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SEC Says New Financial Regulation Law Exempts it From Public Disclosure

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Under a little-noticed provision of the recently passed financial-reform legislation, the Securities and Exchange Commission no longer has to comply with virtually all requests for information releases from the public, including those filed under the Freedom of Information Act.

The law, signed last week by President Obama, exempts the SEC from disclosing records or information derived from "surveillance, risk assessments, or other regulatory and oversight activities." Given that the SEC is a regulatory body, the provision covers almost every action by the agency, lawyers say. Congress and federal

agencies can request information, but the public cannot.

That argument comes despite the President saying that one of the cornerstones of the sweeping new legislation was more transparent financial markets. Indeed, in touting the new law, Obama specifically said it would "increase transparency in financial dealings."

The SEC cited the new law Tuesday in a FOIA action brought by FOX Business Network. Steven Mintz, founding partner of law firm Mintz & Gold LLC in New York, lamented what he described as "the backroom deal that was cut between Congress and the SEC to keep the SEC's failures secret. The only losers here are the American public." If the SEC's interpretation stands, Mintz, who represents FOX Business Network, predicted "the next time there is a Bernie Madoff failure the American public will not be able to obtain the SEC documents that describe the failure," referring to the shamed broker whose Ponzi scheme cost investors billions.

"The new provision applies to information obtained through examinations or derived from that information," said SEC spokesman John Nester. "We are expanding our examination program's surveillance and risk assessment efforts in order to provide more sophisticated and effective Wall Street oversight. The success of these efforts depends on our ability to obtain documents and other information from brokers, investment advisers and other registrants. The new legislation makes certain that we can obtain documents from registrants for risk assessment and surveillance under similar conditions that already exist by law for our examinations. Because registrants insist on confidential treatment of their documents, this new provision also removes an opportunity for brokers, investment advisers and other registrants to refuse to cooperate with our examination document requests."

Criticism of the provision has been swift. "It allows the SEC to block the public's access to virtually all SEC records," said Gary Aguirre, a former SEC staff attorney-turned-whistleblower who had accused the agency of thwarting an investigation into hedge fund Pequot Asset Management in 2005. "It permits the SEC to promulgate its own rules and regulations regarding the disclosure of records without getting the approval of the Office of Management and Budget, which typically applies to all federal agencies."

Aguirre used FOIA requests in his own lawsuit against the SEC, which the SEC settled this year by paying him \$755,000. Aguirre, who was fired in September 2005, argued that supervisors at the SEC stymied an investigation of Pequot – a charge that prompted an investigation by the Senate Judiciary and Finance committees.

The SEC closed the case in 2006, but would re-open it three years later. This year, Pequot and its founder, Arthur Samberg, were forced to pay \$28 million to settle insider-trading charges related to shares of Microsoft (NASDAQ:MSFT). The settlement with Aguirre came shortly later.

"From November 2008 through January 2009, I relied heavily on records obtained from the SEC through FOIA in communications to the FBI, Senate investigators, and the SEC in arguing the SEC had botched its initial investigation of Pequot's trading in Microsoft securities and thus the SEC should reopen it, which it did," Aguirre said. "The new legislation closes access to such records, even when the investigation is closed.

"It is hard to imagine how the bill could be more counterproductive," Aguirre added.

FOX Business Network sued the SEC in March 2009 over its failure to produce documents related to its failed investigations into alleged investment frauds being perpetrated by Madoff and R. Allen Stanford. Following the Madoff and Stanford arrests it, was revealed that the SEC conducted investigations into both men prior to their arrests but failed to uncover their alleged frauds.

FOX Business made its initial request to the SEC in February 2009 seeking any information related to the agency's response to complaints, tips and inquiries or any potential violations of the securities law or wrongdoing by Stanford.

FOX Business has also filed lawsuits against the Treasury Department and Federal Reserve over their failure to respond to FOIA requests regarding use of the bailout funds and the Fed's extended loan facilities. In February, the Federal Court in New York sided with FOX Business and ordered the Treasury to comply with its requests.

Last year, the network won a legal victory to force the release of documents related to New York University's lawsuit against Madoff feeder Ezra Merkin.

FOX Business' FOIA requests have so far led the SEC to release several important and damaging documents:

- FOX Business used the FOIA to obtain a 2005 survey that the SEC in Fort Worth was sending to Stanford investors. The survey showed that the SEC had suspicions about Stanford several years prior to the collapse of his \$7 billion empire.

- FOX Business used the FOIA to obtain copies of emails between Federal Reserve lawyers, AIG and staff at the Federal Reserve Bank of New York in which it was revealed the Fed staffers knew that bailing out AIG would result in bonuses being paid.

Recently, TARP Congressional Oversight Panel chair Elizabeth Warren told FOX Business that the network's Freedom of Information Act efforts played a "very important part" of the panel's investigation into AIG.

Warren told the network the government "crossed a line" with the AIG bailout.

"FOX News and the congressional oversight panel has pushed, pushed, pushed, for transparency, give us the documents, let us look at everything. Your Freedom of Information Act suit, which ultimately produced 250,000 pages of documentation, was a very important part of our report. We were able to rely on the documents that you pried out for a significant part of our being able to put this report together," Warren said.

The SEC first made its intention to block further FOIA requests known on Tuesday. FOX Business was preparing for another round of "skirmishes" with the SEC, according to Mintz, when the agency called and said it intended to use Section 929I of the 2000-page legislation to refuse FBN's ongoing requests for information.

Mintz said the network will challenge the SEC's interpretation of the law.

"I believe this is subject to challenge," he said. "The contours will have to be figured out by a court."

SEC Financial Regulatory Law H.R. 4173