Confidential Treatment Applications Submitted Pursuant to Rules 406 and 24b-2

Division of Corporation Finance
Securities and Exchange Commission
CF Disclosure Guidance: Topic No. 7
Date: December 19, 2019

Summary: This guidance addresses how and what to submit when filing an application objecting to public release of information otherwise required to be filed under the Securities Act and the Securities Exchange Act. This guidance replaces and supersedes the guidance provided in Staff Legal Bulletins 1 and 1A.

Supplementary Information:*The statements in this CF Disclosure Guidance represent the views of the Division of Corporation Finance. This guidance is not a rule, regulation or statement of the Securities and Exchange Commission. Further, the Commission has neither approved nor disapproved its content. This guidance, like all staff guidance, has no legal force or effect: it does not alter or amend applicable law, and it creates no new or additional obligations for any person.*

Introduction

Securities Act Rule 406[1] and Exchange Act Rule 24b-2[2] provide the exclusive means for companies to object to the public release of confidential information that is otherwise required to be filed. While the rules refer to "documents" that contain confidential information, generally, applications for confidential treatment pursuant to these rules relate to material contracts required to be filed as exhibits to filings.[3] Prior to March 2019, confidential treatment applications under these rules used to be the primary method for companies to protect confidential commercial or financial information filed in materials contracts. In March 2019, the Commission changed several of its exhibit filing requirements to allow companies to omit immaterial, competitively harmful information without having to provide the information to the Commission and request staff approval of the omissions.[4] While most companies now rely on those provisions, the process described in this guidance is still an available alternative to companies that wish to protect confidential information using the traditional confidential treatment application process. This guidance also applies to those filings, such as Schedule 13D or filings whose exhibit requirements are set out in Item 1016 of Regulation M-A, where confidential treatment applications are still the only available method to protect private information in filed
exhibits.

How to apply for confidential treatment

File the exhibit on EDGAR without the confidential information

To apply for confidential treatment under Rules 406 and 24b-2, an applicant must file the required exhibit with the associated filing. The applicant must omit all confidential information from that exhibit and must mark it to indicate where it has omitted information. The filing must indicate, at the appropriate places in the exhibit, that the confidential information has been filed separately with the Commission.

Submit a written application

The applicant must send a paper application to the Office of the Secretary in which it objects to public disclosure of the confidential information.[5] As required by Rules 406 and 24b-2, the applicant must:

1. Provide one unredacted copy of the contract required to be filed with the Commission with the confidential portions of the document identified;
2. Identify the Freedom of Information Act[6] exemption it is relying on to object to the public release of the information and provide an analysis of how that exemption applies to the omitted information.
   Often, this is the exemption provided by Section 552(b)(4)[7] of the FOIA, which protects "commercial or financial information obtained from a person and privileged or confidential." If this is the case, the Supreme Court's decision in Food Marketing Institute v. Argus Leader Media, 139 S.Ct. 2356 (2019) addresses the definition of confidential and may be helpful in providing this analysis;
3. Justify the time period for which confidential treatment is sought;
4. Explain, in detail, why, based on the applicant's specific facts and circumstances, disclosure of the information is unnecessary for the protection of investors. This generally is encompassed in a materiality discussion, addressed below;
5. Provide written consent to the furnishing of the confidential information to other government agencies, offices or bodies and to the Congress;
6. Identify each exchange, if any, with which the material is filed (required in applications under Rule 24b-2 relating to Exchange Act filings only); and
7. Provide the name, address and telephone number of the person with whom the Division should communicate and direct all issued notices and orders.

Additional considerations

Consistent with our investor protection mandate and the provisions of the FOIA, we also consider additional information when assessing the potential impacts of the proposed omissions of information from material contracts. These considerations generally fall into two categories:

Materiality of the omitted information

We do not permit filers to omit material information from an exhibit, even if it has been previously treated as confidential by the applicant.

While evaluating a confidential treatment application, we consider the omitted provisions and information provided in the application and, if it is clear from the text of the filed document and the associated application that the redacted information is not material, we will not question the applicant's materiality representation. If it is not clear to us whether some or all of the omitted information is not material, we will discuss our concerns with the applicant. If we are unable to agree that some or all of the omitted information is immaterial, we will request an amended application and amendment to the filing.

Excessive omissions

If the applicant omits information beyond what it customarily and actually treats as private or confidential, we will request an amendment with more circumscribed omissions and an amended application.

Division review of applications for confidential treatment

The Division reviews all applications for confidential treatment to determine whether the applicant has provided all information necessary to warrant the issuance of an order granting the request for confidential treatment.

If we require additional information to assess the application, we will convey any comments to the applicant by telephone and request a written response. Upon resolution of any comments, we will grant the application or allow the applicant to withdraw it, as appropriate. If we determine to grant an application, we will issue an order and post it with the company's filing history on sec.gov. We will notify the applicant by phone that we have posted the order.

If the applicant does not respond to our comments or our comments are not resolved, we may take action to deny the application. We will notify the applicant or the agent for service by registered or certified mail and advise it that it may petition the Commission for review of a determination by the Division disallowing the objections.[8] If as a result of this process we ultimately issue an order denying the application, we will post the denial order with the company's filing history on sec.gov.

Extensions of previously granted confidential treatment applications

Companies that previously have obtained a confidential treatment order which is about to expire must file an application under Rules 406 or 24b-2 to continue to protect the confidential information from public release. Filing the redacted exhibit on EDGAR following the procedures specified by the 2019 amendments to Item 601(b) of Regulation S-K will not provide confidential treatment for the previously filed information.
Our short form application provides a streamlined process to file an application to extend the time for which confidential treatment has been granted. Pursuant to this application, the applicant can affirm that the most recently considered application continues to be true, complete and accurate regarding the information for which the applicant continues to seek confidential treatment and indicate the desired time period of the extension.[9] The applicant must provide a brief explanation to support the request. The applicant is not required to refile the unredacted documents or provide the supporting analysis presented in the previous application for that document(s) if the analysis remains the same. If the applicant reduces the extent of omitted information, it must file the revised redacted version of the exhibit on EDGAR when it submits the short form extension application.
The short form application is not the exclusive means to request an extension of confidential treatment for previously granted requests. It is available as an alternative to the traditional method of requesting such extensions.

This short form application may only be used if the confidential material is the subject of an unexpired order granting confidential treatment. The short form application may be limited to only those agreements the applicant wishes to keep confidential and does not have to include all exhibits that are subject to a previous grant of confidential treatment.

Submit a short form application to CTExtensions@sec.gov. Do not use this email address for any other type of confidential treatment or extension request. Our procedures to evaluate and grant or deny applications to extend confidential treatment are the same as we follow to evaluate new requests.

[1] 17 CFR 230.406.
[2] 17 CFR 240.24b-2.
[3] We will refer to documents that are the subject of a confidential treatment request under Rules 406 and 24b-2 as "documents," "material contracts" or "exhibits."
[4] *See* Release No. 33-10618 (March 20, 2019)[84 FR 12674].
[5] Rules 406 and 24b-2 provide that the confidential information will not be made publicly available at least as long as the final disposition of the application is pending.
[6] 5 USC 552.
[7] 5 USC 552(b)(4).
[8] *See* 17 CFR 201.431.
[9] In light of the *Food Marketing Institute* decision, applicants for confidential treatment extensions no longer need to satisfy the competitive harm standard that may have been applied to their original applications.