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Fresh Filing Fee Fun

By [Teri O'Brien](#), [Elizabeth Razzano](#), [Melissa Garcia](#) & [Spencer Young](#)

On October 13, 2021, the U.S. Securities and Exchange Commission (the "**Commission**") adopted the Filing Fee Disclosure and Payment Methods Modernization Final Rule (the "**Final Rule**"), its first sweeping rule changes since the appointment of Chair Gary Gensler in April 2021.¹ The Final Rule includes extensive amendments to filing fee-related disclosures across "most fee-bearing forms, schedules and statements," which are geared toward improving efficiencies related to the payment and calculation of filing fees throughout the registration and related Commission review processes and to reduce the miscalculation of filing fees by registrants.²

Summary

At its core, the Final Rule makes three overarching changes: (i) it modernizes the payment methods available to registrants; (ii) reorganizes and refines the presentation of filing fee-related information; and (iii) shifts filing fee disclosure from the front cover of a filing or the filing's header to an exhibit structured utilizing Inline eXtensible Business Reporting Language ("**Inline XBRL**").

The filing fee disclosure amendments (including moving the disclosure to an exhibit) will not be effective until January 31, 2022. The amendments changing the payment methods will not be effective until May 31, 2022.³ The requirement to utilize Inline XBRL will be phased in over time, with dates ranging from July 31, 2024 to July 31, 2025.⁴ For more detailed information regarding these changes, we have provided brief summaries below, organized by topic.

Payment Methods

Pursuant to the Final Rule, registrants will now be able to pay their filing fees via ACH, debit card and credit card. Fees will no longer be payable through paper check or money order; however, registrants will still be able to pay via wire transfer.⁵ This change will be effective starting on May 31, 2022.⁶

Like the current payment methods, registrants should note that there are limitations surrounding paying their filing fees via credit card, debit card, or ACH. Debit and credit card payments will not be processed instantaneously and will not be available to be applied toward the payment of filing fees until the Commission receives the funds. The Commission has indicated that debit card payments are expected to post (and be available for the payment of filing fees) the next business day, and credit card payments are expected to post within 24 hours.⁷

In addition, credit cards and debit cards used to pay filing fees must be issued by a U.S. financial institution and will be subject to payment limitations—credit cards will be limited to a daily and per filing fee limit of up to \$25,000 and debit cards can only be used for up to the total available funds in the linked account.⁸ Notably, the Commission has indicated that it does not plan to charge a fee for utilizing

credit cards or debit cards, but fees could be charged by the card's issuing financial institution.⁹ While ACH payments are generally settled on the same day for amounts under \$100,000, the Commission anticipates that filing fee payments made via ACH will be settled within one to three business days.¹⁰ Accordingly, the Commission cautions filers to pay their filing fees with ample time so as to not affect their target filing date.¹¹

Presentation of Filing-Fee Information

The Final Rule makes numerous changes to the required disclosures of filing fee-related information and the format of that disclosure. Most significantly, pursuant to the Final Rule, filers will now need to include up to three tables in registration forms, "Table 1: Newly Registered and Carry Forward Securities" ("**Table 1**"), "Table 2: Fee Offset Claims and Sources" ("**Table 2**"), and "Table 3: Combined Prospectuses" ("**Table 3**"), instead of one table with various footnotes including narrative explanation or having the pertinent information spread across filings.

Revised Table 1 replaces the fee table registrants have come to know and love. The table has been updated to include all of the information needed to calculate the applicable filing fee.¹² It will also include disclosure regarding the type(s) of securities being registered and carried forward, as applicable, and identifiable information (i.e., registration form type, file number, and effective date) for the registration statement(s) pursuant to which the filer is carrying forward filing fees¹³ and unsold securities.¹⁴ New Table 2 will include additional information regarding fee offsets pursuant to Rule 457(b) and (p) of the Securities Act of 1933, as amended (the "**Securities Act**") and Rule 0-11(a)(2) of the Securities Exchange Act of 1934, as amended (the "**Exchange Act**").¹⁵ New Table 3 will need to be included for those registrants filing a single prospectus related to multiple registration statements in reliance on Rule 429 of the Securities Act.¹⁶

In order to understand the full impact of these changes, it is helpful to take a look at the new and redesigned tables, which are included in Annex I at the end of this article.

A detailed recitation of the other filing fee disclosure amendments would be lengthy and dense, but generally the Final Rule adopts further changes that, among other things:

- Amend the filing fee tables in Schedules TO and 13E-3 and include filing fee tables in Schedules 13E-4F, 14A, 14C and 14D-1F eliciting basic fee-related information;
- Add or provide clarification for filing-fee-related disclosure instructions;
- Amend Rule 424(g) of the Securities Act so any form of prospectus included in an automatic shelf registration statement electing to utilize pay-as-you-go registration fees must include all filing fee information required to calculate the filing fee in an exhibit;
- Amend the general instructions to Forms S-3 and F-3 to provide that required filing fee information be disclosed in a filing fee exhibit to a post-effective amendment or prospectus filed pursuant to Rule 424(b) or (h) of the Securities Act, as opposed to a periodic report incorporated by reference into the filing; and
- Amend the general instructions to Forms S-3, F-3, S-4 and F-4 to provide that post-effective amendments, final prospectuses or final prospectus supplements thereto, as applicable, include certain additional information, including the maximum aggregate amount or maximum aggregate offering price in addition to transaction-specific information.¹⁷

These changes will be effective on January 31, 2022.¹⁸

Inline XBRL Structured Exhibit

Currently, filing fee information is set forth on the cover page of a fee-bearing form and is included in the filing's submission header. However, not all information needed to calculate the applicable filing fee is required to be disclosed, occasionally requiring the Commission to contact a filer for supplemental information, greatly increasing the burden on the reviewer and generally resulting in inefficiencies in the review process.¹⁹ The Final Rule will instead require all filing fee-related information to be presented in an exhibit filing in lieu of on the cover page.²⁰ The Commission hopes this change will "streamline presentation of the information and potentially facilitate future changes in structuring technology applied to it."²¹ The change will be implemented by a new Item 601(b)(107) of Regulation S-K as well as new provisions added to a number of Securities Act, Exchange Act and Investment Company Act of 1940, as amended, forms.²² Filers must transition to utilizing an exhibit for their fee-related disclosure by January 31, 2022.

In addition, the filing fee exhibit should be prepared utilizing Inline XBRL structuring, which the Commission notes will "result in machine-reachable data that could then be used to more efficiently automate the filing fee preparation, disclosure, assessment, and verification processes."²³ Once the filing fee information is structured in the Inline XBRL format, it will be checked by EDGAR's validation system, enabling errors to be easily identified and hopefully remedied prior to filing.²⁴ For the three months following the date after which all filers must comply with the structuring requirements, EDGAR will accept filings with filing-fee errors that are identified by its validation system—though the filing will be flagged for the Commission. Thereafter, filers will be unable to submit a filing until all filing fee errors are corrected and a clean test filing is completed.²⁵ Since the exhibit will be structured in Inline XBRL, filers will not need to separately tag the information (as they would for XBRL filings).²⁶

The Commission recognizes that compliance with the structuring requirements could be burdensome for filers, particularly smaller filers and others who are not yet required to utilize Inline XBRL in their periodic filings. Accordingly, the Commission has elected to phase-in compliance with the structuring requirements based on filer's status, as follows:

- Large accelerated filers – July 31, 2024 (30 months after effectiveness); and
- Accelerated filers and all other filers – July 31, 2025 (42 months after effectiveness).²⁷

Conclusion

No filer should be caught unaware of the various changes heralded by the Final Rule and their respective effectiveness dates, as the changes will require additional lead time to be built into anticipated filing goals. The filing fee table disclosure changes will take time to understand and will differ from existing precedent. The payment-related changes should offer additional flexibility and lower cost options for registrants to pay filing fees, but do not provide for same day payment, and in some cases, include restrictions on amounts. Finally, the Inline XBRL structuring-related changes could be burdensome to implement, particularly for smaller filers.

In addition, it is worth noting that the Final Rule came down within the time period specified in the Commission's Annual Rulemaking Agenda, which was released in June 2021. Other final rules anticipated to be released in October 2021 relate to Rule 144 and Form 144 filings, Regulation ATS for alternative trading systems that trade U.S. government securities, and the proposed amendments to the National

Market System Plan Governing the Consolidated Audit Trail regarding data security.²⁸ We will continue to monitor these and other changes to the securities laws.

Annex I

New Tables²⁹

Table 1: Newly Registered and Carry Forward Securities

	Security Type	Security Class Title	Fee Calculation or Carry Forward Rule	Amount Registered	Proposed Maximum Offering Price Per Unit	Maximum Aggregate Offering Price	Fee Rate	Amount of Registration Fee	Carry Forward Form Type	Carry Forward File Number	Carry Forward Initial effective date	Filing Fee Previously Paid In Connection with Unsold Securities to be Carried Forward
Newly Registered Securities												
Fees to Be Paid	X	X	X	X	X	X	X	X				
Fees Previously Paid	X	X	X	X	X	X		X				
Carry Forward Securities												
Carry Forward Securities	X	X	X	X		X			X	X	X	X
	Total Offering Amounts					X		X				
	Total Fees Previously Paid							X				
	Total Fee Offsets							X				
	Net Fee Due							X				

Table 2: Fee Offset Claims and Sources

	Registrant or Filer Name	Form or Filing Type	File Number	Initial Filing Date	Filing Date	Fee Offset Claimed	Security Type Associated with Fee Offset Claimed	Security Title Associated with Fee Offset Claimed	Unsold Securities Associated with Fee Offset Claimed	Unsold Aggregate Offering Amount Associated with Fee Offset Claimed	Fee Paid with Fee Offset Source
Rules 457(b) and 0-11(a)(2)											
Fee Offset Claims		X	X	X		X					
Fee Offset Sources	X	X	X		X						X
Rule 457(p)											
Fee Offset Claims	X	X	X	X		X	X	X	X	X	
Fee Offset Sources	X	X	X		X						X

Table 3: Combined Prospectuses

Security Type	Security Class Title	Amount of Securities Previously Registered	Maximum Aggregate Offering Price of Securities Previously Registered	Form Type	File Number	Initial Effective Date
X	X	X	X	X	X	X

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If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

San Diego

Teri E. O'Brien
1.858.458.3031
teriobrien@paulhastings.com

Spencer F. Young
1.858.458.3026
spe nceryoung@paulhastings.com

Palo Alto

Elizabeth A. Razzano
1.650.320.1895
elizabethrazzano@paulhastings.com

Melissa M. Garcia
1.858.458.3054
melissagarcia@paulhastings.com

¹ SEC FINAL RULES, <https://www.sec.gov/rules/final.htm> (last visited Oct. 15, 2021).

² Filing Fee Disclosure and Payment Methods Modernization, Securities Act Release No. 33-10997, Exchange Act Release No. 34-93285, Investment Company Act Release No. IC-34396 (Oct. 13, 2021), SEC FINAL RULE, *Filing Fee Disclosure & Payment Methods Modernization*, at 11-13 (Oct. 13, 2021).

³ *Id.* at 1.

⁴ *Id.* at 56-57.

⁵ *Id.* at 61-62.

⁶ *Id.* at 1.

⁷ *Id.* at 64.

⁸ *Id.*

⁹ *Id.* at 64.

¹⁰ *Id.* at 63.

¹¹ *Id.* at 64.

¹² Changes include, for example, adding new columns disclosing the type of security being registered / carried forward; disclosing the registration form type, file number and effective date of registration statements that were previously filed from which a filer is carrying forward unsold securities; disclosing the fees paid with amendment filings; and disclosing the applicable filing "fee rate." See *id.* at 19.

¹³ *Id.* at 36.

¹⁴ *Id.* at 35.

¹⁵ *Id.* at 36.

¹⁶ *Id.* at 36.

¹⁷ *Id.* at 18-23.

¹⁸ *Id.* at 1.

¹⁹ *Id.* at 17.

²⁰ *Id.* at 17-18.

²¹ *Id.* at 24.

²² *Id.* at 25.

²³ *Id.* at 9.

²⁴ *Id.* at 42.

²⁵ *Id.* at 43.

²⁶ *Id.* at 43.

²⁷ *Id.* at 56-57.

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²⁸ OFFICE OF MGMT. & BUDGET, SEC, AGENCY RULE LIST – SPRING 2021, https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST¤tPub=true&agencyCode=&showStage=active&agencyCd=3235&csrf_token=7CE97CC2D49C9B6B70868F7B2752E582C86F1945A4A46F34426C18AF1ABE101E611318F64B67159C3A36E7556BD0FB872C8F (last visited Oct. 15, 2021).

²⁹ Duplicated from *Filing Fee Disclosure & Payment Methods Modernization*, *supra* note 28, at 124-125.