

October 5, 2010

Dodd-Frank Provision Protecting the Confidentiality of SEC Examination Material Repealed

Today the President signed into law Congress' rapid repeal of Section 929I of the newly enacted Dodd-Frank Wall Street Reform and Consumer Protection Act ([S. 3717](#)). Section 929I had amended the Securities Exchange Act of 1934 to provide the SEC with authority to protect information gathered under its examination authority from both public disclosure under the Freedom of Information Act ("FOIA") and disclosure in response to subpoenas in litigation. Similar provisions in Section 929I had applied to records provided to the SEC under the Investment Company Act of 1940 and the Investment Advisers Act of 1940. Congress repealed Section 929I only days after the SEC issued guidance concerning how it would apply that provision, and despite Congressional testimony by SEC Chairman Mary Schapiro that Section 929I would enhance the SEC's ability to conduct timely and comprehensive examinations.

In the past, the SEC has relied on exemptions under FOIA as authority to withhold examination material from public disclosure, including FOIA exemption 4 (for trade secrets and confidential commercial or financial information) and FOIA exemption 8 (for matters contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions). However, in urging support for the protections included in Section 929I, the SEC had asserted that the FOIA exemptions provided incomplete protection from public disclosure under FOIA and could not be asserted to prevent a compelled disclosure in response to subpoenas served on the SEC in private litigation.

While repealing the explicit authority provided to the SEC by Section 929I to withhold records obtained pursuant to its examination authority, the repealing legislation provides that "any entity" for which the SEC has responsibility for "regulating, supervising, or examining" is deemed to be a "financial institution" — one of the predicates for invoking FOIA exemption 8. Nevertheless, S. 3717 strips the SEC of the clear statutory authority to resist disclosure of such examination material in response to third-party subpoenas that it briefly enjoyed under Section 929I (and thus any objections by the SEC to such disclosure will have to be based on other grounds). A public statement issued by Barney Frank, Chairman of the House Financial Services Committee, at the time the Senate passed the bill suggests that there may be further legislative action on this issue.

The rapid repeal of Section 929I has significance for all financial institutions subject to the SEC's examination power and may be of particular concern to those entities over which the Dodd-Frank Act gave the SEC new authority, including many investment advisers to hedge funds and private equity funds, municipal advisers, and credit rating agencies. Regulated entities called upon to submit records to the SEC examination staff must be alert to the importance of limiting, to the extent possible, what commercially sensitive material is provided to the SEC and requesting confidential treatment pursuant to the SEC's procedures for material that is provided.

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