



Client Alert

The SEC's new interactive financial data filing requirements are fast approaching for the last group of reporting companies required to comply. This client alert discusses the transition to these new filing requirements.

The Approaching Interactive Data Filing Requirements

This Client Alert summarizes the transition rules and legal liability associated with the new interactive data filing requirements adopted by the SEC. For most reporting companies (i.e., companies other than "large accelerated filers"— those that have at least \$700 million of common equity held by non-affiliates), these new requirements will apply beginning with the quarterly report on Form 10-Q for the quarter ending June 30, 2011.

Interactive Data Tagging of Financial Information

The rules will require filers to provide interactive data "tagging" of financial statements and any required financial statements schedules, and eventually footnotes to the financial statements, made part of a filing with the SEC under the Securities Act of 1933 or the Securities Exchange Act of 1934. Interactive data will be required for all periods covered by the financial statements, including prior periods, but will not be required for pro forma financial statements or certain other financial statements that may be required as part of a filing. The interactive data is to be set forth separately in an exhibit to the filing.

The interactive data generally must be provided at the same time as the rest of the filing to which it relates; however, a 30-day grace period will be afforded for



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each company's first interactive data submission (a similar grace period will apply to the first filing required to contain detailed tagging of financial statement footnotes). A non-large accelerated filer, therefore, will be permitted to file its first interactive data either (1) with its 10-Q for the quarter ending June 30, 2011 or (2) by an amendment to the 10-Q filed within 30 days after the earlier of the due date or the filing date of the 10-Q.

Website Posting of Interactive Data

Filers also will be required to post their financial statements in interactive data format on their corporate websites, if they have one, not later than the end of the calendar day on which the financial statements were filed or required to be filed with the SEC, whichever is earlier.

SOX Certifications

Interactive data is excluded from the CEO and CFO certifications imposed under the Sarbanes-Oxley Act of 2002 and Exchange Act Rules 13a-14 and 15d-14.

Modified Securities Law Liability for Interactive Data

Filers that do not provide to the SEC (or post on their websites) required interactive data on the date required will not be current with their Exchange Act reports and, as a result, will be:

- Ineligible to use the short Form S-3 or S-8 (relating to employee stock option plans and similar plans) registration statements under the Securities Act
- Ineligible to elect under Form S-4 (relating to the issuance of securities in a merger or other business combination) to provide information at a level prescribed by Form S-3 (relating to incorporation of information by reference to other SEC filings)
- Deemed not to have available adequate current public information for purposes of the resale exemption safe harbor provided by Rule 144

A filer that is deemed not current solely as a result of not providing (or posting) the interactive data when required will again become current in its public information once it provides (or posts) the interactive data. In other words, a late filer will not lose its status as having "timely" filed its Exchange Act reports (which would render it ineligible to use Form S-3) solely as a result of the delay in providing (or posting)

the required interactive data.

Generally speaking, an interactive data file will be subject to the liability provisions of the federal securities laws in a modified manner if the filer submits the interactive data file within 24 months of the time the filer first is required to submit interactive data. In particular, new Exchange Act Rule 406T provides that, during the time a filer's interactive data files are treated in this modified manner, they will be:

- Protected from liability under Exchange Act Section 10(b)(5) and Rule 10b-5 and other specified anti-fraud provisions of the federal securities laws for failing to comply with the tagging requirements, if the failure occurred despite a "good-faith" attempt to comply and the failure is corrected "promptly" (i.e., as soon as reasonably practicable under the facts and circumstances at the time) after the filer becomes aware of the failure
- Deemed not "filed" or part of a registration statement or prospectus for purposes of Section 11 or 12 of the Securities Act and not otherwise subject to the strict liability provided for under those sections

As noted, to qualify for the exception to anti-fraud liability during this transition period, there must have been a "good-faith attempt" to comply with the tagging requirements, which the SEC interprets as not being "knowing" or "reckless" (i.e., the scienter required for purposes of the anti-fraud provisions).

During the 24-month transition period, a filer would be subject to legal actions under circumstances where the protections of new Rule 406T do not apply. According to the SEC Release, for example, the SEC could bring an action against a filer under Section 13 (a) of the Exchange Act if the filer submits a noncompliant interactive data file with a periodic report in circumstances where the noncompliance is not in good faith or where, despite a good-faith attempt, the filer fails to correct the interactive data file promptly after it discovers the noncompliance.

The SEC has suggested that the ability of analysts and other users to discover mistakes or alterations not consistent with the desired use of the interactive data may give filers an additional incentive to prepare such data with care and promptly to correct any errors. Presumably, however, this is less of an incentive for filers whose securities are not covered by analysts.

Interactive data in viewable form that are displayed on the SEC's website will reflect the related interactive data file and will be treated in the same manner as the related interactive data file in regard to a filer's failure to correctly tag an interactive data file that results in a failure of the interactive data in viewable form to reflect the related official filing.

This modified liability for interactive data files will end after the transition period; at that time, filers will be subject to the same liabilities under the federal securities laws for erroneous or missing interactive data as for all other data in the filer's Securities Act or Exchange Act filings. In other words, the SEC decided to limit the liability associated with the interactive data tagging requirements, but only for the 24-month transition period described above.

Test Submissions and Error Reports

To assist filers in ensuring the accuracy of their interactive data submissions, the SEC plans to make available to filers the opportunity to make a test submission with the SEC. The test submission will enable the filer to learn how the SEC's validation system would respond if the test submission were a live submission and then, if the filer wishes, use the SEC website if the interactive data were accepted and disseminated.

If the SEC's validation system finds an error, it will advise the filer of the nature of the error and as to whether the error was "major" or "minor." A major error in an interactive data exhibit that was part of a live filing will cause the exhibit to be held in suspense in the electronic filing system. The rest of the filing will be accepted and disseminated if there are no major errors outside the interactive data exhibit. If that were to happen, the filer would need to revise the interactive data exhibit to eliminate the major error and submit the exhibit as an amendment to the filing to which it is intended to appear as an exhibit. A minor error in an interactive data exhibit that is part of a live filing will not prevent the interactive data exhibit from being accepted and disseminated together with the rest of the filing if there are no major errors in the rest of the filing.

Internal Controls

A filer's independent auditor may be involved in the preparation of interactive data, but need not review or attest to the filer's interactive data tagging. The SEC believes that, as the technology associated with interactive data improves, filers may integrate

interactive data technology into their business information processing, and such integration may have the same implications regarding internal control over financial reporting as any other controls or procedures related to the preparation of financial statements. If this integration occurs, the preparation of financial statements may become interdependent with the interactive data tagging process, and filers and their auditors would have to evaluate these changes in the context of their reporting on internal control financial reporting. If this integration occurs, interactive data would fall within the definition of "disclosure controls and procedures."

Taxonomies

Filers using U.S. GAAP will be required to tag their financial statements using the most recent list of tags for U.S. financial statement reporting, as released by XBRL U.S. and required by the SEC's EDGAR Filer Manual (at present, there are 15,000 such tags). Each company will be required to use one or more of the five industry-standard specific tag lists identified in the EDGAR Filer Manual as is appropriate for its business. Presumably, even during the transition period where interactive data is subject to modified liability, the use of incorrect or imprecise tags, if not in good-faith and not corrected after being discovered, would be potentially actionable under the anti-fraud rules and also could subject the filer to SEC enforcement actions.

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If you would like to know more about interactive data filing requirements, please contact [Dale Short](#), Chairman of the firm's Corporate Department, or the TroyGould attorney with whom you regularly work.

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