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## SEC Rulemaking Developments 2016

Authors: [Jeffrey Nadler](#), [Paul Watkins](#), [Nir Servatka](#), Scott D. Fisher, Rachel Charney and Jennifer J. Liu

The U.S. Securities and Exchange Commission (SEC) had a busy rulemaking year in 2016. As part of its Disclosure Effectiveness Initiative launched at the end of 2013, the SEC continued to propose and adopt rules that are intended to improve and modernize the disclosure requirements for reporting companies. The SEC also continued to implement sections of the *Jumpstart Our Business Startups Act* (JOBS Act) and the *Fixing America's Surface Transportation Act* (FAST Act) to provide more flexibility in capital raising and reduce the regulatory burden on private companies.

Despite the SEC's intensive rulemaking in 2016, with Mary Jo White stepping down as SEC Chair in January 2017 and President Donald Trump's expressed commitment to scale back on financial regulations, 2017 may be the beginning of a new era from a U.S. securities law perspective. President Trump has already taken preliminary steps to reduce some of the regulatory burdens imposed on reporting companies in the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act), landmark legislation crafted by the Obama administration and passed by Congress in 2010 in response to the economic meltdown. On February 14, 2017, President Trump signed into law Congress's repeal of the extractive industry transparency rules adopted by the SEC in June 2016 that required oil and gas companies to disclose payments from the U.S. and foreign governments. President Trump also signed an executive order directing the Department of the Treasury to restructure major provisions of the Dodd-Frank Act. While some believe that U.S. securities laws are set for potentially significant changes in 2017, the impact of this executive order and other measures yet to be announced by the Trump administration on U.S. securities laws generally, and SEC rulemaking in particular, remains to be seen.

This update provides an overview of the following significant U.S. securities law and regulatory developments in 2016:

1. Final SEC rules facilitating intrastate and regional securities offerings
2. Final SEC rule amendments increasing the thresholds for Exchange Act registration, termination of registration and suspension of reporting
3. Interim final SEC rule amending Form 10-K to allow a summary section
4. Final Nasdaq rule requiring listed companies to disclose third-party payments to directors and director nominees
5. SEC staff guidance on the definition of "foreign private issuer"
6. SEC staff guidance on non-GAAP financial measures
7. Proposed SEC rules requiring the use of universal proxies
8. Proposed SEC rules requiring hyperlinks to exhibits in filings

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. Final SEC rules facilitating intrastate and regional securities offerings**

In October 2016, the SEC modernized the exemptions for intrastate securities offerings to facilitate capital raising for smaller companies.

[Read more about the final SEC rules facilitating intrastate and regional securities offerings.](#)

## **2. Final SEC rule amendments increasing the thresholds for Exchange Act registration, termination of registration and suspension of reporting**

In May 2016, the SEC adopted rule amendments pursuant to sections 12(g) and 15(d) of the *Securities Exchange Act of 1934*, as amended (Exchange Act) to implement higher thresholds for registration, termination of registration and suspension of reporting obligations under the Exchange Act. The rule amendments were adopted under the JOBS Act and the FAST Act to reduce the regulatory burden of private companies and provide more flexibility for their capital raising.

[Read more about the final SEC rule amendments increasing the thresholds for Exchange Act registration, termination of registration and suspension of reporting.](#)

## **3. Interim final SEC rule amending Form 10-K to allow a summary section**

An interim final rule of the SEC, which became effective on June 9, 2016, amended Form 10-K to allow (but not require) issuers to provide a summary section in their annual reports so long as each item in the summary “is presented fairly and accurately” and includes a cross-reference by hyperlink to the more detailed material contained in the issuer’s Form 10-K to which the item relates. Issuers that summarize information that is incorporated by reference into the Form 10-K from an exhibit that is filed with the form must include a hyperlink from the summary to the accompanying exhibit.

[Read more about the interim final SEC rule amending Form 10-K to allow a summary section.](#)

## **4. Final Nasdaq rule requiring listed companies to disclose third-party payments to directors and director nominees**

In August 2016, the Nasdaq Stock Market LLC (Nasdaq) adopted a rule requiring listed companies to publicly disclose the material terms of all agreements and arrangements between a director or director nominee and any third party relating to compensation and other payments in connection with that person’s candidacy or service as a director. The new rule is intended to enhance the transparency of the governance processes of listed companies by disclosing compensation arrangements that could raise conflicts of interest among directors. The new rule applies to all Nasdaq-listed companies, except that foreign private issuers may elect to follow their home country practices in lieu of the new rule, subject to the typical conditions in the Nasdaq rules that are applicable to foreign private issuers that elect to follow their home country practices.

[Read more about the final Nasdaq rule requiring listed companies to disclose third-party payments to directors and other nominees.](#)

## **5. SEC staff guidance on the definition of “foreign private issuer”**

In December 2016, the SEC staff updated its Compliance and Disclosure Interpretations to provide further guidance on the definition of “foreign private issuer” under Rule 405 under the *Securities Act of 1933*, as amended, and Rule 3b-4(c) under the Exchange Act.

[Read more about the SEC staff guidance on the definition of “foreign private issuer.”](#)

## **6. SEC staff guidance on non-GAAP financial measures**

In May 2016, the SEC staff updated its Compliance and Disclosure Interpretations to provide guidance on the use and presentation of non-GAAP financial measures, to address increasing concerns that these measures were being used improperly. This guidance is also relevant to Canadian public companies and other foreign private issuers that are SEC registrants, especially to those that prepare financial statements in accordance with GAAP in the United States.

[Read more about SEC staff guidance on non-GAAP financial measures.](#)

## **7. Proposed SEC rules requiring the use of universal proxies**

In October 2016, the SEC proposed new rules under the Exchange Act that would require parties soliciting proxies in contested director elections to use universal proxies listing all the nominee director candidates for whom proxies are being solicited. The purpose of the proposed rules is to have the proxy voting process better mirror the in-person voting process that takes place at shareholders' meetings so that shareholders voting by proxy may vote for any combination of the registrant and dissident nominees. The proposed rules apply only to registrants that are subject to the U.S. federal proxy rules and, therefore, will not affect foreign private issuers, including Canadian public companies with securities listed on a U.S. stock exchange.

[Read more about the proposed SEC rules requiring the use of universal proxies.](#)

## **8. Proposed SEC rules requiring hyperlinks to exhibits in filings**

In August 2016, the SEC proposed rules and form amendments that would require each SEC registrant that is filing a registration statement or current report that is subject to the exhibit requirements under section 601 of Regulation S-K, or that is filing a Form F-10 or 20-F, to include a hyperlink to each exhibit that is listed in the exhibit index of the SEC filing. The proposed rules, which are part of the SEC's Disclosure Effectiveness Initiative, are primarily intended to allow users of EDGAR to access exhibits in an efficient manner via a hyperlink. As currently proposed, the rules would not require Canadian issuers that are SEC registrants to include hyperlinks to exhibits in multijurisdictional disclosure system forms filed with the SEC.

[Read more about proposed SEC rules requiring hyperlinks to exhibits in filings.](#)

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Key Contacts: [Jeffrey Nadler](#) and [Paul Watkins](#)