



**U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION**  
**Washington, D.C. 20507**

Office of  
Legal Counsel

November 29, 2012

TRANSMITTED VIA  
EMAIL TO: [rule-comments@sec.gov](mailto:rule-comments@sec.gov)

Todd Scharf  
Acting Chief Privacy Officer  
U.S. Securities and Exchange Commission  
100 F Street NE  
Washington, DC 20594-1090

Re: 77 FR 65913, Notice by the Securities and Exchange Commission on 10/31/2012  
Privacy Act of 1974: System of Records  
File Number S7- 10-12

Dear Mr. Scharf:

The U.S. Equal Employment Opportunity Commission (EEOC or the Commission) submits this comment in response to the Securities and Exchange Commission's (SEC's) notice of a new system of records, "Backup Care Employee and Family Records (SEC-66)," published in the Federal Register on October 31, 2012.<sup>1</sup> The EEOC offers these comments as the federal agency responsible for enforcing the federal equal employment opportunity laws that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, disability, and genetic information. The laws enforced by EEOC also prohibit retaliation for filing a discrimination complaint, participating in a discrimination proceeding, or otherwise opposing discrimination.<sup>2</sup>

SEC-66 contains records of current SEC employees who voluntarily sign up for backup care benefits and their family members, including family members' "physician medical form[s]." There are six "routine uses" of records maintained in the system by which the SEC may disclose such records or information therein outside the agency. As explained below, the scope of the routine uses in SEC-66 may conflict with the requirements of Title II of the Genetic Information Nondiscrimination Act of 2008 (GINA).

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<sup>1</sup> See Privacy Act of 1974: Systems of Records, 77 Fed. Reg. 65913 (Oct. 31, 2012).

<sup>2</sup> See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 et seq.; Section 501 of the Rehabilitation Act of 1973, 29 U.S.C. § 791; the Equal Pay Act of 1963, 29 U.S.C. § 206(d); and Title II of the Genetic Information Nondiscrimination Act of 2008, 42 U.S.C. § 2000ff et seq.

GINA prohibits discrimination on the basis of genetic information and requires that federal agencies and other covered entities that lawfully obtain genetic information about applicants, employees, and former employees maintain the information in separate medical files and treat it as confidential. Covered entities may disclose genetic information only in very limited circumstances. Specifically, the information may be disclosed to the employee or to the employee's relative about whom the information pertains, upon receipt of the employee's or the employee's relative's written request; to an occupational or other health researcher conducting research in compliance with 45 C.F.R. part 46; in response to a court order (but only the genetic information expressly authorized by the order); to government officials investigating compliance with Title II of GINA (if the information is relevant to the investigation); for FMLA or state law family and medical leave certification purposes; and to a public health agency, if information about the manifestation of a disease or disorder concerns a contagious disease that presents an imminent hazard of death or life-threatening illness.<sup>3</sup>

“Genetic information” includes, among other things, an individual's family medical history, i.e., “information about the manifestation of disease or disorder in family members of the individual.”<sup>4</sup> It thus appears that SEC-66 is likely to contain genetic information. For example, if an employee wants back up care for a child, it appears that he or she would have to submit a medical form about that child (family medical history) and that form would be part of the system of records. GINA would prohibit the disclosure of such genetic information except according to one of the exceptions described above. We therefore recommend that the SEC review the disclosure provisions in SEC-66 to ensure that they comply with GINA.

Thank you for the opportunity to provide these comments. We welcome the opportunity to discuss the issues raised in this letter in further detail. Should you have questions or comments, please feel free to contact Assistant Legal Counsel Corbett Anderson at (202) 663-4579 or Attorney Advisor John Gwynn at (202) 663-4177.

Sincerely,

/s/

Peggy R. Mastroianni  
Legal Counsel

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<sup>3</sup> See 29 C.F.R. § 1635.9.

<sup>4</sup> 29 C.F.R. § 1635.3(b), (c).