PUBLIC AVAILABILITY OF SEC COMMENT LETTERS AND COMPANY RESPONSES

DECEMBER 19, 2003

Communications with Securities and Exchange Commission ("SEC") staff have been subject to the risk of public disclosure, subject to certain exceptions and protocols, since the enactment of the Freedom of Information Act, or FOIA. In the past, however, it has been uncommon for third parties to seek disclosure of routine communications between the SEC and issuers, such as comment letters issued by the SEC staff and the response letters prepared and submitted on behalf of issuers.

Global Securities Information, Inc. ("GSI") recently announced that it was offering, as an adjunct to its LIVEDGAR service, access to a new database comprised of selected SEC comment letters and the related response correspondence. The new GSI database, which may ultimately be replicated by other service providers, is reported to contain approximately 600 completed SEC review files, consisting of approximately 2,500 pieces of correspondence with such information being compiled in a format that is "word-searchable." GSI has indicated that it obtained these materials through a massive FOIA request and that it intends to update its database with new comment letters and company response letters. As a result of this new initiative, documents relating to SEC reviews are now much more likely to be publicly accessed and scrutinized by a variety of parties, including competitors, disgruntled stakeholders and plaintiffs' lawyers.

In light of this development, companies may wish to consider more carefully how they respond to SEC comments, including SEC requests for supplemental information, in order to minimize the risk that sensitive or confidential information will become publicly available. To the extent that a response to an SEC comment compels a company to provide sensitive or confidential information, the company may seek to protect such information in the two ways summarized below.[1]

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[1] This memorandum discusses the procedures for obtaining confidential treatment of materials submitted in connection with an SEC review, and does not discuss the requirements and procedures for seeking confidential treatment of information required to be filed with the SEC, such as material contracts, under Rule 406 under the Securities Act of 1933, as amended, and Rule 24b-2 under the Securities Exchange Act of 1934, as amended.

Confidential Treatment Requests Under Rule 83

A company may make a confidential treatment request with respect to information included in correspondence with, or supplemental information provided to, the SEC under Rule 83 of the SEC's Rules on Information and Requests.[2] In order to make a request for confidential treatment under Rule 83, a company must:

- file electronically the comment response letter or other supplemental information with the confidential information redacted, and mark each applicable page or portion of each page with "Confidential Treatment Requested by [name]" and include an identifying number and code, such as a Bates-stamped number;
- submit to the SEC in a paper filing a copy of the complete comment response letter or other supplemental information, without the confidential information redacted;
- submit to the SEC in a paper filing a letter requesting confidential treatment under Rule 83, which, among other things, specifies the information as to which confidential treatment is requested and refers to the applicable identifying number and code; and
- send a copy of the request (but not the underlying documents with respect to which confidential treatment is requested) by mail to the Office of Freedom of Information and Privacy Act Operations with the legend "FOIA Confidential Treatment Request" prominently at on the top of the first page of the written request, and include the name, address and telephone number of the person requesting confidential treatment.[3]

In evaluating whether to make a Rule 83 request, it is important to note that a company does not need to substantiate its request for confidential treatment until a third party, such as GSI, requests disclosure of the information under FOIA. If and when a company is required to substantiate its request for confidential treatment under Rule 83, the company will need to provide the following, among certain other information, regarding the request:[4]

- the reasons why the information should be withheld under FOIA and the specific exemptive provisions of FOIA relied on;
- the existence and applicability of any prior determinations by the SEC, other federal agencies, or a court, concerning the confidential treatment of the information;

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[2] 17 CFR 200.83.

[3] A confidential treatment request under Rule 83 will expire ten years from the date the Office of Freedom of Information and Privacy Act Operations receives it, unless that office receives a renewal request before the expiration date or determines, pursuant to a third party FOIA request, that confidential treatment is not warranted. 17 CFR 200.83(c)(7) and (e).

[4] 17 CFR 200.83(d)(2).

- the adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of the confidential information, including any adverse effect on the business' competitive position;
- the measures taken by the business to protect the confidentiality of the information in question and of similar information, prior to, and after, its submission to the SEC;
- the ease or difficulty of a competitor's obtaining or compiling the commercial or financial information; and
- whether the commercial or financial information was voluntarily submitted to the SEC and, if so, whether and how disclosure of the information would tend to impede the availability of similar information to the SEC.

It should be noted that Alan Beller, the Director of the SEC's Division of Corporation Finance, has recently indicated that issuers should not submit blanket Rule 83 confidentiality requests covering the contents of all SEC/issuer correspondence, as the staff will not honor such requests.

Paper Filings of Supplemental Information

A company may also submit supplemental information to the SEC in a paper filing (instead of an electronic filing) and request that the SEC return such materials following its review. Pursuant to Rule 12b-4 of the Securities Exchange Act of 1934, as amended, and Rule 418(b) of the Securities Act of 1933, as amended, the SEC will, at the request of the company, return to the company any supplemental information requested by the SEC, provided that:

- the company's request is made at the time the information is furnished to the SEC staff;
- the return of the information is consistent with the protection of investors;
- the return of the information is consistent with FOIA; and
- the information is not filed electronically.

If the SEC returns the supplemental materials to the company, such materials generally cannot become the subject of a request under FOIA.

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This memorandum is for general informational purposes and should not be regarded as legal advice. Please contact your relationship partner if we can be of assistance regarding these important developments. The names and office locations of all of our partners, as well as additional memoranda regarding recent corporate governance developments, can be obtained from our website, *www.simpsonthacher.com*.

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