

# Public Company Advisory

Recent developments governing public companies and their officers, directors and investors

## Practical Suggestions for Dealing with Public Availability of SEC Comment Letters

The SEC recently initiated its previously announced program to make staff comment letters relating to filings under the Securities Act of 1933 and the Securities Exchange Act of 1934, as well as company letters responding to these comment letters, publicly available on its website. The SEC is now releasing letters related to SEC-reviewed registration statements and reports filed after August 1, 2004. In the future, the SEC will release letters not earlier than 45 days after the staff has completed its review.

SEC comment letters and company responses have potentially been available in the past, but only pursuant to a request under the Freedom of Information Act. As a result, these letters were not readily available to the public. Although the SEC has been releasing comment letters and company responses as a result of ongoing FOIA requests by Global Securities Information, Inc. since December 2003, availability has been limited to subscribers to GSI's LIVEDGAR service. The SEC will now make these letters freely available, with the related filings, on its website.

This Alert summarizes practical steps that companies can take to protect the confidentiality of information submitted to the SEC in response letters and supplemental materials in connection with staff review of the company's filings.

### SEC Confidentiality Procedures – Overview

Confidentiality has been an increasingly important consideration since GSI began making large-scale FOIA requests for SEC comment letters and company responses in 2003. SEC rules provide several procedures for companies to obtain confidential treatment of materials related to filings under the Securities Act and Securities Exchange Act. The first procedure applies only to materials that must be filed with the SEC under these Acts, such as material contracts that are exhibits to SEC registration statements and reports. Confidential treatment requests for materials required to be filed are governed by Rule 406 under the Securities Act and Rule 24b-2 under the Securities Exchange Act.

In addition, there are two separate procedures by which companies may seek confidential treatment of responses to SEC comment letters and related supplemental materials, which are not "filed." Note that comment letters issued by the SEC staff cannot be protected by confidential treatment requests.

The first procedure is governed by SEC Rule 83 under the Freedom of Information Act. Companies may seek confidential treatment under Rule 83 for both their responses to SEC comment letters and for any materials submitted in response to SEC staff requests for supplemental information in connection with the staff's review. Rule 83 requires a

company to comply with a number of procedural requirements when it submits its response letter and/or supplemental materials to the SEC, but does not require the company to substantiate the request until a third party seeks release of the company's materials under FOIA.

The second procedure for obtaining confidential treatment of non-filed materials is available only for supplemental materials submitted by companies to the SEC staff, and requires the company to submit the supplemental materials in paper form with an appropriate request that the SEC staff return the materials when its review is completed. Although this procedure is likely to result in more predictable confidential treatment of the supplemental materials because the materials are physically returned to the company at the end of the staff's review, it is subject to certain limitations and is not available for information contained in company response letters.

## **Obtaining Confidential Treatment**

### ***Rule 83***

A company requesting confidential treatment of information submitted to the SEC under Rule 83 must comply with the procedural requirements of the rule when it first submits its response letter (and any related supplemental materials) to the SEC. It is very important to note that failure to comply with Rule 83 is likely to result in release of the materials by the SEC without any further opportunity for the company to obtain confidential treatment.

Unlike requests for confidential treatment of materials "filed" with the SEC, companies are not required to substantiate their confidential treatment requests until the SEC receives a request for release of the materials under FOIA. This differs from SEC procedures for filed materials under Rule 406 and Rule 24b-2, which provide for substantive review of the company's confidential treatment request by the SEC staff when the company submits the request, and require the company to file any material for which the staff does not grant confidential treatment upon completion of the staff's review of the company's confidential treatment request.

The SEC staff, however, will not accept a blanket request for confidential treatment under Rule 83. A broad statement in a response letter that "the company hereby requests confidential treatment of the contents of this letter [and/or the supplemental materials] pursuant to Rule 83" will therefore not protect the confidentiality of the information and is likely to result in the staff requiring the company to resubmit the letter and/or materials with a proper Rule 83 request. Requests for confidential treatment should therefore be narrow in scope – for example, limited to a specific response or selected sensitive information within a specific response – and evaluated using the same standards that apply to filed materials. Historically, the SEC staff has considered whether or not public release of information would cause competitive harm to the company to be one of the principal factors when reviewing confidential treatment requests.

In general, Rule 83 requires the following:

1. The company should submit response letters and any supplemental information electronically (using the EDGAR "correspondence" tag), but information for which the company is requesting confidential

information should be redacted. The company should clearly mark each page or portion of each page with the words “Confidential Treatment Request by [company name]” and an identifying number and code (for example, a sequential Bates-stamped number).

2. At the same time, the company should submit to the SEC staff examiner:
  - a paper copy of the company’s response letter and/or supplemental materials, without any redactions, and
  - a separate written request for confidential treatment, which should (i) clearly indicate that the company is requesting confidential treatment under Rule 83 and (ii) specify the portions of the response letter and/or supplemental materials for which confidential treatment is requested, using the relevant identifying numbers and codes.
3. Simultaneously, the company should also send a copy of its request for confidential treatment to the SEC’s Office of Freedom of Information and Privacy Act Operations at the address specified in Rule 83(c)(3) (currently: Operations Center, 6432 General Green Way, Alexandria, VA 22312–2413). The legend “FOIA Confidential Treatment Request” should clearly and prominently appear at the top of the first page of the request letter. This submission should not include any of the information for which the company has requested confidential treatment. It is important to note the following:
  - The company’s letter must also include the name, address and telephone number of the person requesting confidential treatment so that the Office of Freedom of Information and Privacy Act Operations will be able to contact the company if the SEC receives a FOIA request for disclosure of the materials for which the company has requested confidential treatment.
  - The company should update this contact information if there is any change, in order to ensure that the company receives timely notice of any FOIA requests for release of the information. Failure to do so is likely to result in public release of the information without the company having an opportunity to substantiate its request for confidential treatment.
  - The request for confidential treatment expires automatically 10 years after the initial request unless the company submits a renewal request to the Office of Freedom of Information and Privacy Act Operations *before the initial request expires*.

### ***Supplemental Materials Submitted in Paper Form***

As an alternative to electronic submission of supplemental materials for which a company will seek confidential treatment, in appropriate cases the company may submit the materials to the SEC staff in paper form, with a request that the staff return the materials when its review is complete. Companies seeking confidential treatment for supplemental materials provided to the staff should request return of such materials

under Securities Act Rule 418(b) or Securities Exchange Act Rule 12b-4, depending on the Act under which the registration statement or report subject to review was filed. The company should submit any supplemental materials for which it is not seeking confidential treatment electronically, together with the company's response letter, as required by SEC rules. The SEC staff will return the supplemental materials submitted in paper if the following conditions are satisfied:

1. the request is made at the time the materials are furnished to the staff;
2. return of the information is consistent with protection of investors and with FOIA; and
3. the company did not submit the information electronically (via EDGAR).

In addition to materials specifically requested by the SEC staff, companies may wish to consider providing information that might otherwise be included in the text of a response letter separately as supplemental materials in paper form, where appropriate. This may avoid possibilities for inadvertent or unintended disclosure later as a result of either an adverse determination by the SEC staff or procedural problems under Rule 83. The practical usefulness of this approach may be limited, however, because the staff has in recent years been increasingly unwilling to accept paper submissions that relate to a staff review.

### **Other Confidentiality Considerations**

Where possible, companies may wish to consider responding orally to SEC comments or questions, since purely oral communications are not subject to subsequent FOIA requests. However, the staff is often unwilling to engage in detailed oral discussions before the company submits a written response. In these cases, companies must choose between submitting (i) a detailed written response, and relying on Rule 83 to protect any confidential information contained in the written response or (ii) a less-detailed written response that will be supplemented by a more detailed oral response that avoids potential future disclosure if the company were not able to substantiate a confidential treatment request for a more detailed written response. Companies considering oral communications as an alternative to written responses should consider several factors when weighing these alternatives:

1. Submitting a less-detailed written response creates a risk that the staff will find the response weak and either fail to give the company a full opportunity for a subsequent oral response, or fail to be persuaded by the oral arguments in light of the "weaker" written response.
2. If the staff accepts the company's oral arguments, it is likely to require the company to put them into written form and submit them electronically, thereby nullifying the whole strategy after a company has tried to reduce the amount of confidential information in its initial written response.
3. If a company chooses to use oral communications as part of its response to staff comments, it exposes itself to the risk that a lower-level staff member may present the company's position less effectively to senior

staff members than a carefully worded, fully-developed written response letter. This may delay or even jeopardize a successful outcome in the case of comments that require review by senior staff members.

When responding to staff comments, companies should be careful to avoid making statements that might be viewed as conceding that prior disclosure may have been materially incomplete or incorrect. This is especially true where staff comments relate to the company's selection or application of accounting principles or policies. Company response letters should be carefully reviewed to reduce the possibility that plaintiffs or others could use statements in the company's response to support claims that its SEC filings did not comply with applicable disclosure requirements.

Expanded broad public access to SEC comment letters and responses also emphasizes the importance of considering existing confidentiality arrangements with third parties before a company discloses information in a response letter or provides supplemental information to the staff. Although confidentiality agreements often include exceptions for disclosures that are "required by law," these provisions vary greatly in their coverage. In some cases companies may need to seek waivers from third parties, who may be reluctant to consent to the release of information they consider confidential.

The securities and corporate finance attorneys at Goodwin Procter keep current on these matters. We are available to help advise investment banks, public companies and their officers and directors on specific issues as well as to provide educational presentations to help them understand and meet their responsibilities under both current and proposed rules and regulations. Please contact your regular Goodwin Procter attorney or any of the individuals listed below if we may be of assistance.

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