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SEC Proposes Mandatory XBRL Use

On May 14, 2008, the SEC voted unanimously to propose a new rule requiring companies to provide financial information using interactive data formatted in eXtensible Business Reporting Language (“XBRL”). Developed by XBRL US Inc., XBRL permits filers to mark their disclosures with interactive data tags that function to uniquely identify items in a company’s financial statements. SEC Chief Information Officer Corey Booth said the rule “represents the next logical step in the evolution of company disclosure.”

Creating documents in XBRL allows them to be easily searched, downloaded and reorganized, thereby facilitating the delivery and analysis of meaningful financial information. A number of public companies have been submitting interactive data in a voluntary filer program for the past three years, but the new rule would make interactive data filing mandatory for the companies to which it applies.¹

Under the new rule, interactive data would be required to be filed as an exhibit with a company’s Form 10-K, Form 10-Q, transition reports, and Securities Act registration statements, as well as posted on its corporate web site. The SEC currently envisions a three-year phase-in. The rule would initially apply only to domestic and foreign large accelerated filers that use U.S. GAAP and have a worldwide public float over \$5 billion (approximately the 500 largest companies), and would be targeted to take effect for fiscal periods ending on or after December 15, 2008 (meaning those companies would begin making XBRL-tagged filings as early as the spring of 2009). In year two, all other domestic and foreign large accelerated filers using U.S. GAAP would be subject to interactive data reporting, and in year three all remaining filers using U.S. GAAP, including smaller reporting companies, and all foreign private issuers that prepare their financial statements in accordance with International Financial Reporting Standards (“IFRS”) would be subject to the same reporting requirements.

¹ To view filings made by voluntary participants in the XBRL program, see <http://216.241.101.197/viewer>.

In the SEC's announcement, Booth said the new rule represented "a quantum leap in helping companies explain their business to investors." While the SEC appears confident that implementing required interactive data disclosure will allow investors to get important information delivered faster, more reliably and at a lower cost, detractors point to several issues that need to be sorted out. For example, regarding the issue of liability, the SEC indicated that liability for XBRL data would be similarly limited as it is under the voluntary program. Currently, XBRL-tagged data is considered "furnished" rather than "filed," which means the liability imposed on voluntary filers is limited to some extent.² There is also an issue of whether the year-end effective date gives companies ample time to comply with the new rule, particularly since filers that do not provide or post required interactive data on the date required would be deemed not current with their Exchange Act reports, and hence ineligible for short form registration or the resale exemption safe harbor under Rule 144. In order to ease the transition, the proposed rule would allow for a 30-day grace period for a company's first XBRL filing. The SEC has provided a 60-day comment period (from the date of publication in the Federal Register) for those interested in commenting on the proposed rule.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Jon Mark at (212) 701-3100 or jmark@cahill.com; John Schuster at (212) 701-3323 or jschuster@cahill.com; or Linda Sharkey at (212) 701-3016 or lsharkey@cahill.com.

² Regulations 401 and 402 of Regulation S-T set forth some of the rules which govern the submission of XBRL information and among other things, provide that such information is not deemed filed for purposes of Section 11 of the Securities Act, Section 18 of the Exchange Act or Section 34(b) of the Investment Company Act, or otherwise subject to the liability under these Sections and is not part of any registration statement to which it relates, nor is such information deemed incorporated by reference in filings under those statutes. See Rule 402(a)(1) and (2). However, Regulation 402(a)(3) states that such information is subject to all other liability and anti-fraud provisions of such Acts and is deemed filed for purposes of Item 103 of Regulation S-T.