

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34-75388; File No. S7-07-14]

RIN: 3235-AL58

Freedom of Information Act Regulations: Fee Schedule, Addition of Appeals Time Frame, and Miscellaneous Administrative Changes

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“Commission”) is adopting amendments to its regulations under the Freedom of Information Act (“FOIA”) to allow the Commission to collect fees that reflect its actual costs, add an appeals time frame that will create a more practical and systematic administrative process and clarify other issues in the regulations.

EFFECTIVE DATE: August 14, 2015.

FOR FURTHER INFORMATION CONTACT: John Livornese, FOIA/PA Officer, Office of FOIA Services, (202) 551-3831; Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549-5041.

SUPPLEMENTARY INFORMATION: The Commission is adopting amendments to its FOIA regulations at 17 CFR 200.80 and 17 CFR 200.80e.

I. INTRODUCTION

On June 20, 2014 the Commission proposed amendments to its regulations under the Freedom of Information Act.¹ The proposed amendments would amend the Commission’s

¹ See *Freedom of Information Act Regulations: Fee Schedule, Addition of Appeal Time Frame and Miscellaneous Administrative Changes*, Release No. 34-72440 (June 20, 2014), 79 FR 36443 (June 27, 2014).

FOIA fee schedule for searching and reviewing records; establish an appeals time frame; allow for submission of appeals by additional methods; and allow the Commission's Office of FOIA Services to issue responses to FOIA requests indicating that no records were located. The proposing release requested comment on all aspects of the proposal.

The Commission received three comments regarding the proposed amendments to its regulations under the Freedom of Information Act.² One commenter wholly supported the Commission's amendment of the regulations related to its FOIA fee schedule. The other two commenters disagreed with the proposed time frame for FOIA appeals, and one also objected to the proposed fee amendments. The comments are discussed in more detail below. In adopting this final rule, the Commission has reviewed and considered all of the comments received.

II. DISCUSSION OF THE FINAL RULES

As discussed in further detail below, the Commission is adopting the rules largely as proposed, with the exception of the provision concerning the FOIA appeals time frame, which has been revised in response to comments received.

A. Changes to Fee Regulations

The fees the Commission charges for searching, reviewing, and duplicating records pursuant to FOIA requests are currently set forth in 17 CFR 200.80e, Appendix E--Schedule of fees for records services. The Commission is updating the fee schedule for searching and reviewing records in accordance with Uniform Freedom of Information Act Fee Schedule and Guidelines promulgated by the Office of Management and Budget.³

² See letter from Sheldon Mark Patnett (July 14, 2014) (the Patnett letter); letter from the National Archives and Records Administration's Office of Government Information Services (July 28, 2014) (the OGIS letter), and letter from David K. Colapinto of Kohn, Kohn & Colapinto, LLP (July 28, 2014) (the Colapinto letter).

³ See 52 FR 10011 (March 27, 1987).

The OMB Guidelines, pursuant to the Freedom of Information Reform Act of 1986, require that each agency's fees be based upon its "direct reasonable operating costs of providing FOIA services."⁴ The guidelines state that "[a]gencies should charge fees that recoup the full allowable direct costs they incur."⁵ Direct costs include "the salary of the employee performing work (the basic rate of pay for the employee plus 16 percent of that rate to cover benefits)."⁶ OMB recognized that costs would necessarily vary from agency to agency and directed that each agency promulgate regulations specifying the charges for search, review, and duplication. The OMB Guidelines state that "agencies should charge at the salary rate[s] [i.e. basic pay plus 16 percent] of the employee[s] making the search" or, "where a homogeneous class of personnel is used exclusively . . . agencies may establish an average rate for the range of grades typically involved."⁷

The Commission's current regulation contains set rates for FOIA request search and review activities: \$16/hour for grade 11 and below; and \$28/hour for grade 12 and above. The Commission proposed to revise this regulation to reflect the formula contained in the OMB Guidelines (basic pay plus 16 percent) rather than setting forth a fixed price. The proposal would establish a representative rate for each of the three different groups of grades typically involved: personnel in grades SK-8 or below; personnel in grades SK-9 to SK-13; and personnel in grades SK-14 or above.⁸ The Commission's website will contain current rates for search and review fees for each class. The rates will be updated as salaries change and will be determined

⁴ *Id.* at 10015.

⁵ *Id.* at 10018.

⁶ *Id.* at 10017.

⁷ *Id.* at 10018.

⁸ In the proposing release, while the preamble set forth these three groupings, the draft rule text erroneously listed the groupings as: Grades SK-9 or below; Grades SK-10 to SK-14; and Grades SK-15 or above. That was a typographical error and was inconsistent with the text of the preamble of the proposal. Only one commenter addressed the specific amount of the fees, and in making its comment, that commenter used the correct grouping as stated in the preamble of the proposing release.

by using the formula in the regulation. For the current calendar year, the fees would be assessed as follows: SK-8 or below: \$29/hour; SK-9 to 13: \$61/ hour; and SK-14 or above: \$89/hour.⁹

The proposed regulation would allow the Commission to charge FOIA requesters in quarter-hour increments at the rates established by reference to the OMB Guidelines.¹⁰ The Commission also proposed to remove the first sentence of 17 CFR 200.80(e)(1) which provides that up to one half hour of staff time devoted to searching for and reviewing Commission records will be provided without charge.

One commenter asserted, without providing any data, that increasing FOIA fees would make it more difficult for individuals to obtain information from the SEC and will “put the FOIA process out of reach of the average citizen.”¹¹ All changes to the Commission’s FOIA fee schedule are in conformity with the FOIA and guidance set forth by the Office of Management and Budget. The OMB Guidelines, pursuant to the Freedom of Information Reform Act of 1986, require that each agency’s fees be based upon its “direct reasonable operating costs of providing FOIA services.” The Commission has not increased its fees for processing FOIA requests in over 20 years, despite increased costs to the agency.

Under the proposal, fees would not be charged under either the FOIA or the Privacy Act where the costs of collecting and processing the fee are likely to equal or exceed the amount of the fee or where the requester has met the requirements for a statutory fee waiver. The new language is based upon that of 5 U.S.C. 552(a)(4)(A)(iv) (providing that no fee may be charged

⁹ The SK-8 and below rate is estimated using the maximum and minimum annual salary of a Washington, DC-based SK-6 staffer. For 2014 this is $[(\$41,619 + \$63,307)/2][1/2087 \text{ hours per year}][1.16 \text{ OMB markup factor}] = \29 per hour. Similarly, the SK-9 through SK-13 category is estimated by using the maximum and minimum annual salary of a Washington, DC-based SK-12 staffer, who typically does most of the work of a FOIA request. For 2014 this is $[(\$82,037 + \$138,211)/2][1/2087 \text{ hours/year}][1.16 \text{ OMB markup factor}] = \$61/\text{hour}$. Finally, the SK-14 and above category is estimated by using the maximum and minimum salary of a Washington, DC-based SK-15 supervisor. For 2014 this is $[(\$118,743 + \$200,033)/2][1/2087 \text{ hours per year}][1.16 \text{ OMB markup factor}] = \$89/\text{hour}$.

¹⁰ As per the OMB Guidelines, fees for searches of computerized records will continue to be based on the actual cost to the Commission which includes machine and operator time. 17 CFR 200.80(e)(9)(i).

¹¹ See Colapinto letter.

if the fee exceeds the costs of collecting and processing the fee). No comments addressed this provision, and the Commission is adopting the amendments as proposed. Currently, the cost of the average fee collection activity is \$20, so no fee will be charged of \$20 or less.

One commenter also recommended that the Commission allow documents to be released generally without any charge or at a reduced charge at its discretion and/or if disclosure of the information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.¹² 17 CFR § 200.80(e)(4)(i) allows the Commission's Office of Freedom of Information and Privacy Act [Services] to waive or reduce search, review, and duplication fees if: (A) Disclosure of the requested records is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and (B) Disclosure is not primarily in the commercial interest of the requester. Thus, much of what the commenter suggested is already allowed by existing rules. Possible changes to that section, including allowing for purely discretionary waivers or reduction of fees as suggested by the commenter, are not the subject of this rulemaking. This portion of the rule will be adopted as proposed.

B. *Changes to FOIA Appeals Time Frames*

The FOIA requires federal agencies to notify requesters of their right to appeal any adverse determination. 5 U.S.C. 552(a)(6)(A)(i). Although the FOIA does not require agencies to establish an appeals time frame, neither does it preclude them from doing so. The Commission proposed to establish an appeals time frame of 30 days in order to allow more efficient and improved appeals processing by the Commission's Office of the General Counsel. Under the proposal, an appeal from an adverse decision "must be received within thirty (30)

¹²See OGIS letter.

calendar days of the date of the adverse decision.” The proposing release noted that the implementation of a 30 day appeals time frame is consistent with the practices of a number of other federal agencies. Commission staff has reviewed the practices at twenty-two separate federal agencies. Of these, ten have a FOIA appeals time frame of 30 days, one has a 30 business day time frame, one has a 35 day time frame, two have a 45 day time frame, seven have a 60 day time frame and one has a 90 day time frame.¹³

Two comment letters opposed the 30 day time frame. One suggested that the Commission consider allowing a 60 day time frame for appeals.¹⁴ The sole reason offered was the commenter’s observation that mail screening by Federal agencies can slow the amount of time it takes appeals to reach their destination. Another commenter similarly objected to the imposition of a 30 day time frame in which to file an appeal as too short and asserted that it “does not afford individuals (such as whistleblowers and individual investors) sufficient time to find legal representation or to file a substantive appeal.”¹⁵ The commenter also noted that the likelihood of missing the 30 day deadline “is high.”

In response to these concerns, the Office of FOIA Services staff referred to the above-referenced review of the FOIA appeals procedures at twenty-two federal agencies. It was noted that over half of those agencies have appeals time frames longer than 30 days. To permit FOIA requesters ample opportunity to fully address any complex issues related to their appeal, the Commission has determined to adopt a 90 day time frame for filing an appeal. The longer time frame should also obviate any concerns about delays resulting from mail screening. The 90 day time frame being adopted today is among the longest of those identified

¹³ Independent financial agencies comparable to the SEC (CFTC and FTC) have 30 calendar day appeals time frames. The FDIC has a 30 business day appeals time frame.

¹⁴ See OGIS letter.

¹⁵ See Colapinto letter.

at other federal agencies. Accordingly, the Commission believes that an appeals time frame of 90 days is appropriate.

C. *Submission of FOIA Appeals by Email and Facsimile*

The Commission proposed to revise 17 CFR 200.80(d)(6)(ii) to allow appeals to be submitted by facsimile or email as well as through the mail. No commenter addressed this issue, and the Commission is adopting it as proposed.

D. *Responses to FOIA Requests Indicating No Records Could Be Located*

The Commission proposed to amend 17 CFR § 200.80(d)(5)(i) by adding a sentence to provide for responses to FOIA requests that indicate that no responsive records were located.¹⁶ This proposed amendment would make clear that a possible response to a FOIA request is that no responsive records could be located. No commenter addressed this issue, and the new sentence would be adopted as proposed.

III. ECONOMIC ANALYSIS

The Commission is sensitive to the economic effects, including the costs and benefits, that result from its rules, and Section 23(a)(2) of the Exchange Act requires the Commission, in making rules pursuant to any provision of the Exchange Act, to consider among other matters the impact any such rule would have on competition.

As the Commission explained in the proposal, the rules are intended to help align the Commission's fees related to FOIA requests with its direct reasonable operating costs of providing FOIA services and to allow more efficient processing of requests. In the proposal, the Commission explained that although the Commission believed that the proposed rules were

¹⁶ The draft amended rule text of 17 CFR §200.80(d)(5)(i) published in the proposed rule inadvertently omitted the penultimate sentence from existing paragraph (d)(5)(i). That language is included in amendatory text of this final rule.

unlikely to have a significant impact on the economy, the proposed rules would benefit the Commission and the public. In particular, compared to the baseline, which includes the current fee structure outlined above, the Commission believed that the proposed rules would permit the Commission to charge fees that more closely reflect the direct costs the Commission incurs to provide FOIA services. Additionally, as the Commission explained, the proposed rules would provide increased flexibility to FOIA requesters by expressly permitting appeals by email and facsimile and would also improve efficiency in the appeal process by establishing a time frame for FOIA appeals that, in light of potential alternatives, is consistent with the practice of other federal agencies.

The Commission also recognized in the proposal that the proposed rules may impose costs. Specifically, the Commission explained that the proposed rules may impose additional costs on individuals who wish to obtain access to Commission records and may impose a burden on requesters who would be required to appeal a decision within 30 days. The Commission noted, however, that those costs would be insignificant. Additionally, the Commission noted that the proposed rules would not burden competition and that the Commission believed that any potential burden on competition imposed by the proposed rules would be appropriate in furtherance of purposes of the Exchange Act.

The Commission requested comment on all aspects of the benefits and costs of the proposal, including any anticipated impacts on competition. No commenter addressed the economic analysis contained in the proposal, although, as discussed above, one commenter noted that the proposed rules would increase costs for FOIA requesters. After reviewing the comments, the Commission continues to believe that the rules will result in the economic effects described in the proposal and notes that the 90 day appeal time frame will likely impose less of a

burden on requesters compared to the proposed 30 day time frame. In addition, the Commission continues to believe that the rules will have a minimal economic effect and that any potential burden on competition imposed by the amended rules would be appropriate in furtherance of purposes of the Exchange Act.

IV. REGULATORY FLEXIBILITY ACT CERTIFICATION

Pursuant to Section 605(b) of the Regulatory Flexibility Act,¹⁷ the Commission certified that, when adopted, the amendments to 17 CFR 200.80 would not have a significant economic impact on a substantial number of small entities. This certification, including our basis for the certification, was included in the proposing release. The Commission solicited comments on the appropriateness of its certification, but received none. The Commission is adopting the final rules as proposed. Accordingly, there have been no changes to the proposal that would alter the basis upon which the certification was made.

V. OTHER ADMINISTRATIVE LAW MATTERS

These amendments do not contain any collection of information requirement as defined by the Paperwork Reduction Act of 1995, as amended.¹⁸

VI. STATUTORY AUTHORITY AND TEXT OF RULE AMENDMENTS

The amendments contained herein have been made under the authority set forth in 5 U.S.C. 552 and 15 U.S.C. 78d-1.

List of Subjects in 17 CFR Part 200

Administrative practice and procedure, Freedom of information.

¹⁷ 5 U.S.C. 605(b).

¹⁸ 44 U.S.C. 3501-3520

Text of Amendments

For the reasons stated in the preamble, title 17, chapter II of the Code of Federal Regulations is amended as follows:

PART 200—ORGANIZATION; CONDUCT AND ETHICS; AND INFORMATION AND REQUESTS

Subpart D—Information and Requests

1. The authority citation for part 200, subpart D, is revised to read, in part, as follows:
Authority: 5 U.S.C. 552, as amended, 15 U.S.C. 77f(d), 77s, 77ggg(a), 77sss, 78m(F)(3), 78w, 80a-37, 80a-44(a), 80a-44(b), 80b-10(a), and 80b-11, unless otherwise noted.

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- 2. Amend § 200.80 by:
 - a. Revising paragraph (d)(5)(i);
 - b. Revising paragraphs (d)(6)(i) and (d)(6)(ii);
 - c. Revising paragraph (e) introductory text; and
 - d. Removing the first sentence of paragraph (e)(1)

The revisions read as follows:

§ 200.80 Commission records and information.

* * * * *

(d) * * *

(5) *Initial determination; multi-track processing, and denials--(i) Time within which to respond.* When a request complies with the procedures in this section for requesting records under the Freedom of Information Act, a response shall be sent within 20 business days from the date the Office of FOIA Services receives the request, except as described in paragraphs

(d)(5)(ii) and (d)(5)(iii) of this section. If that Office has identified the requested records, the response shall state that the records are being withheld, in whole or in part, under a specific exemption or are being released. If that Office cannot locate any requested records, the response shall advise the requester accordingly.

* * * * *

(6) * * *

(i) *Time limits and content of appeal.* Appeals shall be clearly and prominently identified at the top of the first page with the legend “Freedom of Information Act Appeal” and shall provide the assigned request number. Copies of the request and the SEC’s response, if any, should be included with the appeal. If an appeal is from an adverse decision, it must be received within ninety (90) calendar days of the date of the adverse decision. If only a portion of the decision is appealed, the requester must specify which part of the decision is being appealed. An appeal from an adverse decision should also identify the name of the deciding official, the date of the decision, and the precise subject matter of the appeal. An appeal is not perfected until the SEC receives the information identified in this paragraph (d)(6)(i).

(ii) *How to file and address a written appeal.* The appeal must be sent to both the General Counsel and the Office of FOIA Services at 100 F Street, NE, Washington, DC 20549. The SEC accepts facsimiles (faxes) and emails as written FOIA appeals. Information regarding where to fax or email a FOIA appeal is available on the SEC’s FOIA home page on the Commission’s website at <http://www.sec.gov/foia.shtml>. A legible return address must be included with the FOIA appeal. The requester may also include other contact information, such as a telephone number and/or an email address.

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(e) *Fees for records services*. Information pertaining to search and review services, including locating, reviewing, and making records available, attestations and copying, appears in appendix E to this subpart D, 17 CFR 200.80e. A schedule of fees is located at the Commission's website at <http://www.sec.gov/foia/feesche.htm>.

* * * * *

3. Amend § 200.80e by:
 - a. Adding introductory text; and
 - b. Revising the paragraph that begins, "Search and review services:".

The addition and revision read as follows:

§ 200.80e Appendix E – Schedule of fees for records services.

The requester will be charged search, review, and duplication fees according to his or her fee category. In addition, the SEC will charge the requester for any special handling or services performed in processing the request and/or appeal. Duplication fees also are applicable to records provided in response to requests made under the Privacy Act. Fees will not be charged under either the FOIA or the Privacy Act where the costs of collecting and processing the fee are likely to equal or exceed the amount of the fee or where the requester has met the requirements for a statutory fee waiver. Fees will be determined as follows:

Search and review services (review applies to commercial-use requesters only): (1) The Commission will establish and charge average rates for the groups of grades typically involved in search and review. Those groups will consist of employees at:

- (i) Grades SK-8 or below;
- (ii) Grades SK-9 to SK-13; and
- (iii) Grades SK-14 or above.

(2) The average rates will be based on the hourly salary (i.e., basic salary plus locality payment), plus 16 percent for benefits, of employees who routinely perform those services. Fees will be charged in quarter-hour increments. The average hourly rates are listed on the Commission's website at <http://www.sec.gov/foia/feesche.htm> and will be updated as salaries change.

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By the Commission.

Date: July 8, 2015

Brent J. Fields
Secretary