



Confidential Treatment Applications and SEC Disclosure Guidance

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In December 2019, the Division of Corporation Finance (Staff) of the U.S. Securities and Exchange Commission issued new “[CF Disclosure Guidance: Topic No. 7](#)” (Guidance) regarding confidential treatment requests pursuant to Securities Act Rule 406 and Exchange Act Rule 24b-2.

The Guidance addresses how and what to include when submitting a confidential treatment request objecting to public release of information otherwise required to be filed under the Securities Act and the Exchange Act. The guidance replaces and supersedes the guidance provided in Staff Legal Bulletins 1 and 1A.

As discussed in our May 17, 2019, client alert, “[A Guide to Redacting Commercially Sensitive Information From Exhibits Filed With the SEC](#),” the exhibit filing requirements in Item 601(b) of Regulation S-K were amended in April 2019 to permit the redaction of immaterial and commercially sensitive information from filed agreements without submitting a confidential treatment request. While most companies now rely on those provisions, the process described in the Guidance still is available to companies as an alternative (albeit generally less desirable) approach to protecting confidential information from being disclosed to the public. In addition, certain filings, such as Schedule 13D or filings whose exhibit requirements are set out in Item 1016 of Regulation M-A, still are required to submit confidential treatment requests according to the process described in the Guidance, given it remains the only available method to protect confidential information from public disclosure in those instances.

Applying for Confidential Treatment. The Guidance provides an enumerated list of the necessary steps for submitting a confidential treatment request. Notably, with regard to identifying the Freedom of Information Act (FOIA) exemption that the company is relying on, the Guidance refers to the recent decision in *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019). That U.S. Supreme Court case broadened the definition of “confidentiality” under FOIA exemption 4, which protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential.” As redefined by the Court, “confidentiality” for FOIA exemption 4 purposes no longer requires a showing of substantial competitive harm and instead

only requires a showing that “commercial or financial information is both customarily and actually treated as private by its owner and provided to the government under an assurance of privacy.”

Staff Review of Confidential Treatment Requests. The Guidance states that the Staff reviews all requests for confidential treatment to determine whether it should issue an order granting the request. The Guidance highlights that in addition to confirming that an applicant has satisfied the necessary steps for submitting a confidential treatment request, the Staff will consider the materiality of the omitted information and whether there are excessive omissions. Further, unlike in the past, where the Staff would issue written comments to an applicant in a formal letter, the Guidance indicates that the Staff will now issue comments to the applicant via telephone and request a written response. Once the comments are resolved, the Staff will either grant the confidential treatment request or allow the applicant to withdraw its request.

Extensions of Previously Granted Requests. The Guidance also reiterates the process on how to obtain extensions of time for companies that have previously obtained a confidential treatment order that soon will expire. The Guidance reminds companies that filing the redacted exhibit on EDGAR following the amendments to Item 601(b) of Regulation S-K will not provide confidential treatment for the previously filed information. Instead, in order to request an extension of confidential treatment, companies are permitted to use a **short-form application** in lieu of the initial longer-form application traditionally required by Securities Act Rule 406 and Exchange Act Rule 24b-2. The short-form application requires a brief explanation of the reason for the extension and asks the applicant to affirm that the most recently considered application continues to be true, complete and accurate regarding the redacted information.