

SEC PROPOSES MANDATORY XBRL FILINGS

On May 30, 2008, the Securities and Exchange Commission (the “SEC”) proposed rules for mandatory eXtensible Business Reporting Language (“XBRL”) filings for domestic and foreign public companies.¹ XBRL is an open standard electronic format that defines or “tags” data using standard definitions. The proposed rules are designed to provide financial statement information in a form that is more useful to investors and analysts, including by facilitating the comparison of financial and business performance across companies, reporting periods and industries. The proposal builds on the voluntary filer program started in 2005 in which over 75 companies participated. Reactions from commentators on the XBRL initiative have generally been favorable, but there are concerns about the time and cost to companies of XBRL-tagging, particularly in the second and third years after the rules take effect when more detailed tagging will be required.

The Proposed Rules

The proposed interactive data requirements would not change what is currently reported, but would require that financial statements in interactive data format using XBRL be added as a separate exhibit to periodic reports, registration statements and transition reports (in addition to the traditional format) and that such data be posted on filers’ corporate websites on the same day. This would allow financial statement information to be: (i) downloaded directly into spreadsheets, (ii) analyzed using commercial off-the-shelf software and (iii) used within investment models in other software formats, thereby enabling investors and analysts to analyze this information more quickly and at a lower cost.

Key elements of the proposed rules are as follows:

- *Phase-in.* These new requirements would take effect:
 - for fiscal periods ending on or after December 15, 2008, in the case of domestic and foreign large accelerated filers² that use U.S. GAAP and have a worldwide public common equity float above \$5 billion;
 - for fiscal periods ending on or after December 15, 2009, in the case of all other domestic and foreign large accelerated filers using U.S. GAAP; and
 - for fiscal periods ending on or after December 15, 2010, in the case of all remaining filers using U.S. GAAP and all foreign private issuers that use International Financial Reporting Standards (“IFRS”).

¹ See SEC Release Nos. 33-8924 and 34-57896 (May 30, 2008).

² Exchange Act Rule 12b-2 generally defines “large accelerated filer” as an issuer that has common equity held by unaffiliated persons with a value of at least \$700 million, has been subject to the Exchange Act’s periodic reporting requirements for at least 12 months, has filed at least one annual report and is not eligible to use the disclosure requirements available to smaller reporting companies for its periodic reports.

Registered investment companies and “business development companies” are not covered by the proposed rules.³

- *Tagging.* Filers would be required to tag financial statements and required financial schedules.⁴ Tagging of notes to the financial statements and schedules by increasing level of detail would be gradually phased in: in the first year, financial statement notes would be “block tagged” with a single tag; starting in the second year, filers would be required to tag their notes and schedules in detail, which would increase the burden and cost imposed on filers. The SEC has not yet proposed tagging MD&A, executive compensation or other financial, statistical or narrative disclosure.
 - The initial interactive data exhibit of a filer would be required within 30 days of the earlier of the due date or filing date of the related report or registration statement. In year two, a filer would have a similar 30-day grace period for its first interactive data exhibit that includes detailed tagging of its notes and schedules. All other interactive data exhibits would be required at the same time as the related report or registration statement.
 - The rules also propose a six business day temporary hardship exemption relating to the XBRL exhibit for “unanticipated technical difficulties.” To utilize this exemption, the issuer would only need to replace the exhibit with the specified legend.
 - Since the rules as proposed would replace the existing voluntary system, certain participants in the current voluntary system (such as companies that tag MD&A and foreign private issuers that tag interim financial information included on a Form 6-K) would no longer have a means to file such additional information in interactive format. We expect this to be the subject of comment.
- *Non-compliance.* Filers that fail to provide or post required interactive data on the date required would be deemed not current with their Exchange Act reports and would thus not be eligible to use the short Forms S-3, F-3 or S-8, or elect under Form S-4 or F-4 to provide information at a level prescribed by Form S-3 or F-3.⁵ Upon providing the interactive data, a filer would immediately regain its status as having timely filed its Exchange Act reports.

³ The SEC has recently proposed separate rules requiring mutual funds to file the risk/return summary section of fund prospectuses in interactive data format.

⁴ Filers also would be required to tag a limited number of document and entity identifier elements, such as the form type, company name and public float. Other financial statements, such as for acquired businesses under Rule 3-05 of Regulation S-X, would not be required to be tagged.

⁵ Similarly, such filers would not be deemed to have available adequate current public information for purposes of the resale exemption safe harbor provided by Rule 144.

- *Liability framework:*
 - Viewable interactive data (as displayed through software available on the SEC's website), and to the extent identical in all material respects to the corresponding portion of the traditional format filing, would be subject to all the same liability provisions of the federal securities laws as the corresponding data in the traditional electronic format part of the official filing.
 - Data in the interactive data file submitted to the SEC (*i.e.*, non-viewable interactive data) would be (i) excluded from the officer certification requirements under Exchange Act Rules 13a-14 and 15d-14; (ii) deemed not filed for purposes of liability under Sections 11 and 12 of the Securities Act and Section 18 of the Exchange Act; and (iii) protected from liability for failure to comply with the proposed tagging and related requirements if the interactive data either (x) met the requirements or (y) failed to meet the requirements, but the failure occurred despite the filer's good faith and reasonable effort, and the filer corrected the failure as soon as reasonably practicable after becoming aware of it. It would, however, remain subject to the anti-fraud provisions of the federal securities laws.

Request for Comment

Comments on the proposed rules are due by August 1, 2008. The SEC has stated that it expects to have final rules adopted by year-end in time for the first phase of mandatory filings to commence with the 2008 annual reports.

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If you have any questions about the proposed rules or need assistance in preparing for these new requirements, please contact David K. Boston (212-728-8625), dboston@willkie.com), Jeffrey S. Hochman (212-728-8592, jhochman@willkie.com), Melinda I. Wang (212-728-8125, mwang@willkie.com) or the attorney with whom you regularly work.

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