FREQUENTLY ASKED QUESTIONS ABOUT CONFIDENTIAL TREATMENT REQUESTS

General

What is a "confidential treatment request"?

A "confidential treatment request" ("CTR") is an application made by a registrant to the Securities and Exchange Commission (the "SEC") requesting that certain information contained in a document required to be filed with the SEC under the Securities Act of 1933, as amended (the "Securities Act"), or the Securities Exchange Act of 1934, as amended (the "Exchange Act"), be afforded "confidential treatment" and thus redacted from the registrant's SEC filing and not publicly disclosed for a specified period of time.

The SEC's decision granting or denying the CTR will be contained in a confidential treatment order ("CTO") to be issued to the registrant.

What type of information can be kept confidential?

A registrant can request confidential treatment for information, the disclosure of which could adversely affect the company's business and financial condition, usually because of the competitive harm that could result from such disclosure.[1] Common examples of this kind of information include pricing terms, technical specifications and milestone payments.[2]

In most instances, the CTR is made with respect to sensitive information contained in a contract or agreement that is required to be filed as an exhibit to a registrant's SEC filing, such as a registration statement, Annual Report on Form 10-K, Quarterly Report on Form 10-Q or a Current Report on Form 8-K. The obligation to file such contract or agreement stems from the requirement in Item 601 of Regulation S-K under the Securities Act ("Regulation S-K") that a registrant file all material contracts not made in the ordinary course of its business in a Securities Act or Exchange Act filing with the SEC.

Note however that a registrant cannot request confidential treatment on information that has already been publicly disclosed, even if inadvertently.[3] The registrant must in fact make a representation in the CTR that none of the confidential information has been disclosed to the public.

In addition, it is important to remember that the CTR process does not take precedence over the registrant's obligations to disclose material information in its public filings and to comply with the requirements of Regulation S-K, Rule 10b-5 under the Exchange Act, and

[1] *See* Section II. A of Staff Legal Bulletin No. 1, dated February 28, 1997 (the "Original SLB"), as amended by the Addendum, dated July 11, 2001 (the "Addendum"), issued by the staff (the "Staff") of the SEC's Division of Corporation Finance. The Original SLB and the Addendum are collectively referred to hereinafter as "Staff Legal Bulletin No. 1."

[2] *Id.*

[3] *See* Section II. B.1 of Staff Legal Bulletin No. 1.

other applicable SEC rules and Forms (*e.g.*, Form S-1, Form 10-K, Form 10-Q or Form 8-K).

Why do issuers typically seek confidential treatment?

An issuer typically seeks confidential treatment in its CTR on the basis that disclosure of the subject information will cause it substantial competitive harm. In fact, the Staff requires the registrant to include this statement as one of its representations in the CTR, along with a representation by the registrant that the disclosure of the confidential information is not necessary for the protection of investors.[4]

In addition, an issuer needs to support its request for confidential treatment by citing one of the exemptions under The Freedom of Information Act (the "FOIA").[5] The FOIA specifies nine categories of information that may be exempted from the FOIA's general requirement to make information available to the general public. Usually, companies that are publicly held or that are registering their securities with the SEC for public sale would rely on subsection (b)(4) of the FOIA, which exempts from the broad public disclosure requirements of the FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Hence, an issuer can request confidential treatment with respect to trade secrets or privileged or confidential commercial or financial information obtained from another person.

The Staff cautions, however, that a CTR should not be overly broad. The information covered by the application should: (i) include no more text than necessary to prevent competitive harm to the issuer; and (ii) cover only those words and phrases for which confidentiality is necessary and supported by the FOIA and applicable SEC rules.[6]

Can confidential treatment be granted for required disclosures, including related party transactions?

No. Except in unusual circumstances, information that is required to be disclosed by the registrant to the SEC under the Securities Act, the Exchange Act and their related rules and regulations, along with any material information, must be disclosed, even if such information is confidential in nature.[7] According to the Staff, examples of information that are required to be disclosed by the rules include, but are not limited to, the following:

- the identity of a 10% customer;
- the dollar amount of firm backlog orders;
- interest expense and other similar terms in a material credit agreement;
- the duration and effect of all patents, trademarks, licenses and concessions held;
- required disclosure in the Management's Discussion and Analysis of Financial Condition and Results of Operations ("MD&A") section relating, for instance, to loan arrangements and installment payment obligations on debt; and
- disclosure about related party transactions.[8]

Examples of information material to investors, which must be disclosed, generally include: the name of a key supplier, material contingency clauses, indemnification clauses, anti-assignability clauses, take-or-pay clauses,

[4] *See* Section III. A of Staff Legal Bulletin No. 1.
[5] 5 U.S.C. §552.
[6] *See* Section II. C.1 of Staff Legal Bulletin No. 1.
[7] *See* Section II. B.2 of Staff Legal Bulletin No. 1.
[8] *Id.*

and financial covenants in material financing or credit agreements.[9]

Disclosure about related party transactions is specifically required under Item 404 of Regulation S-K and hence, must be disclosed. Note however that the Staff's guidance contains a carve-out to this general rule (*i.e.*, "except for unusual circumstances"). Also, where particular terms of a related party transaction agreement constitute trade secrets or confidential information that is not otherwise required to be disclosed by the rules, then it is possible for this type of information to be covered by a CTR.

Can any issuer request confidential treatment?

Domestic and foreign companies that are publicly held or that are registering their securities with the SEC for public sale can request confidential treatment via the CTR process with the SEC.

In addition, and outside the CTR context, two types of issuers may avail themselves of the SEC's "confidential submission process" and confidentially submit their initial public offering ("IPO") registration statements for confidential review: (i) emerging growth companies ("EGCs"); and (ii) certain foreign private issuers ("FPIs") that are registering for the first time with the SEC (*e.g.*, a foreign government registering its debt securities, or an FPI that is concurrently listing its securities on a non-U.S. securities exchange). The Jumpstart Our Business Startups Act (the "JOBS Act") permits an EGC to submit its IPO registration statement confidentially for nonpublic review by the Staff, provided that the initial confidential submission and all amendments are publicly filed with the SEC no later than 15 days prior to the issuer's commencement of a "road show" (as defined in Rule 433(h)(4) under the Securities Act). The Staff will require EGCs to submit via the SEC's Electronic Data Gathering, Analysis and Retrieval System ("EDGAR") all of the responses to Staff comment letters on the confidential draft registration statements at the time the registration statement is first filed.

What impact, if any, does confidential treatment have on IPO pricing?

The SEC will not declare the registration statement for an IPO effective if there is an outstanding CTR. Since the IPO cannot price until there is an effective registration statement, then it follows that IPO pricing will be delayed until the resolution of all issues related to the CTR.

Per Staff guidance, CTRs filed with IPOs pursuant to Rule 406 under the Securities Act are processed by the Staff concurrently with the review of the IPO registration statement. All issues related to the CTR must be resolved, and the CTR must be complete, before the acceleration of effectiveness of the IPO registration statement.[10] The Staff advises issuers to file the CTR at the time they initially submit or file the registration statement, rather than waiting to file the agreements and the CTR with later amendments to the registration statement.[11]

[9] *Id.*

[10] *See* Section III. B.1 of Staff Legal Bulletin No. 1.

[11] *Id.*

Preparing and Submitting Confidential Treatment Requests

How is a confidential treatment request submitted to the SEC?

Staff Legal Bulletin No. 1 outlines the procedural requirements for the submission of a CTR with the SEC.[12] In essence, there are two filings to be made: an applicant should file: (i) a CTR in paper form with the Office of the Secretary of the SEC; and (ii) the redacted material or agreement from which the applicant has omitted the confidential information, in an SEC filing via EDGAR. The following summarizes the relevant steps an applicant must observe with respect to the paper filing and the EDGAR filing.[13]

Paper Filing

- Send the CTR application to the Office of the Secretary of the SEC in an envelope marked "confidential." This envelope should be separate from the envelope containing any materials publicly filed or to be publicly filed by the issuer.
- File the CTR application in paper form. If an applicant files electronically by mistake information meant to be covered by a CTR, such information becomes immediately available to the public and is no longer confidential.
- File the paper form at the same time as the EDGAR filing. The confidential treatment process contemplates that issuers file CTRs (in paper form) at the same time that they file the publicly disclosed portions (on EDGAR). The Staff will not process the CTR application unless and until the material from which information is omitted has been filed publicly.
- Include one complete copy of the document clearly marked to show those portions of the document covered by the CTR. The confidential segments should be underlined, highlighted, circled or otherwise clearly marked in that copy. The applicant must submit the complete marked copy in the same form as the remainder of the material filed on EDGAR.
- Include in the CTR the name, address and telephone number of the person to whom correspondence, orders and notices of the Staff should be sent.

EDGAR Filing

- Omit from the SEC public filing all of the information that is the subject of the CTR application.
- Indicate at the appropriate place in the material to be filed on EDGAR that the confidential portion has been so omitted and filed separately with the SEC.
- Adequately mark the confidential portions of the publicly filed documents. According to the Staff:
  - A recommended method of marking is to place an asterisk or other mark in the precise places in the document where the applicant deletes information.
  - If the registrant uses this method of marking, it should key the mark to a

[12] *See* Section II. D of Staff Legal Bulletin No. 1.
[13] *Id.*

legend which includes the required language on the page from which material is omitted and/or on the first page of the exhibit.

- Where the confidential information consists of multiple pages, the publicly-filed document must include an indication of the number of pages omitted pursuant to the CTR.
- The applicant should mark the exhibit index of the SEC filing to indicate that portions of the exhibit or exhibits have been omitted pursuant to a request for confidential treatment.

Is there a specific format for the submission?

No. Unlike the usual SEC forms for public companies where a particular format is prescribed (*e.g.*, Form S-1, Form 10-K or Form 8-K), there is no specific format or form prescribed by the SEC or the rules for the CTR application. In essence, the CTR application is a letter from the registrant, addressed to the Office of Secretary of the SEC, which should comply with the substantive and procedural requirements of the rules and be accompanied by a full copy of the redacted document.

What must be included in the submission?

Staff Legal Bulletin No. 1 outlines the substantive requirements for a CTR.[14] The following summarizes the relevant items that must be shown or included in the CTR application.[15] The CTR must:

- Identify clearly the specific information covered by the application.
- Include factual and legal analysis for the exemption requested. According to the Staff, the application should:
  - cite the applicable exemption under the SEC's rules adopted under the FOIA;
  - include sufficient legal analysis, including case law references;
  - contain a factual analysis of the basis for the exemption requested (*e.g.*, commercial harm to the filing party) with respect to the specific information subject of the request;
  - where it relates to different types of information (*e.g.*, trade secrets and financial provisions), address each type separately; and
  - describe relevant information about the issuer's business or specific contract that would help the Staff evaluate the sensitivity and importance of the information to the issuer.
- Specify a particular duration for the confidential treatment request.
- Include the registrant's written consent to the release or furnishing of the confidential information to other government agencies, offices or bodies and to Congress.
- Include the following representations:
  - none of the confidential information has been disclosed to the public;

[14] *See* Section II. B and II. C of Staff Legal Bulletin No. 1.
[15] *See* Section II. B and II. C of Staff Legal Bulletin No. 1; *see also* Rule 406 under the Securities Act and Rule 24b-2 under the Exchange Act.

- disclosure of the information will cause substantial competitive harm to the issuer; and
- disclosure of the confidential information is not necessary for protection of investors.

- Include statements to the effect that:
  - the registrant has separately filed on EDGAR the redacted exhibits; and
  - the redacted portions in the EDGAR filing, including the exhibit index, have been marked.
- Include the name, address and telephone number of the person to whom correspondence, orders and notices of the Staff should be sent.
- Be accompanied by a complete copy of the document, marked to show those portions of the document covered by the CTR.

What common mistakes do registrants make that result in the inadvertent disclosure of the information that is the subject of the CTR?

The Staff has stated that based on their experience, the following common mistakes are made by registrants, resulting in the inadvertent disclosure of the information subject to the CTR application.

- For paper filings, the text can be read through the marking used to delete the information.
- For EDGAR filings, the registrant fails to remove all of the confidential information from the electronic version of the document.
- The registrant omits the information, such as pricing terms, from one part of the document, but not from another part of that document or another document or report.
- Another party to the agreement has disclosed (or intends to disclose) the information publicly.
- The registrant has included the information in a press release or news article or has provided the information to one or more analysts.
- The registrant has disclosed the information in documents filed publicly with other regulators, such as insurance, banking, utility or environmental regulators.[16]

How long does the confidential treatment last?

The registrant must specify in the CTR a particular duration for the confidential treatment of the subject information. The application must request a specific date (year, month and day) for the termination of confidential treatment of the subject information.[17] As a rule of thumb, the Staff has indicated that confidential treatment beyond the minimum term of an agreement usually is inappropriate, as the value of the information typically is associated with the effective period of an agreement.[18]

If the CTR is granted, the CTO would specify the time period for which confidential treatment is allowed (i.e., ordinarily, the CTO would specify the exhibit number and SEC filing that is the subject of the CTR, along with the corresponding specific date (year, month and day) of expiration of the confidential treatment). The SEC makes available, through EDGAR, a database of CTOs issued since May 1, 2008.[19]

[16] *See* Section II.B.1 of Staff Legal Bulletin No. 1.
[17] See Section II. C.3 of Staff Legal Bulletin No. 1.
[18] *Id.*
[19] *See* https://www.sec.gov/edgar/searchedgar/ctorders.htm.

Must an exact confidentiality period be requested?

Yes. The registrant must specify a particular duration for confidential treatment in its CTR. The Staff's guidance states that the application must:

- request a specific date (year, month and day) for the termination of confidential treatment of the subject information;
- include an analysis that supports the period requested;
- contain an analysis that is specific to the confidential information and to the company and its business; and
- tie the term to specific provisions of, anticipated performance under, or other facts related to, the contract from which the confidential information is omitted.[20]

Usually, the duration of confidential treatment that is granted by the SEC would be for the minimum term of the contract or 10 years, whichever is less. For a contract that is terminable at will by either party, the Staff typically grants a confidential treatment period of no more than three years.[21]

What legends must be included on the submission?

In marking the confidential portions of the EDGAR filing, the Staff states that a recommended method of marking is to place an asterisk or other mark on the precise places where the information is redacted and then to key such asterisk or other mark to a legend which includes the required language on the page from which material is omitted and/or on the first page of the exhibit.[22]

In most instances, the legend would read as any of the following: "Confidential treatment requested" or "Confidential treatment has been requested with respect to this omitted information" or "Confidential information has been omitted and filed separately with the Securities and Exchange Commission."

How long does the review process usually take?

In the case of CTRs filed under Rule 24b-2 under the Exchange Act and when no registration statement is pending, the Staff says that they aim to complete the initial review of the CTR within 28 days from its filing date. If the Staff has no comments, a CTO granting the CTR will be issued. If the Staff issues comments, the applicant has 21 days from the date of the comment letter to respond.

In the case of CTRs filed under Rule 406 under the Securities Act, the timing for the review process is usually tied to the timing of the review of the registration statement. In this case, the Staff member assigned to review the SEC filing will also review the CTR. If the Staff issues comments, the applicant typically has 21 days from the date of the comment letter to respond.

How does Rule 83 apply to requests for SEC comment letter responses or supplemental information?

Rule 83 of the SEC's Rules of Practice ("Rule 83")[23] applies with respect to information not required to be filed with the SEC in a Securities Act or Exchange Act filing (for instance, information provided by a registrant

[20] *See* Section II. C.3 of Staff Legal Bulletin No. 1.
[21] *See also* "*Is it possible to extend or renew confidential treatment beyond the term of the relevant agreement?*" below.

[22] *See* Section II. D.5 of Staff Legal Bulletin No. 1.
[23] 17 CFR 200.83.

in response to a Staff comment or other supplemental information). In contrast, if the information is required to be filed with the SEC under the Securities Act or the Exchange Act, then Rule 406 under the Securities Act ("Rule 406") or Rule 24b-2 under the Exchange Act ("Rule 24b-2"), respectively, would apply, not Rule 83.

Rule 83 provides a procedure by which persons submitting information may request that it be withheld when requested under the FOIA. As it relates to SEC comment letters or supplemental information, Rule 83 would involve the registrant making three separate submissions:[24]

- *A letter to the Staff examiner, requesting confidential treatment of the information to be provided by the registrant in response to the Staff comment*. Pursuant to Rule 83, the registrant should submit a letter in paper form to the Staff examiner reviewing the registrant's filing, and mark each page of the letter with "Confidential Treatment Requested by [name]" and an identifying number and code, such as Bates-stamped number. The legend "FOIA Confidential Treatment Request" must clearly and prominently appear on the top of the first page of the request and the written request should include the name, address, telephone number and fax number of the person requesting confidential treatment. The letter should clearly specify which portions of the response letter are subject to the confidential treatment request.
- *Response letter filed via EDGAR*. This filing should exclude the confidential, non-public information which is the subject of the application, by marking the redacted version with an asterisk or any other mark similar to what is done with respect to an EDGAR filing subject to a CTR under Rule 406 or Rule 24b-2. The letter should also indicate that confidential treatment has been requested pursuant to Rule 83 and that a full, unredacted version of the response letter has been filed with the Staff.
- *Letter to SEC's FOIA office.* The Registrant should submit a cover letter to the SEC's FOIA office enclosing a copy of the redacted EDGAR version of the response letter. No determination of the request will be made by the FOIA office until it receives a FOIA request for the records, in which case, it will then notify the registrant.

How can an issuer seek return of supplemental materials using Rule 418/Rule 12b-4 requests?

As part of its review of a company's Securities Act or Exchange Act filings, the Staff may request registrants to submit supplemental information (*e.g.*, a report, survey or other supplemental materials) by invoking its power under Rule 418 under the Securities Act ("Rule 418") or Rule 12b-4 under the Exchange Act ("Rule 12b-4"). If an issuer would like to have these materials returned to it, then it should submit the materials in paper form to the Staff, along with a request that the Staff return the materials upon completion of their review. Pursuant to Rule 418 and Rule 12b-4, the supplemental materials will be returned to the registrant, provided that:

- such request is made at the time such information is furnished to the Staff;

[24] *See* 17 CFR 200.83; *see also* "Securities and Exchange Commission – Confidential Treatment Procedure Under Rule 83," available at: https://www.sec.gov/foia/conftreat.htm.

- the return of such information is consistent with the protection of investors;
- the return of such information is consistent with the FOIA; and
- the information was not filed in electronic format (*i.e.*, the supplemental materials were not submitted via EDGAR).

Justifications for Confidential Treatment

What is the legal basis for the confidential treatment request?

Rule 406 and Rule 24b-2 set forth the exclusive means of requesting confidential treatment of information required to be filed with the SEC under the Securities Act and the Exchange Act, respectively.

Rule 83 of the SEC's Rules of Practice applies with respect to information not required to be filed with the SEC in a Securities Act or Exchange Act filing (for instance, information provided by a registrant in response to a Staff comment or other supplemental information).

The above rules incorporate the criteria allowing non-disclosure to the public of certain types of information, as set forth in the FOIA.[25]

What types of information are typically granted confidential treatment?

Most public companies rely on subsection (b)(4) of the FOIA, which exempts from the broad public disclosure requirements of the FOIA "trade secrets and commercial or financial information obtained from a person and privileged or confidential." Hence, an issuer can request confidential treatment with respect to trade secrets or privileged or confidential commercial or financial information obtained from another person. Case law provides the following guidance as to the meaning of these terms:

- 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."[26]
- The term "commercial or financial information" has been construed by courts in accordance with its plain meaning and broadly encompasses information relating to commerce or compiled in pursuit of profit.[27]
- Information is "confidential" within the meaning of subsection (b)(4) of the FOIA "if disclosure . . . is likely to have either of the following effects: (1) to impair the government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[28]

[25] *See* 5 U.S.C. §552(b); *see also* "*Why do issuers typically seek confidential treatment?*" above.

[26] *See Center for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 244 F.3d 144, 150-51 (D.C. Cir. 2001), *quoting Public Citizen Health Research Group v. Food and Drug Admin.*, 704 F.2d 1280, 1288 (D.C. Cir. 1983).

[27] *See Public Citizen Health Group v. Food and Drug Admin.*, 704 F.2d 1280, 1290 (D.C. Cir. 1983); and *American Airlines, Inc. v. National Mediation Board*, 588 F.2d 863, 870 (2d Cir. 1978).

[28] *See Bartholdi Cable Co. v. Federal Communications Comm'n*, 114 F.3d 274, 281 (D.C. Cir. 1997) (*quoting National Parks and Conservation Ass'n v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974)); *Frazee v. United States Forest Serv.*, 97 F.3d 367, 371 (9th Cir. 1996); and *Nadler v. Federal Deposit Ins. Corp.*, 92 F.3d 93, 96 (2nd Cir. 1996).

Other examples of information that are typically granted confidential treatment include, but are not limited to, the following:

- pricing, payment and purchase information;
- sensitive information regarding business strategy, or timing of research, development and commercialization efforts;
- technical designs;
- details of intellectual property to be shared by a licensor;
- specific rates used to calculate license fees under license, manufacturing and development agreements;
- customer databases;
- specific milestone payments; and
- specific unit prices.

In some instances, however, the Staff has granted confidential treatment for *specific* royalty rates or *specific* license fees, but has required that these rates or fees be expressed in a range (*e.g.*, "high single digits" or "low twenties"), in order to convey to investors the material terms of the registrant's material contracts.

With respect to intellectual property, the Staff does not grant confidential treatment covering issued patents, given that information regarding such patents is publicly available through the U.S. Patent and Trademark Office ("USPTO") and the patent applications that have been published by the USPTO are available electronically at the USPTO's website.

Moreover, the Staff has indicated that confidential treatment is not appropriate for information that is material to investors. Based on Staff comment letters, material information *generally* includes, but is not limited to, the following terms, provisions or information contained in a material contract or agreement:

- warranties;
- indemnification;
- insurance;
- infringement;
- limitations of liability;
- extent and scope of any licenses granted;
- arbitration;
- assignment;
- termination rights;
- duration or term of the agreement;
- aggregate value or cost of the agreement to the registrant; and
- the rights and responsibilities of the parties and their performance obligations.

Which arguments are the most persuasive? Competitive Harm? Materiality?

The competitive harm argument is almost always cited as an argument in a CTR, and Staff Legal Bulletin No. 1 does mention "competitive harm" in a number of places. But "competitive harm" alone is not sufficient, as the Staff guidance also requires the CTR to be based on a ground that is supported by the FOIA. In this regard, the trade secrets or privileged or confidential commercial or financial information exemption under subsection (b)(4) of the FOIA has been frequently cited by registrants and allowed by the SEC.

In addition to the above, it is important for registrants to examine whether the subject information is material to investors, since as a rule, information that is material

to investors should be disclosed even if confidential.[29] However, the fact that information is immaterial to investors does not mean that citing competitive harm alone would result in the CTR being granted.

Extending and Renewing Confidential Treatment

How can the confidential treatment period be extended or renewed?

A registrant can request an extension of a previously granted order for confidential treatment by submitting an application for extension *before* the expiration date of the earlier order.[30] This is because after the expiration date stated in the CTO, the subject information becomes publicly available upon request under the FOIA.[31]

The request for extension must comply with the substantive and procedural rules applicable to an original CTR, since the SEC will process such extension request in the same manner it processes a new CTR. The new application should specify the duration of the confidential treatment for the new request. In addition, the updated CTR application containing the extension request should also include:

- a copy of the relevant agreement or agreements;
- a copy of the original CTO granting the earlier CTR; and
- a copy of the original CTR application and correspondence with the SEC.

The applicant must again represent in the CTR that:

- none of the confidential information has been disclosed to the public;
- disclosure of the information will cause substantial competitive harm to the issuer; and
- disclosure of the confidential information is not necessary for protection of investors.[32]

Is it possible to extend or renew confidential treatment beyond the term of the relevant agreement?

Yes. According to the Staff, where confidential treatment after the term of the agreement is justified, then the Staff will consider applications to extend the period, utilizing the following guidelines:

- if the remaining term of the contract is greater than 10 years from the date of the extension application, the Staff will generally only grant confidential treatment for 10 years;
- if the remaining term of the contract is less than 10 years from the date of the extension application, the Staff will consider a request for the remaining term of the contract; and
- if the remaining term of the contract is less than five years from the date of the application, but there is a possibility that it will be extended beyond its stated term, the Staff will consider granting confidential treatment for a period of up to five years.[33]

[29] *See* Section II. B.2 of Staff Legal Bulletin No. 1.
[30] *See* Section III.A of Staff Legal Bulletin No. 1.
[31] *Id.*
[32] *Id.*
[33] *See* Addendum.

Is it possible to extend or renew confidential treatment when part of a redacted agreement subsequently becomes public?

Yes. According to the Staff, to the extent that the applicant cannot make the required representations in the CTR (*e.g.*, the representation that the confidential information has not been disclosed to the public), then the applicant should refile the agreement to disclose the information that no longer satisfies the requirements.[34] Hence, the applicant should prepare a new version of the redacted exhibit (now with less redactions, since some of the previously redacted portions have subsequently become public). The applicant would then (i) mail this new version of the redacted exhibit to the Office of the Secretary of the SEC, along with the CTR extension application and other supporting documents, and (ii) file the new version of the redacted exhibit on EDGAR in its next SEC filing.

What if the confidential treatment expired without an extension?

As a rule, the registrant must make a request for the extension of a previously granted CTO *before* the expiration date of the earlier order. If the confidential treatment expired without the registrant submitting an extension request, then the subject information becomes publicly available upon request under the FOIA.[35]

There is no prescribed procedure under the rules or in the Staff's guidance that addresses a scenario where a registrant fails to file the extension request (through inadvertence or otherwise) before the original CTO expires. The registrant may try to do a belated CTR application and filing with the Staff and see if they would entertain the request. It is important for the registrant, however, to make sure that the subject information is still not yet publicly available, since any information that is publicly available cannot be the subject of a CTR.

Impact on Other SEC Filings

Can an EGC seek confidential treatment when it submits a registration statement under the SEC's confidential submission process? If yes, when and how can it do so?

Yes. An EGC that has confidentially submitted its registration statement to the SEC under the SEC's confidential submission process may also request confidential treatment with respect to information it has submitted to the SEC. The EGC can seek confidential treatment by identifying the subject information in its response letter to the Staff, using Rule 83. Set forth below is the particular guidance of the Staff on the JOBS Act as it relates to this topic:[36]

> "**(26) Question:**
>
> Should an emerging growth company identify information for which it intends to seek confidential treatment when it submits its responses to staff comments on confidential draft registration statements?
>
> **Answer:**
>
> Yes. Although an emerging growth company need not seek confidential treatment for its response letters for information it does not want to be made public during the course of the confidential review, in its response letters, the company should appropriately identify the information for which it intends to seek

[34] *See* Section III.A of Staff Legal Bulletin No. 1.
[35] *Id.*
[36] *See* FAQ no. 26, available at: https://www.sec.gov/divisions/corpfin/guidance/cfjjobsactfaq-title-i-general.htm.

confidential treatment upon public filing to ensure that the staff does not include that information in its comment letters. When the company resubmits its responses to staff comments on the confidential draft registration statement on EDGAR, it should follow the Rule 83 procedures. Alternatively, the company could follow the Rule 83 procedures at the time it submits its response letters to the staff."

How does a confidential treatment request impact the effectiveness of a registration statement?

All issues related to the CTR must be resolved first before a registration statement can become effective. The Staff has stated that: "[r]egardless of whether the staff selects a registration statement for review, the staff must act on a confidential treatment request filed in connection with a registration statement pursuant to Rule 406 before the acceleration of effectiveness of pending registration statement."[37] As a result, the length of time for the Staff's review should be taken into account when planning for the effectiveness of a registration statement.

The Staff has clarified, however, that well-known seasoned issuers ("WKSIs") are not required to delay filing an automatic shelf registration statement until pending confidential treatment applications are acted upon. But the WKSI must assure that any prospectus used in an offering contains the information required to be included by Section 10(a) of the Securities Act and the applicable rules thereunder.[38]

What is the impact on the issuer's periodic reports?

If a CTR is filed with respect to a registrant's Exchange Act reports and the registrant's registration statement incorporates by reference such periodic reports, then the Staff will not allow the registration statement to go effective until all issues relating to the CTR are resolved.[39]

If a CTR is filed with respect to a registrant's Exchange Act reports and the Staff denies the CTR, then the registrant must file the full, unredacted exhibit as soon as possible on EDGAR, otherwise the SEC filing is incomplete and not compliant with the Exchange Act rules.

Miscellaneous

Is a new confidential treatment request needed for a change/amendment to a pricing schedule?

Yes. A new CTR must be submitted since the change or amendment to a pricing schedule constitutes new pricing information. The registrant should submit a new CTR at the same time that the exhibit with the redacted and updated pricing schedule is filed on EDGAR. The registrant should point out in its CTR application that the original pricing schedule is already covered by a CTO, if such is the case.

Is a new confidential treatment request needed for a new agreement replacing an older, identical agreement?

Yes. The registrant should file a new CTR for a new agreement that supersedes an older agreement. This is the rule notwithstanding that the new agreement is identical to the old agreement.

[37] *See* Section III.B.2 of Staff Legal Bulletin No. 1; *see also "What impact, if any, does confidential treatment have on IPO pricing?"* above.

[38] *See* Question 144.07 of the Staff's Compliance and Disclosure Interpretations with respect to Securities Act Forms, available at: https://www.sec.gov/divisions/corpfin/guidance/safinterp.htm.

[39] *See* Section III.B.2 of Staff Legal Bulletin No. 1.

If the registrant's counterparty to a contract already filed and received confidential treatment from the SEC covering certain portions of such contract, can the registrant submit its own confidential treatment request, asking that different sections of the contract be redacted for a different period of time?

As a rule, the registrant party to the contract must make a showing in its CTR that:

- none of the confidential information has been disclosed to the public;
- disclosure of the information will cause substantial competitive harm to the registrant; and
- disclosure of the confidential information is not necessary for protection of investors.

As a rule too, the registrant must make this showing on its own and independently from the CTR granted to the counterparty, since (1) a CTR application is unique to a particular applicant, and (2) different considerations may apply to the registrant vis-à-vis the counterparty (*e.g.*, information that may be confidential and sensitive in nature to the registrant, may not be so for the counterparty, and vice versa; information that is material to the registrant may not be so for the counterparty, and vice versa; and disclosure of certain information may cause substantial competitive harm to the registrant, but not so for the counterparty, and vice versa).

In this situation however, it may be difficult for the registrant to ask that different sections of the contract be redacted, or that a different time period apply with respect to the same information covered by a prior CTR granted to the counterparty. If, on the one hand, the registrant redacts more information than that redacted by the counterparty in its CTR, then the registrant cannot show that its redaction contains information that has not yet been disclosed to the public. This is because any portion of the contract that was not redacted by the counterparty in its CTR application has been filed with the SEC and made publicly available on EDGAR. If, on the other hand, the registrant redacts less information than that redacted by the counterparty in its CTR, then the registrant might be "violating" the confidential treatment afforded by the SEC to the information redacted by the counterparty, by making that information publicly available on EDGAR. Along the same lines, if the registrant asks in its CTR for a confidentiality period that is shorter than that granted to the counterparty, then the registrant might again be "violating" the confidential treatment afforded the counterparty, since any redacted information becomes publicly available after the lapse of a CTO.

In this situation, the registrant should reference in its CTR application that certain portions of the contract are subject to an existing CTO granted to the counterparty. The registrant also should not, in the contract exhibit to its EDGAR filing, redact more information than was redacted in the counterparty's CTR. The registrant should explain the relevant facts and issues in its CTR application with the SEC.

How do mergers impact confidential treatment?

If, as a result of a merger, an agreement subject to confidential treatment is amended by the merger parties and continues to be a material agreement for the surviving entity, then: (i) such amendment must be filed as an exhibit to the surviving entity's 10-K or 10-Q; and (ii) the surviving entity must request confidential treatment for the relevant portions of the agreement.

Does the grant of confidential treatment have any impact on the issuer's liability exposure?

No. Neither the CTR review process nor the grant of confidential treatment by the SEC relieves the registrant from its obligation to disclose material information under the Securities Act or the Exchange Act, even if such information was redacted from its SEC filing and afforded confidential treatment by the Staff. The registrant continues to be subject to the anti-fraud provisions of the federal securities law and may incur liability if, in its public filings, it makes any untrue statement of a material fact, or it omits to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading.[40]

By Ze'-ev D. Eiger, Partner,
Anna T. Pinedo, Partner, and
Ryan Castillo, Associate,
Morrison & Foerster LLP

[40] *See* 17 CFR 240.10b-5.