

# Securities Update

## SEC Adopts Final Rules Mandating the Use of XBRL for Securities Act and Exchange Act Filings

On January 30, 2009, the SEC published final rules requiring issuers to file their financial statements using XBRL, an abbreviation for eXtensible Business Reporting Language.<sup>1</sup> The new requirement, which is intended to allow investors and analysts to download and analyze financial data with greater ease, applies to domestic and foreign companies that prepare their financial statements in accordance with U.S. GAAP, and foreign private issuers that prepare their financial statements in accordance with IFRS as issued by the International Accounting Standards Board.

The final rules were adopted substantially as originally proposed in May 2008,<sup>2</sup> but with the following changes, which will generally benefit filers:

- The implementation of mandatory XBRL has been deferred: large accelerated filers that use U.S. GAAP and have a worldwide public common equity float above US \$5 billion will have to comply with respect to their first Form 10-Q, 20-F or 40-F for fiscal periods ending on or after June 15, 2009 (instead of December 15, 2008). Phase-in for other large accelerated filers and all other filers will occur for fiscal periods ending on or after June 15, 2010 and June 15, 2011, respectively. One of the key changes is that the first mandatory XBRL filing for domestic companies will always be a Form 10-Q, allowing more time to address any difficulties prior to filing the more extensive annual report on Form 10-K.
- With respect to Securities Act registration statements: (1) XBRL data is not required for a Form S-1 or F-1 used in connection with an IPO, and (2) XBRL data is required only after a price or price range has been determined and any later time when the financial statements are changed, rather than with each filing.
- XBRL data is not required for Exchange Act registration statements on Forms 10, 20-F or 40-F.
- If an issuer files revised or updated financial statements under cover of Forms 6-K or 8-K, those financial statements will need to be provided in XBRL format.
- In contrast to the proposed rules, the new rules will apply to Canadian filers using U.S. GAAP that file Securities Act registration statements or Exchange Act reports under the multijurisdictional disclosure system (MJDS).
- Filers must post XBRL data exhibits on their corporate websites no later than the end of the calendar day (rather than end of business day, as proposed) on which such files are submitted or are required to be submitted, whichever is earlier. Such data must be available for at least 12 months on the corporate website.

The White & Case Securities Update provides a brief overview of some of the latest legislative, regulatory and judicial actions, policy statements and decisions that affect public and private companies.

Please contact the lawyer at White & Case who regularly advises you or any of the lawyers listed on the last page of this memo with any questions in connection with this Securities Update.

<sup>1</sup> Final Rules: Interactive Data to Improve Financial Reporting; Release Nos. 33-9002, 34-59324, IC-28609 (Jan. 30, 2009).

<sup>2</sup> Proposed Rules: Interactive Data to Improve Financial Reporting; Release Nos. 33-8924, 34-57896, 39-2455, IC-28293 (May 30, 2008).

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- Filers are permitted, but not required, to tag each narrative disclosure to the extent they choose.
- The final rules establish a modified liability regime for XBRL filings submitted within 24 months of the time the filer is first required to submit XBRL filings, but in no event later than October 31, 2014.

The new requirements do not supersede current financial statement filing requirements, and filings must continue to be made in HTML or ASCII format. The rules do not apply to registered investment companies or business development companies, which are the only companies that will be permitted to continue using the SEC's existing voluntary XBRL-based filing program.

### What is XBRL?

Current EDGAR filings are required to be made in HTML or ASCII format, which "tags," or identifies, data so that its structure can be read and presented in the correct format in a web browser. However, HTML and ASCII data are "dead data" and simply forms part of the text of the document. Investors wishing to analyze this data in an interactive way either have to pay a third-party vendor to extract and analyze the data or re-enter the data into their own spreadsheets for analysis. In an XBRL-based filing, portions of the data are tagged in a manner that allows a range of software applications, such as databases, financial reporting systems and spreadsheets, to identify the type of information represented by each data entry and the value reported. The data can then be easily extracted by investors for an assortment of functions, such as detailed company-specific analysis, comparative analysis with data from other XBRL-based filings and generating charts.

To enable consistent implementation of XBRL reporting, the SEC has developed a list of standard tags for data appearing in financial statements. These tags contain descriptive labels, definitions and references under the applicable accounting standards that are necessary to ensure that the data is uniformly

understood by software applications. The SEC has developed tags for U.S. GAAP, and the International Accounting Standards Committee has developed tags for IFRS. The latest list of data tags for U.S. GAAP financial statements was released on April 28, 2008 and contains approximately 13,000 standard tags for different data elements contained. A company can use standard tags or can develop its own tags, called "extensions," if it reports financial information differently from the standard tags. An updated list of tags for U.S. GAAP-reporting companies should be available in mid-February 2009,<sup>3</sup> but that the updated list will not differ significantly from the old list and will not pose an additional burden on the tagging process.

Tags are further defined in "taxonomies," which can be thought of as data dictionaries that describe individual items of information and mathematical and definitional relationships among the items. The SEC has defined taxonomies for five different industry groups: commercial, industrial, banking and savings, insurance and investment companies, and expects most companies to fall within the commercial or industrial categories. Filers can use the appropriate taxonomy as a template to create their own XBRL-formatted financial statements.

### What is the background of the final rules?

In March 2005, the SEC adopted its first set of rules regarding the use of XBRL.<sup>4</sup> These rules permitted issuers to submit financial statements and other financial data in XBRL format voluntarily via EDGAR as an additional exhibit to the filer's Exchange Act filings. For this purpose, the SEC created a new Exhibit 100 under Item 601 of Regulation S-K solely for voluntary XBRL submissions. These submissions were in addition to, and not in place of, the issuer's regular HTML and ASCII filings, and were intended to allow the SEC to gather data on the benefits of XBRL reporting. The SEC adopted Rule 402 under Regulation S-T, which provides that XBRL-based documents are not subject to liability under Sections 11 and 12 of the Securities Act, Section 18 of the Exchange Act or Section 34(b) of the Investment Company Act,

<sup>3</sup> The tags are available at <http://xbrl.us/usgaappublicreview/Pages/default.aspx>.

<sup>4</sup> XBRL Voluntary Financial Reporting Program on the EDGAR System; Release Nos. 33-8529, 34-51129, 35-27944, 39-2432, IC-26747 (February 3, 2005).

and are not covered by the CEO's and CFO's certifications under Section 302 of the Sarbanes-Oxley Act of 2002. Voluntary XBRL filers are required to include a cautionary legend that investors should not rely on the interactive data when making an investment decision. The voluntary XBRL filing system is currently used by over 100 companies.

To provide an example of how XBRL reporting facilitates analysis of particular data points across companies, in December 2007 the SEC released a database of compensation information for named executive officers from 500 companies using "tagged" information from proxy statements.<sup>5</sup> Using this interactive data, the SEC launched its Executive Pay Reader application, which allowed investors to retrieve pay data for named executive officers of the 500 firms in the database.

### What do the final rules require?

The final rules do not supersede current financial statement filing requirements, and filings must continue to be made via EDGAR in HTML or ASCII format. Filers will also be required to submit a separate XBRL-formatted exhibit containing their financial statements. The exhibit will be filed as a new Exhibit 101 under Item 601 of Regulation S-K or Form 20-F. The XBRL tagging requirement applies to all periods appearing on the face of the financial statements (e.g., balance sheet, income statement, statement of comprehensive income, statement of cash flows and statements of owners equity, as applicable), to any required financial statement schedules and to financial statement footnotes. The SEC will permit companies to tag financial statement schedules and footnotes as a single block of text in the first year that they are required to file financial statements in XBRL format. After the first year, footnotes must be tagged using four different levels of detail. This requirement results in each of the following items requiring a separate tag: (1) each complete footnote, (2) each significant accounting policy, (3) each table within a footnote, and (4) each monetary amount within a footnote. Issuers will be permitted to tag narrative disclosure to the extent they choose.

The tags for each data entry must conform to the most updated requirements contained in the taxonomies set forth in the SEC's EDGAR filer manual. To maximize comparability, a key element of the rules is that companies will only be permitted to develop their own "extensions" to the standard tags if an appropriate financial statement element does not exist in the standard list of tags. The SEC gives the example of a company that uses the term "gross margin" instead of "gross profit" stating that a company should not create its own tag for "gross margin," but should instead change the label attached to the "gross profit" tag included in the standard list and rename it "gross margin." An amendment to a filing will be required to correct a material tagging error.

Filers will be able to submit a filing that contains an XBRL exhibit as a test submission. If the SEC's validation system identifies an error, the filer will be advised whether it is a major or minor error. If there is a major error in an XBRL exhibit contained in a live filing, but no major errors outside of the XBRL exhibit, the XBRL exhibit will be held in suspense in the electronic filing system while the rest of the filing will be accepted and disseminated. The filer will then need to file a revised XBRL exhibit as an amendment to the filing to eliminate the major error. If there is a minor error in an XBRL exhibit contained in a live filing and no major errors in the rest of the filing, the entire filing, including the XBRL exhibit, will be accepted and disseminated.

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<sup>5</sup> Chairman Cox Unveils New Internet Tool With Instant Comparisons of Executive Pay; Press Release No. 2007-268 (December 21, 2007).

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### What filings are subject to the new XBRL rules?

The XBRL exhibit filing requirement will apply to financial statements contained in the following filings:

#### Securities Act Registration Statements

- Registration statements that actually contain financial statements (e.g. not registration statements that merely incorporate financial statements by reference) once a price or price range has been determined and anytime thereafter when the financial statements are changed. This covers Forms S-1, S-3, S-4, S-11, F-1, F-3, F-4, F-9 and F-10.
- XBRL is **not** required for an IPO.

#### Exchange Act Reports

- Forms 10-Q, 10-K (only after a Form 10-Q has been filed containing XBRL financial statements) and 20-F (only when used as an annual report), and related transition reports that contain financial statements, and Form 40-F (only when used as annual report).
- Forms 6-K and 8-K that contain revised or updated financial statements.

Any amendment to financial statements contained in the above registration statements (only after a price or price range has been determined) or reports will also need to be re-filed in XBRL format as an exhibit to the amended registration statement or report.

The XBRL filing requirement will not apply to financial statements contained in a final prospectus filed pursuant to Rule 424(b) under the Securities Act. In addition, it does not apply to financial statements of businesses acquired or to be acquired (Rule 3-05 under Regulation S-X), financial statements of unconsolidated subsidiaries and 50% or less owned persons (Rule 3-09 under Regulation S-X), financial statements of guarantors (Rule 3-10 under Regulation S-X) or pro forma financial statements (Rule 3-11 under Regulation S-X).

Each XBRL-formatted exhibit must be posted directly on the filer's website in interactive format (as opposed to hyperlinked to the SEC website) by the earlier of the end of the calendar day that the related EDGAR filing is made or is required to be made (subject to any applicable 30-day grace period). The XBRL-formatted exhibits must be available on the corporate website for at least 12 months.

The SEC stated in the adopting release that it will continue to consider the advisability of optional or required interactive data for disclosures made outside of financial statements (including permitting optional XBRL filings with respect to financial disclosures such as MD&A, executive compensation or other financial, statistical or narrative data).

## What are the compliance deadlines for the new XBRL requirements?

The XBRL filing requirements described above will be phased in as follows:

Type of Issuer	Initial Compliance Deadline
<p>Domestic and foreign companies that:</p> <ul style="list-style-type: none"><li>■ are large accelerated filers<sup>6</sup></li><li>■ use U.S. GAAP</li><li>■ have a worldwide public common equity float above US\$5 billion as of their most recently completed second fiscal quarter</li></ul>	<p>Reports on Form 10-Q, 20-F and 40-F, and registration statements that contain financial statements, for fiscal periods ending on or after June 15, 2009.</p> <p>Example: A domestic calendar year company will be required to file its June 30, 2009 quarterly report using XBRL. A domestic company with a June 30 fiscal year end will file its September 30, 2009 quarterly report using XBRL.</p>
<p>All other domestic and foreign companies that are:</p> <ul style="list-style-type: none"><li>■ are large accelerated filers</li><li>■ use US GAAP</li></ul>	<p>Reports on Form 10-Q, 20-F and 40-F, and registration statements that contain financial statements, for fiscal periods ending on or after June 15, 2010.</p>
<p>All remaining companies that use US GAAP (including “smaller reporting companies”) and all foreign private issuers that use IFRS as issued by the IASB.</p>	<p>Reports on Form 10-Q, 20-F and 40-F, and registration statements that contain financial statements, for fiscal periods ending on or after June 15, 2011.</p>

The rules provide for an initial 30-day grace period for the first mandatory submission of financial statements made using XBRL format, regardless of the filing type. This grace period permits companies to file the XBRL exhibit within 30 days after (1) the earlier of the due date or filing date for an Exchange Act report, (2) the filing of the price or price range in a Securities Act registration statement, or (3) the filing of a Form 6-K or 8-K containing financial statements to reflect a subsequent event (not a correction). In addition, the SEC has provided a further 30-day

grace period for footnotes and schedules tagged using all levels of detail in the first filing in the second year of required XBRL filings. For both grace periods, companies will be able to file the exhibit as an amendment to the previously filed report and will not be subject to the certification requirements of Rule 12b-15 under the Exchange Act.

<sup>6</sup> The term “large accelerated filer” is defined in Rule 12b-2 under the Exchange Act 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 its most recently completed second fiscal quarter, 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.

### Will companies be liable for XBRL filings?

Financial statements, schedules and footnotes filed in XBRL-format, when displayed through software available on the SEC's website in a form identical in all material respects to the corresponding HTML or ASCII filings, will be subject to liability in two separate ways. Companies filing interactive data files within 24 months of the time they are first required to submit XBRL filings will be subject to a modified liability regime under new Rule 406T. Under this rule, until 24 months after a company was first required to make an XBRL filing and no later than October 31, 2014, a filer's interactive data files will be:

- subject to the anti-fraud provisions of the federal securities laws except in connection with a failure to comply with the tagging requirements that occurs despite a good faith attempt to comply and is corrected promptly after the filer becomes aware of the failure
- deemed not filed or part of a registration statement or prospectus for purpose of liability under Sections 11 or 12 of the Securities Act and not otherwise subject to liability under these sections
- deemed not filed for purposes of Section 18 of the Exchange Act or Section 34(b) of the Investment Company Act and not otherwise subject to liability under these sections
- deemed filed for purposes of (and, as a result, benefit from) Rule 103 under Regulation S-T, which provides relief from liability under the anti-fraud provisions of the federal securities laws with respect to electronic transmission errors corrected as promptly as reasonably practicable after discovery

In addition, an issuer will be deemed to have complied with the SEC's XBRL filing requirement if it makes a good-faith effort to comply and promptly corrects any failure to comply as soon as reasonably practicable after the issuer becomes aware of it. Under a non-exclusive safe harbor, a correction will be considered prompt if made before the later of 9:30 am Eastern Time of the next business day or within 24 hours, in each case, after the company becomes aware of the need for an amendment.

After the expiration of the modified liability period, financial statements, schedules and footnotes filed in XBRL-format will be subject to the same liability under the federal securities laws as apply to the corresponding HTML or ASCII filing, except that XBRL data will be excluded from the CEO's and CFO's certifications under Section 302 of the Sarbanes-Oxley Act of 2002. The SEC has also clarified, however, that auditors are not required to review interactive data or related viewable data from an XBRL filing.

The liability regime that attaches to XBRL filings is one of the most challenging aspects of the rules because the SEC is trying to balance its desire to roll out XBRL filings while acknowledging the potential exposure that companies face from a simple tagging error in financial statements. Such a tagging error has the potential to result in a material misstatement or omission.

The SEC encourages companies to make XBRL filings on a voluntary basis. Any voluntary filings made after April 13, 2009, will be subject to the new rules and not the rules governing the SEC's current voluntary program. For a company that currently makes XBRL filings voluntarily, this means that the liability regime described above would apply to its filings and the cautionary legend permitted under the SEC's voluntary program—to the effect that investors should not rely on the interactive data when making an investment decision—would no longer be permitted or required.

### What are the consequences of noncompliance?

A failure to submit the required XBRL exhibit electronically to the SEC and post it on the filer's corporate website results in the filer not being considered current in its Exchange Act reports. This, in turn, results in the filer not being eligible to use Forms S-3, F-3 or S-8 for registered offerings, nor being able to incorporate certain items by reference into Forms S-4 or F-4. In addition, the filer will not be considered to have adequate public information available for the purpose of the resale exemption safe harbor provided by Rule 144. Eligibility for all of these items will be regained as soon as the company submits the required XBRL exhibit. Also, the SEC has modified the hardship exemption provided by Rule 201 under

Regulation S-T so that it applies without any action on the part of the SEC if a filer experiences unanticipated technical difficulties that prevent the timely preparation and electronic submission of an XBRL filing. The exemption only applies for six business days from the date that the XBRL filing was required to be submitted.

### How should companies prepare to comply with the XBRL filing requirement?

For most filers, XBRL “tagging” and production of the XBRL files will be an additional process that will have to be performed before an actual filing. Particularly with respect to the first filing in XBRL format, the rules require registrants to build more time into preparing EDGAR submissions and reviewing for compliance with the new requirements. The SEC estimated that the internal hours required to tag the financial statements for the first filing (excluding the financial statement schedules and footnotes) would be 125 hours and for the second filing (with financial statement schedules and footnotes) would be an additional 70 hours. These estimates assume that the infrastructure for tagging (i.e., the appropriate software, training and decisions regarding which tags to use) have already been implemented. These initial activities will add additional time beyond the above estimates. Therefore, for the first and second years of implementation in particular, legal counsel should work closely with the issuer’s finance department to ensure that sufficient time is included in the filing schedule for these initial activities. After the first successful filing, though, the XBRL files may be reused as templates for subsequent filings, subject to changes as needed, and the lead time should diminish.

Based on information from the voluntary XBRL program, the SEC estimates the average direct costs of submitting and posting XBRL-formatted financial statements with block text footnotes range between \$40,510 and \$82,220 for the first submission and \$13,450 to \$21,340 for the second submission. The SEC estimates that the time required will drop 85% between the first and second submissions. The price ranges are wide because of the different levels of internal XBRL experience that companies may have, the decision to outsource versus developing software internally, and the size and complexity of different companies’

financial statements. The SEC believes that smaller issuers generally have less complex financial and labor costs that tend to be 20 to 30% lower than larger issuers. Participants in the voluntary XBRL program tended to be larger companies. The SEC noted in the proposing release that an analysis of an XBRL program implemented in Japan indicated that, although smaller Japanese filers required less time to prepare and submit their first XBRL filing, smaller filers exhibited the greatest compliance difficulties. Most compliance failures occurred because smaller filers underestimated the resources required for their first filing, with 44% of the failing firms electing to prepare and submit their documents on their own. This data appears to confirm that smaller companies in particular would benefit from outsourcing XBRL tagging since they often lack the resources to do so internally. Accordingly, companies should start considering whether to convert their financial statements from ASCII or HTML into XBRL using third-party software or whether to engage a third party, such as a financial printer, to perform the task. Companies choosing to convert in-house using third-party software will need to designate persons responsible for tagging and ensure close coordination between their financial reporting staff and IT experts trained in XML.<sup>7</sup>

The SEC will continue to permit companies to submit XBRL-based filings voluntarily prior to the initial compliance deadlines. Companies should consider doing so as an opportunity to overcome any technical challenges and perfect in-house protocols for mandatory filings. This will also enable companies to compare different third-party vendors that provide services to create XBRL-formatted exhibits. Whether tagging their financial statements in-house or through a third party, companies will need to check carefully the tags used for each item of data. The SEC expects that the tagging process will become easier after the first year; however, extra care and attention will need to be paid in the first year of tagging. In-house counsel will also need to have an understanding of the rules governing tagging to ensure that the issuer is creating “extensions” only when permitted, as doing otherwise would result in a violation of the rules.

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<sup>7</sup> XBRL is an extension, or subset, of XML (eXtensible Markup Language), and persons with expertise in XML could learn XBRL with some supplemental training.

### What are the benefits?

The SEC believes that in the long run, companies will benefit from improved consistency, reliability, accuracy and speed of reporting. By using commercially available XBRL software, a single entry of any financial data would be transmitted automatically through all reports, including the final report filed via EDGAR. This means that if financial data needs to be modified near the filing date, simply updating the data in one place would cascade the change through all other locations and documents. Using the Interactive Financial Report Viewer, a web-based application created by the SEC, analysts and investors will be able to view, analyze and compare a company's filings. They will also be able to export the filings to spreadsheet applications, like Microsoft Excel, for further analysis. The viewer is an example of the analysis potential of XBRL-formatted exhibits, and the SEC expects that current and future commercial off-the-shelf products will lead to even more sophisticated applications using the "tagged" data.

Through XBRL, the SEC anticipates that analysts and investors will be able to increase the number of businesses they follow and easily compare financial data. Every investor with a computer and internet access will be able to view and use the interactive reports he or she would otherwise have to purchase from third-party sources. As more XBRL-based filings become accessible, the SEC expects the magnitude of benefits from interactive data to become more apparent.



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