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## **SEC Issues Final Rules Requiring Links To Exhibits**

The following is written by Laura Anthony, Esq., a going public attorney focused on OTC listing requirements, direct public offerings, going public transactions, reverse mergers, Form 10 and Form S-1 registration statements, SEC compliance and OTC Market reporting requirements.

On March 1, 2017, the SEC passed a final rule requiring companies to include hyperlinks to exhibits in filings made with the SEC. The amendments require any company filing registration statements or reports with the SEC to include a hyperlink to all exhibits listed on the exhibit list. In addition, because ASCII cannot support hyperlinks, the amendment also requires that all exhibits be filed in HTML format. The rule change was made to make it easier for investors and other market participants to find and access exhibits listed in current reports, but that were originally provided in previous filings.

The SEC first proposed the rule change on August 31, 2016. The new rule continues the SEC's Division of Corporation Finance's ongoing Disclosure Effectiveness Initiative. I anticipate that this initiative will not only continue but gain traction in the coming years under the new administration as, hopefully, more duplicative, antiquated and immaterial requirements come under scrutiny. At the end of this blog, I include an up-to-date summary of the proposals and request for comment related to the ongoing Disclosure Effectiveness Initiative.

## Background

On April 15, 2016, the SEC issued a 341-page concept release and request for public comment on sweeping changes to certain business and financial disclosure requirements in Regulation S-K (“S-K Concept Release”). The S-K Concept Release contained a discussion and request for comment on exhibit filing requirements. Item 601 of Regulation S-K specifies the exhibits that must be filed with registration statements and SEC reports. Item 601 requires the filing of certain material contracts, corporate documents, and other information as exhibits to registration statements and reports.

A particular area of discussion recently has been the need to file schedules to contracts. These schedules can be lengthy and lack materiality. Likewise, a recent area of discussion has been the necessity of filing an immaterial amendment to a material exhibit. The S-K Concept Release contains a lengthy discussion on exhibits, including drilling down on specific filing requirements. Many of the exhibit filing requirements are principle-based, including, for example, quantitative thresholds for contracts. Consistent with the rest of the S-K Concept Release, the SEC discusses whether these standards should be changed to a straight materiality approach. The SEC also discusses eliminating some exhibit filing requirements altogether, such as where the information is otherwise fleshed out in financial statements or other disclosures (for example, a list of subsidiaries).

Currently companies are allowed to reference exhibits filed in prior filings as opposed to refiling the exhibit with the SEC. The better practice has always been to include a specific reference to the filing, including the date of the filing, and where the original exhibit can be located. However, many companies do not do so, leaving the public to search through prior filings to find the listed exhibit. Moreover, as time goes by and companies switch counsel, some choose not to spend the time and funds to have new counsel update an exhibit list to include a full reference. The new rule will require them to do so. The rule amendment is limited to the presentation of the exhibit list and requires including a hyperlink to the actual filed exhibit.

## Rule Amendments

In addition to the filing of exhibits and schedules, Item 601 of Regulation S-K requires each company to include an exhibit index list that lists each exhibit included as part of the filing. The list is cumulative. For example, the company's articles of incorporation are required to be included as an exhibit with every 10-Q and 10-K filing. Once an exhibit has been filed once, the company could historically incorporate by reference by including a footnote as to which filing the original exhibit can be found in. Unfortunately, I find that companies often will indicate that an exhibit has been previously filed, without giving a specific reference as to which filing or when, leaving an investor or reviewer to go fish. The SEC rightfully asserts that requiring companies to include hyperlinks from the exhibit index to the actual exhibits filed would allow much easier access to these filings.

The new rule change would require companies to include a hyperlink to each filed exhibit on the exhibit index as required by Item 601 of Regulation S-K, for virtually all filings made with the SEC, including XBRL exhibits. An active hyperlink will now be required in all filings made under the Securities Act or Exchange Act, provided however that if the filing is a registration statement, the active hyperlinks need only be included in the version that becomes effective.

Currently exhibits may be filed in the EDGAR system in either ASCII or HTML format. HTML format allows for hyperlinks to another place within the same document or to a separate document. ASCII does not support such hyperlinks. Over the years HTML has become the standard used for EDGAR filings, with 99% of filings in 2015 using HTML. The rule amendment will now prohibit the use of ASCII for exhibits and require only HTML with the newly required hyperlinks.

In addition, the rule changes include conforming changes to Rule 105 of Regulation S-T. Rule 105 sets forth the limitations and liabilities for the use of hyperlinks. Rule 105 allows hyperlinks to other documents within the same filing or previously filed documents on EDGAR but prohibits hyperlinks to sites, locations, or documents outside the EDGAR system.

The new Rule goes into effect on September 1, 2017, provided however that non-accelerated filers and smaller reporting companies that submit filings in ASCII may delay compliance through September 1, 2018.

## Further Background

I have been keeping an ongoing summary of the SEC's ongoing Disclosure Effectiveness Initiative. The following is a recap of such initiative and proposed and actual changes. However, I note that with the recent election, and the GOP sweeping control of both the House and Senate, it is unclear what the future of these initiatives holds.

On August 31, 2016, the SEC issued proposed amendments to Item 601 of Regulation S-K to require hyperlinks to exhibits in filings made with the SEC. The proposed amendments would require any company filing registration statements or reports with the SEC to include a hyperlink to all exhibits listed on the exhibit list. In addition, because ASCII cannot support hyperlinks, the proposed amendment would also require that all exhibits be filed in HTML format.

On August 25, 2016, the SEC requested public comment on possible changes to the disclosure requirements in Subpart 400 of Regulation S-K. Subpart 400 encompasses disclosures related to management, certain security holders and corporate governance.

On July 13, 2016, the SEC issued a proposed rule change on Regulation S-K and Regulation S-X to amend disclosures that are redundant, duplicative, overlapping, outdated or superseded (S-K and S-X Amendments).

That proposed rule change and request for comments followed the concept release and request for public comment on sweeping changes to certain business and financial disclosure requirements issued on April 15, 2016.

As part of the same initiative, on June 27, 2016, the SEC issued proposed amendments to the definition of "Small Reporting Company". SEC also previously issued a release related to disclosure requirements for entities other than the reporting company itself, including subsidiaries, acquired businesses, issuers of guaranteed securities and affiliates.

As part of the ongoing Disclosure Effectiveness Initiative, in September 2015 the SEC Advisory Committee on Small and Emerging Companies met and finalized its recommendation to the SEC regarding changes to the disclosure requirements for smaller publicly traded companies. For more information on that topic and for a discussion of the reporting requirements in general.

In March 2015 the American Bar Association submitted its second comment letter to the SEC making recommendations for changes to Regulation S-K. For more information on that topic.

In early December 2015 the FAST Act was passed into law. The FAST Act requires the SEC to adopt or amend rules to: (i) allow issuers to include a summary page to Form 10-K; and (ii) scale or eliminate duplicative, antiquated or unnecessary requirements for emerging-growth companies, accelerated filers, smaller reporting companies and other smaller issuers in Regulation S-K. The current Regulation S-K and S-X Amendments are part of this initiative. In addition, the SEC is required to conduct a study within one year on all Regulation S-K disclosure requirements to determine how best to amend and modernize the rules to reduce costs and burdens while still providing all material information.

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Securities Law Blog is written by Laura Anthony, Esq., a going public lawyer focused on OTC Listing Requirements, Direct Public Offerings, Going Public Transactions, Reverse Mergers, Form 10 Registration Statements, and Form S-1 Registration Statements. Securities Law Blog covers topics ranging from SEC Compliance, FINRA Compliance, DTC Chills, Going Public on the OTC, and OTCQX and OTCQB Reporting Requirements. Ms. Anthony is also the host of LawCast.com, the securities law network.

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