

Alert | Corporate



April 2019

SEC Guidance on Exhibit Redactions for Immaterial, Competitively Harmful Information

No April Fool's Joke! – On April 1, 2019, the SEC provided **additional guidance** relating to its new rules that permit companies to file redacted material contracts without applying for confidential treatment of the redacted information provided the redacted information (i) is not material and (ii) would be competitively harmful if publicly disclosed. The new rules became effective upon their publication in the Federal Register on April 2, 2019.

Summary of New Rules

The new rules, primarily located in Regulation S-K Item 601(b), require companies to identify where information has been omitted from a filed exhibit. Specifically, 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 information¹ 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.

¹ Staff Legal Bulletins 1 and 1A provide the SEC's long-established views on appropriate redactions of confidential information (available [here](#)).

To facilitate consistency across the SEC's exhibit requirements, the new rules also apply to certain exhibit-related requirements in specified disclosure forms for which Item 601(b)(10) does not apply, including Form 8-K, Form 20-F (to maintain a consistent approach for domestic and foreign companies) and forms used by investment companies such as Form N-1A and Form N-2.

Compliance Reviews

The SEC intends to review company filings for compliance with the new rules. When it does this in connection with a regular filing review, the SEC will separate its requests for supplemental information, and will request that companies provide their responses to those requests separately from the regular filing review comment and response process to minimize the risk of inadvertent public disclosure of competitive information.

Redacted Exhibit Review Process

To initiate a redacted exhibit review, the SEC will send a letter with a request that the company provide a paper copy of the unredacted exhibit marked to highlight the redacted information. Once the SEC reviews the unredacted materials, it may or may not ask for further substantiation of the company's redaction decisions.

If the SEC's review of the unredacted exhibit does not lead to comments, the SEC will send a letter indicating that its compliance review is complete. If its review of the unredacted exhibit leads to questions about immateriality or claims of competitive harm, the SEC will provide the company with comments separate from any comments on the associated filing. When its questions are resolved, the SEC will send the company a letter indicating that its compliance review is complete.

Securities Act Registration Statements – Resolution Before Effectiveness

Consistent with historical practice, the SEC will ask companies to resolve any questions relating to redacted exhibits in registration statements before submitting a request for acceleration of the effective date.

The SEC will release the initial request for an unredacted exhibit and the closing of review letter publicly on EDGAR in connection with posting the other correspondence related to the filing review. The SEC will not, however, make public its comments or the company's responses relating to the redacted exhibits.

Exchange Act Filings

The SEC will make its initial request for an unredacted exhibit and the closing of review letter 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 relating to the filing review. These letters, however, will only note the existence of an opened and a closed redacted exhibit compliance review. To avoid public disclosure of competitively harmful information, the SEC will not make public its comments or the company's responses relating to the redacted exhibits.

Confidentiality of Supplemental Materials

Companies may request confidential treatment of supplemental materials pursuant to Rule 83. Upon completion of a compliance review, the SEC will destroy or return all supplemental materials so long as the company has complied with the procedures outlined in Rules 418 or 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 rather than just having the company send supplemental information relating to those exhibits to individual staff members or the staff member who made the request.

Transition Issues

The new rules have not changed a company's ability to request confidential treatment pursuant to Rule 406 or Rule 24b-2, and the SEC will continue to process new applications as well as pending applications that are not withdrawn, following well-recognized procedures.

If a company has a confidential treatment request pursuant to Rule 406 or Rule 24b-2 pending, the company may, but is not required to, withdraw its pending application. A company that withdraws its confidential treatment application and relies on the new rules must amend its filing to conform to the new rule requirements and alert its respective Assistant Director office.

If the company has received an order granting confidential treatment, and the order is still in effect, the grant of confidential treatment will continue until the date stated on the order.

Transition Questions

The SEC encourages companies to direct transition questions to RedactedExhibits@sec.gov.

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