

The FOIA Blitzkrieg

Company documents provided to the SEC are under attack

By Michael J. Rivera and
Kimberly A. Cain

With so many hedge funds and other investment companies flush with cash and looking to outshine their brethren, skirmishes to find the next successful investment are fiercer than ever. An increasingly popular “research” technique is filing requests under the Freedom of Information Act (FOIA) for access to government-held public company documents. FOIA was enacted under the premise that citizens own the government and, absent a compelling reason, should have access to all documents in the government’s possession. A successful FOIA request can yield valuable information about a public company, particularly now that individual employee emails produced by a company to the government often are included in the windfall.

Some investors file their own FOIA requests. Most, however, now seek the assistance of companies whose business plans involve bombarding the Securities and Exchange Commission (SEC) with FOIA requests, hoping to score vital information. As a result,

Rivera is a partner, Cain is an associate at Fried, Frank, Harris, Shriver & Jacobson LLP in Washington, D.C. Their e-mails are michael.rivera@friedfrank.com; kimberly.cain@friedfrank.com.

FOIA requests have become a cottage industry. Almost 42,000 FOIA requests were filed with the SEC between 2000 and 2006. In this environment, companies producing documents to the SEC are well advised to meticulously follow the SEC’s confidential treatment rules. Failing to do so leaves vulnerable documents that might otherwise qualify for protection under FOIA. A FOIA request can be initiated by a simple letter and requires no legal proceeding. Of course, even if documents are protected under FOIA, a valid subpoena to the custodian agency can nonetheless prompt production. This article reviews FOIA and the SEC’s confidential treatment rules, and recommends how best to protect documents from unnecessary release to the public.

The Freedom of Information Act

FOIA (5 U.S.C. § 552) grants the public the right to access nonpublic government-held records. FOIA is premised on the notion that a well informed public will hold its government accountable for its actions, and will ensure the continuing vitality of our democratic system. Generally, the government must grant the public access to a government-held document, unless the document qualifies

for a FOIA exemption (5 U.S.C. § 552(b)). The exemptions attempt to balance the general presumption of open government against other interests of the general public, including the need to protect sensitive personal, commercial, and governmental information. For example, FOIA exempts from disclosure documents containing privileged or confidential commercial or financial information (including trade secrets) and certain documents compiled for law enforcement purposes.

SEC FOIA requests have increased dramatically

In recent years, private research firms have sought to profit from selling information obtained in response to SEC FOIA requests. Investment companies, accounting firms, law firms and investment banks, among others, pay to access such information.

The aggressive FOIA tactics adopted by private research firms, coupled with the post-Enron spike in the public’s and plaintiff lawyer’s interest in corporate fraud, has caused a dramatic increase in the number of SEC FOIA requests. The current volume of SEC FOIA requests is staggering. In the SEC’s 2006 fiscal year, the SEC received 8,961 FOIA requests, compared to 2,875 FOIA requests in fiscal

2000. In total, 41,765 SEC FOIA requests were filed from fiscal 2000 to 2006. The SEC publishes detailed FOIA statistics in annual reports, which are accessible on the agency's Web site (www.sec.gov/foia.shtml).

Internal SEC changes likely will increase the amount of information the agency discloses

Several factors prompted internal SEC changes that are likely to increase the frequency and amount of information released by the agency in the coming years. First, a report published in 2005 by the Coalition of Journalists for Open Government revealed that the SEC had the worst backlog of FOIA requests among federal agencies (www.clog.net/documents/2004_foia_performance.pdf). The SEC reportedly had a 225 percent backlog, much higher than the average government-

requesters, making more documents publicly available and increasing staffing. The Action Plan also imposes specific time milestones and adopts measurements of success.

Top 10 considerations for protecting information provided to the SEC

Any information submitted to the SEC is at serious risk of being released to the public in response to a FOIA request. The most important step a company can take to avert unwanted disclosure is to properly request "confidential treatment" for records submitted to the SEC. The procedures for requesting confidential treatment are set forth in 17 C.F.R. § 200.83 (the "SEC Rules"). Asserting confidential treatment should, at a minimum, ensure that the submitter is provided an opportunity to formally object prior to disclosure of the information. In

ments to a disk or hard drive for production. Indeed, SEC Enforcements lawyers frequently request (or demand) that parties produce all documents in electronic format, including documents that exist only in hard copy form. This format enables SEC lawyers to easily search and store the documents.

Producing electronic documents on a disk or hard drive often saves significant time and effort (as compared to printing and FOIA-stamping the documents). Affixing a FOIA Stamp to the physical disk or hard drive logically might be thought to satisfy the "each page" requirement in the rules. However, this issue has not been tested in court. Nor has the SEC provided guidance on this issue. Moreover, if SEC personnel print documents from the disk or hard drive, these unstamped documents could end up floating around the agency, thereby creating a

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wide backlog of 20 percent and double the next highest backlog of 105 percent (at the National Archives and Records Administration). Second, the public is aggressively suing the SEC for failing to respond to FOIA requests, resulting in three judicial decisions in 2006. *See, e.g., Gavin v. S.E.C.*, Civil No. 04-4522 (PAM/JSM), 2006 U.S. Dist. LEXIS 75227 (D. Minn. October 13, 2006). Third, the SEC's FOIA response problems have been featured in the press. *See, e.g., Gretchen Morgen-son, Deafened by the SEC's Silence, He Sued*, THE NEW YORK TIMES, May 28, 2006, at 1.

To remedy its FOIA problems, the SEC adopted a "FOIA Program Action Plan" (www.sec.gov/foia/foiaactionplan.pdf) in June 2006. The plan outlines steps the SEC will take to eliminate its current FOIA backlog, such as improving response times to

addition to carefully reviewing the SEC Rules, persons producing documents to the SEC should consider the following 10 issues.

1. Stamp every page of every document. The SEC Rules require that an identifying number or code be affixed to "each page" for which confidential treatment is sought. Each page must also be marked with the words "Confidential Treatment Requested by [insert name of requesting party]." Stamping the first page of a multi-page document is not sufficient—every page must be marked with its own "FOIA Stamp" consisting of both an identifying number and confidential treatment statement.

2. Stamp documents produced in electronic format. To respond to SEC document requests, companies typically review electronic documents online and then burn the responsive docu-

risk that the SEC could erroneously produce the documents in response to a FOIA Request. Technology has developed a solution to this issue. It is now possible to configure a disk or hard drive so that a FOIA Stamp is electronically affixed to each page of each electronic document. A number of document management firms offer this service.

3. Protect witness depositions. Transcripts of depositions conducted in the course of SEC investigations are eligible for confidential treatment. Confidentiality may be important for the substantive issues discussed during the testimony, as well as to protect personal information elicited during background questioning. Because it is impractical to file a written confidential treatment request at the time of a deposition, the SEC Rules allow up to 30 days after the deposition to file a

written request. But the requester must notify the SEC staff at the deposition “or as soon thereafter as possible, that he or she is requesting confidential treatment.” It is prudent to assert this request on the record at the beginning of the deposition.

4. Request confidentiality for correspondence. Confidential treatment is not reserved exclusively for preexisting company documents. Confidential treatment can, and in many cases should, be claimed for correspondence with the SEC and other written documents prepared for submission to the SEC. In SEC enforcement investigations, for example, companies routinely draft letters responding to enforcement staff questions and information requests. Such correspondence, including so-called “Wells” submissions and document production cover letters, may contain sensitive informa-

Counsel should remember to seek confidential treatment in these contexts if warranted. If confidential treatment is not warranted, however, no request should be made. That is because the SEC staff has cautioned that it may bring enforcement actions against market participants that assert unwarranted confidential treatment claims for comment letters. See Alan Beller, SEC Division of Corporation Finance, Remarks at the Meeting of the ABA Committee on Federal Regulation of Securities, in Atlanta GA (August 9, 2004) (*available at* www.abanet.org/abanet/common/login/securedarea.cfm?areaType=committee&role=CL410000&url=/buslaw/committees/CL410000/dialogue/20050131000001.pdf).

6. Submit a proper confidential treatment request letter. The SEC Rules state that a confidential treatment letter must accompany the docu-

affixing a FOIA Stamp to the confidential treatment letter and denoting that confidential treatment is also being sought for the letter.

A copy of the confidential treatment letter (but not the documents for which confidential treatment is requested) must be sent to the SEC’s FOIA Office. All information contained in the letter that is not required by the SEC Rules (as described above) may be redacted. For example, it is common to have a document production cover letter serve also as a confidential treatment letter. In such circumstances, a requester may redact statements about the document production from the version of the letter filed with the FOIA Office.

7. Expressly identify voluntarily produced documents. A FOIA exemption shields from disclosure “trade secrets and commercial or financial

Confidential treatment can be claimed for correspondence with the SEC.

tion, including the fact that an investigation exists, the staff’s allegations, and/or a company’s defenses. Persons seeking confidential treatment for correspondence should affix a FOIA Stamp to each page of the correspondence (in the same manner as preexisting documents).

5. Confidential treatment is not limited to SEC enforcement investigations. Confidential treatment requests are most commonly associated with SEC Enforcement investigations, likely because of the large volume of documents any one investigation can yield. However, companies provide documents and information to the SEC for numerous other reasons. For example, documents are produced in connection with comment processes regarding a company’s periodic filings, proxy contests, and examinations by the Office of Compliance and Inspections.

ments for which confidential treatment is requested. The confidential treatment letter must (i) identify the numbers affixed to the documents for which confidential treatment is being requested, (ii) prominently and clearly display a legend on the top of the page stating “FOIA Confidential Treatment Request,” and (iii) contain the name, address and telephone number of the person requesting confidential treatment. In situations where a law firm (or other third party) is requesting confidential treatment on behalf of a client, the letter must identify the client and provide the name, telephone number and address of the person at the client whom the SEC should contact in the event a relevant FOIA request is filed. It is also possible and prudent to seek confidential treatment for the confidential treatment letter itself. This can be accomplished by

information obtained from a person and privileged or confidential.” A question arises as to whether information remains “confidential” after a company voluntarily provides it to the government (as opposed to production being compelled by a subpoena). At least one federal circuit court (and a few federal district courts) has held that information voluntarily provided to the government remains confidential for purposes of this FOIA exemption if it is the type of information that the submitter would customarily not release to the public. See *Critical Mass Energy Project v. Nuclear Regulatory Comm’n*, 975 F2d 871 (D.C. Cir. 1992). Accordingly, when a company voluntarily provides the SEC information that it ordinarily does not release publicly, it is advisable to note the voluntary nature of the submission in the transmittal letter and confidential treatment letter. Remem-

ber, however, that voluntarily producing privileged documents risks waiving the privilege. See *In Re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982).

8. Request that produced materials be returned to you. It is unfortunate, to put it mildly, when submitted documents become subject to a FOIA request filed when the documents should no longer have been in the SEC's possession. Counsel can try to avoid this outcome by asking the SEC to return documents immediately after the agency's need for them ends. Although many such requests are not honored, sometimes the staff will return documents. It is worth making the request.

9. Renew confidential treatment requests after 10 years. Under the SEC Rules, a confidential treatment request expires after 10 years. A confidential treatment request can be renewed for successive 10 year periods, so long as a renewal request is filed with the SEC's

FOIA office before each 10-year period expires. The SEC will not notify requesters when a claim is about to expire. Thus, at the time of production it is wise to evaluate whether a 10-year renewal is likely to be necessary. If so, a reliable calendaring system could be used to ensure that the issue is reviewed prior to the 10-year mark.

10. Fight for your rights. The SEC's FOIA Office is required to promptly notify a confidential treatment requester when the FOIA Office has determined that no grounds appear to exist to justify withholding documents subject to a FOIA request. The submitter then has 10 days to submit a written explanation (called a substantiation) detailing why the documents should not be released. It is important that the substantiation be filed in a timely manner. If it is not feasible to file a substantiation within the requisite 10 days, it is common for the FOIA Office to grant an extension on

request. Should the FOIA Office ultimately determine to disclose documents that a confidential treatment requester believes are protected under FOIA, the requester may appeal the decision to the SEC General Counsel, whose decision can be appealed in federal district court. Documents can be, and have in many instances been, prevented from disclosure after a well-written (and timely) substantiation and/or appeal has been filed.

Closing

In the current environment, companies under investigation often produce very sensitive information to federal agencies in order to maximize the "cooperation credit" they hope to receive. Shielding this information from public disclosure may be important to protect trade secrets, personal information or other FOIA-protected categories of data. Knowing the FOIA rules can be essential to achieving this goal.