

SEC Mandates Electronic Tagging of Financial Disclosures

March 2009

On January 30, 2009, the Securities and Exchange Commission (SEC) issued final rules regarding the use of interactive data. The final rules require U.S. and foreign private issuers that prepare financial statements in accordance with generally accepted accounting principals (U.S. GAAP) and foreign private issuers that prepare financial statements in accordance with International Financial Reporting Standards (IFRS), as issued by the International Accounting Standards Board (IASB), to “tag” their financial statements, footnotes and required financial statement schedules using data in an interactive electronic format known as eXtensible Business Reporting Language (XBRL). This tagging must be done on such companies’ websites and as an exhibit to certain registration statements filed pursuant to the Securities Act of 1933, as amended (Securities Act) and annual, periodic and transition reports, as well as current reports that include financial statements. The rules will be phased in over a three year period, as discussed below, and are substantially similar but not identical to those proposed on May 30, 2008. For background, see “SEC Moves to Mandate Electronic Tagging of Financial Statements,” *Burns & Levinson Securities Law Update*, June 2008 (http://www.burnslev.com/apps/uploads/publications/Burns_Securities_XBRL_June08.pdf). For the complete text of the January 30, 2009 release, see SEC Release Nos. 33-9002; 34-59324; and 39-2461, available at <http://www.sec.gov/rules/final/2009/33-9002.pdf>.

The final rules require filers to provide their financial statements and certain financial information as an exhibit to certain filings with the SEC using the XBRL interactive data format and to include any supporting files required by the EDGAR Filer Manual. A list of tags based upon U.S. GAAP is located at <http://xbrl.us/pages/us-gaap.aspx>. The XBRL standard “tags” certain information using standard definitions of financial

concepts derived from U.S. GAAP and IFRS. To view a sample demonstration of XBRL tools, one can visit the XBRL-US Website at www.xbrl.us/Pages/default.aspx. XBRL filings made by participants in the SEC’s voluntary filer program, which started in 2005, can be viewed by following the link on <http://www.sec.gov/spotlight/xbrl/xbrlwebapp.shtml>.

The SEC believes that the new requirements will:

- Give both individual and institutional investors the ability to search for, aggregate and analyze information quickly, cost-effectively and dynamically;
- Facilitate comparison of financial and business performance across issuers, industries and reporting periods; and
- Provide opportunities to further automate regulatory filings and information processing, eliminating manual data entry on largely repetitive disclosures and thereby increasing the speed, accuracy and usability of disclosures.

The SEC further believes that enactment of these final rules will improve market pricing of all stocks by providing more widespread access to comparative financial information. Similarly, the coverage of small companies by analysts may improve with reductions in costs and time associated with the production of meaningful comparative data.

COMPANIES COVERED BY THE RULES

The final rules apply to all public companies that trade on domestic exchanges and report their financial information in accordance with U.S. GAAP, and to foreign private issuers that report their financial information in accordance with U.S. GAAP or IASB IFRS.

The final rules do not apply to investment

companies, as defined by the Investment Company Act of 1940, as amended, nor do they apply to business development companies or other entities that report under the Securities Exchange Act of 1934, as amended (Exchange Act) and prepare financial statements in accordance with Article 6 of Regulation S-X.

INFORMATION REQUIRED TO BE PRESENTED IN INTERACTIVE DATA FORMAT

The final rules require interactive data tagging of financial statements, relevant footnotes and required financial statement schedules, for all periods included therein. This information must be filed as an exhibit to certain filings and posted to corporate websites. Pro forma financial statements are not subject to the requirements, nor are financial statements furnished solely pursuant to Rules 3-05, 3-09, 3-14, and 3-16 of Regulation S-X.

Footnotes to Financial Statements

For a filer’s first year of XBRL reporting, each complete footnote must be tagged as a single block of text. As of one year from the date of a filer’s initial required XBRL submission, footnotes must be tagged with the following additional detail:

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

Schedules to Financial Statements

Filers are also required to include interactive data in any financial statement schedules prescribed by Article 12 of Regulation S-X. For a filer’s first year of XBRL reporting,

each complete financial statement schedule must be tagged as a full block of text. As of one year from the date of the filer's initial required XBRL submission, required schedules must be tagged with the following additional detail:

- Each amount (i.e., monetary value, percentage or number) in a financial statement schedule must be separately tagged.

FILINGS COVERED BY THE RULES

Periodic Reports

Interactive data in XBRL format must be submitted for financial statements and related information contained in periodic reports on Forms 10-K, 10-Q, 20-F and 40-F. The SEC also extended the new requirements to current reports on Forms 8-K and 6-K that contain revised or updated financial statements. Under the final rules, filers also must provide XBRL data for any transition reports on Forms 10-Q, 10-K or 20-F.

Registration Statements

The final rules also apply to registration statements filed pursuant to the Securities Act, when financial statements are included directly in the registration statement (rather than being incorporated therein by reference). The requirements apply to financial statements required for inclusion in such registration statements in accordance with Regulation S-X and other applicable SEC rules.

The final rules apply to registration statement filings "only after a price or price range has been determined" for the securities being offered and thereafter if the financial statements are changed. The final rules will not apply to financial information contained in registration statements filed under the Exchange Act on Forms 10, 20-F and 40-F.

Filers will also be required to post to their corporate websites the same interactive data required in any filing submitted to the SEC, beginning the earlier of the calendar date the applicable report or registration statement (a) was filed, or (b) was required to be filed, and continuing thereafter for a period of 12 months.

EFFECTIVE DATES FOR COMPLIANCE

The final rules are being enacted pursuant to

a phased-in compliance schedule based primarily according to size of the filer, as follows:

For domestic and foreign large accelerated filers (as defined pursuant to Rule 12b-2 of the Exchange Act) using U.S. GAAP, with worldwide public common equity float of \$5 billion or more as of the second fiscal quarter of their most recently completed fiscal year:

First quarterly report on Form 10-Q or annual report on Forms 20-F or 40-F containing financial statements for any fiscal period ending **on or after June 15, 2009** must be filed in XBRL format.

For all other large accelerated filers using U.S. GAAP (those issuers with common equity held by non-affiliates that is valued at \$700 million or more):

First quarterly report on Form 10-Q or annual report on Forms 20-F or 40-F containing financial statements for any fiscal period ending **on or after June 15, 2010** must be filed in XBRL format.

For all remaining filers using U.S. GAAP:

First quarterly report on Form 10-Q or annual report on Forms 20-F or 40-F containing financial statements for any fiscal period ending **on or after June 15, 2011** must be filed in XBRL format.

For foreign private issuers with financial statements prepared in accordance with IASB IFRS:

First annual report on Forms 20-F or 40-F for any fiscal period ending **on or after June 15, 2011** must be filed in XBRL format.

Grace Periods

A 30-day grace period will apply to each company's initial XBRL submission, irrespective of filing type. Thus, the initial submission will be permitted as an amendment to:

- A periodic report on Forms 10-K, 20-F, 40-F or 10-Q within 30 days after the earlier of the due date or actual filing date of the report;
- A Securities Act registration statement within 30 days after the filing date of the price or price range as part of the related registration statement; or
- A current report on Forms 8-K or 6-K

containing revised or updated financial statements reflecting a subsequent event (rather than correction of an error) within 30 days after the filing of the related report.

Furthermore, for the first filing subject to requirements of more detailed tagging of footnotes and schedules, as described above (i.e., beginning one year from the date of the filer's initial required XBRL submission), filers will have an additional 30 days to submit the XBRL interactive data exhibit.

Temporary Hardship Exemption

The final rules provide for a temporary hardship exemption from electronic submission requirements, without necessity of SEC approval, whenever a filer experiences unanticipated technical difficulties that prevent timely compliance. The final rules also permit filers to apply in writing for a continuing hardship exemption if electronic information cannot be filed without undue burden or expense, but the SEC has the power to deny or grant the request for exemption. Finally, the final rules provide a continuing hardship exemption from XBRL requirements for corporate websites.

CONSEQUENCES OF NON-COMPLIANCE

The final rules provide that filers that fail to either make a required XBRL submission or post the required interactive data on their corporate website within the time provided cannot (a) use the short form registration statements on Forms S-3, F-3 or S-8, or (b) elect to incorporate certain information by reference into Forms S-4 or F-4, in each case until such time as such required interactive data is submitted and/or posted. During this period of non-compliance, filers will also be deemed not to have filed adequate current public information for purposes of Rule 144 of the Securities Act.

A filer applying for the temporary hardship exemption will be deemed compliant for short-form registration statement, incorporation by reference and Rule 144 purposes, in each case for a period of no more than six business days from the date the interactive data was required to be submitted and/or posted. Under the continuing hardship exemption, a filer will be deemed compliant for short-form registration statement, incorporation by

reference and for Rule 144 purposes until the end of the period granted by the SEC.

As with other filings, interactive data filings are generally subject to the anti-fraud provisions of the federal securities laws, except as described below.

Good Faith Exemption from Liability Under Securities Laws

Under new Rule 406T, interactive data filings are subject to a modified standard of liability for a transitional period ending October 31, 2014, provided the filer submits the required XBRL filing within 24 months of the time it is initially required to be filed and no later than October 31, 2014.

Rule 406T provides that during the time period that interactive filings are subject to this modified standard of liability, such filings will be:

- Subject to the anti-fraud provisions of Section 17(a)(1) of the Securities Act, and Section 10(b) and Rule 10b-5 of the Exchange Act, except in connection with a failure to comply with tagging requirements that occurs despite a “good faith attempt” to comply (conditioned upon prompt correction after the filer becomes aware of its failure to file);
- Deemed not filed or part of a registration statement or prospectus for purposes of Sections 11 or 12 of the Securities Act and not otherwise subject to liability under those sections;
- Deemed not filed for purposes of Section 18 of the Exchange Act and not otherwise subject to liability under this section; and
- Deemed filed pursuant to Rule 103 of Regulation S-T and, therefore, will not be liable for transmission errors which are beyond the filer’s control, if the filer corrects the error via amendment as soon as “reasonably practicable” after becoming aware of the problem.

Auditor Liability

There is no additional basis for auditor liability based on data tagging, and auditors are not required to apply AU Sections 550 (SAS 8), 711 (SAS 37), or 722 (SAS 100) to interactive data in any filing.

Officer Certifications

In the final rules, the SEC adopted amendments to the proposed rules such that interactive data is now excluded from the officer certifications with respect to disclosure controls and procedures and internal control over financial reporting required to be included in certain periodic reports pursuant to Rules 13a-14 and 15d-14 of the Exchange Act.

SEC Compliance Checks

The SEC plans to use specially adapted validation software to check interactive data for compliance with technical requirements. Among other things, this software will:

- Check for conformity with required conventions;
- Identify, count and sort all non-standard labels and tags;
- Identify the use of positive practices that enhance usability;
- Check for mathematical errors; and
- Analyze explanations by filers of financial facts and results.

VOLUNTARY TEST SUBMISSIONS

For filers who wish to test the accuracy of their interactive data tagging systems, the SEC allows such filers to submit a “test” filing, which will enable the filer to learn how the validation system would respond if a test submission were “live.” The validation system will notify the filer of any errors and advise as to whether they are considered major or minor in nature.

Explanatory Notes:

This update is intended to provide a general summary and to call your attention to a number of rule changes actually covered which may be of possible interest and relevance to you. It is not intended to constitute a legal opinion or definitive summary of all changes that could be material to you or to serve as a substitute for legal advice.

Please contact a member of the Securities Law Group at Burns & Levinson if you have any questions about these rule changes or want to learn more about our expertise in this area.

Burns & Levinson's Securities Law Group represents public and private companies, underwriters and investment banks, venture capital and investment funds, real estate investment funds, investment advisors, broker-dealers, stockholder groups and individuals in public and private securities offerings and transactions, SEC, FINRA and stock exchange compliance, corporate governance, fund formation and offerings, SEC enforcement and securities litigation.

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If you have any questions regarding this Burns & Levinson Securities Law Update, please contact one of the individuals named above.

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ABOUT BURNS & LEVINSON'S SECURITIES LAW GROUP

Burns & Levinson's attorneys have extensive experience representing public and private issuers, stockholder groups and individual investors. Our attorney team counsels clients on IPOs and follow-on offerings of equity, debt and other securities (including shelf registration takedowns), corporate acquisitions involving registered and restricted stock, mergers and acquisitions where one or both parties are publicly traded, private investment in public equity (PIPE) transactions, private placements, venture capital financings, and complex securities law transactions and issues, including corporate governance/Sarbanes-Oxley and SEC and stock exchange reporting and compliance.

In the securities compliance area, we advise our clients on corporate governance/Sarbanes-Oxley and SEC and stock exchange reporting and compliance. Specifically, we assist our clients in fulfilling their ongoing SEC and stock exchange reporting obligations, managing sensitive disclosure issues internally and with industry analysts, preparing proxy statements and handling stockholder meetings, structuring employee benefit plans and executive compensation packages under the SEC's "short-swing profit" reporting and liability rules, effecting resales of securities in the public trading markets under

the SEC's Rule 144, and advising boards of directors and board committees concerning the requirements and restrictions imposed on their actions by the securities laws and corporate governance laws such as Sarbanes-Oxley. We have served as special securities counsel to the Boards and Audit Committees of publicly traded companies looking for opinions or advice of counsel other than their regular outside counsel.

We have counseled clients both domestic and international, from high technology and life sciences to emerging growth companies, and are positioned to provide clients with timely, expert, efficient and cost effective advice that they need to meet their business objectives. We take a practical and proactive approach to the rapidly changing securities disclosure and corporate governance laws, providing our clients with timely updates, identifying specific situations in which the new laws will impact particular clients either operationally or structurally, and working with clients to implement the changes that are either required or advisable to comply with the new regulatory schemes and investor sentiment.

Underwriters and Investment Banks

Our attorneys also represent underwriters in initial and follow-on public offerings and investment banks in private placements and mergers and acquisitions.