

Client Alert

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SEC Finalizes Rules to Facilitate Access to Exhibits

On March 1, 2017, the US Securities and Exchange Commission (the SEC) finalized rule and form amendments requiring issuers to include hyperlinks to the exhibits in their filings.¹ Specifically, the [final rule](#) requires registrants that file registration statements or periodic reports subject to the exhibit requirements under Item 601 of Regulation S-K, or that file Forms F-10 or 20-F (for foreign private issuers), to include a hyperlink to each exhibit in the exhibit index of these filings. In addition, to support functional hyperlinks, the final rule also requires registrants to submit these filings in HyperText Markup Language (HTML) format.

The final rule is intended to facilitate easier access to exhibits attached to company registration statement and periodic report filings. According to the [SEC press release](#), “[a]s the SEC looks for new ways to modernize financial disclosures, one of the easiest things we can do is add hyperlinks that automatically direct users to additional information on our EDGAR system.” As explained by SEC Acting Chairman Michael Piowar in his [opening statement](#) on the rule, “[t]he main reason for the hyperlinking requirement is a practical one – it will make it easy for someone trying to find a company’s articles of incorporation, tax opinion, material contract, underwriting agreement or other exhibit.”

The SEC proposed amendments to Item 601 of Regulation S-K and Forms F-10 and 20-F on August 31, 2016. The final rule adopts the requirements substantially as proposed.

Hyperlinking to Exhibits

Item 601 of Regulation S-K (i) identifies the exhibits that must be filed with registration statements under the Securities Act of 1933 (Securities Act) and Securities Exchange Act of 1934 (Exchange Act) and exhibits that must be filed with periodic and current reports under the Exchange Act and (ii) requires registrants to include an exhibit index that lists each exhibit included with the filing. As explained by Commissioner Kara Stein in her [statement](#) on the rule, “[i]n many cases, exhibits are incorporated by reference, meaning that they are not attached to a current filing but were filed sometime in the past.” Consequently, investors and market participants trying to access an exhibit that a registrant has incorporated by reference from a previously filed registration statement or report must review the exhibit index to determine the filing in which the exhibit was included and then must search the registrant’s filings to locate it. According to Commissioner Stein, “[t]oday’s rule will eliminate the inefficiencies associated with such a search process.”

The amendments require registrants to include an active hyperlink to each exhibit identified in the exhibit index in any registration statement or report that is required to include exhibits under Item 601 of Regulation S-K or under Forms F-10 or 20-F. The requirements also apply to the forms for which exhibits are required under Item 601 of Regulation S-K, including Forms S-1, S-3, S-4, S-8, S-11, F-1, F-3, F-4,

¹ Exhibit Hyperlinks and HTML Format, Release Nos. 33-10322 and 34-80132 (Mar. 1, 2017) (to be codified in 17 C.F.R. Parts 229, 232, 239 and 249). See also press release, Securities and Exchange Commission, SEC Approves Rules to Ease Investor Access to Exhibits in Company Filings (Mar. 1, 2017); Acting Chairman Michael S. Piowar, Opening Statement on Hyperlinks and HTML Adopting Release (Mar. 1, 2017); Commissioner Kara M. Stein, Statement on the Final Rule on Exhibit Hyperlinks and HTML Format (Mar. 1, 2017).

SF-1 and SF-3 under the Securities Act; and Forms 10, 10-K, 10-Q, 8-K and 10-D under the Exchange Act.

The final rule provides for a few exceptions where hyperlinking is not required, including: (i) exhibits filed on paper pursuant to a temporary or continuing hardship exemption under Rules 201 or 202 of Regulation S-T or pursuant to Rule 311 of Regulation S-T; (ii) exhibits previously filed in paper format prior to the time that the use of the Electronic Data Gathering, Analysis, and Retrieval (EDGAR) system became mandatory; (iii) exhibits filed with Form ABS-EE; and (iv) eXtensive Business Reporting Language (XBRL) exhibits. The SEC determined that it was unnecessary to require hyperlinks to exhibits filed with Form ABS-EE or to XBRL exhibits because these exhibits are filed in unconverted code.

For periodic or current reports, registrants are required to include hyperlinks to exhibits when the report is filed. For registration statements, registrants are required to include hyperlinks to exhibits in the initial registration statement and in each subsequent pre-effective amendment. This requirement represents a notable change from the proposal, which only required the registrant to include an active hyperlink to each exhibit in the version of the registration statement that becomes effective. According to the final rule, the change is designed to “further enhance the navigability of these documents, which may be used by investors to begin making investment decisions before effectiveness.”

HTML Format

Rule 105 of Regulation S-T establishes limitations on, and liability for, the use of HTML documents and hyperlinks in electronic SEC filings. Among other things, Rule 105 (i) allows hyperlinking to documents within the same filing, such as exhibits, and other documents that have been previously filed on EDGAR and (ii) prohibits hyperlinking to websites or documents outside the EDGAR system.

Under current rules, registrants may submit electronic filings to the SEC using the EDGAR system in either the ASCII format or the HTML format. However, because the ASCII format does not support hyperlink functionality, the final rule amends Rule 105 to require registrants filing registration statements and periodic reports subject to the exhibit filing requirements under Item 601 of Regulation S-K and Forms F-10 and 20-F to file these forms in HTML format. The final rule clarifies that schedules or forms that are not subject to the exhibit filing requirements under Item 601, such as proxy statements, may continue to be filed in ASCII format. The final rule notes that only a small percentage of registrants currently make filings in ASCII format.

Concerns About Inaccurate Hyperlinks

Commenters raised a few concerns regarding inaccurate or nonfunctioning hyperlinks. In response to concerns about the correction of inaccurate hyperlinks, the final rule adds an instruction to Rule 105 requiring registrants to: (i) in the case of a registration statement that is not effective, correct the inaccurate hyperlink by filing a pre-effective amendment to such registration statement; or (ii) in the case of a registration statement that is effective or a periodic report, correct the inaccurate hyperlink in the next periodic report that requires, or includes, an exhibit index, or alternatively by filing a post-effective amendment to the registration statement.

Commenters also expressed concerns about liability issues or other penalties regarding inaccurate hyperlinks. In response, the final rule clarifies that an inaccurate hyperlink alone will not render a filing materially deficient or affect the registrant’s ability to use short-form registration statements. In addition, the final rule reminds registrants that Rule 105 prohibits hyperlinks to external websites and that including external links may subject registrants to the civil and antifraud liability provisions of the federal securities laws with reference to the information contained in the linked material.

Next Steps

The final rule will take effect on September 1, 2017. However, in response to comments, the final rule adopts a phase-in period of one year from the effective date for nonaccelerated filers and smaller reporting companies that submit filings in ASCII format. The final rule also adopts a phase-in period for certain filings on Form 10-D to allow the staff time to implement certain programming changes on EDGAR, which will allow issuers to include the Form 10-D and Form ABS-EE in a single submission so that the required hyperlinks can be created at the time the Form 10-D is filed.

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