

June 28, 2004

## SEC Staff to Publicly Release Comment Letters and Responses

On June 24, 2004, the staff of the SEC announced that it will publish on the SEC website comment letters issued by it relating to disclosure filings (such as registration statements and periodic reports) made after August 1, 2004 if the filing is selected for review by the staff of the Division of Corporation Finance or of the Division of Investment Management. The staff will also publish written responses to staff comment letters filed by registrants (excluding those portions for which confidential treatment is requested). As a result, the public generally will have access to comment letters and responses without having to submit a Freedom of Information Act ("FOIA") request.

The staff is interested in receiving suggestions on how to make the transition and process work efficiently. Comments are to be submitted promptly. The request for comments, however, does not negate the fact that comment letters and responses will be released to the public, as described below.

### *Release of comment letters and filer responses*

It has been a longstanding practice of the staff of the SEC to select and review in certain cases disclosure filings made in compliance with federal securities laws. The staff provides registrants with comments where they believe the filing could be improved or enhanced. A typical staff review may involve several rounds of comments from the staff and a similar number of responses from the filer. Upon resolution of all issues relating to the review, the staff advises the registrant that its review is complete.

The staff's current practice is to release comment letters and responses only in response to a FOIA request and only after the staff review is complete. Recently, the staff has been releasing an increasing number of comment letters and responses through the FOIA process, but only to those who make a FOIA request. In order to expand the transparency of the review process, the staff intends to ensure that in the future comment letters and responses are available to a broader audience.

### *Timing*

The staff will begin publishing comment letters and responses relating to disclosure filings made after August 1, 2004 which are selected for review. The documents will be available on the SEC's website upon completion of necessary technical upgrades. In applying the August commencement date, the staff has indicated that it will look to the filing that is the primary focus of the staff review. For example, if a registration statement is filed before August 1, 2004, but an amendment is filed after that date, the determination will be made on the basis of the earlier filing. If as part of a review of a

---

1285 Avenue of the Americas  
New York, New York 10019-6064  
(212) 373-3000

Fukoku Seimei Building 2<sup>nd</sup> Floor  
2-2, Uchisawaicho 2-chome  
Chiyoda-ku, Tokyo 100, Japan  
(81-3) 3597-8120

1615 L Street, NW  
Washington, DC 20036-5694  
(202) 223-7300

Oriental Plaza, Tower E3, Ste. 1205  
No. 1, East Chang An Avenue  
Beijing 100738, People's Republic of China  
(86-10) 8518-2766

Alder Castle, 10 Noble Street  
London EC2V 7JU England  
(44-20) 7367 1600

12<sup>th</sup> Fl., Hong Kong Club Building  
3A Chater Road, Central  
Hong Kong  
(852) 2536-9933

10-K filed before August 1, 2004, the staff also reviews a 10-Q, the determination will be based on the filing date of the 10-K.

Correspondence will be released to the website not less than 45 days after the completion by the staff of its review.

### *Confidential treatment*

Rule 83 of the Rules of Practice allow registrants to request confidential treatment ("CTR") for a variety of submissions made to the SEC not otherwise covered by other rules. In the case of response letters, a registrant making a CTR would file two separate response letters under Rule 83 – a response to the staff's comments without the confidential information and a separate paper filing including the confidential information properly marked as confidential. The staff will publish on its website only the version with the confidential information redacted. Those who wish to seek access pursuant to FOIA to the redacted portions of a response letter must submit a FOIA request.

The staff will continue its current practice of processing CTRs pursuant to Rule 83. As would be the case for all CTRs (see, for example, Staff Legal Bulletin No. 1), the staff has indicated that it will continue to question overly broad requests and has reminded registrants and their counsel that there must be an appropriate basis for a request for confidential treatment.

### *"Tandy" waiver*

The staff has also indicated that because of the wide public availability of the comment letters and filer responses, it will ask all companies whose disclosure filings are selected for review in the future to represent in writing that they will not use the SEC's review process as a defense in any securities-related litigation against them. This waiver, which is known as a "Tandy" waiver, generally is used when the staff permits a registration statement to go effective, notwithstanding the pendency of an investigation of the issuer by the Division of Enforcement. Similar waivers have been requested as part of the 1934 Act process when registrants are aware they are the subject of an investigation. In such a waiver, the registrant notes that the disclosure is the registrant's responsibility and that staff comments, changes made in response to staff comments and acceleration of effectiveness do not relieve a registrant from such responsibility. The staff notes that this staff request and the waiver are not to be construed as confirming that there is, or is not, an ongoing investigation.

### **Implications**

Traditionally, response letters were drafted without significant thought being given to readers other than the staff. Clearly, any responses that registrants, their counsel or auditors are concerned about (from a competitive or other standpoint) need to be drafted with public disclosure in mind, unless they are to be made the subject of a CTR. The staff's new policy also requires that responses that are more in the nature of a negotiation with the staff be addressed outside the formal written response process. Finally, registrants and counsel are far less likely now to "buy the comment" (that is take an aggressive position that clearly is likely to invite SEC comment) if to do so could create issues in the public domain.

\* \* \*

This memorandum provides only a general overview of the staff's position on release of comment letters and responses and is not intended to provide or constitute legal advice, and no legal or business decision should be based on its contents. Any questions concerning the foregoing should be addressed to members of the Paul Weiss Securities Group (see below). In addition, memoranda on related topics may be accessed under Securities Group publications on our website ([www.paulweiss.com](http://www.paulweiss.com)).

Mark S. Bergman	(44 20) 7367-1601	Andrew J. Foley	(1) 212-373-3078
John C. Kennedy	(1) 212-373-3205	Edwin S. Maynard	(1) 212-373-3024
Gábor Molnár	(44 20) 7367-1605	Raphael M. Russo	(1) 212-373-3309
Tong Yu	(81 3) 3597-6306		

**PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP**