

## CLIENT ALERT

### Cybersecurity Breach Turns Back the Clock - Confidential Information to be Filed in Paper

Jan.12.2021

On January 6, 2021, the Administrative Conference of U.S. Courts authorized federal district courts to develop policies for accepting “highly sensitive court documents (HSDs),” which would normally be filed electronically under seal, via paper filing. The statement from the Administrative Conference also acknowledged that the recent cybersecurity attack on SolarWinds products compromised the confidentiality of documents filed under seal on the Judiciary’s Case Management/Electronic Case Files system (CM/ECF).

As a result, courts nationwide are issuing notices delineating what constitute HSDs, and how parties must file HSDs, effective immediately. While some courts have yet to issue guidance, a number of other federal courts have issued general orders requiring that HSDs be filed in paper in drop boxes in or outside the courts. Individual courts are left with a split between treating all sealed documents as HSDs, and leaving to the presiding Judge, or if none, the Chief Judge, the determination of whether a document is an HSD. The U.S. District Court for the District of Columbia will take the latter approach and has provided that the HSD determination may consider whether the document contains closely held trade secrets, or confidential government enforcement information.

On a practical level, these orders may require that sealed documents, including bid protests, are filed by the court’s close of business to be considered timely filed, rather than 11:59 p.m., the deadline for electronic filing. The orders also may require more conferences among the parties to reach consensus on what information must be filed under seal, particularly if the presiding Judge or Chief Judge of a District has to decide when the parties fail to agree, as is often the case. We will continue to monitor these developments.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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