SEC/FOIA Debate

# The Dodd-Frank Act: A FOIA Exemption for SEC Misconduct?

BY GARY J. AGUIRRE

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Section 929I of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) grants the Securities and Exchange Commission (SEC) a unique, new exemption from the Freedom of Information Act (FOIA). It is a wildcard the SEC can play when its other exemptions fail, which is extremely rare. It extinguishes the last ray of light afforded by FOIA into SEC blunders, such as its botched investigations of the Ponzi scheme run by Bernard Madoff, the insider trading conducted by Pequot Capital Management and its chief executive officer, the overvaluing of mortgage backed securities by Bear Stearns, and similar scandals. Despite these failures, Congress granted the SEC even more power to regulate the nation's financial markets, while shuttering its windows from the public's eyes.

In closing FOIA access to the SEC, § 929I sharply conflicts with the stated purpose of the Dodd-Frank Act "to promote the financial stability of the United States *by improving accountability and transparency in the financial system* (emphasis added)." Congress's confusion about the effect of § 929I is understandable. Section 929I creates a one-of-a-kind exemption by employing two legal fictions and cross-references to statutes whose scope expands under the SEC's rule-making authority. The SEC has been giving mixed messages where it stands on its own transparency: While the SEC sought to exempt itself from FOIA through § 929I, SEC Chairman Mary Schapiro beat the table during her Congressional testimony in July about the SEC's "comprehensive overhaul aimed at strengthening our FOIA program *and our commitment to open government* (emphasis added)."[1]

Immediately after its passage, the SEC asserted its new exemption as a basis for withholding records in a lawsuit brought by Fox Business Network under FOIA seeking information about the SEC's botched investigation of Bernard Madoff, according to Fox Business attorneys. Since then, Fox Business has made its grief over the SEC's new exemption quite public. Its outcry was soon amplified by a chorus of public service organizations who claimed the SEC needed more transparency, not less.[2] As a consequence, five bills have been drafted to repeal § 929I.[3]

Feeling the heat, one of § 929I's coauthors, Rep. Barney Frank (D-Mass.), Chairman of the House Financial Services Committee, has set a hearing for Sept. 23 to decide if the exemption goes too far. Chairman Schapiro is expected to explain why the SEC needs such a broad, unique exemption for itself alone.

Chairman Schapiro's task of justifying § 929I may have gotten tougher since her public statement that the SEC needed the new exemption so FOIA requesters could not obtain proprietary information of regulated entities, such as "algo-

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rithmic formulas."[4] As the same chorus of public service organizations quickly pointed out, the SEC already has two separate FOIA exemptions permitting it to withhold such information.[5] So why would it need a third?

This article discusses the legal issues which lie at the center of the controversy over § 929I. It addresses the mechanism by which § 929I grants the SEC its unique power to exempt its operations from FOIA's reach, the SEC's contentions why it needs the new exemptions, the decision of a U.S. district court in *Aguirre v. SEC*[6] that likely prompted the SEC to seek the new exemptions, and the constitutional issue which § 929I raises. Finally, the author concludes from this analysis that the SEC sought and obtained a unique exemption in § 929I: A FOIA exemption to withhold information of its own misconduct.

## Section 929I of the Dodd-Frank Act Grants the SEC the Power to Exempt Itself from FOIA

Section 929I of the Dodd-Frank Act does not directly amend any FOIA provision. Rather, it adds language to the three principal securities acts under which the SEC regulates the financial markets—the Securities Exchange Act of 1934 (Exchange Act), the Investment Company Act of 1940 (Company Act), and the Investment Advisers Act of 1940 (Advisers Act)—to effectively create a unique FOIA exemption available only to the SEC.

Section 929I creates the new SEC exemption in two steps. First, it amends the Exchange Act, the Company Act, and the Advisers Act so each declares the SEC cannot be compelled to disclose information provided to the SEC under either of the three securities acts. For example, as amended, § 210 of the Advisers Act now declares the SEC cannot be compelled to disclose information it collects from investment advisers under § 204 of that Act. This amendment is expressly designed to create an exemption to FOIA under what is commonly referred to as FOIA's Exemption 3(B).[7] Exemption 3(B) excludes from FOIA's reach "matters that are specifically exempted from disclosure by statute… *provided that such statute… establishes particular criteria for withholding or refers to particular types of matters to be withheld* (emphasis added)." If § 929I did nothing more than add the language described above, the amended acts would not likely qualify under Exemption 3(B), because they contain no criteria limiting the SEC's discretion to withhold records, a fatal deficiency.[8]

Section 929I overcomes this deficiency—its failure to incorporate the criteria required by Exemption 3(B)—through a second amendment, which creates a legal fiction. At the suggestion of the SEC,[9] § 929I amends § 210 of the Advisers Act so it simply declares itself to be an Exemption 3(B) statute, though it lacks any constraints on the SEC's discretion what it may withhold, an explicit requirement of this exemption. Likewise, § 929I added the same language to § 24 of the Exchange Act and § 31 of the Company Act, each now declaring itself to be an Exemption 3(B) statute. No other provision in the U.S. Code purports to grant any agency such unbridled discretion by declaring itself to be an Exemption 3(B) statute.[10] In this way, § 929I appears to be a unique grant of power by Congress to a federal agency.

Nevertheless, given the clear expression of legislative intent, no court will likely entertain the argument that the amended securities acts do not qualify as Exemption 3(B) statutes. However, as discussed below, Congress's unfettered grant of power to the SEC to decide what government secrets should be disclosed to the public may raise constitutional issues.

Alternatively, § 929I could have amended the same sections of each securities act to specify criteria the SEC would apply in deciding what information to withhold and thereby qualify for a FOIA exemption under Exemption 3(B),[11] a practice Congress has frequently used in the past.[12] For example, an amendment to § 210 of the Investment Advisers Act could have specified that the SEC should withhold records containing proprietary information. Apparently, the SEC did not wish to specify all of the types of information it wishes to withhold, *e.g.*, records of controversial SEC investigations.

It is hard to imagine what meaningful records would not be exempt under § 929I's amendments

to the three securities acts. By way of example, § 929I amends § 210 of the Advisers Act so any records "provided to the Commission under section 204, or records or information based upon or derived from such records or information" would be exempt from FOIA at the SEC's discretion. Further, § 204 of the Advisers Act defines "records" to include "accounts, correspondence, memorandums, tapes, discs, papers, books, and other documents or transcribed information of any type, whether expressed in ordinary or machine language." "Machine language" includes the binary format by which computers speak.[13] Hence, the new exemption would include all information received by the SEC from an investment adviser in any kind of document whether in hard copy or electronic format, *e.g.*, emails.

And § 929I grants the SEC an even more extraordinary power: the ability to expand the scope of its new FOIA exemptions at will. Should the SEC believe the current form of its new exemptions is too narrow, it may expand their scope under its rule-making authority. By way of example, as amended, § 210 of the Advisers Act specifies that information an investment adviser provides to the SEC under § 204 is exempt from FOIA. In turn, § 204 states that the scope of information an investment adviser may be required to provide to the SEC is controlled by the rules promulgated by the SEC under that section. Hence, the scope of the SEC's FOIA exemption under § 204 is also determined by the rules the SEC under § 204. The same is true for the amendments to the Exchange Act and the CompanyAct. Hence, if the SEC decides it needs an even broader exemption under FOIA, it simply modifies its rules to broaden the exemptions' reach.

Section 929I also eliminates the SEC's statutory obligation under § 3518 of Title 44 of the U.S. Code[14] to submit any rules relating to its new FOIA exemption to the Office of Management and Budget for approval. Section 929I uses its second fiction to carve out an exception to § 3518, just as it uses its first fiction to qualify as an Exemption 3(B) statute. To bypass § 3518, § 929I of the Dodd-Frank Act amends § 210 of the Advisers Act to state: "Collection of information pursuant to section 204 *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 (emphasis added)." This gross distortion of the English language allows the SEC *alone* to decide how far it wishes to extend its exemption to block FOIA access by the public.

The SEC's assertion that information sought by a FOIA requester is exempt under its new FOIA exemptions will be almost impossible to effectively challenge. To begin with, each of the sections which now exempt information is the primary section in each securities act under which the regulated entity is required to maintain records and provide them to the SEC. Hence, any information collected from a regulated entity in the future under any of the newly amended securities acts would presumably be provided to the SEC under the section which now exempts such information from the reach of FOIA requests.

Further, the SEC can easily make this argument bullet-proof. It merely needs to cite one of the FOIA-proof sections of the securities acts as its statutory authority for seeking the information in the informal request or subpoena served on the regulated entity. For example, an SEC staff attorney could add the following language to a letter requesting information from an investment adviser, such as a hedge fund, "the Commission requests that you provide the following information under Section 204 of the Advisers Act…" The letter then becomes irrefutable evidence that the information was collected under § 204 and is therefore exempt from FOIA, should the FOIA requester file a lawsuit.

## Does § 929I Have a Constitutional Infirmity?

But there could be a wrinkle: Congress may have granted too much discretion to the SEC under § 929I to decide what government secrets should be withheld from the public. The SEC does not merely have unfettered discretion to take an exemption for virtually any information it collects under the three acts that permit it to monitor the activities of regulated entities. As discussed above, it also has the capacity to ex-


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pand the scope of that exemption at will through its rule-making authority. Hence, § 929I's broad grant of power to the SEC appears void of any standards which would permit it to pass constitutional muster. As the Supreme Court noted in its 1976 decision in *Eastlake v. Forest City Enterprises, Inc.*, "Courts have frequently held in other contexts that a congressional delegation of power to a regulatory entity must be accompanied by discernible standards, so that the delegatee's action can be measured for its fidelity to the legislative will."[15]

The U.S. District Court was on the fringe of this constitutional issue in *Aguirre* when it rejected the SEC's contention that § 210 of the Advisers Act qualified as an Exemption 3(B) statute. The court reasoned:

> **[I]f the SEC's novel and overly expansive interpretation of Exemption 3 were to be accepted, it would mean that the SEC would have *unbridled discretion* regarding all information obtained by a subpoena (emphasis added).[16]**

The SEC now possesses even greater power under § 929I to withhold records than it asserted it could withhold in *Aguirre*, since § 929I includes the power to withhold information collected under the Exchange Act, the Company Act, and the Advisors Act. With such "unbridled discretion" to withhold information from FOIA requesters comes the question whether § 929I constitutes an unlawful delegation of legislative authority.

Apparently aware that § 929I goes too far, Chairman Schapiro offered to "publish on our website guidance to our staff that ensures the provision is used only as it was intended."[17] This overture may assuage some concerns in Congress, but the SEC's decision to exercise self-restraint cannot cure a constitutional flaw in § 929I as the Supreme Court held in 2001 in *Whitman v. Am. Trucking Ass'ns.*, which stated:

> **The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory. The very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would itself be an exercise of the forbidden legislative authority.[18]**

## The SEC's Justifications for Seeking § 929I Are Indefensible

As the popular backlash over § 929I gathered momentum, Chairman Schapiro broke the SEC's silence with her July 30 letter to Sen. Christopher Dodd (D-Conn.) and Rep. Frank, in which she explained why the SEC needed its new FOIA exemption. It boiled down to this: "Existing FOIA exemptions were insufficient to allay concerns" of regulated entities that confidential information provided to the SEC "will later be made public."[19]

Chairman Schapiro's statement is indefensible for several reasons. First, nothing in the Dodd-Frank Act requires the SEC to withhold confidential information obtained from a regulated entity. Rather, it prohibits a court from requiring the SEC to disclose any information covered by the new exemption. Put differently, the SEC retains the right to release any information—confidential or otherwise—to 23 classes of third parties.[20] Hence, the only entity § 929I protects is the SEC.

Further, Chairman Schapiro cited only one supposed deficiency in one exemption: the failure of FOIA's Exemption 8 to define "financial institutions." While true, the SEC has persuaded the courts since 1986 to apply the broad definition of "financial institution" taken from the legislative history of the Sunshine Act,[21] because "FOIA and the Sunshine Act are *in pari material*."[22] This exemption appears to be working for the SEC: It has won every case on this issue since 1972.[23]

Additionally, Chairman Schapiro's concern about any putative flaw in Exemption 8 is a red herring, because the primary FOIA protection for confidential and proprietary information is under Exemption 4, not Exemption 8. Exemption 4 excludes from FOIA's reach "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential." The SEC has no qualms about routinely asserting Exemption 4. According to the SEC's Office of In-

spector General, the SEC asserted Exemption 4 some 132 times in 2007 and 160 times in 2008 in refusing to release records it obtained from the financial institutions it regulates.[24] Further, FOIA requesters rarely file a judicial challenge to the SEC's assertion of Exemption 4, and, when they do, they almost always lose.

Since FOIA became law in 1967, only one reported decision has ever overruled the SEC's assertion of Exemption 4—*Aguirre*. In that case, the SEC made no claim the disclosure would harm any regulated entity. Instead, the SEC claimed the disclosure would harm it. The SEC's theory boiled down to this: "[w]itnesses who believe that the details of their testimony will become matters of public record are likely to be less candid and forthcoming with details." In rejecting the SEC's sweeping contention, the court observed: "[T]here is no legal or factual support for this novel application of Exemption 4."[25]

Nor can the SEC contend it needs the new exemption, because it voluntarily complies with FOIA requests. Last September, SEC Inspector General H. David Kotz issued a 60-page report (OIG FOIA Report) damning the SEC's conscious failure to comply with FOIA. Mr. Kotz noted the SEC releases records in response to only 13% of requests, while other federal agencies do so in response to 60% of the requests.[26] Mr. Kotz cited numerous causes for the SEC's dismal record of compliance with FOIA, concluding the SEC had adopted a "presumption of withholding" rather than the "presumption of disclosure" urged by President Barack Obama in a memorandum issued on the first day of his presidency.

At the time Chairman Schapiro requested the new FOIA exemption embodied in § 929I, the SEC had a staggering record of success in litigating FOIA cases over the past 25 years. The courts had consistently sustained the SEC's assertions of FOIA exemptions, except in three cases, and, in two of those cases, the plaintiffs won only a few scraps. In *Feshbach v. SEC*,[27] the plaintiff's application for attorneys' fees was denied, because he had not "substantially prevailed"; and in *Am. Lawyer Media, Inc. v. United States SEC*,[28] the court ordered the SEC to release two paragraphs of its 69-page FOIA training manual and one of its 50 exhibits. The third case was *Aguirre*, where the court overruled all of the asserted exemptions.

Finally, the SEC claims some regulated entities have refused to provide records to SEC staff or refused to permit SEC staff to remove records from their offices. Either refusal violates the securities acts, *e.g.*, § 204(a) of the Advisers Act requires an investment advisor to provide copies of requested records to SEC staff. Any investment adviser who violated the act is subject to civil or criminal penalties. Hence, the SEC's remedy is to enforce the law against the regulated entity, not block the public's access under FOIA.

To sum up, the SEC's justification for § 929I—to protect proprietary information—makes no sense. Nor is there a clue in the case law or the OIG FOIA Report why the SEC needed exemptions embodied in § 929I. The SEC routinely and successfully withholds confidential financial information under Exemption 4. The courts have almost always backed up the SEC's assertions of all other FOIA exemptions, with one glaring exception, *Aguirre*. This history suggests a closer look at this case to see if it sheds any light on the mystery about why the SEC sought its new FOIA exemption.

## Section 929I Closes FOIA's Path to Records of SEC Misconduct Opened by *Aguirre v. SEC*

In *Aguirre*, the author, a former SEC staff attorney, led an SEC insider trading and market manipulation investigation of Pequot Capital Management during 2004 and 2005. The SEC discharged the author in September 2005 after he complained internally that his supervisors were giving preferential treatment to a prominent Wall Street banker. In November 2006, the SEC closed the Pequot investigation without filing charges. In August 2007, the Senate Committee on the Judiciary and the Senate Committee on Finance issued a 108-page joint report in which they found the SEC (1) had been unduly deferential to the Wall Street banker and (2) had fired the author for questioning that deferential treatment.[29]

The author served requests under FOIA on the SEC in December 2005 and March 2006 seeking

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records relating to the Pequot investigation and the SEC's decision to discharge him. When the SEC failed to produce those records, the author filed an action against the SEC under FOIA with the U.S. District Court in Washington, D.C., in July 2006. Both parties filed summary judgment motions.

The court issued a 47-page decision in April 2008, which relied heavily on the joint Senate report, overruling each exemption asserted by the SEC—FOIA Exemptions 3, 4, 6 and 7(C)—with a minor exception here and there. The court also directed the SEC to conduct a more thorough search of its files.

The biggest roadblock to obtaining the records in *Aguirre* was exemption 7(C), the law enforcement exemption, which protects personal information in law enforcement records, such as the SEC's records of the Pequot insider trading investigation. The court described the burden on a FOIA requester to overcome the "strong presumption in favor of withholding enforcement records under Exemption 7(C)"[30] as follows:

> **[I]nformation that is probative of allegations of official misconduct can rebut this presumption… . A 'bare suspicion' of agency misconduct is insufficient; the FOIA requester 'must produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred (citations omitted).' …The evidentiary standard is easily met in this case.[31]**

The court then summarized the author's evidence which rebutted the presumption, relying heavily on the Senate report. This ruling unlocked the padlock to tens of thousands of records which the SEC had been withholding.

Late in the summary judgment proceedings, when the SEC's attorneys likely realized Exemption 7(C) might fail them, they shifted their emphasis to Exemption 3(B) on the same theory incorporated into § 929I of the Dodd-Frank Act. In particular, the SEC claimed § 210 of the Advisers Act was an Exemption 3(B) statute and thus all information collected under § 210—all records of the Pequot investigation—was exempt from FOIA. In rejecting the SEC's contention that § 210 of the Advisers Act qualified as an Exemption 3(B) statute, the court reasoned:

> **In addition to these damning facts, the law does not support the SEC's position that the Investment Advisers Act is an Exemption 3 statute. First, if the SEC's novel and overly expansive interpretation of Exemption 3 were to be accepted, it would mean that the SEC would have unbridled discretion regarding all information obtained by a subpoena. But there is no legal support for this approach, nor does it appear that the SEC has ever invoked this theory before.[32]**

By April 2009, the SEC had produced approximately 30,000 pages of records. At the court's prompting, the SEC also paid the author's attorneys fees. Consequently, *Aguirre* provides a pathway for the media, financial writers, and the public to obtain information about the SEC's failures, such as those which led to the financial crisis, where a plaintiff has proof of misconduct by SEC staff.

Relying largely on records obtained through the FOIA action, the author sent a 16-page letter, with 11 attached exhibits, on Jan. 2, 2009, to the SEC, other law enforcement agencies, and several Congressional committees.[33] He contended in the letter that the evidence he had enclosed and summarized established that Pequot and Arthur Samberg, its chief executive officer, had engaged in insider trading in Microsoft options in April 2001, one of the matters the author was investigating when he was discharged in 2005.[34] On May 27, 2010, the SEC filed a complaint against Pequot and its CEO for insider trading and on the same day announced that the two defendants had agreed to pay $28 million to settle the claim.[35] The allegations in the complaint tracked the factual assertions in the author's Jan. 2 letter.[36] One month later, the author settled his wrongful discharge claim with the SEC for a record settlement, according to The New York Times.[37]

The SEC initially sought and obtained a stay of the decision in May 2008 so it could file an appeal. But no appeal was ever filed. Instead, a few weeks after the stay expired, Rep. Paul E. Kanjorski (D-

Pa.) introduced a bill[38] in the House containing language, inserted at the SEC's request, which would have nullified *Aguirre* as a precedent that the Advisers Act did not qualify as an Exemption 3(B) statute[39]. Though passed by the House, it was not passed by the Senate and thus never got to the President's desk. In July 2009, Chairman Schapiro requested the inclusion of a similar provision in what became the Dodd-Frank Act. It amended § 210 of the Advisers Act to declare to declare that the SEC could not be compelled to produce information collected under the Advisers Act and also amended § 210 to declare that section to be an Exemption 3(B) statute, thereby nullifying *Aguirre* as a precedent.

## What is the Status of the Bills to Repeal § 929I?

Five bills have been introduced to amend or repeal § 929I of the Dodd-Frank Act. They fall into two categories: (1) bills which simply repeal § 929I and (2) bills which repeal § 929I *and* amend § 24 of the Exchange Act to specify the SEC is an "agency" and those it regulates are "financial institutions" within the meaning of 5 USC 552(b)(8), commonly referred to as FOIA's Exemption 8. The second type of bill would appear to codify existing law, since the SEC has persuaded every court since 1972[40] that it qualifies for Exemption 8 protection.[41]

The real drama over § 929I is whether Congress will be able to undo the FOIA wildcard it gave the SEC in July. According to Congressional staff, any bill to repeal § 929I will probably have to clear both the Senate Banking Committee and the House Financial Services Committee, which means as a practical matter that the chairmen of both committees, Sen. Dodd and Rep. Frank, must be in favor of any bill to repeal § 929I. Rep. Frank has given hints that § 929I may be broader than Congress intended, but neither he nor Sen. Dodd have committed themselves to amending or repealing it. Rep. Frank also claims that § 929I was the handiwork of Senators Dodd and Richard Shelby (R-Al). There is of course the possibility that one or both chairmen knew the bill would block all meaningful access under FOIA to information about SEC blunders. If this is the case, no repeal bill will likely exit these committees.

**NOTES**

1. Testimony of SEC Chairman Mary Schapiro before the U.S. House of Representatives Committee on Financial Services, Subcommittee on Capital Markets, Insurance and Government-Sponsored Enterprises, July 20, 2010, available at http://financialservices.house.gov/Media/file/Testimony%20-%20SEC%20Oversight%207_21_10.pdf.
2. See the letter sent on Aug. 3, 2010, to Senator Dodd and Representative Frank, by the Project on Government Oversight (POGO) and other organizations (POGO letter) available at http://www.pogo.org/pogo-files/letters/financial-oversight/fo-fra-20100803.html.
3. H.R. 5924, available at http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5924:, H.R. 5948, available at http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5948:, H.R. 5970, available at http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.5970:, H.R. 6086, available at http://thomas.loc.gov/cgi-bin/query/z?c111:H.R.6086:, and S. 3717, available at http://thomas.loc.gov/cgi-bin/query/z?c111:S.3717:.
4. July 30, 2010, letter of SEC Chairman Mary Schapiro to Senator Christopher Dodd and Representative Barney Frank (Schapiro letter), available at http://voices.washingtonpost.com/market-cop/frank.pdf.
5. POGO letter.
6. *Aguirre v. SEC*, 551 F. Supp. 2d 33 (D.D.C. 2008). The author of this article was the plaintiff and co-counsel in this case.
7. 5 USC 552(b)(3)(B).
8. *Aguirre v. SEC*.
9. Schapiro letter.
10. The author found 13 provisions in the U.S. Code which express or imply that a statute empowering an agency to collect or generate information qualifies for an exemption under Exemption 3(B): 5 USC § 574(j), 7 USC § 8401(h)(3), 10 USC § 128(a)(1), 15 USC § 78o-5, 15 USC § 78q, 16 USC § 3844(b)(1)(A), 19 USC § 1333(h), 19 USC § 1677f(g), 42 USC § 247d-7e(e)(1)(A), 42 USC § 262a(h)(3), 42 USC § 2167(a), 42 USC § 2168(a)(1), 49 USC § 1114(e)(2).
11. American Jewish Congress, at 628.
12. These sections of the U.S. Code are cited in endnote 10 above.
13. *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 459 (U.S. 2007).
14. 44 USC 3518.
15. *Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668, 675 (U.S. 1976).
16. *Aguirre*, at 52.


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17. Schapiro letter.
18. *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 473 (U.S. 2001).
19. Schapiro letter.
20. *Aguirre*, 551 F. Supp. 2d at 53. For a full list of the third parties to whom the SEC may release such information, see: SEC Forms 1661 and 1662 on the SEC website at http://www.sec.gov/about/offices/ocie.shtml.
21. See for example: *Mermelstein v. SEC*, 629 F. Supp. 672, 674 (D.D.C. 1986).
22. *Mermelstein*, at 672, 674.
23. The SEC has prevailed on this issue on every reported decision since *M. A. Schapiro & Co. v. SEC*, 339 F. Supp. 467, 468-472 (D.D.C. 1972).
24. *Review of the SEC's Compliance with the Freedom of Information Act*, Report No. 465, Sep. 25, 2009 (OIG FOIA Report). Available at http://www.sec-oig.gov/Reports/AuditsInspections/2009/465.pdf.
25. *Aguirre*, at 52.
26. OIG FOIA Report.
27. *Feshbach v. SEC*, 5 F. Supp. 2d 788 (N.D. Cal. 1998).
28. *Am. Lawyer Media, Inc. v. SEC*, 2002 U.S. Dist. LEXIS 16940 (D.D.C. Sept. 5, 2002).
29. *The Firing of an SEC Attorney and the Investigation of Pequot Capital Management*, Senate Report No.110-28 (2007).
30. *Aguirre*, at 56.
31. *Aguirre*, at 56.
32. *Aguirre*, at 52.
33. Available at http://www.whistleblower.org/storage/documents/AguirreLetter.pdf.
34. The circumstances under which the author provided Senate investigators, the FBI and the SEC with the evidence that triggered the reopening of the Pequot investigation and the later filing of a complaint against Pequot and its CEO are discussed in detail in the author's declaration (Docket no. 37-2) in *SEC v. Aguirre*, Civil Action No. 08-1872 (ESH), available on PACER.
35. SEC press release, *SEC Charges Pequot Capital Management and CEO Arthur Samberg with Insider Trading*, May 27, 2010, available at http://www.sec.gov/news/press/2010/2010-88.htm.
36. SEC complaint available at http://www.sec.gov/litigation/complaints/2010/comp-pr2010-88.pdf.
37. Gretchen Morgenson, *S.E.C. Pays Settlement To Staff Lawyer It Fired,* The New York Times June 30, 2010, at B3.
38. H.R. 6513.
39. The SEC claims it sought somewhat similar amendments to the same three acts in 2006, shortly after two Senate committees sought records from the SEC relating to the Pequot investigation.
40. *M. A. Schapiro*.
41. See for example: *Mermelstein v. SEC*, 629 F. Supp. 672 (D.D.C. 1986) and *Bloomberg, L.P. v. SEC*, 357 F. Supp. 2d 156, 170 (D.D.C. 2004).

# Regulation FD at Age 10: Whence and Whither?

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Ten years ago this October, the Securities & Exchange Commission outlawed selective disclosure. The SEC adopted, by a bare majority, Regulation FD.[1] The new rule was controversial from conception. Indeed, the proposed regulation generated the largest number of comments the SEC had ever received during a rulemaking. The opinions expressed were passionate. Individual investors implored the Commission to create a level playing field between them and big institutions. Research analysts warned that the rule would dry up the flow of information from companies to the market.

With the benefit of a decade's experience, we now know that Reg FD was that rarest of creatures: a new regulation that worked as it was designed to, and that did not generate unintended adverse consequences. The credit for that goes, in large part, to the public companies that were the subject of the regulation—they adapted promptly to the new regime and complied with it in good faith.

This article takes a look back at the highlights in Reg FD's young life and contemplates some changes that may come with adolescence.