

June 8, 2022

SEC Adopts Amendments Requiring Electronic Filing of Certain Documents, Including “Glossy” Annual Reports, Forms 144 and Forms 6-K

Amendments Mandate the Electronic Filing or Submission Through EDGAR of Certain Documents that are Currently Permitted to be Filed in Paper Form

SUMMARY

On June 2, 2022, the Securities and Exchange Commission (the “SEC”) adopted amendments¹ to Regulation S-T, the Securities and Exchange Act of 1934 (the “Exchange Act”) and certain forms, including Forms 144, to mandate the electronic filing or submission of documents that are currently permitted to be filed in paper form, including “glossy” annual reports to security holders, Forms 144 in the case of public companies, Forms 6-K, notices of exempt solicitations and exempt preliminary roll-up communications and annual reports of employee stock purchase, savings and similar plans on Form 11-K. The rules also mandate the use of Inline eXtensible Business Reporting Language (“Inline XBRL”) for the filing of the financial statements and accompanying notes to the financial statements required in the annual reports on Form 11-K.

The amendments will be effective 30 days after the date of publication in the Federal Register. However, as described below under “Compliance Dates”, extended transition periods will be available for certain filings or submissions.

BACKGROUND

Under Rule 101(b) of Regulation S-T, several categories of documents may be filed or submitted either electronically or in paper form.

In order to review paper filings, such as Forms 144 submitted in paper form, investors must go to the SEC's public reference room or subscribe to a third-party information service that scans and distributes the information. However, due to the COVID pandemic, the public has not been allowed to access the SEC's public reference room since April 13, 2020.

In April 2020, the Division of Corporation Finance provided temporary no-action relief specifying it would not recommend enforcement action to the SEC if a Form 144 was submitted as a complete PDF attachment and emailed to the Commission in lieu of filing the form in paper. Subsequently, on June 25, 2020, the Division of Corporation Finance indefinitely extended this no-action relief.²

Since the implementation of EDGAR, the SEC has sought to make EDGAR more comprehensive by including more filings in the category of mandatory electronic filings. In furtherance of this objective, the SEC adopted the amendments to extend the categories of documents subject to mandatory EDGAR filing requirements.

AMENDMENTS

Under the amendments, various issuers, affiliates and national securities exchanges must electronically file or submit via EDGAR:

- “Glossy” annual reports to security holders;
- Notices of exempt solicitations and exempt preliminary roll-up communications;
- Forms 144 for sales of securities of issuers subject to the reporting requirements of Section 13 or Section 15(d) of the Exchange Act (paper filings of Forms 144 for affiliates of non-public companies continue to be permitted);
- Annual reports of employee stock purchase, savings and similar plans on Form 11-K;
- Filings on Form 6-K;
- Filings made by multilateral development banks;
- Filings made pursuant to Section 33 of the Investment Company Act of 1940; and
- Certifications made pursuant to Section 12(d) of the Exchange Act and Exchange Act Rule 12d1-3 that a security has been approved by an exchange for listing and registration.

As a result of the adoption of these amendments, upon the compliance date, the SEC will withdraw its previous statement on no-action relief which allowed for submission of Form 144 in PDF form by email in lieu of filing in paper form. Form 144 filings where the issuer of the securities is subject to the Exchange Act reporting requirements will need to be submitted in electronic format via EDGAR. Moreover, the

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amendments eliminate the requirement under Rule 144(h)(1) that an affiliate send one copy of the Form 144 notice to the principal exchange, if any, on which the securities are admitted to trading, and delete certain personally identifiable information from the Form.

Currently, in reliance on Staff Guidance,³ many registrants post an electronic version of their “glossy” annual report to security holders to their corporate website for one year in lieu of mailing paper copies or submitting it on EDGAR. Since the “glossy” annual report to security holders will be categorized as a mandatory EDGAR submission upon the effective date, the SEC will also withdraw this Staff Guidance.⁴

In addition to these electronic submission requirements, the amendments also require the use of Inline XBRL for filing financial statements and accompanying notes to the financial statements required by Form 11-K and require the electronic submission of certain foreign language documents through EDGAR in PDF form.⁵

COMPLIANCE DATES

The amendments will be effective 30 days after the date of publication in the Federal Register. The SEC is providing the following transition periods for certain of the amendments:

- Six months after the effective date of the amendments for filers to submit electronically through EDGAR their “glossy” annual reports to security holders, notices of exempt solicitations and exempt preliminary roll-up communications, Forms 6-K, filings made by multilateral development banks and certain foreign language documents;
- Six months after the date of publication in the Federal Register of the SEC release that adopts the version of the EDGAR Filer Manual addressing updates to Form 144 for filing Form 144 electronically on EDGAR (estimated to be March 2023);⁶ and
- Six months after the effective date for the filing of Forms 11-K electronically, but three years after the effective date for filers to submit the financial statements and accompanying schedules to the financial statements required by Form 11-K in the Inline XBRL structured data language.

In the adopting release, the SEC notes it provided these transition periods to give registrants adequate time to apply for access to file on EDGAR, prepare electronic submissions in accordance with the EDGAR filer manual and prepare Inline XBRL submissions on Form 11-K.

IMPLICATIONS

Forms 144. The SEC estimates that 75% of Form 144 filers lack the required CIK codes to file electronically. Form 144 filers without CIK codes should proceed to obtain these codes.

As noted by the SEC in the adopting release, historically, many Form 144 filings have been made by broker-dealers for their affiliate clients. In light of the SEC’s proposal to have a Form 144 portal that would permit the form to be completed on-line, it is unclear this practice will continue. Although the SEC indicates in the adopting release that the portal will permit the bulk filing of Forms 144, it is not clear whether once the portal

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is established that, like Form 4 filings, Form 144 filings will be made by in-house counsel and not by the executing broker-dealer. Affiliates and broker-dealers entering into Rule 10b5-1 sales plans that extend beyond the estimated March 2023 compliance date should consider this issue.

Forms 6-K. Foreign private issuers will need to put in place procedures to have the required Forms 6-K EDGARized and determine whether to do this in-house or use an outside vendor.

Forms 11-K. The requirement that Forms 11-K be filed electronically and converted into Inline XBRL will be a significant undertaking and will need to be factored into the timeline for the filing of Forms 11-K. In our experience, it can take several business days for financial statements to be converted into Inline XBRL and then checked for accuracy.

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ENDNOTES

- ¹ Updating EDGAR Filing Requirements and Form 144 Filings, SEC Release No. 33-11070 and No. 34-95025 (June 2, 2022) (“adopting release”), available at <https://www.sec.gov/rules/final/2022/33-11070.pdf>. See also SEC Fact Sheet: Amendments to Electronic Filing Requirements (June 2, 2022), available at <https://www.sec.gov/files/33-11070-fact-sheet.pdf>.
- ² Division of Corporation Finance Statement Regarding Requirements for Form 144 Paper Filings in Light of COVID-19 Concerns, U.S. Sec. & Exch. Comm’n (June 25, 2020), available at <https://www.sec.gov/corpfin/announcement/form-144-paper-filings-email-option-update>.
- ³ Proxy Rules and Schedule 14A (Regarding Submission of Annual Reports to SEC Under Rules 14a-c(3) and 14c-3(b)), U.S. Sec. & Exch. Comm’n (Nov. 2, 2016), available under “Compliance and Disclosure Interpretations – Proxy Rules and Schedule 14A” at <https://www.sec.gov/divisions/corpfin/guidance/exchange-act-rule-14a3-14c3.htm>.
- ⁴ Adopting release at p. 8, footnote 12.
- ⁵ Currently, under Rules 306(b) and (c) of Regulation S-T, filers may submit two types of foreign language documents in paper form: unabridged foreign language documents if an English translation or summary of the document has already been provided in an electronic filing or submission; and a foreign language version of a foreign government’s or its political subdivision’s latest annual budget if an English translation of the budget is unavailable and such an exhibit is required by Form 18 or Form 18-K. After the compliance date, submission of these types of documents must be in an electronic format that EDGAR supports, e.g., PDF form.
- ⁶ The SEC originally proposed a six-month transition period after the effective date of the amendments to Regulation S-T. Rule 144 Holding Period and Form 144 Filings, SEC Release No. 33-10911 and No. 34-90773 (Dec. 22, 2020) (“adopting release”), available at <https://www.sec.gov/rules/proposed/2020/33-10911.pdf>. See also SEC Proposes Amendments to Rule 144 Holding Period and Form 144 Filings (Jan. 15, 2021), available at <https://www.sullcrom.com/files/upload/SC-Publication-SEC-Proposes-Amendments-Rule-144-Holding-Period-and-Form-144-Filings.pdf>. However, in response to a comment from the Securities Industry and Financial Markets Association, the SEC adopted a six-month transition period commencing after the date of publication in the Federal Register of the release that adopts the EDGAR Filer Manual addressing updates to Form 144 in order to allow firms adequate time to collect EDGAR filing credentials from clients and establish processes for filing Forms 144 and maintaining EDGAR credentials. The adopting release notes the SEC expects they would consider adoption of the relevant EDGAR Filer Manual updates in September 2022, with publication in the Federal Register occurring thereafter.

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