

SEC Reporting & Compliance Alert

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Editor's note: This is an updated version of our September 22, 2020, client alert. It covers new rules and staff guidance.

U.S. Securities and Exchange Commission (SEC) rules require reporting companies to file material agreements as exhibits to periodic reports, registration statements and certain other disclosure documents. Often times those agreements contain terms that the company treats as commercially sensitive or otherwise confidential. Certain rules permit companies to redact such terms that are not material to investors from agreements to be filed with the SEC. In the past, for companies to redact terms from a publicly filed agreement, the SEC required that a formal letter, known as a confidential treatment request, be submitted at the same time as the exhibit filing, describing the legal and factual bases the company had relied upon to redact portions of the agreement.

Effective April 2019, the exhibit rules were updated to eliminate the requirement to submit a confidential treatment request to the SEC in most situations in which companies would be required to file material agreements containing commercially sensitive terms.¹ Those updates simplified the process companies are required to follow to file redacted copies of agreements with the SEC. Application of the updated rules, however, has presented certain transition and other related questions. This guide answers those questions by outlining the applicable rules and guidance from the staff of the SEC Division of Corporation Finance (Staff) and by offering practical pointers.

Filing Redacted Exhibits With SEC Under Updated Rules

Companies may redact confidential information from versions of agreements filed as exhibits with periodic reports and registration statements without a confidential treatment request, so long as (i) that information is not material and (ii) the company

¹ The updated rules are set forth in Regulation S-K, Items 601(b)(2)(ii) 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 updated 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.

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customarily and actually treats that information as private or confidential.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) is the type that the company treats as private or confidential;
- 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.

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, 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 company to file with the SEC a revised version of the exhibit that includes the publicly disclosed information. For instance, companies should safeguard

² The updated 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 updated 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. The updated rules thus expanded 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.

Effective March 15, 2021, the SEC further revised the exhibit rules to reflect the revised definition of confidentiality for purposes of the Freedom of Information Act exemption, consistent with a U.S. Supreme Court opinion, replacing the “competitive harm” prong of the exhibit redaction standard with the “customarily and actually treated as private or confidential” prong. See Adopting Release No. 33-10884, “Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets” (November 2, 2020).

³ See Adopting Release No. 33-10618, “FAST Act Modernization and Simplification of Regulation S-K” (March 20, 2019) (emphasizing that the updated rules “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 CF Topic 7 (“If the [confidential treatment] applicant omits information beyond what it customarily and actually treats as private or confidential, we will request an amendment with more circumscribed omissions and an amended application.”).

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, consistent with the requirements under Regulation S-K Item 601(b)(10)(iv),

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

⁵ 17 C.F.R. § 200.83. A cover letter requesting Rule 83 confidential treatment, without the confidential materials, 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.

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the Staff's comments likely will focus on whether the redacted information is material and/or the company customarily and actually treats that information as private or confidential.

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 require that the company file a revised exhibit with fewer redactions and an amendment to the original registration statement or report. 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

Prior to the adoption of the updated 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. As mentioned above, that process requires companies to submit to the SEC a confidential treatment request that outlines the legal and factual bases for redacting specific contract terms. It also requires companies to provide the SEC with unredacted copies of those agreements, which would be protected from public disclosure under the Freedom of Information Act (FOIA) for specified periods of time by formal confidential treatment orders, typically remaining in effect for no longer than 10 years.

In light of the updated rules, most companies will no longer rely on the confidential treatment request process under Rules 406 and 24b-2. There are certain scenarios, however, where the updated rules are not available, such as in the context of exhibits to beneficial ownership filings on Schedule 13D and materials filed to comply with Item 1016 of Regulation M-A. In addition, because many companies continue to reference in their periodic report or

registration statement exhibit lists agreements that are covered by confidential treatment orders issued under Rules 406 and 24b-2, they will need to consider appropriate next steps to maintain the confidentiality of the redacted terms of those agreements prior to the expiration of existing confidential treatment orders.

The discussion below briefly outlines the traditional confidential treatment request process under Rules 406 and 24b-2 and describes the options available to companies seeking to maintain the confidentiality of agreements beyond the life of existing confidential treatment orders, including the options available for transitioning to the more simplified process under the updated rules.

Traditional Confidential Treatment Request

In order to rely on Rule 406 or 24b-2 to redact portions of an agreement required to be filed as an exhibit to an SEC filing, a company must submit a confidential treatment request in paper form to the SEC at the same time as the redacted version of the agreement is filed as an exhibit. As explained in more detail in CF Disclosure Guidance: Topic No. 7 (CF Topic 7),⁷ the request should, among other things, identify the FOIA exemption the company has relied upon to redact the information, provide an analysis as to why the exemption is applicable, justify the time period of confidential treatment being sought and explain why the information is not material to investors. The request also must be accompanied by an unredacted version of the agreement, marked to show the terms that have been redacted from the publicly filed version.

The Staff reviews all confidential treatment requests to determine whether it should issue an order granting the request. CF Topic 7 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 redactions. CF Topic 7 cautions companies against making excessive redactions by indicating that the Staff will request more circumscribed redactions and an amended confidential treatment request if a company seeks to omit information beyond what is customarily and actually treated as private or confidential.

The Staff will issue any comments to the applicant over the telephone (rather than in a formal letter) 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.

⁷ SEC Division of Corporation Finance, [CF Disclosure Guidance: Topic No. 7, "Confidential Treatment Applications Submitted Pursuant to Rules 406 and 24b-2"](#) (issued December 19, 2019; amended March 9, 2021). CF Topic 7 replaced and superseded the prior guidance provided in Staff Legal Bulletins 1 and 1A.

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FOIA Exemption 4

Companies often rely on the FOIA exemption provided in 5 U.S.C. § 552(b)(4) (Exemption 4), which protects “trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential,” to redact terms from agreements required to be filed as exhibits with the SEC. CF Topic 7 refers those relying on Exemption 4 to the decision in *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356 (2019), which defined “confidential” broadly for purposes of the exemption. As defined by the Court, “confidential” under Exemption 4 no longer requires a showing of substantial competitive harm, as it had been interpreted in the past, 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.”

Protecting Information From Public Disclosure After Confidential Treatment Order Expires

As described above, companies relying on Rules 406 and 24b-2 are required to provide an unredacted version of the agreement to the SEC along with its confidential treatment request. The purpose of confidential treatment orders is to protect those unredacted versions in the possession of the SEC from requests for public disclosure under FOIA. According to CF Topic 7, companies have the following options where a confidential treatment order is about to expire:

- **Refile the redacted exhibit** in accordance with the updated exhibit-filing rules (without a confidential request) if the initial confidential treatment order was issued on or before October 15, 2017, the agreement remains material to investors, the redacted terms are not material and the company customarily and actually treats the redacted terms as private or confidential. For additional information, refer to “Refiling Redacted Exhibits Under Updated Exhibit Rules” below.
- **Refile the unredacted exhibit** if the agreement remains material to investors but none of the previously redacted information continues to require protection from public disclosure.
- **Request an extension of the confidential treatment order** if the agreement remains material to investors and the previously redacted information continues to be confidential.
 - If the initial order was issued after October 15, 2017: The company may submit a one-page short-form extension request to the SEC at CTExtensions@sec.gov. For additional information, refer to “Short-Form Extension Requests” below.
 - If the initial order was issued on or before October 15, 2017: The company is not permitted to submit a short-form application but may submit an entirely new confidential

treatment request under Rule 406 or 24b-2 (as described under “Traditional Confidential Treatment Request” above and in CF Topic 7). This option usually is less desirable than refiling the redacted exhibit in accordance with the updated exhibit-filing rules, given that the former entails sending another unredacted version of the agreement to the SEC along with producing and submitting a new confidential treatment request.

Refiling Redacted Exhibits Under Updated Exhibit Rules

If the initial confidential treatment order was issued on or before October 15, 2017, a company may transition to the updated exhibit rules with respect to that agreement. As discussed above, the updated rules permit companies to forgo the traditional confidential treatment request process, which can consume time and other resources. To rely on the updated rules, the company must refile the redacted version of the agreement in accordance with the process described above under “Filing Redacted Exhibits With SEC Under Updated Rules.”

In terms of timing, a company may refile⁸ the redacted exhibit pursuant to the updated rules at any time and, therefore, if it wishes, well in advance of the expiration date of the confidential treatment order (without waiting until the order is close to expiring). If a company waits until the confidential treatment order expires, the company is expected to refile a redacted exhibit in the company’s first Exchange Act report following the expiration of the order.⁹

Short-Form Extension Requests

If the initial order was issued after October 15, 2017, 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.¹⁰ 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.¹¹ It also requires the company to affirm that its most recently approved confidential treatment request continues to be

⁸ A company may refile the redacted exhibit by including it in a new filing or by amending a prior filing, either before or after expiration of the confidential treatment order. See CF Topic 7, endnote 11. For example, a company may refile a redacted exhibit with its annual report on Form 10-K before the confidential treatment order expires.

⁹ CF Topic 7 notes that the Staff will not recommend an enforcement action if a company refiles the redacted exhibit with its first Exchange Act report following the expiration of the order.

¹⁰ 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](#).

¹¹ The short-form request is not available for adding new exhibits or making additional redactions that the Staff did not previously consider.

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true, complete and accurate in all material respects regarding the redacted information, such as with respect to its lack of materiality and its private or confidential nature.¹²

¹²The 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.

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 automatically will be posted on the company's EDGAR filing page.

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