

## SECURITIES ALERT

### SEC BEGINS PUBLICLY RELEASING STAFF COMMENT LETTERS AND FILER RESPONSES ON EDGAR



On May 12, 2005, the staff of the Securities and Exchange Commission (the SEC) began publicly releasing staff comment letters and filer response letters relating to disclosure filings made after August 1, 2004, and reviewed by the Division of Corporation Finance and the Division of Investment Management. The SEC indicated that it commenced the process with some of the oldest eligible filings, but as it continues, letters will be released no earlier than 45 days after the review of the disclosure filing is complete.

Where the SEC comments on more than one filing of a company in a comment letter, the SEC will look to the earliest filing reviewed in applying the August 1, 2004, date. Where the SEC comments on an amendment to a filing, the SEC will look to the filing that is being amended with respect to applying the August 1, 2004, date.

### FINDING COMMENT AND RESPONSE LETTERS

The SEC is making staff comment letters and filer responses relating to disclosure filings made after August 1, 2004, available through the SEC's EDGAR system at [www.sec.gov](http://www.sec.gov). SEC comment letters are displayed on EDGAR, grouped with issuer filings, under the header tag "letter." Comment response letters are filed electronically and available under the EDGAR header tag "correspondence." With the Sarbanes-Oxley Act requirement that the SEC review the disclosures of every company with listed securities at least once every three years, the volume of available comment and response letters should grow quickly.

Prior to its public release of staff comment letters and filer responses, the SEC released such materials only in response to Freedom of Information Act (FOIA) requests. Filings made on or before August 1, 2004, remain subject to FOIA requests. The SEC's decision to make comment and response letters publicly available was at least partly driven by a surge in FOIA requests, including requests by a service provider named GSI Online, which in 2003 began making available to subscribers of its LIVEDGAR database SEC staff comment letters and filer responses that it obtained through massive FOIA requests. GSI Online states that its database

contains more than 6,700 letters between the SEC and more than 1,500 companies, and that its goal is to include all documents related to significant SEC staff reviews for periodic reports such as 10-Ks and transactional filings such as registrations dating back to January 2002, and all available documents related to the SEC's 2002 Fortune 500 review project.

### **REQUESTING CONFIDENTIAL TREATMENT OF INFORMATION IN COMMENT RESPONSE LETTERS**

A company may want to keep certain competitive or proprietary information contained in a comment response letter confidential. Rule 83 under FOIA is the SEC's rule that allows filers to request confidential treatment for portions of a written response to a staff comment letter. The SEC generally will not accept blanket requests for confidential treatment, so a company should carefully consider what information should be kept confidential and make its request narrow. Under Rule 83, to request confidential treatment of information in a comment response letter, a filer must follow the following procedure:

- File on EDGAR the comment response letter with the information for which confidential treatment is requested redacted. The filer must also mark each page or portion of each page with the words "Confidential Treatment Request by [name]" and an identifying number and code (e.g., a Bates-stamped number).
- Submit to the SEC staff, on paper, a letter requesting confidential treatment under Rule 83, along with a complete copy of the comment response letter with no redactions, which together specifically identify the sections or provisions of the materials for which confidential treatment is requested.
- Send a copy of the letter requesting confidential treatment, but not the response letter, to the SEC's Office of Freedom of Information and Privacy Act Operations (the OFIPAO), with the legend "FOIA Confidential Treatment Request" clearly and prominently appearing on the top of the first page of the request.

Where there is a properly submitted confidential treatment request, the SEC will make only the redacted version of the response letter available to the public, with the redacted information remaining subject to a FOIA request. The SEC's decision regarding whether redacted information is in fact confidential will be made at the time of any FOIA request for such information and not at the time of the initial request for confidential treatment. Once a company has been notified that a FOIA request has been made, the company must set forth its arguments to the SEC substantiating the confidential treatment request. Note, however, that the SEC has stated that it will continue to question a request for confidential treatment under Rule 83 that is on its face overly broad.

A confidential treatment request automatically expires 10 years after the request is made, unless the OFIPAO receives a renewal request before the original request expires. A properly made renewal request expires 10 years after it is made, unless another renewal request is received by the OFIPAO before the existing renewal request expires.

Rule 83 notably covers only information not required to be filed under the Securities Act of 1933 (the Securities Act) or the Securities Exchange Act of 1934 (the Exchange Act), which includes information provided to the SEC with respect to an examination, inspection or investigation by the SEC. Rules 406 and 24b-2 (and not Rule 83) set forth the requirements for obtaining confidential treatment of information in filings made under the Securities Act or Exchange Act, respectively.

## **MAINTAINING CONFIDENTIALITY OF SUPPLEMENTAL MATERIALS**

Another means of maintaining the confidentiality of information provided supplementally to the SEC in response to a comment letter is to request the return of such information. Rules 418(b) and 12b-4 under the Securities Act and the Exchange Act, respectively, provide that the SEC will return, upon request, any supplemental information filed by a company or its counsel provided: (i) the request is made at the time of submission of the supplemental material, (ii) the return of the information is consistent with protection of investors, (iii) the return of the information is consistent with the provisions of the FOIA and (iv) the information was not filed in electronic format (i.e., by EDGAR).

## **ADDITION OF “TANDY” LANGUAGE TO COMMENT RESPONSE LETTERS**

The SEC has indicated that since it will be making all comment and response letters publicly available, the SEC will ask all companies whose filings are reviewed for a representation that they not use the SEC’s comment process as a defense in any securities-related litigation against them. This representation is known as a “Tandy” letter, which is the name of the first company that was asked to provide such representation. Prior to the SEC’s public release of comment and response letters, “Tandy” letter representations were generally requested only of companies with a pending registration statement that were the subject of an inquiry into possible securities law violations. The SEC would let such registration statements become effective even though a company was the subject of an inquiry, so long as the company provided the representation. The SEC has noted that its request and a company’s representation should not be construed as confirming that there is or is not, in fact, an inquiry or investigation or other matter involving the company.

## **WHAT TO DO IN RESPONSE TO A COMMENT LETTER**

In light of the SEC’s decision to make comment and response letters publicly available, companies should implement the following practices:

- Carefully consider and draft responses to SEC comments with the view that responses could potentially be reviewed by plaintiffs’ lawyers in building a case against the company.
- In preparing response letters, take advantage of access to available comment and response letters, which, while having no precedential value, provide insight into the SEC staff’s current thinking on certain issues.

- Seek confidential treatment, when appropriate, with the knowledge that the redacted portions of a response letter can still be publicly obtained through a FOIA request if the confidential treatment request cannot be substantiated.
- Consider providing more data supplementally rather than in the body of the response letter, and request the return of supplementally provided materials.
- Consider discussing particularly sensitive issues on the phone with the SEC, rather than in writing.

## CONTACT INFORMATION

If you have any questions or would like to learn more about this topic, please contact the partner who normally represents you, or:

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