

SEC to Publicly Release Comment Letters and Responses

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Executive Summary

In a recent press release, the Securities and Exchange Commission ("SEC") announced plans to begin publicly releasing comment letters and filer responses relating to disclosure filings reviewed by its Divisions of Corporation Finance and Investment Management. These comment and response letters are currently only available upon submission of a Freedom of Information Act (FOIA) request or through services that make letters obtained through FOIA available to paid subscribers. The SEC will begin releasing such information with respect to disclosure filings made after August 1, 2004 that are selected for review, although no correspondence will be posted until at least 45 days after the SEC's review of a particular filing is completed.

Background

Some disclosure filings made by public companies with the SEC under the Securities Act of 1933, the Securities Exchange Act of 1934, the Trust Indenture Act of 1939 or the Investment Company Act of 1940 are selected for review by SEC staff. In certain cases, the Divisions of Corporation Finance and Investment

Management provide filers with comments on filings and request company responses. Access to this correspondence is currently only available to third parties in response to a FOIA request. Under the new regime, the SEC will begin releasing comment and response letters as a matter of course, without a FOIA request.

Confidential Treatment

The SEC, however, will only release the redacted version of response letters where there is a Rule 83 request for confidential treatment. Rule 83 allows filers to request confidential treatment for some portions of their written response to an SEC staff comment letter, including supplemental materials. Rule 83 requires filers to submit two separate documents: a redacted response to the comment letter without the confidential information via EDGAR and a separate paper document with no redactions, which includes the confidential information. To obtain access to the complete unredacted response letter, a person will need to make a FOIA request and seek determination that the filer is not entitled to confidential treatment of the redacted materials.¹

1. Rule 83 confidential treatment requests relate to information which is not required to be disclosed under either the Securities Act of 1933 or the Securities Exchange Act of 1934. Securities Act Rule 406 and Exchange Act Rule 24b-2 set forth the exclusive means of obtaining confidential treatment of information required to be filed under such Acts, including material contracts that contain competitive business information.

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continued

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The SEC will process requests for confidential treatment of information pursuant to FOIA and Rule 83. The press release notes that consistent with current practice, the SEC will question a request for confidential treatment that is overly broad, and reminds companies and their counsel that there must be an appropriate basis for a request for confidential treatment. Confidential treatment is generally available under Rule 83 if the response or supplemental material contains market sensitive or competitive information.

"Tandy" Language

The SEC also announced that it will ask all companies whose filings are reviewed to submit what is known as a "*Tandy*" letter, in which the filer represents that it will not use the SEC's comment process as a defense in any securities related litigation. Currently, this language is typically requested where a matter relating to the company is actually under inquiry or investigation by the SEC. The press release

states that such a request 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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This document is intended as an informational notice and does not constitute legal advice. If you have any questions or would like to discuss a particular situation, you should contact your usual Wiggin and Dana attorney or one of the following attorneys:

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