



ALERTS

SEC Overhauls Confidential Treatment Request Regime

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The U.S. Securities and Exchange Commission (SEC) recently adopted new rules and procedures that permit public companies to file redacted material contracts as exhibits to SEC filings without applying for a confidential treatment request (CTR). These new rules present a major overhaul of the SEC's prior CTR regime, which proved to be time-consuming, expensive, and uncertain for registrants. The new rules and procedures, primarily amending Regulation S-K Item 601(b), will provide much needed relief to companies by reducing the significant cost and time expended to prepare and process CTRs, without necessarily diminishing the quality of information available to investors. The new rules and procedures became effective on April 2, 2019.

Under the SEC's prior CTR procedures, a company seeking to omit competitively sensitive information from material contracts was required to submit a detailed application to the SEC identifying the particular text for which confidential treatment was sought, a statement of the legal grounds for the redaction, and an explanation why (based on the facts and circumstances of the particular case) disclosure of the redacted information was unnecessary for the protection of investors.

Under the new rules and procedures, companies can redact certain information from material contract exhibits on their own accord, without first submitting a CTR, provided that the redacted information (i) is not material, and (ii) would be competitively harmful if publicly disclosed. To comply with these rules, the company must:

- mark the exhibit index of the relevant SEC filing to indicate that

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portions of the exhibit or exhibits have been omitted;

- include a prominent statement on the first page of the redacted exhibit that certain identified information has been excluded from the exhibit because it is both (i) not material, and (ii) would be competitively harmful if publicly disclosed; and
- indicate with brackets where the information has been omitted from the filed version of the exhibit.

The SEC has stated that it intends to review registrants' filings to determine compliance with the new procedures. Consequently, while public companies will have significantly more flexibility to protect their competitively sensitive material on the front end, this does not mean companies are completely free from SEC scrutiny on the back end. In this regard, companies should still consider it a best practice to document their justifications for the redactions and be prepared to submit them to the SEC if the company is reviewed.

To further highlight the new rules, the information in the following table summarizes the SEC's new CTR review process:

Type of Review Process	Summary of New Review Process
	To initiate a redacted exhibit review, the SEC will send a letter with a request that the registrant provide the SEC Staff with a paper copy of the unredacted exhibit marked to highlight the redacted information. Once the Staff reviews the unredacted materials, they may ask for further substantiation of the registrant's redaction decisions.
General Compliance Review Process	<p>If the Staff's review of the unredacted exhibit does not lead to comments, the Staff will send a letter indicating that the compliance review is complete.</p> <p>If the Staff's review of the unredacted exhibit leads to questions about immateriality or claims of competitive harm, the Staff will send a stand-alone comment letter to the registrant dealing only with the redactions. When the Staff's questions are resolved, they will send the registrant a letter indicating that the compliance review is complete.</p>
	Consistent with past practice, the SEC will ask registrants to resolve any questions relating to redacted exhibits in registration statements before submitting a request for acceleration of the effective date.
Securities Act Registration Statements	The SEC will release the initial request for an unredacted exhibit and the closing of review letter publicly on the EDGAR system in connection with posting the other correspondence related to the filing review. In order to avoid public disclosure of competitively harmful information, the SEC will not make public the Staff's comments regarding redacted exhibits, nor registrant

responses to Staff requests or comments related to that topic.

Exchange Act
Filings

The SEC will make its initial request for an unredacted exhibit and the closing of review letter for that exhibit publicly available on EDGAR following the closing of the review. If the review was done in conjunction with a regular filing review, the SEC will post the initial request and closing of review letter at the time it posts the other correspondence related to the filing review. These letters will only note the existence of an opened and a closed redacted exhibit compliance review. In order to avoid public disclosure of competitively harmful information, the SEC will not make public the Staff's comments regarding redacted exhibits, nor registrant responses to Staff requests or comments related to that topic.

Procedures to
Preserve
Confidentiality
of
Supplemental
Materials

Registrants will continue to have the ability to request confidential treatment of supplemental materials while they are in the SEC's possession pursuant to Rule 83. Upon completion of a compliance review, the SEC will destroy all supplemental materials so long as the registrant has complied with the procedures outlined in Securities Act Rule 418 or Exchange Act Rule 12b-4. To minimize the risk of inadvertent disclosure of the information, the SEC will provide specific supplemental material delivery instructions in its request for unredacted exhibits. The SEC encourages registrants to follow those instructions and not send supplemental responses to requests for unredacted exhibits or other supplemental information relating to those exhibits to individual Staff members or the Staff member that made the request.

To obtain more information regarding this alert, contact the Barnes & Thornburg attorney with whom you work, David P. Hooper, chair of the [Securities and Capital Markets Practice Group](#), at 317-231-7333 or david.hooper@btlaw.com, or Thomas J. Lyons, III, at 317-261-7844 or thomas.lyons@btlaw.com.

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