DAVIES

SEC Rulemaking Developments in 2017

By Jeffrey Nadler, Scott Fisher, Paul Watkins, Nir Servatka and Rachel Charney

Within the first hundred days of taking office, President Trump reiterated his commitment to scaling back existing financial regulations. In February 2017, President Trump signed into law Congress's repeal of the extractive industry transparency rules adopted by the U.S. Securities and Exchange Commission (SEC) in June 2016. These rules would have required all SEC reporting issuers, including Canadian and other foreign companies, that are engaged in the commercial development of oil, natural gas or minerals to report information about payments made to the U.S. federal government or foreign governments that are related to the commercial development of these resources. Additionally, in February 2017, President Trump signed an executive order establishing core principles to guide his administration's regulation of the U.S. financial system and directed the U.S. Department of the Treasury to report on laws and regulations that inhibit regulation of the U.S. financial system in a manner consistent with the core principles. In response, the U.S. Department of the Treasury issued recommendations to promote access to capital, among other things, through reducing regulatory obligations and modernizing the U.S. capital markets regulatory structure and processes.

Despite these recommendations, 2017 was a fairly quiet rulemaking year for the SEC. The SEC's proposed and final rules issued in 2017 focus primarily on improving the readability, navigability and accuracy of disclosure documents.

This update provides an overview of the following U.S. securities law and regulatory developments in 2017:

1. FAST Act modernization and simplification of Regulation S-K

2. SEC filings must include hyperlinks to exhibits and be in HTML format

3. Inline XBRL filing of tagged data

4. SEC guidance on pay ratio disclosure

5. SEC approves an NYSE rule amendment prohibiting release of material news after market close

Although some of these rules are applicable only to U.S. issuers, we believe these developments should be of interest to market participants abroad, as well as Canadian issuers and their advisers.

1. FAST ACT MODERNIZATION AND SIMPLIFICATION OF REGULATION S-K

As required by the *Fixing America's Surface Transportation Act*, the SEC is proposing amendments to Regulation S-K based on the recommendations made in the SEC staff's Report on Modernization and Simplification of Regulation S-K, released in the last quarter of 2016. Regulation S-K sets forth the content requirements of the non-financial statement portions of certain registration statements, annual reports and other documents under U.S. securities law. The proposed amendments are intended to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms, as well as reduce the costs and burdens on registrants and improve the readability and navigability of disclosure documents.

Read more about the SEC's proposal to simplify Regulation S-K.

2. SEC FILINGS MUST INCLUDE HYPERLINKS TO EXHIBITS AND BE IN HTML FORMAT

New rules of the SEC that require exhibits to be hyperlinked in most SEC filings became effective on September 1, 2017. Under the new rules, registrants that are filing a registration statement or current report that is subject to the exhibit requirements under section 601 of Regulation S-K or that are filing a Form F-10 or 20-F must insert a hyperlink to each exhibit listed in the exhibit index of such filing. The final rules do not require Canadian issuers to include hyperlinks to exhibits in any multijurisdictional disclosure system (MJDS) form filed with the SEC or any Form 6-K furnished to the SEC. The final rules also require all filings covered by the rules to be in the HTML format to support hyperlinks.

Read more on the new hyperlinks rule.

3. INLINE XBRL FILING OF TAGGED DATA

The SEC is proposing amendments that are intended to facilitate improvements in the quality and usefulness of eXtensible Business Reporting Language (XBRL) data and decrease filing costs by decreasing XBRL preparation costs over time. The proposed amendments would require financial statement information to be provided in the Inline XBRL format, which, in practical terms, means that filers would be required to embed XBRL data directly into an HTML formatted filing.

Read more about Inline XBRL filing.

4. SEC GUIDANCE ON PAY RATIO DISCLOSURE

On September 21, 2017, the SEC adopted interpretive guidance to assist domestic reporting companies in their efforts to comply with the pay ratio disclosure required by item 402 of Regulation S-K under the *Securities Act of 1933*, as amended. On the same day, the SEC staff provided separate guidance on calculating the pay ratio disclosure. Domestic reporting companies must begin providing pay ratio disclosure for the first time in early 2018 for the fiscal year beginning on or after January 1, 2017.

Read more about SEC guidance on pay ratio disclosure.

5. SEC APPROVES AN NYSE RULE AMENDMENT PROHIBITING RELEASE OF MATERIAL NEWS AFTER MARKET CLOSE

On December 4, 2017, the SEC approved an NYSE rule amendment – revised Rule 202.06 – prohibiting NYSE-listed companies from releasing material news after the NYSE's official trading closing time (NYSE Closing Time) until the earlier of (i) the publication of a company's official closing price on the NYSE and (ii) five minutes after the NYSE Closing Time. The rule amendment, which became effective on December 7, 2017, is intended to reduce price discrepancies between the official closing price on the NYSE and the prices of execution in other exchanges and non-exchange venues.

Read more about the NYSE rule amendment.

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FAST Act Modernization and Simplification of Regulation S-K

By Jeff Nadler and Rachel Charney

Securities disclosure requirements in the United States are complex, and compliance can be a challenge. Compliance with Regulation S-K, which contains requirements applicable to the content of the non-financial statement portions of certain registration statements, annual reports and other documents needed under U.S. securities law, can be particularly trying for registrants.

As required by the *Fixing America's Surface Transportation Act,* the U.S. Securities and Exchange Commission (SEC) is proposing amendments to Regulation S-K based on the recommendations made in the SEC staff's Report on Modernization and Simplification of Regulation S-K, released in the last quarter of 2016. These amendments are intended to modernize and simplify certain disclosure requirements in Regulation S-K and related rules and forms. The SEC is focusing on reducing costs and burdens on registrants and is aiming to improve the readability and navigability of disclosure documents while continuing to provide all material information to investors.

Below is a brief summary of the key proposed changes to Regulation S-K that, if implemented, may contribute to a more efficient securities regime in the United States. Some of the proposed changes relate to annual reports of foreign private issuers that are filed with the SEC, including annual reports on Form 40-F filed by Canadian foreign private issuers using the multijurisdictional disclosure system.

MANAGEMENT'S DISCUSSION AND ANALYSIS (MD&A) (ITEM 303)

This item requires registrants to discuss their financial condition, changes in financial condition, and results of operations. Instruction 1 to item 303(a) provides that, generally, discussion of financial statements and other statistical data must cover the three-year period included in the financial statements and use year-to-year comparisons or any other format that, in the registrant's judgment, enhance a reader's understanding. Instruction 1 also provides that where trend information is relevant, reference to the five-year selected financial data may be necessary. The SEC is proposing three amendments to this item:

(a) providing that discussion about the earliest year would not be required when financial statements included in a filing cover three years, if (i) that discussion is not material to an understanding of the registrant's financial condition, changes in financial condition, and results of operations; and (ii) the registrant has filed its prior year annual report on Form 10-K on EDGAR containing MD&A of the earliest of the three years included in the financial statements of the current filing;

(b) eliminating the reference to trend information in Instruction 1 in order to decrease duplication because the disclosure requirements for liquidity, capital resources and results of operations already require trend disclosure; and

(c) emphasizing that registrants may use any presentation in their discussion that, in the registrant's judgment, would enhance a reader's understanding.

Conforming changes to Form 20-F are also being proposed, which would impact foreign private issuers currently using a Form 20-F for their annual report. The SEC has not proposed conforming changes to Form 40-F because MD&A contained in Form 40-F is largely prepared in accordance with Canadian disclosure standards.

RISK FACTORS (ITEM 503(C))

This item requires disclosure of the most significant factors that make the offering speculative or risky, and enumerates specific examples of possible risk factors. The SEC is proposing to eliminate the enumerated examples to encourage registrants to focus on their own identification process and ensure that registrants address only risk factors that are significant to the registrant's business. The SEC is also proposing to relocate this item from Subpart 500 (which contains offering-related disclosure requirements) to Subpart 100 to reflect the application of risk factor disclosure requirements to registration statements on Form 10 and periodic reports, in addition to offering-related disclosure.

INFORMATION OMITTED FROM EXHIBITS (ITEM 601)

This item generally requires registrants to file complete copies of exhibits, but under item 601(b)(2) a registrant need not file schedules or similar attachments to material plans of acquisition, reorganization, arrangement, liquidation or succession unless they contain information material to an investment decision that is not otherwise disclosed in the agreement or the disclosure document. The SEC is proposing to expand the existing accommodation in item 601(b)(2) to include all exhibits filed under item 601. Additionally, the SEC is proposing the codification of its practice of permitting personally identifiable information such as bank account numbers, social security numbers and home addresses to be redacted from exhibits filed under item 601. Conforming changes have been proposed to Form 20-F. The SEC is also proposing to add language that would significantly reduce the need for registrants to submit applications for confidential treatment of information in material contract exhibits required by item 601, again with conforming changes to Form 20-F.

MATERIAL CONTRACTS (ITEM 601(B)(10))

This item requires registrants to file every material contract not made in the ordinary course of business so long as the contract (i) must be performed in whole or in part at or after the filing of the registration statement or report, or (ii) was entered into not more than two years before the filing. The SEC is proposing to limit the test in part (ii) above to (a) newly reporting registrants, which would be defined as any registrant filing a registration statement that, at the time of such filing, is not subject to the reporting requirements of section 13(a) or 15(d) of the *Exchange Act of 1934*, as amended (Exchange Act), whether or not such registrant has ever previously been subject to such reporting

requirements, and (b) any registrant that has not filed an annual report since the revival of a previously suspended reporting obligation. Conforming changes have been proposed to Form 20-F.

VARIOUS RULES RELATED TO INCORPORATION BY REFERENCE

The SEC is proposing several amendments related to incorporation by reference, including the following:

– revising item 10(d) to allow incorporation by reference of documents that have been on file with the SEC for more than five years, without exception;

– eliminating the requirements under the Exchange Act and the *Securities Act of 1933*, as amended (Securities Act), that copies of information incorporated by reference be filed as exhibits to registration statements or reports; and

– requiring, under the Securities Act and the Exchange Act, that hyperlinks be provided to information that is incorporated by reference if that information is available on EDGAR.

VARIOUS REGULATIONS' AND FORMS' TREATMENT OF XBRL

The SEC is proposing several amendments related to XBRL, including the following:

– requiring all of the information on the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F to be tagged in Inline XBRL in accordance with the EDGAR *Filer Manual*; and

– requiring the cover pages of Form 10-K, Form 10-Q, Form 8-K, Form 20-F and Form 40-F to include the trading symbol for each class of registered securities.

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SEC Filings Must Include Hyperlinks to Exhibits and Be in HTML Format

By Paul Watkins

New rules of the U.S. Securities and Exchange Commission (SEC) that require exhibits to be hyperlinked in most SEC filings became effective on September 1, 2017. Under the new rules, registrants that are filing a registration statement or current report that is subject to the exhibit requirements under section 601 of Regulation S-K or that are filing a Form F-10 or 20-F must insert a hyperlink to each exhibit listed in the exhibit index of such filing (whether the exhibit is filed with the same registration statement or current report or incorporated therein by reference to a previous filing). The final rules do not require Canadian issuers to include hyperlinks to exhibits in any multijurisdictional disclosure system (MJDS) form filed with the SEC or any Form 6-K furnished to the SEC. The final rules also require all filings covered by the rules to be in the HTML format to support hyperlinks.

BACKGROUND

When filing a registration statement or current report, an SEC registrant may incorporate by reference a document that is listed in the exhibit index of such registration statement or current report by referring to a previously filed registration statement or current report that includes the document incorporated by reference. This eliminates the need for SEC filers to refile the same exhibit again in a subsequently filed registration statement or current report. However, without a hyperlink, the process of seeking and retrieving an exhibit that is incorporated by reference to a previous filing is both time-consuming and cumbersome because the user needs to review the exhibit index to determine which previous filing included the exhibit and then locate that filing to access the exhibit. EDGAR users should be able to access exhibits in SEC filings quickly with hyperlinks.

SCOPE OF THE FINAL RULES

The final rules apply to nearly all forms that are required to include exhibits under item 601 of Regulation S-K,[1] specifically Forms S-1, S-3, S-4, S-8, S-11, F-1, F-3, F-4, SF-1 and SF-3 under the

1 Exhibits that are excluded from the rules include XBRL exhibits, exhibits filed on paper under temporary or continuing hardship exemptions and exhibits incorporated by reference that were filed on paper prior to the time that electronic filing on EDGAR became mandatory.

Securities Act of 1933, as amended, and Forms 10, 10-K, 10-Q, 8-K and 10-D under the *Exchange Act of 1934*, as amended, and make corresponding revisions to Form F-10 and Form 20-F. In a change from the proposed rules, an active hyperlink to each exhibit is required to be inserted in an initial registration statement filed with the SEC as well as each subsequent pre-effective amendment filed with the SEC (whereas the proposed rules only required the final, effective amendment to include hyperlinks). The final rules do not apply to Form 6-K, Form 40-F or to other MJDS forms (such as Forms F-7, F-8 and F-80). Additionally, because proxy statements are not required to include exhibits, the new rules do not apply to them.

Prior to the final rules, filers were required to submit electronic filings to the SEC using the EDGAR system in either ASCII format or HTML format. HTML has features that allow hyperlinks that link to another place in the same document or to a separate document. ASCII cannot support functional hyperlinks. As a result, the final rules also require all filings covered by the rules to be in HTML format.

EFFECTIVE DATES

As mentioned, the final rules became effective on September 1, 2017, which was also the compliance date for most SEC registrants. However, non-accelerated filers and smaller reporting companies that submit filings in ASCII format have until September 1, 2018 to begin to comply with the rules (until then these filers may continue to file registration statements and reports in ASCII format without hyperlinks to the exhibits).

Inline XBRL Filing of Tagged Data

By Jeff Nadler and Rachel Charney

A company that prepares its financial statements in accordance with U.S. generally accepted accounting principles (GAAP) or International Financial Reporting Standards (IFRS) as issued by the International Accounting Standards Board and files with the U.S. Securities and Exchange Commission (SEC) a registration statement or a periodic or current report must submit (as an exhibit to the filing) a separate interactive data file that includes information from the accompanying financial statements tagged in eXtensible Business Reporting Language (XBRL) format using the taxonomies specified on the SEC's website. The interactive data file currently must also be posted on the company's website on the earlier of the date it is submitted to the SEC or was required to be submitted.[1] The SEC is proposing amendments that are intended to facilitate improvements in the quality and usefulness of XBRL data and decrease filing costs by decreasing XBRL preparation costs over time.

SEC staff uses XBRL data to support risk assessment, rulemaking and enforcement activities, and there is a wide range of other potential uses. However, concerns regarding XBRL data have been voiced to the SEC and some commenters have indicated that XBRL data use has been limited, in part due to concerns regarding data quality and reliability. For example, SEC staff has identified several recurring issues with financial statement information in XBRL data, including errors related to the characterization of a number as negative when it is positive, incorrect scaling of a number (e.g., in billions rather than in millions), unnecessary taxonomy extensions ("custom tags"), incomplete tagging (e.g., a failure to tag numbers in parentheses) and missing calculations that show relationships between data (e.g., how subtracting cost of revenue from revenue equals gross profit). SEC staff believes that some of these errors may result from the submission of XBRL tagged information as an exhibit separate from the related filing.

The proposed amendments would require financial statement information to be provided in the Inline XBRL format, which, in practical terms, means that filers would be required to embed XBRL data directly into an HTML formatted filing. The resulting single document would be human-readable and

1 An interactive data file is a machine-readable computer code that presents information in XBRL electronic format. XBRL is a markup language that can be processed by software for analysis. When a reported disclosure is labelled (or tagged) using a markup language such as XBRL, the reported disclosure item will be machine-readable, which facilitates the analysis of information and allows for aggregation, comparison and large-scale statistical analysis of reported information. The requirement to submit and post an interactive data file that includes financial statement information in XBRL format, originally adopted in 2009, is set forth in, among other provisions, item 601(b)(101) of Regulation S-K, Forms F-10, 20-F, 40-F and 6-K and Rule 405 of Regulation S-T. Since the XBRL requirements were adopted in 2009, the XBRL technology has continued to evolve.

would also enable the automated extraction and analysis of embedded XBRL data by the user's XBRL extraction software. Using Inline XBRL would eliminate the need for filers to prepare and submit a separate XBRL exhibit. Inline XBRL is already used by some filers under an SEC order from mid-2016, and it is hoped that widespread adoption may reduce the time and effort associated with preparing XBRL filings, simplify the review process for filers and improve data quality.

The SEC also proposes to eliminate the requirement for filers to post interactive data files on their websites because it believes that users of XBRL data generally seek the information directly from the SEC's EDGAR system or third-party aggregators as opposed to filers' websites. Sufficiently reliable access to XBRL data is available on EDGAR, and the backup of a website posting of XBRL data is no longer necessary.

The proposed Inline XBRL requirements for financial statement information would apply to all company filers, including smaller reporting companies, emerging growth companies and foreign private issuers that currently are required to submit financial statement information in XBRL. Filers would be required, on a phased-in basis, to embed a part of the interactive data file within an HTML[2] document using Inline XBRL and to include the rest in an exhibit to that document. The portion filed as an exhibit to the form would contain contextual information about the XBRL tags embedded in the filing.

The Inline XBRL requirements would be phased in for companies in annual increments based on the category status of the filer. Large accelerated filers that prepare their financial statements in accordance with GAAP would be required to comply with Inline XBRL requirements for financial statement information in the second year after the rule is effective. Accelerated filers that prepare their financial statements in accordance with GAAP would be required to comply in the third year after the rule is effective. All other operating company filers that are required to submit interactive data files would be required to comply in the fourth year after the rule is effective.

2 The vast majority of SEC filers currently file in HTML format. Inline XBRL is not compatible with the ASCII format. Therefore, those filers that currently prepare SEC filings in ASCII format would need to switch to HTML format (unless they already have done so to comply with the SEC rule requiring hyperlinks to exhibits, which came into effect on September 1, 2017).

SEC Guidance on Pay Ratio Disclosure

By Jeffrey Nadler and Nir Servatka

On September 21, 2017, the U.S. Securities and Exchange Commission (SEC) adopted interpretive guidance to assist domestic reporting companies in their efforts to comply with the pay ratio disclosure required by item 402 of Regulation S-K under the *Securities Act of 1933*, as amended. On the same day, the SEC staff provided separate guidance on calculating the pay ratio disclosure. Domestic reporting companies must begin providing pay ratio disclosure for the first time in early 2018 for the fiscal year beginning on or after January 1, 2017.

BACKGROUND

The pay ratio disclosure rule, which was adopted by the SEC in August 2015, requires domestic registrants (other than smaller reporting companies and emerging growth companies) to disclose the following: (i) the annual total compensation of the chief executive officer; (ii) the median of the annual total compensation of all other employees, which is calculated by identifying a registrant's "median employee"; and (iii) the ratio of the figures in (i) and (ii) expressed either as a ratio in which the median compensation of all other employees equals one or, narratively, as the multiple that the chief executive officer compensation bears to the median compensation of all other employees. Foreign private issuers, Canadian multijurisdictional disclosure system (MJDS) filers, smaller reporting companies and emerging growth companies are exempt from providing pay ratio disclosure.

USE OF REASONABLE ESTIMATES, ASSUMPTIONS AND METHODOLOGIES, AND STATISTICAL SAMPLING

The pay ratio disclosure rule requires a registrant to identify its "median employee." Registrants have significant flexibility in determining the appropriate methodology to identify the median employee and calculating the median employee's annual total compensation. Registrants may choose a method based on their own facts and circumstances, including statistical sampling, but must disclose the method they use in identifying the median employee, as well as any material assumptions, adjustments and estimates used.

The SEC interpretive guidance clarifies that, so long as a registrant uses reasonable estimates, assumptions, statistical sampling or other methodologies, or a combination thereof, to identify the median employee and calculate the median employee's annual total compensation, the pay ratio disclosure that results from such use would not provide the basis for SEC enforcement action unless the disclosure was made or reaffirmed without a reasonable basis or was provided other than in good faith.

In addition, depending on the registrant's particular facts and circumstances, registrants may use sampling methods. Some examples of sampling methods that could be appropriate include (i) simple random sampling (i.e., drawing at random a certain number or proportion of employees from the entire employee population); (ii) stratified sampling (i.e., dividing the employee population into strata, based on location, business unit, type of employee, collective bargaining agreement or functional role and sampling within each strata); (iii) cluster sampling (i.e., dividing the employee population into clusters based on some criterion, drawing a subset of clusters, and sampling observations within appropriately selected clusters); and (iv) systematic sampling (i.e., having the sample drawn according to a random starting point and a fixed sampling interval, every n^{th} employee is drawn from a listing of employees sorted on the basis of some criterion).

USE OF INTERNAL RECORDS

The rule requires a registrant to disclose the median of the annual total compensation of all its employees (excluding its principal executive officer). All employees of a registrant and its consolidated subsidiaries worldwide must be taken into account in calculating such median, except that a registrant may exclude all employees outside the United States so long as the total number of excluded non-U.S. employees does not exceed 5% of the total number of employees worldwide.

The SEC interpretive guidance clarifies that

- a registrant may use appropriate existing internal records, such as tax or payroll records, in determining whether the 5% *de minimis* exemption is available;

- a registrant may use existing internal records in identifying its median employee even if such internal records do not include every element of compensation (such as equity awards widely distributed to employees) so long as such internal records reasonably reflect annual compensation to identify the median employee; and

- when a registrant determines that using a consistently applied compensation measure based on internal records results in anomalous characteristics of the identified median employee's compensation that have a significant higher or lower impact on the pay ratio, the registrant may, in lieu of concluding that such consistently applied compensation measure was unsuitable to identify its median employee, substitute another employee with substantially similar compensation to the original identified median employee based on the compensation measure such registrant used to select the median employee.

DETERMINING WHETHER AN INDIVIDUAL IS AN "EMPLOYEE"

An individual employed by the registrant or any of its consolidated subsidiaries is considered an "employee" under the rule. Workers who are employed, and whose compensation is determined, by an unaffiliated third party but who provide services to the registrant or its consolidated subsidiaries as independent contractors or "leased" workers are excluded. The SEC's guidance clarifies that, in determining whether a worker is an employee or independent contractor, a registrant may apply a widely recognized test under another area of law, such as employment or tax law, which the registrant uses to determine whether its workers are employees.

SEC Approves an NYSE Rule Amendment Prohibiting Release of Material News After Market Close

By Jeffrey Nadler and Nir Servatka

On December 4, 2017, the U.S. Securities and Exchange Commission (SEC) approved a New York Stock Exchange (NYSE) rule amendment – revised Rule 202.06 – prohibiting NYSE-listed companies from releasing material news after the NYSE's official trading closing time (NYSE Closing Time) until the earlier of (i) the publication of a company's official closing price on the NYSE and (ii) five minutes after the NYSE Closing Time. The rule amendment, which became effective on December 7, 2017, is intended to reduce price discrepancies between the official closing price on the NYSE and the prices of execution in other exchanges and non-exchange venues.

Trading on the NYSE ends at 4:00 p.m. Eastern Time, except for certain days on which trading closes early at 1:00 p.m. Eastern Time. After trading ends at the NYSE Closing Time, the designated market maker facilitates the close of trading in a closing auction, which typically takes no longer than five minutes. If an NYSE-listed company whose securities are traded after the NYSE Closing Time on other exchanges or non-exchange venues releases material news after the NYSE Closing Time but before the closing auction on the NYSE is completed, there can be a significant price discrepancy in nearly contemporaneous trades between the closing price of such securities on the NYSE and the price in which such securities are traded on other exchanges or non-exchange venues. The price discrepancy can increase the risk of market disruption and reduce investor confidence in trading on the NYSE, given that trade orders cannot be cancelled or modified after the NYSE Closing Time to take into account the material news, even though the NYSE closing price may not yet have been established by the closing auction process.

Prior to the rule amendment, Rule 202.06 of the NYSE *Listed Company Manual* merely recommended that companies delay the issuance of material news after the NYSE Closing Time until the earlier of (i) the publication of such company's official closing price on the NYSE and (ii) fifteen minutes after the NYSE Closing Time.

The only exception to the rule amendment prohibition is when a company makes an unintentional selective disclosure of material public information and must therefore promptly make a public disclosure of such information in order to comply with Regulation FD under the *Securities Exchange Act of 1934*, as amended. The revised Rule 202.06 continues to include the foregoing recommendation to NYSE-listed companies.