

What You Need to Know About XBRL for '40 Act Companies

Memorandum

SEC Release 33-8929; IC-28298 Regarding Interactive Data for Mutual Fund Risk/Return Summary

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On June 10, 2008, the Securities and Exchange Commission ("SEC") published rule proposals ("Proposed Rules") that would require mutual funds to provide risk/return summary information in an interactive data format using eXtensible Business Reporting Language ("XBRL"). The purpose of this memorandum is to provide a summary of the Proposed Rules and discuss some of the related issues. The following are some of the key points of the Proposed Rules:

SUMMARY OF THE PROPOSED RULES

- The Proposed Rules would require that mutual funds provide to the SEC, via an EDGAR filing, an exhibit to their registration statements which would be the risk/return summary information prepared in an interactive data format using XBRL tagging.
- The Proposed Rules would apply to all initial registrations and any post-effective amendments to effective registration statements that become effective after December 31, 2009.
- Mutual funds would also be required to post that information in interactive data format to their websites (if they have a website) on the earlier of the date that the interactive data is submitted to the SEC or the date it is required to be submitted.
- Each interactive data submission would be required to be filed as a post-effective amendment under Rule 485(b) under the Securities Act of 1933 ('33 Act) and would be required to be filed with the SEC and posted to the fund's website (if any) after the related filing becomes effective, but no later than 15 business days after the effective date.
- If a mutual fund does not submit the required exhibit to the SEC or fails to post the interactive data on its website, the fund's ability to file post-effective amendments to its registration statement under Rule 485(b) under the '33 Act would be automatically suspended until the fund complies with the requirements.
- Proposed Rules are not intended to require mutual funds to provide interactive data that is more, less or different from the current required disclosures.

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USE OF XBRL

The Proposed Rules provide that the EDGAR Filer Manual would require the use of the most recent list of tags released by XBRL U.S. that relate to the Risk/Return Summary.

The current tags were developed by the ICI and provided to the SEC. The ICI also received acknowledgement from XBRL International with respect to its risk/return summary taxonomy.

XBRL is a derivative of the XML Standard. XBRL is widely used throughout the financial reporting community and, in fact, U.S. financial institutions use XBRL to submit reports to the banking regulators. XBRL U.S. is a nonprofit organization that promotes the use of XBRL within the U.S. XBRL U.S. is the United States' representative to XBRL International. These Standards setting organizations provide a stable environment for the development and dissemination of taxonomies for specific industries or segments of an industry, such as the mutual fund industry. XBRL is also widely used elsewhere in the world.

The SEC EDGAR Filer Manual will be updated to reflect the specific requirements of submitting the Risk/Return Summary that has been prepared using interactive data.

COMPLIANCE DATES

The Proposed Rules would require all mutual funds to submit the required interactive data exhibit for any initial registration or any post-effective amendment on Form N-1A that includes or amends Risk/Return Summary. Each interactive data submission will be required to be filed as a post-effective amendment under Rule 485(b) under the '33 Act and will be required to be filed after effectiveness of the related filing, but no later than 15 business days after the effective date of the related filing.

In addition to submitting the exhibit which contains the interactive data to the SEC, if a fund group has a website, it will be required to post the same interactive data on its website. It must be posted by the end of the business day on the earlier of the date that the interactive data is submitted to the SEC or is required to be submitted.

If a fund fails to submit or post the interactive data as required, the fund's ability to file post-effective amendments to its registration statement under Rule 485(b) under the '33 Act would automatically be suspended until the fund submits and posts the interactive data as required.

THE RISK/RETURN SUMMARY

As noted above, the Proposed Rules do not alter the Risk/Return Summary. The Proposing Release states very clearly that, "the information in interactive data format should not be more or less than the information in the ASCII or HTML part of the Form N-1A filing."

Thus, the Proposed Rules contemplate that, once the registration statement has been declared effective, the ASCII or HTML version of the Risk/Return Summary is "translated" or "tagged" with the appropriate XBRL tags. The document identifiers are included as will be required by the EDGAR Filer Manual. This XBRL tagged version is then submitted to the SEC by filing a 485(b) filing and including the XBRL tagged version as an exhibit to the registration statement using the appropriate EDGAR document identifiers. It should be noted the funds are not permitted to file this interactive Risk/Return Summary until after the registration to which it relates becomes effective.

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LIABILITY UNDER THE PROPOSED RULES

Current Voluntary Program:

Under the current voluntary program for filing interactive data, there are limited protections from liability under the federal securities laws; however, the information is subject to the anti-fraud provisions. The voluntary program further provides that a participant is not liable for information in its interactive data that reflects the same information that is contained in its ASCII or HTML filing, to the extent that the information was not materially false or misleading. There is also a safe harbor for interactive data that is not the same provided that certain conditions are met. In addition, in the voluntary program, participants include a statement to the effect that investors should not rely on the interactive data information in making investment decisions.

Proposed Rules:

The SEC is now proposing “that viewable interactive data as displayed through software available on the Commission’s website..., would be subject to the same liability under the federal securities laws as the corresponding portions of the traditional format filing.” The SEC is also preparing to no longer require or permit the disclaimer informing investors that they should not rely on the interactive data information in making investment decisions.

In the Proposing Release, the SEC provided the following commentary on the liability issue:

Interactive data would be subject to the following liability-related provisions:

- deemed not filed or part of a registration statement or prospectus for purposes of Sections 11 and 12 of the Securities Act;
- deemed not filed for purposes of Section 18 of the Exchange Act and Section 34(b) of the Investment Company Act;
- not otherwise subject to the liabilities of these sections;
- subject to other liability under these Acts for the substantive content of the risk/return summary disclosures (as distinct from compliance with proposed Rule 405) in the same way and to the same extent as the corresponding information in the related traditional format official filing. The content of the risk/return summary disclosures refers, for example, to the investment objectives and strategies, costs, risks, and past performance. The Rule 405 requirements generally refer to the process of tagging and formatting the content of the risk/return summary for the interactive data file;
- deemed filed for purposes of (and, as a result, benefit from) Rule 103 of Regulation S-T; and
- protected from liability under these Acts for failure to comply with the requirements of proposed Rule 405 if the interactive data either:
 - met the requirements of proposed Rule 405 of Regulation S-T; or
 - failed to meet those requirements but the failure occurred despite the mutual fund’s good faith and reasonable effort and the mutual fund corrected the failure as soon as reasonably practicable after becoming aware of it.

MANAGING THE LIABILITY RISKS

There are several areas in which risks can arise:

- tagging errors (i.e., the wrong tags are used to tag the Risk/Return Summary resulting in a document that appears differently than the traditionally filed document or provides an erroneous comparison when a comparison tool is used to view the information)
- structural issues (i.e., again the interactive data version does not appear to be the same as the traditional version)
- transmission errors
- website maintenance issues

With respect to issues arising out of both tagging and structural issues, organizations must build into their interactive data processes a routine that:

- lets them test the interactive data document with a viewer similar to the SEC
- make use of the test filing capability of the SEC
- carefully examine the data on your own website to see that it is the same as the traditionally filed Risk/Return Summary
- test your data against other industry data to make sure that appropriate comparisons can be made

If there are transmission errors, in general, the fund would not be subject to liability for electronic transmission errors beyond its control if the fund corrected the problem through the filing of a subsequent amendment as soon as reasonably practicable after the fund became aware of the problem. Therefore, as part of an interactive data process, the filer should make a close examination of the actual filing on the SEC website using the SEC's viewer to make sure the data is still accurately presented.

As with websites today, funds must be diligent in maintaining the website so as to not allow the data and information to be displayed in a manner that is misleading and, when errors are discovered, to address them as soon as practicable. 1. Securities Act Release No. 33-8929 (June 10, 2008) (herein referred to as "Proposing Release") 2. The Risk/Return Summary information is currently required under Items 2 and 3 of Form N-1A. If the recently proposed amendments to Form N-1A are adopted, such amendments would result in the Risk/Return Summary being contained in Items 2, 3 and 4. In the Proposing Release, the SEC notes that, should the amendments to Form N-1A be adopted, it would make conforming changes to any applicable tagging rule.

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Judith Hasenauer is a principal in the law firm of Blazzard, & Hasenauer, P.C. She is a 37 year veteran of the financial services business and devotes her practice to the development and regulatory clearance of variable annuities and variable life insurance products, mutual funds, broker-dealers and investment advisors.

Throughout her career, Ms. Hasenauer has been responsible for many innovations and breakthroughs in our industry. For example, she is the originator of the Contingent Deferred Sales Charge – an innovation that revolutionized not only the variable annuity and variable life insurance business, but the mutual fund industry as well.

In October, 2002, Ms. Hasenauer was inducted into the NAVA Hall of Fame. She is a graduate of the University of Rochester with a degree in general science and of Golden Gate University with a J.D. degree. She also holds a designation as a Chartered Life Underwriter. She is admitted to practice law in California, Connecticut, New York, the District of Columbia, and Florida.

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