Testimony Before the
United States House of Representatives Committee on Financial Services

"Legislative Proposals to Address Concerns Over
the SEC's New Confidentiality Provision"
Thursday, September 16, 2010
by
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Chairman Frank, Ranking Member Bachus, and members of the Committee:

Thank you for the opportunity to testify today on behalf of the Securities and Exchange Commission concerning Section 929I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Section 929I was designed to eliminate a substantial and longstanding impediment to our examiners' ability to obtain vital examination information on a timely basis by providing clarity to regulated entities that the Commission can protect the confidential and proprietary information they provide to Commission examiners.

Overview

The Commission is responsible for examining in excess of 17,000 entities, including investment advisers, broker-dealers, credit rating agencies, self-regulatory organizations, clearing agencies, transfer agents and municipal advisors, among others. There are significant differences among these highly specialized regulated entities. Given the vital role they play in the nation's securities markets, the Commission must routinely access important and potentially sensitive information on a timely basis. Unfortunately, some regulated entities have in the past expressed concern about the level of protection available to examination materials provided to the Commission.

Though the Freedom of Information Act (FOIA) does provide important protections for examination materials obtained from "financial institutions," courts have not yet addressed whether every entity the Commission examines is a "financial institution" for purposes of these FOIA protections. In addition, these protections do not apply in non-FOIA contexts such as third-party litigation. Accordingly, Commission examinations, in some cases, have been hindered by registered entities' refusal to produce in a timely way certain information requested by examination staff due to concerns about the Commission's ability to protect the information from compelled third-party disclosure.

Section 929I enhances the Commission's ability to examine regulated entities by making clear that the Commission may protect, in appropriate circumstances, information gathered in the examination process from the many entities it regulates, supervises or examines. This provision will better enable the Commission's examination staff to access important information to monitor markets, identify risks, discover fraud and other securities law violations, and more efficiently focus its in-depth examinations – in short, to better protect investors and maintain efficient capital markets.

I understand there are questions about the scope of Section 929I. To address these concerns, Commission staff was instructed to not use Section 929I pending promulgation of Commission guidance that makes clear that Section 929I should be used in accordance with the principles of FOIA. That guidance, which the Commission recently promulgated, is both attached[1] and described in more detail below.

Prior Congressional Action

The Commission has raised these issues with Congress for many years. At least as far back as July 2006, then-SEC Chairman Cox provided legislative language that sought the same substantive protections for examination documents as the current Section 929I to the Chairmen and Ranking Members of the House Financial Services Committee and Senate Banking Committee, among others. As noted then, the proposed language sought to ensure the confidentiality of sensitive business records that the staff obtained during examinations, indicating that while such records:

> generally are protected from disclosure under [FOIA] by Exemptions 4 and 8 . . . [i]n other proceedings, such as pursuant to a court-issued subpoena, the staff must contest any production of records on grounds such as relevance and the application of common law privileges. In the absence of the [requested] provision, a judge taking an expansive view of relevance or a narrow view of possible privileges could order the production of sensitive records to a firm's competitor. Such disclosures could cause significant harm to the businesses whose records are disclosed, and the integrity of the supervisory process.

Chairman Cox provided the same legislative proposal and explanation to the Chairmen and Ranking Members of the same committees in May 2007, and re-referenced it again in May 2008.

On September 11, 2008, the House of Representatives passed the Securities Act of 2008 by voice vote. The bill was introduced by Chairman Kanjorski and was co-sponsored by seven Democrats and eight Republicans. Section 15 of that bill contained language that was virtually identical to the language Chairman Cox had provided.

Dodd-Frank Wall Street Reform and Consumer Protection Act

In July 2009, I provided a list of forty-two legislative proposals to the Chairmen and Ranking Members of the relevant House and Senate Committees and Subcommittees. Included was language that, while not identical, was substantively the same in its protection of examination documents as what Chairman Cox had provided[2] and which ultimately became Section 929I.

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[1] *See* Guidance to Staff on the Application of Section 929I of the Dodd-Frank Act, located at http://www.sec.gov/news/section-929i-guidance.htm.

[2] The operative language of Chairman Cox's proposal stated "Notwithstanding any other provision of law, the Commission shall not be compelled to disclose any information, documents, records or reports that relate to an examination of a person subject to or described in" three sections of the securities laws – Section 17 of the Exchange Act, Section 31 of the Investment Company Act, and Section 204 of the Investment Advisers Act. In my July 2009 proposal, the operative language included was "the Commission shall not be compelled to disclose records or

In November 2009, this Committee reported out the Investor Protection Act of 2009, Section 409 of which was very similar to what passed the House in 2008. This language was included in the Wall Street Reform and Consumer Protection Act that passed the House on December 11, 2009.

Finally, the base text for the Conference Committee's consideration of the financial reform bill included the current Section 929I. The provision was not amended during the conference's consideration of the legislation.

The importance of certainty in this area has been heightened by the passage of the Dodd-Frank Act, which mandates new responsibilities for the Commission, including new authority over, for example, municipal advisors, credit rating agencies, and clearing agencies that clear securities-based swaps. Fulfilling these responsibilities will require that the Commission expand and improve its examination capabilities, including its surveillance and risk assessment capabilities, to provide the type of risk-focused regulatory oversight necessary to protect investors. Accordingly, it is critical that examined entities freely share relevant and potentially sensitive information without concern that the information will later be made available to competitors or other third parties. Such disclosures may occur in response to a FOIA request or a subpoena served on the Commission in non-FOIA litigation. Section 929I was sought to address these issues.

Why the Existing FOIA Exemptions Alone Are Insufficient

Some have questioned why it is that the Commission needs Section 929I, arguing that existing FOIA Exemptions 8 and 4 should provide comfort to regulated entities that sensitive materials they provide to the Commission during examinations will not ultimately be disclosed to third parties. FOIA Exemption 8 applies 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," while FOIA Exemption 4 applies to "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential."

FOIA Exemption 8

With respect to FOIA Exemption 8, neither the text nor the legislative history of FOIA defines the term "financial institution" or otherwise sheds light on what Congress intended that term to encompass. The courts have looked to the Government in the Sunshine Act (Sunshine Act) for guidance, holding that FOIA and the Sunshine Act are *in pari materia*, or "upon the same matter or subject." Although the text of the Sunshine Act also does not define the term "financial institution," the legislative history includes an illustrative list of types of institutions that Act was intended to encompass. The case law applying Exemption 8 to the Commission has extended the

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information obtained pursuant to [the same three sections of the Exchange Act, Investment Company Act and Investment Advisers Act], or records or information based upon or derived from such records or information, if such records have been obtained by the Commission for use in furtherance of the purposes of this title, including without limitation surveillance, risk assessments, or other regulatory and oversight activities."

exemption to those entities specifically named in the legislative history to the Sunshine Act.[3] Despite this, other types of entities the Commission is responsible for supervising, regulating or examining (e.g., credit rating agencies, transfer agents, municipal advisors) are not specifically named in the Sunshine Act legislative history and, indeed, may not even have existed when the Sunshine Act was passed three decades ago.

Although the Commission believes that all entities it regulates, supervises or examines are encompassed by the term "financial institution" and that, as a result, all entities subject to examination by the Commission should be covered by this exemption, it cannot be presumed that the courts will find that every entity the Commission examines is necessarily a "financial institution." For example, before the Sunshine Act was passed, the governing case law rejected the argument that national securities exchanges and broker-dealers were "financial institutions."[4]

Section 929I eliminates any legal uncertainty concerning FOIA Exemption 8 by making it clear that information obtained in examinations from any covered regulated entities would be protected, even if there is uncertainty as to whether they are "financial institutions" covered by Exemption 8.

FOIA Exemption 4

The Commission also believes that FOIA Exemption 4 should protect all information provided to the Commission in examinations that constitutes trade secrets and confidential commercial or financial information, but again, it cannot be presumed that courts necessarily will agree. While this exemption provides broad protection for trade secrets and confidential commercial or financial information submitted voluntarily to the government, information that is required to be submitted to the government enjoys more limited protection.[5] Because the Commission's examination authority allows it to require entities to produce information in examinations, there is a possibility that the broad protection for voluntarily submitted information might not apply to information obtained in an examination.[6]

When information is required to be submitted, it is protected only if "disclosure of the information is likely to have either of the following effects: (1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[7] To satisfy the

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[3] *See, e.g.*, *Mermelstein v. SEC*, 629 F. Supp. 672 (D.D.C. 1986) (securities exchanges); *Feshbach v. SEC*, 5 F. Supp. 2d 774 (N.D. Cal. 1997) (broker-dealers and self-regulatory organizations), and *Berliner, Zisser, Walter & Gallegos v. SEC*, 962 F. Supp. 1348 (D. Colo. 1997) (investment advisers).

[4] *M.A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 470 (D.D.C. 1972).

[5] *See, e.g.*, *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 767-70 (D.C. Cir. 1974), *as clarified by Critical Mass Energy Project v. NRC*, 975 F.2d 871, 878 (D.C. Cir. 1992) (en banc); *see generally* Department of Justice Guide to the Freedom of Information Act (*FOIA Guide)* at 276.

[6] *See Center for Auto Safety v. Nat'l Highway Traffic Safety Admin., 244 F.3d. 144,149 (D.C. Cir. 2001).*

[7] *Nat'l Parks & Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974).

first prong, the government cannot simply argue that forced disclosure could impair its ability to quickly and efficiently obtain similar information in the future; instead it must show that disclosure "will result in a diminution of the 'reliability' or 'quality' of what is submitted."[8] Courts rarely have found the first prong met, rejecting arguments about potential harms to reliability and quality as too speculative.[9]

Courts have limited the definition of "competitive harm" in the second prong to "harm flowing from the affirmative use of proprietary information by competitors" and have explained that this "should not be taken to mean simply any injury to competitive position, as might flow from customer or employee disgruntlement."[10] Beyond this, there are stringent requirements to establish a "competitive harm," including in some cases a line-by-line analysis and justification of potentially thousands of pages of documents. Given these impediments, courts have frequently required disclosure of information that businesses endeavored to keep confidential.[11]

<u>Non-FOIA Litigation</u>

Of course, neither FOIA Exemption 8 nor 4 is available in non-FOIA litigation. The Commission cannot, for example, rely on FOIA exemptions when responding to a subpoena served on it in private litigation. When faced with such subpoenas, the Commission has had to rely on arguments of undue burden, relevance, or common law privileges to protect the information provided by the registered entities.[12]

Section 929I addresses this issue by providing important protections in non-FOIA litigation, clarifying that sensitive information received from third parties in examinations should be protected from forced disclosure to outside persons in both the FOIA <u>and</u> non-FOIA contexts, thereby removing a substantial barrier to the Commission's ability to obtain critical information in a timely fashion via our examination and surveillance efforts.

Rather than use the Commission to gain access to the third-party information, private litigants should seek the documents from the registered entities themselves. This approach is in many

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[8] *See, e.g.*, *Critical Mass*, 975 F.2d at 878; *FOIA Guide* at 301 (and cases cited therein).

[9] *See, e.g., Niagara Mohawk Power Corp. v. DOE*, 169 F.3d 16, 18 (D.C. Cir. 1999); *Aguirre v. SEC*, 551 F. Supp. 2d 33, 52-53 (D.D.C. 2008); *FOIA Guide* at 301.

[10] *See, e.g., Pub. Citizen Health Research Group v. FDA*, 704 F.2d 1280, 1291 n.30 (D.C. Cir. 1983).

[11] *See, e.g., N.C. Network for Animals v. USDA,* No. 90-1443, slip op. at 8-9 (4th Cir. Feb. 5, 1991) (finding "evidence presented by" agency "insufficient to support" its burden, noting absence of sworn affidavits or detailed justification for withholding from submitters); *Lee v. FDIC*, 923 F. Supp. 451, 455 (S.D.N.Y. 1996) (rejecting competitive harm when submitter failed to provide "adequate documentation of the specific, credible, and likely reasons why disclosure of the document would actually cause substantial competitive injury"); *see generally FOIA Guide* at 305-47.

[12] Indeed, earlier this year the Commission received a third-party subpoena in a civil action involving only private parties broadly seeking all documents provided by three registered entities in connection with a 2007 sweep examination, as well as all internal work product based on those documents. One of the three registered entities is not a party to the litigation.

cases preferable to seeking the documents from the SEC, as the registered entities are best positioned to articulate the sensitivity of the information.

Post-Enactment Concerns and Commission Guidance

Shortly after enactment, concerns were expressed about Section 929I. The Commission shares the commitment to accountability and transparency embodied by FOIA and recognizes that Section 929I reflects a balancing of competing interests, specifically, the public's right to gain access to certain documents and information, with the need for a robust Commission examination program that encourages open communication and unfettered Commission access to information that best protects investors and contributes to orderly markets.

To ensure that these important and competing interests were fully realized, soon after passage of the Dodd-Frank Act I determined that Commission guidance for using Section 929I was necessary and instructed staff to not invoke Section 929I until such guidance was issued. Recently, the Commission published guidance instructing staff on when and how to assert Section 929I. In my view, that guidance will provide the clarity we need for a more robust examination program in a manner consistent with principles of open government. A copy of that guidance is attached. The guidance is clear and unequivocal, and states that Section 929I is:

> designed to protect the confidential and proprietary information of regulated entities and foster an open examination process – not to protect the Commission or any Commission employee. Public oversight and transparency are essential and the staff may not invoke Section 929I to withhold information to protect the Commission or a Commission employee.

The guidance defines the few circumstances in which Section 929I may be invoked, and then only to address potential gaps in the pre-Section 929I law aimed at alleviating concerns among regulated entities about the Commission's ability to protect certain information from disclosure. Specifically, the guidance addresses the extent to which the Commission will rely on Section 929I in the context of both FOIA requests and discovery requests served on the Commission. In response to FOIA requests and in FOIA litigation, the Commission will rely on Section 929I only to address situations where the absence of case law holding the entities at issue to be "financial institutions" could limit the application of FOIA Exemption 8 pertaining to examination-related materials. In response to discovery requests, the Commission will not rely on Section 929I in any non-FOIA case in which it is a party, and in other cases will invoke Section 929I only with respect to information obtained pursuant to the Commission's examination authority that would be withheld in response to a FOIA request. The Commission will, however, continue to produce documents in third-party litigation where the party requesting the documents has demonstrated a "substantial need" for them that outweighs the confidentiality interest of the examined entity.

Pending Legislation

Four bills have been introduced in the House that explicitly or effectively would repeal Section 929I: H.R. 6086 by Chairman Towns, H.R. 5948 by Congressman Campbell, H.R. 5924 by

Congressman Issa, and H.R. 5970 by Congressman Paul. I am concerned that, as currently drafted, these bills may not provide certainty to regulated entities concerning the protection of their proprietary information, thereby undercutting the Commission's ability to obtain in a timely manner the sensitive or confidential information needed for comprehensive examinations.

Though H.R. 6086 seeks to address the ambiguity in FOIA Exemption 8 relating to "financial institutions," this proposal currently would not provide any clarity to address the risk of compelled disclosure in private litigation, i.e., those instances in which third parties seek through third-party subpoenas to compel the Commission to produce documents provided to the Commission in examinations. As stated above, when responding to a subpoena served on it in private actions, the Commission is not able to rely on FOIA exemptions and instead must rely on common law arguments such as undue burden or lack of relevance. Failure to make clear that sensitive information received from third parties in examinations is protected from forced disclosure in both FOIA and non-FOIA matters will continue to inhibit the Commission's ability to obtain critical, timely information through the exercise of our examination authority.

In addition, Section 929I struck Section 31(c) of the Investment Company Act, which provided that the Commission could not be compelled to disclose – in response to a FOIA request or otherwise – any internal compliance or audit records provided to the Commission by a registered investment company. The need for Section 31(c) was obviated by the broader Section 929I. The current draft of H.R 6086, however, essentially strikes Section 929I but does not restore Section 31(c), potentially resulting in fewer protections for these entities' documents than was the case prior to Dodd-Frank.

H.R. 5948, H.R. 5924 and H.R. 5970 all would repeal Section 929I and restore Section 31(c) of the Investment Company Act, effectively returning the Commission to the pre-Dodd-Frank status quo when our examinations were impacted by registered entities' concerns about our ability to protect sensitive information from compelled disclosure. I believe a more careful balance could be reached if any legislation not only restored prior protections but also addressed the unnecessary legal ambiguities in this area, in particular (1) the "financial institution" issue concerning FOIA Exemption 8, and (2) the non-FOIA instances in which private litigants seek to compel the Commission to produce documents via third-party subpoenas.

Response to Commission's Office of the Inspector General Report on FOIA

On September 25, 2009, the Commission's Office of the Inspector General (OIG) issued a report entitled "*Review of the Securities and Exchange Commission's Compliance with the Freedom of Information Act*". The review was conducted by the OIG as part of its continuous efforts to assess management of the Commission's programs and operations and was based on the OIG's audit plan. The report contained ten recommendations developed to strengthen the Commission's FOIA function and process, including recommending that the Chairman's Office affirm the importance of FOIA to its mission and ensure the Chief FOIA Officer has sufficient Commission-wide support to fulfill the responsibilities contained in the Open Government Act.

In response, a significant number of actions have been undertaken to address the findings and recommendations made by the OIG. In summary, the significant actions taken in response to the report include:

- Hiring a new Chief Freedom of Information Act/Privacy Act Officer in October 2009;
- Requiring that a staff attorney be contacted to verify whether an open enforcement investigation is active or inactive before asserting FOIA Exemption 7(A);
- Issuing new procedural guidance that provides clear and concise processing guidance to all FOIA/Privacy Act liaisons and Commission staff tasked with involvement in FOIA responses;
- Implementing a policy that, in general, a decision on a FOIA appeal may be made only by a senior officer who did not participate substantively in processing the initial FOIA request;
- Restructuring the FOIA/Privacy Act Office to improve management oversight of quality and consistency of responses, adherence to policy and procedure, and workload volume and backlog management;
- Increasing training opportunities for FOIA staff and liaisons, including annual 3-day seminars led by the former Co-Director of the Department of Justice's Office of Information Policy (the office responsible for providing guidance to all agencies on FOIA-related questions);
- Emphasizing the importance and seriousness of every staff member's obligation to assist with making timely FOIA responses through my sending of an agency-wide email;
- Reinstating a web-based resource for all FOIA and Privacy Act matters that can be accessed by any staff member through the Commission's intranet; and
- Improving technology and office equipment resources for the FOIA/Privacy Act Office, including upgrading the software, server support and performance that is at the center of the Office's work.

Significantly, action has been taken on all ten recommendations. Nine of the ten recommendations made in the report have been closed by the OIG, and we hope to have closure on the remaining item in the very near future.

Conclusion

Section 929I is central to our ability to develop a robust examination program that better protects investors. Though we recognize the competing policy interests it raises, a return to the pre-Section 929I status quo will perpetuate circumstances that have limited the efficacy of our examination program.

I believe the Commission's guidance strikes an appropriate balance by addressing the primary issues that existed prior to Section 929I while simultaneously protecting against its application to a broader than-intended swath of information. It will allow the SEC to gain access in a timely fashion to information and data that it otherwise may not receive, thereby further enhancing our ability to maintain an efficient and effective compliance program, while also ensuring that the provision is not used to protect the Commission or its employees. It will provide certainty to registrants by clarifying that the sensitive information the Commission receives in its examination or surveillance efforts can be protected from compelled disclosure, while maintaining the commitment to transparency and accountability that FOIA promotes. In short, it will improve our ability to fulfill our mission in a manner that is consistent with the principles of open government.

Thank you again for allowing me to be here today to discuss Section 929I. I look forward to working with Congress and interested parties to ensure that these importance interests are fully achieved.

Appendix

GUIDANCE TO STAFF ON APPLICATION OF SECTION 929I OF THE DODD-FRANK ACT

Introduction. The Commission is committed to accountability and transparency in government as embodied by the Freedom of Information Act (FOIA). FOIA provides a broad framework for disclosure of government documents, subject to particular exemptions that recognize compelling public policy interests including the effective examination and supervision of financial institutions.

A fundamental element of an effective oversight and examination regime is the ability to obtain access to sensitive information from regulated entities. In FOIA Exemption 8, Congress recognized that if details from examinations were made available to the public or to competitors of financial institutions, those institutions might "cooperate less than fully with federal authorities." *Consumers Union of United States, Inc. v. Heimann*, 589 F.2d 531, 534 (D.C. Cir. 1978).

In recent years, some entities subject to examination have resisted sharing potentially sensitive information with the Commission in light of concerns about the Commission's ability to protect certain information from disclosure. These concerns arise in both FOIA and litigation contexts.

In the FOIA context, while the Commission believes that all entities it regulates, supervises or examines are "financial institutions" within the meaning of FOIA Exemption 8, a court could reach a different conclusion.

In the non-FOIA context, sensitive information obtained pursuant to the Commission's examination authority remains subject to discovery in litigation.

The uncertainty about the Commission's ability to protect sensitive information can cause delay and undermine the open dialogue and review essential for a thorough examination. These problems could be magnified as the Commission's role expands and the types of entities regulated, examined and supervised by the Commission increase. Although the Commission has considerable statutory authority to compel access to sensitive information over the objections of a regulated entity, a supervisory regime where regulated entities provide timely access to sensitive information to regulators because they are confident the information will remain protected from mandatory disclosure ensures more efficient and often more productive examinations.

Section 929I of the Dodd-Frank Consumer Financial Protection and Wall Street Reform Act (Public Law 111-203) gives the Commission clear authority to protect, in appropriate circumstances, all information gathered in the examination process from many of the entities it regulates, supervises or examines. It is an important provision that will better enable the staff to access important information to monitor markets, identify risks at regulated entities, and more efficiently focus its in-depth examinations.

Summary of the Guidance. The Commission should use Section 929I in a manner that recognizes the importance of both open government and an effective examination process. This guidance instructs the staff on when and how to assert Section 929I so that it is applied consistently with the provision's intent and the principles of open government. The guidance addresses to what extent the Commission will rely on Section 929I in the context of both FOIA requests and discovery requests served on the Commission. In response to FOIA requests, the Commission will rely on Section 929I only to address situations where the possibility that some of the entities the Commission examines may not be deemed "financial institutions" could limit the application of Exemption 8. In response to discovery requests in non-FOIA cases, the Commission will not rely on Section 929I in any case in which it is a party, and in other cases will invoke Section 929I only with respect to information obtained pursuant to the Commission's examination authority that would be withheld in response to a FOIA request. The Commission will, however, continue to produce documents if the party requesting the documents has demonstrated a "substantial need" for them that outweighs the confidentiality interest of the examined entity.

Application in Response to FOIA Requests. In response to a FOIA request, staff will invoke Section 929I only for information obtained pursuant to the Commission's examination authority, and only to information provided by entities not already clearly covered as "financial institutions" under FOIA Exemption 8. Because FOIA Exemption 8 protects materials related to examinations of "financial institutions" – but does not define the term "financial institution" – staff should invoke Section 929I in response to a FOIA request only:

(1) where the request seeks information obtained pursuant to the Commission's examination authority from an entity the Commission is responsible for regulating, supervising or examining;

(2) the examined entity may not be clearly recognized as a "financial institution" under Exemption 8; and

(3) Exemption 8 would protect the information if the entity were clearly deemed a "financial institution."

Application in Response to Discovery Requests where the Commission or the United States Is a Party. In non-FOIA litigation, staff should *not* invoke Section 929I in response to discovery requests where the Commission or the United States is a party.[13] As noted above, Section 929I was designed to protect information obtained pursuant to the Commission's examination authority where parties in litigation are using the discovery process to seek from the Commission information about their competitors or about other unrelated entities.

Application in Response to Third-Party Discovery Requests (where the Commission or the United States Is Not a Party). In response to discovery requests in litigation in which neither the Commission nor the United States is a party, Section 929I may be invoked only if:

[13] When the Commission is a defendant in FOIA litigation, staff should be guided by the Application in Response to FOIA Requests.

(1) the information sought was obtained pursuant to the Commission's examination authority from an entity the Commission is responsible for regulating, supervising or examining,

(2) the information would be withheld if sought in a FOIA request; and

(3) the requesting party has not demonstrated a "substantial need" sufficient to overcome the need to maintain confidentiality.

In deciding whether a "substantial need" has been shown, the staff should consider (i) the relationship of the information to the issues raised by the litigation in which the discovery is being sought; (ii) the requestor's need for the information to prepare or present its case; (iii) the reason why the requestor cannot obtain the information from any other source; and (iv) the requestor's commitment to obtain a protective order acceptable to the Commission from the judicial or administrative tribunal hearing the action. The need to maintain confidentiality is paramount when the information at issue is a trade secret or confidential commercial information within the meaning of FOIA Exemption 4, and confidentiality of such information should be maintained in private litigation except in extraordinary circumstances.

Discretionary Disclosures. Section 929I and FOIA do not *require* the Commission to withhold information. Even if Section 929I or a FOIA exemption may provide a basis for withholding information, the Commission should make disclosures, where permitted by law, when the need for confidentiality is outweighed by the public's interest in accountability and transparency.[14]

As noted, these provisions are designed to protect the confidential and proprietary information of regulated entities and foster an open examination process – not to protect the Commission or any Commission employee. Public oversight and transparency is essential and the staff may not invoke Section 929I to withhold information to protect the Commission or a Commission employee.

Application in Administrative Proceedings Brought by the Commission or the United States. Section 24(f) of the Exchange Act (as renumbered pursuant to Section 929I(a) of the Dodd-Frank Act), Section 31 of the Investment Company Act of 1940 (as amended by Section 929I(b) of the Dodd-Frank Act), and Section 210 of the Investment Advisers Act of 1940 (as amended by Section 929I(c) of the Dodd-Frank Act) confirm that the Commission cannot assert Section 929I as a basis for refusing to "comply with an order of a court of the United States in an action brought by the United States or the Commission." The staff should interpret "a court of the United States" as including administrative proceedings brought by Commission divisions or offices.

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[14] The Commission cannot make a discretionary release pursuant to Section 929I or FOIA if another provision of law prohibits disclosing the information at issue (*e.g.*, if the Privacy Act or the Trade Secrets Act requires that the information be withheld). In addition, before making any discretionary disclosure of information that is subject to a confidential treatment request, the staff should first follow the procedures detailed in the Commission's regulations. *See* 17 C.F.R. 200.83.

No Private Right. This guidance does not create any right or benefit, substantive or procedural, enforceable at law or equity by any party against the Commission.

If you any questions about this Guidance, please contact Richard Humes, Associate General Counsel for Litigation and Administrative Practice.