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Inline XBRL is now a basic part of SEC rulemaking

By *Dimensions* staff

The use of structured data is woven throughout SEC reporting for issuers of all types. Building on that foundation, SEC rulemaking is steadily adding reporting requirements for Inline XBRL (iXBRL), which allows tags to be embedded directly into an HTML filing. Several proposed and final rules the SEC has issued in 2019 and 2020 reveal a carefully considered focus on structured data in general and iXBRL in particular.

Worldwide, iXBRL is becoming the reporting standard. For example, the European Single Electronic Format (ESEF) is the iXBRL mandate issued by the European Securities and Markets Authority. Since the start of 2020, with no phase-in period, all issuers on regulated markets within the European Union and the European Economic Area must submit their annual financial reports in ESEF.

These developments are part of a long trajectory. After a decade of requiring traditional XBRL tagging for financial statements, the SEC in 2019 began requiring iXBRL in filings in stages, starting first with large accelerated filers. Using iXBRL provides a single format that is readable by both machines and humans, the ideal format for many modern disclosures that are both nuanced and complex. By combining human- and machine-readable formats in one presentation, iXBRL merges the strength of HTML text and tabular electronic reporting with the efficiency and comparability of financial reporting tagged in XBRL.

The following is an overview of recent SEC rulemaking that involves structured disclosures, particularly iXBRL.

Structured data now a key element in SEC rulemaking

The SEC now considers structured data in every new or revised reporting requirement. As noted in a September 2017 *Dimensions* interview with Mike Willis, Assistant Director of the Office of Structured Disclosure (OSD) in the Division of Economic and Risk Analysis (DERA), the OSD tries "to be involved in the rulemaking process as early as possible. When relevant, we provide counsel and support on when and how structuring approaches can enhance the accessibility and usability of required disclosures, how various structuring approaches can be most efficient for filers, which requirements would help to enhance the usability and data quality of the disclosures, and how the structured disclosures can be reused for various analytics."

The SEC asks three key questions when considering what format it should mandate for new forms and rules:

- Who are the consumers of the data?
- How will they use that data?
- What are the data's characteristics that determine how it should be structured?

The answers direct how the SEC rulemakers adopt the use of iXBRL.

Structured data in recent proposed rules

Structured data, particularly iXBRL, plays a role in several recent proposed rules on disclosure. In others, structured data or iXBRL are mentioned but not proposed, suggesting that the SEC is considering the merits of iXBRL in every rule on a case by case.

Proposed rule on modernizing fee disclosure

An extensive proposed rule, *Filing Fee Disclosure and Payment Methods Modernization* (Release No. 33-10720), would introduce iXBRL tagging in all registration statements and prospectuses (both 1933 and 1940 Acts). While filers might submit iXBRL-tagged financials with their registration statements, the proposed rule would require iXBRL tagging for every filing with fee data—a major expansion of the iXBRL mandate. It would significantly improve fee data for the SEC and issuers by eliminating errors, thus improving the ability to raise capital.

"This opens the door to requiring Inline XBRL tagging for the entire 1933 Act registration cover in the future," suggests Jennifer Froberg, a Senior Product Specialist at Toppan Merrill, in remarks to *Dimensions*. She further noted that the SEC has an open proposal to tag the complete Form N-2 cover.

Specifically, iXBRL would apply to the tagging of fee tables and associated footnotes. The proposed rule seeks to standardize fee tables across form types for consistency and to require all needed fee data. Affected form types are:

- 1933 Act registration statements (corporate issuers)
- 1940 Act registration statements (investment companies)
- Tender offers and proxies with fees (i.e., only PREM14A, PREM14C, PRER14A, and PRER14C)

This includes the initial filing, amendments, and prospectuses (any related pre- or post-effective filing with fee data). A few form types are exempt, including ABS SF-1 and SF-3 (filed in XML). A new Exhibit 107, the *General Interactive Data* file, would be required for fee-tagging.

The proposal also seeks to modify Rule 424, which governs prospectuses, to allow fee information anywhere within the filing, even in a separate exhibit. "From this detail," Ms. Froberg comments, "we can infer that the SEC is concerned that the prospectus cover might become too crowded if all fee data were included, prompting a proposal to include it elsewhere in the submission."

STRUCTURED DATA, PARTICULARLY iXBRL, PLAYS A ROLE IN SEVERAL RECENT PROPOSED RULES ON DISCLOSURE

The SEC also calls for automated EDGAR validation of tagged fee data during test filings and live filings. In the proposal, the SEC states over 700 filings annually contain fee errors requiring manual review by SEC staff. Fee tagging and validation would eliminate this issue, thereby increasing efficiency and reducing errors for both the SEC and issuers. Errors would produce a warning but no longer cause a suspension. Filings with fee warnings would trigger a followup flag for the SEC's fee unit.

Fee-bearing proxies and tender offers would have to be filed in HTML to accommodate Inline XBRL. Ms. Froberg notes that this is the first mandate of iXBRL in any proxy form type. The SEC still has several open proposals (dating from 2015) to XBRL-tag executive compensation in proxies.

Proposed rule on iXBRL for Form CC

As part of the National Market Systems suite of related rules to oversee all exchanges and market participants, a rule proposed by the SEC in *Market Data Infrastructure* (Release No. 34-88216), would introduce iXBRL to Form CC *(Competing Consolidators).*

"Requiring this could create benefits for market participants by enabling more efficient retrieval, aggregation and analysis of disclosed information and facilitating comparisons across competing consolidators," the SEC indicated. "This alternative also could allow a competing consolidator to efficiently benchmark key aspects of its operations (e.g., operational capabilities or fee structures) against the rest of the potential competing consolidator population."

Using iXBRL would make aggregation and comparison more efficient for market participants, and it would bring the benefits of efficient benchmarking to potential competing consolidators.

Proposed rule on disclosures by resource extraction issuers

The SEC is considering the merits of mandating iXBRL on a case-by-case basis, as shown by *Disclosure of Payments by Resource Extraction Issuers* (Release No. 34-87783). This proposed rule calls for standard XBRL—explicitly not iXBRL—for disclosures by oil and gas companies reporting payment data while exploring for resources. "This is an outlier format," Ms. Froberg observes, "based on who is consuming the data."

Since the SEC will be the primary user of this data, it comments that iXBRL is not necessary: "Given the nature of the disclosure required by the proposed rules, which is primarily an exhibit with tabular data, we do not believe that Inline XBRL would improve the usefulness or presentation of the required disclosure."

Proposed rule on overhauling the MD&A regulations

Further insight into the SEC's thought process is discernible from *Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information* (Release 33-10750). In this proposed rule, the SEC discusses iXBRL as an alternative format but does not officially propose it.

USING iXBRL WOULD MAKE AGGREGATION AND COMPARISON MORE EFFICIENT FOR MARKET PARTICIPANTS

The SEC discusses the challenges of data comparison and tagging in the MD&A when each company or industry has customized its disclosures, yet reaffirms the value of structured data:

> Requiring registrants to structure MD&A disclosures could create benefits for investors (either through direct use of the data or through reliance on the data as extracted and analyzed by intermediaries) as well as other market participants by enabling more efficient retrieval, aggregation, and analysis of disclosed information and facilitating comparisons across issuers and time periods.

XBRL US submitted a comment letter on the proposal, extolling the merits of Inline tagging the MD&A: "The value and usability of the MD&A would increase with text block tags required for the reporting of large categories of content." It further observed:

> We do not believe there is any difference between large or small filers in terms of text block tagging. All companies are required to tag their filings in the same way today and should be subject to the same requirements. As noted earlier, public companies are accustomed to this practice of text block tagging. The US GAAP Taxonomy contains numerous text block disclosures that SEC filers include in their financial statement preparation process each quarter. The cost of adding five new concepts to be tagged would be minimal for issuers. The benefit to end users however, would be much greater.

Structured data in recent SEC final rules

Several recent final rules on disclosure call for use of iXBRL tagging.

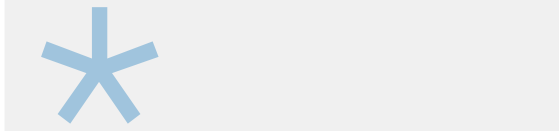
Final rule on the reform of offerings by closed-end investment companies

In *Securities Offering Reform for Closed-End Investment Companies* (Release No. 33–10771), the SEC finalizes a significant new mandate to modernize reporting, including several iXBRL disclosures, for closed-end funds and business-development companies (BDCs). These entities file a mix of submissions under the 1934 and 1940 statutes. The final rule requires iXBRL disclosures for the following:

- Cover-tagging on N-2 registration statement (except fee table)
- Cover-tagging on Forms 8-K, 10-Q, and 10-K for BDCs
- Financials filed with Forms 10-Q and 10-K for BDCs
- Fund prospectus key data, including: fee table, senior securities table, investment objectives and policies, risk factors, and share price data, along with capital stock, long-term debt, and other securities

The SEC has posted (see *here* and *here)* the draft taxonomy for the mandated N-2 disclosures. EDGAR will be updated by March 2021 for early voluntary filers (both form types and iXBRL).

By adopting so many various iXBRL disclosures in this rule, the SEC signals its strong support for the format and how mainstream it is at the Commission.



"WE DO NOT BELIEVE THERE IS ANY DIFFERENCE BETWEEN LARGE OR SMALL FILERS IN TERMS OF TEXT BLOCK TAGGING."

Final rule on defining accelerated and large accelerated filers

Under an extensive new final rule, *Accelerated Filer and Large Accelerated Filer Definitions* (Release No. 34-88365), accelerated and large accelerated filers must obtain and file an auditor's attestation with their annual financial statements. The Commission also added an iXBRL checkbox to the cover of Forms 10-K, 20-F, and 40-F for companies to indicate whether the report includes an auditor's attestation. The proposed rule did not include this checkbox. Issuers will need to tag the attestation once they are mandated to file iXBRL.

The FAST Act rules require that all cover-page data for reports be tagged. Adding a new checkbox in this fashion reinforces how routine the cover tagging and the use of iXBRL have become in the SEC's rulemaking process. "After reviewing these comments [on the proposed rule]," the SEC states in the final rule, "we are persuaded to add a check box to the cover pages of Forms 10-K, 20-F, and 40-F to indicate whether an ICFR auditor attestation is included in the filing because we agree that more prominent and easily accessible disclosure of this information would be useful to investors and market participants while imposing only minimal burdens on issuers."

Final rule on disclosures for variable annuities and life insurance

The SEC has issued a final rule focused on 1940 Act filers, *Updated Disclosure Requirements and Summary Prospectus for Variable Annuity and Variable Life Insurance Contracts* (Release No. 33-10765). The rule clearly confirms the value of iXBRL and the SEC's commitment to introducing its use where doing so will help to improve disclosure. To modernize, improve, and align reporting for all 1940 Act entities, the final rule expands iXBRL reporting beyond the risk/return summary for mutual funds.

Be sure your company is up to speed with Inline XBRL

The final iXBRL rules have a three-year phase-in period. Large accelerated filers were phased in on June 15, 2019. The inline mandate for accelerated filers begins with the first Form 10-Q for fiscal periods on or after June 15, 2020; all others will be phased in on June 15, 2021.

For accelerated filers whose fiscal year ends on December 31st, this means the mandate starts with the 10-Q for the second quarter. Accelerated filers should partner with a service provider now to successfully prepare for the SEC's iXBRL requirements.

THE RULE CLEARLY CONFIRMS THE VALUE OF iXBRL AND THE SEC's COMMITMENT TO INTRODUCING ITS USE WHERE DOING SO WILL HELP TO IMPROVE DISCLOSURE.

When the CEO falls ill: Steps to take on disclosure

Abstracted from: *Disclosing A Senior Executive Illness*

By Mike Dicke, Susan Muck, David Bell, and Alison Jordan

Fenwick & West, San Francisco CA (MD and SM) and Mountain View CA (DB and AJ)

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The board must stay on top of a CEO's illness. It is difficult for a public company to know whether and when to disclose that the CEO (or another executive) is seriously ill, because no US security law or case creates an explicit duty to do so. The company must fall back on the general requirement regarding all nonpublic information: Disclosure is necessary if there is "a present duty to disclose" and if the information is "material." The complex determination of materiality is usually within the board's discretion, explain attorneys Mike Dicke, Susan Muck, David Bell, and Alison Jordan. Information that a reasonable investor would be likely to use in deciding whether to purchase or sell company stock is material. Adding to the complexity is the conflict between the CEO's right to privacy and the company's disclosure duties. Still another difficulty is the "half-truth" doctrine, under which a company that makes any voluntary disclosure has to provide all the information needed to assure the disclosure is not misleading. While neither the regulators nor the courts have ever applied this doctrine to medical information, they might eventually do so, and medical disclosures have triggered shareholders' derivative suits.

A wide swing in the extent of disclosure. Absent legal guidance, how much companies tell about a CEO's illness varies greatly. One choice is full disclosure, the impetus for which can be adherence to high standards of corporate governance, promotion of transparency in investor relations, an assessment that the facts will ultimately become public, or a tendency to err on the side of caution. After full disclosure, the authors advise, the board ought to take three steps:

(1) Make sure all disclosure is comprehensive and true.

(2) Set up formal or informal controls on health updates from the CEO to facilitate ongoing materiality assessments and resultant changes to the disclosure.

(3) Prevent trading by insiders who know material nonpublic information before it is disclosed.

To block a revelation is to skate on thin ice. A company might choose partial, rather than full, disclosure. Five steps are then advisable:

(1) Enhance disclosure with substantive qualifications concerning the CEO's prognosis.

(2) Set up controls on updates from the CEO, as with full disclosure.

(3) Condition disclosure on a medical professional's corroboration of the CEO's illness.

(4) Explicitly deny any duty or plan to give updates.

(5) Do not opine on third-party rumors.

The company's third choice, the authors suggest, is nondisclosure, after which it should do four things:

(1) Set up short- and long-term plans for succession, and review both yearly.

(2) Consult counsel about the plans.

(3) Think about disclosing the plans to calm stakeholders' anxieties and to avert stock-price plunges, both of which could occur if the CEO unexpectedly announces an illness or goes on a leave of absence.

(4) Update the next Form 10-Q's risk factors on key persons.

Do not play in-house hide-and-seek. The apparent consensus among academics and commentators is that the CEO has a legal duty to tell the board about a severe health problem so the directors can establish a suitable succession plan and that the company's other officers must tell the board if the CEO does not. Officers who withhold information might violate their duty of good faith, the authors warn. The directors can decide what health information, including periodic updates, they want from the CEO and convey that requirement informally in talks or formally in a bylaw, the corporate code of ethics, or an employment agreement. If clear signs show that the CEO is ill, the directors have a duty to investigate. Any representations that they, the officers, or the corporate spokespeople make which contradict known facts about the CEO's health might breach US securities laws.

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EDITOR'S NOTE: For an analysis of a public company's disclosure and other obligations, including SEC filings and succession planning, with respect to executive officers' and directors' illnesses during the coronavirus crisis, see *Managing coronavirus/COVID-19: Illness in the C-suite—Disclosure and other considerations for public companies* from Covington & Burling.

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