

COLUMBIA UNIVERSITY  
IN THE CITY OF NEW YORK

LAW SCHOOL

Robert J. Jackson, Jr.  
Professor of Law and  
Milton Handler Fellow  
Co-Director, Ira M. Millstein Center

435 West 116th Street  
New York, New York 10027  
Phone: (212) 854-0409  
robert.jackson@law.columbia.edu

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Carl W. Hoecker  
Inspector General  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977  
**VIA ELECTRONIC MAIL**

Dear Inspector General Hoecker:

On the fifth anniversary of your Office's *Report* detailing the Commission's lack of compliance with the Freedom of Information Act (FOIA),<sup>1</sup> I write to describe how the Commission's FOIA staff continues to flout federal law and the directives of the President by denying the public access to the Commission's records. Moreover, there is a troubling new pattern in the Commission's noncompliance with FOIA: Commission staff now regularly use their access to certain information to advance their private research agendas while the Commission's FOIA staff deny the public access to those very same data.

My teaching and research focus on empirical study of corporate law. I write in my individual capacity; my institutional affiliation is noted for identification purposes only.

As your *Report* pointed out in 2009, and as the financial press<sup>2</sup> and the federal courts have repeatedly noted,<sup>3</sup> the Commission's FOIA staff frequently refuse to disclose records that the public is entitled to under FOIA. Among other things, your *Report* showed five years ago that the Commission responded to *more than half* of the FOIA requests it received by contending that there was "no information found" regarding the request. As I explain below, today the Commission's performance on that score is even worse today than it was in 2009. And, as also described below, the Commission today denies FOIA requests on that basis even where leaders of the Commission's Divisions have published articles using the requested information—and have noted, in that same published material, that the information was obtained from the SEC.

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<sup>1</sup> OFFICE OF THE INSPECTOR GENERAL, SECURITIES AND EXCHANGE COMMISSION, REVIEW OF THE SEC'S COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT 9 (2009) (concluding that, contrary to federal law and the directives of the President, the Commission's FOIA staff employ a "[p]resumption of [n]on-[d]isclosure", and that the Commission's rate of compliance with FOIA was "significantly lower [than] all other federal agencies").

<sup>2</sup> See, e.g., William D. Cohan, Stonewalled by the S.E.C., N.Y. TIMES, May 13, 2010 ("[T]he FOIA office at the S.E.C. seems to have perfected the art of obfuscation and premeditated delay").

<sup>3</sup> See, e.g., Gavin v. SEC, No. 04-4522, 2006 WL 1738417, at \*3 (D. Minn. June 20, 2006) (as to FOIA, "the SEC has attempted to play by its own rules and disregard the law").

Because the Commission's FOIA staff so frequently denies the public access to important information in the SEC's possession, researchers are unable to study critical matters that deserve empirical attention. In my view, that is an important problem that should be immediately addressed. But for the Commission's most senior economists, it is an extraordinary opportunity. Today, those economists regularly use their access as employees to Commission data to publish articles advancing their private research agendas. Over the past two years this has led to the stunning result that, while FOIA officers have denied the public access to information in the SEC's possession, *both* Deputy Directors of the Commission's Division of Economic and Risk Analysis have used the very same information in papers published in their private capacities. No competing or contrasting work has been or can be published, because only SEC employees have access to the data—a monopoly protected by the FOIA staff's intransigence.

Before proceeding, I wish to note that I have long been familiar with, and had deep admiration for, the published work of several senior SEC economists. For that reason I worked extensively with the Commission's FOIA office, and with the Commission's economists themselves, for nearly a year before writing your Office. It is now clear, however, that the Commission and its employees do not intend to comply with FOIA. Thus, I hereby request that your Office initiate an audit to evaluate the following two questions:

- Five years after the issuance of your Office's *Report* concluding that the Commission had failed to comply with FOIA, why does the SEC's FOIA staff continue today to deny requests on the basis that the Commission does not have the requested information, even where senior SEC officials have published work based on that information?
- Why does the Commission permit its senior staff, including the Deputy Directors of significant Divisions, to use information obtained through SEC employment to publish private research while the FOIA staff deny the public access to the same information?

For the reasons given below, such an audit would convince the SEC that providing key information only to SEC insiders—rather than to the public—is indefensible as a matter of law and logic. Moreover, the audit would show that, by continuing to flout the mandates of FOIA five years after your *Report*, the SEC's staff is depriving the Commission and the Nation of the research needed to examine the regulatory questions the Commission is charged with answering.

### **Continued Noncompliance with FOIA**

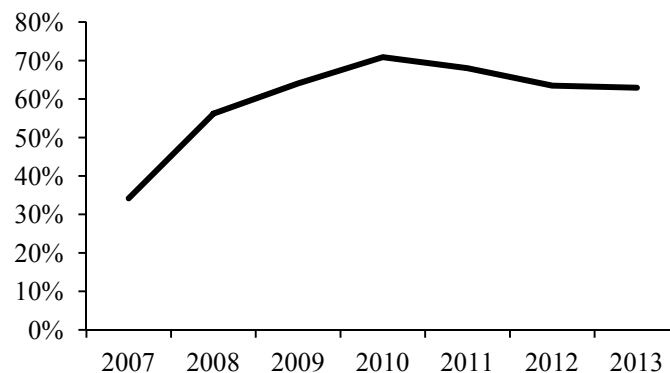
Among the most striking findings in your 2009 *Report* was the fact that the SEC responded to more than half of the FOIA requests it received by asserting that the Commission did not have any documents that were responsive to the request. Finding that the SEC denied some 56% of FOIA requests on that basis in 2008, you wrote that the “SEC has inadequate or incorrect procedures for disclosing responsive documents that are not in compliance with” FOIA, which led the SEC to “withhold information from the public that should be released.”<sup>4</sup>

Today, however, the SEC denies *even more* FOIA requests on this basis than it did when you issued your *Report*. Figure 1 below describes the percentage of FOIA requests denied by the SEC on the basis that it does not possess documents responsive to the request:

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<sup>4</sup> OFFICE OF THE INSPECTOR GENERAL, *supra* note 1, at iv.

FIGURE 1. PERCENTAGE OF SEC FOIA DENIALS BASED ON CLAIM OF NO RESPONSIVE DOCUMENTS<sup>5</sup>



As Figure 1 shows, the SEC today denies more FOIA requests based on a claim of no responsive documents than it did when you wrote your *Report* in 2009. In 2013, the SEC rejected some 63% of FOIA requests on this basis. A FOIA requester at the SEC faces about a two-thirds chance that the Commission will claim that it lacks even a single responsive document.

Of course, this fact alone might not be troubling if one believed that the Commission did, in fact, lack responsive documents for two-thirds of the FOIA requests it receives. But, as your *Report* showed, these statistics instead confirm that the SEC has “inadequate or incorrect procedures for determining whether potentially responsive documents exist,” “which ha[s] the effect of creating a presumption in favor of withholding, rather than disclosure, as required by FOIA.”<sup>6</sup> That is why, as you noted in your *Report*, the SEC has been repeatedly “censure[d] by the courts” for its FOIA practices. As you explained there, “the SEC’s consistent pattern of non-disclosure expose[s] the Commission to the costs of litigation and negative publicity,” which is why you concluded that “SEC practice and policy disregards the intent of FOIA.”<sup>7</sup>

Five years later, little has changed. In fact, today the Commission not only denies FOIA requests by asserting without basis that there are no responsive documents. The SEC does this *even where its own senior officials have published public work* based on the very documents that the public has requested. In other words, the SEC’s procedures for searching for documents are less effective than a simple Google search would be in identifying responsive records.

For example, in December 2013 I filed a FOIA request with the Commission asking, in connection with research I am conducting regarding investment advisers, that the SEC produce certain data from forms that all such advisers must file with the Commission known as Form

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<sup>5</sup> Figure 1 was compiled from data provided in the SEC’s annual FOIA reports, *see, e.g.*, SECURITIES AND EXCHANGE COMMISSION, FREEDOM OF INFORMATION ACT ANNUAL REPORT FOR FISCAL YEAR 2013, *available at* <http://www.sec.gov/foia/arfoia13.pdf>; the method for calculating this percentage in each year was borrowed from the method used in your Office’s *Report*.

<sup>6</sup> OFFICE OF THE INSPECTOR GENERAL, *supra* note 1, at 9.

<sup>7</sup> *Id.* at 16 (citing *Gavin v. SEC*). For a more recent example of a federal judge expressing frustration with the Commission’s disregard of FOIA, *see, e.g.*, *Cuban v. SEC*, 744 F. Supp. 2d 60, 88 (D.D.C. 2010) (repeatedly describing the SEC’s legal positions regarding the assertion of FOIA exemptions as a series of “vague descriptions” “which are nothing more than conclusory”).

ADV.<sup>8</sup> In my request, I noted that the Commission already reviews and discloses limited information contained in those forms, so producing the forms would be straightforward,<sup>9</sup> and also offered to pay the Commission's costs in producing the forms. The Commission did not respond within twenty business days or request an extension of that time limit, as federal law requires it to do. Instead, more than forty business days later, the Commission responded with the answer that it now provides to approximately two-thirds of FOIA requesters:

[W]e conclude that no responsive information exists and we consider this request to be closed.<sup>10</sup>

The Commission's response did not explain how, given that the SEC already discloses limited data contained in those forms, the SEC could have no documents responsive to the request. Nor did the response describe the searches, if any, that the Commission's FOIA office conducted to reach its conclusion that no responsive information existed.

That is striking because a simple Google search would have revealed to the FOIA staff that, in fact, the SEC is in possession of data responsive to this request. Indeed, such a search would have revealed published research, including research by SEC staff, using exactly the data that I requested. After receiving the Commission's response, I conducted such a Google search. The sixth result was a paper in the peer-reviewed *Journal of Financial Economics* stating:

*The SEC provided us with a database of all Form ADV filings from August 2001 through July 2006 . . . . These data are not publicly accessible and, to our knowledge, no other researchers have examined them.*<sup>11</sup>

Stunned that the SEC determined that it lacked responsive documents regarding Form ADV where a peer-reviewed, published paper made clear that the Commission possessed those documents, I searched Google for other work by the authors of that paper. That search revealed a similar paper by those authors—along with a new coauthor. That coauthor is Dr. Jennifer Marietta-Westberg, Deputy Director of the Commission's Division of Risk, Strategy, and Financial Innovation. Dr. Marietta-Westberg's paper states:

Our data come from two sources. First, we use a panel of SEC Form ADV data. . . Because Form ADV is legally required, this panel should be comprehensive and survival-bias free. *We have all filings from 2001 through 2006.*<sup>12</sup>

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<sup>8</sup> See Letter of Robert J. Jackson, Jr., to Securities and Exchange Commission Office of FOIA Services (Dec. 6, 2013). This letter is attached for your convenience.

<sup>9</sup> See *id.* (citing SECURITIES AND EXCHANGE COMMISSION, HISTORICAL ARCHIVE OF INVESTMENT ADVISER REPORTS, available at <http://www.sec.gov/foia/iareports/inva-archive.htm> (providing limited information regarding the content of these forms)).

<sup>10</sup> Letter of Felicia Taylor, Office of FOIA Services, United States Securities and Exchange Commission, to Robert J. Jackson, Jr. (Feb. 5, 2014). In this letter, which is attached for your convenience, Ms. Taylor pointed out that FINRA Regulation, Inc., assists the SEC with maintenance of the database in which this information is located. I contacted Richard Pullano, Vice President of FINRA's Registration and Disclosure Division, and he and his FINRA colleague Jeffrey Weinstein explained that, pursuant to FINRA's contract with the Government, the Commission could request that data be produced to address a valid FOIA inquiry. The SEC's FOIA staff subsequently met with representatives of FINRA to discuss my request. Since that time, Messrs. Pullano and Weinstein have refused to produce the requested data or to explain their refusal to do so.

<sup>11</sup> Stephen G. Dimmock & William C. Gerken, Predicting Fraud by Investment Managers, 105 J. FIN. ECON. 153, 157 (2012) (emphasis added).

In July 2014, I notified the Commission that the determination of no responsive records could not be correct, and as a courtesy notified Dr. Marietta-Westberg that the SEC's FOIA officials were denying the public access to data she has used in her private research. On August 8, 2014, I spoke with Dr. Marietta-Westberg, who confirmed that she had personally extracted the data from Form ADV filings, accessible through her employment at the Commission, to provide the information I had requested to the *Journal of Financial Economics* and for her own research. On August 12, however, the SEC's FOIA office responded again to the request, having reversed their position that the Commission had no responsive documents. This time, the FOIA staff denied the request because the Commission had *too many* responsive documents:

For the SEC to locate all ADV filings during the period specified, would require the FOIA staff to conduct an unduly burdensome search. . . This search could also yield thousands, if not millions of pages of potentially responsive records . . . .<sup>13</sup>

I gave the FOIA staff three reasons why this conclusion, like the staff's first basis for rejecting the request, could not be correct. First, a Deputy Director of a major Division of the Commission had personally extracted these same data for her own research; unless the Commission allows its Deputy Directors to engage in unduly burdensome work for their private research, it is impossible that such a review would be so burdensome as to be a basis for rejection of a FOIA request. Second, the Commission already reviews and discloses information from these forms, so producing them is unlikely to be burdensome. Finally, the request could be limited only to those investment advisers identified by Dr. Marietta-Westberg to reduce the costs of production. More than three weeks later, however, the staff responded to these arguments by stating that employees in two SEC divisions had determined that the request should be denied:

We have talked to staff in the . . . Division of Investment Management and the Division of Economic and Risk Analysis . . . . Staff in both divisions [told us] that they are not aware of a means of providing access to all Form ADVs that would not be "unreasonably burdensome."<sup>14</sup>

In 2009, your *Report* showed that a significant cause of the SEC's noncompliance with FOIA was the FOIA's staff's inadequate review of responsive documents. You explained that the Commission's FOIA staff would simply "send[] the relevant office or division a copy of the FOIA request" and ask the division to respond; "[i]f the [division] indicate[d] that [the request should be denied], the FOIA analyst [did] not review the records" to confirm that judgment. Your *Report* correctly described such procedures as "inadequate" under FOIA, and urged the Commission to reform those practices in order to comply with federal law.<sup>15</sup> As explained above, however, the Commission's FOIA staff continues to use those same practices today.

In sum, in 2009 your *Report* showed that the Commission's FOIA staff repeatedly and incorrectly denied FOIA requests by claiming that it lacked responsive documents. You also

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<sup>12</sup> Stephen G. Dimmock, William C. Gerken, and Jennifer Marietta-Westberg, What Determines the Allocation of Managerial Ownership within Firms? Evidence from Investment Management Firms (April 25, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1669800](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669800) (emphasis added).

<sup>13</sup> Letter of Dave Henshall, FOIA Branch Chief, Securities and Exchange Commission, to Robert J. Jackson, Jr., (Aug. 12, 2014). This letter is attached for your convenience.

<sup>14</sup> Email of Jeffrey L. Oval, FOIA Branch Chief, Securities and Exchange Commission, to Robert J. Jackson, Jr. (Sep. 5, 2014).

<sup>15</sup> OFFICE OF THE INSPECTOR GENERAL, *supra* note 1, at 14.

concluded that FOIA staff failed to confirm, or even perfunctorily examine, the claims of SEC divisions that wished the staff to deny FOIA requests. Five years later, the FOIA staff deny even more FOIA requests by claiming that there are no responsive documents, even where a simple Google search would reveal responsive information. And the Commission's FOIA staff continue to defer to the judgments of SEC divisions who encourage the staff to deny FOIA requests.<sup>16</sup>

### **SEC Officials' Use of Information Denied to the Public**

It is unsurprising that the Division of Economic and Risk Analysis encouraged FOIA officials to deny a request regarding public disclosure of Form ADV. That is because officials in that Division have regularly used information from those and other sources, accessible through their employment at the Commission, in their private research. This monopoly over important information about our financial markets is doubtless a valuable employment benefit for Commission staff. But it is contrary to federal law—and the SEC's regulatory objectives.

Since you published your *Report* in 2009, economists at the SEC have published several papers making use of information that is available to SEC employees but not made public—or, more frequently, not made public in a fashion that would allow other researchers to use the data. Indeed, the SEC's economists—or their favored coauthors, with whom SEC insiders often share data—usually take pains to note in published work that the information used in their papers is not made available to the public in a way that would allow competing research. For example:

- The authors of the aforementioned paper in the *Journal of Financial Economics*, using information provided by Dr. Marietta-Westberg, noted that the SEC website, in contrast to Dr. Marietta-Westberg's data, allows "investors [to] access the latest filings only one at a time," and contains only "summaries . . . rather than item data"; thus, Dr. Marietta-Westberg's data, as used in the paper, is "not publicly accessible";<sup>17</sup>
- Dr. Marietta-Westberg herself writes in a recent paper that the SEC website makes public only "investment management firms' most recent Form ADV filings," while the information she uses for her private research includes "all filings from 2001 through 2006," making her dataset unusually "comprehensive";<sup>18</sup>
- In another study examining how often the public accesses the SEC's EDGAR website, the authors expressly state that the "SEC maintains server logs that record every request

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<sup>16</sup> In later correspondence, the FOIA staff abandoned this view and concluded instead, without explanation, that addressing the request would take so much staff time that the soonest the request could be fulfilled is December 2015. Letter of Mark P. Siford, Office of Support Operations, United States Securities and Exchange Commission, to Robert J. Jackson, Jr. (Oct. 6, 2014). An appeal has been taken from that decision, and I have attached both the staff's most recent letter and the appeal for your convenience. Regardless of the resolution of that appeal, however, the staff's conduct evinces the same troubling noncompliance with law that you identified in your 2009 *Report*. Moreover, I have notified the Commission's Office of the General Counsel ("OGC") regarding the staff's conduct and have received no response; as your *Report* pointed out, "OGC supports and defends the [FOIA staff's] practice of limited and perfunctory document review," even though that practice has "resulted in censure by the [federal] courts." *Id.* at 15. There is no reason to expect, therefore, that an appeal will lead the SEC faithfully to apply FOIA.

<sup>17</sup> Dimmock & Gerken, *supra* note 11, at 157.

<sup>18</sup> Dimmock, Gerken, and Marietta-Westberg, *supra* note 12, at 8 & n.5. Dr. Marietta-Westberg and her coauthors have since revised this passage to state that the data "are available from the SEC under the Freedom of Information Act (FOIA)", despite the fact that, in response to my request for the data, the SEC's FOIA staff denied for more than six months that the SEC was in possession of the data.

for a public filing . . . . These logs are not publicly available, but were privately provided to us by the SEC for research purposes,” after expressing special “grat[itude] to Scott Bauguess,” like Dr. Marietta-Westberg, a Deputy Director of the Division of Economic and Risk Analysis, as well as “many others at the Securities and Exchange Commission for assistance in acquiring . . . the proprietary data used in this paper”;<sup>19</sup> and

- Relatedly, Dr. Bauguess himself recently released a paper in which he and two coauthors use a “similar dataset on EDGAR search traffic” to the paper described above, but the Commission’s FOIA logs reveal no FOIA requests for that information from Dr. Bauguess or his coauthors.<sup>20</sup>

These examples show that senior SEC economists have engaged in private use of information that the Commission’s FOIA staff have repeatedly refused to provide to the public. At the same time, staff in the Division of Economic and Risk Analysis have encouraged the SEC’s FOIA officials to deny the public’s requests for that same information.

It is unclear whether this result is the product of a deliberate effort by Commission officials to maintain a private monopoly on public information or an unfortunate combination of the FOIA staff’s failure to follow federal law and SEC economists’ entrepreneurial approach to their research. For present purposes, it is not important whether the SEC’s approach to these matters results from deliberate decisionmaking or organizational dysfunction. What is important is that, five years after your *Report*, the Commission continues to flout federal law in its administration of FOIA in a fashion that undermines public confidence in the SEC. At the same time as its FOIA officials deny valid requests from the public for information, senior members of the Commission’s Division of Economic and Risk Analysis are using that same information for their private research purposes.

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Despite the repeated remonstrations of the President, the Congress, and your Office, five years after your *Report* the SEC continues to disregard FOIA in exactly the manner that you identified then as so damaging to the Commission and to the Nation. The Commission’s FOIA officials now reject nearly two-thirds of all public requests for information on the basis that there are no responsive documents—more than the fraction you found so troubling in 2009. They do this on the basis of obviously inadequate searches that fail to identify public information confirming the existence of responsive records. And, in the meantime, Commission insiders use the same information that the FOIA staff denies to the public for their own private research.

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<sup>19</sup> Michael S. Drake, Darren T. Roulstone, and Jacob R. Thornock, The Demand for Mandatory Disclosure: Evidence from Investors’ Use of SEC EDGAR (July 2011), *available at* [http://kelley.iu.edu/feaconference/papers/Paper\\_Upload\\_Drake\\_M\\_76931.pdf](http://kelley.iu.edu/feaconference/papers/Paper_Upload_Drake_M_76931.pdf). Similarly, another recent working paper states that its “data come from the SEC, which logs all search traffic on its EDGAR system,” and expresses gratitude to “Scott Bauguess, as well as others, at the U.S. Securities and Exchange Commission for . . . assistance with the data.” Charles M.C. Lee, Paul Ma, and Charles C.Y. Wang, Search-Based Peer Firms: Aggregating Investor Perceptions Through Internet Co-Searches (July 2014) (forthcoming, *Journal of Financial Economics*), *available at* [http://www.hbs.edu/faculty/Publication%20Files/13-048\\_0e7a49b1-bbbf-4715-bd91-3c6bc3150be2.pdf](http://www.hbs.edu/faculty/Publication%20Files/13-048_0e7a49b1-bbbf-4715-bd91-3c6bc3150be2.pdf).

<sup>20</sup> Scott Bauguess, Jack Cooney, and Kathleen Weiss Hanley, Investor Demand for Information in Newly Issued Securities (December 2013), *available at* [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2379056](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2379056). While some members of the public have attempted to obtain information on EDGAR logs through the FOIA process—with varying levels of success—the SEC’s FOIA logs themselves reveal no such attempts by Dr. Bauguess or his coauthors.

For these reasons, I urge your Office promptly to initiate an audit to examine why the Commission continues to ignore FOIA, and your recommendations, five years after you issued your *Report*. If you or your staff should have any questions at all, or if I can be of assistance in any way, please feel free to contact me at your convenience; I may be reached at (212) 854-0409 or via electronic mail at [robert.jackson@law.columbia.edu](mailto:robert.jackson@law.columbia.edu).

Sincerely,



Robert J. Jackson, Jr.

cc:

J.W. Verret  
Chief Economist and Senior Counsel  
Committee on Financial Services  
U.S. House of Representatives  
2129 Rayburn House Building  
Washington, D.C. 20515

Ammon Simon  
Financial Services Counsel  
U.S. Representative Randy Hultgren  
332 Cannon Office Building  
Washington, D.C. 20515

John R. Tyler  
Assistant Director, Civil Division  
United States Department of Justice, Room 7344  
20 Massachusetts Avenue, Northwest  
Washington, D.C. 20001

Mary Jo White  
Chairman  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977

Luis A. Aguilar  
Commissioner  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977

Daniel M. Gallagher  
Commissioner  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977

Kara M. Stein  
Commissioner  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977

Michael S. Piwowar  
Commissioner  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977

Anne Small  
General Counsel  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977

Scott Bauguess  
Deputy Director and Deputy Chief Economist  
Division of Economic and Risk Analysis  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977

Jennifer Marietta-Westberg  
Deputy Director and Deputy Chief Economist  
Division of Economic and Risk Analysis  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977

Barry Walters  
Chief FOIA/PA Official  
United States Securities and Exchange Commission  
100 F Street, Northeast  
Washington, D.C. 20549-2977



COLUMBIA UNIVERSITY  
IN THE CITY OF NEW YORK

LAW SCHOOL

Robert J. Jackson, Jr.  
Professor of Law and  
Milton Handler Fellow  
Co-Director, Ira M. Millstein Center

435 West 116th Street  
New York, New York 10027  
Phone: (212) 854-0409  
robert.jackson@law.columbia.edu

October 23, 2014

Barry Walters  
Chief FOIA/PA Officer  
Securities and Exchange Commission  
Station Place, 100 F Street Northeast, Mail Stop 2736  
Washington, D.C. 20549

Dear Mr. Walters:

I write to appeal your Office's disposition of my request under the Freedom of Information Act (FOIA), No. 14-08144. That request, which was filed on December 6, 2013, asked that the SEC produce data filed with the Commission under Form ADV between 2000 and 2014. Your Office previously denied this request on two different grounds: first, that the SEC does not possess these data, and, later, that obtaining the data would be "unreasonably burdensome."<sup>1</sup> Having abandoned those grounds, your colleagues' most recent basis for delaying the SEC's response is that obtaining the data would require sufficient staff time that work cannot begin on the request until December 2015.<sup>2</sup> That last determination is the subject of this appeal.

As explained below, the claim that extensive staff work would be necessary to address this request has no basis in fact. The data that I have requested are located in databases to which the SEC has easy access, and those databases already provide some of the requested data to the public on the Internet. All that is necessary to fulfill this request is to provide data that is available to the SEC right now. In fact, as explained below, extracting the data is so straightforward that the current Deputy Director of your Division of Economic and Risk Analysis had the time, on the eve of the financial crisis, to extract the data for her private use.

The reason your colleagues have delayed this request has nothing to do with its merits. Instead, it is motivated by the longstanding practice of the SEC, repeatedly denounced by the Commission's own Inspector General and the federal courts, to "presume[] in favor of

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<sup>1</sup> See Letter of Felicia Taylor, Office of FOIA Services, United States Securities and Exchange Commission, to Robert J. Jackson, Jr. (Feb. 5, 2014) ("we conclude that no responsive information exists"); Letter of Dave Henshall, FOIA Branch Chief, United States Securities and Exchange Commission (Aug. 12, 2014) ("For the SEC to locate all [of the data requested] would require . . . an unreasonably burdensome search.").

<sup>2</sup> Your colleagues now say that they "have been advised that it will take a minimum of 55 hours to process [the] request," and that it is thus "being placed in [the] complex queue," in which processing will not begin "until approximately December 2015." Letter of Mark P. Siford, Office of Support Operations, United States Securities and Exchange Commission, to Robert J. Jackson, Jr. (Oct. 6, 2014). As explained below, your colleagues have given no factual basis for that claim whatsoever, and none exists.

withholding, rather than disclosure, as FOIA requires.”<sup>3</sup> Rather than seek ways to satisfy the request, your colleagues have lurched from one basis for denial to another, finally settling on the absurd notion that obtaining data that the SEC already has would take significant staff time.

Because my interactions with your staff have made clear that the SEC does not take FOIA seriously, I have today, concurrently with this appeal, sent a detailed letter to the SEC’s Office of the Inspector General describing how your Office has failed to follow federal law—and how this has led the Commission to deny data to the public that its economists now use for their private purposes. Since the Commission’s failure to follow FOIA reflects longstanding and widespread practice at the agency, I have no expectation that this appeal will be taken seriously.<sup>4</sup> The law requires, however, that I exhaust my right to appeal before I pursue the inevitable and entirely unnecessary litigation that will follow. Thus, I explain below why your colleagues’ approach to my request is inconsistent with federal law.

### **The Existence, and Accessibility, of the Requested Data**

As noted above, your Office’s initial response to this request was to claim that the SEC does not possess the requested data. Your Office then contended that accessing the information would be “unduly burdensome,” relieving the Commission of its legal obligation to produce the data. Both of these judgments were reached without even a cursory investigation as to the location, nature, or availability of the requested information. And your colleagues’ current claim that obtaining the information would require significant staff time is similarly without basis.

For one thing, your Office’s initial responses reveal a complete failure to explore the basic facts underlying FOIA requests. In claiming that the SEC did not possess the requested data, your Office ignored the fact that the *exact same data has been used twice in published work* by the Commission’s current Deputy Director of Risk, Strategy, and Financial Innovation, Dr. Jennifer Marietta-Westberg.<sup>5</sup> To discover this, your Office could simply have conducted a simple Google search. Instead, for the six months that followed my request, your Office insisted either that you did not have the very same data your colleague was in the process of published.

Your Office’s current claim—that obtaining the data would take significant staff time—is equally frivolous. The data that I have requested reside on a database maintained on behalf of the Commission by FINRA Regulation, Inc., and the Commission has easy access to these data. That

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<sup>3</sup> OFFICE OF THE INSPECTOR GENERAL, SECURITIES AND EXCHANGE COMMISSION, REVIEW OF THE SEC’S COMPLIANCE WITH THE FREEDOM OF INFORMATION ACT 9 (2009).

<sup>4</sup> The Commission’s own Inspector General has pointed out that the SEC’s Office of the General Counsel (OGC) has long been complicit in the FOIA staff’s failure to exercise even cursory diligence when responding to valid FOIA requests from the public. *Id.* at 15 (“OGC supports and defends the [FOIA staff’s] practice of limited and perfunctory document review,” even though that approach has “resulted in censure by the courts”).

<sup>5</sup> First, Dr. Marietta-Westberg provided the data to two favored coauthors, Stephen G. Dimmock and William C. Gerken, who published the data in the *Journal of Financial Economics*, expressing gratitude for the SEC’s generosity. Predicting Fraud by Investment Managers, 105 J. FIN. ECON. 153, 157 (2012) (“The SEC provided us with a database of all Form ADV filings”). She and these coauthors later released a second paper using the same data. Stephen G. Dimmock, William C. Gerken, and Jennifer Marietta-Westberg, What Determines the Allocation of Managerial Ownership within Firms? Evidence from Investment Management Firms at 9 (April 25, 2014), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1669800](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1669800) (“We have all [Form ADV] filings from 2001 through 2006”). Dr. Marietta-Westberg has since revised this passage to state that the data “are available from the SEC under the Freedom of Information Act (FOIA),” despite the fact that, in response to my request for the data, your staff denied for more than six months that the SEC was even in possession of the data.

is why Dr. Marietta-Westberg had time to extract the data for her own private research while drawing a federal salary. And that is why there is no basis for the claim that providing these data would take more than a few hours of staff time.

Indeed, the Commission currently presents these data to the public on the SEC's own website, drawing from the database maintained by FINRA.<sup>6</sup> All that would be needed to address my request would be to provide the data currently on your website, and historical data that has previously been on your website, directly to me. I have informed your staff that no modification, streamlining, or other treatment of the data is necessary; I will accept it in any form in which you are willing to provide it. In fact, it may be that FINRA is, upon the SEC's request, required by contract to provide the data without any labor by Commission staff at all.<sup>7</sup>

Your staff has somehow concluded that doing this will require dozens of staff hours. Moreover, your colleagues have provided no basis whatsoever for that conclusion. In response to repeated inquiries, none of your staff has been able to provide any explanation why staff time is needed at all. Instead, they have asserted only that they "have been advised," in "consultations with the relevant SEC program offices," that staff time is necessary. They have not explained which program offices provided that advice; what the nature of the staff work might be; why FINRA is not obligated to perform the work under an existing contractual agreement; or why a less burdensome alternative might avoid the need for staff work altogether.

Five years ago the Commission's Inspector General explained that the SEC's FOIA staff simply "send[] the relevant office or division a copy of the FOIA request" and ask the division to respond; "[i]f the division indicate[d] that [the request should be denied], the FOIA analyst [does] not review the records" to confirm that denial is appropriate.<sup>8</sup> The Inspector General described this approach as "inadequate" under FOIA. Your staff, however, has apparently accepted without basis a claim by an unnamed Commission colleague. That is why I have appealed their decision. And that is why I have concurrently asked the Inspector General to examine why, five years later, the SEC continues to flout federal law.

### **Questions Presented by this Appeal**

It is especially striking that your staff would delay a FOIA request without basis where, as here, the requester has demonstrated that a Deputy Director of a major Commission Division has used the requested information for private purposes. That undisputed fact raises several questions in connection with this appeal:

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<sup>6</sup> Among the many justifications for nondisclosure provided by your staff throughout this process, some of your colleagues have occasionally asserted, again without basis, that some of the data I have requested includes personally identifiable information (PII) that, by law, must be excluded from any FOIA response. For three reasons, this claim is unwarranted. First, Form ADV contains no PII whatsoever. Second, if the data do in fact include PII, by disclosing it to the *Journal of Financial Economics* Dr. Marietta-Westberg has violated federal law, see 5 U.S.C. § 552a *et seq.*, and I doubt that your staff wish to accuse her of that. Third, the SEC displays these data, without modification, on the SEC's website—which, if the information in fact contained PII, would violate federal law.

<sup>7</sup> Indeed, I have discussed my request directly with Richard Pullano, Vice President of FINRA's Registration and Disclosure Division, as well as his colleague Jeffrey Weinstein, and both confirmed that, upon the Commission's request, FINRA is obligated to provide information in this database pursuant to FINRA's contract with the Government. After my conversation with Messrs. Pullano and Weinstein, your staff met with representatives of FINRA to discuss this request. Since that time, Messrs. Pullano and Weinstein have refused to produce the requested data or to explain their refusal to do so.

<sup>8</sup> OFFICE OF THE INSPECTOR GENERAL, *supra* note 3, at 14.

- What work, exactly, is required for your staff to extract the data I have requested? Was that work required for Dr. Marietta-Westberg to obtain her data? If not, why can't your staff use the same approach to obtain the data I have requested? If so, given that your staff have indicated that the work associated with my request will cost \$7,975, who paid the costs of extracting the data that Dr. Marietta-Westberg used for her private purposes?
- Given your staff's conclusion that extracting this information would consume significant time, and the fact that Dr. Marietta-Westberg extracted the data on her own in the months immediately before the financial crisis of 2008, how much of Dr. Marietta-Westberg's time during that period was spent on her private research while drawing a federal salary?
- How exactly did Dr. Marietta-Westberg extract the data? Was she able to do so only in connection with her employment at the Commission? If so, did her extraction, distribution, and publication of the data violate the terms of her employment with the Commission? Did Dr. Marietta-Westberg obtain permission to disseminate data she could access only as a Commission employee to her privately favored recipients?
- In light of your staff's intimations that the data I have requested contains PII, did Dr. Marietta-Westberg's disclosure of the data violate the Privacy Act?

In my view, answers to these questions are necessary to sustain, or even to understand, your colleagues' claim that addressing my request will require significant staff time. Without answers to these questions, their conclusion represents nothing but the type of blanket assertion that, the federal courts have repeatedly held, reflects an inadequate response under FOIA.

\* \* \* \*

Your colleagues' determination to delay this straightforward request for two years flouts the mandates of FOIA. Moreover, the fact that a senior SEC official has used the requested information for her own private purposes raises serious questions about the propriety of the delay your colleagues have imposed. For these reasons, I urge you to reconsider their disposition of my FOIA request. If you should have any questions at all, or if I can be of assistance in any way, please feel free to contact me at your convenience; I may be reached at (212) 854-0409 or via electronic mail at [robert.jackson@law.columbia.edu](mailto:robert.jackson@law.columbia.edu).

Sincerely,



Robert J. Jackson, Jr.

cc:

Anne Small  
*Care of:* Office of the General Counsel  
 United States Securities and Exchange Commission  
 100 F Street, Northeast  
 Station Place, 100 F Street Northeast  
 Mail Stop 2736  
 Washington, D.C. 20549-2977

Carl W. Hoecker  
 Inspector General  
 United States Securities and Exchange Commission  
 100 F Street, Northeast  
 Washington, D.C. 20549-2977

COLUMBIA UNIVERSITY  
IN THE CITY OF NEW YORK  
LAW SCHOOL

Robert J. Jackson, Jr.  
Associate Professor of Law and  
Milton Handler Fellow

Phone: (212) 854-0409  
Fax: (212) 854-7946  
robert.jackson@law.columbia.edu

December 6, 2013

Securities and Exchange Commission  
Office of FOIA Services  
100 F Street, Northeast  
Washington, D.C. 20549-2736  
**VIA ELECTRONIC DELIVERY**

Dear Sir or Madam:

We respectfully submit the following request pursuant to the Freedom of Information Act, 5 U.S.C. § 552. We ask that the Commission provide us with select data from certain *Form ADVs* filed with the Commission pursuant to the Investment Advisers Act of 1940. Because our request supplements a previous disclosure of *Form ADVs* that the Commission has provided in response to a prior FOIA request, we expect that our request will be uncontroversial.<sup>1</sup> And, as we explain below, we have limited our request to minimize the burden on the Commission, and the data that the Commission would provide us is to be used purely for academic purposes.

The Commission's Prior Disclosure provides detailed data with respect to all non-exempt filers of *Form ADVs* from January 2009 through December 2013. We ask that the Commission supplement those disclosures in the following three ways to permit more precise empirical analysis of investment intermediaries over a longer period of time:

- **First**, the Commission's Prior Disclosure addressing filings between January 2009 and December 2013 does not include any data from Schedule A, Schedule B, Schedule D, and Disclosure Reporting Pages (DRPs). We therefore request that the Commission disclose, for any *Form ADV* filer included in the Prior Disclosure from January 2009 through December 2013, data from the last previously filed Schedule A, Schedule B, Schedule D, and any DRPs for each such filer immediately prior to December 2009, December 2010, December 2011, December 2012, and December 2013.<sup>2</sup>

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<sup>1</sup> SECURITIES AND EXCHANGE COMMISSION, HISTORICAL ARCHIVE OF INVESTMENT ADVISER REPORTS, available at <http://www.sec.gov/foia/iareports/inva-archive.htm> (last accessed Dec. 4, 2013) [hereinafter, the Commission's "Prior Disclosure"].

<sup>2</sup> To minimize the burden on the Commission, and because our research objectives can be achieved without additional detail, we seek only the most recent filing for each *Form ADV* filer as of the end of each of the 2009, 2010, 2011, 2012, and 2013 calendar years. In addition, we would be pleased for the Commission to address all of the items throughout this request either by providing data in the Microsoft Excel format the Commission chose in the Prior Disclosure, by providing electronic or paper copies of the various Schedules and DRPs themselves, or in any other fashion that the Commission deems prudent.

- **Second**, the Commission's Prior Disclosure addressing *Form ADV* filings between June 2006 and January 2009 includes only summary data in six columns (summarizing, for example, criminal disclosures) rather than the detailed information from Items 1 through 11 of Part 1A of *Form ADV* included in the Prior Disclosure for filings between 2009 and 2013, making comparison of the information in the Prior Disclosure over time difficult. We therefore request that the Commission disclose detailed information from Items 1 through 11 of Part 1A of *Form ADV*—comparable to the information available in the Prior Disclosure covering filings between 2009 and 2013—for any *Form ADV* filer included in the Prior Disclosure from June 2006 through December 2009, based on the last-filed *Form* filed for each such filer immediately prior to each of December 2006, December 2007, and December 2008. In addition, the Prior Disclosure addressing filings from June 2006 through January 2009, like the Prior Disclosure addressing filings in later periods, does not include any data from Schedule A, Schedule B, Schedule D, or DRPs. We therefore also request that the Commission disclose, for any *Form ADV* filer included in the Prior Disclosure from June 2006 through December 2009, data from Schedule A, Schedule B, Schedule D, and any DRPs for each such filer based on the last-filed *Form* immediately prior to each of December 2006, December 2007 and December 2008.
- **Third**, the Prior Disclosure includes only data from filings between 2006 and 2013. Comprehensive analysis of these data requires information over a longer period of time. We acknowledge, however, that drawing data from historical filings over too long a period might impose significant burdens on the Commission. We therefore request only that the Commission provide (1) detailed information from Items 1 through 11 of Part 1A of *Form ADV* comparable to the information available in the Prior Disclosure covering filings between 2009 and 2013 and (2) data Schedule A, Schedule B, Schedule D, and any DRPs, in each case for any filer of *Form ADV*, based on the last-file form immediately prior to December of each year between 1996 and 2005, inclusive.

These data will provide us with a unique opportunity to examine the relationship between the governance of investment advisers and the underlying equity holdings of those advisers. Current academic research on this topic is limited to particular types of advisers, such as hedge funds. In our view, research on the entire ecosystem of investment advisers is critical to understanding the risks investors face in today's stock market.

In order to help determine fees, you should know that we are an educational requester. We are willing to pay fees of up to \$4,000; if you expect that total fees will exceed this amount, please contact us before proceeding.

Should you have any questions at all, please do not hesitate to contact me at your convenience. I can be reached at (212) 854-0409. Thank you very much for your time and your consideration of our request. We very much look forward to hearing from you soon.

Very truly yours,



Robert J. Jackson, Jr.



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2736

Office of FOIA Services

February 05, 2014

Mr. Robert Jackson, Jr.  
Columbia Law School  
435 West 116th Street  
New York, NY 10019

RE: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. 14-02331-FOIA

Dear Mr. Jackson:

This letter is in response to your request dated December 06, 2013, and received in this office on December 09, 2013, for access to select data from certain Form ADVs filed with the Commission pursuant to the Investment Advisers Act of 1940.

For your information, the Investment Adviser Information Reports' data is collected from electronic submissions of Form ADV by investment adviser firms to the Investment Adviser Registration Depository (IARD) system. This system, which is operated by FINRA Regulation, Inc., permits investment advisers to satisfy their filing obligations under state and federal law with a single electronic filing made over the Internet. As the SEC does not maintain this database, we are unable to extract the requested data of interest to you. Thus, please contact the Financial Industry Regulatory Authority (FINRA), located at 1735 K Street, NW, Washington DC, 20006, website address [www.finra.org](http://www.finra.org), to obtain the requested information.

If you still have reason to believe that the SEC maintains the type of information you seek, please provide us with additional information, which could prompt another search. Otherwise, we conclude that no responsive information exists and we consider this request to be closed.

Mr. Robert Jackson, Jr.  
February 05, 2014  
Page 2

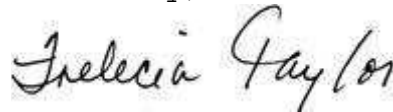
14-02331-FOIA

You have the right to appeal the adequacy of our search or finding of no responsive information, to our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6). Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

Send your appeal to the Office of FOIA Services of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2736, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

If you have any questions, please contact me at [taylorf@sec.gov](mailto:taylorf@sec.gov) or (202) 551-8349. You may also contact me at [foiapa@sec.gov](mailto:foiapa@sec.gov) or (202) 551-7900.

Sincerely,

A handwritten signature in dark ink that reads "Felecia Taylor". The signature is written in a cursive, flowing style.

Felecia Taylor  
FOIA Lead Research Specialist





UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2736

Office of FOIA Services

August 12, 2014

Mr. Robert Jackson, Jr.  
Professor of Law and Milton Handler Fellow  
Columbia Law School  
435 West 116th Street  
New York, NY 10019

RE: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. 14-08144-FOIA

Dear Mr. Jackson:

This letter is an interim response to your request dated and received in this office on July 16, 2014, for access to the actual Form ADVs filed by all registered investment advisers between 1998 and 2013. This also refers to my e-mail communications of August 6, 2014, and August 8, 2014, and your e-mail messages of August 4, 2014, August 6, 2014, August 7, 2014, August 8, 2014, and August 12, 2014.

By e-mail message dated August 8, 2014, Ms. Taylor advised you that after consulting with the Division of Economic and Risk Analysis (DERA), she could provide you with a spreadsheet that contains information collected from the Form ADVs filed with the SEC. She also stated in her message that this spreadsheet was used in the drafting of the academic papers referenced in your e-mail. She stated that the data is in an Excel format and includes certain information from Items 1-11 on Form ADV and certain information from Schedules A, B, D, and the Disclosure Reporting Pages. The data covers the time period of May 2001 through September 2006. You responded to her e-mail message on August 8, 2014, and stated you would like this information as soon as possible. However, you contend that you should still be able to obtain access to the documents you initially requested and stated you wish to obtain all actual ADV filings provided to the Commission from 1998 through 2013.

For the SEC to locate all ADV filings during the period specified, would require the FOIA staff to conduct an unduly burdensome search. To locate the filings you requested would

Mr. Robert Jackson, Jr.  
August 12, 2014  
Page 2

14-08144-FOIA

require the staff to conduct a manual search of each investment adviser registered with the SEC for 15 years. This task alone could take several thousand hours of staff time or more.

This manual search could also yield thousands, if not millions of pages of potentially responsive records. In addition, once the filings are located, each filing must be reviewed for personal privacy information prior to release. As you may know, agencies are not required to conduct wide-ranging, "unreasonably burdensome" searches for records. See Massachusetts v. Dep't of HHS, 727 F. Supp. 35, 36 n.2 (D. Mass. 1989).

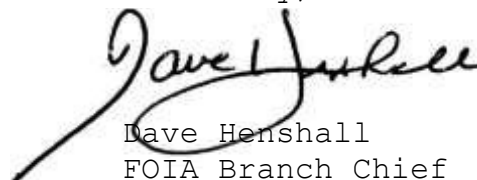
If you believe this constitutes a denial of your request, you have the right to appeal to our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6). Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

Send your appeal to the Office of FOIA Services of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2736, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

The program office is still reviewing the spreadsheet for personally identifiable information. As soon as the review is completed, you will be notified of the accessibility of the spreadsheet.

In the interim, if you have any questions, please contact Felecia Taylor of my staff at [taylorf@sec.gov](mailto:taylorf@sec.gov) or (202) 551-8349. You may also contact me at [foiapa@sec.gov](mailto:foiapa@sec.gov) or (202) 551-7900.

Sincerely,



Dave Henshall  
FOIA Branch Chief



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
STATION PLACE  
100 F STREET, NE  
WASHINGTON, DC 20549-2736

Office of FOIA Services

October 6, 2014

Professor Robert Jackson  
435 West 116th Street  
New York, NY 10019

Re: Freedom of Information Act (FOIA), 5 U.S.C. § 552  
Request No. 14-08144-FOIA

Dear Professor Jackson:

This letter is in response to your December 6, 2013 FOIA request for Form ADV data. In addressing the issues related to your request we have communicated with you on multiple occasions. We have also conducted numerous meetings between the Office of FOIA Services, the Division of Economic and Risk Analysis, the Office of Compliance, Inspections and Examinations, the Division of Investment Management and FINRA. During this process you narrowed your request to include information from Part 1A of Form ADV, as well as the information from Schedules A, B, C, D, and the Disclosure Reporting Pages, for the period 2000 through 2014. You indicated that you would accept the data in any form or format.

In our consultations with the relevant SEC program offices, we have been advised that it will take a minimum of 55 hours to process your request as narrowed. Consequently, you are being placed in our complex processing queue. In prior correspondence we informed you that processing will not begin on any request placed in our complex queue for approximately 24 months from the date the request is originally submitted. Since you submitted your original request in December 2013, we do not expect to begin processing it until approximately December 2015.

Since you are an "educational" requester for fee purposes, there are no search or review charges for processing your request. You are responsible, however, for the direct

costs incurred by the SEC in producing the records to you. We have been advised that the cost of providing the data will be approximately \$7,975.

You have the right to appeal this decision to our General Counsel under 5 U.S.C. § 552(a)(6), 17 CFR § 200.80(d)(5) and (6). Your appeal must be in writing, clearly marked "Freedom of Information Act Appeal," and should identify the requested records. The appeal may include facts and authorities you consider appropriate.

Send your appeal to the Office of FOIA Services of the Securities and Exchange Commission located at Station Place, 100 F Street NE, Mail Stop 2736, Washington, D.C. 20549, or deliver it to Room 1120 at that address. Also, send a copy to the SEC Office of the General Counsel, Mail Stop 9612, or deliver it to Room 1120 at the Station Place address.

If you have any questions, please contact me by email at [sifordm@sec.gov](mailto:sifordm@sec.gov) or by telephone at (202) 551-7201. If you cannot reach me please contact Mr. John J. Livornese by calling (202) 551-7900 or by sending an e-mail to [foiapa@sec.gov](mailto:foiapa@sec.gov).

Sincerely,



Mark P. Siford  
Counsel to the Director  
Office of Support Operations