

Corporate and Securities Law Developments Newsletter

JULY 9, 2004

SEC Staff to Publicly Release Comment Letters and Company Responses

The SEC's Divisions of Corporation Finance and Investment Management recently announced plans to publicly release the comment letters they provide as part of their review of disclosure filings and those portions of each company's response letters for which confidential treatment is not sought. While these comment and response letters are currently available to persons who make a Freedom of Information Act (FOIA) request (including subscription services that make letters obtained through FOIA available to their subscribers), the SEC's action will make these materials much more broadly available.

According to a press release issued by the SEC on June 24, 2004, the SEC staff will begin publicly releasing these materials via the SEC's website commencing with filings made after August 1, 2004 that are selected for review. Given the SEC's announced timing, filings currently under review or selected for review on or before July 31, 2004 should not be affected by the SEC's new policy (although this correspondence will continue to be available through the existing FOIA request process). The SEC also announced that no correspondence will be posted until at least 45 days after the SEC's review of a particular filing is completed.

Companies Can Seek Confidential Treatment of Some Responses

Rule 83 provides a procedure by which filers can request confidential treatment for portions of their written response to an SEC staff comment, including supplemental materials submitted in response to SEC comments. Rule 83 requires the filer to submit both a complete copy of the response letter (including the confidential informa-

tion) by paper submission to the staff, as well as a redacted copy of the response letter (excluding the confidential information) as non-public correspondence by EDGAR. The SEC's release states that, consistent with its current practice, it will continue to question overly broad requests for confidential treatment. In general, confidential treatment is available under Rule 83 if the response or supplemental material contains market-sensitive or competitive information.

It is not possible to obtain confidential treatment for any portion of the SEC's comment letter. Therefore, no matter how careful a company is in drafting its response letters, the company will need to consider the investor relations issues resulting from the fact that the nature of the SEC's inquiries will eventually be disclosed to the public.

The SEC only plans to make publicly available under its new policy the redacted copy of a company's response letters. A person who seeks access to the complete, unredacted response letter will need to make a FOIA request and seek a determination that the company is not entitled to confidential treatment of the redacted material.

It should be noted that Rule 83 confidential treatment requests relate to confidential treatment of information not required to be filed under the Securities Act or the Exchange Act. Securities Act Rule 406 and Exchange Act Rule 24b-2 set forth the exclusive means for obtaining confidential treatment of information required to be filed under the Securities Act or the Exchange Act, including material contracts that contain competitive business information such as pricing terms, technical specifications, and milestone payments.

WILMER CUTLER PICKERING HALE AND DORR LLP

All Companies Receiving Comments Will Be Requested to Provide a “Tandy” Letter

The SEC announcement stated that the SEC will request all companies, as part of their response letters, to represent that they will not use the SEC’s comment process as a defense in any securities related litigation against them. Currently, this language, which is referred to as a “Tandy” letter, is generally only requested where a matter relating to the company is actually under inquiry or investigation by the SEC’s Division of Enforcement. Although the language may be changed in the future, based on previous comment letters issued by the SEC staff requesting “Tandy” letters, we expect the substance of the representations for a registration statement under full review to be as follows:

“The disclosure in the filing is the responsibility of the registrant. The registrant acknowledges that staff comment or changes in response to staff comment in the proposed disclosure in the registration statement may not be asserted as a defense in any proceeding which may be brought by any person with respect to this matter. The registrant also represents to the Commission that should the Commission or the staff, acting pursuant to delegated authority, declare the filing effective, it does not foreclose the Commission from taking any action with respect to the filing and the registrant represents that it will not assert this action as a defense in any proceeding initiated by the Commission or any person under the federal securities laws of the United States.

The registrant further acknowledges that the action of the Commission or the staff, acting pursuant to delegated authority, in declaring the filing effective does not relieve the registrant from its full responsibility for the adequacy and accuracy of the disclosures in the filing.”

The SEC’s press release states that its request for a “Tandy” letter should not be construed as confirming that there is or is not, in fact, an inquiry or investigation or other matter involving the company.

For more information, please call your WCPHD contact or any of our lawyers below:

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| Meredith B. Cross | (202) 663-6644
<i>Meredith.Cross@wilmerhale.com</i> |
| Erika L. Robinson | (202) 663-6402
<i>Erika.Robinson@wilmerhale.com</i> |
| Jonathan Wolfman | (617) 526-6833
<i>Jonathan.Wolfman@wilmerhale.com</i> |
| Catherine T. Brown | (202) 663-6968
<i>Catherine.Brown@wilmerhale.com</i> |