

August 3, 2010

Senator Christopher Dodd
Chairman
Senate Committee on Banking, Housing and Urban Affairs
534 Dirksen Senate Office Building
Washington, D.C. 20510

Representative Barney Frank
Chairman
House Committee on Financial Services
2129 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairmen Dodd and Frank:

We, the undersigned organizations concerned with government accountability and transparency, are writing to express our concerns about Section 929I of the recently passed Dodd-Frank Wall Street Reform and Consumer Protection Act (the Dodd-Frank Act). If interpreted broadly, this provision has the potential to severely hinder the public's ability to access critical information related to the oversight activities of the Securities and Exchange Commission (SEC), thereby undermining the bill's overarching goals of more transparency and accountability.

As you know, Section 929I states that the SEC cannot be compelled to disclose records or other information obtained from its registered entities—including entities such as hedge funds, private equity funds, and venture capital funds that will now be regulated by the SEC—if this information is used for “surveillance, risk assessments, or other regulatory and oversight activities” outlined in the Securities Exchange Act of 1934, the Investment Company Act of 1940, and the Investment Advisers Act of 1940.¹

SEC Chairman Mary Schapiro wrote to you last week defending this provision. She argued that registered entities need to be able to provide the SEC with access to sensitive or proprietary information “without concern that the information will later be made public.” She further explained that, prior to the passage of 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.” She also claimed that investment advisers routinely refuse to turn over personal trading records of investment management personnel, “instead requiring staff to review hard

¹ “Dodd-Frank Wall Street Reform and Consumer Protection Act,” Pub. L. No. 111-203, Section 929I. http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h4173enr.txt.pdf (Downloaded August 2, 2010)

copies of the records on the adviser's premises," which "materially impacts the staff's ability to detect insider trading activity."²

These arguments do not adequately describe the SEC's existing regulatory authority, and they fail to acknowledge that the Freedom of Information Act (FOIA) already provides sufficient exemptions to protect against the release of sensitive and proprietary information. Furthermore, the SEC has a troubling history of being overly aggressive in withholding records from the public. For these reasons, we strongly urge you to repeal Section 929I, or to at least curtail the SEC's broad authority to withhold critical information from the public.

First, we are not convinced by Chairman Schapiro's claim that "existing FOIA exemptions were insufficient to allay concerns [about public disclosure] due in part to limitations in FOIA." For instance, Exemption 8 protects 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." Chairman Schapiro argues that this exemption may not apply to all registrants, but it's worth noting that the courts have broadly construed the term "financial institutions," holding that it is not limited to depository institutions and can also include investment advisers.³ In addition, Exemption 4 protects "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." The Department of Justice's (DOJ) FOIA guide states that this exemption "encourages submitters to voluntarily furnish useful commercial or financial information to the government and it correspondingly provides the government with an assurance that such information will be reliable,"⁴ calling into question Chairman Schapiro's claim that additional exemptions are needed in order for the SEC to collect information from its registered entities.

Second, the SEC's track record with FOIA raises additional concerns about giving the agency even more authority to withhold information from the public. Last year, an audit conducted by the SEC Office of Inspector General (OIG) uncovered a wide range of problems related to the SEC's FOIA operations. We were particularly troubled by the OIG's finding that the SEC Chief FOIA Officer was not operating in compliance with Executive Order 13392 or the OPEN Government Act; that few FOIA liaisons have written policies and procedures for processing FOIA requests, increasing the risk that the agency is unnecessarily withholding information from the public; and that there is an insufficient separation between the initial FOIA determination and the appeal process.

² Letter from SEC Chairman Mary Schapiro to Representative Barney Frank and Senator Christopher Dodd, July 30, 2010. <http://voices.washingtonpost.com/market-cop/frank.pdf> and <http://voices.washingtonpost.com/market-cop/dodd.pdf> (Downloaded August 2, 2010)

³ Department of Justice, "Exemption 8," *Freedom of Information Act Guide*, May 2004. <http://www.justice.gov/oip/exemption8.htm> (Downloaded August 2, 2010)

⁴ Department of Justice, "Exemption 4," *Freedom of Information Act Guide*, May 2004. <http://www.justice.gov/oip/exemption4.htm> (Downloaded August 2, 2010)

The OIG concluded that the SEC's FOIA release rate was "significantly lower when compared to all other federal agencies."⁵

The OIG put forth a number of recommendations for correcting the glaring deficiencies in the SEC's FOIA operations, such as ensuring that accurate searches are made for responsive information, providing guidelines or written policies for all FOIA-related staff that address the concerns raised by the OIG, and ensuring that all FOIA-related staff has access to sufficient legal expertise to process requests in compliance with FOIA. But according to the OIG's most recent semiannual report to Congress, the SEC has not completed final action on any of these recommendations.⁶ Rather than giving the SEC any more leeway to improperly withhold information from the public, we urge you to hold Chairman Schapiro accountable for the excessive delays in implementing the OIG's recommendations.

Third, we notice that Chairman Schapiro is "asking the Commission to issue and publish on our website guidance to our staff that ensures [Section 929I] is used only as it was intended." The solution for addressing the uncertainty surrounding this provision is not additional guidance. The solution is clarification in the law that public access is vital to accountability and that the existing FOIA exemptions can adequately protect confidential business information provided by regulated entities.

Fourth, Chairman Schapiro neglected to mention that the SEC already has the authority to compel registered entities to provide information and records. Under the Securities Exchange Act of 1934, the SEC has the authority to subpoena witnesses and require the production of any records from its registered entities. If these entities fail to comply, the SEC has the authority to suspend these entities, impose significant monetary penalties, and refer cases to DOJ for possible criminal proceedings.⁷ But instead of using these existing authorities, Chairman Schapiro seems to think that Congress needs to provide blanket FOIA exemptions in order to convince the SEC's registered entities to cooperate. We think such a blanket exemption fosters an environment that defers to the entities it regulates and is inadvisable.

Finally, it is unclear what Chairman Schapiro's plans are for implementing other blanket FOIA exemptions in the Dodd-Frank Act, such as Section 404, which exempts the SEC from FOIA with respect to any "report, document, record, or information" received from investment advisers to private funds.

In the aftermath of the recent financial crisis, the need for greater transparency in our financial system is all too apparent. The SEC's ongoing effort to withhold vital records

⁵ Securities and Exchange Commission, Office of Inspector General, *Review of the SEC's Compliance with the Freedom of Information Act* (Report No. 465), September 25, 2009. <http://www.sec-oig.gov/Reports/AuditsInspections/2009/465.pdf> (Downloaded August 2, 2010)

⁶ Securities and Exchange Commission, Office of Inspector General, *Semiannual Report to Congress: October 1, 2009 – March 31, 2010*, pp. 98-99. <http://www.sec-oig.gov/Reports/Semiannual/2010/semiapr10.pdf> (Downloaded August 2, 2010)

⁷ Securities Exchange Act of 1934, Section 21(b) - (d), Section 32. <http://www.sec.gov/about/laws/sea34.pdf> (Downloaded August 2, 2010).

from the public undermines the spirit of the transparency reforms in the Dodd-Frank Act, and flies in the face of President Obama's guidance instructing agencies to adopt a "presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government."⁸

We call on you to repeal the unnecessary FOIA exemption in Section 929I, examine the SEC's current record on withholding information, and take whatever steps are necessary to ensure that the SEC isn't given any additional authority to keep its records under a veil of secrecy. We welcome an opportunity to discuss this issue with you further. To reach our groups, you or your staff may contact Angela Canterbury at the Project On Government Oversight at 202-347-1122 or acanterbury@pogo.org.

Sincerely,

American Library Association

American Association of Law Libraries

Citizens for Ethics and Responsibility in Washington (CREW)

Essential Information

Government Accountability Project (GAP)

Liberty Coalition

OMB Watch

OpenTheGovernment.org

Project On Government Oversight (POGO)

Public Citizen

Sunlight Foundation

cc: Senator Patrick Leahy

⁸ "Memorandum of January 21, 2009 – Freedom of Information Act," *Federal Register*, Vol. 74, No. 15, January 26, 2009. <http://edocket.access.gpo.gov/2009/pdf/E9-1773.pdf> (Downloaded August 2, 2010)