

September 12, 2017

Requirement Takes Effect for SEC Filings to Include Hyperlinks to Exhibits

New Requirements Take Effect September 1, 2017 for Most Companies, With One-Year Delay for Certain Non-Accelerated Filers and Smaller Reporting Companies

SUMMARY

Effective September 1, 2017, the rules of the Securities and Exchange Commission require registrants to include active hyperlinks to documents listed in the exhibit indices in most registration statements and reports filed with the SEC. Relatedly, to enable the inclusion of these hyperlinks, companies must submit all such filings on EDGAR in HTML format rather than ASCII format.

The requirements apply to filings subject to the exhibit requirements in Item 601 of Regulation S-K, which generally includes registration statements under the Securities Act of 1933, as well as Forms 10, 10-K, 10-Q and 8-K. They do not apply to filings with exhibit requirements governed by other rules, such as Schedules 13D or 13G.

The SEC adopted these rule changes in Rel. No. 33-10322, *Exhibit Hyperlinks and HTML Format* (Mar. 1, 2017), which is available at <https://www.sec.gov/rules/final/2017/33-10322.pdf>. The September 1, 2017 effective date does not apply to non-accelerated filers and smaller reporting companies that submit filings in ASCII, which have an additional year to comply.

DISCUSSION

A. KEY FEATURES OF THE EXHIBIT HYPERLINKS REQUIREMENT

Item 601 of Regulation S-K lists the exhibits that registrants must file with registration statements under the Securities Act of 1933 and periodic and current reports under the Securities Exchange Act of 1934, and it also requires registrants to include an exhibit index in these filings. The new rules amend Item 601

SULLIVAN & CROMWELL LLP

of Regulation S-K to require an active hyperlink to each exhibit listed in the exhibit index that is filed with the registration statement or report. If the exhibit is incorporated by reference, the registrant must include an active hyperlink to the exhibit separately filed on EDGAR. With respect to registration statements, registrants must include exhibit hyperlinks in the initial registration statement, each subsequent pre-effective amendment and the registration statement that becomes effective.

The rules apply to the forms for which exhibits are required under Item 601, which include:

- Securities Act Forms S-1, S-3, S-4, S-8, S-11, SF-1, SF-3, F-1, F-3 and F-4; and
- Exchange Act Forms 10, 10-K, 10-Q, 8-K and 10-D.

The rules do not apply to SEC filings for which the exhibit requirements are governed by rules other than Item 601, such as Schedules 13D and 13G, insider ownership reports under Section 16 of the Exchange Act or Forms 144.

In addition, the hyperlink requirement does not apply to:

- Exhibits that are filed in paper pursuant to a temporary or continuing hardship exemption under Regulation S-T;
- Exhibits in eXtensible Business Reporting Language (“XBRL”) format;
- Exhibits that are filed with Form ABS-EE; or
- Exhibits filed in paper form before the advent of EDGAR.

The new rules also adopt corresponding exhibit hyperlink requirements for Forms F-10 and 20-F, with the same effective dates. However, the SEC has not extended these new requirements to other forms under the multi-jurisdictional disclosure system used by certain Canadian issuers or to Form 6-K used by foreign private issuers.

B. KEY FEATURES OF THE HTML FORMAT REQUIREMENT

Rule 105 of Regulation S-T places limitations on the use of HTML documents and hyperlinks in electronic filings. The SEC’s new rules amend Rule 105 of Regulation S-T to require registrants to file in HTML format a registration statement or report subject to Item 601 of Regulation S-K or on Form F-10 or Form 20-F. Registrants may continue to file in ASCII format any schedules or forms that are not subject to the exhibit filing requirements under Item 601, such as proxy statements and Schedules 13D and 13G.

C. CORRECTION OF INACCURATE EXHIBIT HYPERLINKS

To address concerns regarding inaccurate exhibit hyperlinks, the SEC added an instruction to Rule 105 of Regulation S-T that requires a registrant to correct a non-functioning or inaccurate hyperlink. In the case of a registration statement that is not yet effective, the registrant must make the correction in a pre-effective amendment. In the case of a registration statement that is effective or a report previously filed under the Exchange Act, the registrant must make the correction in the next Exchange Act report that

SULLIVAN & CROMWELL LLP

requires or includes an exhibit pursuant to Item 601 of Regulation S-K. In the case of a foreign private issuer, the company must make the correction in the next Form F-10 or 20-F, as applicable.

In the adopting release, the SEC expressly noted that an inaccurate exhibit hyperlink alone would not render the filing materially deficient nor would it affect a registrant's eligibility to use short-form registration statements.

D. COMPLIANCE DATES

The amendment took effect on September 1, 2017. However, the SEC has adopted phase-in periods for two situations:

- First, non-accelerated filers and smaller reporting companies that submit filings in ASCII format will be subject to the new rules starting September 1, 2018.
- Second, the SEC staff is currently working on programming changes to EDGAR that will allow companies to include Form 10-D and Form ABS-EE in a single submission. Therefore, the SEC is delaying the compliance date for any Form 10-D that requires hyperlinks to any exhibit filed with Form ABS-EE. The SEC will announce the applicable compliance date for such filings when it is determined.

E. PRACTICAL IMPLICATIONS

In advance of any filings to which the new requirements will apply, companies should coordinate with their third-party or internal EDGAR filing agents and software providers to confirm that their systems will allow them to include the required exhibit hyperlinks in the filings. Companies should also consider how to modify their disclosure controls and procedures to provide authentication of the exhibit hyperlinks and corrections. Specifically, it would seem advisable for companies to implement procedures for testing these exhibit hyperlinks immediately prior to filing, but after "Edgarization" of the intended filing.

It may be useful for companies to review the exhibits in their prior year's filings and assess whether all of those exhibits continue to be required, and whether any other changes should be made to their exhibit indices. Because a company's annual report on Form 10-K or Form 20-F typically has the longest list of exhibits, examining the exhibit indices on the prior year's annual report would be a logical starting point. At the same time, companies should focus on their compliance with the SEC rules relating to incorporation by reference, including Instruction 1 to Item 601 of Regulation S-K (any incomplete exhibit that is filed in preliminary form may not be incorporated by reference in any subsequent filing) and Item 10(d) of Regulation S-K (documents that are on file with the SEC for more than five years may not be incorporated by reference, except for (i) documents contained in registration statements for so long as the registrant has a reporting requirement with the SEC; or (ii) documents that the registrant specifically identifies by SEC file number reference).

* * *

Copyright © Sullivan & Cromwell LLP 2017

SULLIVAN & CROMWELL LLP

ABOUT SULLIVAN & CROMWELL LLP

Sullivan & Cromwell LLP is a global law firm that advises on major domestic and cross-border M&A, finance, corporate and real estate transactions, significant litigation and corporate investigations, and complex restructuring, regulatory, tax and estate planning matters. Founded in 1879, Sullivan & Cromwell LLP has more than 875 lawyers on four continents, with four offices in the United States, including its headquarters in New York, four offices in Europe, two in Australia and three in Asia.

CONTACTING SULLIVAN & CROMWELL LLP

This publication is provided by Sullivan & Cromwell LLP as a service to clients and colleagues. The information contained in this publication should not be construed as legal advice. Questions regarding the matters discussed in this publication may be directed to any of our lawyers listed below, or to any other Sullivan & Cromwell LLP lawyer with whom you have consulted in the past on similar matters. If you have not received this publication directly from us, you may obtain a copy of any past or future related publications from Michael B. Soleta (+1-212-558-3974; soletam@sullcrom.com) in our New York office.

CONTACTS

New York

| | | |
|----------------------|-----------------|--|
| Robert E. Buckholz | +1-212-558-3876 | buckholzr@sullcrom.com |
| Catherine M. Clarkin | +1-212-558-4175 | clarkinc@sullcrom.com |
| Heather L. Coleman | +1-212-558-4600 | colemanh@sullcrom.com |
| Donald R. Crawshaw | +1-212-558-4016 | crawshawd@sullcrom.com |
| Robert G. DeLaMater | +1-212-558-4788 | delamaterr@sullcrom.com |
| Robert W. Downes | +1-212-558-4312 | downesr@sullcrom.com |
| John E. Estes | +1-212-558-4349 | estesj@sullcrom.com |
| William G. Farrar | +1-212-558-4940 | farrarw@sullcrom.com |
| David B. Harms | +1-212-558-3882 | harmsd@sullcrom.com |
| Scott D. Miller | +1-212-558-3109 | millersc@sullcrom.com |
| Robert W. Reeder III | +1-212-558-3755 | reederr@sullcrom.com |
| Glen T. Schleyer | +1-212-558-7284 | schleyerg@sullcrom.com |
| William D. Torchiana | +1-212-558-4056 | torchianaw@sullcrom.com |
| Marc Trevino | +1-212-558-4239 | trevinom@sullcrom.com |
| Frederick Wertheim | +1-212-558-4974 | wertheimf@sullcrom.com |
| George H. White III | +1-212-558-4328 | whiteg@sullcrom.com |

Washington, D.C.

| | | |
|----------------------|-----------------|--|
| Eric J. Kadel, Jr. | +1-202-956-7640 | kadelej@sullcrom.com |
| Richard C. Morrissey | +1-202-956-7565 | morrisseyr@sullcrom.com |
| Robert S. Risoleo | +1-202-956-7510 | risoleor@sullcrom.com |
| Dennis C. Sullivan | +1-202-956-7554 | sullivand@sullcrom.com |

SULLIVAN & CROMWELL LLP

Los Angeles

| | | |
|-------------------|-----------------|--|
| Patrick S. Brown | +1-310-712-6603 | brownp@sullcrom.com |
| Alison S. Ressler | +1-310-712-6630 | resslera@sullcrom.com |

Palo Alto

| | | |
|-----------------|-----------------|--|
| Scott D. Miller | +1-650-461-5620 | millersc@sullcrom.com |
| Sarah P. Payne | +1-650-461-5669 | paynesa@sullcrom.com |
| John L. Savva | +1-650-461-5610 | savvaj@sullcrom.com |

London

| | | |
|-----------------------------|------------------|--|
| Kathryn A. Campbell | +44-20-7959-8580 | campbellk@sullcrom.com |
| Oderisio de Vito Piscicelli | +44-20-7959-8589 | devitopiscicellio@sullcrom.com |
| John O'Connor | +44-20-7959-8515 | oconnorj@sullcrom.com |
| Stewart M. Robertson | +44-20-7959-8555 | robertsons@sullcrom.com |
| David Rockwell | +44-20-7959-8575 | rockwelld@sullcrom.com |

Paris

| | | |
|----------------------|-----------------|--|
| William D. Torchiana | +33-1-7304-5890 | torchianaw@sullcrom.com |
|----------------------|-----------------|--|

Frankfurt

| | | |
|---------------------|------------------|--|
| Krystian Czerniecki | +49-69-4272-5525 | czernieckik@sullcrom.com |
|---------------------|------------------|--|

Tokyo

| | | |
|--------------|-----------------|--|
| Izumi Akai | +81-3-3213-6145 | akaii@sullcrom.com |
| Keiji Hatano | +81-3-3213-6171 | hatanok@sullcrom.com |

Hong Kong

| | | |
|---------------------|----------------|--|
| Garth W. Bray | +852-2826-8691 | brayg@sullcrom.com |
| Michael G. DeSombre | +852-2826-8696 | desombrem@sullcrom.com |
| Chun Wei | +852-2826-8666 | weic@sullcrom.com |

Melbourne

| | | |
|------------|-----------------|--|
| Robert Chu | +61-3-9635-1506 | chur@sullcrom.com |
|------------|-----------------|--|

Sydney

| | | |
|--------------------|-----------------|--|
| Waldo D. Jones Jr. | +61-2-8227-6702 | jonesw@sullcrom.com |
|--------------------|-----------------|--|
