

Independent Investment Research Focused on Public Company Interactions With the SEC.

## Confirmed, Undisclosed SEC Investigation

### No SEC Probe Found at Bofl Holding? That's Not How We See It.

**Please note:** *If we alert you to existence of an undisclosed SEC probe, that means we filed a Freedom of Information Act (FOIA) request with the SEC on the company in question and have a response, in black-and-white, on government letterhead that supports our statement. Other interpretative guidance and disclosures appear below.*

**Analyst Summary:** Yesterday, 25-Jul-2016, Mr. Brad Berning, a senior analyst with Craig-Hallum, published a research report in which he wrongly concluded that his, "SEC FOIA Request Reveals No SEC Investigation Into BOFI".

Mr. Berning's misguided conclusion about the absence of SEC activity at BOFI primarily appears to be the result of good-faith interpretative errors. But they are errors nonetheless. Our own letter from the SEC confirmed enforcement proceedings were on-going for BOFI as of 31-May-2016. This was and remains undisclosed. We published our findings on 09-Jun-2016.

In this report we explain the flaws in Mr. Berning's analysis that led him to reach the conclusions he did. But his report did create uncertainty as to whether BOFI has an SEC probe. Given this, we recommend you call upon BOFI management to answer this very simple question: What contact has BOFI had with the SEC's Division of Enforcement at any time in the past year, and what was the nature of that contact? The answer should be none. But watch out: We've seen companies with SEC probes that wait until the day *after* an earnings call to make an SEC filing in which they disclose an SEC probe.

**The Misguided Analyst Report:** It appears Mr. Berning framed his FOIA request differently than how we do it and, therefore, got results different than we get. We see this often when others without our experience or expertise with the FOIA try making their own requests. We also see confusion among those who don't have our extensive experience in analyzing SEC comment letters. But we don't need to see Mr. Berning's actual FOIA

request to say his conclusions regarding the results are flat wrong. The flaw is found in the weight and meaning he assigned to what he said was provided in response to his request. Specifically, he was misinformed to say, "Our research into the SEC correspondence supports BOFI's previous statements that there are no investigations into the Company."

Apparently, Mr. Berning did not realize this, but that "one letter dated May 13, 2015," which he said the SEC supplied in response to his FOIA request, was already posted to EDGAR in Jul-2015. In fact, SEC comment letters have been posted on EDGAR since 2004, in large part because of [our early efforts using the FOIA at the SEC](#). **As BOFI's earlier comment letters are already posted to EDGAR, there would be no reason to block them in response to a FOIA request. This is true even if there were an on-going SEC probe at the time.**

Further, SEC comment letters come from the SEC's Division of Corporation Finance. The Enforcement Division conducts the investigations. The existence or absence of an SEC comment letter tells you nothing regarding whether the company receiving one is under investigation. We know this because, again, of our own extensive history with SEC comment letters. (For more, you can [view the video we produced on the SEC review process posted here](#).)

On the next page we list BOFI's SEC comment letters posted to EDGAR since 2014 (Source: Lexis). We highlighted the letter cited in Mr. Berning's report which he said he received in response to his FOIA request. As you can see, it was posted in Jul-2015.

- 1 **Bofi Holding, Inc.** [Info](#)  
[SEC Comment](#) Letter Date: 6/23/2015 Subject Filing: [10-K](#)  
 SIC Code: 6035 Release Date: 7/28/2015 A/D Office: 7
- 2 **Bofi Holding, Inc.** [Info](#)  
[Company Response](#) Letter Date: 5/27/2015 Subject Filing: [10-K](#)  
 SIC Code: 6035 Release Date: 7/28/2015 A/D Office: 7
- 3 **Bofi Holding, Inc.** [Info](#)  
[SEC Comment](#) Letter Date: 5/13/2015 Subject Filing: [10-K](#)  
 SIC Code: 6035 Release Date: 7/28/2015 A/D Office: 7
- 4 **Bofi Holding, Inc.** [Info](#)  
[SEC Comment](#) Letter Date: 5/1/2014 Subject Filing: [10-K](#)  
[10-Q](#)  
[10-Q](#)  
 SIC Code: 6035 Release Date: 5/30/2014 A/D Office: 7
- 5 **Bofi Holding, Inc.** [Info](#)  
[Company Response](#) Letter Date: 3/4/2014 Subject Filing: [10-K](#)  
[10-Q](#)  
[10-Q](#)  
 SIC Code: 6035 Release Date: 5/30/2014 A/D Office: 7
- 6 **Bofi Holding, Inc.** [Info](#)  
[Company Response](#) Letter Date: 2/21/2014 Subject Filing: [10-K](#)  
[10-Q](#)  
[10-Q](#)  
 SIC Code: 6035 Release Date: 5/30/2014 A/D Office: 7
- 7 **Bofi Holding, Inc.** [Info](#)  
[SEC Comment](#) Letter Date: 2/10/2014 Subject Filing: ---  
 SIC Code: 6035 Release Date: 5/30/2014 A/D Office: 7

Continuing, Mr. Berning tells us in his research note that his request, "... specifically requested whether there were [sic] any correspondence by the SEC or the Company for matters where confidential treatment was requested."

So far as investigations go, in our experience, knowing whether confidential treatment was requested is only meaningful after a probe has ended. Let us explain.

Claims for confidentiality under the FOIA are usually substantiated at one of two times: At the time of making an SEC filing, and at the time you submit records to the SEC as part of an investigation.

When the request for confidential treatment is made at the time of making a filing, it is also evaluated at that time. If the SEC agrees, the company receives an order of confidentiality that expires at a later date. While you

might learn that Sprint requested confidential treatment for an exhibit to a 10-K that details terms of a telecom services contract with Apple, you won't learn anything that tells you there is, or is not, an SEC probe.

In the course of an investigation, public companies can, and often do, stamp something akin to the term "Confidentiality Requested under the FOIA" on records they submit to the SEC. But you would never know about it in response to a FOIA request at the time a probe was ongoing. Again, it's only meaningful after the probe ends.

When assertions of confidentiality occur during a probe, under the FOIA they are also not technically treated as an official request for confidential treatment; that is, until *after* the investigation ends, *AND*, someone like us comes along and asks for those same records. But if no one ever asks, the company's request remains as simply a place holder for a potential confidentiality claim somewhere down the line.

Because sweeping claims of confidentiality made in the course of SEC probes are often bogus, many of those requests for confidentiality are later denied. We also view them as a black mark against the company doing so.

**Here's What We Did and What We Found:** On 31-Mar-2015, we filed our first FOIA request on BOFI. In a letter dated 01-Apr-2015, the FOIA office of the SEC said it did not locate any information responsive to our request on the company.

In a letter dated 04-Feb-2016, the FOIA office of the SEC said it did not locate any information responsive to our 28-Jan-2016 request on the company.

To this point, any statements made by the company between 01-Apr-2015 and 04-Feb-2016, claiming it was not under investigation by the SEC, appear as credible.

However, BOFI's claim in its conference call of 26-Apr-2016 (or elsewhere) of having "no enforcement actions" is not terribly meaningful in the context of SEC investigations. In fact, it may even be misleading.

Here's why: Most SEC probes end without the agency bringing an enforcement action. Even when they occur, enforcement actions don't show up until after an investigation has ended. Either way, the consequences for investors can still be severe. So while it sounds

impressive to declare there is no enforcement action now, it is also potentially misleading if nothing is said about an investigation a company knows about at the time it makes such a statement.

In Apr-2016, BOFI then showed up on our proprietary screening system as having potential for SEC investigative activity. Thus, we filed a new FOIA request.

In a letter dated 25-May-2016, we received information from the SEC suggesting BOFI was involved in unspecified SEC investigative activity. We found no disclosure of the same as of this date. We filed an administrative appeal to challenge this response. In our experience, over two-thirds of these SEC responses are confirmed on appeal. This was one of them.

In response to our administrative appeal, in a letter dated 31-May-2016, the SEC then confirmed BOFI’s involvement in on-going enforcement proceedings that remain undisclosed as of this date. As we often say, a confirmed investigation is the highest standard we can achieve regarding undisclosed SEC activity at a public company. All we know is that as of 31-May-2016, Bofi Holding, Inc. was involved in an SEC investigation that somehow involved its conduct, transactions, and/or disclosures.

Below is an excerpt from the SEC letter of 31-May-2016 to us regarding BOFI –



UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C. 20549

Stop 9612

May 31, 2016

Probes Reporter  
P.O. Box 47331  
Plymouth, MN 55447

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They know it. Now you know it.®

Re: Appeal, Freedom of Information Act Request No. \_\_\_\_\_ designated on  
appeal as No. \_\_\_\_\_

Dear

This responds to your Freedom of Information Act (FOIA) appeal of the FOIA Officer’s denial of your May 5, 2016 FOIA request for certain investigative records concerning Bofi Holding, Inc. that the Commission has obtained or generated since May 4, 2014. By letter dated May 25, 2016, the FOIA Officer denied your request pursuant to FOIA Exemption (b)(7)(A). On May 27, 2016, you filed this appeal challenging the FOIA Officer’s invocation of Exemption 7(A). I have considered your appeal and it is denied.

I have determined that the FOIA Officer correctly asserted Exemption 7(A).<sup>1</sup> There is a two-step test to determine whether information is protected under Exemption 7(A), whether: (1) a law enforcement proceeding is pending or prospective, and (2) release of information about it could reasonably be expected to cause some articulable harm.<sup>2</sup> We have confirmed with staff that releasing the withheld information could reasonably be expected to interfere with on-going enforcement proceedings.<sup>3</sup>

<sup>1</sup> Exemption 7(A) authorizes the withholding of “records or information compiled for law enforcement purposes, but only to the extent that production of such law enforcement records or information \*\*\* could reasonably be expected to interfere with enforcement proceedings.” 5 U.S.C. § 552(b)(7)(A), 17 C.F.R. § 200.80(b)(7)(i).

## Final Thoughts:

It's taken us more than 16 years to perfect our methods and processes when it comes to the SEC and the FOIA. We've probably compiled and interpreted more SEC FOIA responses and related documents than anyone in the private sector. We also spent a lot of money in legal fees perfecting, compiling, and filing our appeals.

We've seen others make mistakes similar to those made by Mr. Berning. Many times people come to us (and often become clients) after trying, and failing, at making FOIA requests on their own. Expertise and experience is what our clients expect of us when it comes to the FOIA and SEC process and procedure. They don't expect it from sell-side analysts.

Still, Mr. Berning should be congratulated for going the extra mile to try to research a company on which he has a buy rating. Every trade requires a bid and an ask and he tried to live up to his role in the discourse. We only wish more sell-side analysts were willing to challenge the companies they cover when it comes to SEC exposures.

Other than what we assume were good-faith interpretative errors, we otherwise have no opinion on Mr. Berning or his research. We have never met nor spoken with him, nor have we ever met, spoken with, or been contacted by anyone at or representing BOFI regarding our research.

**Notes:** *New SEC investigative activity could theoretically begin or end after the date covered by the latest information in this report which would not be reflected here. All companies with undisclosed SEC investigations are maintained on our Watch List of companies with undisclosed SEC probes. The SEC did not disclose the details on those investigations referenced herein. All we know is that they somehow pertain to the conduct, transactions, and/or disclosures of the companies referenced. The SEC reminds us that its assertion of the law enforcement exemption should not be construed as an indication by the Commission or its staff that any violations of law have occurred with respect to any person, entity, or security.*

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Given the controversial nature of BOFI, we close with these additional thoughts –

Unless it impacts our analysis, we are indifferent to what any company we research makes, sells, or does. We are equally indifferent to who loves the company, who hates it, or why they feel that way. Always, we follow the facts where they lead us. Always, if we say a company has an undisclosed SEC probe we can back it up with a document in black & white on government letterhead provided to us in response to a Freedom of Information Act request we made on that same company. Always, we receive these records directly from the government using our own fully-documented efforts. We prohibit trading in shares of any companies on which we are conducting active research. No one connected with Probes Reporter has ever had securities positions of any kind in BOFI. No one paid us to research this company, produce this report, or influence the timing of the same.

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