

# District of Delaware Issues Guidance on Highly Sensitive Documents

## **Client Alert**

01.29.2021

In response to the increasing prevalence of data breaches in both the private sector and government, the District of Delaware issued a Standing Order on January 29, 2021, providing guidance on new security procedures to protect “highly sensitive documents” (“HSD”) filed with the Court. The Standing Order does not otherwise disrupt filing procedures in place under the Court’s existing procedures and protective orders, and it will only apply, if at all, to a narrow set of defined documents in civil cases.

Documents containing highly sensitive information (“HSI”) qualify for the extra measures under the Standing Order. The Court generally defined HSI as confidential and sensitive information of interest to those in intelligence services or foreign governments that, if disclosed, would likely result in significant harm. For business entities, HSI is generally defined as information that, if disclosed, could lead to “catastrophic financial and/or other loss for the entity.”

Documents that presumptively qualify as HSD include those “substantially likely to adversely affect any of the following:

1. the nation’s security;
2. the integrity of government operations;
3. the reputational interests of the United States;
4. a foreign sovereign interest;
5. ongoing law-enforcement investigations and intelligence-gathering operations if either such investigations or operations involve documents that are substantially likely to be used to commit domestic or international crimes;
6. the safety of public officials or individuals cooperating with law enforcement in criminal investigations or prosecution; or
7. the ability of an entity to maintain cybersecurity.”

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As for most civil filings, including the overwhelming majority of documents filed under seal in intellectual property and Chapter 11 cases, the Court categorized those as presumptively not containing HSI.

A party seeking to demonstrate that a document qualifies as HSD bears the burden of doing so. It must file a motion with the Court, along with a proposed order, explaining why the document qualifies as HSD or why it should qualify, keeping in mind the presumptions set forth by the Court. After filing the motion, the party must then deliver to the Clerk's Office the document in question, accompanied by a certificate of service. It must also serve the document on the other parties in any manner specified in Civil Rule 5(b)(2), except for service via the Court's electronic filing system. If the Court finds that the document contains HSI, it will maintain a paper copy of the document or keep an electronic copy on a secure electronic device.

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