

Keeping Materials Filed with the SEC Confidential

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The procedures are relatively straightforward. The consequences for failure to follow them can be severe. In the post-Enron era, where the number of information requests under the Freedom of Information Act, or FOIA (5 U.S. Code 552), more than tripled between 2001 and 2003, it pays to know the proper procedures for protecting confidential information that is submitted to the Securities and Exchange Commission.

Disclosure of SEC Filings under the FOIA

It is important to note at the outset that everything filed electronically with the SEC is available under the FOIA, including comment response letters and other supplemental materials provided in response to staff comments. Rule 101(a) of Regulation S-T sets forth the SEC-mandated electronic submissions, and the note to that rule provides that failure to submit a required electronic filing will, among other things, result in ineligibility to use Forms S-3 and S-8.

Rule 418(b) and Rule 12b-4 Exceptions

One exception to this general rule is Rule 101(c)(2) of Regulation S-T, which provides that supplemental information must be submitted in paper if the submitter requests that (1) the information be returned after staff review and the information is of a type typically returned by the staff pursuant to Rule 418(b) under the Securities Act of 1933 or Rule 12b-4 under the Securities Exchange Act of 1934, or (2) the information be protected from disclosure under the FOIA and the rules and regulations promulgated thereunder (17 C.F.R. §§ 200.80 through 200.83).

SEC Exception Rules 418(b) and 12b-4 generally provide that the staff will return, upon request, any supplemental information filed by a company or its counsel, provided that:

- the request is made at the time of submission of the supplemental material;
- the return of the information is consistent with the protection of investors;
- the return of the information is consistent with the provisions of the FOIA; and
- the information was not filed in electronic format.

This exception is significantly more useful than a request for confidential treatment under the FOIA. Once the material is returned by the staff, it will not be the subject of an FOIA request, at least not one that is determined by the SEC. Generally, the staff will more likely return the materials, if requested, than keep them.

FOIA Exception

The other, probably better-known exception for seeking confidential treatment of supplemental materials provided to the SEC, as mentioned above, is a request made under Rule 83 under the FOIA. It is important to note at the outset that making a request for confidential treatment under Rule 83 does not guarantee that the information will be protected from public disclosure. Rather, Rule 83 provides a procedure by which the SEC will resolve whether or not to provide such information to an FOIA requester at the time such request is made. By making a request for confidential treatment, the issuer simply puts the SEC on notice that it wants such information kept confidential. The SEC won't resolve whether it is appropriate to honor a confidentiality request until such time as someone requests a copy of it under the FOIA. If no confidentiality request is made, however, the SEC will generally presume that the issuer has waived any interest in asserting an exemption from disclosure under the FOIA.

FOIA Procedure

Under Rule 83(c), an issuer who submits confidential information to the SEC may request that the SEC afford confidential treatment under the FOIA to such information for reasons of personal privacy or business confidentiality or for any other reason permitted by Federal law. Rule 83(c) requires the issuer, at the time the information is first received by the SEC, to take all steps reasonably necessary to ensure that the information:

- is supplied segregated from information for which confidential treatment is not being requested;
- is appropriately marked as confidential; and
- is accompanied by a written request for confidential treatment that specifies the information about which confidential treatment is requested.

In addition, the issuer must mark each page or segregable portion of each page with the words "Confidential Treatment Requested by [name]" and an identifying number and code, such as a Bates-stamped number.

In practice, then, the issuer would submit its comment response letter and other supplemental materials by EDGAR and redact the information for which confidential treatment is sought. The issuer would then submit, in paper, the entire comment letter and supplemental materials along with a letter to the staff examiner requesting confidential treatment under Rule 83 and specifically identifying the portions for which the issuer is seeking confidential treatment. If it is impractical to submit the confidentiality request at the time the materials are first given to the SEC, the issuer may submit the request within 30 days from the date the materials are submitted. In no circumstance, however, will the need to comply with the requirements of Rule 83 justify or excuse any delay in submitting such materials to the SEC.

Seeking Confidential Treatment of the Entirety of a Submission

The staff will generally not accept a request for confidential treatment of the entire comment response letter or the entire amount of other supplemental material, and may request the issuer to refile the materials and specifically identify the provisions for which confidentiality is sought. For example, if the staff examiner requests a copy of the banker's book be submitted supplementally, it would not be appropriate to request confidential treatment of those portions of the banker's book that are summarized in the filing, e.g., the background to the deal.

Office of Freedom of Information and Privacy Act Operations

If it is appropriate for the entire comment response letter or entire amount of other supplemental materials to be afforded confidential treatment, the issuer should file a short letter by EDGAR indicating that the material was submitted in paper, and that the issuer has requested confidential treatment for that material.

In addition to giving a copy of the written request for confidential treatment to the staff examiner, the issuer must send a copy of the request, but not the underlying materials, to the Office of Freedom of Information and Privacy Act Operations. The legend "FOIA Confidential Treatment Request" must clearly and prominently appear on the top of the first page of the written request. The written request must also contain the name, address, and telephone number of the person requesting confidential treatment, which contact information must be continually updated. If the materials are submitted on behalf of the issuer by someone else, e.g., outside counsel, the request must identify the contact information of the person at the issuer who could provide prompt substantiation of the confidentiality request at the time such information is sought under the FOIA.

A request for confidential treatment will expire 10 years from the date the Office of Freedom of Information and Privacy Act Operations receives it unless a renewal request is received before the confidential treatment request expires. Likewise, any renewal request will expire 10 years from the date it is received unless further renewed.

Substantiating Confidential Treatment

If an FOIA request is made for materials for which confidential treatment has been requested, and no other grounds appear that would justify withholding such materials, the SEC's FOIA officer will contact the issuer to substantiate the request for confidential treatment. Failure to submit written substantiation within 10 calendar days from the time of notification may be deemed a waiver of the confidential treatment request and the right to appeal an initial decision denying confidential treatment.

To substantiate the confidential treatment request, the issuer will need to provide the following regarding the request:

- the reasons why the information should be withheld under the FOIA and the specific exemptive provisions of the FOIA relied on (e.g., a trade secret);
- the applicability of any specific statutory or regulatory provisions that may govern the treatment of the information;
- the existence and applicability of any prior determinations by the SEC, other Federal agencies, or a court concerning the confidential treatment of the information;
- the adverse consequences to a business, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including on the issuer's competitive position;
- the measures taken by the issuer 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;
- 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; and
- such additional facts and such legal and other authorities as the requesting person may consider appropriate.

Appealing an Adverse Decision

If the SEC denies the confidentiality request, the issuer has 10 days from the date of such preliminary decision to submit supplemental materials. A final decision will be made no sooner than 10 days from the date of the preliminary decision. The issuer or the FOIA requester, as the case may be, will have 10 days from the date of the final decision to appeal the decision. If the issuer loses and does not appeal, the information will be released 10 days after the date of final determination.

If either party appeals the final decision, the General Counsel of the SEC will consider the appeal, and may refer the appeal to the SEC for resolution. If the General Counsel of the SEC determines that confidential treatment is not warranted, the issuer may commence an action in Federal Court and the General Counsel may stay disclosure until final judicial resolution of the matter. Again, if the issuer does not seek judicial intervention, the information will be released 10 days after resolution of the appeal. Otherwise, the information will be released as ordered by the court.

Conclusion

While the procedures are straightforward, an issuer should not seek confidential treatment for all supplemental materials it sends the SEC. Discretion should be used to seek confidential treatment only for that information for which, if requested under the FOIA, the issuer can substantiate confidential treatment. The issuer should err on the side of requesting confidential treatment, however, as failure to request confidential treatment may be deemed a waiver of the issuer's right to prevent disclosure.