

SEC ISSUES FINAL RULES MANDATING XBRL FILINGS

Last week, the Securities and Exchange Commission (the “SEC”) issued final rules mandating 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 final 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 final rules were adopted substantially as proposed. Most commentators on the proposal generally supported the rules, but many expressed concern about the proposed phase-in requirements, detailed tagging of footnotes and potential liability related to the interactive data file. The principal changes from the proposed rules relate to these three issues.

The interactive data requirements do not modify current substantive disclosure requirements, but rather require that financial statements in interactive data format using XBRL be added as a separate exhibit² (in addition to the traditional format) to periodic reports, transition reports and registration statements, as well as reports on Form 8-K or Form 6-K that contain revised or updated financial statements that appeared in a periodic report. Such financial data must also be posted on filers’ corporate websites on the same day. This will allow financial statement information to be: (i) downloaded directly into spreadsheets, (ii) analyzed using commercial off-the-shelf software and (iii) used in investment models in other software formats, thereby enabling investors and analysts to analyze this information more quickly and at lower cost.

Key elements of the final rules are as follows:

Three-year phase-in. These new requirements will take effect:

- for fiscal periods ending on or after June 15, 2009, in the case of domestic and foreign large accelerated filers³ that use U.S. GAAP and have a worldwide public common equity float above \$5 billion as of the last business day of the second fiscal quarter of their most recently completed fiscal year;

¹ SEC Release Nos. 33-9002, 34-59324, 39-2461 and IC-28609 (January 30, 2009). The rules become effective on April 13, 2009.

² This is referred to as an “interactive data file” and must be listed as exhibit 101. Exhibit 100 remains reserved for “XBRL-related documents” for filers participating in the voluntary XBRL program. Minor changes have been made to the cover of the SEC periodic reports to reference interactive data files.

³ 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 as of the last business day of the second fiscal quarter of its most recently completed fiscal year, 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.

- thus, such large domestic companies will be required to file their financial statements in XBRL commencing with their second quarter 2009 report on Form 10-Q, whereas such foreign private issuers, which do not file quarterly reports, will not be required to file financial statements in XBRL until their 2009 Annual Report on Form 20-F;
- for fiscal periods ending on or after June 15, 2010, in the case of all other domestic and foreign large accelerated filers using U.S. GAAP; and
- for fiscal periods ending on or after June 15, 2011, in the case of all remaining filers using U.S. GAAP and all foreign private issuers that use International Financial Reporting Standards as issued by the IASB (“IFRS”).

Companies that become subject to reporting requirements after the phase-in is complete will first be required to submit an interactive data file for their first periodic report on Form 10-Q or first annual report on Form 20-F or 40-F, as applicable.

Registered investment companies, “business development companies” and filers that prepare their financial statements in accordance with accounting principles other than U.S. GAAP or IFRS are not covered by these rules.⁴

With respect to registration statements, the interactive data file must be submitted with a filing only after a price or price range has been determined and any later time when the financial statements are changed, rather than requiring interactive data submissions with each filing. Because a company’s first filing to be subject to these rules is a quarterly report (or, for a foreign private issuer, an annual report), the interactive data file exhibit will not be required for initial public offerings.

Website posting. The interactive data file must be posted on the filer’s website not later than the earlier of the end of the *calendar* day the related report or registration statement is deemed officially filed (which may not be the day the report or registration statement is submitted electronically to the SEC) or was required to be filed. The file must remain posted on the website for at least 12 months. Filers are not allowed to comply with this requirement by simply hyperlinking to the filing on the SEC website.

⁴ In December 2008, the SEC voted to adopt rules requiring interactive data for the risk/return summary section of mutual fund prospectuses. See Press Release No. 2008-300 (December 18, 2008).

Tagging. Filers will be required to tag financial statements and any applicable financial schedules.⁵ Tagging of notes to the financial statements and schedules by increasing level of detail will be gradually phased in: in the first year, financial statement notes and schedules must be “block tagged” with a single tag; starting in the second year, filers will be required to tag the quantitative disclosures within the notes and schedules in detail and will be permitted, but not required, to tag each narrative disclosure. The final rules neither require nor permit tagging of MD&A, executive compensation or other financial, statistical or narrative disclosures.

- **Grace periods.** Although interactive data exhibits are generally required to be filed at the same time as the related filing, the final rules provide relief in two instances. An initial interactive data exhibit may be filed within 30 days of the earlier of the due date or the filing date of the related report or registration statement. In year two, a filer will have a similar 30-day grace period for its first interactive data exhibit that includes detailed tagging of its financial notes and schedules.

Noncompliance. Filers that fail to provide or post required interactive data on the date required will be deemed not current with their Exchange Act reports and will 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-3.⁶ However, upon providing the interactive data, a filer will immediately regain its status as having timely filed its Exchange Act reports. In addition, the rules provide a six business day temporary hardship exemption relating to the interactive data file exhibit (and the requirement to post to the filer’s website) for “unanticipated technical difficulties.”⁷ To utilize this exemption, the filer would only need to replace the exhibit with the legend specified in Rule 201(c) of Regulation S-T.

Liability issues:

- **Transition period.** To address, at least partially, concerns expressed by many commentators, the final rules modify liability under the federal securities laws if the filer submits the interactive data file within 24 months of the time the filer first is required to submit interactive data files but no later than October 31, 2014. During this transition period, interactive data files will be (i) deemed not filed for purposes of liability under Sections 11 and 12 of the Securities Act and Section 18 of the Exchange Act; and (ii) protected from liability for failure to comply with the tagging requirements if the interactive data file failed to meet these requirements but the failure occurred despite the

⁵ Filers also will 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 or pro forma financial statements under Article 11 of Regulation S-X, are not required to be tagged.

⁶ Similarly, such filers will not be deemed to have available adequate current public information for purposes of the resale exemption safe harbor provided by Rule 144.

⁷ See revised Rule 201 of Regulation S-T. There is also a continuing hardship exemption under Rule 202 that requires an application in writing to the SEC.

filer's good faith attempt to comply, and the filer corrected the failure "promptly"⁸ after becoming aware of it. The files would, however, remain subject to the anti-fraud provisions of the federal securities laws.

- After this transition period, interactive data files will be subject to the same liability provisions as the related official filing.
- **Executive officer certifications.** The rules also exclude the interactive data files from the officer certification requirements under Exchange Act Rules 13a-14 and 15d-14, even beyond the transition period.
- **Test submissions.** Filers will have the opportunity to make a test submission with the SEC, which includes a "pre-viewer" function to see the viewable interactive data that would be displayed on the SEC website if the interactive data were accepted and disseminated. If the validation system finds a "major error" in the interactive data file, (i) the filer will be notified, (ii) the interactive data file exhibit will be held in suspense, but the rest of the filing will be accepted and (iii) the filer must revise that exhibit to correct the major error and submit the exhibit as an amendment to the filing. If the validation system finds a "minor error," (i) the filer will be notified and (ii) the entire filing, including the interactive data file that has the minor error, will be accepted.
- **Auditor liability.** There is no additional basis for auditor liability based on data tagging. Filers are not required to obtain auditor assurance on interactive data files, but may wish to do so.⁹ The adopting release also notes that the rules do not prohibit filers from indicating in the financial statements (likely in a tagged note) the degree of auditor involvement in the tagging process.

These new requirements will require substantive involvement by filers' accounting personnel to analyze and apply the appropriate XBRL tags, well beyond the more mechanical implementation of the EDGAR filing process. If you have any questions about the final 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.

⁸ The rules define "promptly" as "as soon as reasonably practicable under the facts and circumstances at the time" and provide a non-exclusive safe harbor that a correction made by the later of 24 hours or 9:30 a.m. on the next business day after the filer becomes aware of the need for the correction is deemed promptly made.

⁹ An auditor may be engaged to examine and report on whether the XBRL-related documents accurately reflect the information in the corresponding part of the official filings. See PCAOB Interim Attestation Standard -- AT sec. 101, Attest Engagement on interactive data.

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