

Client Alert

SEC Staff To Make Public Comment Letters and Company Responses

On June 24, 2004, the SEC staff announced that comment letters issued by the Division of Corporation Finance and the Division of Investment Management on disclosure filings with the SEC and the responses to these comment letters would be made publicly available after completion of the staff review process through the EDGAR database on the SEC website (www.sec.gov) and the SEC's public dissemination service.¹ Currently, these comment letters and responses are released only in response to specific Freedom of Information Act (FOIA) requests and only to the persons making the FOIA requests. Several information service providers have recently compiled databases of comment letters and responses obtained through FOIA requests and have made them available to subscribers for a fee. The SEC staff believes it is appropriate to expand the transparency of the SEC review and comment process so that the information contained in its comment letters and the responses is available to a broader audience, free of charge.

Timing

The SEC staff will begin releasing comment letters and responses relating to filings made after August 1, 2004 selected for staff review; the specific date that the documents will become publicly available will be announced in the near future. The staff stated that once the public release system is operational the documents will be released not less than 45 days after completion of the staff's review of the filing. The SEC staff will look to the filing that is the primary focus of the review for purposes of applying the August 1, 2004 commencement date (e.g., for a registration statement filed on or before August 1, 2004, an amendment filed after August 1 will not subject the comment letters and responses to the automatic public disclosure that would be applicable to a registration statement initially filed after August 1, 2004). However, comment letters and responses relating to filings made on or before August 1, 2004 will remain subject to public release pursuant to specific FOIA requests, as is currently the case.

Confidential Treatment

The SEC staff noted that pursuant to Rule 83 of the SEC's Rules of Practice, companies may request confidential treatment for portions of a written response to a staff comment letter. The company must submit both a complete paper version and a redacted electronic version excluding the confidential information, following the procedures set forth in Rule 83. The SEC staff will release only the redacted version of a response letter when a request for confidential treatment has been made. Persons seeking the public release of the portions of the response letter covered by a confidential treatment request must submit a FOIA request. The SEC staff also noted that consistent with current

¹ A copy of the SEC's June 24, 2004 press release is available on the SEC website at www.sec.gov/news/press/2004-89.htm.

practice, the staff will continue to question a Rule 83 request for confidential treatment that is on its face overly broad.

“Tandy” Letter

In connection with the public release of comment and response letters, the SEC staff will as a routine matter request that any company whose filing is reviewed include in its response letter a written representation that the company will not use the SEC’s comment process as a defense in any securities related litigation brought against the company, also known as a “Tandy” letter. In the past, the SEC staff has generally used “Tandy” letters when there is an SEC investigation or inquiry involving a company whose filing is being reviewed by the staff. However, given that inclusion of “Tandy” letters will become a matter of routine, the SEC staff has stated that neither the SEC staff’s request nor a company’s inclusion of the requested representation should be construed as confirming that there is or is not, in fact, an inquiry or investigation or other matter involving the company.

Observations

Although SEC comment letters and responses have been subject to public release pursuant to FOIA for many years, the recent move by information service providers to make available (for a fee) databases of these documents and the SEC staff’s decision to make the letters publicly available without need for a FOIA request will likely cause companies to take a more cautious and deliberate approach to responding to SEC comment letters. This will now also include consideration of whether to request confidential treatment for any of the information included in the responses. Seeking confidential treatment under Rule 83 may require additional lead-time, as a separate confidential treatment request letter identifying the portions as to which confidential treatment is requested and a redacted electronic version of the response letter must be prepared, and other Rule 83 procedures must be followed. The confidential treatment request must be submitted to the SEC staff in hard copy contemporaneously with the submission of the redacted response letter via EDGAR.

Companies can also seek to maintain the confidentiality of information by providing hard copies to the SEC staff supplementally and requesting the return of those materials pursuant to Rule 418(b) of the Securities Act and/or Rule 12b-4 of the Exchange Act upon completion of the SEC review process. The SEC staff will return the supplemental materials if: the request for return is made at the time the information is forwarded to the SEC staff; the return of the information is consistent with the protection of investors and the provisions of FOIA; and the information was not filed in electronic format. Companies may also seek to maintain the confidentiality of certain information by providing it to the SEC staff orally, if possible, although often the staff will request that such information be confirmed in writing.

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For Additional Information

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