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# Securities Law Developments

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## SEC Makes Changes To Requests For The Confidential Treatment Of Records

The Securities and Exchange Commission has amended its procedures under Rule 83 for requesting confidential treatment of records submitted to the Commission when no other procedures apply. In addition, the Commission has amended its procedures under Rule 80 for requesting Commission records under the Freedom of Information Act ("FOIA").<sup>1</sup> The amendments make substantive and procedural changes to conform the Rules to current statutory and case law and Commission practice. The Rules became effective on Friday, October 13, 2000.

In the table below, we outline the differences between the revised and former Rules. A few changes merit particular attention. The requester of confidential treatment should be aware that it must now refer to the records it is producing by Bates number. Moreover, the location of the Commission's FOIA office has changed. Copies of confidential treatment requests (without the records) must now be sent to the Office of Freedom of Information and Privacy Act Operations in Alexandria, Virginia.

Finally, the Commission has imposed a ten-year expiration date on confidential treatment requests, unless the Office receives a renewal request before the expiration date. The Commission does not plan to notify the requester when the ten-year period is about to expire. The Rule does not state when the requester must, or even should, file the renewal request. But it would seem inappropriate to make a renewal request in the first letter asking for confidential treatment. Requesters, therefore, should monitor their confidential treatment requests. For those requests that require confidential treatment beyond ten years, requesters should be prepared to submit renewal notices before the period expires and a renewal notice for each ten-year period thereafter. Significantly, the Rule does not address whether the expiration date applies retroactively to requests for confidential treatment that have already been made.

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<sup>1</sup> See Securities Exchange Act Release No. 34-43239 (Sept. 1, 2000).

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*This letter is for general informational purposes only and does not represent our legal advice as to any particular set of facts, nor does this letter represent any undertaking to keep recipients advised as to all relevant legal developments.*

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**Table Comparing Revised SEC Rules  
Regarding Confidential Treatment With Former Rules**

<b>Revised Rule 83: Confidential Treatment</b>	<b>Former Rule 83</b>
<p><i>Mark Each Page Confidential With Bates #.</i> Requester of confidential treatment must clearly mark each page or segregable portion of each page “Confidential Treatment Requested by [name]” <i>and</i> include on each page an identifying number and code. In the written confidential treatment request, the person <i>must</i> refer to the record by identifying number and code. 17 C.F.R. § 200.83(c)(2).</p>	<p>Previously, a requester of confidential treatment only had to mark each page clearly “Confidential Treatment Requested by [name].” Only if this was impractical could a cover sheet be used with such marking along with each page separately marked with an identifying number and code.</p>
<p><i>New Address of FOIA office.</i> A copy of the confidential treatment request without the records must be sent by mail to: Office of Freedom of Information and Privacy Act Operations; SEC; Operations Center; 6432 General Green Way, Alexandria, VA 22312-2413. 17 C.F.R. § 200.83(c)(2).</p>	<p>The old address and title of the office was: Freedom of Information Act Officer; SEC; Washington, DC 20549. 17 C.F.R. § 200.83(c)(2).</p>
<p><i>10-Year Expiration Date.</i> Confidential treatment requests expire after ten years from the date that the Office receives it, without any notice from the Commission, <i>unless</i> the Office receives a renewal request before the expiration date clearly identifying the records at issue. This expiration date does not affect the duration of the grant of confidentiality or the Commission’s right to review a grant in light of subsequent events. Renewal requests also expire after 10 years unless another renewal request is made. 17 C.F.R. § 200.83(c)(7).</p>	<p>There was no expiration date on confidential treatment requests.</p>
<p><i>Request is nonpublic.</i> Confidential treatment requests are nonpublic, but may become part of the court record if a FOIA requester or the confidential treatment requester files suit. 17 C.F.R. § 200.83(c)(8) &amp; (g).</p>	<p>There was no former rule.</p>

Revised Rule 83: Confidential Treatment	Former Rule 83
<p><i>Alternative procedures.</i> In their discretion, the Commission, the Commission’s General Counsel, and the FOIA Officer may use alternative procedures for considering confidential treatment requests. 17 C.F.R. § 200.83(k).</p>	<p>There was no former rule.</p>
<p><i>Appellate Procedure.</i> The Office of Freedom of Information and Privacy Operations Act first makes a <i>preliminary decision</i> which the confidential requester may disagree with within 10 calendar days of the preliminary decision date, by submitting supplemental arguments. A <i>final decision</i> is reached no sooner than 10 calendar days from the preliminary decision date, from which the confidential treatment requester may appeal within 10 calendar days to the Commission’s General Counsel. 17 C.F.R. § 200.83(e)(1).</p>	<p>Previously, the Office only issued a final decision; there was no preliminary decision and no opportunity to submit supplemental arguments to the initial decision-maker.</p>
<p><i>Explanation of Voluntary Submission.</i> Although not specified in the rule, the confidential treatment requester should continue to explain the circumstances of a voluntary submission, after receiving notice of a FOIA request for the records.</p>	<p>Same as former rule.</p>

Revised Rule 80: Commission Records	Former Rule 80
<p><i>No Telephone Requests re Availability of Recs.</i> Inquiries concerning the nature and extent of records available at the Commission's public reference facilities may be made in person or <i>in writing</i>. 17 C.F.R. § 200.80(c)(2).</p>	<p>Previously, inquiries could be made in person or <i>by telephone</i>.</p>
<p><i>Access to Commission records.</i> Requests for access to Commission records in the public reference facilities may be made in person, by <i>facsimile</i> (703-914-1149), or by <i>internet</i> (foia/pa@sec.gov). 17 C.F.R. § 200.80(d)(1).</p>	<p>Previously, requests for access to Commission records had to be made in person or by mail.</p>
<p><i>Responses to FOIA Requests.</i> Office of Freedom of Information and Privacy Act shall respond within 20 business days after receipt of a FOIA request. If the request is too voluminous, the requester will wait in line in the <i>first-in, first-out</i> (“FIFO”) system, unless “compelling need” is demonstrated for expedited processing (i.e. threat of physical safety, urgent public need for information). Any denial shall estimate the volume of records withheld unless giving such information would harm an interest protected by an applicable exemption. Amount of redaction shall be indicated on released portion of records. 17 C.F.R. § 200.80(d)(5)(i)-(v).</p>	<p>Previously, the FOIA officer of the Commission had to respond within 10 business days after receipt of a FOIA request. The original rule did not mention the FIFO system.</p> <p>Former denials did not have to estimate the volume of records withheld. Redacted information did not have to reveal the amount redacted.</p>
<p><i>No Telephone Requests re Availability of Recs.</i> Inquiries concerning the nature and extent of records available at the Commission's public reference facilities may be made in person or <i>in writing</i>. 17 C.F.R. § 200.80(c)(2).</p>	<p>Previously, inquiries could be made in person or <i>by telephone</i>.</p>
<p><i>Access to Commission records.</i> Requests for access to Commission records in the public reference facilities may be made in person, by <i>facsimile</i> (703-914-1149), or by <i>internet</i> (foia/pa@sec.gov). 17 C.F.R. § 200.80(d)(1).</p>	<p>Previously, requests for access to Commission records had to be made in person or by mail.</p>

If you have any questions regarding the revised rules, please contact Harry Weiss (202-663-6993), Jeffrey McFadden (202-663-6385), or Reed Brodsky (202-663-6401).

**WILMER, CUTLER & PICKERING**

2445 M Street, N.W.  
Washington, D.C. 20037-1420  
Telephone: (202) 663-6000  
Facsimile: (202) 663-6363

**Securities Practice Group**

*James E. Anderson  
Brandon Becker  
Stephen F. Black  
Joseph K. Brenner  
Mark D. Cahn  
Richard W. Cass  
Bruce E. Coolidge  
Meredith Cross  
Charles E. Davidow  
Paul Engelmayer  
Robert F. Hoyt  
Andrew Kaizer  
Michael R. Klein*

*Yoon-Young Lee  
Lewis Liman  
Eric R. Markus  
Robert B. McCaw  
William McLucas  
Eric J. Mogilnicki  
Thomas Mueller  
Marianne K. Smythe  
Andrew N. Vollmer  
Harry J. Weiss  
Andrew B. Weissman  
Soo J. Yim*

*Robert G. Bagnall  
Matthew A. Chambers  
Stuart F. Delery  
Colleen Doherty-Minicozzi  
Sara E. Emley  
Steven Finizio*

*Leon B. Greenfield  
Satish Kini  
David Lurie  
Jeffrey E. McFadden  
Karen Mincavage  
Jeffrey Roth*

*Mark S. Shelton  
Beth A. Stekler  
William White  
Jolie Zimmerman*