

New York State Bar Association
One Elk Street
Albany, NY 12207
518-463-3200

Business Law Section
Committee on Securities Regulation

November 5, 2004

Securities and Exchange Commission
450 Fifth Street, N.W.
Washington, D.C. 20549-0609

E-mail address: rule-comments@sec.gov

Attention: Jonathan G. Katz, Secretary

Re: File No. S7-35-04
XBRL Voluntary Financial Reporting Program on the EDGAR System
Release Nos. 33-8496, 34-50453, 35-27894, 39-2428, IC-26622

Ladies and Gentlemen:

The Committee on Securities Regulation (the "Committee") of the Business Law Section of the New York State Bar Association appreciates the invitation in Release Nos. 33-8496, 34-50453, 35-27894, 39-2428, IC-26622 ("Release") to comment on the proposed XBRL Voluntary Financial Reporting Program on the EDGAR System.

The Committee is composed of members of the New York Bar, a principal part of whose practice is in securities regulation. The Committee includes lawyers in private practice and in corporation law departments. A draft of this letter was reviewed by certain members of the Committee, and the views expressed in this letter are generally consistent with those of the majority of members who reviewed and commented on the letter in draft form. The views set forth in this letter, however, are those of the Committee and do not necessarily reflect the views of the organizations with which its members are associated, the New York State Bar Association, or its Business Law Section.

Summary

The Committee supports the continuing efforts of the Commission to modernize the EDGAR system. We believe that it is appropriate for the Commission to establish a voluntary program permitting registrants to voluntarily file supplemental tagged financial information using XBRL, in order to help the Commission evaluate the usefulness of data tagging, as proposed in the Release. Our comments and positions expressed in this letter relate only to the voluntary program and could differ in the case of a mandatory program.

We agree that XBRL-Related Documents should not be deemed filed for liability purposes and should not be deemed incorporated by reference. We believe that the proposed limited protection from liability based on a "good faith and reasonable" standard for registrants participating in the program should be expanded, particularly in light of the voluntary nature of the program, development stage of the technology, and issues about reliability and potential liability discussed in the Release and companion Concept Release on Tagged Data (Release Nos. 33-8497, 34-50454, 35-27895, 39-2429 IC-26623; hereafter the "Concept Release"). This may encourage greater participation in the voluntary program; and we believe is a matter of essential fairness for this voluntary program..

Therefore, we urge the Commission to exercise its authority to provide protection from liability in the absence of a showing of actual knowledge and the elements of fraud. This would be consistent with the Commission's caution that "investors and others should continue to rely on a registrant's official filings in making investment decisions rather than the XBRL exhibits."

We have the following additional comments with respect to the proposed voluntary program, some of which apply to specific requests for comments in the Release.

- We recommend that the Commission change the proposed requirement that XBRL-Related Documents must "reflect the same information" as appears in the official related filing, which we believe is unclear and vague. Instead, the requirement should be based on accuracy - the data is properly tagged and the tagged data is substantially the same as the corresponding information in the related official filing. This change is also necessitated by the uncertainty with respect to potential liability created by the proposed requirement.

- We agree with the proposed rule that the certifications under Rules 13a-14 and 15d-14 of the Securities Exchange Act of 1934 (the “Exchange Act”) and Rule 30a-2 under the Investment Company Act of 1940 (the “Investment Company Act”) should not apply to XBRL-Related Documents. We believe that registrants or their officers should not be required to certify the XBRL data. In addition, we request that the Commission in the adopting release clarify that XBRL-Related Documents are not encompassed by the certifications regarding disclosure controls and procedures and internal controls referred to in those Rules, and explicitly provide that XBRL-Related Documents furnished in the program are not included in the reports and assessments required in connection with Section 404 of the Sarbanes-Oxley Act.
- We agree with the Release that audit opinions and interim review reports included in the body of the official filings should be omitted from the XBRL-Related Documents. We also believe that the Commission should not require the auditors to attest to the XBRL data.
- We recommend that the Commission permit a registrant to delete an XBRL-Related Document in the event it discovers an error in the document, as an alternative to correcting the Document.

Finally, we have not addressed the above and other issues with respect to the possibility of the Commission imposing a requirement that registrants must provide XBRL-Related Documents or adopting some extension of the voluntary program, following the proposed program. We believe that those issues would best be evaluated, and urge that consideration of these issues in the context of a mandatory requirement be deferred until, after completion of the voluntary program,

Discussion

General

The Committee supports the approach of the Commission to institute XBRL Voluntary Financial Reporting Program on the EDGAR system as a means to evaluate the usefulness of data tagging. We believe that because of the relatively short history of this technology, a

voluntary program would assist market participants in determining the efficacy of a more broad-based, and possibly mandatory, program of financial reporting in XBRL. The Committee at this time does not take a position as to whether reporting in XBRL should be mandatory, in the hope that the experiences of participants in the voluntary program would provide for a more informed position on the issue. Our comments below relate only to the voluntary program and the positions taken would not necessarily be the same if participation in the program were mandatory.

Liability Provisions

We agree that XBRL-Related Documents should not be deemed filed for liability purposes and should not be deemed incorporated by reference. We urge the Commission to expand the limited safe-harbor provided to XBRL Documents submitted under the voluntary XBRL program.

We are concerned that the proposed safe harbor in proposed Rule 402(b) of Regulation S-T does not provide sufficient certainty to a registrant to be able to rely on its availability for a number of reasons.

Reliance on proposed Rule 402(b) requires that:

- the registrant make a good faith effort to have the XBRL document reflect the same information as is contained in the corresponding portion of the underlying official filing; and
- its effort be reasonable.

The proposed rules use a negligence standard. In the event of a difference between information in the XBRL-Related Document and the official filing, a registrant would have to establish in hindsight: (1) that persons in its organization have in fact made a sufficiently “good faith” effort to reflect the same information; and (2) the reasonableness of the efforts. In addition, the requirement to “reflect the same information” is unclear (discussed below).

In light of the developing stage of this technology, the voluntary nature of the program and the lack of familiarity of at least some registrants with this technology, we urge the Commission to provide liability protection from the federal securities laws for XBRL-Related

Documents filed pursuant to the voluntary program absent a showing of: (1) the elements of fraud and (2) actual knowledge that the information contained in an XBRL-Related Document is not substantially the same as the corresponding information contained in the official filing. This would be consistent with the Commission's caution that "investors and others should continue to rely on a registrant's official filings in making investment decisions rather than the XBRL exhibits." In addition, the "actual knowledge" standard would be similar to the standard applied to forward-looking information in sections 27A of the Securities Act of 1933 and 21E of the Exchange Act.

Requirement that XBRL-Related Documents "reflect the same information"

The requirement that XBRL-Related Documents reflect the same information as appears in the related official filing is vague. As we understand it, two of the principal elements to reflecting the same information in XBRL are: (a) the data contained in the XBRL Document must be the same as the corresponding data in the underlying filing; and (b) the data must be tagged properly (i.e. the matching of a data element with its appropriate tag must be correctly done in accordance with the appropriate XBRL taxonomies). We recommend that the Commission express any requirement in precise terms, such as the two elements above, if that is what is intended, instead of the using the vague expression "reflect the same information." We believe that the Commission should clarify the meaning of "reflect the same information" both in relation to the filing requirement and any requirements to amend XBRL-Related Documents to correct errors. In addition, "reflect the same information" is also used in the proposed related safe harbor provision. In the paragraph on liability above we urge the Commission to change the wording of the safe harbor. If, however, the Commission does not make the changes we urge, the Commission should similarly clarify the meaning of "reflect the same information" in the safe harbor provision.

Certifications of XBRL Documents and Section 404 of the Sarbanes-Oxley Act.

We strongly support the Commission's excluding XBRL-Related Documents from the certifications required by Rules 13a-14 and 15d-14 of the Exchange Act and 30a-2 of the Investment Company Act. We believe that registrants or their officers should not be required to certify the XBRL data. Certification should not be required because, as we understand it, XBRL technology is still in the development stage from a technological and market acceptance and

understanding standpoint, and procedures would have to be developed before certifying the accuracy of such documents. We assume that XBRL-Related Documents are also intended to be excluded from the certifications regarding disclosure controls and procedures and internal controls referred to in those Rules, and ask that the Commission expressly provide that such Documents are also excluded from the certifications in Rules 13a-14, 15d-14 and 30a-2. Finally, if certifications were required, we believe it would discourage registrants from participating in the voluntary program.

For similar reasons, we urge the Commission to expressly clarify that XBRL-Related Documents are excluded from the reports and assessments required in connection with Section 404 of the Sarbanes-Oxley Act. We believe that inclusion of XBRL-Related Documents in the Section 404 reports and assessments would impose a significant burden on volunteers at a time when registrants universally are adjusting to the new requirements of Section 404, and would discourage participation in the program.

Audit Opinions and Interim Review Reports

We agree with the Release that audit opinions and interim review reports included in the body of the official filing should be omitted from the XBRL-Related Documents, and that the Commission should not require the auditors to attest to the XBRL-Related Documents. The attachment of an audit report to an XBRL-Related Document could result in the erroneous interpretation that the auditor is attesting to the accuracy of the XBRL-Related Document. If the auditor were required to attest to the accuracy of the XBRL-Related Documents, we believe that the benefits would not justify the resulting increase in audit related costs, especially in the case of a voluntary program, and where the Commission expects to caution investors and others to continue to rely on the official filings. Furthermore, we understand that while the American Institute of Certified Public Accountants has issued an interpretation relating to standards for attest engagements on financial information included in XBRL-Related Documents, the Public Company Audit Oversight Board has not yet adopted those standards.

Correction of XBRL-Related Documents

We support the Commission's effort to protect a registrant that discovers a mistake subsequent to filing an XBRL-Related Document as long as the mistake is corrected as soon as

reasonably practicable. Because this technology is still in development, innocent mistakes are quite possible, and we believe that the ability to correct such mistakes without attracting liability would encourage participation in the program.

In addition to making modifications to correct a mistake, we encourage the Commission to permit a registrant that finds errors in an XBRL-Related Document to amend the applicable filing so as to remove the XBRL-Related Document in its entirety without incurring liability. This would allow filers who are unable to correct mistakes in an XBRL-Related Document within a reasonable timeframe to stop the dissemination of the incorrect information by simply removing the XBRL-Related Document altogether.

We hope the Commission finds these comments helpful. We would be happy to discuss these comments further with the Staff.

Respectfully submitted,

COMMITTEE ON SECURITIES REGULATION

By Michael J. Holliday
MICHAEL J. HOLLIDAY
CHAIR OF THE COMMITTEE

Drafting Committee:

Richard E. Gutman
Michael J. Holliday
Asi Kirmayer

Copy to:

The Honorable William H. Donaldson, Chairman
The Honorable Paul S. Atkins, Commissioner
The Honorable Roel C. Campos, Commissioner
The Honorable Cynthia A. Glassman, Commissioner
The Honorable Harvey J. Goldschmid, Commissioner
Alan L. Beller, Esq., Director of Division of Corporation Finance
Donald T. Nicolaisen, Chief Accountant