

SEC Requires Interactive Data Disclosure for Funds' Risk/Return Summaries

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A recent Securities and Exchange Commission (SEC) Release¹ requires all mutual funds to submit their Risk/Reward Summary sections in interactive data format, as of January 1, 2011. Funds may be subject to severe penalties for noncompliance.

The primary purpose of the new rule is to enhance the ability of investors, analysts, and regulators to search and compare mutual fund data. The new interactive data format² will not result in a change in the scope of fund disclosures, nor will it replace traditional, text-based filing formats. If desired, funds can utilize the interactive data filing format as early as June 15, 2009, the effective date of the SEC rule.

Form N1-A Filing. Under the new rule, any fund registration statement or post-effective amendment on Form N1-A that includes a fund's risk/return summary³ must include an interactive data file with the same risk/return summary information. This interactive data file must be made as an amendment to the related registration statement and must be submitted within 15 business days of the effective date of the related Form N1-A filing. The interactive data risk/return summary may be submitted as an exhibit under rule 485(b) and according to the SEC Release, must include "the new exhibit, a facing page, a signature page, a cover letter explaining the nature of the amendment, and a revised exhibit index."⁴

497 Filing. An interactive data file must also be submitted whenever a fund files a prospectus according to Rules 497(c) or 497(e) under the Securities Act of 1933 if the filed prospectus includes risk/return summary information. When filing subject to Rule 497, the interactive data file may be submitted as an exhibit concurrent with the Rule 497 filing, but must be submitted within 15 business days.

Web Disclosure. Any fund submitting an interactive data file of its risk/return summary must also post the summary on its website by the earlier of either (1) the end of the day that it submits the same to the SEC or (2) the date such SEC submission is required. Additionally, the risk/return summary must remain on the fund's website as long as the related registration statement remains current. This means that to satisfy the new web disclosure requirement, funds may not simply provide a link to the SEC's website.

Compliance Implications

Significant Consequences of Noncompliance. A fund's ability to file immediately effective, nonmaterial amendments under Rule 485(b) will be **automatically** suspended if a fund fails to submit a required interactive

1. See Interactive Data for Mutual Fund Risk/Return Summary, Securities Act Release No. 33-9006, Securities Exchange Act Release No. 34-59391, Investment Company Act Release No. IC-28617 (Feb. 11, 2009), available at <http://www.sec.gov/rules/final/2009/33-9006.pdf>.

2. All interactive data filings will be in XBRL format.

3. This includes any information contained in Items 2, 3, or 4 of Form N1-A.

4. See SEC Release, *supra* note 1, at 28.

data file of its risk/return summary, or fails to post the interactive data on its own website.⁵ Until the automatic suspension is cured, the fund will not be able to maintain effectiveness of its registration statement by means of a Rule 485(b) filing. Unless effectiveness is achieved by another means, the fund would ultimately be selling shares in violation of Section 5 of the Securities Act, thereby creating rescission rights for purchasers of the unregistered shares.

Hardship Exemption. A fund may apply in writing for a continuing hardship exemption if it is unable to submit an interactive data file without suffering undue burden or expense.

Liability Under New Rule 406T of Regulation S-T. The SEC concurrently created a new Rule 406T under Regulation S-T, which subjects interactive data filings to the antifraud provisions of the Securities Act, the Securities Exchange Act, and the Investment Advisers Act. Additionally, Rule 406T treats an interactive data filing as “filed” for purposes of Rule 103 of Regulation S-T, which protects a fund from liability “resulting solely from electronic transmission errors beyond the control of the [fund],” if corrected “as soon as reasonably practicable after the [fund] becomes aware[.]”⁶

It is important to note, however, that because an interactive data filing is not deemed filed as part of the fund’s registration statement or prospectus for purposes of Sections 11 and 12 of the Securities Act, various parties, including a fund’s directors who sign the registration statement, will not be exposed to Section 11 liability if the interactive data filing is materially defective.

Rule 406T also subjects an interactive data filing to liability under Rule 405 of Regulation S-T. A fund can avoid liability under Rule 405, however, if it makes a good-faith attempt at compliance and promptly amends the interactive data file after becoming aware of the noncompliance. The SEC also defined “promptly” under Rule 11 of Regulation S-T to mean “as soon as reasonably practicable under the facts and circumstances at the time.”⁷ Generally, if a fund corrects its noncompliant interactive data filing within 24 hours or by 9:30 a.m. on the next business day after becoming aware of the noncompliance, the fund will be treated as having “promptly” amended its filing.⁸

If a fund’s noncompliant information appears in multiple places as a result of a single, noncompliant interactive data filing, the fund will only be liable once. Additionally, the SEC plans to include standard cautionary language on its website data viewer that will warn viewers to consult funds’ full prospectuses.

Mutual Fund Surveillance Program. Interactive data filings for funds’ risk/return summaries are also expected to aid SEC initiatives to increase fund oversight. In a December 2008 speech, Lori Richards, Director of the SEC’s Office of Compliance Inspections and Examinations, indicated that increased electronic disclosures by funds could “enhance investor protection” and allow “the SEC staff to better detect emerging and resurgent risks or compliance and operation problems.”⁹ This surveillance could, in turn, allow the SEC to “more efficiently and intelligently focus [its] exam resources[.]”¹⁰ As a result, risk/return data disclosed by funds in interactive data filings could increase the likelihood of an SEC examination.

Conclusion

Although the new SEC rule does not expand the scope of required disclosure, funds, fund investment advisers, and fund administrators should be aware of the new filing requirements under Rule 485(b), Rule 497, and the newly required disclosure on fund websites, as well as the related compliance implications.

5. This suspension, however, would not apply to a fund’s submission of an interactive data file to cure the non-compliance. Additionally, funds in noncompliance with the new rule as a result of Rule 497 filings may cure their noncompliance with an additional 497 filing.

6. 65 Fed. Reg. 24788, 24800 (Apr. 27, 2000).

7. See SEC Release, *supra* note 1, at 46.

8. Funds should also note that the newly adopted liability provisions under Rule 406T expire on October 31, 2014, at which time the SEC will subject interactive data filings to liability equal to official filings.

9. Lori Richards, *Speech by SEC Staff: The Role That Surveillance Might Play in the Risk-Based Oversight of Mutual Funds* (Dec. 16, 2008), available at <http://www.sec.gov/news/speech/2008/spch121608lar.htm>.

10. *Id.*

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