

SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 200

[Release Nos. 34-83506 ; FOIA-193; File No. S7-09-17]

RIN 3235-AM25

Amendments to the Commission's Freedom of Information Act Regulations

AGENCY: Securities and Exchange Commission.

ACTION: Final rule.

SUMMARY: The Securities and Exchange Commission (“Commission” or “SEC”) is adopting amendments to the Commission’s regulations under the Freedom of Information Act (“FOIA”). The Commission is amending the FOIA regulations to reflect changes required by the FOIA Improvement Act of 2016 (“Improvement Act”) and to clarify, update, and streamline the regulations.

DATES: Effective *[insert date 30 days after date of publication in the FEDERAL REGISTER]*.

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SUPPLEMENTARY INFORMATION:

I. Introduction

On December 21, 2017, the Commission proposed amendments to its existing regulations under the FOIA, 5 U.S.C. 552,¹ to reflect changes required by the Improvement Act and to clarify, update, and streamline the language of several procedural provisions. The Commission received four comment letters on the proposed amendments. After consideration of the comments received, the Commission is adopting the amendments to its FOIA regulations as proposed, other than changes to two definitions related to the collection of fees and a few technical modifications for clarity. Due to the scope of the amendments, this

¹ See Release No. 34-82373 (Dec. 21, 2017), 83 FR 291 (Jan. 3, 2018) (“Proposing Release”).

final rule replaces the Commission's existing FOIA regulations in their entirety (17 CFR 200.80 through 200.80f).

II. Final Amendments

A. Changes to Conform to the Improvement Act

The Commission is adopting four changes to the Commission's FOIA regulations to conform them to the Improvement Act. These changes are being adopted largely as proposed.² First, the final rule revises Section 200.80(a) to provide that records the FOIA requires to be made available for public inspection will be available in electronic format on the Commission's website, <http://www.sec.gov>. Second, the final rule revises Section 200.80(c) to provide that a request for records may be denied to the extent the exemptions in 5 U.S.C. 552(b) apply to the requested records and Commission staff reasonably foresees that disclosure would harm an interest protected by the applicable exemption, the disclosure of the requested records is prohibited by law, or the requested records are otherwise exempted from disclosure under 5 U.S.C. 552(b)(3). Third, the final rule revises the regulations to state that FOIA requesters may seek assistance from the Office of FOIA Services' FOIA Public Liaisons (Sections 200.80(b), (d), and (e)) and to advise FOIA requesters of their right to seek dispute resolution services offered by the Office of Government Information Services in the case of a denied request (Section 200.80(e)). Fourth, the final rule incorporates the amendments to the FOIA requiring agencies, if they do not comply with the time limits, to waive fees, under certain circumstances (Section 200.80(g)).

B. Amendments to Certain Procedural Provisions

The final amendments also revise certain procedural provisions. Those changes clarify, update, and streamline the Commission's regulations, and most of the changes make the regulations consistent with existing practices. These changes are being largely adopted as proposed.³ The amended regulations,

² The Commission is making one technical, clarifying modification from the proposal. Specifically, in the first sentence of Section 200.80(a)(2)(ii), the word "Those" is changed to "Persons."

³ The Commission is making one technical, clarifying modification from the proposal. Specifically, the third sentence of Section 200-.80(f)(3), is changed from "Appeals should include a statement of the requester's arguments

among other things, update the various methods for submitting FOIA requests and administrative appeals (Sections 200.80(b) and (f)); incorporate language requiring requesters to include their full names and return addresses in their FOIA requests (Section 200.80(b)); describe certain information that is required when submitting requests for records about oneself or another individual (Section 200.80(b)); explain the situations in which the Office of FOIA Services staff will work with other Federal agencies that have an interest in agency records that may be responsive to a request (Section 200.80(c)); incorporate language that allows the Office of FOIA Services to seek a one-time clarification of an ambiguous request and toll the time period for responding to the request until the requester clarifies the request (Section 200.80(d)); clarify when the 20-day statutory time limit for responding to requests begins (i.e., when requests are received by the Office of FOIA Services and when requests are modified so that they reasonably describe the records sought) (Section 200.80(d)); clarify the Office of FOIA Services' system for multitrack processing of requests (Section 200.80(d)); and insert a provision to enable the Office of FOIA Services to aggregate requests involving related matters where it appears that multiple requests together constitute a single request that would involve unusual circumstances (Section 200.80(d)).

The final rule also clarifies, consistent with existing practice, that the Office of FOIA Services will close requests if requesters do not take certain steps within set time periods. For example, requesters must respond to the Office of FOIA Services' one-time clarification request within 30 calendar days (Section 200.80(d)); agree to pay anticipated fees within 30 calendar days of the Office of FOIA Services' fee estimate (Section 200.80(g)); and, when required to do so, make an advance payment within 30 calendar days of the Office of FOIA Services' fee notice (Section 200.80(g)).

as to why the records requested should be made available and why the adverse determination was in error” to “Appeals should include a statement of the requester’s arguments as to why the records requested should be made available and the reason(s) the FOIA requester contends the adverse determination was in error.”

C. Revisions to Fee Provisions

Section 200.80(g) of the final rule revises the Office of FOIA Services' fee procedures and fee schedule in two ways. Both of these changes are being adopted as proposed. First, the final rule allows the Office of FOIA Services to collect fees before sending records to a requester instead of seeking payment when the records are sent (Section 200.80(g)(1)). Second, the final rule removes the set duplication fee of 24 cents per page and instead refers requesters to the FOIA fee page on the Commission's website, where the current fee will be posted (Section 200.80(g)(3)(v)).⁴ The duplication fee posted on the website will reflect the direct costs of photocopying or producing a printout, taking into account various factors including the salary of the employee(s) performing the work and the cost of materials. The duplication fee posted on the Commission's website will be adjusted as appropriate to reflect current costs. Eliminating the set duplication fee will allow the Office of FOIA Services to align its photocopying and printout fees with the actual costs of duplicating records for production to requesters (in paper format) without having to amend the regulations.

As proposed, the final rule also codifies several existing practices. For example, it states that fees for duplicating records onto electronic medium (including the costs associated with scanning materials, where applicable) will be the direct costs of duplicating records for requesters (Section 200.80(g)(3)(v)); clarifies that the Office of FOIA Services will not process any requests once it determines that a fee may be charged unless the requester commits to pay any estimated fees (Section 200.80(g)(5)(ii)); clarifies the direct costs that can be charged by the Office of FOIA Services as part of search, review, and duplication fees (Section 200.80(g)(3)); and sets forth the various methods by which FOIA processing fees can be paid (Section 200.80(g)(1)).

⁴ The initial posted fee will be 15 cents per page, and the Commission is already charging this lower cost.

The final rule also revises existing fee-related definitions and incorporates new fee-related definitions (Section 200.80(g)(2)). As discussed below, some of these definitions have been slightly revised in the final rule in response to comments received on the proposed rule.⁵

D. Elimination of Certain Provisions

As proposed, the final rule eliminates certain provisions in the Commission's current FOIA regulations that repeat information contained in the FOIA statute and do not need to be in the Commission's regulations. Among the provisions that the Commission is removing are: (1) the list of information the FOIA requires the Commission to publish in the Federal Register (Section 200.80(a)(1) of the superseded regulations), (2) the categories of records the FOIA requires the Commission to make available for public inspection (Section 200.80(a)(2) of the superseded regulations), and (3) the nine categories of records that are exempt from disclosure under 5 U.S.C. 552(b) (Section 200.80(b) of the superseded regulations). Finally, the final rule eliminates Appendices A through F from the existing FOIA regulations. Appendices A through D and F of the existing regulations provide general information that is available on the Commission's website to the extent it is relevant to the public. The information in Appendix E of the existing regulations is revised and updated and moved to Section 200.80(g) (Fees) of the final rule.

E. Structure of the Final Rule

The structure of the regulations is amended accordingly: Section 200.80(a) (General provisions); Section 200.80(b) (Requirements for making requests); Section 200.80(c) (Processing requests); Section 200.80(d) (Time limits and expedited processing); Section 200.80(e) (Responses to requests); Section 200.80(f) (Administrative appeals); and Section 200.80(g) (Fees).

⁵ The Commission is also making several technical, clarifying modifications from the proposal in the fee provisions. In the first sentence of Section 200.80(g)(3), the phrase "shall charge the fees summarized in chart form..." is changed to "shall charge fees for the services summarized in chart form..." to more accurately describe the chart. In the first sentence of Section 200.80(g)(3)(ii)(B), the phrase "to locate records" is changed to "to locate or identify responsive records" so as to more precisely describe the search. In Section 200.80(g)(12)(ii), the phrase "shall consider all four of the following factors" is changed to "shall consider each of the following four factors."

III. Public Comments

The Commission received four comment letters in response to the proposed rulemaking. Two of the comments concern definitions in the fee provisions of the proposed rule and suggest substantive changes to the Commission's proposed fee definitions.⁶ One comment suggests technical clarifications to some of the Commission's FOIA procedures.⁷ The final letter supports certain provisions in the proposed rule.⁸ The Commission has considered the comments received and, as discussed below, in certain cases has made modifications in the final amendments in response to those comments.

In proposing the definitions in the fee provisions of the proposed rule, the Commission considered the FOIA's directive that agencies "promulgate regulations . . . specifying the schedule of fees applicable to the processing of requests . . . [and that] [s]uch schedule shall conform to the guidelines which shall be promulgated . . . by the Director of the Office of Management and Budget [("OMB")]."⁹ In light of this directive, the Commission looked to the definitions in the OMB's 1987 FOIA fee guidelines except to the extent that courts have held that the definitions are not consistent with the FOIA.¹⁰

A. *Section 200.80(g)(2)(iv) (Definition of educational institution)*

One commenter expressed concern that the Commission's definition of "educational institution" in proposed Section 200.80(g)(2)(iv) is inconsistent with the FOIA provision that addresses fees that agencies can charge when "records are not sought for commercial use and the request is made by an educational or noncommercial scientific institution, whose purpose is scholarly or scientific research."¹¹ The commenter stated that the Commission's proposed definition of "educational institution" "deviates

⁶ See letter from Ryan P. Mulvey, Counsel, Cause of Action Institute, dated January 3, 2018 ("CoA Institute letter"); letter from Keith P. Bishop, dated January 12, 2018 ("Bishop letter")

⁷ See letter from Rachel Wood, dated April 27, 2018.

⁸ See letter from Lori Gayle Nuckolls, dated January 22, 2018.

⁹ 5 U.S.C. 552(a)(4)(A)(i).

¹⁰ Uniform Freedom of Information Act Fee Schedule and Guidelines, 52 Fed. Reg. at 10,018 (March 27, 1987).

¹¹ See Bishop letter (quoting 5 U.S.C. 552(a)(4)(A)(ii)(II)).

from the statute in two respects” – the definition “omits reference to ‘scientific research’” and it “requires that the purpose of the request be ‘to further scholarly research’ whereas the statute requires only that the educational institution have a purpose of scholarly or scientific research.”¹²

The FOIA does not define the term “educational institution.” The Commission’s proposed definition of “educational institution” did not include a reference to “scientific research” because in promulgating its fee guidelines, the OMB found that “the statute and the legislative history recite the formula ‘educational or scientific institution/scholarly or scientific research,’ and it seems clear that the phrase was meant to be read disjunctively so that scholarly applies to educational institution and scientific applies to non-commercial scientific institution.”¹³ In addition, “scholarly research” is a broad term that would generally include “scientific research.” Accordingly, the Commission does not believe it is necessary to include “scientific research” as part of its definition of “educational institution.”

In response to the commenter’s suggestion to remove from the definition of “educational institution” the requirement that the records are sought to “further scholarly research,” the Commission is deleting this language from the definition and is inserting language to clarify that the requester must show that the request is made in connection with the requester’s role at the educational institution and that the records are not sought for commercial or personal use. The definition of “educational institution” in the final rule at §200.80(g)(2)(iv) is thus revised to read:

Educational institution is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with the requester’s role at the educational institution and that the records are not sought for commercial or personal use.

B. Section 200.80(g)(2)(v) (Definition of noncommercial scientific institution)

One commenter expressed concern that the Commission’s proposed definition of “noncommercial scientific institution” in proposed §200.80(g)(2)(v) is inconsistent with the FOIA

¹² See Bishop letter.

¹³ 52 Fed. Reg. at 10,014.

“because it imposes additional limitations and conditions not found in the statutory definition.”¹⁴ This commenter stated that the FOIA, unlike the proposed rule, “does not require (i) that the institution be operated solely for the purpose of conducting scientific research, or (ii) that the request is being made under the auspices of a qualifying institution.”¹⁵

The Commission believes that its proposed definition of “noncommercial scientific institution” is consistent with the FOIA. The FOIA does not define the term “noncommercial scientific institution” and the Commission has adopted the definition from the OMB’s FOIA fee guidelines. Those guidelines provide that the “term ‘non-commercial scientific institution’ refers to an institution that is not operated on a ‘commercial’ basis . . . and which is operated solely for the purpose of conducting scientific research the results of which are not intended to promote any particular product or industry.”¹⁶ The OMB guidelines further state that “[t]o be eligible for inclusion [in the noncommercial scientific institution] category, requesters must show that the request is being made as authorized by and under the auspices of a qualifying institution and that the records are not sought for a commercial use, but are sought in furtherance of . . . scientific . . . research.”¹⁷ Accordingly, the Commission is adopting the proposed definition of “noncommercial scientific institution” in Section 200.80(g)(2)(v) of the final rule without change.

C. Section 200.80(g)(2)(vi) (Definition of representative of the news media or news media requester)

Two commenters expressed concern that the Commission’s proposed definition of “representative of the news media” or “news media requester” is inconsistent with the statutory definition.¹⁸ Both commenters noted that the statutory definition does not require a “news media requester” to be “organized

¹⁴ See Bishop letter.

¹⁵ *Id.*

¹⁶ 52 Fed. Reg. at 10,018.

¹⁷ 52 Fed. Reg. at 10,019.

¹⁸ See Bishop letter; CoA Institute letter.

and operated to publish or broadcast news to the public.”¹⁹ One of the commenters specifically recommended striking the “organized and operated” standard from the definition.²⁰ In response to these comments, the Commission has omitted the “organized and operated” language in the final rule.

One commenter addressed three additional considerations related to the Commission’s proposed definition of “news media requester.”²¹ This commenter first recommended further revising the proposed definition of “news media requester” by deleting the last sentence of the proposed definition (“The Office of FOIA Services will determine whether to grant a requester news media status on a case-by-case basis based upon the requester’s intended use of the requested material.”) because “the statute’s focus [is] on requesters, rather than [their] requests.”²² In response to this recommendation, the Commission has removed the final sentence from the definition of “news media requester” in the final rule.

This commenter also recommended that the Commission recognize that a news media requester may use “editorial skills” to turn “raw materials into a distinct work” when writing documents such as press releases and editorial comments, as the U.S. Court of Appeals for the District of Columbia stated in *Cause of Action v. Federal Trade Commission*.²³ The commenter did not recommend any changes to the rule to address this issue, and the Commission believes none are necessary.²⁴ The Commission, as appropriate, will consider *Cause of Action* and any other relevant precedents in applying the fee provisions in its regulations.

¹⁹ *Id.*

²⁰ *See* CoA Institute letter.

²¹ *Id.*

²² *Id.* (citing *Cause of Action v. Federal Trade Commission* 799 F.3d 1108, 1121 (D.C. Cir. 2015)).

²³ *Id.* (citing *Cause of Action*, 799 F.3d at 1122-25).

²⁴ *Id.*

Finally, this commenter recommended that the Commission “should indicate [in its definition of “news media requester”] that any examples of news media entities it may include in its regulations are non-exhaustive.”²⁵ The Commission is not making any changes in response to this comment because the definition in the final rule does not contain any examples of news media entities.

IV. Other Matters

If any of the provisions of these amendments, or the application thereof to any person or circumstance, is held to be invalid, such invalidity shall not affect other provisions or application of such provisions to other persons or circumstances that can be given effect without the invalid provision or application.

V. Economic Analysis

The Commission is sensitive to the economic effects, including the costs and benefits, that result from its rules. Section 23(a)(2) of the Securities Exchange Act of 1934 (“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 and prohibits any rule that would impose a burden on competition that is not necessary or appropriate in furtherance of the purposes of the Exchange Act.²⁶ Further, Section 3(f) of the Exchange Act requires the Commission, when engaging in rulemaking where it is required to consider or determine whether an action is necessary or appropriate in the public interest, to consider, in addition to the protection of investors, whether the action will promote efficiency, competition, and capital formation.²⁷

As explained in the proposal and discussed further below, the Commission believes that the economic effects of the final rule will be limited. The Commission notes that, where possible, it has attempted to quantify the costs, benefits, and effects on efficiency, competition, and capital formation

²⁵ *Id.*

²⁶ 15 U.S.C. 78w(a).

²⁷ 15 U.S.C. 78c(f).

expected to result from the proposed amendments. In some cases, however, the Commission is unable to quantify the economic effects because it lacks the information necessary to provide a reasonable estimate. Additionally, some of the potential benefits of the amendments are inherently difficult to quantify.

The amendments to the Commission's FOIA regulations fall into four categories. First, as discussed in more detail above, the Commission is amending its regulations to conform the regulations to the Improvement Act. Consistent with the Improvement Act, the amended rule provides: (1) records required to be made available pursuant to the FOIA will be made available in electronic format; (2) records will be withheld under the exemptions in 5 U.S.C. 552(b) only if Commission staff reasonably foresees that disclosure would harm an interest protected by the applicable exemption or disclosure is prohibited by law; (3) FOIA requesters may seek assistance from the Office of FOIA Services' FOIA Public Liaisons and will be advised that they have the right to seek dispute resolution services from the Office of Government Information Services if their request is denied; and (4) the Office of FOIA Services is required to waive fees, in certain circumstances, if it does not comply with the time limits under the FOIA. The Commission believes that these changes will have minimal impact on FOIA requesters because they largely codify the Commission's existing practices. To the extent the amendments result in these practices being followed more consistently, they could benefit the public by increasing the amount of information available, making more information available in an electronic format, and ensuring that requesters know of their right to seek alternative dispute resolution. The Commission also believes that the public could benefit from the increased transparency regarding these practices. The Commission does not expect these amendments to result in additional costs to any member of the public.

Second, the final rule will amend several procedural provisions within the Commission's FOIA regulations, which will better reflect and improve existing practice. Most of these changes codify existing Office of FOIA Services practice, including: (1) adding to the regulation additional methods for submitting FOIA requests and administrative appeals; (2) clarifying the existing procedures for submitting requests for records about oneself or another individual; (3) clarifying the existing procedures for submitting a proper FOIA request and seeking clarification of a request; (4) clarifying existing

procedures for submitting an administrative appeal; and (5) clarifying the existing practice that limits administrative appeals to written filings (i.e., there is no opportunity for personal appearance, oral argument, or hearing on appeal). The Commission does not expect these changes to result in additional costs to any member of the public. The Commission also expects that there would be some benefit to FOIA requesters from the increased transparency regarding these practices.

Two procedural changes could impose limited costs on members of the public. First, FOIA requesters will be required to include their full names and addresses in their requests. Providing a full name and address is not itself burdensome, but some requesters may prefer to remain anonymous and could be deterred from submitting FOIA requests by this requirement. However, because nearly all FOIA requesters provide this information already, the Commission expects that the economic impact of the amendment will be minimal. Second, the Office of FOIA Services will be able to aggregate related requests from one requester (or a group of requesters). The Office of FOIA Services can aggregate requests that on their own do not involve “unusual circumstances,” as defined in the amended regulations, or warrant placement in a track for complex requests (i.e., requests that require more work and/or time to process than most requests), so aggregation may lead to extended deadlines for processing a request or cause a request to be handled after other complex requests. Based on past experience, the Commission expects that few requests will be aggregated. In addition, if the aggregation of requests results in the requests being placed in a track for complex requests that could extend the processing time, the requester can modify the request so that it can be processed more quickly. Thus, the Commission expects that the impact of this amendment also will be minimal.

Third, the Commission is revising the Office of FOIA Services’ fee procedures and fee schedule in several ways, including: (1) eliminating from the rule the per page duplication fee for copying or printing requested records, and instead referring requesters to the FOIA fee page on the Commission’s website; (2) allowing the Office of FOIA Services to collect fees before sending records to a requester instead of seeking payment when the records are sent; (3) clarifying the direct costs that can be charged by the Office of FOIA Services as part of its search, review, and duplication fees; and (4) codifying the

existing Office of FOIA Services practice of charging requesters the actual cost of production for materials produced in an electronic format. In general, lowering fees associated with FOIA requests could encourage additional FOIA submissions, while raising fees could deter them. However, as discussed below, the Commission does not anticipate that any of its changes to the Office of FOIA Services' fee procedures will impose significant new costs on FOIA requesters.

With respect to the elimination of the set per page duplication fee, the Office of FOIA Services has already lowered its per page duplication fee from 24 cents to 15 cents to reflect its actual duplication costs. Even if the Office of FOIA Services were to increase the per page duplication fee in the future, the impact of any increase would likely be minimal. Information about the fees the Commission has collected for FOIA requests for the past six years allows the Commission to estimate the economic effects of this proposed change. Table 1 shows the number of requests received and processed by the Commission during fiscal years 2011 through 2017 and the fees the Commission collected. The fees collected by the Commission for processing FOIA requests include charges for staff time associated with locating, reviewing, and copying responsive documents, as well as duplication fees for paper copies and production costs for other types of media. The fee schedule for FOIA requests is available on the Commission's website.

Fiscal Year	Requests Received	Requests Processed	Fees Collected for Processing Requests
2011	11,555	11,562	\$78,005.94
2012	11,292	11,302	\$27,577.00
2013	12,275	12,167	\$35,954.30
2014	14,862	14,757	\$22,670.81
2015	16,898	16,207	\$19,890.07
2016	14,458	15,196	\$41,029.68
2017	13,063	13,069	\$35,025.15

As shown in Table 1, from fiscal years 2011-2017, the Office of FOIA Services collected an average of \$37,164.71 per year in fees for processing an average of 13,466 requests. These amounts

correspond to an average fee of \$2.76 collected per request processed.²⁸ Even if all of those fees were for duplication (which they were not), a one cent per page increase in duplication fees would result in an increase in total fees collected of approximately \$1,548.53,²⁹ corresponding to an average fee of \$2.87 collected per request processed.³⁰

With respect to the amendment providing that the FOIA Office can collect fees before sending records to a requester (instead of seeking payment when the records are sent), the Commission expects that any additional cost will be limited to a slight delay in receiving documents. The timing of the collection will not itself impose any additional costs on FOIA requesters because the timing would not alter the amount of fees charged. Any delay in receiving the documents will not be significant because a FOIA requester could make an electronic payment upon receipt of the request for payment, and the Office of FOIA Services would then provide the documents. The Commission notes that some requesters may choose to forgo receiving the records in question if the fees are substantial, though even this impact may be muted because requesters will have been advised of and approved potential charges before requests are processed by the FOIA Office.

The clarification regarding direct costs and codification of existing practices with respect to fees for materials produced in an electronic format are consistent with existing practices, and the Commission therefore does not expect these amendments to impose any additional burden on the public. The other changes to the Office of FOIA Services' fee procedures also codify existing processes and will therefore not impose any additional burden on requesters. These changes include: (1) clarifying that the Office of FOIA Services will not process any requests once it determines that a fee may be charged unless the requester commits to pay the estimated fees; and (2) adding and clarifying certain fee-related definitions.

²⁸ Calculated as $\$37,164.71 / 13,466 = \2.76 .

²⁹ To arrive at this estimated increase, we divide \$37,164.71 in duplication fees by a cost of \$0.24 per page to derive an estimate of approximately 154,853 pages of copies on average per fiscal year. 154,853 pages x \$0.01 increase in per-page duplication fees = \$1,548.53 in additional total processing fees.

³⁰ Calculated as $(\$37,164.71 + \$1,548.53) / 13,466 = \$2.87$.

The Commission does not expect these amendments to result in additional costs to any member of the public. To the contrary, the Commission believes that the public could benefit from the increased transparency regarding these practices. As discussed above, some of the fee-related definitions have been revised in the final rule in response to comments on the proposed rule. Specifically, the Commission has revised the definitions of “educational institution” and “representative of the news media” or “news media requester.” The revisions serve to clarify and broaden the scope of existing definitions, which may benefit some requesters. The Commission does not expect these revisions to result in additional costs to any member of the public.

Finally, the final rule will eliminate certain provisions in the SEC’s FOIA regulations that are restatements of provisions in the FOIA statute. The Commission does not expect these amendments to result in any economic effects, as the elimination of these redundant provisions will not have any substantive consequence.

The Commission requested comments on all aspects of the benefits and costs of the proposal. No commenter addressed the economic analysis contained in the proposal. The Commission continues to believe that the amendments to the Commission’s FOIA regulations will not have any significant impact on efficiency, competition, or capital formation.

VI. Regulatory Flexibility Act Certification

Pursuant to Section 605(b) of the Regulatory Flexibility Act of 1980,³¹ the Commission certified that, when adopted, the amendments to 17 CFR 200.80 would not have a significant economic impact on a substantial number of small entities. This certification, including our basis for the certification, was included in the proposing release. The Commission solicited comments on the appropriateness of its certification, but received none. The Commission is adopting the final rules as modified and discussed above. These modifications to the proposal would not alter the basis upon which the certification was made.

³¹ 5 U.S.C. 605(b).

VII. Paperwork Reduction Act

The Commission stated in the proposed release that the proposed amendments to the FOIA regulations do not contain any collection of information as defined by the Paperwork Reduction Act of 1995 (“PRA”).³² The Commission also determined that the proposed amendments would not create any new filing, reporting, recordkeeping, or disclosure reporting requirements. Accordingly, the Commission did not submit the proposed amendments to the Office of Management and Budget for review under the PRA.³³ The Commission solicited comments on whether its conclusion that there are no new collections of information is correct, and it did not receive any comments.

VIII. Statutory Authority and Text of Rule Amendments

The amendments contained herein are being proposed under the authority set forth in Public Law 114-185 §3(a), 130 Stat. 538; 5 U.S.C. 552; 15 U.S.C. 77f(d), 77s, 77ggg(a), 78d-1, 78w(a), 80a-37(a), 80a-44(b), 80b-10(a), and 80b-11(a).

List of Subjects in 17 CFR Part 200

Administrative practice and procedure; Freedom of information.

Text of Amendments

For the reasons stated in the preamble, the Commission amends 17 CFR part 200 as follows:

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

Subpart D—Information and Requests

1. The authority citation for subpart D is amended to read 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.

³² 44 U.S.C. 3501 *et seq.*

³³ 44 U.S.C. 3507(d) and 5 CFR 1320.11.

Section 200.80 also issued under Public Law 114-185 sec. 3(a), 130 Stat. 538; 5 U.S.C. 552; 15 U.S.C. 77f(d), 77s, 77ggg(a), 78d-1, 78w(a), 80a-37(a), 80a-44(b), 80b-10(a), and 80b-11(a), unless otherwise noted.

Section 200.82 also issued under 15 U.S.C. 78n.

Section 200.83 also issued under E.O. 12600, 3 CFR, 1987 Comp., p. 235.

2. Section 200.80 is amended to read as follows:

§200.80 Securities and Exchange Commission records and information.

(a) *General provisions.* (1) This section contains the rules that the U.S. Securities and Exchange Commission follows in processing requests for records under the Freedom of Information Act (“FOIA”), 5 U.S.C. 552, as amended. These rules should be read in conjunction with the text of the FOIA and the Uniform Freedom of Information Fee Schedule and Guidelines published by the Office of Management and Budget (“OMB Guidelines”). Requests made by individuals for records about themselves under the Privacy Act of 1974, 5 U.S.C. 552a, are processed in accordance with the Commission’s Privacy Act regulations at subpart H, as well as this section.

(2) *Proactive disclosure of Agency records.* (i) Records that the FOIA requires to be made available for public inspection in an electronic format (pursuant to 5 U.S.C. 552(a)(2)) are accessible through the Commission’s website, <http://www.sec.gov>. Each division and office of the Commission is responsible for determining which of its records are required to be made publicly available in an electronic format, as well as identifying additional records of interest to the public that are appropriate for public disclosure, and for posting and indexing such records. Each division and office shall ensure that its posted records and indexes are reviewed and updated on an ongoing basis.

(ii) Persons who do not have access to the Internet may obtain these records by contacting the Commission’s Office of FOIA Services by telephone at 202-551-7900, by email at foiapa@sec.gov, or by visiting the Commission’s Public Reference Room, 100 F Street NE, Washington, DC 20549-2736, on official working days between the hours of 10:00 a.m. and 3:00 p.m.

(b) *Requirements for making requests for records* — (1) *How made and addressed*. The Commission has a centralized system for responding to FOIA requests, with all requests processed by the Office of FOIA Services. Requests for agency records must be in writing and include the requester’s full name and a legible return address. Requesters may also include other contact information, such as an email address and a telephone number. Requests may be submitted by U.S. mail or delivery service and addressed to the Freedom of Information Act Officer, SEC, 100 F Street, NE, Washington, DC 20549. Requests may also be made by facsimile (202-772-9337), email (foiapa@sec.gov), or online at the Commission’s website (<http://www.sec.gov>). The request (and envelope, if the request is mailed or hand-delivered) should be marked “Freedom of Information Act Request.”

(2) *Requests for records about oneself or another individual*. (i) A requester who is making a request for records about himself or herself must comply with the verification of identity provisions set forth in subpart H of this part to obtain any documents that would not be available to the public under the FOIA.

(ii) For requests for records about another individual, a requester may receive greater access by submitting either a notarized authorization signed by the individual permitting disclosure of his or her records or proof that the individual is deceased (*e.g.*, a copy of a death certificate or an obituary). The Office of FOIA Services can require a requester to supply additional information if necessary to verify that a particular individual has consented to disclosure.

(3) *Description of records sought*. A FOIA request must reasonably describe the agency records sought with sufficient specificity with respect to names, dates, and subject matter to enable personnel within the divisions and offices of the Commission to locate them with a reasonable effort. Before submitting a request, a requester may contact the Office of FOIA Services’ FOIA Public Liaisons to discuss the records they are seeking and to receive assistance in describing the records (contact information for these individuals is on the Commission’s website, <http://www.sec.gov>). If the Office of FOIA Services determines that a request does not reasonably describe the records sought, it shall inform the requester what additional information is needed or how the request is insufficient. A requester who is attempting to reformulate or modify such a request may discuss the request with the Office of FOIA

Services' designated FOIA contact, its FOIA Public Liaisons, or a representative of the Office of FOIA Services, each of whom is available to assist the requester in reasonably describing the records sought. When a requester fails to provide sufficient information within 30 calendar days after having been asked to reasonably describe the records sought, the Office of FOIA Services shall notify the requester in writing that the request has not been properly made, that no further action will be taken, and that the FOIA request is closed. Such a notice constitutes an adverse determination under paragraph (e)(2) of this section for which the Office of FOIA Services shall follow the procedures for a denial letter under paragraph (e)(2) of this section. In cases where a requester has modified his or her request so that it reasonably describes the requested records, the date of receipt for purposes of the 20-day time limit of paragraph (d) of this section shall be the date of receipt of the modified request.

(c) *Processing requests* — (1) *In general.* (i) A request for records may be denied to the extent the exemptions in 5 U.S.C. 552(b) apply to the requested records and:

(A) Commission staff reasonably foresees that disclosure would harm an interest protected by the applicable exemption; or

(B) The disclosure of the requested records is prohibited by law or is exempt from disclosure under 5 U.S.C. 552(b)(3).

(ii) In determining which records are responsive to a request, the Office of FOIA Services ordinarily will include only records in the agency's possession as of the date that it begins its search.

(2) *Re-routing of misdirected requests.* Any division or office within the Commission that receives a written request for records should promptly forward the request to the Office of FOIA Services for processing.

(3) *Consultation, referral, and coordination.* When reviewing records located in response to a request, the Office of FOIA Services will determine whether another Federal agency is better able to determine if the record is exempt from disclosure under the FOIA. As to any such record, the Office of FOIA Services will proceed in one of the following ways:

(i) *Consultation.* In instances where a record is requested that originated within a division or office within the Commission and another Federal agency has a significant interest in the record (or a portion thereof), the Office of FOIA Services will consult with that Federal agency before responding to a requester. When the Office of FOIA Services receives a request for a record (or a portion thereof) in its possession that originated with another entity within the Federal Government that is not subject to the FOIA, the Office of FOIA Services will typically consult with that entity prior to making a release determination.

(ii) *Referral.* When the Office of FOIA Services receives a request for a record (or a portion thereof) in its possession that originated with another Federal agency subject to the FOIA, the Office of FOIA Services will typically refer the record to that agency for direct response to the requester. Ordinarily, the agency that originated the record will be presumed to be best able to make the disclosure determination. However, if the Office of FOIA Services and the originating agency jointly agree that the Office of FOIA Services is in the best position to make a disclosure determination regarding the record, then the record may be handled as a consultation and processed by the Office of FOIA Services. Whenever the Office of FOIA Services refers a record to another Federal agency for direct response to the requester, the Office of FOIA Services shall notify the requester in writing of the referral and inform the requester of the name of the agency to which the record was referred.

(iii) *Coordination.* If disclosure of the identity of the agency to which the referral would be made could harm an interest protected by an exemption, the Office of FOIA Services generally will coordinate with the originating agency to seek its views as to disclosure of the record and then advise the requester of the release determination for the record that is the subject of the coordination.

(iv) *Classified information.* On receipt of any request involving classified information, the Commission staff in possession of the information shall determine whether the information is currently and properly classified and take appropriate action to ensure compliance with subpart J of this part. Whenever a request involves a record containing information that has been classified or may be appropriate for classification by another Federal agency under an executive order concerning the

classification of records, the Office of FOIA Services shall refer the responsibility for responding to the request regarding that information to the agency that classified the information, or that should consider the information for classification. Whenever agency records contain information that has been classified by another Federal agency, the Office of FOIA Services shall refer the responsibility for responding to that portion of the request to the agency that classified the underlying information except in circumstances that come within paragraph (c)(3)(iii) of this section.

(d) *Time limits and expedited processing* — (1) *In general*. The Office of FOIA Services will seek to respond to requests according to their order of receipt within each track of the Office of FOIA Services' multitrack processing system as described in paragraph (d)(4) of this section.

(2) *Initial response*. A determination whether to comply with a FOIA request shall be made within 20 days (excepting Saturdays, Sundays, and legal public holidays) from the date the Office of FOIA Services receives a request for a record under this part, except when the circumstances described in paragraphs (d)(3), (5), or (7) of this section are applicable. In instances where a FOIA requester has misdirected a request that is re-routed pursuant to paragraph (c)(2) of this section, the response time shall commence on the date that the request is first received by the Office of FOIA Services, but in any event not later than 10 working days after the request is first received by any division or office of the Commission.

(3) *Clarification of request*. The Office of FOIA Services may seek clarification of a request (or a portion of a request) for records. The request for clarification generally should be in writing. The first time the Office of FOIA Services seeks clarification, the time for responding to the entire request (set forth in paragraph (d)(2) of this section) is tolled until the requester responds to the clarification request. The tolled period will end when the Office of FOIA Services receives a response from the requester that reasonably describes the requested records. If the Office of FOIA Services asks for clarification and does not receive a written response from the requester within 30 calendar days from the date of the clarification request, the Office of FOIA Services will presume that the requester is no longer interested in the record(s) sought and notify the requester that any portion of the request as to which clarification was sought has been closed.

(4) *Multitrack processing.* The Office of FOIA Services shall use a multitrack system for processing FOIA requests. The Office of FOIA Services shall designate one track for requests that are granted expedited processing, in accordance with the standards set forth in paragraph (d)(7) of this section. The Office of FOIA Services shall use two or more additional processing tracks that distinguish between simple and more complex requests based on the estimated amount of work and/or time needed to process the request. Among the factors the Office of FOIA Services may consider are the time to perform a search, the number of pages that must be reviewed in processing the request, and the need for consultations or referrals. The Office of FOIA Services shall advise requesters of the track into which their request falls and, when appropriate, shall offer the requesters an opportunity to narrow the scope of their request so that it can be placed in a different processing track.

(5) *Unusual circumstances.* The Office of FOIA Services may extend the time period for processing a FOIA request in “unusual circumstances.” To extend the time, the Office of FOIA Services shall notify the requester in writing of the unusual circumstances involved and of the date by which processing of the request is expected to be completed. If the extension exceeds 10 working days, the Office of FOIA Services shall provide the requester, in writing, with an opportunity to modify the request or arrange an alternative time frame for processing the request or a modified request. The Office of FOIA Services shall also make available its FOIA Public Liaisons to assist in the resolution of any disputes and notify the requester of the right to seek dispute resolution services from the Office of Government Information Services. For purposes of this section, “unusual circumstances” include:

(i) The need to search for and collect the requested records from field facilities or other establishments that are separate from the office processing the request.

(ii) The need to search for, collect, and appropriately examine a voluminous amount of separate and distinct records that are the subject of a single request.

(iii) The need to consult with another Federal agency having a substantial interest in the determination of the FOIA request or among two or more divisions or offices within the Commission having substantial subject-matter interest therein.

(6) *Aggregating requests.* The Office of FOIA Services may aggregate requests in cases where it reasonably believes that multiple requests, submitted either by a requester or by a group of requesters acting in concert, together constitute a single request that would involve unusual circumstances, as defined in paragraph (d)(5) of this section. Multiple requests involving unrelated matters shall not be aggregated. The Office of FOIA Services shall advise requesters, in writing, when it determines to aggregate multiple requests and comply with paragraph (d)(5) of this section. Aggregation of requests for this purpose will be conducted independent of aggregation requests for fee purposes under paragraph (g)(8) of this section.

(7) *Expedited processing.* The Office of FOIA Services shall grant a request for expedited processing if the requester demonstrates a “compelling need” for the records. “Compelling need” means that a failure to obtain the requested records on an expedited basis could reasonably be expected to pose an imminent threat to an individual’s life or physical safety or, if the requester is primarily engaged in disseminating information, an urgency to inform the public about an actual or alleged Federal Government activity.

(i) A request for expedited processing may be made at the time of the initial request for records or at any later time.

(ii) A requester who seeks expedited processing must submit a statement, certified to be true and correct to the best of that person’s knowledge and belief, explaining why there is a “compelling need” for the records.

(iii) The Office of FOIA Services shall determine whether to grant or deny a request for expedited processing and provide notice of that determination within 10 calendar days of receipt of the request by the Office of FOIA Services. A request for records that has been granted expedited processing shall be processed as soon as practicable. If a request for expedited processing is denied, any appeal of that determination shall be decided expeditiously.

(8) *Appeals.* An administrative appeal shall be decided within 20 days (excepting Saturdays, Sundays, and legal public holidays) from the date the Office of FOIA Services receives such appeal except in the unusual circumstances specified in paragraph (d)(5) of this section. In those unusual circumstances, the

20-day time limit may be extended by written notice to the person making the appeal setting forth the unusual circumstances for such extension and the date on which a determination is expected to be dispatched. No such notice shall specify a date that would result in an extension of more than 10 working days.

(e) *Responses to requests for records* — (1) *Acknowledgment of requests*. Upon receipt of a request for records, the Office of FOIA Services ordinarily will send the requester an acknowledgment letter that provides an assigned request number for further reference and, if necessary, confirms whether the requester is willing to pay fees.

(2) *Responses to requests*. (i) Any letter determining whether to comply with a request will inform the requester of the right to seek assistance from the Office of FOIA Services' FOIA Public Liaisons.

(ii) If the Office of FOIA Services makes a determination to grant a request in whole or in part, it shall notify the requester in writing of such determination, disclose records to the requester, and collect any applicable fees.

(iii) If the Office of FOIA Services makes an adverse determination regarding a request, it shall notify the requester of that determination in writing. Adverse determinations, or denials of requests, include decisions that: the requested record is exempt, in whole or in part; the request does not reasonably describe the records sought; the requested record does not exist (or is not subject to the FOIA), cannot be located, or has previously been destroyed; or the requested record is not readily producible in the form or format sought by the requester. Adverse determinations also include designations of requesters' fee category, denials of fee waiver requests, or denials of requests for expedited processing.

(iv) An adverse determination letter shall be signed and include:

(A) The names and titles or positions of each person responsible for the adverse determination;

(B) A brief statement of the reasons for the adverse determination, including any FOIA exemption applied by the official denying the request;

(C) For records disclosed in part, markings or annotations to show the applicable FOIA exemption(s) and the amount of information deleted, unless doing so would harm an interest protected by an applicable exemption. The location of the information deleted shall also be indicated on the record, if feasible;

(D) An estimate of the volume of any records or information withheld by providing the number of pages withheld in their entirety or some other reasonable form of estimation. This estimate is not required if the volume is otherwise indicated by deletions marked on the records that are disclosed in part or if providing an estimate would harm an interest protected by an applicable FOIA exemption;

(E) A statement that the adverse determination may be appealed under paragraph (f) of this section, and a description of the requirements for filing an administrative appeal set forth in that paragraph; and

(F) A statement of the right of the requester to seek dispute resolution services from the Office of FOIA Services' FOIA Public Liaisons or the Office of Government Information Services ("OGIS").

(3) *Mediation services.* OGIS offers mediation services to resolve disputes between requesters and the Office of FOIA Services as a non-exclusive alternative to litigation. Requesters with concerns about the handling of their requests may contact OGIS.

(f) *Administrative appeals* — (1) *Administrative review.* If a requester receives an adverse determination as described in paragraph (e)(2)(iii) of this section, or the request has not been timely determined within the time period prescribed in paragraph (d)(2) of this section or within an extended period permitted under paragraph (d)(5) of this section, the requester may file an appeal to the Office of the General Counsel consistent with the procedures described in paragraphs (f)(2) through (4) of this section. A requester must generally submit a timely administrative appeal before seeking review by a court of an adverse determination.

(2) *Time limits.* Appeals can be submitted in writing or electronically, as described in paragraph (f)(3) of this section. The appeal must be received within 90 calendar days of the date of the written denial of the adverse determination and must be received no later than 11:59 pm, Eastern Time, on the 90th day. If the Office of FOIA Services has not issued a determination on a request, an appeal may be submitted any time after the statutory time period for responding to a request ends.

(3) *Contents of appeal.* Appeals should be clearly and prominently identified at the top of the first page as “Freedom of Information Act Appeal” and should provide the assigned FOIA request number. The appeal should include a copy of the original request and adverse determination. Appeals should include a statement of the requester’s arguments as to why the records requested should be made available and the reason(s) the FOIA requester contends the adverse determination was in error. If only a portion of the adverse determination is appealed, the requester must specify which part is being appealed.

(4) *How to file and address an appeal.* If submitted by U.S. mail or delivery service, the appeal must be sent to the Office of FOIA Services at 100 F Street, NE, Washington, DC 20549. Appeals may also be made by facsimile at 202-772-9337, email (foiapa@sec.gov), or online at the Commission’s website (<http://www.sec.gov>). 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 email address.

(5) *Adjudication of appeals.* The Office of the General Counsel has the authority to grant or deny all appeals, in whole or in part. In appropriate cases the Office of the General Counsel may refer appeals to the Commission for determination. No opportunity for personal appearance, oral argument, or hearing on appeal is provided. Upon receipt of an appeal, the Office of FOIA Services ordinarily will send the requester an acknowledgment letter that confirms receipt of the requester’s appeal.

(6) *Determinations on appeals.* A determination on an appeal must be made in writing. A determination that denies an appeal, in whole or in part, shall include a brief explanation of the basis for the denial, identify the applicable FOIA exemptions asserted, and describe why the exemptions apply. As applicable, the determination will provide the requester with notification of the statutory right to file a lawsuit in accordance with 5 U.S.C. 552(a)(4), and will inform the requester of the mediation services offered by the Office of Government Information Services as a non-exclusive alternative to litigation. If the Office of FOIA Services’ determination is remanded or modified on appeal, the Office of the General Counsel will notify the requester of that determination in writing.

(g) *Fees — (1) In general.* The Office of FOIA Services shall charge fees for processing requests under the FOIA in accordance with the provisions of this section and with the OMB Guidelines, except

where fees are limited under paragraph (g)(4) of this section or when a waiver or reduction is granted under paragraph (g)(12) of this section. To resolve any fee issues that arise under this section, the Office of FOIA Services may contact a requester for additional information. The Office of FOIA Services shall ensure that searches, review, and duplication are conducted in an efficient manner. The Office of FOIA Services ordinarily will collect all applicable fees before sending copies of records to a requester. Requesters must pay fees by check, certified check, or money order, or where possible, by electronic payment.

(2) *Definitions.* For purposes of this section:

(i) *Commercial use request* is a request from or on behalf of a person who seeks information for a use or purpose that furthers his or her commercial, trade, or profit interests, which can include furthering those interests through litigation. The Office of FOIA Services will determine whether to place a requester in the commercial use category on a case-by-case basis based on the requester's intended use of the information.

(ii) *Direct costs* are those expenses the Office of FOIA Services and any staff within the divisions and offices of the Commission incur in searching for and duplicating (and, in the case of commercial use requests, reviewing) records to respond to a FOIA request. Direct costs include the salary of the employee(s) performing the work (*i.e.*, the basic rate of pay for the employee(s), plus 16% of that rate to cover benefits), the cost of materials, and the cost of operating computers and other electronic equipment, such as photocopiers and scanners. Direct costs do not include overhead expenses such as the costs of space and of heating or lighting a facility in which the service is performed.

(iii) *Duplication* is reproducing a record, or the information contained in it, to respond to a FOIA request. Copies can take the form of paper, audiovisual materials, or electronic records, among others. The Office of FOIA Services shall honor a requester's specified preference of form or format of disclosure if the record is readily reproducible with reasonable efforts in the requested form or format.

(iv) *Educational institution* is any school that operates a program of scholarly research. A requester in this fee category must show that the request is made in connection with the requester's role at the educational institution and that the records are not sought for commercial or personal use.

(v) *Noncommercial scientific institution* is an institution that is not operated to further a commercial, trade, or profit interest and that is operated solely for the purpose of conducting scientific research, the results of which are not intended to promote any particular product or industry. A requester in this category must show that the request is authorized by and is made under the auspices of a qualifying institution and that the records are sought to further scientific research and are not for a commercial use.

(vi) *Representative of the news media or news media requester* is any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience. The term "news" means information that is about current events or that would be of current interest to the public.

(vii) *Review* is the examination of a record located in response to a request to determine whether any portion of it is exempt from disclosure. Review time includes doing all that is necessary to prepare the record for disclosure, such as redacting the record and marking any applicable exemptions. Review time also includes time spent obtaining and considering formal objections to disclosure made by a submitter under §200.83, but it does not include time spent resolving legal or policy issues regarding the application of exemptions.

(viii) *Search* is the review, manually or by automated means, of agency records for the purpose of locating those records that are responsive to a request. Search time includes page-by-page or line-by-line identification of information within records and the reasonable efforts expended to locate and retrieve information from electronic records.

(3) *Charging fees.* In responding to FOIA requests, the Office of FOIA Services shall charge fees for the services summarized in chart form in paragraph (g)(3)(i) of this section and explained in paragraphs (g)(3)(ii) through (v) of this section, unless fees are limited under paragraph (g)(4) of this section or a waiver or reduction of fees has been granted under paragraph (g)(12) of this section.

(i) The four categories of requesters and the chargeable fees for each are:

Requester Category	Search fees	Review fees	Duplication fees
(A) Commercial use requesters	Yes	Yes	Yes
(B) Educational and noncommercial scientific institutions	No	No	Yes (first 100 pages, or equivalent volume, free).
(C) Representatives of the news media	No	No	Yes (first 100 pages, or equivalent volume, free).
(D) All other requesters	Yes (first 2 hours free)	No	Yes (first 100 pages, or equivalent volume, free).

(ii) *Search fees.* (A) Search fees shall be charged for all requests—other than requests made by educational institutions, noncommercial scientific institutions, or representatives of the news media—subject to the limitations of paragraph (g)(4) of this section. The Office of FOIA Services may charge for time spent searching even if no responsive records are located or it is determined that the records are entirely exempt from disclosure. Search fees shall be the direct costs of conducting the search by agency employees.

(B) Requesters shall be charged the direct costs associated with conducting any search that requires the creation of a new computer program to locate or identify responsive records. Requesters shall be notified of the costs associated with creating and implementing such a program and must agree to pay the associated costs before the costs may be incurred.

(C) For requests that require the retrieval of agency records stored at a Federal records center operated by the National Archives and Records Administration (“NARA”), additional costs shall be charged in accordance with the Transactional Billing Rate Schedule established by NARA.

(iii) *Review fees.* Review fees shall be charged to requesters who make commercial use requests. Review fees shall be assessed in connection with the initial review of the record, *i.e.*, the review agency employees conduct to determine whether an exemption applies to a particular record or portion of a record. Also, if an exemption asserted to withhold a record (or a portion thereof) is deemed to no longer apply, any costs associated with the re-review of the records to consider the use of other exemptions may

be assessed as review fees. Review fees shall be the direct costs of conducting the review by the involved employees. Review fees can be charged even if the records reviewed ultimately are not disclosed.

(iv) *Search and review services (review applies to commercial-use requesters only)*. (A) The Office of FOIA Services will establish and charge average rates for the groups of employees' salary grades typically involved in the search and review of records. Those groups will consist of employees at:

- (1) Grades SK-8 or below;
- (2) Grades SK-9 to SK-13; and
- (3) Grades SK-14 or above.

(B) 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 search and review services. The average hourly rates are listed on the FOIA webpage of the Commission's website at <http://www.sec.gov> and will be updated as salaries change. Fees will be charged in quarter-hour increments. No search fee or review fee will be charged for a quarter-hour period unless more than half of that period is required for search or review.

(v) *Duplication fees*. Duplication fees shall be charged to all requesters, subject to the limitations of paragraph (g)(4) of this section. Fees for either a photocopy or printout of a record (no more than one copy of which need be supplied) are identified on the FOIA webpage of the Commission's website at www.sec.gov. For copies of records produced on tapes, disks, or other media, the Office of FOIA Services shall charge the direct costs of producing the copy, including operator time. Where paper documents must be scanned to comply with a requester's preference to receive the records in an electronic format, the requester shall pay the direct costs associated with scanning those materials. For all other forms of duplication, the Office of FOIA Services shall also charge the direct costs.

(4) *Limitations on charging fees*. (i) No search or review fees will be charged for requests by educational institutions (unless the requests are sought for a commercial use), noncommercial scientific institutions, or representatives of the news media.

(ii) Except for requesters seeking records for a commercial use, the Office of FOIA Services shall provide without charge the first 100 pages of duplication (or the cost equivalent for other media) and the first two hours of search.

(iii) Fees will not be charged where the costs of collecting and processing the fee are likely to equal or exceed the amount of the fee.

(iv) The Office of FOIA Services will not assess search fees (or, in the case of requests from representatives of the news media or educational or noncommercial scientific institutions, duplication fees) when 5 U.S.C. 552(a)(4)(A)(viii) prohibits the assessment of those fees.

(5) *Notice of anticipated fees.* (i) When the Office of FOIA Services determines or estimates that the fees to be assessed in accordance with this section will exceed the amount it would cost the Office of FOIA Services to collect and process the fees, the Office of FOIA Services shall notify the requester of the actual or estimated amount of fees, unless the requester has indicated a willingness to pay fees as high as the estimated fees. If only a portion of the fee can be estimated readily, the Office of FOIA Services shall advise the requester accordingly. If the requester is not a commercial use requester, the notice shall specify that the requester is entitled to the statutory entitlements of 100 pages of duplication at no charge and, if the requester is charged search fees, two hours of search time at no charge.

(ii) In cases in which a requester has been notified that the actual or estimated fees will amount to more than it would cost the Office of FOIA Services to collect and process the fees, or amount to more than the amount the requester indicated a willingness to pay, the Office of FOIA Services will do no further work on the request until the requester commits in writing to pay the actual or estimated total fee, or designates some amount of fees the requester is willing to pay, or in the case of a requester who is not a commercial use requester, designates that the requester seeks only that which can be provided by the statutory entitlements. The Office of FOIA Services will toll the response period while it notifies the requester of the actual or estimated amount of fees and this time will be excluded from the 20 working day time limit (as specified in paragraph (d)(2) of this section). The requester's agreement to pay fees must be made in writing, must designate an exact dollar amount the requester is willing to pay, and must

be received within 30 calendar days from the date of the notification of the fee estimate. If the requester fails to submit an agreement to pay the anticipated fees within 30 calendar days from the date of the Office of FOIA Services' fee notice, the Office of FOIA Services will presume that the requester is no longer interested in the records and notify the requester that the request has been closed.

(iii) The Office of FOIA Services shall make available their FOIA Public Liaisons or other FOIA professionals to assist any requester in reformulating a request to meet the requester's needs at a lower cost.

(6) *Charges for other services.* Although not required to provide special services, if the Office of FOIA Services chooses to do so as a matter of administrative discretion, the direct costs of providing the service shall be charged. Examples of such special services include certifying that records are true copies, providing multiple copies of the same document, or sending records by means other than first class mail. The cost for the attestation of records with the Commission seal (*i.e.*, certifying records as true copies) is \$4.00 per record, which may be waived for records certified electronically. Requests for certified copies of records or documents shall ordinarily be serviced within 20 working days. Requests will be processed in the order in which they are received.

(7) *Charging interest.* The Office of FOIA Services may begin to charge interest on any unpaid bill starting on the 31st calendar day following the date of billing the requester. Interest charges shall be assessed at the rate provided in 31 U.S.C. 3717 and accrue from the date of the billing until the payment is received. The Office of FOIA Services shall take all steps authorized by the Debt Collection Act of 1982, as amended, and the Commission's Rules Relating to Debt Collection to effect payment, including offset, disclosure to consumer reporting agencies, and use of collection agencies.

(8) *Aggregating requests.* If the Office of FOIA Services reasonably believes that a requester or a group of requesters acting in concert is attempting to divide a request into a series of requests for the purpose of avoiding fees, the Office of FOIA Services may aggregate those requests and charge accordingly. Among the factors the Office of FOIA Services shall consider in deciding whether to aggregate are whether the requests were submitted close in time and whether the requests seek documents

about related matters. The Office of FOIA Services may presume that multiple requests that involve related matters made by the same requester or a group of requesters within a 30 calendar day period have been made to avoid fees. For requests separated by a longer period, the Office of FOIA Services will aggregate them only where it determines that aggregation is warranted in view of all the circumstances involved.

(9) *Advance payments.* (i) For requests other than those described in paragraphs (g)(9)(ii) and (iii) of this section, the Office of FOIA Services shall not require a requester to make advance payment (*i.e.*, payment made before the Office of FOIA Services begins to process or continues to work on a request). Payment owed for work already completed (*i.e.*, payment before copies are sent to a requester) is not an advance payment.

(ii) When the Office of FOIA Services determines or estimates that a total fee to be charged under this section will exceed \$250.00, it shall notify the requester of the actual or estimated fee and may require the requester to make an advance payment of the entire anticipated fee before beginning to process the request. A notice under this paragraph shall offer the requester an opportunity to discuss the matter with the Office of FOIA Services' FOIA Public Liaisons or other FOIA professionals to modify the request in an effort to meet the requester's needs at a lower cost.

(iii) When a requester has previously failed to pay a properly charged FOIA fee to the Office of FOIA Services or other Federal agency within 30 calendar days of the date of billing, the Office of FOIA Services shall notify the requester that he or she is required to pay the full amount due, plus any applicable interest, and to make an advance payment of the full amount of any anticipated fee, before the Office of FOIA Services begins to process a new request or continues processing a pending request from that requester. Where the Office of FOIA Services has a reasonable basis to believe that a requester has misrepresented the requester's identity to avoid paying outstanding fees, it may require that the requester provide proof of identity and pay in advance.

(iv) When the Office of FOIA Services requires advance payment or payment due under paragraphs (g)(9)(ii) and (iii) of this section, the Office of FOIA Services will not further process the request until the

required payment is made. The Office of FOIA Services will toll the processing of the request while it notifies the requester of the advanced payment due and this time will be excluded from the 20 working day time limit (as specified in paragraph (d)(2) of this section). If the requester does not pay the advance payment within 30 calendar days from the date of the Office of FOIA Services' fee notice, the Office of FOIA Services will presume that the requester is no longer interested in the records and notify the requester that the request has been closed.

(10) *Tolling.* When necessary for the Office of FOIA Services to clarify issues regarding fee assessment with the requester, the time limit for responding to a FOIA request is tolled until the Office of FOIA Services resolves such issues with the requester.

(11) *Other statutes specifically providing for fees.* The fee schedule of this section does not apply to fees charged under any statute (except the FOIA) that specifically requires an agency to set and collect fees for particular types of records. In instances where records responsive to a request are subject to a statutorily-based fee schedule program, the Office of FOIA Services shall inform the requester how to obtain records from that program. Provision of such records is not handled under the FOIA.

(12) *Requirements for waiver or reduction of fees.* (i) Records responsive to a request will be furnished without charge, or at a charge reduced below that established under paragraph (g)(3) of this section, if the requester asks for such a waiver in writing and the Office of FOIA Services determines, after consideration of information provided by the requester, that the requester has demonstrated that:

(A) Disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government; and

(B) Disclosure of the information is not primarily in the commercial interest of the requester.

(ii) In deciding whether disclosure of the requested information is likely to contribute significantly to public understanding of the operations or activities of the government, the Office of FOIA Services shall consider each of the following four factors:

(A) *The subject of the request*: whether the subject of the requested records concerns the operations or activities of the government. The subject of the requested records must concern identifiable operations or activities of the Federal Government, with a connection that is direct and clear, not remote or attenuated.

(B) *The informative value of the information to be disclosed*: whether the disclosure is likely to contribute to an understanding of government operations or activities. The disclosable portions of the requested records must be meaningfully informative about government operations or activities to be likely to contribute to an increased public understanding of those operations or activities. The disclosure of information that already is in the public domain, in either a duplicative or a substantially identical form, would not be likely to contribute to such understanding.

(C) *The contribution to an understanding of the subject by the public likely to result from disclosure*: whether disclosure of the requested information will contribute to the understanding of a reasonably broad audience of persons interested in the subject, as opposed to the individual understanding of the requester. A requester's expertise in the subject area and ability and intention to effectively convey information to the public shall be considered. It shall be presumed that a representative of the news media satisfies this consideration.

(D) *The significance of the contribution to public understanding*: whether the disclosure is likely to contribute significantly to public understanding of government operations or activities. The public's understanding of the subject in question prior to the disclosure must be significantly enhanced by the disclosure.

(iii) In deciding whether disclosure of the requested information is primarily in the commercial interest of the requester, the Office of FOIA Services shall consider the following factors:

(A) *The existence and magnitude of a commercial interest*: whether the requester has a commercial interest that would be furthered by the requested disclosure. The Office of FOIA Services shall consider any commercial interest of the requester (with reference to the definition of "commercial use requester" in paragraph (g)(2)(i) of this section), or of any person on whose behalf the requester may be acting, that

would be furthered by the requested disclosure. Requesters shall be given an opportunity to provide explanatory information regarding this consideration.

(B) *The primary interest in disclosure*: whether the public interest is greater than any identified commercial interest in disclosure. The Office of FOIA Services ordinarily shall presume that where a news media requester has satisfied the public interest standard, the public interest will be the interest primarily served by disclosure to that requester. Disclosure to data brokers or others who merely compile and market government information for direct economic return shall not be presumed to primarily serve the public interest.

(iv) If only a portion of the requested records satisfies both the requirements for a waiver or reduction of fees, a waiver or reduction of fees will be granted for only that portion.

(v) Requests for a waiver or reduction of fees should address all the factors identified in paragraphs (g)(12)(ii) and (iii) of this section.

(vi) Denials of requests for a waiver or reduction of fees are adverse determinations (as defined in paragraph (e)(2)(iii) of this section) and may be appealed to the General Counsel in accordance with the procedures set forth in paragraph (f) of this section.

3. Remove §200.80a.

§200.80a [Removed]

4. Remove §200.80b.

§200.80b [Removed]

5. Remove §200.80c.

§200.80c [Removed]

6. Remove §200.80d.

§200.80d [Removed]

7. Remove §200.80e.

§200.80e [Removed]

8. Remove §200.80f.

§200.80f [Removed]

By the Commission.

Dated: June 25, 2018

Brent J. Fields
Secretary