

SEC Issues Guidance on New Rules for Confidential Treatment of Material Agreements

April 5, 2019

As discussed in our recent [memo](#), the SEC recently adopted rules to modernize and simplify public company disclosure, which included new procedures for filing redacted material agreements with the SEC without the need to make a formal confidential treatment request.

Those rules became effective on April 2, one day after the SEC issued guidance that explained how they will review redacted agreements under the new rules and sought to resolve various transition issues for companies with pending confidential treatment requests.

New Rule Requirements

Companies may file redacted material contracts without applying for confidential treatment as long as the redacted information is not material and would be competitively harmful if publicly disclosed, which is the same standard as the prior confidential treatment regime.

However, unlike the prior regime where the SEC limited confidential treatment orders to a maximum of 10 years (in the absence of an extension), there is no expiration date for the confidential treatment of information filed pursuant to the new rules.

Under the new rules, companies must:

- mark the exhibit index to indicate that 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.

No separate confidential treatment request is required to be filed with or submitted to the SEC.

Compliance Reviews

The SEC has indicated that that it intends to review company filings to monitor compliance pursuant to the following procedures:

- The SEC will send a letter with a request that the company provide a paper copy of the unredacted contract marked to highlight the redacted information.
- After review, the SEC will either send a letter indicating that the compliance review is complete or will provide the company with comments separate from any comments on the related filing.
- Once any questions are resolved, the SEC will send a letter indicating that the compliance review is complete.
- In order to maintain confidentiality of the information, only the initial request and closing review letter will be posted on EDGAR.
- Companies may request confidential treatment of materials that are in the SEC's possession pursuant to Rule 83 – and, upon completion of the SEC's review, the SEC will destroy all

supplemental materials in its possession so long as the procedures outlined in Rule 418 or Rule 12b-4 (as applicable) are complied with.

- The SEC will provide specific instructions for how to deliver the requested supplemental information in order to avoid the risk of inadvertent disclosure.

In the case of a review in connection with a Securities Act registration statement, and consistent with past practice, the SEC will require that companies resolve any issues related to the redaction of material contracts prior to submitting an acceleration request.

Transition Issues and Confidential Treatment Requests

Companies that have pending confidential treatment requests may either continue the process or may withdraw their pending application and rely on the new rules. Two benefits of transitioning to the new regime are avoiding the need to request an extension for confidential treatment if the agreement is still effective when the original order expires given that an initial confidential treatment order is effective for only up to 10 years and avoiding the materials submitted as part of that original request being subject to a Freedom of Information Act request.

Companies that withdraw a confidential treatment request to rely on the new rules need to amend their filing to conform to the new rule requirements. This would require an amendment to the exhibit list in that filing and also re-filing any exhibits to conform to the requirements described above. A separate withdrawal request will also need to be submitted to the SEC, instructing the SEC to either destroy or return the materials included as part of the original confidential treatment request.

If a company received an order granting a confidential treatment request under the old rules and the order is still in effect, the grant of that confidential treatment will remain in effect until the date stated in the order. If the agreement is still in effect and competitively sensitive upon expiration of the original confidential treatment timeframe, then the company will need to submit an extension request. It cannot rely on the new rules to refile the agreement at that time in order to avoid the potential disclosure of the materials submitted as part of the original confidential treatment request, because the materials submitted as part of the original confidential treatment request will still be in the possession of the SEC and subject to requests under the Freedom of Information Act.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Bruce Dallas	650-752-2022	bruce.dallas@davispolk.com
Derek Dostal	212-450-4322	derek.dostal@davispolk.com
Marcel Fausten	212-450-4389	marcel.fausten@davispolk.com
Joseph A. Hall	212-450-4565	joseph.hall@davispolk.com
Michael Kaplan	212-450-4111	michael.kaplan@davispolk.com
James C. Lin	+852-2533-3368	james.lin@davispolk.com
Richard D. Truesdell, Jr.	212-450-4674	richard.truesdell@davispolk.com
Elizabeth Weinstein	212-450-3889	elizabeth.weinstein@davispolk.com

© 2019 Davis Polk & Wardwell LLP | 450 Lexington Avenue | New York, NY 10017

This communication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. This may be considered attorney advertising in some jurisdictions. Please refer to the firm's [privacy notice](#) for further details.