

Comment to SEC Proposed Amendments to FOIA Regulations

Submitted on July 28, 2014

To Whom It May Concern:

Please accept these comments on the Securities and Exchange Commission (“SEC”) proposed changes to its regulations implementing the Freedom of Information Act (“FOA”). The SEC is proposing to amend its FOIA regulations at 17 C.F.R. 200.80 and 17 C.F.R. 200.80e.

I am an attorney who has been practicing law for more than 25 years at the law firm of Kohn, Kohn and Colapinto, LLP. I am also the General Counsel of the National Whistleblower Center, a non-profit, tax exempt, charitable organization. Through my law practice and pro bono work, I have represented whistleblowers for more than 25 years.

I have utilized the Freedom of Information Act and Privacy Act on behalf of my clients to advance the public interest. I have also been counsel or lead counsel in several FOIA and Privacy Act lawsuits, including but not limited to: *National Whistleblower Center v. HHS*, 904 F. sup.2d 59 (D.D.C. 2012) (preliminary injunction granted to require FDA to immediately release records that contained evidence of FDA’s email monitoring and government misconduct); *Edmonds v. FBI*, 417 F.3d 1319 (D.C. Cir. 2005) (an order granting expediting FOIA processing satisfies prevailing party standard for award of attorneys fees); *Whitehurst v FBI*, on appeal, *NACDL, et al. v. Dept. of Justice*, 182 F.3d 981 (D.C. Cir. 1999).

In recent years, I have personally filed FOIA and Privacy Act requests with the SEC and I am familiar with the obstacles and difficulties involved in obtaining information from the SEC under those laws.

In regards to the proposed amendments to the SEC’s FOIA regulations, I write to oppose setting a deadline for filing of FOIA administrative appeals and to increase fees. Both proposed amendments will make it more difficult for consumers, investors, whistleblowers and citizens to obtain information from the SEC. Both proposed amendments should be withdrawn. First, imposing a 30-day deadline for requesters to file an administrative appeal from the denial of a FOIA request will adversely affect the average citizen (such as individual investors and whistleblowers) who files FOIA requests. The proposed deadline is both unreasonable and counter to the purposes of the FOIA statute.

In addition, given the complexity of the subject matter of the SEC’s work as well as the legal basis on which the SEC most frequently cites to withhold information under the FOIA exemptions, 30 days is too short a time period in which to file an administrative appeal. Rarely does the SEC provide a denial to a FOIA request within the statutory time frame. Faced with receiving a denial months or even years after filing a FOIA request, the requester will now be forced to file an administrative appeal within 30 days or risk waiving one’s rights given the exhaustion requirements. Many of our clients file FOIA requests pro se, so they are not represented at the initial request stage. Imposing a 30-day deadline in which to file an

administrative appeal does not afford individuals (such as whistleblowers and individual investors) sufficient time to find legal representation or to file a substantive appeal.

When an agency has timely denied a request or complied with the statutory time deadlines, FOIA requesters must exhaust administrative appeals before going to court under the FOIA. *Oglesby v. U.S. Dept. of Army*, 920 F.2d 57, 61-62 (D.C. Cir. 1990). However, by creating a new 30-day administrative appeal deadline many requesters (many of whom will not be represented by counsel) will lose their right to pursue FOIA rights if they miss this new administrative deadline.

The likelihood of missing the 30-day deadline is high. Even sophisticated requesters and those who are represented by counsel will find it difficult to meet these requirements in many instances and will find themselves having waived their rights.

I have personally filed administrative appeals from denials of FOIA requests with the SEC General Counsel. In each instance I found briefing the appellate issue to be challenging even though I am an experienced FOIA requester and a successful advocate in several court cases under FOIA. In order to prepare a proper administrative appeal that provides substance in the appeal letter takes more than 30 days.

The 30-day time limit for filing administrative appeals will defeat the purpose of having an administrative appeal. Many FOIA requesters will resort to simply filing a one-sentence appeal letter stating, "I hereby appeal the denial of my FOIA request." Such brevity may be all that is required to meet the administrative time limit, but the administrative process will suffer greatly as a result.

If the SEC wants to encourage FOIA requests to utilize the administrative appeals process, and ensure that the administrative appeals process works to resolve disputes under FOIA, then it should not impose a deadline on filing administrative appeals. Certainly, a 30-day deadline for filing administrative appeals will result in an increase of one-line appeals. This will reduce appeals that are substantive, but will likely give most FOIA requesters more grounds to seek resolution through the court system rather than the administrative appeals process. If the SEC truly believes that administrative appeals are beneficial and can work, then there should not be a 30-day time limit imposed on filing administrative appeals.

Second, increasing fees charged for search, review and processing of FOIA requests will make it more difficult for investors and whistleblowers to obtain access to information from the SEC. Individual investors and whistleblowers have had difficulty in obtaining waivers of fees and the SEC has placed in them the category of commercial requesters. By raising the fees charged under the SEC FOIA fee schedule will discourage individuals from requesting information under FOIA. While true commercial requesters arguably might be able to afford these fees, the SEC should find other ways to increase efficiency in its FOIA program, which in many instances is outright dysfunctional and highly bureaucratic. Even after waiting several years for production of documents, FOIA requesters are often disappointed by the lack of substantive information that is disclosed. Forcing requesters to pay between \$29-\$89 per hour for review and search fees will put the FOIA process out of reach of the average citizen.

There are many programmatic deficiencies in the SEC FOIA program that should be addressed before these proposed amendments imposing deadlines on requests and increasing search and review fees take place. Both of these proposed amendments will place unacceptable burdens (both financial and legal) on requesters.

Sincerely,

/s/ David K. Colapinto
David K. Colapinto
Kohn, Kohn & Colapinto, LLP
3233 P Street, N.W.
Washington, D.C. 20007-2756
Phone: [REDACTED]
Email: [REDACTED]