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Where does XBRL go from here? SEC Commissioner Jackson shares his vision on structured data

By *Dimensions* staff

The use of structured data, especially XBRL, is accelerating both in the capital markets and at the SEC. Public remarks from SEC commissioners and staff in recent years have clearly established the agency's ongoing push to modernize all areas of financial disclosure through structured data—well beyond the SEC's internal operations.

THE USE OF STRUCTURED DATA, especially XBRL, is accelerating both in the capital markets and at the SEC. Public remarks from SEC commissioners and staff in recent years have clearly established the agency's ongoing push to modernize all areas of financial disclosure through structured data—well beyond the SEC's internal operations.

In a 2016 speech, SEC Commissioner Kara Stein famously stated "It's time to revolutionize our disclosure paradigm" by making structured data the bedrock of all financial reporting. SEC Commissioner Michael Piwowar was a champion of Inline XBRL. He served on the Commission until July 2018, just after the final rule was adopted. In a March 2018 speech he extolled the value of XBRL to "enhance the reusability, quality, and timeliness of information processing for producers and consumers of information, as well as regulators." Not long after, William Hinman, the director of the SEC's Division of Corporation Finance, testifying before the House Committee on Financial Services, outlined several SEC initiatives to deepen the role of XBRL in financial reporting.

Robert J. Jackson Jr., one of the three SEC commissioners appointed in 2018, recently added his voice in support of expanding the use of XBRL in disclosure and improving XBRL quality in SEC filings. He was the keynote speaker at *Investor Forum 2018: Powering Fintech,* a half-day conference organized by XBRL US and held on November 8, 2018. The event included a panel discussion on regulatory standard-setting moderated by Mike Schlanger, Toppan Merrill VP of Solution Sales.

A market-guided vision for the future of XBRL and structured data in financial disclosure

Commissioner Jackson, who has taught at the NYU and Columbia law schools, brings special expertise in data science to the SEC. He was the founding director of the Columbia Law School Data Lab. Indeed, he began his talk by noting that he has "spent a great deal of time thinking about data science, data-extraction techniques, and the ways we can use them to make American corporations and the investment funds that own them more transparent."

To outline his vision for the future of structured data, he presented three specific paths for improving or expanding the role of XBRL data in financial disclosure: 1) fix the incomprehensible public data; 2) expand the use of XBRL; and 3) encourage data analysis, not extraction. Notably, his recurring theme was a collaborative approach in which the market guides the SEC on where to focus. As Toppan Merrill's Mike Schlanger noted following the event, Commissioner Jackson "threw his full support behind the SEC's structured data efforts to improve the accessibility of data critical for all stakeholders' investment decisions."

First fix the problem of financial data that is "public but incomprehensible"

The commissioner told the audience that "we're making a mistake as an investing public about what kinds of data we actually have." A conventional view would recognize two types of corporate financial data: private data—especially about privately owned companies—that must be purchased; and data from public SEC filings. He identifies a third type: data that is "public but completely incomprehensible." Much of the publicly available data in filings accessible on the SEC's website is essentially hidden, because mining it is "costly, time-consuming, and error-prone." With this understanding, one of his goals "for the SEC and for all of you in the XBRL community is that we are going to eliminate that third kind of data."

Many investors are unaware of how much good financial data is publicly available

In the commissioner's experience, this inadvertent obscuring of valuable data in plain sight means many investors are unaware of how much good financial data about companies and investment advisory firms is publicly available. He gave an intriguing example. At Columbia Law School, he oversaw the development of a website called the Corporate Reporting and Ownership (CROWN) Database. It applied a series of algorithms to extract data intensively and efficiently from SEC filings—for example, detailed information from the Form ADV filings of any investment advisory firm in the United States.

BY FAR, THE MOST COMMON RESPONSE he received to the website's findings was: "Wow, this is valuable data. Where did you get it?" The answer, of course, is almost ludicrously simple and obvious: public resources at the SEC's website.

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By far, the most common response he received to the website's findings was: "Wow, this is valuable data. Where did you get it?" The answer, of course, is almost ludicrously simple and obvious: public resources at the SEC's website.

This obfuscation of data in SEC filings has spawned inequality between those who are able to mine the data and those who are not. The barrier to obtaining the more obscure information in SEC filings is the prohibitive cost of doing so. "In other words," Commissioner Jackson suggests, "we impose a tax on the investing public in the form of costs to take those data and make them comprehensible, digestible, [and] usable by an investor." Because not all investors are able to pay that cost, some are "excluded from the fundamental facts of the companies they own and the investment advisors to which they trust their retirements, their educations, their futures." The commissioner wants the SEC and filers to work together to diminish that body of public but inaccessible information.

Second, expand XBRL to corporate-governance disclosure

Another element of the commissioner's vision is the expansion of XBRL use in disclosure. Although the SEC began its XBRL requirement in key number-driven areas of financial statements, the commissioner believes the time has come to widen the scope of XBRL. In particular, he hopes to apply XBRL to corporate-governance disclosures, such as those in the proxy statement.

Reporting corporate governance disclosures in XBRL is valuable because of the growing movement among investors to hold management and boards accountable. Investors today want "a good look at executive compensation, who's on the board, why they were appointed, how they were appointed to the board, who's on the committees, what their expertise is, what their board attendance is, how much oversight management really has." None of that information is yet tagged in XBRL, but Commissioner Jackson believes it all should be.

"I think another way to explain to the investing public that this is an important project is to tell them that not only can we make it easier for investors to value companies, we can make it easier to hold management accountable by making the data on these basic facts available to them." There is "an entire phase of this revolution that will dig into corporate-governance-relevant data that we haven't even begun to explore."

By making XBRL data easily mined by all, the business incentive for data vendors shifts from extraction to analysis

Third, encourage the business of data analysis, not data extraction

Returning to his initial theme of making corporations' public financial data more accessible, Commissioner Jackson observed that some XBRL-tagged data in SEC filings is hard to extract. He theorizes that the SEC has inadvertently created a business model which consists of "simply extracting information from our publicly available data sources and making it available" to investors who already have access to that data.

In making XBRL data easily mined by all investors, the SEC will shift the business incentive for data vendors from extraction to analysis. "That's where the rubber meets the road in our financial markets—in actually understanding what a balance sheet means, not in extracting the numbers on the page. If this project is successful, in 5, 10, 15, 20 years, it will be a lot less profitable to extract the data and a lot more profitable to analyze them—to understand them, to explain them to the investing public."

XBRL for earnings releases

After his prepared remarks, the commissioner answered audience questions. One asked whether the SEC would require XBRL disclosure for earnings releases. That, he replied, is a complicated issue, requiring both finesse and compromise. All SEC filers think that their company's earnings releases have unique attributes which cannot easily be standardized in XBRL. Yet investors see great value in having data in standard structured format. He noted:

> We have always had a principles-based approach to the securities laws. We resist—intuitively—standardization. However, a principles-based approach is not free. It comes with a cost. And the cost is that it's hard to make [data] XBRL-able, because we will not standardize it, and therefore it's hard to give people access to it. I would very much be in favor of providing some standardization in that space so that we could have easier extraction of earnings-based information.

Note that the SEC has issued a request for comments on the disclosure of earnings releases, including the use of XBRL.

Where else in the proxy can XBRL be used?

Another question concerned data in proxy statements. The summary compensation table is already in an HTML format, which would lend itself readily to being tagged in XBRL. Where else in the proxy could XBRL be used? Commissioner Jackson suggested applying XBRL to other areas of the proxy where some standard structure already exists. "The proxy card itself," he gave as an example, "lists the name, identity, age, and biography of [nominated] directors in fairly standardized terms—easily extractable and made XBRL-able. For those who are worried about things like board turnover, independence of directors, etc., that would be very valuable information."

In the view of Toppan Merrill's Mike Schlanger, Commissioner Jackson's reply was "a strong endorsement of structured data, specifically for the proxy." Given this and other recent signals from the SEC about expanding XBRL into parts of the proxy statement, filers should be prepared for new rules on that front in the future.

SEC enforcement of XBRL quality

What about using SEC enforcement actions to improve XBRL quality? Commissioner Jackson thought that enforcement could make a big difference, yet noted that while this "may be a path we have to travel, … if that's where this ends up, it's bad news." Preferring a more collaborative approach, he wants the motivation for producing high-quality XBRL to be not punishment but rather the benefits of accurate XBRL tagging for telling a company's financial story. It

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would be far better, he suggested, to "convince people to do the right thing before we bring an enforcement action. I would like us to be able to reach out to the people who are not producing the kind of data they need to, and persuade them that they should."

Editor's Note: A video recording of Commissioner Jackson's talk is available at the YouTube channel of XBRL US.

SIGNIFICANTLY, COMMISSIONER JACKSON ANSWERED A QUESTION about the prospect of applying SEC enforcement to the improvement of XBRL quality. Poor XBRL tagging is a major barrier to the use of financial data by investors. He explained that while he feels SEC enforcement of XBRL quality could make a big difference, "if that's where this ends up, it's bad news."

When to revise an already-mailed proxy statement

Abstracted from: *Avoiding "Proxy Panic": Tips For Dealing With Post-Mailing Surprises*
The Corporate Counsel
Vol. 43, No. 4, Pgs. 1-7

Between a rock and a hard place. Few things distress a public company that has mailed a proxy statement more than finding the statement requires correction. Omissions of or mistakes in mandatory line-item disclosures are common, and numerous other errors can occur. Post-mailing events might also impel the company to add, remove, or modify proposals; to update the disclosure; or to do both. These include business developments and shareholders' or proxy advisors' objections to proposals. Certainly, *The Corporate Counsel* reminds, there are various post-mailing events that do not ordinarily call for corrections or updates. For example:

+ The resignation of a board nominee, if the company has disclosed that its proxies may vote for replacement nominees
+ The withdrawal of shareholders' proposals
+ The withdrawal of management's proposals, unless this affects the disclosure concerning other management proposals

Mine the new data for materiality To avoid liability under SEC Rule 14a-9, the company must revise the proxy statement when an error or a post-mailing event is material. The Supreme Court defined "material" in *TSC Industries v. Northway* (1976) as substantially likely to be seen by a reasonable shareholder as important to a voting decision. A new proposal or a change to an existing one is material; so too is new information on executives' or directors' pay or on governance procedures. Even immaterial new information should prompt a revision, *The Corporate Counsel* advises, if doing that would improve business or investor relations. The revision can be an amendment or a supplement to the proxy statement. Only a material error requires an amendment; an immaterial

error or new information may go into a supplement, which can be in any form the company thinks appropriate (except an 8-K, 10-Q, or 10-K). Both entail a Schedule 14A filing and may include voting instructions, board recommendations on voting, and a new proxy card.

Apply a standard not set in stone. Under SEC Rule 14a-6 and Note 1 to 14a-6(a), a company planning to mail shareholders an amendment or supplement that represents a “fundamental change” to the proxy statement must first file it with the SEC and then wait ten days. The SEC staff has given scant guidance on this standard, which does not always apply. A company whose original proxy statement contained only routine matters (e.g., electing directors and ratifying auditors) would not have been subject to the general Rule 14a-6 preliminary-filing requirement. If, however, that company adds a non-routine proposal, the requirement does apply, even if the company decides the new proposal does not represent a fundamental change. Next comes the question of mailing to shareholders. A company ought to mail an amendment or supplement having a material change and must, of course, mail one having a new proposal. Even if an amendment or supplement requires new proxy cards, most companies will count votes cast on the original cards, unless a fundamental change in a proposal makes doing so unreasonable.

Pick postponement, adjournment, or recess. A company that materially changes a proxy statement might give shareholders more time for deliberation by postponing the meeting or convening and then adjourning it. No rules govern the length of either option, but five to ten business days is common. Postponement could—but adjournment ordinarily would not—require changing the record date. That change would, in turn, require discarding proxy cards already received and soliciting new ones from the shareholders on the new record date. A company might therefore prefer the ease of adjournment, although who has the power to adjourn is not always clear. Ideally the bylaws will empower the directors or the shareholders; state statutes rarely do. (The board ordinarily has the power to postpone.) A recess is a creative but legally untested third choice; ignoring bylaws or statutes, the meeting chair assumes the inherent power to declare a recess lasting up to several days.

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Cybersecurity risk: SEC priorities and filer disclosure patterns

By *Dimensions* staff

You think it could never happen to your company—until it does. In 2018, the SEC announced a startling discovery: nine publicly traded companies in the United States were duped by a simple e-mail scam and lost a total of almost $100 million, most of which was not recoverable. Pretending to be company executives issuing instructions or vendors requesting payments, cyberfraudsters tricked corporate employees into sending millions of dollars to the perpetrators' bank accounts. According to the SEC's investigative report (SEC Release No. 84429), some of the scams persisted for months. The fraud in several cases was detected only when the real vendors complained about nonpayment or when law enforcement intervened. Each of the nine companies lost at least $1 million; two lost more than $30 million.

The SEC cited these incidents as part of a warning to companies that cybersecurity must be a key part of their internal accounting controls. The SEC's advice was echoed by commentaries from numerous law firms, including Gibson Dunn & Crutcher.

The SEC has made cybersecurity a top priority

With that horror story fresh in everyone's mind, SEC Chair Jay Clayton mentioned cybersecurity as a hot topic during a speech in December 2018. Referencing the SEC's 2018 statement and guidance on cybersecurity issues, he indicated that the SEC continues to look for robust cybersecurity-related procedures and disclosures in its examinations of SEC filers—for instance, in risk governance, access controls, prevention of data loss, and vendor management and training.

Meanwhile, the SEC's Cyber Unit is rooting out Internet-based fraud and other forms of online misconduct in the market. Disturbing incidents it has investigated include "intrusions into retail brokerage accounts, the submission of false regulatory filings, and hacking to obtain material non-public information." Commissioner Clayton added that the SEC's Office of Investor Education and Advocacy is also busily informing investors about "cybersecurity hygiene and red flags of cyber fraud" to help them identify companies where the risk of cyber problems may affect the stock price.

As SEC Commissioner Robert Jackson has stated succinctly: It is essential for companies to "build the internal reporting structure that will help boards and management better anticipate, assess, and, where necessary, disclose the next significant cyber attack."

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What companies are disclosing

The SEC's investigative report on the nine victims of the e-mail scams did not name the companies or recommend enforcement actions. To discover how companies in such circumstances disclose their cybersecurity problems, research firm Audit Analytics tried to find similar cases by applying a dataset it maintains on cyberbreaches. (See *SEC Registrants with Poor Cyber Controls.*) Audit Analytics located nine companies that had disclosed similar breaches. Six had revealed the events in their SEC filings, although only one did so on its Form 8 K. Of those six, three stated that the breaches had stemmed from a material weakness in their internal controls.

More broadly, accounting firm Ernst & Young surveyed cybersecurity-related disclosures in the proxy statements and Form 10-K filings of Fortune 100 companies. (See *Cybersecurity Disclosure Benchmarking*.) All of the surveyed companies disclosed cybersecurity as a risk factor. At most of them, cybersecurity risk is now supervised by the board. Other findings in the Ernst & Young survey include:

+ Cybersecurity experience is among the crucial qualifications for directors on the board at 41% of the companies.
+ The majority (84%) designate a board member to oversee cybersecurity issues.
+ In their disclosures, 41% discuss how management reports to the board on cyber issues.
+ Most of the surveyed companies (71%) specifically disclose ways in which they address cybersecurity risks, such as specialized hiring, the development of cybersecurity processes and systems, and employee training.

Nevertheless, only 14% of the surveyed companies describe cybersecurity in their proxy statement as a "strategic focus" and a mere 6% indicate that it features in "shareholder engagement conversations."

Commissioner Jackson gave an insightful, wide-ranging speech on the topic in March 2018, titled *Corporate Governance: On the Front Lines of America's Cyber War.* He and his staff compiled data on cyberdisclosure related to breaches in 2017 filings and found something surprising: "[O]f 82 cybersecurity incidents at public companies in 2017, only four companies chose to file an 8-K disclosing the breach to their investors. In other words, in 2017, companies that suffered data breaches chose not to file an 8-K more than 97% of the time."

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info@toppanmerrill.com
800.688.4400