

SEC Adopts Final Rules Requiring Exhibit Hyperlinks and HTML Formatting

In March, the Securities and Exchange Commission (“SEC”) adopted final rules to require the inclusion of active hyperlinks to each exhibit in a filing’s exhibit index. The final rules also require the use of Hyper Text Markup Language (“HTML”) formatting for all filings subject to the hyperlink rule. These amendments will affect all SEC reporting companies as well as those filing their first registration statement, and according to the SEC Acting Chairman Michael Piwowar, they are the “commonsense solution [that] will make life simpler for a lot of people.”

Background

Currently, to access an exhibit that is incorporated by reference into a company’s Securities Act registration statement or Exchange Act report, an investor or any other user must search through that company’s previous SEC filings to locate it. On August 31, 2016, the SEC proposed amendments requiring reporting companies to include hyperlinks to each exhibit in an exhibit index. Since the text-based American Standard Code for Information Interchange (“ASCII”) format cannot support functional hyperlinks, the SEC also proposed to require public companies to submit their filings in HTML formatting. The proposed rules were open for public comment for forty-five days, and according to the SEC, the comments were overwhelmingly in support of the proposed rules.

Final Rules

The primary purposes of these final rules are to modernize financial disclosures and to facilitate easier access to exhibits for investors and other users of the information. To further advance these objectives, the final rules will apply to most registration statements, including those filed on Forms S-1, S-3, S-4, S-8 and S-11 as well as any Exchange Act reports required to include exhibits under Item 601 of Regulation S-K such as Forms 10, 10-K, 10-Q, 8-K and 10-D. In addition, Form F-10 and Form 20-F must also contain hyperlinks for their exhibits. The final rules provide an exemption for exhibits filed in paper pursuant to the hardship exemptions under Rules 201 and 202. It is important to note that EDGAR does not accept documents that include hyperlinks to external websites.

The recent amendment also codifies a new instruction to Rule 105 of Regulation S-T, requiring companies to correct mistaken or nonfunctioning hyperlinks. For registration statements that are not yet effective, the correction must be included in a pre-effective amendment to the registration statement. If the inaccurate or nonfunctioning hyperlink appears in an effective registration statement or an Exchange Act report, then the next Exchange Act periodic report that includes an Item 601 exhibit must contain the correct, functioning hyperlink. Under the final rules, a mistaken or nonfunctioning hyperlink will not render the filing materially deficient. In other words, inaccurate hyperlinks alone will not affect a company’s eligibility to use a short-form registration statement such as a Form S-3.

What to Do Now

The recently adopted final rules regarding hyperlinks will be effective on September 1, 2017, requiring year-end reporting companies to comply with the new rules when filing their Form 10-Qs for the quarter ending September 30, 2017. For smaller reporting companies and non-accelerated filers who submit filings in ASCII format, the final rules are not effective until September 1, 2018. However, the SEC encourages early compliance. If you would like more information regarding these final rules and how they will apply to your company, please contact a member of our firm’s Securities and Capital Markets Group at 585.232.6500.



Harter Secrest & Emery LLP

ATTORNEYS AND COUNSELORS

ROCHESTER

1600 Bausch & Lomb Place
Rochester, NY 14604-2711
585.232.6500

BUFFALO

50 Fountain Plaza, Suite 1000
Buffalo, NY 14202-2293
716.853.1616

ALBANY

111 Washington Ave., Suite 303
Albany, NY 12210-2209
518.434.4377

CORNING

8 Denison Parkway East, Suite 403
Corning, NY 14830-2638
607.936.1042

NEW YORK

733 Third Avenue
New York, NY 10017
646.790.5884

SECURITIES AND CAPITAL MARKETS GROUP

PARTNERS

James M. Jenkins

jjenkins@hselaw.com

Daniel R. Kinel

dkinel@hselaw.com

Alexander R. McClean

amcclean@hselaw.com

COUNSEL

Scot J. Foley

sfoley@hselaw.com

Kayla E. Klos

kklos@hselaw.com

ASSOCIATES

Jeffrey M. Donigan

jdonigan@hselaw.com

Amanda M. Karpovich

akarpovich@hselaw.com

Robert G. Little

rlittle@hselaw.com

Michael J. Roche

mroche@hselaw.com