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SEC to Make Registration Statement Comment Letters and Responses Publicly Available

How to protect your proprietary and confidential information

The Securities and Exchange Commission has announced that it will begin making SEC comment letters and company responses readily available to the public, free of charge. This action emphasizes the need for companies that are public or intending to become public to understand how best to protect proprietary or confidential information that may be contained in this correspondence.

Comment letters result from review by the SEC staff of securities registration statements filed by private companies which are intending to become public or by public companies or of periodic SEC filings by public companies. While not all filings are reviewed, review has recently become more frequent. In general, the SEC will write to a company with comments on a filing which is being reviewed, and the registrant company will respond by a letter. These responses are fact-specific and detailed, and in order to address SEC concerns, may discuss information which is proprietary or confidential.

Traditionally, the SEC has generally not publicly released these comment letter or company responses. The only way for an interested party to obtain these documents had been to file an official request under the Freedom of Information Act (FOIA). These FOIA requests had been infrequent until recently when a commercial on-line service began making hundreds of FOIA requests to provide content to its paying subscribers. In light of this development, the SEC decided that the best way to level the playing field was to make this information more readily available.

Starting August 1, 2004, comment letters and responses regarding filings made after that date will be available on-line at no charge through the SEC's EDGAR database. Letters and responses will be posted no earlier than 45 days after the completion of the SEC staff's review. As a result, these letters and responses will become very easily accessible by competitors as well as opposing parties in shareholder and other lawsuits or disputes.

So what can a company do to limit access to the correspondence? The SEC comments themselves cannot be kept confidential. Fortunately, FOIA rules permit a company to request confidential treatment of portions of its responses for reasons of personal privacy or business confidentiality. The SEC has said that it strongly discourages and may not honor "blanket requests" for confidential treatment.

If confidential treatment is requested, a redacted version of the response letter would appear on EDGAR. Anyone seeking to view the unredacted version of this response would need to file a FOIA request. When a FOIA request is made to examine the unredacted text, the company must substantiate the necessity of confidential treatment.

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To request confidentiality, a filer must comply with the highly technical requirements set forth in the FOIA rules. Failure to comply fully may result in denial of the request or in the inadvertent disclosure of the information in question.

As an alternative to a confidential treatment request, a company in appropriate circumstances should consider submitting supplemental documentation in accordance with procedures that allow the information to be returned upon completion of the SEC's review. Another alternative in some circumstances may be discussing responses with the SEC staff telephonically or at a meeting.

The SEC will require companies whose filings are reviewed to submit a letter indicating that they will not use the comment process in their defense to any litigation stemming from the issuance and regulation of securities. Ready, public availability of SEC comments and responses, to competitors, to opposing parties in lawsuits and others, must be kept in mind by companies that are considering public offerings and by companies that are involved in a comment process.

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To discuss these changes to the SEC's policy regarding the disclosure of staff comment letters and filer responses or for assistance in preparing confidential treatment requests, please contact your lawyer at Sullivan & Worcester LLP or the lawyer listed below.

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