

## DELAWARE COURT OF CHANCERY UNVEILS NEW RULE FOR CONFIDENTIAL FILINGS

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On November 5, 2012, the Delaware Court of Chancery unveiled a change to its rules for handling confidential filings. The new rule, Rule 5.1, which will go into effect January 1, 2013, imposes stricter requirements on parties seeking to submit confidential filings, reduces the categories of information that are entitled to protection, and streamlines the process for challenging documents filed confidentially. The rule is limited, however, to filings presented to the Court, and does not affect the ability of parties to enter into confidentiality stipulations to govern discovery. In this *Alert*, we highlight the ways in which Rule 5.1 departs from prior practice, and explore the implications for individuals and businesses litigating cases involving sensitive information in the Delaware Court of Chancery.

### “Good Cause” Standard for Confidential Treatment

Rule 5.1 replaces Rule 5(g), which had governed the procedures for designating materials as confidential since 1990. Like its predecessor, Rule 5.1 requires the party seeking confidential treatment to show “good cause” as to why the information should be kept confidential. However, unlike Rule 5(g), which did not clearly define “good cause,” leading to the over-designation of material as confidential, Rule 5.1 specifies that “good cause” exists “only if the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause.” Examples of information for which there may be “good cause” for confidential treatment include trade secrets, sensitive proprietary information, sensitive financial and business information, as well as sensitive personal information such as medical records, social security numbers, and the names of minor children. By clarifying the “good cause” standard and better defining the types of information that will be considered confidential, Rule 5.1 will likely curtail the practice of over-designating material as confidential, and thereby enhance public access to judicial proceedings.

### Procedures for Filing Confidential Documents

Rule 5.1 also changes the procedures for filing public (i.e. redacted) versions of confidential documents, affording parties a longer period of time to prepare a public version, but imposing a strict requirement that, if a public version is not filed within that period, the document will automatically lose its confidential status and be made available to the public. Under the prior rule, a party that filed a confidential document had three days to file a redacted version. However, parties often failed to meet this deadline and frequently a redacted version was never filed. Under Rule 5.1, a party that files a confidential document has until 3:00 p.m. on the next business day to give notice of the confidential filing to other parties that have asserted a confidentiality interest in the information. The notice must include a proposed public version of the filing. The other parties then have an opportunity to offer their input as to what information should be redacted, and by 3:00 p.m. on the fifth business day after the initial filing, a public version must be filed with the Court. If no public version is filed at that time, the original document is automatically made available to the public. Significantly, these procedures do not apply to documentary exhibits or deposition transcripts, and a filer need not file a public version of such exhibits or transcripts unless someone challenges their confidential status.

### Confidential Complaints

In addition to reforming the existing procedures for confidential filing, Rule 5.1 creates a procedure for filing complaints confidentially, an issue that was previously governed by custom rather than formal rules. Pursuant to Rule 5.1, a plaintiff seeking confidential treatment for a complaint may submit the complaint as a confidential filing, but to ensure that the public is alerted to the nature of the dispute, the plaintiff must publicly file a cover sheet summarizing the claims asserted in the complaint. On the same day the complaint is filed, the plaintiff must use its best ef-

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forts to give actual notice to every person with a potential interest in designating material in the complaint as confidential. The notice must be accompanied by a proposed public version of the complaint, and state that the public version will be filed by 3:00 p.m. on the third business day after the initial filing. As with other confidential filings, if the plaintiff does not timely file a public version, the information in the complaint will lose its confidential status. The Court of Chancery explained that it adopted a shorter period for filing public versions of complaints (three days) than for other confidential filings (five days) to protect the public's right to be informed about the "essence" of every lawsuit that is filed.

#### **Challenges to a Confidential Filing**

Finally, Rule 5.1 makes it easier to challenge the confidential treatment of a filing. Under Rule 5(g), any party that objected to the designation of materials as confidential was required to first give written notice of its objection to the party that submitted the confidential filing. Now, pursuant to Rule 5.1, anyone — including the public and the press — wishing to challenge a confidentiality designation need only file a notice with the Register in Chancery, and does not have to set forth any basis for the challenge. Once a challenge is filed, the party seeking to maintain confidentiality must demonstrate that "good cause" exists to keep the information confidential. If the notice challenges a document for which no public version was filed, such as a documentary exhibit or deposition transcript, the original filer must file a public version within 10 days of the challenger's notice. If a public version of the challenged filing is already available, Rule 5.1 requires the party seeking to maintain confidentiality to file a motion in support of continued confidential treatment within five days; if no motion is filed, the original document is made publicly accessible. The challenger then has five days to file an opposition or the challenge is considered to be withdrawn. If an opposition is filed, the court will determine whether continued confidential treatment is appropriate.

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In adopting Rule 5.1, the Court of Chancery emphasized that the fundamental purpose of the rule was to promote public access to the judicial system. Accordingly, Rule 5.1

places the onus on the party seeking confidential treatment for a filing to demonstrate to the Court why confidentiality is warranted. Parties will no longer be able to designate information as confidential as a matter of course. Rather, Rule 5.1 makes clear that confidentiality designations should be reserved for situations in which the parties have a legitimate need to shield certain information from the public. Despite Rule 5.1's tightened requirements, such highly confidential information will likely continue to receive protection in the Court of Chancery. ♦

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