

Considerations For Exhibit Hyperlinks In SEC Filings

Law360, New York (March 15, 2017, 11:31 AM EDT) -- On March 1, 2017, the U.S. Securities and Exchange Commission adopted amendments^[1] requiring exhibits listed in the exhibit index of specified SEC filings to be hyperlinked. Hyperlinking will allow readers to directly access exhibits. As a result, investors looking for an exhibit will no longer have to first locate the report containing the exhibit on the SEC's EDGAR system and then find the appropriate exhibit within that filing. Instead, investors will have a convenient, one-click method to retrieve and review exhibits filed with SEC registration statements and reports that are subject to the new requirements.



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Key Features of the Exhibit Hyperlink Requirements

Scope of the New Requirements

The amendments require SEC forms that are subject to Item 601 of Regulation S-K2 to provide hyperlinks for their exhibit indexes. These forms include Forms S-1, S-3, S-4, S-8, S-11, SF-1, SF-3, F-1, F-3 and F-4 under the Securities Act of 1933 (Securities Act) and Forms 10, 10-K, 10-Q, 8-K and 10-D under the Securities Exchange Act of 1934 (Exchange Act). Similarly, Forms F-10 and 20-F must include hyperlinks for their exhibit indexes. However, the SEC did not extend the hyperlink requirements to other forms under the multijurisdictional disclosure system (MJDS) used by certain Canadian issuers or to Form 6-K used by foreign private issuers.



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Which Exhibits Must Be Hyperlinked

Each exhibit in a registration statement or report covered by the amendments must be hyperlinked, except in the circumstances discussed below. This includes exhibits filed with the current registration statement or report, as well as exhibits that are cross-referenced to a prior filing. However, the interactive financial data exhibits filed in Extensible Business Reporting Language (XBRL) and exhibits filed with Form ABS-EE are excluded from the requirements to provide hyperlinks.

The amendments do not require exhibits that were appropriately filed in paper format, including organizational documents, to be refiled electronically. However, companies will be allowed to restate and file in electronic format any exhibit incorporated by reference that was originally filed in paper format.

When Exhibits Must Be Hyperlinked

The exhibit index to a periodic and current report must be hyperlinked when the report is filed. The exhibit index to a registration statement must be hyperlinked when the initial registration statement is filed, as well as when each of its amendments is filed.

HTML

Some companies use American Standard Code for Information Interchange (ASCII) for their EDGAR filings. However, ASCII does not support hyperlinks. Therefore, companies will need to use HyperText Markup Language (HTML) for EDGAR filings that are subject to the amendments. Companies may continue using ASCII for schedules or forms not subject to exhibit filing requirements under Item 601 of Regulation S-K, such as proxy statements.

Hyperlinks to EDGAR Only

EDGAR does not accept documents containing web addresses that hyperlink to external websites. Accordingly, the amendments require that the hyperlinks must be to the location of the relevant exhibit on EDGAR.

Correcting Errors

The amendments specify that if an exhibit index contains a nonfunctioning hyperlink, or a hyperlink to the wrong exhibit, the company must correct it. In the case of a registration statement that is not yet effective, the correction must be made by a pre-effective amendment. If the hyperlink problem occurs in a registration statement that is effective, or in a report under the Exchange Act, the correction must be made in the next Exchange Act report that requires, or includes, an exhibit pursuant to Item 601 of Regulation S-K; however, if the company is a foreign private issuer, the correction would be made in the next Form 20-F or F-10 (in the case of Canadian issuers using MJDS), as applicable.

Form S-3/F-3 Eligibility

The adopting release specifies that an inaccurate hyperlink alone would not render a filing materially deficient or affect the company's eligibility to use a short-form registration statement (such as a Securities Act shelf registration statement on Form S-3/F-3).

Compliance Dates

The amendments will become effective on Sept. 1, 2017, and most companies will need to comply with these requirements for SEC filings submitted on or after that date. In the adopting release, the SEC expressly encouraged early compliance with the new hyperlink requirements.

The amendments provide a transition period for nonaccelerated filers and smaller reporting companies that submit filings in the ASCII format. These issuers will not have to comply with the amendments until Sept. 1, 2018. In addition, the compliance date for any Form 10-D that requires a hyperlink to an exhibit filed with Form ABS-EE will be delayed until the SEC staff completes programming changes to EDGAR that will allow companies to include the Form 10-D and Form ABS-EE in a single submission. The SEC will announce such Form 10-D compliance date in a notice published in the Federal Register and posted on the SEC's website.

Practical Considerations for Exhibit Hyperlinks

The Sept. 1, 2017, effective date for the amendments is less than six months away. Therefore, companies should begin to prepare for the mechanics of the new hyperlink requirements and to design disclosure controls and procedures so that they will be ready to comply on a timely basis.

While a company's annual report on Form 10-K or Form 20-F, as applicable, may not be the first report that will be subject to the new requirements to provide hyperlinks in the exhibit index, the annual report generally has a substantially longer list of exhibits than other filings. Because of this, companies should begin to document the correct internet address (URL) for each exhibit currently listed in the exhibit index of their annual reports so that they can conveniently accomplish this task as their schedules permit, before the rush of next year's proxy and annual report season.

When examining their annual report exhibit indexes to find the appropriate EDGAR URLs to hyperlink, it would be a good exercise for companies to consider whether any substantive changes to the exhibit index should be made. While examining exhibit indexes in their entirety, companies could assess whether the index should be modified to remove older material contracts that are no longer required, to replace exhibits that have been superseded by restatements, or to add exhibit amendments that have not yet been filed.

The task of identifying hyperlinks for previously filed exhibits might reveal that an existing cross-reference to an exhibit number, or to the date of the original filing, needs to be corrected. Accordingly, this process also provides an opportunity to double-check the accuracy of exhibit indexes.

The SEC has announced that it will be updating its EDGAR filer manual to describe the procedures needed to hyperlink an exhibit previously filed and the procedures needed to create a link to an exhibit that is being filed at the same time as a registration statement or report. When the update becomes available, companies should be sure that the procedures are reviewed by the appropriate internal personnel.

Before the effective date of the amendments, companies should coordinate with their EDGAR filing agents or software providers to determine the necessary mechanics of placing the hyperlinks in an exhibit index that needs to be converted to the EDGAR format. For example, companies should determine if they will need to provide a Word copy of the exhibit index containing the URLs for previously filed exhibits to their filing agents and whether EDGAR filing software will automatically hyperlink URLs or whether such software will require that additional steps be taken.

Companies should confirm that each hyperlink in their filings functions properly. Initially, it would be beneficial to do so multiple times: when creating the exhibit index, after the exhibit index has been converted to EDGAR, and after filing. Companies should adopt a disclosure control procedure to assure that the hyperlinks work and that any incorrect hyperlinks are fixed in a subsequent filing within the time frame specified by the amendments.

It will be especially important for companies filing registration statements that must be declared effective by the SEC to confirm that their hyperlinks work properly promptly following filing because hyperlink errors in the exhibit index of any such registration statement must be corrected by a pre-effective amendment.

The amendments will make information that is already public more readily accessible. As a result, hyperlinked exhibit indexes may be viewed as an investor-friendly tool. For this reason, some companies may choose to comply with the new requirements early, especially for periodic and current reports filed under the Exchange Act, in order to get corporate governance “credit” for a disclosure process that they soon will be required to implement. Also, for many companies, early compliance would provide additional EDGAR hyperlinking experience on shorter exhibit indexes before it becomes necessary to provide hyperlinks on the longer exhibit index appearing in an annual report.

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[1] Available at <https://www.sec.gov/rules/final/2017/33-10322.pdf>.

[2] Item 601 of Regulation S-K, available at http://www.ecfr.gov/cgi-bin/text-idx?SID=8e0ed509ccc65e983f9eca72ceb26753&node=17:3.0.1.1.11&rqn=div5%20-%20se17.3.229_1601#se17.3.229_1601, contains a helpful exhibit table indicating which exhibits are required for each report subject to such item.