SEC Staff Comment Letters and Filer Responses Available on EDGAR

On May 12, 2005, the SEC began publicly releasing, through EDGAR, staff comment and filer response letters relating to filings made after August 1, 2004. The SEC started posting the oldest eligible filings; in time, the letters will be released no earlier than 45 days after review of the filing is complete. (A review will be regarded as complete upon resolution of all outstanding issues even if the filer has agreed to make changes in a future filing, but has not yet done so.)

Staff comment and filer response letters relating to amendments to a document filed prior to August 1, 2004 will not be publicly released absent a request under the Freedom of Information Act (“FOIA”).

The new policy of posting comment and response letters applies to filings made 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, reviewed by the SEC’s Division of Corporation Finance or Division of Investment Management.

Finding Comment & Response Letters on EDGAR

Comment and response letters have been assigned one of two form types on EDGAR: “upload” for SEC staff comment letters and “corresp” for company (filer) response letters.

To access letters relating to a particular company, (i) go to the main EDGAR database page, http://www.sec.gov/edgar/searchedgar/webusers.htm, (ii) click on “Companies & Other Filers”, (iii) search for the company’s name, and (iv) enter in the “Form Type” search field the term “upload” or “corresp”, as applicable.

To search for letters across filers, (i) go to the main EDGAR database page, (ii) click on “Historical EDGAR Archives” and (iii) enter in the “EDGAR Search” field, the term “upload” or “corresp”, as applicable.

Confidential Treatment Requests

More than ever, companies should give careful consideration to their responses to SEC comments, and, where appropriate, request that any sensitive information whose disclosure might result in competitive harm be kept confidential.

While companies are not permitted to seek confidential treatment of SEC staff comment letters, the SEC stated in its June 2004 press release announcing the new public access policy1 that companies may request confidential treatment of appropriate portions of their response letters pursuant to Rule 83 of FOIA.2

Under Rule 83, a company should submit to the SEC staff examiner:

(i) a paper copy of its response letter that excludes the confidential information (a “redacted” version);
(ii) a paper copy of the full unredacted version, marking each page with the words “Confidential Treatment Requested by [name]” and including at the top of the first page the legend, “FOIA Confidential Treatment Request”; and
(iii) a separate letter stating that confidential treatment is being requested pursuant to Rule 83 and specifying the portions for which confidential treatment is requested.

Where there is a Rule 83 request for confidential treatment, the SEC plans to make only the redacted versions of response letters available to the public. However, requests by the public for access to those portions of a response letter for which confidential treatment was requested may still be made under FOIA. (Internal SEC staff correspondence concerning whether to raise comments, and how to deal with comments, are not subject to FOIA requests.)

Companies should be aware that, consistent with current SEC practice, there must be an appropriate basis for confidential treatment and blanket requests for confidential treatment or requests that are overly broad will be questioned by the SEC staff.

Routine “Tandy” Letters

As part of its public release of comment and response letters, the SEC will routinely ask companies whose filings are chosen for review to make a representation in writing that they will not use the staff comment process as a defense in securities-related litigation.

Previously, it was common for the SEC to selectively request such a representation, known as a “Tandy” letter (the term derived from the name of the company involved the first time the process was used), from a company in circumstances where there was a possible or pending enforcement action against the company. The SEC noted in its June 24, 2004 press release that neither the request by the SEC nor the representation by the company should be construed as confirming that there is or is not an inquiry or investigation involving the filer.