

SEC Clarifies Guidance for Expiring Confidential Treatment Orders

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On March 9, the Securities and Exchange Commission (SEC) clarified guidance for applications for confidential treatment. We previously reported on the SEC's updated confidential treatment process [here](#). The [clarifications](#) relate to a registrant's options for expiring confidential treatment orders and ties the options available to a registrant with an expiring order to whether the order was initially issued before or after October 15, 2017.

Under the revised guidance, companies with an expiring confidential treatment order have the following options:

1. **Refile the unredacted exhibit.** If the contract continues to be material and the information does not need to be protected from public disclosure, then the registrant may refile it in complete, unredacted form.
2. **Extend the confidential period.** If the contract continues to be material and the previously redacted information continues to be confidential, then the registrant may request to extend confidential treatment under Rule 406 or Rule 24b-2 as follows:
 - If the order was initially issued **after October 15, 2017**, then the registrant may utilize the short form application, described in our [previous publication](#), submitted by email to the SEC.
 - If the order was initially issued **on or before October 15, 2017**, then the short form application is not available, and the registrant may file a new, complete application for confidential treatment.
3. **Transition to the "Redacted Exhibit Rules."** If the contract continues to be material and the order was initially issued **on or before October 15, 2017**, then the registrant may comply with the redacted exhibit rules in Regulation S-K Item 601(b)(10) and parallel rules. If a registrant determines to redact information in an exhibit under the new framework, the registrant may file the redacted exhibit without submitting substantiation to the SEC, but must:
 - mark the exhibit index to indicate that portions of the exhibit 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) is the type that the registrant treats as private or confidential; and
 - indicate with brackets where the information has been omitted from the filed version of the exhibit.

We expect that registrants with orders issued on or before October 15, 2017 will transition to the redacted exhibit rules and avoid the time and expense of updating and tracking outstanding confidential treatment orders. Registrants may transition to the updated exhibit rules by refiling the redacted exhibit in compliance with the SEC rules in any Exchange Act report up until the first report following expiration of the underlying confidential treatment order.

For further information about the redacted exhibit rules, please see our [April 22, 2019 publication](#) discussing the redacted exhibit rules generally and our [December 9, 2020 publication](#) discussing the amendment to prong two of the above from a “competitive harm” standard to a “type that the registrant treats as private or confidential” standard.

For purposes of determining when an order was “initially issued,” registrants should look to when the original order was initially issued, rather than the date of any applicable extensions. For example, if an order was initially issued before October 15, 2017 and then subsequently extended after October 15, 2017, the registrant may rely upon the options available for orders initially issued on or before October 15, 2017.

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