

# SEC Updates Processes for Expiring Confidential Treatment Orders

January 26, 2024

On January 8, 2024, the SEC Division of Corporation Finance updated the guidance on confidential treatment applications and confidential treatment order extensions made pursuant to Securities Act Rule 406 and Exchange Act Rule 24b-2. In particular, the updated guidance sets out the options available to companies that have confidential treatment orders that are about to expire.

There are three alternatives, depending on whether the confidential treatment order was initially granted more or less than three years ago: companies may refile an unredacted exhibit, request an extension or transition to the streamlined process that was created by the Securities and Exchange Commission (the “SEC”) in 2019. The SEC expects that most companies will elect to transition to the streamlined process, which allows companies to file redacted exhibits without submitting a confidential treatment request and an unredacted copy of the document to the SEC, provided that the company customarily treats the redacted information as confidential and the omitted information is not material. Companies that have historically filed confidential treatment applications pursuant to Rules 406 and 24b-2 should consider availing themselves of the SEC’s streamlined process in their next upcoming periodic report.

**Background.** Rules 406 and 24b-2 allow companies to object to the public release of confidential information that would otherwise be required to be filed under the Securities Act or the Exchange Act. Most often, confidential treatment applications relate to certain terms of material contracts that are required to be filed as exhibits to periodic reports and registration statements.

Under the rules, companies seeking confidential treatment orders must file the relevant document on EDGAR, redacting all of the confidential information and indicating at each appropriate place in the document that information has been omitted. The applicant must also submit a written application to the SEC that identifies the exemption under the Freedom of Information Act on which it is relying to object to the public disclosure of the information and includes an unredacted copy of the filed document.

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Until 2019, submitting a confidential treatment application pursuant to Rules 406 or 24b-2 was the primary method for companies to safeguard confidential information that was otherwise required to be filed. In March 2019 and November 2020, the SEC amended Regulation S-K Item 601 to create a streamlined process that allows companies to omit immaterial information that is typically treated as confidential without submitting a confidential treatment request. Under these “redacted exhibit rules,” companies are able to redact such information without also providing unredacted copies to the SEC at the time of filing.

For certain filings, such as Schedules 13D and filings that have exhibit requirements specified in Item 1016 of Regulation M-A, companies are still required to submit confidential treatment applications to the SEC in order to obtain confidential treatment of exhibits.

**Updated Guidance.** Under the updated guidance, when a confidential treatment order is about to expire, companies have three options, depending on when the order was originally issued. These options are:

- **Refile the unredacted exhibit.** Companies may refile the unredacted exhibit if the document is still material but the information no longer needs to be protected from public disclosure.
- **Apply to extend the confidential period.** Companies may extend the confidential period if the document is still material and the information continues to be confidential. This can be done by filing an application pursuant to Rules 406 or 24b-2:
  - If the order was issued less than three years ago, companies may use the short-form extension application, which provides a simplified process to file an application; and
  - If the order was issued more than three years ago, companies must use the long-form extension application.
- **Transition to the streamlined process.** Companies may transition to the redacted exhibit rules if the order was issued more than three years ago and the contract is still material.
  - In order to make this transition, companies must refile the redacted document in compliance with the requirements of Item 601(b)(10)(iv). If the company does this in their first Exchange Act report after the expiration of the confidentiality treatment order, the staff will not recommend enforcement action. Notably, if an order was granted more than three years ago, companies do not need to wait for

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the expiration of the order to transition to the redacted exhibit rules. Rather, companies can transition by complying with the redacted exhibit rules in a new filing or by amending a previously filed document to refile the redacted exhibit.

Disclosure Guidance: Topic No. 7 is available [here](#).

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Please do not hesitate to contact us with any questions.



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