

SEC Adopts Amendments to Financial Disclosure Requirements for Business Acquisitions and Dispositions

By Peter N. Cunningham, Daniel A. Lerner

On May 21, 2020, the SEC **adopted** amendments to the financial disclosure requirements for business acquisitions and dispositions by reporting companies and IPO candidates. The amendments take effect on January 1, 2021, but the SEC is permitting voluntary compliance prior to the effective date.

This advisory focuses on the amendments that are of general application, affecting most public companies and IPO candidates. It includes a description of how those rules apply to smaller reporting companies.

The SEC's amendments include:^[1]

- updates to the investment and income portions of the test used to determine the significance of an acquired business to a registrant (which the SEC expects *"to reflect more accurately the relative significance to a registrant of [an acquired business] and to reduce anomalous results in the application of the definition of 'significant subsidiary'"*);
- reducing or eliminating in certain cases the financial statements that must currently be provided for an acquired business and allowing additional flexibility in presentation where such financial statements are required;
- replacing the existing pro forma financial adjustment requirements with (i) "Transaction Accounting Adjustments" reflecting the application of required accounting for the transaction, (ii) "Autonomous Entity Adjustments" reflecting the financial position and operations of the registrant as an autonomous entity if the registrant was previously part of another entity and (iii) optional "Management's Adjustments" reflecting reasonably estimable synergies and other transaction effects (which the SEC expects will *"improve the content and relevance of [pro forma] information"*);
- eliminating exceptions to the general rule that separate acquired business financial statements are no longer required in registration statements and proxy statements once the business has been included in the registrant's post-acquisition financial statements for a complete fiscal year; and
- conforming changes to requirements for smaller reporting companies.

The SEC also adopted amendments specific to reporting for real estate operations, investment companies, oil and gas producing entities, and foreign private issuers and foreign businesses. Those rules are not addressed in this advisory.

The following tables compare the SEC's amended rules to the current requirements, summarizing the changes generally applicable to public companies and IPO candidates:

- **Significance Tests:**
 - **Updated Investment Test and Income Test**
- **Historical Financial Statement Requirements:**
 - **Reduced Requirements at Certain Significance Thresholds**
 - **Use of Pro Forma Financial Information to Measure Significance in More Cases**
 - **Abbreviated Presentation for Certain Acquired Assets Constituting a Business**
- **Pro Forma Financial Statement Requirements:**
 - **Significance Threshold for Dispositions Increased to Match Acquisition Threshold**

// PUBLISHED

June 25, 2020

// VIEWPOINT TOPICS

Securities & Capital Markets
Mergers & Acquisitions

// PROFESSIONALS

Peter N. Cunningham
Daniel A. Lerner

- Adjustments Presented
- **Registration Statement and Proxy Statement Requirements:**
 - Expanded Ability to Omit Historical Financial Statements for Acquired Businesses Previously Included in Registrant’s Financial Statements
 - Exception When Aggregate Effect of Individually Insignificant Acquisitions Exceeds 50%: Expanded Aggregate Pro Forma Requirement and Elimination of Separate Financial Statements for Businesses Not Above 20% Significance
- **Smaller Reporting Company Requirements:**
 - Smaller Reporting Company Form and Content for Financial Statements

* * *

Significance Tests:

Updated Investment Test and Income Test [2]

Overview:

Rule 3-05 of Regulation S-X requires a registrant that acquires a business to provide separate audited pre-acquisition financial statements of the acquired business if it is “significant” to the registrant. The registrant uses the investment, income and asset tests from the definition of “significant subsidiary” in Rule 1-02(w) of Regulation S-X to determine a percentage of significance to the registrant for the acquired business under each test. If any test exceeds 20%, the acquired business is “significant” for purposes of Rule 3-05. The percentage of significance of the highest test result is then measured against thresholds in Rule 3-05 to determine the periods for which separate audited pre-acquisition financial statements of the acquired business must be provided.

Current

Amended

Investment test:

- Compare the registrant’s investment in and advances to the acquired business to the carrying value of the registrant’s total assets.

Investment test:

- Compare the registrant’s investment in and advances to the acquired business to the aggregate worldwide market value of the registrant’s voting and non-voting common equity (“aggregate worldwide market value”), when available. This amended version of the investment test applies only to acquisitions and dispositions.
- If the registrant does not have an aggregate worldwide market value, the existing test is used for acquisitions and dispositions. The existing test is also retained when the Rule 1-02(w) definition is used for purposes other than acquisitions and dispositions.
- Aggregate worldwide market value of the registrant’s voting and non-voting common equity is determined using the average value calculated daily for the last five trading days of the registrant’s most recently completed month prior to the earlier of the announcement or agreement date of the acquisition or disposition.
- The amendments also make other adjustments and clarifications to the investment test, including to provide that the registrant’s investment in the acquired business must

	include: the fair value of contingent consideration if required to be recognized at fair value by the registrant at the acquisition date under U.S. GAAP[3] or IFRS-IASB[4]; or, if recognition at fair value is not required, all contingent consideration except that for which the likelihood of payment is remote.
<p>Income test:</p> <ul style="list-style-type: none"> Compare the acquired business' net income to the registrant's net income. When calculating average net income, which is used when a registrant's income for the most recent year is at least 10% lower than the average for the last five years, zero is used for loss years under current SEC staff interpretation. 	<p>Income test:</p> <ul style="list-style-type: none"> Add a new revenue component. The revenue component does not apply if either the registrant or the acquired business did not have material revenue in each of the two most recently completed fiscal years. Where the revenue component applies, both the revenue component and the net income component must be tested and met for the acquired business to be significant under the income test. If the threshold is met for both components, the registrant then uses the lower of the revenue component and the net income component to determine the period for which financial statements must be provided under Rule 3-05. The net income test was changed to use the absolute value of income or loss when calculating net income (and when calculating average net income when applicable). In addition, if an acquired business consists of assets meeting the conditions in new Rule 3-05(e) (which allows abbreviated financial statements in certain cases), the income test is determined using the revenues of the acquired business less the expenses permitted to be omitted by the new rule. (See table entitled "<i>Historical Financial Statement Requirements: Abbreviated Presentation for Certain Acquired Assets Constituting a Business</i>" below regarding the new rule.)
<p>Asset test:</p> <ul style="list-style-type: none"> Compare the total assets of the acquired business to the total assets of the registrant as of the end of the most recently completed fiscal year. 	<p>Asset test:</p> <ul style="list-style-type: none"> No change. The final amendments provide that intercompany transactions with the acquired business must now be eliminated from the registrant's total assets when calculating the asset test in an acquisition context.

// Table of Contents

Historical Financial Statement Requirements:
Reduced Requirements at Certain Significance Thresholds [5]

**Significance Test Results for
Acquired Business**

Current

Amended

<ul style="list-style-type: none"> No test exceeds 20% 	<ul style="list-style-type: none"> None required. 	<ul style="list-style-type: none"> No change. None required.
<ul style="list-style-type: none"> Any test exceeds 20%, but no test exceeds 40% 	<ul style="list-style-type: none"> Most recent year audited, plus unaudited for any subsequent interim period and the comparative interim period. 	<ul style="list-style-type: none"> Most recent year audited, plus unaudited for any subsequent interim period, but <u>change</u> to eliminate requirement for comparative interim period (as no corresponding comparative annual period is being presented).
<ul style="list-style-type: none"> Any test exceeds 40%, but no test exceeds 50% 	<ul style="list-style-type: none"> Two most recent years audited, plus unaudited for any subsequent interim period and the comparative interim period. 	<ul style="list-style-type: none"> No change. Two most recent years audited, plus unaudited for any subsequent interim period and the comparative interim period.
<ul style="list-style-type: none"> Any test exceeds 50% 	<ul style="list-style-type: none"> Three most recent years audited, plus unaudited for any subsequent interim period and the comparative interim period. 	<ul style="list-style-type: none"> <u>Change</u> to two most recent years audited, plus unaudited for any subsequent interim period and the comparative interim period.

// Table of Contents

Historical Financial Statement Requirements:

Use of Pro Forma Financial Information to Measure Significance in More Cases [6]

<u>Current</u>	<u>Amended</u>
<ul style="list-style-type: none"> Registrants are generally required to make determinations of significance under Rule 3-05 by comparing the most recent annual financial statements of the acquired business to the registrant's most recent annual consolidated financial statements filed at or prior to the date of acquisition. However, if the registrant has made a significant acquisition subsequent to its latest fiscal year-end and filed a Form 8-K with the audited financial statements of the acquired business for the periods required by Rule 3-05 and the pro forma financial information required by Article 11 of Regulation S-X, the registrant is permitted to determine significance (for another business acquired later) by using pro forma amounts for the latest fiscal year in the Form 8-K rather than by using the historical amounts of the registrant. SEC Proposed Rule Release Commentary on Current Rules: 	<ul style="list-style-type: none"> Allow registrants to use pro forma financial information in significance testing in more cases. For all filings that require financial statements pursuant to Rule 3-05, the SEC amended the rule "to permit registrants to measure significance using filed pro forma financial information that only depicts significant business acquisitions and dispositions consummated after the latest fiscal year-end for which the registrant's financial statements are required to be filed, subject to the following conditions: <ul style="list-style-type: none"> The registrant has filed [financial statements pursuant to Rule 3-05] for any such acquired business; and The registrant has filed the pro forma financial information required by Article 11 for any such acquired or disposed business." Registrants are not permitted to include any applicable Autonomous Entity Adjustments, the optional "Management's Adjustments" or the effects of any "other transactions, such as

- “There is no analogous provision in Rule 3-05 for registrants to use pro forma financial information depicting significant dispositions or for registrants filing initial registration statements.”
- “In considering whether, pursuant to Rule 3-13 and delegated authority, to permit omission or substitution of acquired business financial statements in initial registration statements of registrants growing through acquisition, [SEC] staff has considered the results of significance tests using pro forma financial information.”

the use of proceeds from an offering” when using pro forma financial information to determine significance. The pro forma financial information “must be limited to the applicable amounts that combine the historical financial information of the registrant and the acquired business and Transaction Accounting Adjustments.” (See **table** entitled *Pro Forma Financial Statement Requirements: Adjustments Presented* below regarding rules for “Management’s Adjustments” and “Transaction Accounting Adjustments” in pro forma financial statements.)

- The SEC also codified current guidance to require registrants to use pro forma financial information consistently to measure significance until their next Form 10-K once they elect to do so.

// Table of Contents

Historical Financial Statement Requirements:

Abbreviated Presentation for Certain Acquired Assets Constituting a Business [7]

Current

- When a registrant acquires assets that constitute a “business” for the purposes of the financial statement requirements of Rule 3-05, but the acquired assets did not constitute a separate entity, subsidiary, or division for the seller of the assets, the acquired business may lack the separate financial statements or accounts needed to prepare the financial statements as required by Rule 3-05. The SEC Release notes that “[i]n these circumstances, making relevant allocations of the selling entity’s corporate overhead, interest, and income tax expenses necessary to provide [the required financial statements for the business] may be impracticable.”
- Under current rules, registrants acquiring such a business need to seek relief from SEC staff on a case-by-case basis pursuant to Rule 3-13.

Amended

- Registrants may now provide abbreviated audited annual and unaudited interim financial statements for qualifying acquired assets that constitute a business, as the SEC staff has previously permitted on a case-by-case basis pursuant to Rule 3-13. The SEC revised its proposed rules in response to comments and provided a chart for comparison. The following replicates the portion of the SEC’s chart reflecting the final rules for such abbreviated financial statements:
- **Qualifying Conditions:**
 - “The total assets and total revenues (both after intercompany eliminations) of the acquired or to be acquired business constitute 20 percent or less of such corresponding amounts of [the consolidated seller] as of and for the most recently completed fiscal year.
 - The acquired business was not a separate entity, subsidiary, operating segment (as defined in U.S. GAAP or IFRS-IASB, as applicable), or division during the periods for which the acquired business financial statements would be required.
 - Separate financial statements for the business have not previously been prepared.
 - The seller has not maintained the distinct and separate accounts necessary to present financial statements that include the omitted expenses and it is impracticable to prepare such financial statements.”

• **Presentation Requirements:**

- “The balance sheet may be a statement of assets acquired and liabilities assumed.
- The statement of comprehensive income may be a statement of revenues and expenses (exclusive of corporate overhead, interest and income tax expenses) if certain presentation requirements are met. The title of the statement of comprehensive income must be appropriately modified to indicate it omits certain expenses.
- The statement of comprehensive income must include expenses incurred by or on behalf of the acquired business during the pre-acquisition financial statement periods to be presented including, but not limited to, costs of sales or services, selling, distribution, marketing, general and administrative, depreciation and amortization, and research and development, but may otherwise omit corporate overhead expenses.
- Interest expense may be excluded from the statements if the debt to which the interest expense relates will not be assumed by [the registrant].
- Income tax expense may be omitted.
- The notes to the financial statements include the following additional disclosures:
 - (i) The type of omitted expenses and the reason(s) why they are excluded from the financial statements;
 - (ii) An explanation of the impracticability of preparing financial statements that include the omitted expenses;
 - (iii) A description of how the financial statements presented are not indicative of the financial condition or results of operations of the acquired business going forward because of the omitted expenses; and
 - (iv) Information about the business’s operating, investing, and financing cash flows, to the extent available.”

// Table of Contents

Pro Forma Financial Statement Requirements:

Significance Threshold for Dispositions Increased to Match Acquisition Threshold [8]

<u>Current</u>	<u>Amended</u>
<ul style="list-style-type: none"> • Whenever a registrant is required to provide separate audited pre-acquisition financial 	<ul style="list-style-type: none"> • Pro forma financial statements for dispositions are required if the business exceeds 20%

statements of an **acquired** business because it is significant to the registrant under Rule 3-05 of Regulation S-X (at least one test exceeds 20% significance), the registrant will also be required under Article 11 of Regulation S-X to file unaudited pro forma financial information reflecting the acquired business.

- Registrants are currently required under Article 11 to file unaudited pro forma financial information reflecting the **disposition** of a business if the business exceeds 10% significance in any test.

significance in any test, conforming to the threshold for acquisitions.

// Table of Contents

Pro Forma Financial Statement Requirements: Adjustments Presented [9]	
<u>Current</u>	<u>Amended</u>
<ul style="list-style-type: none"> • Income Statement: <ul style="list-style-type: none"> ◦ Current Rule 11-02 “provides that the only adjustments that are appropriate in the presentation of the pro forma condensed statement of comprehensive income are those that are: <ul style="list-style-type: none"> ▪ Directly attributable to the transaction; ▪ Expected to have a continuing impact on the registrant; and ▪ Factually supportable.” • Balance Sheet: <ul style="list-style-type: none"> ◦ As described in the SEC Release, under current Rule 11-02, “[t]he pro forma condensed balance sheet, on the other hand, reflects pro forma adjustments that are directly attributable to the transaction and factually supportable, regardless of whether the impact is expected to be continuing or nonrecurring because the objective of the pro forma balance sheet is to reflect the impact of the transaction on the financial position of the registrant as of the balance sheet date.” • SEC Release Commentary on Current Rules: <ul style="list-style-type: none"> ◦ “[We] proposed these changes because the existing pro forma adjustment criteria are not clearly defined, can yield inconsistent presentations for similar fact patterns, and preclude the inclusion of adjustments for the potential effects of post-acquisition actions expected to be taken by management.” 	<ul style="list-style-type: none"> • The new rules provide for three categories of pro forma adjustments: <ul style="list-style-type: none"> ◦ Transaction Accounting Adjustments (<i>required</i>); ◦ Autonomous Entity Adjustments (<i>required if applicable</i>); and ◦ Management’s Adjustments (<i>optional</i>). • Transaction Accounting Adjustments: <ul style="list-style-type: none"> ◦ Pro forma condensed balance sheet with the accounting for the transaction required by U.S. GAAP or IFRS-IASB; and ◦ Pro forma condensed income statements with the effects of the pro forma balance sheet adjustments, assuming that the adjustments were made as of the beginning of the fiscal year presented. • Autonomous Entity Adjustments: <ul style="list-style-type: none"> ◦ If the registrant was previously part of another entity (such as an IPO candidate that has been operating as a subsidiary of another entity and files a Securities Act[10] registration statement for its IPO), pro forma adjustments necessary to reflect the operations and financial position of the registrant as an autonomous entity must be presented. • Management’s Adjustments (Optional): <ul style="list-style-type: none"> ◦ Subject to conditions as to the basis and form of presentation, “Management’s Adjustments depicting synergies and dis-synergies of the acquisitions and dispositions for which pro forma financial information is being given may, in the registrant’s discretion, be presented if in its management’s opinion, such adjustments would enhance an understanding of the pro forma effects of the transaction.”

- **Format of Presentation:**

- Two columns, one reflecting the Transaction Accounting Adjustments and the other reflecting the Autonomous Entity Adjustments (if required), accompanied by applicable explanatory notes (as detailed below).
- The optional Management's Adjustments are presented in explanatory notes to the pro forma financial information (as detailed below).

- **Requirements for Explanatory Notes for Transaction Accounting Adjustments and Autonomous Entity Adjustments** (as detailed in SEC Release):

- “[Disclose] revenues, expenses, gains and losses, and related tax effects that will not recur in the income of the registrant beyond 12 months after the transaction.”
- For *Transaction Accounting Adjustments*:
 - “Total consideration transferred or received, including its components and how they were measured. If total consideration includes contingent consideration, the amendments will require disclosure of the contingent consideration arrangement(s), the basis for determining the amount of payment(s) or receipt(s), and an estimate of the range of outcomes (undiscounted) or, if a range cannot be estimated, that fact and the reasons why; and
 - When the initial accounting is incomplete: a prominent statement to this effect, the items for which the accounting depicted is incomplete, a description of the information that the registrant requires, including, uncertainties affecting the pro forma financial information and the possible consequences of their resolution, an indication of when the accounting is expected to be finalized, and other available information regarding the magnitude of any potential adjustments.”
- For *Autonomous Entity Adjustments*: “[A] description of the adjustment (including the material uncertainties), the material assumptions, the calculation of the adjustment, and qualitative information about the Autonomous Entity Adjustments necessary to give a fair and balanced presentation of the pro forma financial information.”

- **Requirements for Optional Management's Adjustments If Presented** (as detailed in SEC Release):

- “There is a reasonable basis for each such adjustment;
- The adjustments are limited to the effect of such synergies and dis-synergies on the historical financial statements that form the basis for the pro forma statement of comprehensive income as if the synergies and dis-synergies existed as of the beginning of the fiscal year presented. If such

adjustments reduce expenses, the reduction shall not exceed the amount of the related expense historically incurred during the pro forma period presented; and

- The pro forma financial information reflects all Management's Adjustments that are, in the opinion of management, necessary to a fair statement of the pro forma financial information presented and a statement to that effect is disclosed. When synergies are presented, any related dis-synergies shall also be presented."
- **Additional requirements as to form:**
 - "If presented, Management's Adjustments must be presented in the explanatory notes to the pro forma financial information in the form of reconciliations of pro forma net income from continuing operations attributable to the controlling interest and the related pro forma earnings per share data to such amounts after giving effect to Management's Adjustments.
 - If Management's Adjustments will change the number of shares or potential common shares, the change must be reflected within Management's Adjustments in accordance with U.S. GAAP or IFRS-IASB, as applicable, as if the common stock or potential common stock were outstanding as of the beginning of the period presented.
 - The explanatory notes must also include disclosure of the basis for and material limitations of each Management's Adjustment, including any material assumptions or uncertainties of such adjustment, an explanation of the method of the calculation of the adjustment, if material, and the estimated time frame for achieving the synergies and dis-synergies of such adjustment."
- **Requirement to update:** "If presented, Management's Adjustments included or incorporated by reference into a registration statement, proxy statement, offering statement or Form 8-K should be as of the most recent practicable date prior to the effective date, mail date, qualified date, or filing date as applicable, which may require that they be updated if previously provided in a Form 8-K that is appropriately incorporated by reference."

// Table of Contents

Registration Statement and Proxy Statement Requirements:

Expanded Ability to Omit Historical Financial Statements for Acquired Businesses Previously Included in Registrant's Financial Statements [11]

<u>Current</u>	<u>Amended</u>
<ul style="list-style-type: none"> • Rule 3-05(b)(4)(iii) permits a registrant to omit Rule 3-05 financial statements of an acquired business from registration statements and proxy statements once the operating results of an acquired business have been reflected in the audited consolidated financial statements of the registrant for a complete fiscal year, but exceptions currently apply when such financial statements have not been previously filed or when they have been previously filed but the acquired business is of major significance to the registrant: <ul style="list-style-type: none"> ◦ Not Previously Filed: This exception primarily affects companies filing for IPOs (or otherwise filing their initial registration statements under the Securities Act or the Exchange Act [12]), because any company with existing Exchange Act reporting obligations would already have been required to file such financial statements on Form 8-K within approximately 75 days after acquisition of a significant business. Companies filing initial registration statements have not previously filed financial statements and as a result of the current exception must determine significance for businesses acquired during any year for which they are otherwise required to provide their historical financial statements and file pre-acquisition financial statements for any significant acquired business, even if that acquired business has been reflected in the registrant's post-acquisition financial statements. ◦ Of Major Significance: Even if financial statements of an acquired business have been previously filed under Rule 3-05, current rules require registrants to keep filing those financial statements if the acquired business is of such significance to the registrant that omission of those financial statements would materially impair an investor's ability to understand the historical financial results of the registrant. Current Rule 3-05(b)(4)(iii) specifies that an acquired business that was significant at an 80% level at the date of the acquisition under any of the significance tests would trigger the requirement that the registrant continue to file financial statements for the acquired business "for such periods prior to the purchase as may be necessary when added to the time for which audited income statements after the purchase are filed to cover the equivalent of the period specified in Rule 3-02." 	<ul style="list-style-type: none"> • Once an acquired business has been reflected in a registrant's filed post-acquisition financial statements for the requisite period of time set forth below, a registrant will no longer have to provide Rule 3-05 financial statements for the business in registration statements and proxy statements, even when such financial statements have not been previously filed or when they have been previously filed but the acquired business is of major significance. • The amended rules permit omission of Rule 3-05 financial statements in registration statements and proxy statements if the acquired business has been included in the registrant's filed post-acquisition financial statements for at least: <ul style="list-style-type: none"> ◦ Nine months, for acquired businesses that exceed 20% significance but do not exceed 40% significance; or ◦ A complete fiscal year, for acquired businesses that exceed 40% significance.

Registration Statement and Proxy Statement Requirements:

Exception When Aggregate Effect of Individually Insignificant Acquisitions Exceeds 50%: Expanded Aggregate Pro Forma Requirement and Elimination of Separate Financial Statements for Businesses Not Above 20% Significance [13]

Current

Amended

- **General Rule:** Audited historical pre-acquisition financial statements are generally not required in a registration statement or proxy statement (other than financial statements for a business to be acquired that is the subject of a proxy statement or registration statement on Form S-4 or Form F-4) under current rules if an acquired or to be acquired business:
 - does not exceed 20% significance, or
 - does not exceed 50% significance and either the acquisition has not yet occurred or the date of the final prospectus or prospectus supplement relating to an offering as filed with the SEC is no more than 74 days after consummation and the financial statements have not been previously filed.
- **Exception:** If the aggregate significance of individually insignificant businesses acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%:
 - **Audited pre-acquisition historical financial statements** covering at least the substantial majority of the businesses acquired must be included; and
 - **Pro forma financial information** covering the aggregate effect of those individually insignificant businesses for which separate financial statements are presented under the aggregate significance rule must be presented (with the pro forma therefore covering at least a majority by significance), but such pro forma financial information is not required to cover the aggregate effect of all of the individually insignificant acquisitions taken together.

- Once the aggregate significance of individually insignificant businesses acquired since the date of the most recent audited balance sheet filed for the registrant exceeds 50%, registrants are required to provide:
 - **Pro forma financial information** depicting the aggregate effect in all material respects of all businesses acquired or to be acquired (changed to 100% rather than at least 50% as currently required) since the date of the most recent audited balance sheet filed for the registrant, for which financial statements are either (i) not required because their individual significance does not exceed 20% or (ii) not yet required because their individual significance does not exceed 50% and the acquisition has not yet occurred or the date of the final prospectus or prospectus supplement is no more than 74 days after consummation and the financial statements have not been previously filed; and
 - **Audited pre-acquisition historical financial statements** only for those businesses with individual significance exceeding 20% that are not yet otherwise required to file financial statements (changed from the current requirement to provide audited historical pre-acquisition financial statements covering at least the substantial majority of the businesses acquired, even if none exceed 20% in individual significance).
- The SEC Release notes that the new rule could accelerate the current required timing to file historical financial statements for acquired businesses with individual significance exceeding 20% in registration statements and proxy statements in certain cases where the aggregate significance of acquisitions exceeds 50%.

// Table of Contents

Smaller Reporting Company Requirements:

Smaller Reporting Company Form and Content for Financial Statements [14]

Current

Amended

- Smaller reporting company disclosure requirements for the **financial statements of businesses acquired** or to be acquired are contained in Rule 8-04 of Regulation S-X. They are analogous to the requirements in Rule 3-05, with four substantive differences as identified in the SEC Proposed Rule Release:
 - “Rule 8-04 permits acquired business financial statements to be prepared in accordance with the form and content required by Article 8, rather than the form and content specified elsewhere in Regulation S-X;
 - Rule 8-04 only requires up to two years of acquired business historical financial statements;
 - Rule 8-04 does not explicitly permit the omission of previously filed financial statements once the operating results of the acquired business have been included in the audited consolidated financial statements of the registrant for a complete fiscal year; and
 - [T]he ability to exclude from a registration statement separate financial statements of the acquired or to be acquired business in certain circumstances is based on the effective date of the registration statement rather than the date of the relevant final prospectus or prospectus supplement.”
- Smaller reporting company **pro forma financial information** requirements for business acquisitions are contained in Rule 8-05 of Regulation S-X. Rule 8-05 has less guidance than analogous provisions of Article 11. As described in the SEC Proposed Rule Release:
 - “Note 2 of the Preliminary Notes to Article 8 provides that, to the extent that Article 11-01 offers enhanced guidelines for the preparation, presentation, and disclosure of pro forma financial information, smaller reporting companies may wish to consider these items.”
 - “Based on [an SEC] staff analysis of 2017 disclosures of acquisitions and dispositions by smaller reporting companies, we believe that most already comply with the conditions in existing Rule 11-01.”

- **Audited Pre-Acquisition Historical Financial Statements** (as detailed in SEC Release):
 - “We are revising Rule 8-04 to reference to Rule 3-05 for the requirements relating to the financial statements of businesses acquired or to be acquired, other than for form and content requirements for such financial statements, which would continue to be prepared in accordance with Rules 8-02 and 8-03. These revisions should ease compliance burdens and clarify the application of our rules for smaller reporting companies [...] by focusing them on the more complete and better understood provisions of Rule 3-05.”
 - “As revised, Rule 8-04 continues to require up to two years of acquired business historical financial statements.”
 - The revised rule “expressly permit[s] smaller reporting companies [...] to omit historical acquired business financial statements if the acquired business has been included in the registrant’s results for either nine months or a complete fiscal year, depending on significance.” (See [table](#) entitled “*Registration Statement and Proxy Statement Requirements: Expanded Ability to Omit Historical Financial Statements for Acquired Businesses Previously Included in Registrant’s Financial Statements*” above regarding the new rule.)
 - “[A] smaller reporting company is eligible to exclude acquired business financial statements from a registration statement if the business acquisition was consummated no more than 74 days prior to the date of the relevant final prospectus or prospectus supplement, rather than 74 days prior to the effective date of the registration statement as under current Rule 8-04(c)(4). We believe it is appropriate to consistently look to the date of the final prospectus or prospectus supplement, as Rule 3-05 currently does, because that date could be later than the effective date, particularly in the case of a delayed offering, which some smaller reporting companies are now permitted to conduct.”
- **Pro Forma Financial Information** (as detailed in SEC Release):
 - “We are adopting the amendments to Rule 8-05 as proposed to require that the preparation, presentation, and disclosure of pro forma financial information by smaller reporting companies substantially comply with Article 11. [...] These revisions should ease compliance burdens and clarify the application of our rules for smaller reporting companies [...] by focusing them on the more complete and better understood provisions of Article 11.”
 - “We are also amending Rule 8-05 as proposed to require presentation of pro forma financial information when the conditions in Rule 11-01 exist. Because Rule 8-05 currently requires pro forma financial

information only for business acquisitions, when Rule 8-05 applies, conforming its conditions to Rule 11-01 will [now] require smaller reporting companies [...] to provide pro forma financial information for significant acquisitions and dispositions [and in certain other circumstances].”

// Table of Contents

* * *

Mintz attorneys are available to help you address any questions you may have regarding these rule changes. Please contact any member of the [Mintz Securities & Capital Markets Practice](#), the Mintz lawyer with whom you usually work, or the authors.

Endnotes

1 Securities and Exchange Commission **Final Rule**, Release No. 33-10786, Amendments to Financial Disclosures About Acquired and Disposed Businesses, May 21, 2020 (the “*SEC Release*”). The SEC’s amendments include updates to the significance tests in Rule 1-02(w) of Regulation S-X, the historical financial statement requirements for businesses acquired or to be acquired in Rule 3-05 of Regulation S-X, the pro forma financial statement requirements in Article 11 of Regulation S-X and conforming changes to Article 8 of Regulation S-X applicable to smaller reporting companies, as well as revisions to related rules and forms. The amendments were initially proposed by the SEC on May 3, 2019: Securities and Exchange Commission **Proposed Rule**, Release No. 33-10635, Amendments to Financial Disclosures About Acquired and Disposed Businesses, May 3, 2019 (the “*SEC Proposed Rule Release*”).

2 SEC Release, 13-14, 19, 21-22, 24-25, 28, 31-32; Reg. S-X, Rule 1-02(w)(2).

3 U.S. Generally Accepted Accounting Principles (“*U.S. GAAP*”).

4 International Financial Reporting Standards issued by International Accounting Standards Board (“*IFRS-IASB*”).

5 SEC Release, 36-38 and Note 92; Reg. S-X, Rule 3-05(b)(2)(i)-(iv).

6 SEC Release, 72-75 and Note 195; SEC Proposed Rule Release, 52-53; Reg. S-X, Rule 3-05(b)(3).

7 SEC Release, 38-39, 42-44 and Note 94; Reg. S-X, Rules 3-05(a)(2) and 11-01(d).

8 SEC Release, 7-8, 118.

9 SEC Release, 102-103, 107-109, 111-113, 115-117 and Note 286; Reg. S-X, Rules 11-01(a)(7) and 11-02(b)(6).

10 Securities Act of 1933, as amended (the “*Securities Act*”).

11 SEC Release, 51, 66, 69-70 and Note 132; SEC Proposed Rule Release, 49; Reg. S-X, Rule 3-05(b)(4)(iii).

12 Securities and Exchange Act of 1934, as amended (the “*Exchange Act*”).

13 SEC Release, 9, 75-76, 79-80 and Notes 20, 203, 214; Reg. S-X, Rules 3-05(b)(2)(i) and 3-05(b)(4)(i).

14 SEC Release, 63-66, 122-123; SEC Proposed Rule Release, 44-45, 89-92.

Authors



Peter N. Cunningham

Associate

Peter N. Cunningham focuses his practice primarily on securities and capital markets matters. He has represented public and private companies in equity and debt financings, corporate and securities law matters, and mergers and acquisitions.



Daniel A. Lerner

Associate

Daniel A. Lerner is a Mintz attorney who focuses his practice on corporate and securities law. He works with public and private companies on a variety of corporate matters.