



Deciphering the Dodd-Frank FOIA Flap

Section 929I of the newly enacted Dodd-Frank Wall Street Reform and Consumer Protection Act (the “Act”) significantly expands the protection from public disclosure of information produced to the United States Securities and Exchange Commission (the “SEC” or “Commission”) by regulated entities. This confidentiality provision received relatively little fanfare as the bill was debated in Congress. Since the Act was signed into law, however, Section 929I has ignited a controversy regarding the extent to which the provision allows the SEC to sidestep public disclosures otherwise required under the Freedom of Information Act (“FOIA”). Some have decried the provision as a “backroom deal” between Congress and the SEC to keep the SEC’s activities shrouded in secrecy.¹ Lawmakers from both parties have now jumped into the fray by introducing at least four different bills to repeal or limit the scope of Section 929I.² In response, SEC Chairman Mary Schapiro sent letters to Senator Dodd and Congressman Frank clarifying the Commission’s view that Section 929I does not provide the Commission with a blanket exemption from FOIA and emphasizing that the provision is needed to ensure that the Commission is able to collect highly sensitive and proprietary information from regulated firms in a timely manner.³

Section 929I provides significant protection from public disclosure — both under FOIA and in response to subpoenas served on the Commission — for certain materials produced to the SEC in connection with the Commission’s examination and surveillance functions.⁴ In the wake of increasing press coverage and political rhetoric focused on whether Section 929I is consistent with the Obama administration’s policy of government transparency, the Commission has promised to publish guidance to its staff to ensure that the provision is used only as it was intended, and Congress has scheduled hearings to discuss the impact the provision will have on public access to information related to financial transactions. In the interim, entities registered with the SEC — including registered brokers, dealers, transfer agents, investment advisers, and investment companies — should pay particular attention to the extent to which Section 929I can be used to preserve the confidentiality of documents produced to the Commission.

¹ Dunstan Prial, *SEC Says New Financial Regulation Law Exempts it From Public Disclosure*, Fox Business, July 28, 2010, <http://www.foxbusiness.com/markets/2010/07/28/sec-says-new-finreg-law-exempts-public-disclosure/>.

² H.R. 5924, 111th Cong. (2010); H.R. 5948, 111th Cong. (2010); H.R. 5970, 111th Cong. (2010); S. 3717, 111th Cong. (2010).

³ Letter from Mary L. Schapiro, Chairman, United States Securities and Exchange Commission, to The Honorable Christopher J. Dodd, Chairman, Committee on Banking, Housing, and Urban Affairs, United States Senate (July 30, 2010); Letter from Mary L. Schapiro, Chairman, United States Securities and Exchange Commission, to The Honorable Barney Frank, Chairman, Committee on Financial Services, United States House of Representatives (July 30, 2010).

⁴ See Section B below for the specific statutory language.

- A. Section 929I addresses the concern of regulated entities that confidential and highly sensitive business information collected during the SEC’s examination process ultimately could be disclosed to the public.** As Chairman Schapiro noted in her letters to Senator Dodd and Congressman Frank, the Commission has long recognized the need for the language contained in Section 929I, which it has sought from Congress as far back as 2006. In the context of its examination and surveillance efforts, the SEC often asks regulated entities to turn over sensitive and proprietary information, including customer information, trading algorithms, internal audit reports, and trading strategy information. Prior to the passage Section 929I, regulated entities were reluctant to comply — and “not infrequently” refused to do so — based on fears that the Commission might be forced to disclose such information to the public. According to Chairman Schapiro, existing FOIA exemptions were not broad enough to assuage concerns regarding public disclosure and, even if a FOIA exemption could be utilized to deny a FOIA request, FOIA exemptions are inapplicable when the SEC is faced with responding to a subpoena. The new legislation resolves this issue by providing certainty to regulated entities that records and information collected by the Commission — including proprietary and customer information — in its examination or surveillance efforts cannot be compelled by third parties either through FOIA requests or subpoenas (other than in actions brought by the Commission).
- B. Section 929I applies to documents provided to the Commission in connection with its examination and surveillance functions.** Specifically, the provision applies to records or information provided to the Commission pursuant to Section 17(b) of the Securities Exchange Act of 1934, Section 204 of the Investment Advisers Act of 1940, or Section 31 of the Investment Company Act of 1940 (collectively, the “Examination and Surveillance Statutes”) “if such records or information have been obtained by the Commission for use in furtherance of the purposes of [these titles], including surveillance, risk assessment, other regulatory or oversight activities.”⁵ In general, the Examination and Surveillance Statutes authorize the SEC to require registered brokers, dealers, transfer agents, investment advisers, and investment companies to maintain certain records and to furnish those records to the Commission’s staff upon request. This authority to inspect the books and records of regulated entities provides the basis for the SEC’s examination program. But the reach of Section 929I is not limited by its terms to documents collected in connection with an examination. The confidentiality provisions extend to documents obtained by the Commission pursuant to one of the Examination and Surveillance Statutes and in furtherance of, among other things, its “regulatory or oversight activities.” The general nature of this language, which could be read broadly to cover documents collected by the Commission for a multitude of purposes, lies at the heart of this brewing controversy. Presumably, the forthcoming interpretive guidance will articulate the Commission’s view as to the appropriate scope of the statute.
- C. As drafted, Section 929I applies not only to all records or information provided pursuant to the Commission’s examination authority but also to all documents based upon or derived from such records or information.** In other words, if Section 929I applies to records or information, it also applies to records or information “based upon or derived from” such records or information. The purpose of this language is to ensure that data and information collected by the Commission remain confidential even where the Commission staff has extrapolated and consolidated the data to create, for example, a surveillance or risk assessment report or database.

⁵ Similarly, Section 404 of the Act extends the protection from public disclosure to the registered investment advisers’ newly-established obligation to file reports related to private funds.

- D. Section 929I does not prevent the Commission from cooperating with other agencies or responding to court orders in actions brought by the Commission or the United States.** The Commission is not authorized to withhold records or information from Congress, to refuse to comply with requests from other federal agencies, or to disregard an order of a court in connection with an action brought by the United States or the Commission. In addition, pursuant to Section 112 of the Act, the Financial Stability Oversight Council is permitted to request and receive data and information from the Commission necessary to monitor the financial services marketplace or to otherwise carry out its duties and responsibilities.
- E. An Administrative Law Judge has held that Section 929I's protections do not apply retroactively.** Section 4 of the Act states that the Act shall take effect one day after the date of enactment, and President Obama signed the Act into law on July 21, 2010. Prior to the passage of the Act, respondents in an administrative proceeding sought to compel documents from the Commission's Office of Compliance Inspections and Examinations ("OCIE"). After the Act was passed, OCIE moved to quash the subpoena on the grounds that the requested documents were protected from compulsory disclosure by Section 929I. In denying the motion to quash, the Administrative Law Judge held that OCIE "may not claim the protection of Section 929I of the Dodd-Frank Act to resist production of documents in response to an administrative subpoena issued before July 22, 2010."⁶
- F. As a matter of practice, regulated entities should expressly identify document productions made pursuant to Section 17(b) of the Exchange Act, Section 204 of the Advisers Act, or Section 31 of the Investment Company Act.** As noted above, the protection from public disclosure offered by Section 929I applies to documents provided to the Commission pursuant to the Examination and Surveillance Statutes. In practice, however, the specific statutory justification underlying the Commission's request for documents or an entity's production of documents is not always clear. Unless and until Commission guidance dictates a specific procedure, regulated entities producing documents to the Commission should identify all situations where Section 929I appears to apply and submit a written cover letter, together with the documents, expressly referencing the relevant statute and claiming confidential treatment.

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⁶ *In the Matter of Morgan Asset Mgmt.*, Administrative Proceeding File No. 3-13847 (Aug. 3, 2010).

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