *Morgan*, Order Denying Reconsideration, Certification, and a Stay, Aug. 3, 2010, *available at* <http://www.sec.gov/alj/aljorders.shtml>, at 2. The Administrative Law Judge held that OCIE could not claim the protection of Section 929I because the provision was not retroactive. *Id.*

<sup>10</sup> *See* Fox Article, *supra* (“The SEC first made its intention to block *further* FOIA requests known on Tuesday. FOX Business was preparing for another round of ‘skirmishes’ with the SEC ... when the agency

way to evaluate the content of a FOIA request that has not yet been made, but the agency has already decided that the “intended” purpose of Section 929I will apply to these future requests. Congress and the American people are justifiably suspicious that the SEC intends to use Section 929I to avoid accountability and transparency by keeping broad categories of information secret.

Second, your letter argues that “[e]xisting FOIA exemptions were insufficient” to allay regulated firms’ concerns that their sensitive and proprietary information would become public if provided to SEC examiners.<sup>11</sup> “Prior to the Dodd-Frank Act,” you wrote, “regulated entities not infrequently refused to provide Commission examiners with sensitive information due to their fears that it ultimately would be disclosed publicly.”<sup>12</sup> But you do not fully explain how FOIA’s existing exemptions fall short.

As you should know, FOIA already exempts from mandatory disclosure trade secrets and confidential commercial or financial information<sup>13</sup> and information covered in financial regulators’ examinations.<sup>14</sup> Your letter purports to provide examples of sensitive information that SEC examiners often request from regulated firms, “including, for example, customer information, trading algorithms, internal audit reports, trading strategy information, portfolio manager trading records and exchanges’ electronic trading and surveillance specifications and parameters.”<sup>15</sup> But all of these examples appear to fall within both exemptions. All of these types of information are highly sensitive and proprietary – the very sort of information that is protected by FOIA’s trade secrets exemption. Moreover, the SEC is a financial regulator, which means that information requested by its examiners should be subject to FOIA’s examination exemption.<sup>16</sup>

Third, you promise to propose to your fellow Commissioners that the Commission “issue and publish on our website guidance to our staff that ensures the provision is used only as it was intended.”<sup>17</sup> In my view, the very need for guidance on Section 929I is an indication that the provision is overbroad and vague. Section 929I

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called and said it intended to use Section 929I of the 2000-page legislation to refuse FBN’s *ongoing* requests for information” (emphasis added)).

<sup>11</sup> *Id.*

<sup>12</sup> Frank / Dodd Letter, *supra*, at 2.

<sup>13</sup> 5 U.S.C. § 552(b)(4) (“This section does not apply to matters that are ... trade secrets and commercial or financial information obtained from a person and privileged or confidential”).

<sup>14</sup> 5 U.S.C. § 552(b)(8) (“This section does not apply to matters that are ... 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”).

<sup>15</sup> Frank / Dodd Letter, *supra*, at 2.

<sup>16</sup> Your letter suggests that FOIA’s “existing exemptions may not apply to all registrants,” with a footnote pointing out that FOIA’s examination exemption applies only to agencies that are “responsible for the regulation or supervision of *financial institutions*” (emphasis yours). But because the SEC is clearly such a regulator, all of its examinations should be subject to that FOIA exemption, regardless of whether it is examining an investment company, an investment advisor, a securities exchange, or some other regulated entity.

<sup>17</sup> Frank / Dodd Letter, *supra*, at 3.

allows the SEC, rather than an impartial court, to determine when to disclose information it has gathered from regulated firms, and when it may hide such information.

For these and other reasons,<sup>18</sup> I do not believe that your letter has made a compelling case that Section 929I should be retained. In order to help the Oversight and Government Reform Committee better understand the arguments you have advanced, please provide the following information as soon as possible, but in no case later than 5 pm EST on August 19, 2010:

1. Provide all records and communications referring or relating to internal policies or guidance, effective between January 1, 2005, and the present, governing the SEC's treatment of FOIA requests.

2. Provide all records and communications referring or relating to Section 929I and every similar legislative proposal that is referred to by your July 30, 2010 letter.<sup>19</sup>

3. State the basis for your suggestion that FOIA's examination exemption<sup>20</sup> might cover some entities that the SEC regulates, but not others.

4. Describe every action taken by the SEC in response to the September 25, 2009 Inspector General report entitled, *Review of the Securities and Exchange Commission's Compliance with the Freedom of Information Act*.<sup>21</sup>

5. In categorical terms, describe any information that was actually withheld from an SEC examiner under the circumstances described by your July 30, 2010 letter<sup>22</sup> and was not covered by any FOIA exemption.

6. If it is your position that "customer information, trading algorithms, internal audit reports, trading strategy information, portfolio manager trading records and exchanges electronic trading and surveillance specifications and parameters"<sup>23</sup> are not covered by any FOIA exemption, state the basis for your position.

Please note that for purposes of responding to this request, the terms "records," "communications," and "referring or relating" should be interpreted consistently with the attached Definitions of Terms.

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<sup>18</sup> As pointed out by a coalition of government transparency organizations, your letter neglects to mention the SEC's existing authority to issue binding subpoenas to regulated entities and impose penalties or make criminal referrals for noncompliance. See Transparency Organizations' Letter, *supra*.

<sup>19</sup> Frank / Dodd Letter, *supra*, at 1.

<sup>20</sup> 5 U.S.C. § 552(b)(8).

<sup>21</sup> Available at <http://www.sec-oig.gov/Reports/AuditsInspections/2009/465.pdf>.

<sup>22</sup> Frank / Dodd Letter, *supra*, at 2 ("Prior to the Dodd-Frank Act, regulated entities not infrequently refused to provide Commission examiners with sensitive information due to their fears that it ultimately would be disclosed publicly. Existing FOIA exemptions were insufficient to allay concerns ...").

<sup>23</sup> *Id.*

The Honorable Mary Schapiro  
August 6, 2010  
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The Committee on Oversight and Government Reform is the principal oversight committee in the House of Representatives and has broad oversight jurisdiction as set forth in House Rule X.

Thank you for your prompt attention to this matter. I look forward to a vigorous and worthwhile debate over how best to protect investors and ensure transparency and accountability at the SEC. If you have any questions regarding this request, please contact Christopher Hixon with the Committee staff at (202) 225-5074.

Sincerely,



Darrell Issa  
Ranking Member

cc: The Honorable Edolphus Towns, Chairman

Attachment

## **Definitions of Terms**

1. The term "record" means any written, recorded, or graphic matter of any nature whatsoever, regardless of how recorded, and whether original or copy, including, but not limited to, the following: memoranda, reports, expense reports, books, manuals, instructions, financial reports, working papers, records notes, letters, notices, confirmations, telegrams, receipts, appraisals, pamphlets, magazines, newspapers, prospectuses, interoffice and intra office communications, electronic mail (e-mail), contracts, cables, notations of any type of conversation, telephone call, meeting or other communication, bulletins, printed matter, computer printouts, teletypes, invoices, transcripts, diaries, analyses, returns, summaries, minutes, bills, accounts, estimates, projections, comparisons, messages, correspondence, press releases, circulars, financial statements, reviews, opinions, offers, studies and investigations, questionnaires and surveys, and work sheets (and all drafts, preliminary versions, alterations, modifications, revisions, changes, and amendments of any of the foregoing, as well as any attachments or appendices thereto), and graphic or oral records or representations of any kind (including without limitation, photographs, charts, graphs, microfiche, microfilm, videotape, recordings and motion pictures), and electronic, mechanical, and electric records or representations of any kind (including, without limitation, tapes, cassettes, disks, and recordings) and other written, printed, typed, or other graphic or recorded matter of any kind or nature, however produced or reproduced, and whether preserved in writing, film, tape, disk, videotape or otherwise. A record bearing any notation not a part of the original text is to be considered a separate record. A draft or non-identical copy is a separate record within the meaning of this term.
2. The term "communication" means each manner or means of disclosure or exchange of information, regardless of means utilized, whether oral, electronic, by document or otherwise, and whether face-to-face, in a meeting, by telephone, mail, telexes, discussions, releases, personal delivery, or otherwise.
3. The terms "referring or relating," with respect to any given subject, means anything that constitutes, contains, embodies, reflects, identifies, states, refers to, deals with or is in any manner whatsoever pertinent to that subject.