

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release No. 34-72440 ; File No. S7-07-14]

RIN 3235-AL58

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

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (“Commission” or “SEC”) is publishing for comment proposed amendments to the Commission’s 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. The proposed amendments provide a formula for fees charged to FOIA requesters; incorporate a time frame in which a FOIA requester must file an appeal in the event a request or a portion thereof is denied; allow for submission of FOIA appeals by email or facsimile; and allow the Office of FOIA Services to issue responses to FOIA requests indicating that no records were located.

DATES: Comments should be received by [insert date that is 30 days from publication in the Federal Register].

ADDRESSES: Comments may be submitted by any of the following methods:

Electronic Comments

- Use the Commission's Internet comment form <http://www.sec.gov/rules/proposed.shtml>);

- Send an email to rule-comments@sec.gov. Please include File Number S7-07-14 on the subject line; or
- Use the Federal eRulemaking Portal (<http://www.regulations.gov>). Follow the instructions for submitting comments.

Paper Comments

- Send paper comments to Secretary, Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090.

All submissions should refer to File Number S7-07-14. This file number should be included on the subject line if email is used. To help us process and review your comments more efficiently, please use only one method. The Commission will post all comments on the Commission's Internet website (<http://www.sec.gov/rules/proposed.shtml>). Comments are also available for website viewing and printing in the Commission's Public Reference Room, 100 F Street, NE, Washington, DC 20549 on official business days between the hours of 10:00 am and 3:00 pm. All comments received will be posted without change; we do not edit personal identifying information from submissions. You should submit only information that you wish to make available publicly.

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

1. Purpose.

The Commission is proposing to amend its FOIA regulations at 17 CFR 200.80 and 17 CFR 200.80e.

A. Proposed 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 believes it is appropriate to update its 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.¹

The OMB Guidelines, in complying with 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."² The guidelines state that "[a]gencies should charge fees that recoup the full allowable direct costs they incur."³

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."⁴

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 is proposing to revise its regulation to reflect the formula contained in the OMB Guidelines (basic pay plus 16 percent) rather than setting forth a fixed price. Moreover, the proposed regulation provides that the Commission will establish a representative rate for each of

¹ See 52 FR 10011 (March 27, 1987).

² *Id.* at 10015.

³ *Id.* at 10018.

⁴ *Id.*

the three different groups of grades typically involved: personnel in grades SK 8 or below; personnel in grades SK 9 to 13; and personnel in grades SK 14 or above.⁵ 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 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.⁶

In connection with this revision, the Commission is also proposing 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. The regulation as amended will allow the Commission to charge FOIA requesters in quarter-hour increments at the rates established by reference to the OMB Guidelines. Presently, the Commission estimates the time spent processing a single FOIA request at approximately 1 ½ hours at an estimated cost of \$42. If the regulations are amended to reflect the formula contained in the OMB Guidelines as discussed above, the average cost per request would increase to approximately \$92.⁷ This cost is estimated by utilizing the hourly rate of pay of a Washington, DC-based SK-12 employee, which is the typical employee who currently does most of the work in processing a FOIA request.

⁵ 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).

⁶ 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 max and min 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 max and min salary of a Washington, DC-based SK-15 supervisor. For 2014 this is $[(\$118,743 + \$200,033)/2][1/2087 \text{ hours per year}][1.16 \text{ OMB markup factor}] = \$89/\text{hour}$.

⁷ All fees will be charged in accordance with the categories of FOIA requesters as set forth in 5 U.S.C. 552(a)(4)(A)(ii), 17 CFR 200.80(e)(10).

The proposed fee regulation provides, 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. The proposed language is based upon the language of 5 U.S.C. 552(a)(4)(A)(iv) (providing that no fee may be charged if the fee exceeds the costs of collecting and processing the fee). Currently, the cost of the average fee collection activity is \$20, so no fee will be charged of \$20 or less.

B. Proposed 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). The Commission's regulations currently provide no time frame in which a FOIA requester must file an appeal. Although the FOIA does not require agencies to establish an appeals time frame, neither does it preclude them from doing so. The proposed amendment would establish an appeals time frame of 30 days, which is appropriate in order to allow for more efficient and improved appeals processing by the Commission's Office of the General Counsel. In addition, the implementation of an appeals time frame is consistent with the practices of other federal agencies. Our staff has reviewed the practices at the 15 United States federal executive departments. Of these, seven have a FOIA appeals time frame of 30 days, five have a 60 day time frame, one has a 35 day time frame, one has a 45 day time frame and one has a 90 day time frame.⁸

C. Submission of FOIA Appeals by Email and Facsimile

The Commission is revising 17 CFR 200.80(d)(6)(ii) to allow appeals to be submitted by facsimile or email as well as through the mail.

⁸ Independent agencies comparable to the SEC (FDIC, CFTC and FTC) have 30 day appeals time frames.

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

The Commission's current regulations do not provide for responses to FOIA requests that indicate that no responsive records were located. The proposed amendment would make clear that a possible response to a FOIA request is that no responsive records were located.

REQUEST FOR COMMENTS

We request and encourage any interested person to submit comments on any aspect of the proposals, other matters that might have an impact on the amendments and any suggestions for additional changes. With regard to any comments, we note that such comments are of particular assistance to us if accompanied by supporting data and analysis of the issues addressed in those comments. We urge commenters to be as specific as possible.

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 discussed further below, the Commission preliminarily believes that the proposed rules will have a minimal economic effect.

The proposed 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. Although the proposed rules are unlikely to have a significant impact on the economy, the Commission believes that the rules will benefit the Commission and the public. Compared to the baseline, which includes the current fee structure outlined above, the proposed rules will permit the Commission to charge fees that more closely reflect the direct costs the Commission incurs to provide FOIA services. Additionally, the proposed rules will

provide increased flexibility to FOIA requesters by expressly permitting appeals by email and facsimile. By establishing a time frame for FOIA appeals that, in light of potential alternatives, is consistent with the practice of other federal agencies, the proposed rules will also improve efficiency in the appeal process.

The Commission recognizes, however, that the proposed rules may also impose costs. Specifically, 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. But, as discussed elsewhere, the Commission believes that those costs would be insignificant. Additionally, the Commission preliminarily believes that the proposed rules will not burden competition and that any potential burden on competition imposed by the proposed rules would be appropriate in furtherance of purposes of the Exchange Act.

The Commission requests comment on all aspects of the benefits and costs of the proposal, including any anticipated impacts on competition.

REGULATORY FLEXIBILITY ACT CERTIFICATION

Section 3(a) of the Regulatory Flexibility Act of 1980 (“RFA”) requires the Commission to undertake an initial regulatory flexibility analysis of the proposed rule amendments on small entities unless the Commission certifies that the proposal, if adopted, would not have a significant economic impact on a substantial number of small entities. The overwhelming majority of FOIA requests made to the Commission involve either no charge or the charges apply to just six companies, none of which appear to be small entities. Generally, increases in the average cost will be from \$0 to approximately \$31 for requests that take one-half hour to process and \$42 to approximately \$92 for those that take 1½ hours to process. Pursuant to 5

U.S.C. 605(b), the Commission certifies that the proposed amendments will not have a significant economic effect on a substantial number of small entities. The Commission requests comments regarding the appropriateness of its certification.

OTHER ADMINISTRATIVE LAW MATTERS

Because these amendments are generally rules of agency organization, procedure and practice that do not substantially affect the rights and obligations of non-agency parties, the Congressional Review Act does not apply.⁹

These amendments do not contain any collection of information requirement as defined by the Paperwork Reduction Act of 1995, as amended.¹⁰ The Commission solicits comment on whether the proposed amendments would be “major” as defined in 5 U.S.C. 804.

STATUTORY AUTHORITY AND TEXT OF PROPOSED RULE AMENDMENTS

The amendments contained herein are being proposed 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.

Text of Proposed Amendments

For the reasons stated in the preamble, the Commission proposes to amend 17 CFR part 200, subpart D as follows:

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

Subpart D—Information and Requests

⁹ 5 U.S.C. 801, et seq.

¹⁰ 44 U.S.C. 3501-3520

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 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 thirty (30) 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 (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 an undesignated introductory paragraph; 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): 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:

- (1) Grades SK-9 or below;
- (2) Grades SK-10 to SK-14; and
- (3) Grades SK-15 or above.

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.

Kevin M. O'Neill
Deputy Secretary

Date: June 20, 2014