

SEC Web Site to Post Agency-Company Comments

Overview

The Securities and Exchange Commission's (SEC) staff is legally bound to review at least one filing from each public company every three years. These staff reviews often raise questions that are sent to management for response, thereby resulting in a company/SEC dialog.

Past SEC policy limited public viewing of these staff comments and the ensuing dialog to only those individuals willing to make formal requests through the Freedom of Information Act. Indeed, some have found a commercial opportunity in this process, whereby they obtain these documents and comments, then re-sell the information to interested parties.

In the wake of recent corporate scandals, inquiries regarding SEC staff review comments have increased substantially and, in the spirit of increased transparency, the SEC announced in late June its decision to dramatically change its policy. At some time after August 1 of this year, the SEC will begin posting staff and company comments on its Web site.

Please find below a June 25th Dow Jones Newswire article by reporter Judith Burns that provides a useful summary of the viewpoints both for and against the ability of this new policy to achieve its intended goal. It also indicates how to submit suggestions for making the new process work efficiently. Thereafter, we provide LHA's analysis of the significant communications challenges we believe the new policy could create and recommend that our clients submit comments to the SEC for consideration.

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SEC to Post Staff Comments on Companies on Its Web Site

The Securities and Exchange Commission has decided to post on its Web site written comments on public-company reports reviewed by the agency, along with responses from the companies. Comment letters by the SEC's staff previously were released only in response to requests under the Freedom of Information Act, or FOIA. Some businesses have been obtaining the documents through a FOIA request and selling them to investors, analysts and others.

Under the new approach, once the comment letters and replies are finalized, they will be released publicly, free of charge, without any FOIA request. The SEC staff said it welcomes suggestions from companies about how to handle the new process, which is expected to take effect later this year. The documents will be made available on the SEC's Web site, at www.sec.gov, and through its electronic database, known as Edgar.

"We believe it is appropriate to expand the transparency of the comment process so that this information is available to a broader audience, free of charge," the SEC staff announced Thursday.

Corporate reports filed after Aug. 1 and reviewed by the corporation-finance or investment-management division staff will be subject to the new, open treatment. The first publication date is still to be determined.

SEC Commissioner Cynthia Glassman said putting the information online will save time and money for the SEC and the public. "It's a win-win situation," she said.

Publicizing the SEC staff's comments will be a "significant change in our practice," said Shelley Parratt, deputy director for disclosure in the SEC's corporation-finance division, which reviews quarterly and annual corporate reports.

"We're just thrilled," said John Gavin, president of SEC Insight Inc., a Plymouth, Minn., firm that provides independent research on public companies. Mr. Gavin, who began making FOIA requests to the SEC in 1998, said he will be happy to skip the effort and expense of securing documents so that he can focus on analyzing them. "Public companies aren't going to like it, but it's a huge victory for investors," he said.

By law, the SEC now must review each public company every three years. Some reviews raise no questions while others generate written comment letters from the SEC staff covering everything from accounting to use of "plain English" language. Firms may agree or disagree, which can produce a flurry of correspondence until the issues are resolved.

Global Securities Information Inc., a Washington, D.C.-based securities-data provider, has been very aggressive on the FOIA front, making 15,000 pages of "valuable SEC insight" on public companies available online for a fee.

"A lot of people want this information," said GSI Chief Executive Phil Brown. "It makes a lot of sense for them to be public."

Ms. Parratt said the SEC staff figured those willing to pay a commercial company or make a FOIA request are able to get the documents, "so why not give it to everybody?"

"This now puts everybody on a level playing field," said Stanley Keller, a partner with the law firm of Palmer & Dodge, in Boston. But he said it could be a "two-edged sword," in that wider access could chill free communication during the comment process.

In the course of reviewing public companies, the SEC staff asks questions that have to be answered, putting firms on the spot, said Mr. Gavin, of SEC Insight. He said the new approach could prompt more companies to seek confidential treatment that would keep SEC staff comments under lock and key. "I expect 'confidential' will end up the new rubber stamp on corporate documents," he said.

Shielding correspondence with federal regulators isn't easy, though. While trade secrets, classified information and the like can be shielded from public release, lawyers say blanket requests for confidential treatment usually won't fly. The SEC staff announcement on Thursday underscored that, telling companies they must have "an appropriate basis for a request for confidential treatment."

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The SEC is interested in receiving suggestions on how to make this policy transition and process work efficiently.

Electronic comments can be submitted as follows:

- [Internet comment form http://www.sec.gov/news/press.shtml](http://www.sec.gov/news/press.shtml)), or
- rule-comments@sec.gov. (Include File Number S7-28-04 on the subject line.)

Written comments can be sent in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. All submissions should refer to File Number S7-28-04.

The SEC has asked that comments be sent using only one method. The SEC will post all comments on its Web site (www.sec.gov/news/press.shtml).

LHA Analysis and Practical Impact

This policy change represents another way in which the SEC is attempting to make information about public companies more transparent and more easily accessible to both professional and private investors. However, LHA believes the implementation of this policy change may unintentionally create significant communications challenges for public companies.

Investor relations best practices support the efficient dissemination of news about important events through the issuance of a press release that accompanies an SEC filing. This practice is in place because it is preferable for public companies to shoulder the responsibility of informing the Street of (potentially disruptive) events rather than allow analysts and investors to find out for themselves through SEC filings or other means. For example, there is no legal requirement compelling companies to report quarterly results before a 10-Q is filed, but doing so allows the construction of a messaging platform that lends perspective to reported results.

However, in this case, there are some considerations that may make the creation of communications strategies surrounding an impending or concurrent SEC posting problematic:

- It is unclear whether companies will be given advance notice of the SEC's timing of web site postings to allow for coordination of relevant press release dissemination
- The iterative nature of the SEC's review process -- a letter followed by a response, followed potentially by another letter and response -- could create a trail of web site postings that could "overhang" the stock price and require a press release series
- Audit and legal counselors may advise issuers against including explanatory language in press releases, limiting release content to a mere advisory of the SEC posting
- SEC comments, by their very nature, can create shareholder alarm, particularly among less sophisticated and retail investors. Any impediment to clear and timely investor communications, such as that stated above, may exacerbate the situation and create more stock price pressure

There are no immediate answers to the above concerns. However, the SEC's solicitation of comments creates an opportunity for public companies to shape the transition to the new practice and the SEC's policy toward communications practices. We encourage our clients to think through these issues with us and devise practical suggestions for SEC submission and consideration. We intend to monitor the implementation of the new policy and are available to discuss with you how best to be prepared for those challenges.