

**SEC TO MAKE PUBLICLY AVAILABLE COMMENT LETTERS
AND COMPANY RESPONSES**

The United States Securities and Exchange Commission (the “SEC”) announced recently that comment letters and filer responses relating to disclosure filings reviewed by the SEC’s Division of Corporation Finance and the Division of Investment Management will be made publicly available through the SEC’s Public Dissemination Service and on its website at www.sec.gov via EDGAR.¹

Current Policy with Respect to Comment and Response Letters

Currently, the SEC’s policy is to release comment letters and filer responses only in response to a Freedom of Information Act (“FOIA”) request after the SEC has completed its review, and only to the person making such FOIA request. According to the SEC, in recent months, an increasing number of comment letters and filer responses have been released through the FOIA process. The SEC believes that “it is appropriate to expand the transparency of the comment process so that this information is available to a broader audience, free of charge.”

Timing

The SEC’s new policy of releasing comment and response letters will apply to disclosure filings made after August 1, 2004 that are selected for review. Such correspondence will be made publicly available not less than 45 days after the SEC’s completion of its review of a filing. In applying the August 1, 2004 commencement date, the SEC will look to the filing that is the primary focus of the review. The SEC provided the following examples:

- If the SEC selects for review a Form 10-K filed prior to August 1, 2004, and in connection with such inquiry the SEC also reviews a Form 10-Q or a Form 8-K filed after August 1, 2004, the determination of whether to release any comment and response letters relating to the Form 10-K filing will be based on the filing date of the Form 10-K; and

¹ SEC Release No. 24-89, dated June 24, 2004, entitled “SEC Staff to Publicly Release Comment Letters and Responses.” Disclosure filings submitted to the SEC are sometimes selected for review. In such cases, the SEC’s Division of Corporation Finance and the Division of Investment Management may provide filers with comments (in the form of a comment letter) where they believe the filing could be improved or enhanced. Such comment letters set forth the SEC’s position on a particular filing only, are limited to the specific facts of the filing and do not apply to any other filings. Such comment letters do not constitute an official expression of the SEC’s views.

- If the SEC selects for review a registration statement filed prior to August 1, 2004, but an amendment is filed after August 1, 2004, the determination will be made on the basis of the earlier filing.

Confidential Treatment

While confidential treatment for SEC comment letters will be unavailable, the SEC has stated that, pursuant to Rule 83 of the SEC's Rules of Practice,² a filer may request confidential treatment for some portions of its response letters (and any supplemental information submitted therewith). As a result of the SEC's new policy of releasing comment and response letters, it is now more important than ever for filers to consider seeking confidential treatment for portions of their response letters. Rule 83 requires a filer seeking confidential treatment for portions of a response letter (and any supplemental information submitted therewith) to take the following actions:

- The filer must file with the SEC its response letter (and any supplemental information submitted therewith) electronically via EDGAR; however, all information for which confidential treatment is requested should be redacted;
- The filer must also submit to the SEC examiner conducting the review (i) a paper copy of the full, unredacted response letter (and any supplemental information submitted therewith)³ and (ii) a separate written request for confidential treatment specifying the information in the response letter (and any supplemental information submitted therewith) as to which confidential treatment is requested;⁴ and
- The filer must send a copy of the written request for confidential treatment (but not the underlying response letter (or any supplemental information submitted therewith)) by mail to the Office of Freedom of Information and Privacy Act Operations (the "FOIA Office"). The legend "FOIA Confidential Treatment Request" must appear clearly and prominently on the top of the first page, and the written request must contain the name, address and telephone number of the person requesting confidential treatment.⁵

² 17 C.F.R. 200.83.

³ Each page, or segregable portion of each page, of the full, unredacted paper copy must be clearly marked with the words "Confidential Treatment Requested by [Name]" and an identifying number and code, such as a Bates-stamped number.

⁴ In specifying the information as to which confidential treatment is requested, the filer must refer to the response letter (and any supplemental information submitted therewith) by identifying number and code.

⁵ Such information is required to be included so that the FOIA Office has a contact on file in the event that there is a subsequent request for disclosure of the confidential material, as discussed below.

A confidential treatment request will expire ten years from the date the FOIA Office receives it, unless the FOIA Office receives a renewal before the expiration of such period.⁶

The SEC stated that, while it will release comment and response letters as a matter of course, it currently intends to release only the redacted version of response letters where there has been a Rule 83 request for confidential treatment.

However, pursuant to Rule 83, no determination on a request for confidential treatment will be made until the FOIA Office receives a request for disclosure of the confidential material.⁷ In the event that a request for disclosure is made, the FOIA Office shall so inform the person requesting confidential treatment and require that substantiation of the request for confidential treatment be submitted.⁸ Any confidential treatment request and substantiation thereof shall be nonpublic.

The SEC reminded filers that there must be an appropriate basis for a request for confidential treatment, and that the SEC intends to continue its practice of questioning requests for confidential treatment that are on their face overly broad. In recent years, the SEC has taken an increasingly narrow view with respect to the approval of confidentiality requests. Therefore, in light of the risk that confidential information may ultimately be released pursuant to a FOIA request for disclosure, and since there is no mechanism under Rule 83 for the “retrieval” of confidential information submitted to the SEC, filers should be careful not to disclose unnecessary or sensitive information in their response letters. Where information is *highly* sensitive, a filer may wish to consider either having an informal discussion with the SEC or submitting such information supplementally, via the process described directly below.

Alternate Means of Maintaining the Confidentiality of Information Submitted to the SEC

Another method of maintaining the confidentiality of information submitted to the SEC is for a filer to request that the SEC return supplemental materials pursuant to Rule 418(b) of the Securities Act of 1933, as amended, or Rule 12b-4 of the Securities Exchange Act of 1934, as amended. These rules relate to supplemental information provided to the SEC in response to the SEC’s request therefor in connection with its review of a filing. Supplemental information

⁶ A renewal request will likewise expire ten years from the date the FOIA Office receives it, unless the FOIA Office receives another timely renewal request.

⁷ Any person seeking the release of confidential information contained in a response letter (and any supplemental information submitted therewith) must submit a FOIA request for disclosure.

⁸ Substantiation of the request for confidential treatment must be made within ten calendar days of the date the confidential treatment requester is notified by the FOIA Office of the request for disclosure. Failure to do so may be deemed a waiver of the confidential treatment request and the confidential treatment requester’s right to appeal a decision denying confidential treatment. Both the confidential treatment requester and the FOIA requester may appeal an adverse decision by the FOIA Office to the SEC’s General Counsel.

requested by the SEC shall not be required to be filed with or deemed part of a registration statement or a periodic or other report, and shall be returned to the filer upon request, provided that:

- Such request is made at the time such information is furnished to the SEC;
- The return of such information is consistent with the protection of investors;
- The return of such information is consistent with the provisions of FOIA; and
- The information was not filed in electronic format.

A filer that submits requested information in supplemental form, rather than including such information (or summaries thereof) directly in its response letter to the SEC, may be able to preserve the confidentiality of such information by having the information returned to the filer upon the completion of the SEC's review.

Addition of "Tandy" Language to All Initial Comments

The SEC stated that it may ask filers that receive comment letters to represent in writing that they will not use the SEC's comment process as a defense in any securities-related litigation against them.⁹ Since the SEC will be making all comment and response letters publicly available, either in response to a FOIA request or pursuant to the SEC's new disclosure policy, the SEC will now ask all filers whose filings are reviewed to make such representation. However, the SEC stated that the request and representation should not be construed as confirming that there is or is not, in fact, an inquiry or investigation or other matter involving the filer.

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If you have any questions concerning the foregoing or would like additional information, please call John S. D'Alimonte at 212-728-8212, Steven J. Gartner at 212-728-8222, William H. Gump at 212-728-8285, Russell S. Albanese at 212-728-8747 or the attorney with whom you regularly work.

⁹ Such request is known as a "Tandy" letter.

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