

SEC Reporting & Compliance Alert

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Update: After publication of this guide, the SEC staff issued new guidance, CF Disclosure Guidance: Topic No. 7, regarding confidential treatment requests and expiring confidential treatment orders. Please see our updated “[Guide to Maintaining Confidentiality of Commercially Sensitive Information in Agreements Filed With SEC.](#)”

A Guide to Redacting Commercially Sensitive Information From Exhibits Filed With the SEC

Rules requiring material agreements to be filed as exhibits to reports and registration statements with the Securities and Exchange Commission (SEC) were amended to permit the redaction of immaterial and commercially sensitive terms from filed agreements without a confidential treatment request.¹ This guide outlines the amended rules, which went into effect in April 2019, and the process companies should follow to prevent the public disclosure of information redacted from their exhibits.

Redactions to New Exhibits Filed With the SEC

Companies may redact confidential information from filed versions of agreements without a confidential treatment request, so long as that information (i) is not material and (ii) likely would result in competitive harm to the company if publicly disclosed.² When filing a redacted exhibit, companies must comply with the following requirements:

- Include a prominent statement on the first page of the filed version of the redacted exhibit that certain identified information has been excluded from the exhibit because it both (i) is not material and (ii) would be competitively harmful if publicly disclosed;
- Indicate with brackets (e.g., “[**]”) in the filed exhibit where the information has been omitted from the filed version of the exhibit; and
- Include a notation indicating that portions of the exhibit have been omitted in the exhibit index of the SEC filing with which the redacted exhibit is filed or incorporated by reference.

As in the past, companies should narrowly tailor their redactions to omit only those terms that they have concluded are appropriate under the rules.³ In addition, although not required, companies should consider documenting the legal and factual bases for such redactions. Doing so helps support a company’s disclosure controls and procedures and prepares it for any subsequent requests for written support as part of a compliance review by the staff of the SEC’s Division of Corporation Finance (Staff), as discussed below. Further, companies should take steps to avoid public disclosure of the redacted terms, given that public disclosure — inadvertent or otherwise — could obligate a

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company to file a revised version of the exhibit with the SEC. For instance, companies should safeguard unredacted copies of agreements and coordinate with counterparties, especially those that have their own SEC or other public filing obligations, to ensure that other publicly available versions of the agreement are consistently redacted.

Staff Compliance Reviews

The Staff will monitor compliance with the rules outlined above.⁴ The Staff's compliance review may occur in connection with the review of a report or registration statement (e.g., a Form 10-K or Form S-1) or otherwise. Typically, a company would not be aware of an ongoing Staff review unless that company receives a comment letter or is otherwise contacted by the Staff. If a company receives a comment letter from the Staff in connection with the review of a report or registration statement, any Staff correspondence pertaining to the review of the redacted exhibit will remain separate and apart from that of the report or registration statement.

Supplemental Submissions of Unredacted Exhibits. When a filed exhibit containing redactions is selected for review, the Staff will send a letter to the company requesting a paper copy of the unredacted version of the exhibit, marked to highlight the redacted information. To avoid unredacted agreements becoming a matter of public record, companies should follow closely the delivery instructions specified in the Staff's letter. To prevent inadvertent disclosure of confidential information, companies should not attempt to justify, at this initial stage, the redactions or submit any other substantive response to the Staff when responding to requests for unredacted exhibits. Companies should, however, specifically request (i) confidential treatment of the unredacted exhibit under Rule 83 of the SEC's Regulation Concerning Information and Requests,⁵ which will help protect the information from public disclosure while in the Staff's possession, and (ii) the return or destruction of the unredacted exhibit (and any other supplemental materials) under Securities Act Rule 418 or Exchange Act Rule 12b-4, as applicable.⁶

Staff Comment Process. Upon review of an unredacted exhibit supplementally provided by a company, the Staff may send a comment letter seeking justification for the scope of redactions. In that event, the Staff's comments likely will focus on whether the redacted information is material and/or whether public disclosure of that information would result in competitive harm to the company.

If the Staff has no comments in the first instance or has no further comments after reviewing a company's response, they will send a "close of review" letter to the company. If, however, the company's response does not resolve the Staff's questions,

the Staff may ask for additional information or request that the company file a revised exhibit with fewer redactions.⁷ The correspondence related to a compliance review should not be combined with other written communications with the Staff, and such correspondence will not be released to the public.

Close of Staff Review. After the close of a compliance review, only the Staff's initial request for an unredacted exhibit and close of review letter will be made publicly available on the company's EDGAR filing page. Unlike correspondence pertaining to the Staff's review of reports and registration statements, any Staff comments or company responses arising from a compliance review of redacted exhibits will not become publicly available on EDGAR. In addition, consistent with historical practice in connection with reviews of registration statements, companies are expected to resolve any Staff comments related to redacted exhibits prior to requesting that a registration statement's effectiveness be accelerated.

Confidential Treatment Requests Under Rules 406 and 24b-2

Extending Previously Granted Confidential Treatment Orders. Prior to adoption of the amended rules discussed above, Securities Act Rule 406 and Exchange Act Rule 24b-2 were the exclusive means by which companies were permitted to redact confidential information from their agreements filed as exhibits to their SEC filings.⁸ As many are aware, that process required companies to submit to the SEC a formal letter, known as a confidential treatment request, that outlined the legal and factual bases under the Freedom of Information Act (FOIA) for redacting specific contract terms. That process also required companies to provide the SEC with unredacted copies of those agreements, which would be protected from public disclosure under FOIA for specified periods of time by confidential treatment orders, typically no longer than 10 years.

Given the alternative process available under the amended rules outlined above, going forward companies are unlikely to rely on Rules 406 and 24b-2 to redact terms from exhibits. However, because the SEC is not permitted to return or destroy unredacted copies of agreements that supported confidential treatment orders already granted under Rule 406 and/or Rule 24b-2, companies that wish to continue to protect those unredacted copies from public disclosure under FOIA still will need to rely on those rules to request the extension of a confidential treatment order before it expires. If an order expires before the SEC receives a request for an extension, the redacted information could be publicly released in response to a third party's request for public disclosure under FOIA.

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Short-Form Extension Requests. Companies are allowed to submit a short, one-page extension request in lieu of the more fulsome request otherwise required by Rules 406 and 24b-2 to extend confidential treatment.⁹ The short form requires a brief explanation of the reason for the extension, and an existing order can be extended for an additional three, five or 10 years.¹⁰ It also requires the company to affirm that its most recently approved confidential treatment request continues to be true, complete and accurate in all material respects regarding the redacted information, such as with respect to its lack of materiality and its competitively sensitive nature.¹¹

The short-form request should be emailed to CTExtensions@sec.gov and should not include any confidential information or materials, such as copies of the prior confidential treatment request or an unredacted version of an agreement. If the Staff grants the request without any questions or objections, a new confidential treatment order with an extended expiration date will automatically be posted on the company's EDGAR filing page.

Initial Confidential Treatment Requests May Be Withdrawn. The Staff will continue to process confidential treatment requests under Rules 406 and 24b-2.¹² A company that has submitted a confidential treatment under one or both of those rules but wishes instead to follow the more efficient process permitted by the amended rules, as outlined under "Redactions to New Exhibits Filed With the SEC," may do so by complying with the amended rules and withdrawing its confidential treatment request. The company must file a revised version of the redacted exhibit that complies with the amended rules by amending the report or registration statement with which the redacted exhibit originally was filed.¹³ To withdraw the pending confidential treatment request, the company should coordinate with the assistant director office responsible for reviewing its filings. Once the Staff has processed the withdrawal, the request and related materials (including the unredacted copy of the agreement) will be returned to the company, if requested, or otherwise destroyed. As a result, the confidential materials will no longer remain in the Staff's possession and be subject to public disclosure under FOIA.

¹ The amendments are reflected in Regulation S-K, Items 601(b)(2)(iii) and (10)(iv); Form 20-F, paragraph 4(a) of Instructions as to Exhibits; Form 8-K, Instruction 6 to Item 1.01; and instructions to certain investment company registration forms. The amended rules do not extend to Schedule 13D, Item 7, which requires certain greater-than-5% shareholders to file agreements, contracts, arrangements or proposals regarding their intent or plans to influence or change control of the issuer. Schedule 13D filers may redact portions of an exhibit required to be filed with a Schedule 13D under Exchange Act Rule 24b-2, which requires a confidential treatment request.

² The amended rules also codified the historical practice of permitting redactions of personally identifiable information, such as bank account numbers, Social Security numbers and home addresses, without a confidential treatment request. See, e.g., Regulation S-K, Item 601(a)(6) and Regulation M-A, Instruction 2 to Item 1016.

In addition, the amended rules permit companies to omit schedules and similar attachments to any exhibit filings (including material contracts), so long as those attachments do not contain material information and that information is not otherwise disclosed in the exhibit or the disclosure document, expanding the accommodation previously limited to plans of acquisition, reorganization, arrangement, liquidation or succession filed under Regulation S-K, Item 601(b)(2). See, e.g., Regulation S-K, Item 601(a)(5) and Regulation M-A, Instruction 1 to Item 1016.

³ See Adopting Release No. 33-10618, "[FAST Act Modernization and Simplification of Regulation S-K](#)" (March 20, 2019) (emphasizing that the amendments "do not affect the principles of what a registrant may or may not permissibly redact from its disclosure for reasons of confidentiality, nor do they change the fundamental disclosure obligations a registrant owes its shareholders"). See also Staff Legal Bulletin No. 1, "[Confidential Treatment Requests](#)" (February 28, 1997) with Addendum (July 11, 2001) (SLB No. 1A).

⁴ SEC Division of Corporation Finance Announcement, "[New Rules and Procedures for Exhibits Containing Immaterial, Competitively Harmful Information](#)" (April 1, 2019).

⁵ 17 CFR § 200.83. A separate cover letter without the confidential information must be sent directly to the SEC's Office of FOIA Services.

⁶ Securities Act Rule 418 and Exchange Act Rule 12b-4 are applicable to supplemental materials submitted in connection with the Staff's review of a filing under the Securities Act or Exchange Act, respectively.

⁷ The Staff has informally advised that a revised redacted exhibit must be filed with an amendment to the original registration statement or report.

⁸ See also SLB No. 1A.

⁹ SEC Division of Corporation Finance Guidance Topic, "[New Streamlined Procedure for Confidential Treatment Extensions](#)" (April 16, 2019). Companies can complete a [blank version of the short-form extension request](#).

¹⁰ The short-form request is not available for adding new exhibits or making additional redactions that the Staff did not previously consider.

¹¹ The form requires the requesting company's counsel or authorized representative to make this affirmation and sign the form. Company personnel generally will be in the best position to provide the required representations.

¹² See Securities Act Rule 406 and Exchange Act Rule 24b-2; SLB No. 1A.

¹³ For example, if the redacted exhibit was filed with a Form 10-Q, a revised version of the redacted exhibit should be filed with an amendment to such Form 10-Q.

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