

## Client Alert

# SEC Staff Comment Letters and Company Responses Publicly Available

On May 9, 2005, the SEC staff announced that beginning May 12, 2005, it will begin implementing its plan, announced on June 24, 2004, to make publicly available, free of charge, comment letters issued by the SEC's Division of Corporation Finance and Division of Investment Management on disclosure filings with the SEC and the responses to these comment letters after completion of the staff review process.<sup>1</sup> Beginning on May 12, 2005, the SEC staff will release, through the EDGAR database on the SEC website ([www.sec.gov](http://www.sec.gov)) and the SEC's public dissemination service, comment letters and responses relating to filings made after August 1, 2004 that are selected for staff review. The staff stated that the public dissemination process would begin with some of the oldest eligible documents, and, going forward, documents will be released not less than 45 days after completion of the staff's review of the filing. Comment letters and responses relating to filings made on or before August 1, 2004 will remain subject to public release pursuant to specific Freedom of Information Act (FOIA) requests.

### Confidential Treatment

In its June 24, 2004 press release, 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, at which time the staff will process the company's confidential treatment request pursuant to the FOIA and Rule 83. The SEC staff also noted that it would 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, as a routine matter, the SEC staff will 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" letter language 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

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<sup>1</sup> Copies of the SEC's May 9, 2005 and June 24, 2004 press releases are available on the SEC website at [www.sec.gov/news/press/2005-72.htm](http://www.sec.gov/news/press/2005-72.htm) and [www.sec.gov/news/press/2004-89.htm](http://www.sec.gov/news/press/2004-89.htm), respectively.

as confirming that there is or is not, in fact, an inquiry or investigation or other matter involving the company.

### Observations

SEC comment letters and responses which have been subject to public release pursuant to the FOIA for many years, more recently have been made more widely available (for a fee) by a number of information service providers and now will be routinely available to the public without need for a FOIA request. Accordingly, companies need to consider whether to request confidential treatment for any of the information included in their 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. Note that unlike the confidential treatment request procedure for information to be filed with the SEC as exhibits, the Rule 83 procedure does not require companies to provide an extensive analysis of the justification for the confidential treatment at the time of the filing, only if and when a FOIA request is made.

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 the 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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