

## SEC STAFF ANNOUNCES TEMPORARY PROCEDURES FOR SUPPLEMENTAL MATERIALS AND RULE 83 CONFIDENTIAL TREATMENT REQUESTS

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In light of health and safety concerns related to the pandemic, the SEC staff recently announced the availability of a temporary secure file transfer process for the submission of supplemental materials pursuant to Rule 418 under the Securities Act of 1933 or Rule 12b-4 under the Securities Exchange Act of 1934 and information subject to Rule 83 confidential treatment requests (“CTRs”).

From time to time companies provide supplemental materials to the SEC staff, typically when responding to SEC comments. Rule 418 provides broad authority to the SEC and its staff to request information concerning a company, its registration statement, the distribution of its securities and market or underwriter activities. Rule 12b-4 provides similar authority with respect to registration statements and periodic or other reports. Both rules require the SEC to return supplemental materials upon request, provided the request is made at the time they are furnished to the staff and return of the materials is consistent with the protection of investors and FOIA. Rule 418 also requires that the materials not have been filed in electronic format.

SEC Rule 83 provides a procedure by which persons submitting information may include a CTR for portions of that information where no other confidential treatment process applies. Typically, this is utilized when companies provide responses to SEC staff comments. Rule 83 generally requires the submission of the information covered by the CTR separately from that for which confidential treatment is not requested, appropriately marked as confidential, and accompanied by a separate written request in paper format for confidential treatment. Although Rule 83 requires that CTRs be submitted in paper format, the rule also permits the designation of alternative procedures.

According to the announcement:

- The SEC staff will retain information received through the secure file transfer process in accordance with the appropriate records retention schedules. It will not retain supplemental information subject to Rule 418 or Rule 12b-4 received through the secure file transfer process after the materials have been reviewed.

- If you wish to submit supplemental information or information subject to a Rule 83 CTR, you should contact the staff member associated with the related matter to request the initiation of a secure file transfer. Such materials should not be sent through email. The secure file transfer process allows for electronic submission to the staff of Rule 83 CTRs together with the confidential information during this temporary accommodation. A copy of the Rule 83 CTR (but not the confidential information itself) must also be submitted to the SEC Office of FOIA Services pursuant to its [guidance](#).
- Submitters may continue to send supplemental materials and information subject to a Rule 83 CTR to the SEC mailroom. There will, however, be delays in the processing of such documents.
- The secure file transfer process is not available for confidential treatment applications submitted pursuant to Securities Act Rule 406 or Exchange Act Rule 24b-2. Rules 406 and 24b-2 require such applications be filed in paper with the SEC Office of the Secretary.

As a reminder, when utilizing Rule 418 or 12b-4, companies should:

- Strictly follow any instructions for supplemental materials in the SEC comment letter.
- Include an explanation as to why investors are not harmed and, consistent with FOIA, the risk for competitive injury to the company.
- Consider whether to include a Rule 83 CTR for the supplemental materials as a fallback, in the event the SEC staff might otherwise disagree with returning them.

## **RELATED PRACTICE AREAS**

- Securities & Corporate Governance

## MEET THE TEAM



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