

# SEC Eliminates “Competitive Harm” Requirement for Confidential Treatment of Material Contracts and Agreements

## WRITTEN BY

Heather M. Ducat | David I. Meyers | Sarah Hanna

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On November 2, the Securities and Exchange Commission (SEC) [adopted amendments](#) to simplify and harmonize certain aspects of the exempt offering framework. These amendments included changes to Item 601 of Regulation S-K to eliminate the “competitive harm” requirement to file redacted material contracts and agreements. Under the amended Item 601, a registrant may file redacted material contracts and agreements provided that the redacted information (1) is not material and (2) is the type of information that the registrant both customarily and actually treats as private and confidential.

## The “Competitive Harm” Requirement and *Food Marketing Institute v. Argus Leader Media*

Under the FAST Act Modernization and Simplification of Regulation S-K adopted on March 20, 2019, previously discussed in [this publication](#), the SEC streamlined the process for confidential treatment requests and filing redacted agreements. The rule adopted in 2019 provided that a registrant could file redacted material contracts and agreements without submitting a confidential treatment request, provided that the redacted information (1) was not material and (2) would be competitively harmful if publicly disclosed. To this end, the registrant was required to include a prominent statement on the first page of the redacted exhibit that certain identified information had been excluded from the exhibit because it was both (1) not material and (2) would be competitively harmful if publicly disclosed.

In June 2019, the Supreme Court rejected the “competitive harm” test in *Food Marketing Institute v. Argus Leader Media* since it applied to determining what information was confidential under Exemption 4 of the Freedom of Information Act. According to the Supreme Court, “[a]t least where 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, the information is ‘confidential’ within the meaning of Exemption 4.”

## New Rules

The amendments to Item 601 of Regulation S-K adjust the exhibit filing requirements to more closely align with the Supreme Court’s definition of “confidential.” If a registrant determines to redact information in an exhibit under the new framework, the registrant 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 (1) not material and (2) *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.

Consistent with the existing rules, the SEC may request that the registrant provide the redacted materials and its materiality and privacy or confidentiality analyses on a supplemental basis. Upon review, the SEC may require the registrant to amend its filing to include redacted information if the redaction it is not supported by the registrant's analyses. Therefore, it is still important that if a registrant determines to redact an exhibit, it carefully considers this analysis and records such analysis at the time of the redactions, so it can be referred to in case the SEC requests such materials. Registrants still can request confidential treatment of materials in the SEC's possession under Rule 83, such that upon completion of the review, the SEC will destroy all supplemental materials.

This amendment will become effective 60 days after publication in the *Federal Register*.

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