
M E M O R A N D U M

March 30, 2007

To: Diego Ruiz
John White
Andrew Donohue
From: Walter Stachnik *W Stachnik*
Re: Backlog of FOIA Requests For Comment Letters (Audit No. 422)

Attached is our audit report. Comments on prior versions of the draft report have been incorporated as appropriate.

We would appreciate receiving any additional comments you have concerning this audit and the report. In particular, we would like to know whether you found the audit useful. We also welcome any suggestions from you concerning how we could improve future audits.

The courtesy and cooperation of you and your staff during this audit are appreciated.

Attachment

cc: Shelley Parratt
James Daly
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BACKLOG OF FOIA REQUESTS FOR COMMENT LETTERS

Executive Summary

The Divisions of Corporation Finance (CF) and Investment Management (IM) issue comment letters and review filer responses (comment letters¹) related to their reviews of public companies' disclosure filings. Over the last several years, commercial users significantly increased their Freedom of Information Act (FOIA) requests for these comment letters. The significant increase (approximately 150% between Fiscal Year (FY) 2002 and FY 2005) resulted in a backlog of FOIA requests.

To their credit, the FOIA/Privacy Act (PA) Office, CF, and IM have taken steps to eliminate this backlog. They assigned additional staff resources to processing FOIA requests, updated their procedures for processing requests, and set general goals for reducing their backlogs.

CF has developed a formal plan to reduce its backlog of FOIA requests, while IM has almost eliminated its backlog. In January 2007, the FOIA/PA Office initiated a special project to process backlogged FY 2003 and 2004 CF FOIA requests and has eliminated almost all of them.

In May 2005, CF and IM began publicly releasing (posting) comment letters on the Commission's web site for filing reviews completed after August 2004. The comment letters issued between August 2004 and May 2005 created a separate backlog of letters to be posted.

CF has now eliminated its backlog of comment letter postings. IM stopped posting comment letters because of a lack of resources.

We are making several recommendations to further enhance the processing of FOIA requests and the posting of comment letters.

Objectives, Scope and Methodology

Our objectives were to determine the causes of the backlogs of FOIA requests and of comment letter postings, and to identify ways to address these backlogs. During the

¹In addition to comment letters and filer responses, CF processes and publicly posts other correspondence including acceleration requests (filers' requests for specific effectiveness dates for their registrations) and letters from auditors and underwriters. We will refer to this correspondence collectively as "comment letters."

audit, we reviewed applicable written guidance, interviewed Commission staff, and analyzed selected data from FYs 2002 to 2005 related to the two backlogs.

The FOIA/PA Office, CF and IM provided FOIA request backlog data. CF also provided comment letter posting backlog data. We used these data for background regarding the size and significance of these backlogs, but did not verify the data.

We selected our data samples on a judgment basis. Therefore, we cannot statistically project our results to the universe of items from which we selected our samples.

We conducted this performance audit from October 2005 to October 2006 in accordance with Generally Accepted Government Auditing Standards (GAGAS). We updated the report with more current backlog data after October 2006.

GAGAS requires that we plan and perform the audit to obtain sufficient, appropriate evidence that provides a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Background

FOIA Request Processing

The public can request copies of federal agency documents by submitting Freedom of Information Act (5 U.S.C. 552) requests. Agencies must respond to FOIA requests within 20 working days. However, they are allowed more time to respond if they notify requesters and give them an opportunity to reduce the scope of their requests.

The FOIA/PA Office receives, processes, and responds to FOIA requests. It categorizes requests as routine, complex, or expedited.

Routine FOIA requests typically involve a small number of documents and minimal research. Complex requests involve searching for and reviewing significant numbers of documents and addressing complicated FOIA issues (e.g., confidential treatment issues). Expedited requests (which the Commission rarely receives) involve urgent matters such as life-threatening situations and, if granted, are processed as soon as practicable.

The FOIA/PA Office forwards FOIA requests to designated staff (FOIA liaisons) in the Commission's offices and divisions for further processing as needed. CF's Office of EDGAR² Information and Analysis (OEIA) and IM's Office of Chief Counsel (OCC) process FOIA requests for their divisions. After receiving the FOIA liaisons' responses, the FOIA/PA office prepares its response to the requester.

FOIA Request Increase

According to data provided by the FOIA/PA Office, the Commission received approximately 3,600 FOIA requests in FY 2002, 5,900 in FY 2003, 9,500 in FY 2004

² The Commission's EDGAR system (Electronic Data Gathering, Analysis, and Retrieval) receives, stores, and disseminates filings and related documents.

and 9,000 in FY 2005 (an approximately 150% increase between FY 2002 and FY 2005).

FOIA Request Resources

The FOIA/PA Office, OEIA and OCC indicated that their staff resources for processing FOIA requests were limited, especially considering the recent workload increases. The FOIA/PA Office indicated that it had 21 staff members in FY 2002 and FY 2003, which increased to 26 staff members in FY 2004 and FY 2005.

OEIA had up to six staff members processing FOIA requests until the end of FY 2004. In FY 2005, OEIA hired 15 additional staff. OCC had one staff member processing FOIA requests until around the end of FY 2005, when two existing staff members added FOIA matters to their other responsibilities.

FOIA Request Backlog

Approximately 9,800 FOIA requests were pending as of the end of FY 2005. Of these, approximately 6,000 were pending in OEIA, while approximately 1150 were pending in OCC.

As of the end of FY 2006, approximately 5,400 of the 6,000 OEIA requests and approximately 170 of the 1150 OCC requests that were pending at the end of FY 2005 were still pending.³ OEIA's pending requests for FY 2006 were approximately 2,700 as of the end of FY 2006. The FOIA/PA Office, OEIA and OCC are now reconciling their FOIA backlog data.

Executive Order 13392

In December 2005, the President issued Executive Order 13392, "Improving Agency Disclosure of Information." This Executive Order included requirements that agencies assess, plan and report on their FOIA operations and improvements.

The Commission submitted an action plan on June 14, 2006 (revised on October 13, 2006) to the Department of Justice and the Office of Management and Budget, as required by the Executive Order. The Commission's plan included the FOIA request backlog as an area for which improvements were planned. Other areas for improvement included proactive disclosures, training, and internal policies and practices.

The Commission's staff's plan to publicly disseminate comment letters (see immediately below) is consistent with Executive Order 13392. The Executive Order requires agencies to plan ways to provide records to the public without the need for FOIA requests.

Posting Comment Letters

In June 2004, the Commission's staff announced (in Press Release 2004-89) its position on publicly releasing comment letters. The staff indicated that it wanted to improve public access to these documents. The release indicated that comment

³ IM indicated that by December 2006 its backlog of FOIA requests had declined further, to approximately 130.

letters would be publicly available on the Commission's website after the Commission completed the necessary technical modifications.

In May 2005, the Commission's staff announced (in Press Release 2005-72) that it would begin publicly releasing (posting) comment letters on its website for filings made after August 2004.

EDGAR data indicated that between August 2004 and May 2005, CF's staff issued comment letters on approximately 8,800 filings. For the same period, IM's staff issued approximately 1,600 comment letters on investment company filings. These previously issued comment letters became subject to posting in May 2005, creating a separate backlog (in addition to the FOIA request backlog).

CF's Office of EDGAR Information and Analysis (OEIA) processes and posts CF's comment letters. OEIA indicated that its backlog of comment letter postings has now been eliminated.

IM's Office of Disclosure Review (ODR) is responsible for processing IM's comment letters and posting them to the Commission's website. Because of insufficient resources, ODR stopped posting comment letters in approximately January 2006.

Audit Results

We found that the FOIA backlog was primarily caused by a large increase in FOIA requests which started in FY 2003. The requests were from commercial entities for comment letters. Limited staff resources hampered the FOIA/PA Office's, OEIA's, and OCC's efforts to eliminate their backlogs of FOIA requests.

To their credit, these offices have taken several steps to address the backlogs, and have made substantial progress. They assigned additional staff resources to processing FOIA requests, developed updated procedures, and set general goals for reducing their backlogs.

OCC has almost eliminated its FOIA request backlog. The FOIA/PA Office and OEIA have almost eliminated OEIA's FY 2003 and 2004 FOIA request backlogs. Posting of comment letters on the Commission website has reduced the number of FOIA requests for these letters, and will continue to do so.

A separate backlog of comment letters to be posted consisted of the comment letters issued in the retroactive period covered by the posting initiative (August 2004 through May 2005). Initially, OEIA's efforts to post comment letters was hampered by limited staff resources, but OEIA has now eliminated this backlog. ODR stopped posting comment letters in approximately January 2006 because of lack of resources.

We are making several recommendations, as described below, to further enhance processing of FOIA requests and posting of comment letters.

45-Day Delay

When authorizing posting of comment letters to the Commission public website, the Commission's staff indicated that the letters would not be posted until at least 45 days after the filing review was completed. The 45 day period was designed to prevent the inadvertent or premature release of information about securities offerings.

OEIA's procedures provide that the posting process for comment letters does not begin until after the 45 day period. These procedures unnecessarily delay posting of comment letters. The comment letters could be prepared for posting once the filing review is completed, and the letters could be scheduled for posting as soon as possible after the 45 day period.

Recommendation A

CF should revise its comment letter posting procedures to provide that the posting process for comment letters begins once the filing review is completed.

CF's Response

CF indicated that it now processes comment letters as soon as possible after completion of filing reviews to allow posting of comment letters as close to the end of the 45-day period as possible.

Role of CF Filing Review Staff

CF's filing reviewers prepare comment letters but do not post them to the public website although they do post the letters to the Commission's internal EDGAR system. OEIA searches internal EDGAR for these letters, downloads them, and processes them for public release.

We discussed with CF ways to include the filing review staff in the public posting process to improve efficiency. CF indicated that the review staff could forward the comment letters and other documents electronically to OEIA, together with a recommendation on whether website posting was appropriate.

Recommendation B

CF should revise its procedures to have its review staff forward comment letters and their posting recommendations to OEIA.

CF's Response

CF indicated that it has implemented this recommendation.

Electronic Filing of Filer Responses

The Commission's General Rules and Regulations For Electronic Filings, Regulation S-T, requires electronic submission through EDGAR of filer responses to comment letters, except for material covered by a confidential treatment request or material the company wants returned. CF indicated that it did not always enforce the electronic filing requirement because it did not want to delay filing reviews.

When processing comment letters for public posting, CF staff must manually search for company responses filed in paper, which increases processing time.

Recommendation C

CF should ensure electronic filing of filer response letters under Regulation S-T.

CF's Response

CF indicated that it receives an immaterial number of filer response letters in paper compared to the total number of responses. CF scans and uploads the paper response letters it receives. CF indicated that it reminds filers to submit their responses electronically.

Deferred Processing of FOIA Requests

CF indicated that it plans to defer processing of commercial firms' FOIA requests for comment letters. It intends to focus instead on posting comment letters to the Commission's public website, processing FOIA requests from other sources, and processing confidential treatment applications.

FOIA requires agencies to process FOIA requests within 20 days. It allows agencies time to resolve their FOIA request backlogs. However, agencies must process their backlogged requests fairly and expeditiously.

As a result of its processing of CF's FY 2003 and FY 2004 backlogged FOIA requests, the FOIA/PA Office sent approximately 30 FY 2003 requests back to CF for additional processing. Once these are processed, the FY 2003 FOIA request backlog in CF would be eliminated. The FOIA/PA staff continues to work on the backlog of FY 2004 requests and has resolved a significant number of them. CF indicated that it will process its confidential treatment requests before it processes the backlog of commercial firm FOIA requests. CF projects that it will be able to resume processing of these FOIA requests in April of this year.

Recommendation D

CF should process the FOIA requests that it receives from the FOIA/PA Office as promptly as possible, on a first-in-first-out basis.

CF's Response

CF indicates that the FOIA Office performs the initial document search for pending FOIA requests and seeks CF assistance as necessary. CF helped the FOIA Office close pending 2003 requests and will assist the FOIA Office on 2004 requests in April 2007. CF indicates that it will continue to assist the FOIA Office in responding to pending 2005, 2006 and 2007 requests when the FOIA Office's document search indicates that CF assistance is required.

Performance Measures

CF developed performance measures (goals and timetables) for reducing its backlogs of FOIA requests and comment letter postings.

IM planned to reduce further its FOIA request backlog by the end of FY 2006. However, IM did not set goals for reducing its backlog of comment letter postings.

IM indicated that its priority was its backlog of FOIA requests, and that it did not have resources for comment letter postings. However, developing goals and timetables for posting comment letters could benefit IM (e.g., by including these goals and timetables in IM's requests for resources to post comment letters).

Recommendation E

IM should develop goals and timetables for eliminating its backlog of comment letter postings.

IM's Response

IM indicated that it will hire additional staff in the next six months to resume posting comment letters.

Tracking Systems

The exact size of IM's remaining comment letter backlog was unclear, as IM does not have a tracking system for comment letters. CF has begun to research improvements for its tracking system, and may be able to assist IM in developing a system.

Recommendation F

IM should develop a tracking system for posting comment letters. It may wish to consult with CF on developing a tracking system.

IM's Response

IM indicated that it will hire additional staff in the next six months to resume posting comment letters.

FOIA Request Database

The FOIA/PA Office plans to provide the Commission's FOIA liaisons with access to its FOIA request database, beginning with the Commission's smaller offices. This plan has several advantages.

Access to the database would enhance coordination on FOIA requests. The Commission will then be able to provide better information to the public on the status of FOIA requests, consistent with Executive Order 13392. Also, duplication of FOIA request tracking systems will be reduced.

Recommendation G

The FOIA/PA Office should implement its plan to provide FOIA liaisons with access to its FOIA request database.

FOIA/PA Office Response

The FOIA/PA Office indicated that it plans to provide FOIA liaisons with read-only access to the FOIA request database.

IM's Posting Resources

IM requested, but has not yet received, funding for a separate group within IM to process the posting of comment letters on the Commission website. IM managers indicated that without the additional staff, they did not have resources to devote to posting of comment letters. IM stopped posting its comment letters in January of 2006, and focused instead on its FOIA request backlog.

In the absence of additional resources, IM could consider other options for posting these letters (*e.g.*, designating certain staff to post them as workload allows).

Recommendation H

IM should consider other options for posting comment letters and continue to seek additional resources for posting them.

IM's Response

IM indicated that it will hire additional staff in the next six months to resume posting comment letters.