Written Testimony Submitted by
Steven G. Mintz
Founding Partner
Mintz & Gold LLP
Before the Committee on Financial Services
U.S. House of Representatives
Hearing on "Legislative Proposals to Address Concerns Over the SEC's New Confidentiality Provision"
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Good morning Chairman Frank, Ranking Member Bachus, and Members of the Committee. My name is Steven Mintz and I am the Founding Partner of Mintz and Gold LLP. Thank you for inviting me to testify on this important issue. The views I am expressing today are solely my own, and do not reflect the views of the Firm, or of any its clients.

My personal practice areas include securities litigation including SEC and FINRA investigations and enforcement proceedings and Freedom of Information Act litigation. During the past few years, I have served as lead counsel in a number of Freedom of Information Act ("FOIA") lawsuits against the Federal Reserve, the Department of the Treasury and the Securities and Exchange Commission. In that capacity, I have been successful in getting the SEC to handover thousands of documents relating to the regulatory failures that culminated in the Bernard Madoff scandal.

INTRODUCTION

Section 929I of the Dodd-Frank Wall Street Reform and Consumer Protection Act has the unintended consequence of weakening government transparency, which has long been embodied in FOIA[1]. As a practical matter, section 929I gives the Securities and Exchange Commission ("SEC") unprecedented control over the information it has to share with the public.

A central feature of the open government principle established by FOIA is the role of the courts in mediating disclosure disputes between citizens and the executive branch. The framers of FOIA began with the premise that the executive branch should not have unfettered authority to decide which documents the press and the public can see. Consequently, they provided for adjudication by neutral courts of law and specifically directed that controversies between citizens and the government should be decided with a presumption in favor of disclosure.

Section 929I reverses that salutary arrangement by giving the agency the unilateral power to decide whether to withhold or disclose. Because of its extremely broad language, the SEC is entitled to refuse disclosure of any document or record as long as it can say that the document or record was

[1] 5 U.S.C. § 552.

obtained through – or even based on or derived from – the exercise of the agency's surveillance, risk assessment or examination duties. Further, the new provision gives the agency absolute and unreviewable authority to demand and collect information from third parties, such as broker/dealers and hedge funds, without prior review from the Office of Management and Budget. Combined with Section 929I's new "SEC Exemption" under FOIA, this will ensure that the agency can first amass untold records in the examination of persons such as Bernard Madoff and then never have to release them to the public. There is simply no meaningful place for judicial intervention in section 929I's sweeping exception to the rule of disclosure.

While Chairman Schapiro has taken the position in her July 30 letter to the Committee that the new FOIA exemption is required to safeguard the confidential proprietary information and trade secrets of business submitters, such as trading algorithms, trading strategy information, portfolio managers' trading reports and so on, such material has always been protected from disclosure under FOIA Exemption 4, which governs trade secrets and confidential commercial information.[2] Likewise, section 929I is completely unnecessary to prevent interference with the SEC's law enforcement functions, since materials compiled for law enforcement purposes are

[2] 5 U.S.C. § 552(b)(4).

already protected by FOIA Exemption 7(A).[3] By the same token, privileged documents are covered by Exemption 5[4] and records implicating personal privacy interests are covered by Exemption 6.[5]

The record is also clear that the agency has not been timid in using FOIA exemptions when faced with requests for information from the public. For example, according to a report of the SEC's Office of Inspector General ("OIG Report"), the agency invoked Exemption 4 on 132 occasions in 2007 and 160 occasions in 2008. It invoked its law enforcement function under Exemption 7(A) 518 times in 2007 and an additional 705 times in 2008.[6] It has invoked other FOIA exemptions as well.

Thus, the adequacy of existing exemptions under FOIA is not the problem. To date, the SEC has not pointed to a single instance in which it has been denied the use of an existing FOIA exemption because of statutory language that is overly narrow. Rather, the problem appears to be one of manpower, not a deficiency in the statute. Both my own experience with the SEC and the findings contained in the OIG Report suggest that the SEC is

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[3] 5 U.S.C. § 552(b)(7)(A).

[4] 5 U.S.C. § 552(b)(5).

[5] 5 U.S.C. § 552(b)(6).

[6] OIG Report at p. 11.

struggling with FOIA compliance not because of the inadequacy of the existing exemptions, but rather because it does not have the resources it needs to collect and review material that has been requested by citizens and then make careful and individualized assessments of the applicability of statutory exemptions that can later be defended in court.

There is considerable evidence that the SEC has been solving its resource problem by aggressively citing FOIA exemptions. The OIG's report revealed in particular that the agency has frequently relied upon the law enforcement exemption under section 552(b)(7)(A) without examining the documents it sought to withhold, and without regard to whether the investigation was open or closed.[7] It now seems, however, that the agency will not need to rectify its overly aggressive use of exemption 7(A) to avoid its FOIA obligations. Under Section 929I, the agency will no longer have to task employees with the review of documents to see whether a real law enforcement exemption actually applies, or defend its use of such an exemption before the OIG or a court; instead, it now has a broad categorical exemption.

[7] Indeed, the OIG Report also found that, in 2008, the SEC granted in full *only* 10.5% of processed FOIA requests, as opposed to 41.8% for all federal agencies. Similarly the SEC partially granted 2.9% of requests in 2008, whereas federal agencies as a whole granted 18.7% of requests in part during the same period. OIG Report at p. 10.

Section 929I provides the agency with a "get out of jail free" card, enabling it to invoke Exemption 3[8] without actually conducting a document-by-document review. Instead, the agency can get by the strictures of the FOIA statute by simply labeling the requested documents as material obtained pursuant to its regulatory authority (or even as material derived therefrom).

I respectfully submit that such an evisceration of FOIA is neither necessary nor appropriate. Accordingly, section 929I needs to be repealed in its entirety. If the SEC is having difficulty complying with FOIA the solution is not to lower – or completely eliminate – the bar, but rather to adopt legislation that ensures that the agency will have the personnel, resources and internal systems to accomplish the disclosure that is required in an open society.

I. The Breadth of § 929I

FOIA establishes the public's and media's right of access to all government records unless one of nine specifically delineated "exemptions" applies. Over the past 44 years, the federal courts have developed an ample and sophisticated body of case law construing and applying the exemptions to ensure that the public's right of access is balanced against any genuine

[8] 5 U.S.C. § 552(b)(3).

need for secrecy in the executive branch. Yet, instead of seeking relief in the courts through a case-by-case adjudication – and without identifying any particular shortcoming of the existing FOIA exemptions – the SEC came to Congress and obtained a sweeping new exemption to shield it from the disclosure obligations that apply to virtually every other executive agency.

Notwithstanding the agency's effort to portray section 929I as something less than a "blanket" exemption for SEC documents,[9] a straightforward reading of the provision demonstrates that it actually encompasses virtually everything the agency does in connection with its core surveillance and examination functions. The section 929I exemption applies not only to records and information obtained under section 17(b) of the Securities Exchange Act of 1934,[10] section 204 of the Investment Company Act of 1940[11] and section 31 of the Investment Advisers Act of 1940[12], but also to records based upon or derived from such records or information. Those are the provisions that implement the SEC's basic

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[9] Letter from Hon. Mary L. Schapiro (Chair, SEC) to Hon. Barney Frank (Chair, Committee on Financial Services, U.S. House of Representatives), dated July 30, 2010 ("Schapiro Letter"), p. 2.

[10] 15 U.S.C. § 78q.

[11] 15 U.S.C. § 80a-30.

[12] 15 U.S.C. § 80b-10.

examination and surveillance functions and serve as the agency's authority for monitoring the integrity and soundness of entities such as those maintained by Bernard Madoff, R. Allen Stanford, Kenneth Ira Starr, and many others. Thus, as a practical matter, section 929I permits the agency to withhold from the public[13] all documents in its possession that it obtains or generates in connection with its regulatory activities.

Section 929I actually confers on the SEC two separate statutory exemptions that, in combination with each other, shield the agency's surveillance function from meaningful public scrutiny. First, with regard to broker-dealers, investment companies and investment advisers, the statute creates a special FOIA exemption for the SEC under 5 U.S.C. § 552(b)(3)(B) authorizing the agency to withhold the records it gathers from regulated entities. While FOIA would ordinarily require the SEC to establish a reason to withhold the documents under other exemptions, such as the exemption for trade secrets under section 552(b)(4) and the exemption for ongoing investigations under section (b)(7)(A), the new "SEC Exemption" under 929I and section 552(b)(3) is categorical in its scope.

[13] Section 929I does have "carve-out" provisions that prevent the agency from refusing to disclose where the material has been requested by other agencies or Congress or material required to be disclosed by court order issued in legal actions brought by the United States government. However, these "carve-outs" do nothing to protect the right of the public or news media to have access to government information.

Then, immediately after creating this new FOIA exemption, Section 929I goes on to recite that the collection of information from each regulated entity "shall be an administrative action involving an agency against specific individuals or agencies pursuant to section 3518(c)(1) of title 44, United States Code". This language refers to the Paperwork Reduction Act,[14] which confers upon the Director of the Office of Management and Budget the statutory authority to review every federal agency's proposed collection of documents from the public.

Section 3518(c) of the Paperwork Reduction Act had historically exempted from OMB review the collection of information in cases specifically involving, among other things, criminal matters as well as any "investigation involving an agency against specific individuals or entities." Now that *all* information gathered by the SEC in its regulatory capacity has been swept into this exemption through section 929I, the SEC has been given a powerful double layer of secrecy. This undesirable result has been accomplished by first giving the agency unreviewable authority to demand documents and records from both registrants and third parties and then sweeping all such documents into a complete and total FOIA exemption. As a result of these dual exemptions, the SEC has been quietly delegated the

[14] 44 U.S.C. §§ 3501-3520.

unilateral authority to make its own rules regarding the dissemination of information that it collects in its surveillance function.

II.

Agency Construction of § 929I Is Not An Adequate Safeguard to Protect the Public's and Media's Right of Access to Government Records

Even the SEC has tacitly acknowledged that the FOIA exemption represented by section 929I is impossibly broad. Indeed, the agency has indicated its intention to ameliorate that defect by publishing "guidance to [its] staff that ensures the provision is used only as it was intended."[15] Assuming that the agency follows through with this promise, there are several obvious problems with this approach.

First, beyond the language of section 929I, there is no meaningful evidence of underlying congressional intent that can be used by the agency to craft relevant "guidance." As the Members who introduced the various corrective measures recognized, section 929I was included in the much larger Dodd-Frank Act without any particularized discussion or debate on this specific language. Indeed, at the time section 929I was adopted, Congress was focused almost entirely on the need to provide enhanced regulation of the securities markets and correspondingly enhanced

[15] Schapiro Letter, p. 3.

protections for consumers. It is thus reasonable to posit that, in actuality, there was no particular conscious intent on Congress's part at all when it adopted this very specialized and seemingly insignificant provision of massive regulatory reform measure. Viewed in that light, any attempt by the SEC to draft guidelines to ensure that the provision "is used only as intended" would be, at best, an exercise in futility and, at worst, an impermissible exercise in legislating by an administrative agency.[16]

Second, the SEC has already demonstrated that it is more than willing to invoke section 929I to the greatest extent permitted by its language. Before the ink was even dry on the Dodd-Frank Act, the agency tried (albeit unsuccessfully) to use section 929I retroactively to prevent enforcement of a subpoena served on its Office of Compliance Inspections and Examinations ("OCIE") by a brokerage firm, that was seeking examination records to

[16] I am aware that several members of the Senate Judiciary Committee have officially urged the SEC Chair to "narrowly interpret and apply the FOIA Exemption in Section 929I" in light of "the overwhelming public interest in restoring stability and accountability to our financial systems." Letter from Hon. Patrick Leahy, Hon. Charles E. Grassley, Hon. John Cornyn and Hon. Edward E. Kaufman to Hon. Mary L. Schapiro, dated August 4, 2010. With all due respect to the Judiciary Committee members, we believe that authorizing the SEC to "interpret" section 929I without providing an intelligible principle to guide the agency's "interpretation" could well result in an improper delegation of legislative authority.

assist in its defense against the agency's charge of fraud.[17] The following week, the agency once again indicated that it was planning to invoke the new provision in a pending FOIA action, again retroactively, in order to avoid having to give my own client, a news media outlet, documents relating to a 2004 and 2005 examination of the Bernard Madoff firm. It is worth noting that, in my own case, the agency withdrew its threat to use section 929I for this purpose shortly after its position was exposed, prompting several members of Congress to take a second look at the statute and to call for its repeal.

Third, and most importantly, the SEC's track record in implementing FOIA suggests that the agency cannot be trusted to formulate guidelines that are sufficiently protective of the public's right of access. My own recent experience in litigating FOIA claims has been that, of the three federal agencies that have played the biggest role in the recent financial crisis (the Treasury Department, the Board of Governors of the Federal Reserve and the SEC), the SEC is – by far – the most reluctant to comply with even the most basic obligations imposed by FOIA, including the obligation to conduct a reasonably adequate search for responsive documents, the

[17] *Matter of Morgan Asset Mgt., Inc., et al.*, Admin. Proceedings Rulings Release No. 659/Aug. 3, 2010, File No. 3-13847, Order Denying Reconsideration, etc. (hereinafter "*Matter of Morgan Asset*, Order Denying Reconsideration").

obligation to conduct a serious review to ensure that only genuinely exempt documents are withheld and the obligation to provide the Court and the FOIA requester with enough information about the withheld documents to determine whether they are truly covered by the statutory FOIA exemptions. In contrast, although the Treasury Department and the Board of Governors opposed certain aspects of the various FOIA requests, those agencies by and large conducted meaningful "searches" and reviews for the requested material and limited their objections to narrow grounds based on their principled views of the FOIA exemptions that they deemed relevant.

My experience with the SEC's cavalier attitude toward the public's right of access is far from unique. The same noncompliant behavior drew considerable unfavorable comment from the Administrative Law Judge in *Matter of Morgan Asset*[18] and prompted a U.S. District Court in Minnesota to complain that "[t]he SEC ha[d] continually and deliberately stalled in fulfilling its obligations to conduct a document-by-document review of

[18] ALJ James T. Kelly specifically complained that the OCIE (a) had "failed to show that it made a good faith effort to conduct a search for the records sought," (b) had adopted a narrow view of the "relevance" of subpoenaed documents that was irreconcilable with the agency's own precedent, (c) had made "blanket" privilege claims without specifying particular privileges and, finally, (d) had advanced ever-shifting justifications for withholding the subpoenaed documents. *Matter of Morgan Asset*, Order Denying Reconsideration, pp 4-5.

material it seeks to withhold pursuant to [FOIA] Exemption 7(A)," "ha[d] attempted to play by its own rules and [had] disregard[ed] the law."[19]

These observations are echoed in the OIG Report referred to above. In the Report, the OIG Audit Office found that (a) the agency had not implemented most of the recommendations that had been made two years earlier, (b) the agency was not in compliance with Executive Order 13392 (requiring agencies to provide maximum transparency) and the OPEN Government Act, and (c) had not made adequate personnel or policy arrangements for carrying out the duties mandated by FOIA.

In summary, I respectfully submit that the solution to section 929I's excessive breadth is not additional rulemaking or "guidance" by an agency that has shown itself unable or unwilling to adhere to FOIA's requirements and goals in the past. Instead, the remedy is to simply repeal the measure, with the understanding that the agency remains free to seek Congress's assistance if it can identify a specific and concrete problem with the application of the existing exemptions to its operations. On the other hand, if (as appears to be the case) the real problem is that the agency does not have the resources to devote to the task of meaningful document search and

[19] *Gavin v. SEC*, No. 04 Civ. 4522 (PAM/JSM), 2006 WL 1738417 (D. Minn. June 20, 2006).

review, then the solution also lies in a request to Congress for additional funding for that purpose. SEC might need more manpower; it does not require more secrecy.

III.

There Is No Legitimate Need for an Agency-Specific Exemption From FOIA's Disclosure Obligations

The sweeping protection from the SEC's disclosure obligation that section 929I represents is not needed to protect any legitimate government interest. To the contrary, to the extent that they are valid at all, the concerns that the agency has are already amply addressed by the exemption provisions that have been built into FOIA itself. These carefully crafted provisions represent Congress's best judgment as to how the public's considerable interest in governmental openness should be weighed in relation to the privacy concerns of individuals and businesses and the legitimate needs of the executive branch to conduct some of its business away from public scrutiny. The exemption provisions should not now be expanded in the context of legislation that focuses primarily upon regulatory reform and, ironically, has increased transparency in the marketplace as one of its central goals.

A. The Efficacy of Exemption 4 (5 U.S.C. § 552[b][4])

To date, the SEC has attempted to justify the broad exemption provided by section 929I by making broad-brush assertions without any supporting facts. Among these assertions is the agency's claim that the threat of disclosure of "sensitive and proprietary" information (such as customer information, trading algorithms, internal audit reports, trading strategy information, portfolio manager trading records and exchanges' electronic trading and surveillance specifications and parameters) has made it difficult for the agency to collect the information it needs to perform its regulatory responsibilities.[20] Notably, the agency has not, to date, provided any examples of cases in which it has been forced to disclose sensitive proprietary information either through a FOIA request or a subpoena issued in a judicial or administrative action.

Furthermore, the suggestion that the agency needs a new exemption from its FOIA obligation in order to assure its registrants' compliance with their responsibility to make records available for inspection and produce them to the agency[21] is disturbing on many levels. Taken at face value, the

[20] Schapiro Letter, pp. 1-2.

[21] *See* 15 U.S.C. §§ 78q(b), 80a-30, 80b-4.

agency's argument constitutes an admission that the SEC cannot now ensure that its own rules are enforced.

To begin with, the Committee should adopt a healthy skepticism to the agency's position. First, the agency's ability to request information even from an unregistered entity is always implicitly backed up by the possibility of a subpoena down the road. Second, as a result of other provisions of the Dodd-Frank Act, entities that previously were outside the scope of SEC registration requirements, such as hedge fund advisors, will now be required to maintain books and records and be subject to the inspection regime governing investment advisers. Third, in the case of Mr. Madoff, the problem in obtaining records was not the result of FOIA, but failures by the agency in the execution of its surveillance function.

Thus, FOIA was never a serious obstacle to the agency's ability to gather needed information and will be even less of an obstacle due to Dodd-Frank. In any event, the solution would not be to entice those entities with further promises of secrecy but rather to adopt additional regulations and penalties to ensure that the law will, in fact, be obeyed.

Moreover, regardless of whether they are traditional regulated entities such as broker-dealers or are instead within the class of newcomers such as hedge funds, any legitimate concerns that regulated firms have about their

proprietary data should be wholly allayed by the existing FOIA exemption for "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential" ("Exemption 4").[22] In fact, SEC Rule 83[23] provides a specific procedure through which a regulated entity submitting information may request confidential treatment for material it submits to the agency and may thereby assure itself of an opportunity to be heard when and if a FOIA request affecting the information is made.

In fact, where confidentiality has been requested, the FOIA statute provides a system for a private entity that perceives itself aggrieved to challenge disclosure through a "reverse" FOIA proceeding.[24] The same is true for proprietary information sought through subpoenas. In such cases the SEC's own regulations provide specific mechanisms to protect information that it obtains in the course of investigations and examinations from disclosure through subpoenas. *See, e.g.*, 17 C.F.R. §§ 240.0-4 and 240.24b-2. Not only do the regulations provide that such information is confidential and non-public, they also require the SEC to respond to any such subpoena by appearing in court to challenge disclosure.

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[22] 5 U.S.C. § 552(b)(4).

[23] 17 CFR § 200.83.

[24] *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979); 5 U.S.C. §706.

Having extensively researched and litigated the applicability of Exemption 4 in the context of the financial industry, I can state with complete confidence that any internal information given to a regulatory agency will be protected from disclosure under FOIA if it is genuinely proprietary in nature and its disclosure would cause the business submitter any demonstrable competitive harm. It seems clear that most of the categories of information that the Schapiro Letter cites (*e.g.*, trading algorithms, customer information, etc.) fall comfortably within these criteria. To the extent that they do not, it is difficult to see what justification there could be for protecting the information from public disclosure.

Indeed, the SEC has so far not offered any concrete examples of proprietary information that could be submitted by a regulated entity but would not be covered by the Exemption 4 privilege. Instead, it has merely speculated about the risk that some of the data obtained from regulated trading firms might be "deconstructed" or "merged into central databases" and then inadvertently disclosed under FOIA.[25] This stated concern is particularly far-fetched. The Board of Governors of the Federal Reserve System, with which I have engaged in extensive FOIA litigation, collects data from the 12 regional Federal Reserve Banks and then aggregates the

[25] Schapiro Letter, p. 2.

data for "daily term reports" and other purposes. In my experience, that agency has had no difficulty in tracing back the aggregated data to its source and then explaining why material, even in aggregated form, should be deemed too commercially "sensitive" for public release. There is no reason that the SEC cannot do the same. In fact, the very language of section 929I, which extends the exemption to "records or information *based upon or derived from*" the information obtained from regulated entities, presupposes that the SEC is capable of identifying the sources of information that has been "deconstructed" or "merged" in central databases. Once again, it is not unreasonable to expect the agency to justify its conclusion that the information in question remains commercially sensitive even in its "deconstructed" or "merged" form -- rather than affording it a blanket exemption that other, similarly situated agencies (including the Board of Governors) do not have.

B. The Efficacy of Exemption 8 (5 U.S.C. § 552[b][8])

Exemption 8 also provides a safe haven for information and records that are "contained in or related to examination, operating, or condition reports" prepared by or for agencies responsible for regulating "financial institutions." As in the case of Exemption 4, the SEC has not articulated a sound reason why Exemption 8 is not sufficient to satisfy its own and its

registrants' legitimate needs for confidentiality.[26] In fact, the agency invoked Exemption 8 seventeen times in 2007, an additional 42 times in 2008, and has not pointed to a single recent case in which an effort to rely on Exemption 8 was rebuffed by the courts.

I would note parenthetically that I question whether Exemption 8 even has a valid role to play in our modern system of open government. Most economists would argue that the financial markets are better served by transparency and that there is no longer a valid reason to conceal the results of regulatory agencies' examinations of the financial institutions that they supervise. Indeed, at the height of the recent economic crisis, the Treasury Department and the Federal Reserve conducted "stress tests" on the nation's largest banks and chose to disclose the results rather than invoking Exemption 8. Neither the banks nor the economy sustained noticeable harm.

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[26] Chairwoman Schapiro has expressed a view that Exemption 8 might not be applicable to some of the entities that are now within the SEC's purview. While one early decision held that securities exchanges and broker-dealers are not "financial institutions" within the meaning of Exemption 8. *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 470 (D.D.C. 1972), that narrow view of the Exemption was long ago discredited and replaced with a view that defines covered "financial institutions" very broadly to include broker-dealers, securities exchanges and even investments advisers, *Mermelstein v. SEC*, 629 F. Supp. 672, 673-675 (D.D.C. 1986); *see Public Citizen v. Farm Credit Admin.*, 938 F.2d 290, 293-294 (D.C. Cir. 1991); *Feshbach v. SEC*, 5 F. Supp. 2d 774, 781 (N.D. Cal. 1997); *Berliner*, 962 F. Supp. at 1351 n.5, 1352.

In any event, there is no apparent reason why the entities regulated by the SEC should enjoy a privilege of confidentiality beyond the privileges that are enjoyed by banks, credit unions and other business entities that are subject to regular examination and review.

C. The Efficacy of Exemption 7(a) (5 U.S.C. § 552[b][7][A])[27]

Exemption 7(A) is always available to protect the SEC from having to make disclosure where such disclosure would be harmful to an active law enforcement investigation or proceeding. The SEC has not been shy about invoking this exemption in the past. In 2007, the SEC used Exemption 7(A) in 67 percent of all of its FOIA denials in fiscal year 2007 and in 66 percent of its denials in fiscal year 2008. OIG Report, p 11. Indeed, far from having difficulty in shielding its law enforcement documents, the SEC's FOIA staff frequently uses blanket Exemption 7(A) claims inappropriately, without actual visual inspection of the documents and sometimes even when the documents have already been made available to the public. *Id.* at 13.

Once again, it is apparent that the agency's problem is not that it has insufficient means through the existing exemptions to protect sensitive

[27] Also deserving of mention is Exemption 5, which furnishes the agency with a privilege for documents reflecting its own deliberative processes, as well as for documents qualifying for the attorney work-product privilege. I would note that, in my own experience in litigation with the SEC, the agency has made liberal use of this exemption.

material from disclosure, but rather that it has insufficient resources to handle its FOIA duties.

The Need for Immediate Repeal

Section 929I must be repealed. This provision, which gives the SEC unilateral decision-making power over its disclosures, is directly contrary to the goal of transparency that the Dodd-Frank Act itself was supposed to advance.

"A democracy requires accountability, and accountability requires transparency."[28] "A government by secrecy benefits no one. It injures the people it seeks to serve; it injures its own integrity and operation. It breeds mistrust, dampens the fervor of its citizens, and mocks their loyalty."[29] On the other hand, opening the operations of government to public view leads to a well-informed citizenry, with greater confidence in its public institutions.[30] It is those principles that prompted the original enactment of FOIA in 1966. And, it is those principles that have impelled Congress and the courts ever since to protect FOIA's core value by limiting the exceptions to those that

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[28] Memorandum for the Heads of Executive Departments and Agencies, issued by President Barack Obama.

[29] S. Rep. No. 89-813, at 45 (1965).

[30] *U.S. Dep't of Justice v. Reporters Comm. For Freedom of the Press*, 489 U.S. 749, 750 (1989).

are strictly necessary to address specific private and governmental concerns.

As discussed above, the existing FOIA exemptions are more than sufficient to protect the legitimate needs of the agency to shelter sensitive information from the public view. In the final analysis, section 929I should be repealed because its enactment sets a very bad precedent.

In my experience as a FOIA litigator, I have become acutely aware of how many executive branch agencies believe that a policy of nondisclosure would best serve their administrative interests. Indeed, the Board of Governors of the Federal Reserve has recently taken a position that is virtually identical to that of the SEC. Like the SEC, the Board has argued that enforcement of existing disclosure rules will hamper its ability to gain the cooperation of the private entities with which it deals. Also like the SEC, the Board has argued that the obligation to make disclosure under FOIA should give way to its programmatic goals.

If the SEC is permitted to obtain its own "agency exception" to FOIA based solely on its view of the degree of secrecy needed to advance its program goals, then there would be no reason that the Board of Governors, the Treasury Department or any other government agency would not be prompted to do the same. The result would be a significant deterioration in

the open government framework that has prevailed during the 44 years since FOIA's passage.

Finally, there are presently a number of bills pending that, in some form or other, would repeal or minimize the effect of section 929I. While all the bills that have been introduced are well intentioned, the bills that would simply repeal section 929I and restore the law to what it was before section 929I are, in my mind, preferable to those that would leave the new exemption intact and simply tinker with its scope.

Thank you again for giving me this opportunity to testify. I look forward to answering any questions that you may have.