

# Commercial Division Seeks Public Comment on Proposed Amendment to the Standard Form Confidentiality Order

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Since its release in February 2007 by the New York City Bar Association's Committee on State Courts of Superior Jurisdiction, many Commercial Division Justices throughout the state (and all but one Commercial Division Justice in New York County) have explicitly incorporated the Standard Form Confidentiality Order ("SFO") into their individual rules of practice. In fact, many of those individual rules provide that parties wishing to deviate from the SFO must provide the court with a redline of their proposed changes and an explanation for those changes.

On January 19, 2016, the Administration Board of New York's Unified Court System published and sought public comment on an amendment to the SFO, proposed by the Advisory Council's Subcommittee on Procedural Rules to Promote Efficient Case Resolution (the "Subcommittee"). The proposed amendment would revise and promulgate the SFO as an appendix to the Rules of the Commercial Division (22 NYCRR 202.70(g)), and would adopt a new rule setting forth procedures for the use of SFOs.

The Subcommittee's recommendation involves numerous revisions to a multipage form, the rationales for which are largely evident from either the change itself or the interlineated commentary. In a September 10, 2015 memorandum from the Subcommittee to the Advisory, however, the Subcommittee specifically highlights and explains the proposed modifications to paragraph 12 of the SFO, which pertains to the filing of confidential documents under seal.

Under the current SFO, parties wishing to file documents under seal can either (1) file hard copies of confidential documents in a formal motion to seal pursuant to 22 NYCRR 216.1 (¶ 12(a)), or (2) bypass a formal motion to seal by simply providing a set of motion papers to the Justice's chambers without filing them at all (¶ 12(b)). After the motion on the merits, chambers either returns or destroys the documents it was provided.

The Subcommittee's proposal would revise paragraph 12 to provide a mechanism for filing confidential documents on ECF, which has become far more prevalent throughout the Commercial Division and, in many counties, is now mandatory. The proposal would also remove the procedure set forth in paragraph 12(b) of the SFO, which allows parties to bypass a formal motion to seal. The Subcommittee notes two problems with this bypass procedure. First, the appellate courts have become increasingly vocal about the presumption of public access to the court system and the concomitant need for the issuance of sealing orders. Second, the bypass procedure creates fundamental problems with respect to appeals because, by not filing motion papers, the putative appellant lacks a record upon which to premise its appeal.

Comments to the proposed rule are due by March 21, 2016 and should be emailed to [rulecomments@nycourts.gov](mailto:rulecomments@nycourts.gov) or mailed to John W. McConnell, Esq., Counsel, Office of Court Admission, 25 Beaver Street, 11th Floor, New York, NY 10004.

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