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SEC Adopts Rules Requiring Financial Reporting in Interactive "XBRL" Format

The SEC has adopted highly anticipated rules that will require public companies to provide their financial statements in an interactive data format using eXtensible Business Reporting Language, or XBRL. Financial statements must now be "tagged" using an interactive data format that will enable investors, analysts and the SEC staff to capture and analyze financial data more quickly and at less cost than if the data was presented in a static format. Analogies have been made between these tags and bar codes – allowing information to be scanned and used in a variety of ways.

Interactive data would be required with a company's annual and quarterly reports, reports on Forms 8-K and 6-K that contain updated or revised versions of financial statements that appeared in a periodic report, most Securities Act registration statements and transition reports. It is important to note that the interactive data format would supplement, but not replace or change, disclosure presentations using traditional electronic formats.

Tagging and the XBRL Exhibit

Under the new rules, companies would be required to convert their financial statements into an interactive data file using the list of tags for U.S. financial statement reporting or International Financial Reporting Standards, or IFRS, approved for use by the SEC. Additionally, companies must provide the footnotes to the financial statements and any applicable schedules to the financial statements in tagged format. The SEC anticipates posting regular updates on its website as updated tags become available and providing advance notice before such updates must be utilized. Additionally, interim extensions may be available to reflect changes in reporting and accounting standards. Interactive data will be required for the entirety of the financial statements, although tagging of footnotes and schedules will be phased in as discussed below.

Under the new rules, companies are required to provide the SEC a new exhibit with their financial statements, in interactive data format. The additional exhibit would be considered a part of the company's filing.

IF YOU WOULD LIKE ADDITIONAL INFORMATION, PLEASE CONTACT:

Howard E. Berkenblit
617 338 2979
hberkenblit@sandw.com

BOSTON

Sullivan & Worcester LLP
One Post Office Square
Boston, MA 02109

NEW YORK

Sullivan & Worcester LLP
1290 Avenue of the Americas
New York, NY 10104

WASHINGTON, DC

Sullivan & Worcester LLP
1666 K Street, NW
Washington, DC 20006

ISRAEL

ZAG/S&W LLP
41-45 Rothschild Blvd., Beit Zion
Tel Aviv, 65784 Israel

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Three Year Phase-In for Financial Statements

The SEC established a three year phase in for the use of interactive data, as follows:

- **Year 1:** Domestic and foreign large accelerated filers that use US GAAP and have a worldwide public float above \$5 billion as of the end of the second fiscal quarter of their most recently completed fiscal year, which is estimated to cover approximately 500 companies. Public float is essentially the market capitalization of a company, less the value of shares held by insiders. These filers will be required to file XBRL exhibits in their first quarterly report on Form 10-Q or annual report on Form 20-F or 40-F containing financial statements for a period ending after June 15, 2009.
- **Year 2:** All other domestic and foreign large accelerated filers using US GAAP. These filers will be required to file XBRL exhibits in any periodic report on Form 10-Q, 20-F or 40-F containing financial statements for a period ending on or after June 15, 2010.
- **Year 3:** All remaining filers using US GAAP, including accelerated filers and smaller reporting companies, and all foreign private issuers that prepare their financial statements in accordance with IFRS. These filers will be required to file XBRL exhibits in any periodic report on Form 10-Q, 20-F or 40-F containing financial statements for a periodic ending on or after June 15, 2011.

In each of the phase-in years, interactive data must also be submitted with a Securities Act registration statement filing, but only after a price or price range has been determined and any later time when the financial statements are changed. Interactive data will not be required in IPO registration statements or as an exhibit to registration statements that do not directly contain financial statements (such as where they are incorporated by reference).

Despite the phase-in, companies should begin preparing as soon as practicable. Learning how to tag data takes time, education and internal resources. Financial printers and other service providers will be useful in assisting in the process but ultimately companies must take ownership of the tagging process. In addition, the SEC expects to eventually expand mandated XBRL-tagging to other parts of filings such as executive compensation tables and MD&A sections, so companies should be prepared to develop in-house expertise on the interactive data process.

Tagging of Footnotes

The SEC adopted a requirement that financial statement footnotes (and schedules) be tagged in four different levels of detail:

- each complete footnote will be tagged as a single block of text;
- each significant accounting policy within the significant accounting policies footnote will be tagged as a single block of text;
- each table within each footnote will be tagged as a separate block of text; and
- each amount within a footnote (monetary value, percentage, and number) must be separately tagged.

To allow filers time to become familiar with tagging footnotes, in each filer's first year of interactive data reporting, only the first level will be required. All four levels will be required starting one year from the filer's initial required submission in interactive data.

Website Availability

The new rules require each company to post the interactive data on its corporate website, if it maintains one, by the earlier of the end of the calendar day the filing is submitted to the SEC or the end of the day the filing was required to be submitted in interactive format. Such filing must be maintained on the corporate website for at least twelve months. The SEC noted that access to the interactive data on a company's website will enable search engines to quickly and cheaply aggregate the data and make it available to investors because the data would be provided by each company for free, instead of through a third party vendor that may charge a fee. In order to make the data most easily accessible and searchable, each company must maintain the data on its website rather than providing a link to the SEC's website.

Initial Grace Period

Although the interactive data must be provided to the SEC and posted on a company's website at the same time as the filing of the related report or registration statement, there are two exceptions. First, each company's initial interactive submission may be filed as an amendment to a registration statement within 30 days of the initial filing or as an amendment to a periodic report within 30 days

of the due date for the rest of the report. In addition, the first interactive data exhibit of each filer that is required to include the footnotes and schedules tagged in detail will also have a 30 day grace period.

Consequences of Late Filing

Filers that do not provide or post the required interactive data on the date required would be deemed not current with their Exchange Act reports and, consequently, would not be eligible to use short form registration statements and would not be deemed to have adequate public information for purposes of the resale exemption safe harbor provided in Rule 144 under the Securities Act. The disqualification lasts only for so long as the information is not available. Consequently, a filer that is deemed not current solely for failure to provide tagged financial statements will be deemed current upon the filing of the interactive data. In other words, such a company would regain short form registration statement eligibility and current status for determining adequate public information under Rule 144. Note that this does not apply to the non-XBRL portions of a filing – for example, a late Form 10-K will continue to cause a company to be ineligible to use short form registration statements for twelve months.

Limited Liability for Good Faith Errors

Acknowledging the potential for errors by companies as they grapple with the new tagging, the SEC has provided that for the first two years a company is subject to the new rules, but no later than October 31, 2014, the company will have limited liability for errors. For example, the tagged version of the data will be deemed “furnished”, not “filed”. This means the tagged version of the data will not be deemed part of a “filed” report or registration statement or prospectus. In addition, companies will not have liability for false statements other than if fraudulent, and will be protected from liability if the company made a good faith and reasonable effort to prepare the interactive data and amends the interactive data promptly after becoming aware of the failure to comply with the new rules. These limitations only apply to the tagged version of the financial statements and not to the version of the financial statements included in the body of the filing, which

will continue to be subject to the same level of antifraud liability exposure for errors as previously existed.

The SEC advises that as data tagging becomes part of the financial reporting process, a company and its auditors should evaluate any changes in the context of reporting on internal control over financial reporting. However, the SEC notes that such evaluation will not require an auditor to prepare a separate report on a company’s interactive data to be included with a company’s filings. Similarly, the tagged data exhibit will not be subject to CEO and CFO certifications included with periodic reports.

The summary above is intended to give an overview of the SEC’s new interactive data rules. For more information about XBRL and its implications, please contact the lawyer at Sullivan & Worcester with whom you regularly consult, or one of the lawyers listed above.