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**Updated Guidance
On Confidential Treatment
In SEC Filings**

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Updated Guidance On Confidential Treatment In SEC Filings

In March 2019, the [SEC](#) adopted amendments to Regulation S-K as required by the Fixing America's Surface Transportation Act ("FAST Act") (see [HERE](#)). Among other changes, the amendments allow companies to redact confidential information from most exhibits without filing a [confidential treatment request \("CTR"\)](#), including omitting schedules and exhibits to exhibits. Likewise, the amendments allow a company to redact information that is both (i) not material, and (ii) competitively harmful if disclosed without the need for a confidential treatment request. The enacted amendment only applies to material agreement exhibits under [Item 601\(b\)\(10\)](#) and not to other categories of exhibits, which would rarely contain competitively harmful information.

After the rule change, the [SEC](#) streamlined its procedures for granting CTR's and for applying for extended confidential treatment on previously granted orders. The amendments to the [CTR process](#) became effective April 2, 2019. See [HERE](#) for a summary of confidential treatment requests. In December 2019, the SEC issued new guidance on confidential treatment applications submitted pursuant to Rules 406 and 24b-2.

Confidential Treatment Requests Under Rule 406 or 24b-2

[Rule 406](#) of the Securities Act of 1933 ("Securities Act") and Rule 24b-2 of the Securities Exchange Act of 1934 ("Exchange Act") set forth the exclusive procedures for seeking confidential treatment for any information that may be required to be publicly filed under either Act and for which the streamlined procedures for confidential treatment of material contracts and their exhibits is not available. Furthermore, a company may voluntarily seek approval under Rules 406 and 24b-2 even if the self-executing procedure for omitting information is available. Later in this blog, I include a refresher on the streamlined, self-executing rules for omitting confidential information from material contract exhibits to SEC filings.

Like all [CTR's](#), requests under these rules must be made in paper format and not electronic. Also, like all CTR's, if a redacted exhibit is included with a registration statement, any questions regarding the confidential treatment will need to be fully resolved before the [SEC](#) will declare the registration statement effective.

To make a CTR under Rule 406 or 24b-2, a person must omit the confidential information from the relevant [EDGAR filing](#), noting that information has been omitted based on a CTR, and concurrently file the [CTR](#) with the SEC using the specific fax number and designated person for receiving such information. All documents and information must be marked "Confidential Treatment."

The CTR must include one unredacted copy of the entire document for which confidential treatment is sought and a cover letter or memo containing (i) identification of the information sought to be kept confidential; (ii) a statement of the grounds for keeping the information confidential, including reference to particular provisions under [FOIA](#) and other [SEC rules](#) and regulations; (iii) the specific time period for which confidentiality is sought (year, month and date) and a justification for such period; (iv) a detailed explanation of why, based on the facts and circumstances of the particular case, disclosure of the information is unnecessary for the protection of investors; (v) a written consent to the furnishing of the confidential information to other government agencies, offices, or bodies and to the Congress; and (vi) the name, address and telephone number of the person to whom all notices and orders should be directed.

For an [Exchange Act Rule 24b-2 CTR](#), the name of each exchange upon which the materials would be filed (or omitted) must also be included. Furthermore, the submission must include a statement that: (i) none of the confidential information has been disclosed to the public; (ii) disclosure of the information will cause substantial competitive harm to the company; and (iii) disclosure of the confidential information is not necessary for protection of investors.

As discussed below, the [SEC](#) will not grant confidential treatment to information that is material. Moreover, if information is omitted beyond what is customarily treated as private or confidential, the SEC will ask that an amendment be filed with fewer omissions and a new CTR filed.



If confidential treatment is granted, an order will be entered and filed on EDGAR. If confidential treatment is denied, the company will have an opportunity to withdraw the filing with the confidential information if withdrawal is otherwise allowable (such as a [voluntary S-1 filing](#) or [Exchange Act report](#) by a voluntary filer). A denial may also be appealed.

Application for Extension of Confidential Treatment

Companies that have previously obtained a confidential treatment order for a material contract must continue to file extension applications under Rules 406 or 24b-2 if they want to protect the confidential information from public release pursuant to a Freedom of Information Act request after the original order expires. The [SEC](#) has created a simple one-page form to apply for an extension of time for which a confidential treatment order had previously been granted. Rather than submitting a whole new application with the confidential information included, a company seeking to extend a confidential treatment order previously granted can simply affirm that the facts and circumstances that supported the prior application continue to be true, complete and accurate.

The short-form application allows for an extension of confidential treatment for a period of three, five or ten years and requires a brief explanation to support the request. The request for extension must be filed prior to the original order's expiration. If the applicant reduces the redactions from the previous version, the revised redacted version of the contract must be publicly filed when the short-form extension application is submitted. The short-form application cannot be used to add new exhibits to the application or make additional redactions. In that case, a full application under Rules 406 or 24b-2 would still be required.

The SEC has provided an email address (CTExtensions@sec.gov) for submittal of the new short-form application. The email address is exclusive to these short-form applications and, as such, should not be used in connection with any other type of confidential treatment or extension request. Upon approval, the SEC will post the order granting [CTR](#) on the applicant's EDGAR page.

Confidential Treatment Requests for Material Contracts

Effective March 2019, [Item 601\(b\)\(10\) of Regulation S-K](#) allows a company 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. If it does so, the company should mark the exhibit index to indicate that portions of the exhibit or exhibits have been omitted and 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 not material and would likely cause competitive harm to the registrant if publicly disclosed. The company also must indicate by brackets where the information is omitted from the filed version of the exhibit.

If requested by the SEC, the company must promptly provide an un-redacted copy of the exhibit on a supplemental basis. The SEC also may request the company to provide its materiality and competitive harm analyses on a supplemental basis. Any requested supplemental information must be provided in paper format and only to the designated email address provided by the [SEC](#) to protect and preserve its confidential nature. If the SEC does not agree with the analysis, it could request that the company amend its filing to include any previously redacted information. If a redacted exhibit is included with a registration statement, any questions regarding the confidential treatment will need to be fully resolved before the SEC will declare the registration statement effective.

The company may request confidential treatment of the supplemental material submitted to the SEC pursuant to [Rule 83](#) while it is in the possession of the SEC. After completing its review of the supplemental information, the SEC will return or destroy the information at the request of the company if the company complies with the procedures outlined in Rules 418 or 12b-4. Rules 418 or 12b-4 require that a company request that the SEC either return or destroy the supplemental information, at the same time as it is first furnished to the SEC and that returning or destroying the information (i) is consistent with the protection of investors and (ii) is consistent with the Freedom of Information Act. Also, if information is electronically provided to the [SEC](#), the SEC has no obligation to return or destroy same.



Although the letter requesting additional information, and the closing of the review letter, will both be made public on the [EDGAR system](#), the SEC will not make public its comments regarding redacted exhibits, nor the company's responses thereto.

The amendments are not meant to alter what information is deemed confidential or can be omitted, but rather to streamline the process by allowing a company to redact without the confidentiality treatment process. The [SEC](#) may still randomly review company filings and "scrutinize the appropriateness of a registrant's omissions of information from its exhibits."

What Information Qualifies for Confidential Treatment

Generally speaking, a company can seek confidential treatment for information which could adversely affect the company's business and financial condition, usually because of competitive harm, if disclosed, as long as the information is not material to investors.

A [CTR](#) must include specific citations to an exemption from disclosure under FOIA. The FOIA specifies nine categories of information that may be exempted from the FOIA's broad requirement to make information available to the general public. The most commonly used exemption for public companies allows for confidential treatment for "trade secrets and commercial or financial information obtained from a person and privileged or confidential." The U.S. Supreme Court's case *Food Marketing Institute v. Argus Leader Media* (October 2018) held that 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 FOIA and that it is not necessary to show substantial competitive harm. The SEC's new guidance refers CTA applicants to the Supreme Court case for assistance in crafting arguments for the [CTA application](#).

Although [FOIA](#) may generally exempt trade secrets, not all trade secrets may be kept confidential by public companies. In essence, when a company determines to go public and files a registration statement under either the Securities Act or Exchange Act, and thus agrees to file reports with the SEC, the company is agreeing to make public the information required by [Regulation S-K](#) and S-X. A company cannot avoid these specific requirements by claiming confidentiality. Examples of information that a private company may deem confidential, but for which a public company will need to disclose, include: (i) the identity of 10% or greater customers; (ii) the identity of 5% or greater shareholders; (iii) the dollar amount of firm backlog orders; (iv) the duration and effect of all patents, trademarks, licenses and concessions held; (v) related party transactions; and (vi) executive compensation.

Assuming that information is not specifically required to be disclosed under the Securities Act or Exchange Act, a "trade secret" is "a secret, commercially valuable plan, formula, process or device that is used for the making, preparing, compounding or processing of trade commodities and that can be said to be the end product of either innovation or substantial effort." Examples of information that a public company could successfully complete a [CTR](#) for include (i) pricing terms; (ii) technical specifications; (iii) payment terms; (iv) sensitive information regarding business strategy, or timing of research, development and commercialization efforts; (v) details of intellectual property (that isn't already public, such as in a filed patent); (vi) details of cybersecurity procedures; and (vii) customer databases.

A company can never obtain confidential treatment for information that is already in the public domain or has been publicly disclosed, even if inadvertently. Accordingly, it is important that a company be very careful to ensure that any information for which it seeks confidential treatment is kept strictly confidential, including by third parties. For example, care should be given that a counterparty to a contract does not issue a press release or otherwise make provisions public.

Confidential Treatment Requests Under Rule 83

[Rule 83](#) provides a procedure for requesting that information be kept confidential from Freedom of Information Act ("FOIA") requests where no other procedure, such as Rules 406 or 24b-2, are available. Generally, Rule 83 is used in the context of requests for supplemental information, examinations, inspections and investigations. Under Rule 83, the submitter of information must mark each page with "Confidential Treatment Requested by [name]" and an identifying



number and code, such as a Bates-stamped number. Also, the words “FOIA Confidential Treatment Request” must appear on the top of the first page of the request. Like all other [CTR's](#), the request must be via paper and not electronically. The SEC has provided a specific fax line and office (the FOIA Office) to receive Rule 83 CTR's to maintain their confidentiality, even among SEC staff. A confidential treatment request will expire 10 years from the date the FOIA Office receives it unless that office receives a renewal request before it expires.

The requester may claim personal or business confidentiality, but need not substantiate his or her request until the FOIA Office notifies him or her of a FOIA request for the records. If a FOIA request is received for the records, the person that requested confidential treatment will be notified and given an opportunity to provide a legal and factual analysis supporting confidential treatment. A substantiation submittal must include: (i) the reasons that the information can be withheld under FOIA and referring to the specific provisions of [FOIA](#) supporting same; (ii) any other statutes or regulatory provisions that may govern the information; (iii) the existence and applicability of any prior determinations by the SEC, other federal agency or court relating to the confidential treatment of the information; (iv) the adverse consequences to a business enterprise, financial or otherwise, that would result from disclosure of confidential commercial or financial information, including any adverse effect on the business' competitive position; (v) the measures taken to protect the confidentiality prior to and after submission to the SEC; (vi) the ease or difficulty of a competitor's obtaining or compiling the commercial or financial information; (vii) whether the information was voluntarily submitted to the SEC; (viii) if the substantiation argument document itself should be kept confidential; and (ix) such additional facts and legal analysis as appropriate to support the request.

Where a [Rule 83 CTR](#) is being made in the course of live testimony or oral discussions, the request for confidential treatment must be made contemporaneously with providing the information and followed with a written request no later than 30 days later.

Rule 83 provides for an appeal process where an initial determination that confidential treatment is not warranted. Rule 83 appeals are reviewed and decided by the SEC's Office of General Counsel. If the General Counsel decides the information does not need to be kept confidential, it will give the person 10 days' notice during which time a person could file an action in federal court to continue to fight to maintain the confidentiality of the information. Likewise, if the [SEC](#) determines that information should be kept confidential, the person seeking the information can appeal by filing suit in federal court.

Rule 83 cannot be relied upon to request confidential treatment for information that would otherwise be required to be disclosed in [SEC registration statements](#) or reports. In that case, the person making the CTR would have to rely on the new procedures for redacting information in material contracts or make a CTR under Rules 406 or 24b-2.



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[Palm Beach securities attorney Laura Anthony](#) and her experienced legal team provide ongoing corporate counsel to small and mid-size private companies, OTC and exchange traded public companies as well as private companies going public on the Nasdaq, NYSE American or over-the-counter market, such as the OTCQB and OTCQX. For more than two decades [Anthony L.G., PLLC](#) has served clients providing fast, personalized, cutting-edge legal service. The firm's focus includes, but is not limited to Regulation D and Regulation S and PIPE Transactions, securities token offerings and initial coin offerings, [Regulation A/A+ offerings](#), as well as registration statements on Forms S-1, S-3, S-8 and merger registrations on Form S-4; compliance with the Securities Exchange Act of 1934, including registration on Form 10, reporting on Forms 10-Q, 10-K and 8-K, and 14C Information and 14A Proxy Statements; all forms of going public transactions; mergers and acquisitions including both reverse mergers and forward mergers; applications to and compliance with the corporate governance requirements of securities exchanges including [Nasdaq](#) and [NYSE American](#). Palm Beach attorney Laura Anthony is also the author of [SecuritiesLawBlog.com](#), the producer and host of [LawCast.com](#), Corporate Finance in Focus, and a contributor to The Huffington Post and Law360.

[Ms. Anthony](#) is involved throughout the community of Palm Beach. She is on the board of directors for the American Red Cross for Palm Beach and Martin Counties, and provides financial support to the Susan Komen Foundation, Opportunity, Inc., New Hope Charities, the Society of the Four Arts, the Norton Museum of Art, Palm Beach County Zoo Society, the Kravis Center for the Performing Arts and several other organizations. She is also a financial and hands-on supporter of Palm Beach Day Academy, one of Palm Beach's oldest and most respected educational institutions. She currently resides in Palm Beach with her husband and daughter.

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