



# Financial Statement Requirements in US Securities Offerings

What Non-US Issuers Need to Know

*2024 Edition*

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# Financial Statement Requirements In US Securities Offerings: What Non-US Issuers Need to Know

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# Financial Statement Requirements In US Securities Offerings: What Non-US Issuers Need to Know

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## Introduction

The most frequently asked question at all-hands meetings for a securities offering is “What financial statements will be needed?” The question seems simple enough. But the answer is rarely straightforward.

This User’s Guide is designed to provide a roadmap to help navigate the financial statement requirements of the US federal securities laws. We focus principally on the requirements for new registration statements in public offerings by “foreign private issuers” (a term that covers most non-US issuers other than foreign governments), including initial public offerings by emerging growth companies (EGCs) under the JOBS Act.<sup>1</sup> We also summarize briefly the practices in the Rule 144A market.<sup>2</sup>

To make the discussion below easier to follow, we have provided examples using actual dates. These dates are based on a company with a December 31 fiscal year end.

## Background

### What Is a “Foreign Private Issuer”?

A “foreign private issuer” means any issuer (other than a foreign government) incorporated or organized under the laws of a jurisdiction outside of the United States unless:<sup>3</sup>

- more than 50% of its outstanding voting securities are directly or indirectly owned of record by US residents; *and*
- any of the following applies:
  - the majority of its executive officers or directors are US citizens or residents;
  - more than 50% of its assets are located in the United States; or
  - its business is administered principally in the United States.

### Some Key Ways in Which Foreign Private Issuers Are Treated Differently Than Domestic US Issuers

Under the US federal securities laws and the rules and practice of the US Securities and Exchange Commission (the SEC), foreign private issuers are not regulated in precisely the same way as domestic US issuers.<sup>4</sup> In particular, foreign private issuers are allowed a number of key benefits not available to domestic US issuers. These include the following.

#### Ability to Use US GAAP, IFRS, or Local GAAP

US domestic companies must file financial statements with the SEC in accordance with US Generally Accepted Accounting Principles (US GAAP).<sup>5</sup> The financial statements of foreign private issuers, however, may be prepared using US GAAP, International Financial Reporting Standards (IFRS), or home-country generally accepted accounting principles (local GAAP).<sup>6</sup> In the case of foreign private issuers that use the English-language version of IFRS as issued by the International Accounting Standards Board (IASB IFRS), no reconciliation to US GAAP is needed.<sup>7</sup> By contrast, if local GAAP or non-IASB IFRS is used, a note to the consolidated financial statements (both annual and required interim statements in a prospectus) must include a reconciliation to US GAAP.<sup>8</sup>

## Quarterly Reporting Not Required; Current Reporting on Form 8-K Not Required

Unlike domestic US issuers, foreign private issuers are not required to file quarterly reports (including quarterly financial information) on Form 10-Q.<sup>9</sup> They are also not required to use Form 8-K for current reports, and instead furnish (not file) current reports on Form 6-K with the SEC.<sup>10</sup> Some foreign private issuers, however, choose (or are required by contract) to file the same forms with the SEC that domestic US issuers use. In that case, they must comply with the requirements of the forms for domestic issuers (and would file quarterly reports on Form 10-Q and current reports on Form 8-K, in addition to annual reports on Form 10-K).<sup>11</sup>

## Financial Information Goes “Stale” More Slowly

The SEC’s rules also allow a foreign private issuer’s registration statement to contain financial information that is of an earlier date than that allowed for domestic US issuers. In particular, foreign private issuers can omit interim unaudited financial statements if a registration statement becomes effective within nine months after the end of the last audited fiscal year (unless the issuer has already published more current interim financial information).<sup>12</sup> After that time, a foreign private issuer must provide interim unaudited financial statements (which may be unaudited) covering at least the first six months of the fiscal year, together with comparative financial statements for the same period in the prior year.<sup>13</sup>

## The Basics

### Background to Financial Statement Requirements

Public securities offerings registered with the SEC under the US Securities Act of 1933 (the Securities Act) require the filing of a registration statement with the SEC and the distribution of a prospectus in connection with the offering. The registration statement and prospectus must contain certain financial statements and other financial information regarding the issuer’s financial condition and results of operations. The financial statement requirements for registration statements of foreign private issuers are found in Items 8, 17, and 18 of Form 20-F, and in Regulation S-X (S-X).

### What Financial Statements Must Be Included in Public Offerings?

The following tables summarize the scope of the basic financial statement requirements for all registered offerings.<sup>14</sup> Note that much of the basic information can be incorporated by reference for issuers eligible to use Form F-3<sup>15</sup> and for certain issuers filing a registration statement on Form F-1.<sup>16</sup> Issuers who are eligible for incorporation by reference will want to consult their underwriters before electing to incorporate all required financial information by reference. For marketing purposes, it is often desirable to include the financial information directly in the printed offering document.

## The Basic Requirements for Public Offerings

### Annual Audited Financial Statements

- Consolidated annual audited financial statements of the issuer consisting of:<sup>17</sup>
  - balance sheet;
  - statement of comprehensive income (or a statement of net income if there was no other comprehensive income);
  - statement of changes in equity;
  - statement of cash flows;
  - related notes and schedules required by the system of accounting under which the financial statements were prepared; and
  - if not included in the primary financial statements, a note analyzing the changes in each caption of shareholders' equity presented in the balance sheet.
- Audited financial statements included in a registration statement (or annual report) must be prepared in accordance with:
  - US GAAP;
  - IASB IFRS; or
  - local GAAP/non-IASB IFRS reconciled to US GAAP, as described below.<sup>18</sup>
- Audited financial statements must cover each of the latest three fiscal years,<sup>19</sup> with certain exceptions:
  - if the issuer has been in existence less than the required three years, financial information covering the issuer's predecessor entities (if any) may need to be provided;<sup>20</sup>
  - if a jurisdiction outside the United States does not require a balance sheet for the earliest year of the three-year period, that balance sheet may be omitted;<sup>21</sup>
  - in an initial registration statement, if the financial statements are presented in accordance with US GAAP (rather than reconciled to US GAAP), the earliest of the three years of financial statements may be omitted if that information has not previously been included in a filing made under the Securities Act or the US Securities Exchange Act of 1934 (the Exchange Act).<sup>22</sup> This accommodation does not apply to financial statements presented in accordance with IASB IFRS unless the issuer is applying IASB IFRS for the first time;<sup>23</sup> and
  - in an EGC IPO registration statement, as discussed below.
- Under certain circumstances, audited financial statements may cover nine to 12 months rather than a full fiscal year for one of the required years.<sup>24</sup>
- Audited financial statements must be accompanied by an audit report covering each of the audited periods.<sup>25</sup>
- Audited financial statements for an issuer must be accompanied by an audit report issued by independent public accountants. The accountants must be registered with the Public Company Accounting Oversight Board (the PCAOB) under standards promulgated by the PCAOB<sup>26</sup> and meet SEC and PCAOB standards for independence.<sup>27</sup> The SEC Staff will not object if the audit report states that the audit was also conducted in accordance with home-country applicable professional standards.<sup>28</sup>



## The Basic Requirements for Public Offerings

### Interim Unaudited Financial Statements

- If a registration statement becomes effective more than nine months after the end of the last audited fiscal year, the issuer must provide consolidated interim financial statements.<sup>29</sup>
- Those financial statements:
  - may be unaudited but must be prepared in accordance with US GAAP or IASB IFRS,<sup>30</sup> or local GAAP/non-IASB IFRS if reconciled to US GAAP;<sup>31</sup>
  - must cover at least the first six months of the fiscal year;
  - should include a balance sheet, statement of comprehensive income, statement of cash flows, statement of changes in equity, and selected note disclosures;
  - may be in condensed form, as long as they contain the major line items from the latest audited financial statements and include the major components of assets, liabilities, and equity (in the case of the balance sheet), income and expenses (in the case of the statement of comprehensive income), and the major subtotals of cash flows (in the case of the statement of cash flows); and
  - should include comparative interim statements for the same period in the prior fiscal year, except that the requirement for comparative balance sheet information may be met by presenting the year-end balance sheet.<sup>32</sup>

### EGC Offerings

- In order to qualify as an EGC, a company must have annual revenue for its most recently completed fiscal year of less than \$1.235 billion.<sup>33</sup>
- An EGC may conduct its initial public equity offering using two years, rather than three years, of audited financial statements.<sup>34</sup>
- After its IPO, an EGC phases into full compliance by adding one additional year of financial statements in each future year until it presents the traditional three years of audited financial statements.<sup>35</sup> The required MD&A would cover only the years for which audited financial statements are provided.<sup>36</sup>

### Acquired Business Financial Information and Pro Forma Financial Information

- Depending on the size of the acquisition and its significance to the issuer (which is measured in various ways – not all of them intuitive), audited financial statements for the most recent one or two fiscal years of the acquired business must be included, plus appropriate unaudited interim financial statements. These requirements are found in S-X Rule 3-05 and S-X Rule 3-14 (which applies to acquisitions of real estate operations). We discuss S-X Rule 3-05 and S-X Rule 3-14 in more detail below.
- Under S-X Article 11, when acquired business financial statements are included in a registration statement (and in certain other instances), pro forma financial information must also be included, covering the most recently completed fiscal year and the most recent interim period. We discuss S-X Article 11 in more detail below.

### Statement of Capitalization and Indebtedness

- A registration statement must include a statement of capitalization and indebtedness.<sup>37</sup> Although the rules require the capitalization table to be as of a date no earlier than 60 days prior to the date of the registration statement,<sup>38</sup> the SEC Staff will not object if a foreign private issuer presents the statement as of the same date as the most recent balance sheet required in the registration statement.<sup>39</sup> If, however, there have been or will be significant changes in capitalization (for example, securities issuances including the proposed IPO), those changes should be reflected in “as adjusted” columns or notes to the table.<sup>40</sup>

## What Financial Statements Must Be Included to Begin SEC Review?

Normally, a registration statement must include – as of the date of filing – all of the financial statements listed in the tables above. However, foreign private issuers that are EGCs and registering with the SEC for the first time may submit draft registration statements for *confidential* review, which is protected from disclosure under the Freedom of

Information Act (FOIA).<sup>41</sup> Foreign private issuers that are not EGCs may also submit draft registration statements for *nonpublic* review, which affords more limited protection from FOIA.<sup>42</sup>

During this review process, financial statements may become “stale” (i.e., are too old and must be updated, as described below). Consequently, a foreign private issuer that is an EGC may omit from its confidential submissions (and, though less common in practice, from its public filings) annual and interim financial data that it reasonably believes will not be required *at the time of the offering*.<sup>43</sup>

A foreign private issuer that is not an EGC may also omit from its nonpublic submissions the annual and interim financial data it reasonably believes will not be required *at the time the issuer files publicly*.<sup>44</sup>

In addition, an EGC or a non-EGC may omit from its confidential or nonpublic submissions the financial statements of an acquired business required by S-X Rule 3-05 or S-X Rule 3-14 that the issuer reasonably believes will not be required *at the time of the offering*.<sup>45</sup>

## When Does Financial Information Go “Stale”?

Understanding the timing requirements for the provision of financial statements is almost as critical as understanding the scope of the financial information required. The determination of when financial statements go stale is sure to come up at the all-hands meeting, and planning to have the necessary financial information prepared on time is an essential part of the offering process. Among other considerations, the SEC Staff has a policy against commencing review of a filing if the financial statements are stale on the filing date.<sup>46</sup>

The following tables summarize financial statement staleness requirements, measured by the number of days between the effective date of the registration statement (or, by analogy, the pricing date of a Rule 144A offering if the transaction is intended to mirror SEC requirements) and the date of the financial statements in the filing.<sup>47</sup> For any of the time frames noted below, if the last day before the financial statements go stale is a Saturday, Sunday, or US federal holiday, Securities Act Rule 417 allows the filing to be made on the next business day, thereby effectively postponing the staleness date.

### Staleness of Financial Statements

#### Staleness of Annual Audited Financial Statements

- The last year of audited financial statements cannot be more than 15 months old at the time of the offering or listing, subject to the two exceptions listed below.<sup>48</sup> This means that an issuer with a December 31 fiscal year end must have its registration statement “go effective” before **March 31**, or else annual audited financial statements for the year just ended must be included.
- In the case of a registration statement relating to an IPO, the audited financial statements must be as of a date not older than 12 months prior to the time the document is filed.<sup>49</sup> In other words, an IPO issuer with a **December 31** fiscal year end cannot file a registration statement after **January 1** without including audited financial statements for the year just ended (or audited financial statements as of an interim date less than 12 months prior to the filing). However, if the issuer is already public in another jurisdiction, the 12-month rule does not apply.<sup>50</sup> In addition, an issuer may comply with the 15-month rule in an IPO where it is able to represent that it is not required to comply with this requirement in any other jurisdiction outside the United States and that complying with the requirement is impracticable or would involve undue hardship.<sup>51</sup>
- In the case of a registration statement relating to an offering of securities (i) upon the exercise of outstanding rights granted *pro rata* to all existing security holders of the applicable class, (ii) pursuant to a dividend or interest reinvestment plan, or (iii) upon the conversion of outstanding convertible securities or upon the exercise of outstanding transferable warrants, the financial statements may be up to 18 months old at the time of the offering.<sup>52</sup> This means that an issuer with a **December 31** fiscal year end must have its registration statement for these types of transactions go effective before **June 30**, or else annual audited financial statements for the year just ended must be included.



## Staleness of Financial Statements

### Staleness of Interim Unaudited Financial Statements

- If a registration statement becomes effective more than nine months after the end of the last audited fiscal year (e.g., **September 30**, in the case of an issuer with a **December 31** fiscal year end) the issuer must provide unaudited interim financial statements either in accordance with, or reconciled to, US GAAP, or in accordance with IASB IFRS, in either case covering at least the first six months of the year.
- In addition, if an issuer publishes interim financial statements that are more current than those required, it must include the more current information in its registration statement.<sup>53</sup> For example, if an issuer with a fiscal year ending **December 31** publishes first quarter information and does a securities offering in July, it must include the first quarter information in its registration statement. Likewise, if an issuer had already included six months' information in connection with an offering in November and then published third quarter information, it must include the third quarter information.
- The more current interim financial information (the first quarter information in the example above) generally need not be reconciled to US GAAP. However, except for financial information prepared in accordance IASB IFRS, a narrative explanation of differences in accounting principles should be provided, and material new reconciling items should be quantified.<sup>54</sup>

## MD&A

Registration statements for foreign private issuers must contain or incorporate by reference an “Operating and Financial Review and Prospects,” which contains essentially the same information as the MD&A (so we will refer to this as the MD&A).<sup>55</sup>

The purpose of the MD&A is to provide investors with management’s explanation of factors that have materially affected the issuer’s historical financial condition and results of operations, and an assessment of known trends and uncertainties that management anticipates will have a material effect in the future. A well-written MD&A will allow investors to view the issuer from management’s perspective. It will identify and discuss the key metrics and any other statistical data that management uses to evaluate the business’ performance and financial health, or that management believes will enhance an investor’s understanding of its financial condition, cash flows, and results of operations. The analysis should cover all separate segments and other subdivisions, such as product lines and geographic regions of the issuer. A foreign private issuer should also refer to the reconciliation to US GAAP and discuss any aspects of US GAAP not covered in the reconciliation that it believes are necessary to understanding the financial statements as a whole.<sup>56</sup>

The MD&A line-item requirements cover the following topics:

**Operating results.** A discussion of significant factors materially affecting the issuers’ income from operations, including material changes in net sales or revenue and reason for the changes (such as new products or services, or changes in prices or amounts); foreign currency fluctuations: the impact of hyperinflation, if any, during the period; and governmental policies.<sup>57</sup>

**Liquidity and capital resources.** A comprehensive discussion of the issuer’s ability to generate and obtain adequate amounts of cash to meet its requirements and its plans for cash in both the next 12 months and a separate discussion of its long-term needs.<sup>58</sup>

**Research and development, patents, and licenses, etc.** A description of the issuer’s research and development policies for the last three years.<sup>59</sup>

**Trend information.** The issuer must identify known trends, uncertainties, demands, commitments, or events that are reasonably likely to have a material effect on its net sales or revenues, income from continuing operations, profitability, liquidity or capital resources, or that would cause reported financial information not necessarily to be indicative of future operating results or financial condition.<sup>60</sup>

**Critical accounting estimates.** Issuers that do not prepare financial statements in accordance with IFRS IASB must provide information about accounting estimates or assumptions that are uncertain and reasonably likely to have a material impact on financial condition or operating performance.<sup>61</sup> The discussion should include qualitative and quantitative information necessary to understand the estimation uncertainty and the impact the critical accounting estimate has had or is reasonably likely to have to the extent the information is material and reasonably available.<sup>62</sup>

In addition, MD&A sections often incorporate a comprehensive analysis of the issuer's future prospects, typically presented under a subheading such as "Outlook." Some issuers even provide specific guidance for upcoming quarters or the current/following fiscal year. Drafting the MD&A section requires close collaboration among the issuer's financial team, its accountants, and legal counsel and can be a time-consuming process.

The SEC has published several interpretive releases with guidance on preparing the MD&A, most recently in 2020, when it streamlined the rules and moved toward a more principles-based approach.<sup>63</sup>

## Using IFRS Without Reconciliation

A foreign private issuer may generally file financial statements prepared in accordance with IASB IFRS without reconciliation to US GAAP.<sup>64</sup> In order to take advantage of this:

- the accounting policy note must state compliance with IASB IFRS and the auditor's report must opine on compliance with IASB IFRS, although the issuer may state, and the auditor may opine on, compliance with both IASB IFRS and home-country standards (such as EU IFRS) if there is no difference;<sup>65</sup> and
- published interim financial information must also be prepared using IASB IFRS (and if the effective date of the registration statement or post-effective amendment is more than nine months after the end of the fiscal year, the issuer must explicitly state compliance with International Accounting Standard (IAS) 34).<sup>66</sup>

Note that reconciliation to IASB IFRS in lieu of full compliance with IASB IFRS is not permitted. In addition, foreign private issuers that voluntarily file on domestic US forms (such as Form 10-K) may file financial statements under IASB IFRS, but should prominently disclose that the company meets the foreign private issuer test and is voluntarily filing on domestic forms.<sup>67</sup>

## Reconciliation to US GAAP

### Annual Audited and Interim Unaudited Financial Statements

Annual audited and interim unaudited financial statements in a registration statement may be prepared using either US GAAP, IASB IFRS, or local GAAP.<sup>68</sup> If local GAAP or non-IASB IFRS is used in the preparation of the financial statements, the consolidated financial statements (both annual and interim) must include a reconciliation to US GAAP.<sup>69</sup>

Reconciliation comprises both disclosure of the material variations between local GAAP/non-IASB IFRS, on the one hand, and US GAAP, on the other hand, as well as a numerical quantification of those variations.<sup>70</sup> In the case of registered offerings, the reconciliation must meet Item 18 of Form 20-F (discussed in more detail below).

A foreign private issuer registering for the first time must reconcile only the two most recently completed fiscal years (and any interim period).<sup>71</sup>

Items that frequently require discussion and quantification as a result of the reconciliation requirements include stock compensation, restructuring charges, impairments, deferred or capitalized costs, investments, foreign currency translation, deferred taxes, pensions, derivatives, consolidation, asset retirement obligations, research and development, and revenue recognition.

## MD&A

A foreign private issuer's MD&A disclosure should focus on its primary financial statements, whether those statements are prepared in accordance with US GAAP, local GAAP, IASB IFRS, or non-IASB IFRS.<sup>72</sup> To the extent those statements are prepared under local GAAP or non-IASB IFRS, a discussion should be included of the reconciliation to US GAAP and any differences between local GAAP/non-IASB IFRS and US GAAP not otherwise discussed in the reconciliation and needed for an understanding of the financial statements as a whole.<sup>73</sup>

## Audit Reports

Audited financial statements must be accompanied by an audit report, covering each of the audited periods.<sup>74</sup> The SEC will generally not accept a disclaimer of an opinion or an audit report containing a qualification.<sup>75</sup>

Note that the audit report must state that the audit has been conducted in compliance with PCAOB standards, although the SEC Staff will not object if the audit report states that the audit was also conducted in accordance with home-country generally accepted auditing standards or International Standards on Auditing.<sup>76</sup> In addition, an accounting firm (US or non-US) that prepares or issues any audit report with respect to any issuer, or plays a substantial role in the preparation or furnishing of an audit report with respect to any issuer, must be registered with the PCAOB.<sup>77</sup>

The auditor's report must also address critical audit matters and information about the auditor's tenure in serving as the issuer's independent accounting firm and independence. Issuers that are EGCs are not subject to the critical audit matters requirement, but still must include auditor tenure information.<sup>78</sup>

The Holding Foreign Companies Accountable Act (HFCAA) requires the SEC, on an annual basis, to identify all registrants that have retained a registered public accounting firm to issue an audit report, where that firm has a branch or office located in a foreign jurisdiction that the PCAOB has determined it is unable to inspect or investigate completely because of a position taken by an authority in that jurisdiction (Commission-Identified Issuers (CII)).<sup>79</sup>

Once the SEC provisionally identifies registrants on its website,<sup>80</sup> a listed registrant has 15 business days to notify the SEC that it believes it has been incorrectly identified and to provide evidence supporting its claim. Thereafter, absent notification of a dispute by the registrant and a subsequent favorable determination by the SEC, the SEC will treat the registrant as conclusively identified, subjecting it to the HFCAA.<sup>81</sup>

In its next annual report following identification, a CII that is also a "foreign issuer"<sup>82</sup> must disclose:<sup>83</sup>

- the PCAOB-identified accounting firm that has prepared an audit report for the issuer during the period covered by the form;
- the percentage of the issuer's shares by governmental entities in the foreign jurisdiction in which the issuer is incorporated or otherwise organized;
- whether governmental entities in the applicable foreign jurisdiction have a controlling financial interest with respect to the issuer;
- the name of each official of the Chinese Communist Party (CCP) who is a member of the board of directors of the issuer (or its operating entity); and
- whether the articles of incorporation of the issuer (or equivalent organizing document) contains any charter of the CCP, including the text of any such charter.

After a CII has had two consecutive non-inspection years (i.e., filing financial statements audited by a PCAOB-identified accounting firm) the SEC will publish an order prohibiting the trading of its securities on a US stock exchange and the US over-the-counter market, with effect on the fourth business day after publication.

On December 15, 2022, the PCAOB issued a determination vacating its 2021 determinations that the positions taken by authorities in mainland China and Hong Kong prevented it from inspecting and investigating registered public accounting firms headquartered in those jurisdictions. As a result, the SEC announced that it would not provisionally or conclusively identify an issuer as a CII if it files an annual report with an audit report issued by a registered public

accounting firm headquartered in either jurisdiction on or after December 15, 2022, until such time as the PCAOB issues a new determination.

The SEC will continue to include any CII on the provisional or conclusive list if it filed an annual report with an audit report issued by a registered public accounting firm headquartered in mainland China and Hong Kong prior to the PCAOB's decision to vacate its 2021 determination. Additionally, each CII that is on the conclusive list must comply with the HFCAA's submission and disclosure requirements for the year that it is identified.<sup>84</sup>

## Currency Translation; Exchange Rates

Foreign private issuers may state amounts in their financial statements in any currency they deem appropriate (the reporting currency),<sup>85</sup> although (except for companies operating in a hyperinflationary environment) operations should generally be measured using the currency of the primary economic environment to measure transactions.<sup>86</sup> The reporting currency must be prominently disclosed on the face of the financial statements.<sup>87</sup> The issuer must also disclose if dividends will be paid in a different currency as well as any material exchange restrictions or controls relating to the reporting currency, the currency of the issuer's domicile, or the currency in which dividends will be paid.<sup>88</sup>

If the reporting currency is not the US dollar, US dollar-equivalent financial statements or "convenience translations" are not permitted to be included, except that an issuer may present a translation of the most recent fiscal year and any subsequent interim period.<sup>89</sup> The exchange rate used for any convenience translations should be as of the most recent balance sheet date included in the registration statement, except where the exchange rate of the most recent practicable date would yield a materially different result.<sup>90</sup>

## Additional Financial Information for Certain Specific Situations

### Recent and Probable Acquisitions

In addition to financial statements of the issuer, registration statements generally require inclusion of audited financial statements for a significant acquisition of a "business" that has taken place 75 days or more before the offering.<sup>91</sup> In the case of an acquisition that exceeds 50% on any of the significance tests discussed below, the audited financial statements must be included in the registration statement as soon as the acquisition becomes "probable."<sup>92</sup> These requirements can be found in S-X Rule 3-05 and S-X Rule 3-14 (which applies only to acquisitions of real estate operations). In addition, where a material acquisition has occurred, or is probable, pro forma financial information complying with S-X Article 11 for the most recent fiscal year and the most recent interim period will generally also be required in the registration statement.

#### What Is a "Business"?

The SEC defines the term "business" to include an operating entity or business unit, but excludes machinery and other assets that do not generate a distinct profit or loss stream.<sup>93</sup> It is important to note that the definition of a business under US GAAP (and potentially other GAAPs) differs from the SEC's definition. Accordingly, an acquisition that is a business under US GAAP may not be one for SEC purposes, and vice versa.

#### What Is "Probable"?

Evaluating whether a given transaction is probable involves looking at the facts and circumstances. The SEC Staff has taken the general view that an acquisition becomes probable at least upon the signing of a letter of intent,<sup>94</sup> and has also stated that an acquisition is probable "where registrant's financial statements alone would not provide adequate financial information to make an investment decision."<sup>95</sup> In practice, unless there were significant conditions relating to a proposed acquisition, an issuer would not want to be in the position of arguing and disclosing that an important acquisition is not probable.

## Significance Tests

Whether financial statements for recent and probable acquisitions must be included in the filing also depends upon the “significance” of the acquisition. Significance of an acquired business is evaluated under S-X Rule 3-05 or S-X Rule 3-14 based upon three tests (which in turn are derived from S-X Rule 1-02(w)):

- **Investment Test** – the amount of the issuer’s investment in the acquired business (generally, the aggregate value of the acquisition) compared to:
  - the aggregate worldwide market value of the issuer’s voting and non-voting common equity, or
  - the issuer’s total assets if it does not have publicly traded equity securities.<sup>96</sup>
- **Asset Test** – the issuer’s share of the consolidated total assets of the acquired business compared to the issuer’s consolidated total assets, in each case after intercompany eliminations.<sup>97</sup>
- **Income Test** – includes two components, both of which must be tested where applicable:
  - *Net income component* – the issuer’s share of “pre-tax income”<sup>98</sup> from continuing operations of the acquired business compared to the issuer’s pre-tax income from continuing operations.<sup>99</sup>
  - *Revenue component* – where the issuer and the acquired business have material annual revenue for the last two fiscal years, the issuer’s (and its other subsidiaries’) share of the consolidated total revenues of the acquired business compared to the issuer’s consolidated total revenues for its most recent fiscal year, in each case after intercompany eliminations.<sup>100</sup>
  - *Note:* When testing significance, *both* components of the test must exceed the applicable threshold. When determining the number of periods for which financial statements must be presented, the issuer uses the *lower* of the two components.<sup>101</sup>

Each of these tests should compare the issuer’s and the acquired business’ most recent annual financial statements (which need only be audited for the issuer).<sup>102</sup> Worldwide market value should be determined using the average of the last five trading days of the month before the acquisition was agreed or announced (whichever is earlier).<sup>103</sup> In addition, any issuer – including an IPO issuer – may use pro forma financial information to measure significance for acquisitions consummated in the most recent fiscal year, so long as it has filed the required S-X Rule 3-05 financial statements and S-X Article 11 pro forma financial information for the acquired businesses.<sup>104</sup> (In the case of an IPO issuer, the relevant disclosure would be made in its IPO registration statement.) Once an issuer uses pro forma financial information to measure significance, it will need to continue to use pro forma financials until the next Form 20-F annual report.<sup>105</sup> This approach can be useful where the pro forma information produces a larger “denominator” for testing significance.

Acquisitions of related businesses are treated as a single acquisition for purposes of the significance tests. Businesses are considered “related” if they are owned by a common seller or under common management, or where the acquisition of one business is conditioned upon the acquisition of each other business or a single common event.<sup>106</sup>

Generally:

- If the acquired business exceeds 20% of any of the three significance tests, then one year of audited financial statements is required, as well as the most recently completed interim period that would be required under S-X Rules 3-01 and 3-02.<sup>107</sup>
- If the acquired business exceeds 40% of any of the three tests, then two years of audited financial statements and the appropriate interim periods are required.<sup>108</sup>

## Financial Statements Required in Connection With Acquisitions

The following table summarizes the general rules for an acquisition that occurred more than 75 days before the offering. The issuer must, when both the net income and revenue components of the Income Test are applicable, use the lower of the two to determine the number of periods required.<sup>109</sup>

Acquisition Scenario	Reporting Requirement
<b>Individual acquisition at or below the 20% significance level</b>	<ul style="list-style-type: none"> <li>No requirement to include audited or interim financial statements.</li> </ul>
<b>Individual acquisition (or multiple acquisitions of “related businesses,” as described above) in excess of the 20% significance level, but not above the 40% level</b>	<ul style="list-style-type: none"> <li>Audited financial statements for the most recent fiscal year of the acquired business must be included. Unaudited interim financial statements for the most recently completed interim period may need to be included, depending on the time of year that the offering takes place.</li> </ul>
<b>Individual acquisition (or multiple acquisitions of “related businesses,” as described above) in excess of the 40% significance level</b>	<ul style="list-style-type: none"> <li>Audited financial statements for the two most recent fiscal years of the acquired business must be included. Unaudited interim financial statements may need to be included, depending on the time of year that the offering takes place.</li> </ul>
<b>Multiple acquisitions of unrelated businesses aggregating more than 50% significance that are:</b> <ul style="list-style-type: none"> <li>less than 20% significance level</li> <li>greater than 20% and less than 50% significance level and: <ul style="list-style-type: none"> <li>have not yet been consummated or</li> <li>have been consummated but for which financial statements are not yet required because of the 75-day grace period<sup>110</sup></li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>Audited financial statements for the most recent fiscal year will be required for any acquired business that exceeds the 20% significance level and for the most recent two fiscal years for any business that exceeds the 40% significance level. The unaudited interim financial statements that are required for individual acquisitions may need to be included, depending on the time of year that the offering takes place.</li> </ul>

**Note that:**

- The permitted age of financial statements of an acquired or soon-to-be-acquired business is generally determined by looking to the “staleness” rules that apply to its financial statements (rather than the staleness rules applicable to the financial statements of the acquiring company).<sup>111</sup> In other words, you need to determine whether the acquired company is, for example, a large accelerated filer, an accelerated filer, or an initial filer, or foreign business or foreign private issuer, and then analyze the dates on which its financial statements go stale under the rules summarized above.<sup>112</sup>
- Below the 50% significance level, no audited financial statements are required in the offering document for probable acquisitions or for completed acquisitions consummated up to 74 days before the date of the offering.<sup>113</sup> The commitment committees of some financing sources may, however, require at least a one-year audit of the acquired company in this situation together with historical pro forma financial information, even if the 74-day grace period has not yet expired.
- When a “foreign business”<sup>114</sup> is acquired, the financial statements of the acquired business may be in accordance with US GAAP, IASB IFRS, or another local GAAP. No US GAAP reconciliation is required for the inclusion of financial statements of an acquired foreign business where that business uses IASB IFRS or when the acquired business is below the 30% level for all significance tests.<sup>115</sup> At or above 30%, if the acquired business qualifies as a foreign business, or does not qualify as a foreign business but would qualify as a foreign private issuer if it were a registrant, the financial statements may be prepared in IASB IFRS without reconciliation to US GAAP or in local GAAP reconciled to either IASB IFRS or US GAAP for the annual and interim periods required to be presented.<sup>116</sup> Any reconciliation need only meet the requirements of Item 17, not Item 18, of Form 20-F.<sup>117</sup>
- Except in very limited circumstances, if the acquired company is not already an SEC-reporting company, its financial statements need not be audited by a PCAOB-registered firm, and the audit report need not refer to PCAOB standards.<sup>118</sup> However, in those cases the audit must be conducted in accordance with US generally accepted auditing standards.
- The amounts used for these calculations must be determined on the basis of US GAAP (for issuers that file their financial statements in accordance with or provide a reconciliation to US GAAP) or IASB IFRS (for foreign private issuers that file their financial statements in accordance with IASB IFRS) rather than local GAAP or non-IASB IFRS.<sup>119</sup>



## Exceptions to the Financial Statement Requirements for Acquired Businesses

There are a number of exceptions to the requirement to provide separate financial statements of acquired businesses:

- Separate financial statements for an acquired business do not need to be presented once the operating results of the acquired business have been included in the issuer's audited consolidated financial statements for at least nine months for an acquired business that exceeds the 20% level of significance and one fiscal year for an acquired business that exceeds the 40% level.
- A single audited period of nine, 10, or 11 months may count as a year for an acquired business in certain circumstances.

### S-X Rule 3-14; Real Estate Operations

The acquisition or probable acquisition of real estate operations is subject to S-X Rule 3-14. "Real estate operations" means a business that generates substantially all of its revenues through the leasing of real property, such as a REIT.<sup>120</sup> In comparison, where real estate is merely incidental to the service provided by a business, as for example in the case of many hotels, the regular S-X Rule 3-05 requirements would apply.

S-X Rule 3-14(a) requires that audited financial statements be provided for the most recent fiscal year and most recently completed interim period for any acquisition or probable acquisition that would exceed 20% significance using the Investment Test, discussed above.<sup>121</sup> S-X Rule 3-14(c) also permits certain variations from the typical form of statement of comprehensive income, provided certain additional textual disclosure is made.<sup>122</sup> In a registration statement, issuers using S-X Rule 3-14 should also consider individually insignificant acquisitions (i.e., those amounting to less than a 20% significance level individually) if, as a group, they exceed the 20% significance level.

### MD&A for Acquisitions

Whenever historical financial statements of an acquired business (or probable acquisition) are included in the offering document, the issuer will need to consider whether a separate MD&A section discussing those financial statements is appropriate. Although there is no specific line item requiring that a second MD&A be included, it is not uncommon for issuers to interpret Securities Act Rule 408<sup>123</sup> to require a full discussion and analysis of the financial statements of an acquired business (or probable acquisition), particularly where it is necessary to make the required statements not misleading.

### Pro Forma Financial Information

As noted above, where a material acquisition has occurred or is probable that would trigger the need for acquired business financial statements under S-X Rule 3-05, pro forma financial information complying with S-X Article 11 must also be included. Pro forma financial information will also be required for multiple acquisitions that in the aggregate exceed the 50% level of significance of (i) individually insignificant businesses (i.e., below the 20% significance level), and (ii) acquisitions of individually significant businesses between the 20% and 50% significance level that have either not have been consummated or for which financial statements are not yet required due to the 75-day grace period.<sup>124</sup> Pro forma financial information is intended to illustrate the continuing impact of a transaction, by showing how the specific transaction might have affected historical financial statements had it occurred at the beginning of the issuer's most recently completed fiscal year or the earliest period presented.

In particular, S-X Article 11 requires:<sup>125</sup>

- a pro forma condensed balance sheet<sup>126</sup> as of the end of the most recent period for which a consolidated balance sheet of the issuer is required, unless the transaction is already reflected in that balance sheet;<sup>127</sup> and
- a pro forma condensed statement of comprehensive income<sup>128</sup> for the issuer's most recently completed fiscal year and the most recent interim period, unless the historical statement of comprehensive income reflects the transaction for the entire period.<sup>129</sup>

S-X Article 11 also requires pro forma financial information in a number of other situations, such as:

- certain dispositions at a greater than 20% significance level (measured under the tests summarized above) that are not fully reflected in the financial statements of the issuer included in the prospectus,<sup>130</sup>
- acquisition of certain investments accounted for under the equity method;<sup>131</sup> and
- other events or transactions for which disclosure of pro forma financial information would be material to investors.<sup>132</sup>

S-X Article 11 provides extensive specific requirements for the content of pro forma financial information, including those set out in the following table.<sup>133</sup>

#### Pro Forma Financial Information – Certain Key Content Requirements – S-X Rule 11-02

##### Required Adjustments

**Transaction Accounting Adjustments** – reflect the application of US GAAP or IASB IFRS to the transaction, linking the effects of the acquired business to the issuer’s audited historical financial statements and must include:

- Total consideration transferred or received, including its components and how they were measured.
- If any consideration is contingent, the basis for determining the amount(s) and an undiscounted estimate of the range of outcomes or an explanation of why a range cannot be estimated.
- If the initial accounting is incomplete, a prominent statement to that effect, and a description of the required information, including uncertainties affecting the pro forma financial information, an estimate of when the accounting will be finalized, and other information regarding the magnitude of the potential adjustments

**Autonomous Entity Adjustments** – reflect the operations and financial position of the acquiror (i.e., the issuer) as an autonomous entity when it was previously part of another entity and must include:

- A description of each adjustment and any material uncertainties, the calculation of the adjustment, and qualitative information about the adjustment necessary to give a fair and balanced presentation.

**Transaction Accounting and Autonomous Entity Adjustments** – must be included in the calculation of the historical and pro forma per share data presented on the face of the pro forma condensed statement of comprehensive income.

**Pro Forma Financial Information** – must include revenues, expenses, gains and losses, and related tax effects that will not recur in the income of the issuer beyond 12 months after the transaction.

**Optional Adjustments**

**Management’s Adjustments** – permit the issuer to include forward-looking information<sup>134</sup> that depicts the synergies and dis-synergies identified by management and provides insight to investors into the potential effects of the acquisition and management’s post-acquisition plans.

The following conditions must be met:

- There is a reasonable basis for each such adjustment;
- Adjustments that reduce expenses may not exceed the amount of the related expense historically incurred during the pro forma period presented;
- The pro forma financial information includes a statement that, in the opinion of management, it reflects all Management’s Adjustments necessary to a fair statement of the pro forma financial information presented; and
- When synergies are presented, any related dis-synergies must also be presented.
- Additional Form of Presentation requirements include:
  - The explanatory notes must 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 period for achieving the synergies and dis-synergies of such adjustment.
  - Management’s Adjustments must be presented in the explanatory notes 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 the adjustments.
  - Management’s Adjustments included (or incorporated by reference) should be as of the most recent practicable date prior to the applicable effective date, mail date, qualified date, or filing date.
  - 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 US GAAP or IASB IFRS, as applicable, as if the shares were outstanding as of the beginning of the period presented.

**Periods to Be Presented**

Pro forma condensed statements of comprehensive income should be presented using the issuer’s fiscal year end.<sup>135</sup> If the most recent fiscal year end of the acquired company differs from that of the issuer by more than 93 days, the acquired company’s fiscal year end should be brought up to within 93 days of the issuer’s fiscal year end (if practicable).<sup>136</sup>

Even if pro forma financial information for an acquired business is not required to be included in the prospectus, the underwriters may nevertheless request that pro forma financial information be included in the disclosure. This situation arises where the bankers want to show the higher “run rate” operating results of the combined companies for marketing reasons even though there is no specific requirement to do so.

**Guarantor Financial Statements**

A guarantee of a security (such as a guarantee of a debt or preferred equity security) is itself a security that must be registered under the Securities Act, absent an applicable exemption.<sup>137</sup> As a result, the general rule is that guarantors, as “issuers” of the guarantee, are required to present the same financial statements as the issuer of the guaranteed securities.<sup>138</sup> Fortunately, S-X Rules 3-10(a) and 13-01 provide an alternative disclosure regime (the Alternative Disclosures) that does not generally require extensive financial information about subsidiary issuers, subsidiary guarantors, and subsidiary non-guarantors. The Alternative Disclosures permit disclosure of summarized financial information about consolidated subsidiary issuers and guarantors, together with material non-financial disclosure

about the guarantee, the issuer, and the guarantors. The effort required to provide the Alternative Disclosures is less burdensome and expensive than producing the separate audited financial statements for every subsidiary issuer or guarantor that would otherwise be required.

### **Eligibility for Alternative Disclosures**

In order to substitute Alternative Disclosures for audited financial statements of individual subsidiary issuers or guarantors, the offering must meet the following conditions:<sup>139</sup>

- The issuer or guarantor must be a consolidated subsidiary of the parent company.
- The parent company must have filed consolidated financial statements and either is or will become an Exchange Act reporting company as a result of the offering.
- The guaranteed security must be debt or “debt-like.”<sup>140</sup>
- The parent company must either:
  - issue or co-issue the security jointly and severally with one or more of its consolidated subsidiaries or
  - fully and unconditionally guarantee the security which is issued by or co-issued with one or more of its consolidated subsidiaries.

### **Requirements for Alternative Disclosures**

The Alternative Disclosures will consist of, to the extent material, qualitative narrative disclosure and summarized financial information, along with an exhibit listing all subsidiary issuers and guarantors. Financial and non-financial disclosures must also include any additional information that would be material to an investor to evaluate the sufficiency of the guarantee and to make the financial information not misleading.<sup>141</sup> The Alternative Disclosures may be located in the MD&A or in the notes to the financial statements.<sup>142</sup> The obligation to provide Alternative Disclosures ends when the issuers and guarantors no longer have an Exchange Act reporting obligation with respect to the securities, even though the securities themselves remain outstanding.<sup>143</sup>

*Narrative Disclosures* should provide a description of:

- The issuers and guarantors (the Obligor Group).<sup>144</sup>
- The terms and conditions of the guarantees and how payments to holders may be affected by the composition of and relationships among the issuers, guarantors, and non-obligor subsidiaries.<sup>145</sup>
- Other factors that may affect payments to holders of the guaranteed securities, including restrictions on dividends, guarantee enforceability, or the rights of a non-controlling interest holder.<sup>146</sup>

*Summarized Financial Information* must be presented for the Obligor Group covering the parent company’s<sup>147</sup> most recently completed financial year and year-to-date interim period.<sup>148</sup> The summarized financial information may be presented on a combined basis after eliminating intercompany balances and transactions and excluding investments by obligors in non-obligors.<sup>149</sup> If any financial or non-financial disclosure does not apply to the combined Obligor Group, summarized financial information for the affected obligors should be presented separately.<sup>150</sup> Narrative disclosure may be substituted for separately presented summarized financial information where it can be easily explained and understood.<sup>151</sup>

The registration statement for the offering must include pre-acquisition summarized financial information for any “significant” business (and/or its subsidiaries) that has been acquired by the parent company since the last balance sheet date where that business or subsidiary will be a member of the Obligor Group.<sup>152</sup>

The parent company may omit summarized financial information if the parent determines such information would not be material to investors.<sup>153</sup> S-X Rule 13-01(a)(4) lists four non-exclusive examples that permit omission of the summarized financial information, if the conditions are met and the omission disclosed:

- The financial information of the combined Obligor Group is not materially different than the corresponding information in the parent company's consolidated financial statements.<sup>154</sup>
- The combined Obligor Group, excluding investments in subsidiaries that are non-obligors, has no material assets, liabilities, or results of operations.<sup>155</sup>
- The issuer is a finance subsidiary<sup>156</sup> of the parent company, the parent company has fully and unconditionally guaranteed the security, and no other subsidiary of the parent company guarantees the security.<sup>157</sup>
- The issuer is a finance subsidiary that co-issued the security, jointly and severally, with the parent company, and no other subsidiary of the parent company guarantees the security.<sup>158</sup>

*Subsidiary Obligor Exhibit* must be provided under S-K Item 601 listing each subsidiary member of the Obligor Group and its role as issuer or guarantor in relation to the securities.<sup>159</sup>

Note that the amounts used for these calculations must be determined on the basis of US GAAP or IASB IFRS rather than local GAAP/non-IASB IFRS.

## Secured Offerings

Where the securities of one or more of an issuer's affiliates have been pledged as collateral for securities being offered, S-X Rule 13-02 requires, to the extent material, substantially the same summarized financial information and non-financial disclosure for each affiliate as would be required under S-X Rule 13-01 for a subsidiary issuer or guarantor.<sup>160</sup> The affiliate disclosure is subject to the same requirement to include any financial and narrative information that would be material to investors to evaluate the pledge of securities and to make the financial and non-financial information not misleading.<sup>161</sup> This information may be located outside the financial statements<sup>162</sup> and is required only as long as the issuer maintains an Exchange Act reporting obligation with respect to the securities.<sup>163</sup>

## Investments Accounted for Under the Equity Method

S-X Rule 3-09 generally requires the inclusion of separate audited financial statements for significant investments that are accounted for under the equity method.<sup>164</sup> S-X Rule 3-09 applies whether the investee is held by an issuer, a subsidiary, or another investee.<sup>165</sup> Note that if the investee is not already an SEC-reporting company, its financial statements need not be audited by a PCAOB-registered firm, and the audit report need not refer to PCAOB standards (although in some circumstances, such as when the principal auditor of the issuer is making reference in its report to the investee auditor's report, the audit must be carried out in accordance with PCAOB standards).<sup>166</sup>

For investees, significance is evaluated under S-X Rule 1-02(w) based on the following two tests:<sup>167</sup>

- whether the amount of the issuer's (and its other subsidiaries') investment in and advances to the investee exceeds 20% of the total assets of the issuer and its subsidiaries on a consolidated basis as of the end of the most recently completed fiscal year (Test 1);<sup>168</sup> and
- whether both (where applicable) the equity of the issuer (and its other subsidiaries) in: (i) the pre-tax income from continuing operations and (ii) the consolidated total revenues from continuing operations (after intercompany eliminations) of the equity investee exceeds 20% of such income and revenue of the issuer and its subsidiaries on a consolidated basis for the most recently completed fiscal year (Test 2).<sup>169</sup> The revenue component of Test 2 applies only when both the issuer and its consolidated subsidiaries and the equity investee had material revenue in each of the two most recently completed fiscal years.

If either of the above tests is met, separate financial statements of the investee must be filed.<sup>170</sup> Insofar as practicable, those financial statements must be as of the same dates and for the same periods as the required audited annual financial statements of the issuer, but need only be audited for those fiscal years in which either Test 1 or Test 2 is met at or above the 20% level.<sup>171</sup> An EGC may include two years of investee financial statements in its initial registration statement, irrespective of whether it presents two or three years of its own financial statements.<sup>172</sup> Note that the amounts used for these calculations must be determined on the basis of US GAAP or IASB IFRS rather than local GAAP/non-IASB IFRS.<sup>173</sup>

US GAAP permits the use of the “fair value option” for certain investments that would otherwise be accounted for under the equity method. If an issuer elects the fair value option, Test 2 above is altered to compare the change in fair value of the investee (as reflected in the issuer’s financial statements) to the issuer’s consolidated pre-tax income for the most recently completed fiscal year.

For equity investees that meet any of the three S-X Rule 1-02(w) criteria at the greater than 10% but not more than the 20% significance level, S-X Rule 4-08(g) requires the presentation of summary financial information as described by S-X Rule 1-02(bb).<sup>174</sup>

Financial statements of equity investees that are presented under local GAAP or non-IASB IFRS to comply with S-X Rule 3-09 do not have to be reconciled to US GAAP unless either of the Test 1 or Test 2 criteria is greater than 30% (calculated on a US GAAP basis).<sup>175</sup> That reconciliation may be done under the less comprehensive requirements of Item 17 of Form 20-F rather than Item 18.<sup>176</sup> A description of the differences in accounting methods is required regardless of the significance levels.<sup>177</sup> Equity investees using IASB IFRS do not need to include a reconciliation.<sup>178</sup>

Summary financial information for a foreign business provided under S-X Rule 4-08(g) must be presented under the same GAAP used by the issuer. For example, a US company would report summarized information for a foreign investee under US GAAP no matter what basis of accounting is used by the foreign investee to prepare its own financial statements.<sup>179</sup>

## Segment Reporting

In addition to all the consolidated financial information required to be included in an offering document, companies that are engaged in more than one line of business or operate in more than one geographic area may also be required to include separate revenue and operating data for each of their business lines or geographic areas. This requirement is a function of whether the company’s business comprises more than one operating segment, as defined by US GAAP. S-K Item 303 requires certain financial reporting and textual disclosure in the MD&A for each relevant, reporting segment or other subdivision of the business if the discussion would be necessary to understanding the business.<sup>180</sup> FASB Accounting Standards Codification 280, “Segment Reporting” (ASC 280), provides detailed guidance for when a component of a larger enterprise constitutes an operating segment and how its discrete financial information must be reported. Note that the IFRS standard for segment reporting (IFRS 8, Operating Segments) has substantially the same requirements as ASC 280.

Generally, an operating segment is a component of a larger enterprise:

- that engages in business activities from which it may earn revenues and incur expenses (including revenues and expenses relating to transactions with other components of the same enterprise);
- whose operating results are regularly reviewed by the enterprise’s chief operating decision maker<sup>181</sup> to make decisions about resources to be allocated to the segment and assess its performance; and
- for which discrete financial information is available.

The aim of segment reporting is to align public financial reporting with a company’s internal reporting in order to permit financial analysts and the public to see the overall enterprise the same way management sees it. The most critical factor in determining whether an issuer has more than one operating segment is how management runs its business.<sup>182</sup> Whether an issuer can aggregate operating segments is highly fact-specific and depends on factors such as economic similarity, the similarity of the products or services sold, the nature of the production process, customer type, distribution methods, and the regulatory environment for the business. The determination is very subjective and is often the subject of much discussion with the company’s accountants and, through the SEC comment process, with the SEC Staff.

Once a segment has been identified, the issuer must provide information about the segment if it meets any of the following 10% thresholds:

- its reported revenue (including both sales to external customers and inter-segment sales) is 10% or more of the combined revenue (internal and external) of all reported operating segments;



- the absolute amount of its reported profit or loss is 10% or more of the greater, in absolute amount, of (i) the combined profit of all operating segments that did not report a loss or (ii) the combined loss of all operating segments that did report a loss; or
- its assets are 10% or more of the combined assets of all operating segments.<sup>183</sup>

Note that, for purposes of applying the 10% significance criteria, an issuer whose primary financial statements are prepared under local GAAP or non-IASB IFRS should use the basis of accounting used for internal management reporting in determining whether segments are reportable.

A company with more than one segment (or aggregated segments) in excess of any of these thresholds must disclose for each such segment the revenues from external customers, a measure of profit or loss,<sup>184</sup> and the total assets attributable to that segment, as well as a reconciliation to the corresponding consolidated amounts. Additional information on items such as equity investments and capital expenditures may be required under ASC 280 (or IFRS 8) if such amounts are reviewed by the chief operating decision maker of the company on a segment basis. For interim periods, disclosure must include a measure of profit or loss for each segment, reconciliations, and material changes to total assets. Financial disclosure for segments will typically be included in the financial statements and may be part of a discussion on operating segments in the MD&A if the company concludes such information is necessary to understand the business. The effect of these requirements is to force disclosure of profitability by segment, which many issuers are reluctant to do for competitive reasons.

The identification and reporting of financial information for operating segments will be critical in the offering process, as the time to prepare such information, the effect on textual disclosure, and the impact on enterprise valuation may all be significant. The need for segment reporting is always considered carefully when a company is issuing securities for the first time. However, the issue should be revisited whenever the company has entered into new business lines or if management has begun to analyze its business in a new way that may impact the original segment analysis. Because the guidance of ASC 280 (and IFRS 8) is complex and its application very fact-specific, it is important to begin an early dialogue with the independent auditors when there may be segment reporting issues.

## Supplemental Schedules for Certain Transactions

S-X Rule 5-04 requires a number of supplemental schedules for particular industries and circumstances.<sup>185</sup> Each schedule contains additional financial information that must be audited and provided, typically including:

- *Schedule I – Condensed Financial Information of Registrant (known as “parent-only” financial statements)*: requires the presentation of condensed non-consolidated balance sheets, statements of comprehensive income, and cash flows, as of the same dates and for the same periods as the audited consolidated financial statements. This requirement applies if the restricted net assets of subsidiaries exceed 25% of the issuer’s consolidated net assets as of the end of the most recently completed fiscal year. “Restricted net assets” refer to the issuer’s proportionate share of net assets of consolidated subsidiaries (after eliminating intercompany transactions) that, as of the end of the most recent fiscal year, may not be transferred to the parent company in the form of loans, advances, or cash dividends without obtaining consent from a third party. This third party may include lenders, regulatory agencies, foreign governments, or other relevant entities.<sup>186</sup>
- *Schedule II – Valuation and Qualifying Accounts*: requires an analysis of each valuation and qualifying account (e.g., allowance for doubtful accounts, allowance for obsolescence).
- *Schedule III – Real Estate and Accumulated Depreciation*: requires real estate operating and investment companies to disclose certain financial details regarding each of their properties.
- *Schedule IV – Mortgage Loans on Real Estate*: requires real estate operating and investment companies to disclose details of each mortgage loan that accounts for 3% or more of the carrying value of all of the issuer’s mortgages.
- *Schedule V – Supplemental Information Concerning Property-Casualty Insurance Operations*: requires disclosure as to liabilities on property-casualty insurance claims if the issuer, its subsidiaries, or 50%-or-less-owned, equity-basis investees have such liabilities. However, the schedule may be omitted if reserves for unpaid property-casualty

claims and claims adjustment expenses did not, in the aggregate, exceed 50% of common stockholders' equity of the issuer and its consolidated subsidiaries as of the beginning of the fiscal year.

Note that issuers in specific industries may have schedule requirements that vary from those listed above. In addition, an issuer may provide the schedule information separately or in the notes to the audited financial statements.

## Industry Guides

S-K Item 801 sets out three industry "guides" requiring enhanced disclosure of financial and operational metrics for issuers in certain industries:<sup>187</sup>

- *Guide 4 – Prospectuses Relating to Interests in Oil and Gas Programs*: requires enhanced disclosure relating to the offering terms and participation in costs and revenues among investors and others, as well as a 10-year financial summary of any drilling programs by the issuer and its associates, including recovery on investment for investors in those programs.
- *Guide 5 – Preparation of Registration Statements Relating to Interests in Real Estate Limited Partnerships*: requires a summary of the financial performance of any other real estate investment programs sponsored by the general partner and its affiliates.
- *Guide 6 – Disclosure Concerning Unpaid Claims and Claim Adjustment Expenses of Property-Casualty Insurance Underwriters*: requires disclosure of details of reserves and historical claim data if reserves for unpaid property-casualty claims and claim adjustment expenses of the issuer, its consolidated and unconsolidated subsidiaries, and equity investees exceed 50% of the common stockholders' equity of the issuer and its consolidated subsidiaries.

In recent years, the SEC has rescinded the following industry guides and moved the disclosure requirements into subparts of S-K.

- *S-K Item 1200 (formerly Guide 2)*: requires enhanced disclosure of oil and gas reserves (including from non-traditional sources), the company's progress in converting proved undeveloped reserves into proved developed reserves, technologies used in establishing reserves, the company's internal controls over reserves estimates, and disclosure based on geographic area (as defined). Required disclosure also includes information regarding proved undeveloped reserves; oil and gas production; drilling and other exploratory and development activities; present activities; delivery commitments; and oil and gas properties, wells, operations, and acreage. Disclosure of probable and possible reserves and oil and gas reserves' sensitivity to price is optional under S-K Item 1200.<sup>188</sup>
- *S-K Item 1300 (formerly Guide 7)*: requires disclosure of mineral resources and reserves that have been determined on the company's properties. The company must provide summary disclosure about its properties in the aggregate along with detailed disclosure about individually material properties, including location of the property, history of previous operations, and a description of the present condition of and operations on the property. The company must also disclose material exploration results and related exploration activity and exploration targets, if the disclosure is accompanied by specified cautionary and explanatory statements. The disclosure must be based on and accurately reflect information and supporting documentation prepared by a mining expert—or "qualified person,"<sup>189</sup> including a dated and signed technical report summary, which identifies and summarizes the information reviewed and conclusions reached about the mineral resources or mineral reserves determined to be on each material property. The technical report summary must be filed as an exhibit when disclosing mineral reserves or mineral resources for the first time or when there is a material change in the mineral reserves or mineral resources from the last technical report summary filed for the property.<sup>190</sup>
- *S-K Item 1400 (formerly Guide 3)* – requires disclosure by bank holding companies about the following for each annual period presented and any additional interim period if a material change in the information or trend evidenced thereby has occurred: distribution of assets, liabilities and stockholders' equity, the related interest income and expense, and interest rates and interest differential; weighted average yield of investments in debt securities by maturity; maturity analysis of the loan portfolio including the amounts that have predetermined interest rates and floating or adjustable interest rates; certain credit ratios and the factors that explain material changes in the ratios,

or the related components during the periods presented; the allowance for credit losses by loan category; and bank deposits including average amounts and rate paid and amounts that are uninsured.<sup>191</sup>

Compiling the information required by these industry guides and S-K Items may be a significant undertaking, and the issuer's financial and operating management should consult with its professional advisors early in the process if an industry guide applies to the offering.

## Quantitative and Qualitative Disclosure About Market Risk

Item 11 of Form 20-F sets out various specific requirements for quantitative and qualitative disclosure about market risk sensitive instruments (such as derivatives). This disclosure can be significant for companies with substantial trading portfolios or that engage in extensive hedging.

## Some Related Issues

### Reconciliation to US GAAP – Item 18 Versus Item 17

Form 20-F provides two levels of financial statement disclosure: Item 17 and Item 18.<sup>192</sup> Item 18 requires a more thorough adaptation of the issuer's financial statements to US GAAP and the requirements of S-X than does Item 17.<sup>193</sup> The distinction between Items 17 and 18 is based on a classification of the requirements of US GAAP and S-X into those that specify the methods of measuring the amounts shown on the face of the financial statements, and those prescribing disclosures which explain, modify, or supplement the accounting measurements.<sup>194</sup> Disclosures that are required by US GAAP but not local GAAP or IFRS need not be furnished for Item 17<sup>195</sup> (although they might need to be disclosed under MD&A).

Securities Act registration statements, Exchange Act annual reports on Form 20-F, and Exchange Act registration statements for secondary listings or spin-offs must generally comply with Item 18.<sup>196</sup> Item 17 is available in certain specific circumstances, including required financial statements of significant acquired foreign businesses,<sup>197</sup> significant equity method investees,<sup>198</sup> entities whose securities are pledged as collateral,<sup>199</sup> and guarantors.<sup>200</sup>

### Additional Financial Information That Is Typically Included

In addition to the formal requirements of Form 20-F and S-X, it is customary to include additional operational and other metrics in the offering document to help investors understand the issuer's business. The three most common examples are described below.

#### Other Financial Data

A page of summary financial data is always included in the "summary box" in the offering document. This key marketing page often supplements the financial information with additional operational and other metrics. These additional metrics will vary with the type of issuer and its industry and will be selected based on the criteria that management and the investment community monitor to evaluate performance or liquidity. Typical examples include comparable store sales data for a retailer, capital expenditures for a manufacturer, and subscriber numbers for a cable television company.

#### Recent Financial Results

If a significant amount of time has passed since the most recent financial statements included in the offering document, it may be appropriate to include a summary of recent financial results in the "summary box." Examples of "recent results" disclosures are most common after a quarter or half year (depending on how frequently the issuer reports) is completed but before financial statements concerning that quarter/half year have become available. The issuer and the underwriters will want to tell investors as soon as possible about any positive improvement in operating trends, while if the recent results are negative, recent results disclosure may be advisable to avoid any negative surprises for investors when the full quarterly/half yearly numbers become available.

## Recent Developments

To the extent material, the likely consequences of material recent developments may also be disclosed in the “summary box” or the MD&A section of the disclosure. For example, it is customary to discuss a material recent or pending and probable acquisition in the MD&A, whether or not audited financial statements of the acquired or to-be-acquired business are required to be presented. This practice will often result in a discussion of the impact of the pending or recently completed transaction on margins, debt levels, etc., in a section of the MD&A labeled “Overview,” “Impact of the Acquisition,” or a similar title. The textual disclosure may also include a discussion of any special charges or anticipated synergies expected to result from the acquisition or other pending event.

## Non-GAAP Financial Measures

Many issuers choose to disclose measures of financial performance or liquidity that, while derived from GAAP figures presented in a company’s financial statements, are not themselves calculated in accordance with GAAP. EBITDA is perhaps the best-known (and most widely used) non-GAAP financial measure.

The SEC’s rules (adopted in response to Section 401(b) of the US Sarbanes-Oxley Act of 2002 (Sarbanes-Oxley)) limit the use of non-GAAP financial measures in various ways. First, Regulation G applies to any public disclosure of non-GAAP financial measures.<sup>201</sup> Second, Item 10(e) of S-K lays on additional requirements for disclosures in Securities Act and Exchange Act filings (and earnings releases furnished to the SEC under Item 2.02 of Form 8-K).<sup>202</sup>

## Regulation G

A non-GAAP financial measure under Regulation G is broadly defined as a numerical measure of financial performance that excludes (or includes) amounts that are otherwise included in (or excluded from) the comparable measure calculated and presented in the financial statements under GAAP.<sup>203</sup>

For purposes of Regulation G, “GAAP” generally means US GAAP. However, in the case of a foreign private issuer whose primary financial statements are prepared in IFRS or local GAAP, “GAAP” means the accounting principles under which the financial statements were prepared, unless the measure in question is derived from US GAAP (in which case GAAP means US GAAP).<sup>204</sup>

The term “non-GAAP financial measure” carves out certain items including:

- operating measures and ratios or statistical measures calculated using financial measures determined in accordance with (1) GAAP (e.g., GAAP sales per square foot and operating margin calculated by dividing GAAP revenues into GAAP operating income) or (2) measures that are not themselves non-GAAP financial measures;<sup>205</sup> or
- financial measures required to be disclosed by GAAP, SEC rules, or an applicable system of regulation of a government, governmental authority, or a self-regulatory organization (e.g., segment measures required by ASC 280 or IFRS 8).<sup>206</sup>

Under Regulation G, if a public company discloses a non-GAAP financial measure, it must:<sup>207</sup>

- present the most directly comparable financial measure calculated in accordance with GAAP; and
- quantitatively reconcile the differences between the non-GAAP financial measure and the most directly comparable GAAP financial measure.<sup>208</sup>

In addition, Regulation G contains an antifraud prohibition – that is, an issuer may not make any non-GAAP financial measure public if the measure contains a material misstatement or omission.<sup>209</sup>

A foreign private issuer need not comply with Regulation G with respect to a specific non-GAAP financial measure if:<sup>210</sup>

- its securities are listed or quoted outside the United States;
- the non-GAAP financial measure being used is not derived from or based on a measure calculated and presented in accordance with US GAAP; and
- the disclosure is made outside the United States.

## S-K Item 10(e)

For purposes of Item 10(e), the term “non-GAAP financial measures” has the same meaning as under Regulation G.<sup>211</sup> Under Item 10(e), if a public company includes a non-GAAP financial measure in an SEC filing it must also include:<sup>212</sup>

- a presentation, with equal or greater prominence, of the most directly comparable GAAP financial measure;
- a quantitative reconciliation of the differences between the non-GAAP financial measure and the most directly comparable GAAP financial measure;
- a statement why management believes the non-GAAP financial measure provides useful information for investors; and
- to the extent material, a statement of the additional purposes for which management uses the non-GAAP financial measure.

Furthermore, Item 10(e) prohibits in SEC filings, among other things:<sup>213</sup>

- non-GAAP measures of liquidity that exclude items requiring cash settlement, other than EBIT and EBITDA;
- non-GAAP measures of performance that eliminate or smooth items characterized as non-recurring, unusual, or infrequent when it is reasonably likely that a similar charge or gain will recur within two years, or there was a similar charge or gain within the prior two years;
- the presentation of non-GAAP financial measures on the face of the financial statements, in the accompanying notes, or on the face of any pro forma financial information required to be disclosed by Article 11 of S-X; and
- using a name for non-GAAP financial measures that is the same as, or confusingly similar to, titles or descriptions used for GAAP financial measures.

Item 10(e) contains an exemption from these prohibitions for a foreign private issuer if the non-GAAP financial measure relates to the local GAAP used in the issuer’s primary financial statements, is required or expressly permitted by the standard-setter that establishes the local GAAP, and is included in the issuer’s annual report for its home jurisdiction.<sup>214</sup>

The SEC Staff monitors the use of non-GAAP financial measures and has issued several interpretations of SEC rules. The guidance covers various areas, such as ensuring equal or greater prominence for GAAP measures, appropriate presentation of per-share measures, handling of forward-looking non-GAAP financial measures without reconciliation, exclusion of recurring items, consistency in the inclusion or exclusion of gains or charges in non-GAAP measures over time, tailored recognition and measurement methods for specific financial statement line items (e.g., revenue), accurate labeling and clear descriptions of non-GAAP measures, and the recognition that disclosure alone may not be sufficient to address misleading non-GAAP measures.<sup>215</sup>

## Internal Control Over Financial Reporting

An IPO will involve close scrutiny of a company’s internal control over financial reporting (ICFR). Once a company is public, Section 404(a) of Sarbanes-Oxley requires an assessment by management of the effectiveness of the issuer’s ICFR, while Section 404(b) requires an attestation report of the issuer’s independent auditors on management’s assessment. Compliance with Section 404 can be a major undertaking for a newly public company. The SEC has adopted rules to allow an IPO issuer to wait until its second annual report to provide management’s Section 404(a) assessment and its auditor’s Section 404(b) attestation.<sup>216</sup>

Foreign private issuers that are “large accelerated filers” or “accelerated filers” must comply with both the Section 404(a) management’s assessment of internal control over financial reporting and the Section 404(b) independent auditor’s attestation report, starting with the second annual report on Form 20-F following the IPO.<sup>217</sup> By contrast, foreign private issuers that are neither large accelerated filers nor accelerated filers are required only to provide management’s assessment of internal control under Section 404(a).<sup>218</sup> An EGC is not required to provide the Section 404(b) independent auditor’s attestation report for as long as it qualifies as an EGC.<sup>219</sup>

If an entire annual report is incorporated by reference into a registration statement (as is the case with a registration statement on Form F-3), the Section 404 reports and disclosures will also be part of the registration statement.



## Interactive Data

The SEC has adopted rules that require foreign private issuers that prepare their financial statements in accordance with US GAAP or IASB IFRS to supplement their filed financial statements with financial statements formatted in eXtensible Business Reporting Language (XBRL).<sup>220</sup> XBRL is a form of electronic communication whose main feature includes interactive electronic tagging of both financial and non-financial data. All operating company filers (including foreign private issuers) are required to embed XBRL data directly into the body of an SEC filing, rather than tag the information in a separate exhibit.<sup>221</sup>

A previously non-reporting company is not required to include XBRL financial statements in its initial Securities Act registration statement (i.e., an IPO on Form F-1 or an initial exchange offer on Form F-4) or its initial Exchange Act registration statement (i.e., Form 20-F).<sup>222</sup> Once having provided its first XBRL financial statements, the company would include XBRL financial statements in a subsequent Securities Act registration statement, but only if it includes a price or price range (and not if it merely incorporates financial statements by reference).<sup>223</sup> This means, for example, that XBRL financial statements are not needed in a base registration statement for a shelf offering.

There is a narrow exception to the XBRL rules relevant to foreign private issuers: the rules only apply to foreign private issuers that prepare their financial statements in accordance with US GAAP or IASB IFRS – i.e., they do not apply to foreign private issuers that prepare their financial statements in accordance with local GAAP.<sup>224</sup> However, there are only a very small number of foreign private issuers that use local GAAP in their SEC filings, so this exception is of limited use.

## Special Considerations in Rule 144A Transactions

The disclosure document in a Rule 144A offering is typically modeled after a public offering prospectus. This holds true for financial statement requirements as well – although the line item disclosure rules of the Securities Act do not strictly apply to private offerings under Rule 144A, it has become standard practice to follow these rules as if they applied to Rule 144A offerings, with only limited exceptions. In many situations, the commitment committees of the major financing sources will insist on including financial disclosure in the Rule 144A offering circular that is in all material respects consistent with the financial statement requirements that would apply to a registration statement filed with the SEC. Rule 144A offerings are typically sold to buyers who expect levels of disclosure substantially equivalent to what they would receive in a public deal. Additionally, in the case of a Rule 144A offering with registration rights, the Rule 144A circular will be followed by a registered exchange offer prospectus, and the buyers of the offered securities will thereby receive full Securities Act disclosure after the closing. Therefore, Rule 144A offering circulars typically follow the public offering rules described above in all material respects.

Foreign private issuers tend to take a flexible approach to financial statements in unregistered transactions depending on a variety of factors, including the type of transaction, local market practice, deal size, underwriter practice, investor expectations, and other marketing issues. It is not uncommon, however, for a working group on a Rule 144A deal to decide to dispense with a particular financial statement requirement if the group determines that that particular item will not materially alter the total mix of information provided, or if there is another way to disclose the item that the S-X requirement is targeting.

After all, Rule 144A(d)(4)'s information requirement is very modest and calls only for “the issuer’s most recent balance sheet and profit and loss and retained earnings statements, and similar financial statements for such part of the two preceding fiscal years as the issuer has been in operation (the financial statements should be audited to the extent reasonably available).” A more flexible approach can also be justified by the fact that the liability standards of Sections 11 and 12 of the Securities Act do not apply to Rule 144A deals. Although Rule 10b-5 does apply to Rule 144A offerings, it is more difficult for disgruntled purchasers to demonstrate the requisite scienter required to establish a valid Rule 10b-5 claim.<sup>225</sup> As a result, it is not uncommon to provide only two years of audited financial statements in a Rule 144A transaction where a registration statement would require three years. This is true for the issuer and for material acquired businesses. We have seen this decision taken in a number of deals, particularly where the issuer is already in its third or fourth fiscal quarter, since the third year of audited financial statements will likely be completed in the natural course before the exchange offer registration statement is required to be filed. Other working groups have elected to exclude some of the finer elements of the financial information requirements where they have



determined that such additional information would not materially alter the total mix of information presented. Although the industry custom is to follow the public offering rules as if they applied to the Rule 144A deal, there is no requirement in Rule 144A to do so, and some working groups will conclude that not every detail of the information called for in a registration statement is required to present Rule 144A investors with full and fair disclosure.

As the full impact of Sarbanes-Oxley has made itself felt upon the private equity community and smaller public companies (for whom a few extra million dollars of administrative expenses are material), we have seen a rise in “144A-for-life” debt financings. These transactions are identical to regular Rule 144A offerings, except that they do not offer bond investors any registration rights and they do not require the bond issuers to become or remain voluntary filers of Exchange Act reports. Because these offerings will not be followed by a registered exchange offer prospectus that is fully compliant with S-X, some deal teams are concluding that “144A-for-life” disclosure documents can more freely dispense with non-core S-X requirements than would be the case in a Rule 144A offering with registration rights. There is no clear consensus among practitioners at this time as to whether, or to what extent, such additional flexibility is appropriate.

## Conclusion

Knowing what financial statements will be required to complete a particular financing and when they go stale is a critical step in planning a financing. This User’s Guide is designed to provide a roadmap to the answers to those questions in the typical cases that we face every day, but is of course not a substitute for reading the rules and regulations we have summarized. In any particular case, securities counsel and the auditors will need to be consulted to confirm your analysis.

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## Endnotes

- <sup>1</sup> The JOBS Act created a category of issuer, called an emerging growth company (EGC). EGCs benefit from various accommodations designed to make the initial public offering (IPO) process more attractive and to ease the transition from private to public company. Foreign private issuers can be EGCs.
- <sup>2</sup> We do not discuss the requirements applicable to Canadian companies under the SEC's multi-jurisdictional disclosure system.
- <sup>3</sup> See Rule 405 under the US Securities Act of 1933, as amended (the Securities Act); see also Rule 3b-4 under the US Securities Exchange Act of 1934, as amended (the Exchange Act).
- <sup>4</sup> For a detailed discussion of the financial statement rules applicable to domestic US companies, see our companion publication "Financial Statement Requirements in US Securities Offerings: What You Need to Know."
- <sup>5</sup> See Regulation S-X (S-X) Rule 4-01(a)(1) (financial statements of domestic US issuers not prepared in accordance with "generally accepted accounting principles" are presumed to be misleading or inaccurate); see also SEC Division of Corporation Finance, Financial Reporting Manual, Section 1410 (US domestic issuers must follow S-X and US GAAP) [*Financial Reporting Manual*].
- <sup>6</sup> S-X Rule 4-01(a)(2).
- <sup>7</sup> Final Rule: Acceptance from Foreign Private Issuers of Financial Statements Prepared in Accordance with International Financial Accounting Standards Without Reconciliation to US GAAP, Release No. 33-8879 (Dec. 21, 2007) [IFRS Reconciliation Release]; see also *Financial Reporting Manual*, Section 6310.1. Note that the accounting policy note must state compliance with IASB IFRS and the auditor's report must opine on IASB IFRS. *Financial Reporting Manual*, Section 6310.2.
- <sup>8</sup> See Form 20-F, Items 17(c), 18.
- <sup>9</sup> Exchange Act Rule 13a-13(b)(2).
- <sup>10</sup> Exchange Act Rule 13a-11(b); see also Exchange Act Rule 13a-16(c) (reports on Form 6-K are furnished, not filed).
- <sup>11</sup> See Exchange Act Rule 13a-16(a)(3); see also *Financial Reporting Manual*, Section 6120.1 (same).
- <sup>12</sup> See Form 20-F, Item 8.A.5; *Financial Reporting Manual*, Sections 6220.1, 6220.6.
- <sup>13</sup> See Form 20-F, Item 8.A.5.
- <sup>14</sup> We do not cover financial statements in mergers and acquisitions (M&A) transactions. When securities are registered on Form S-4 or F-4 in connection with a stock-for-stock acquisition, different requirements may apply.
- <sup>15</sup> Generally, Form F-3 may be used by an issuer to sell securities (provided that the issuer has at least \$75 million of common equity outstanding held by non-affiliates) if the issuer has been subject to the Exchange Act reporting requirements and timely filed all Exchange Act reports for the 12 months prior to registration, and neither the issuer nor its subsidiaries have had any material defaults on a payment related to a dividend, sinking fund, indebtedness, or rentals under long-term leases. See Form F-3, General Instructions.
- <sup>16</sup> In particular, Form F-1 allows an issuer to incorporate information by reference from its previously filed Exchange Act reports if the issuer:
- is required to file Exchange Act reports;
  - has filed all required reports and other materials under the Exchange Act during the prior 12 months (or for such shorter period that the issuer was required to file such reports and materials);
  - has filed an annual report for its most recently completed fiscal year;
  - is not, and during the past three years neither the issuer nor any of its predecessors was, a blank check issuer, shell company, or penny stock issuer; and
  - makes its Exchange Act reports readily available on its website (including by way of hyperlink to the reports).
- See Form F-1, General Instructions.
- <sup>17</sup> See Form 20-F, Item 8.A.1.
- <sup>18</sup> See *id.* at Items 17(c), 18.
- <sup>19</sup> See Form 20-F, Item 8.A.2.
- <sup>20</sup> See Form 20-F, Instruction 1 to Item 8. See also S-X Rule 3-02(a) (noting if the issuer has been in existence less than the prescribed number of years, it is sufficient to provide statements of comprehensive income for the life of the issuer and its predecessors); *Financial Reporting Manual*, Section 6220.5 (a foreign private issuer that has been in existence less than a year must include an audited balance sheet that is not more than nine months old; if the issuer has commenced operations, it must include audited statements of income, stockholders' equity, and cash flows for the period from the date of inception to the date of the audited balance sheet). Financial information of a registrant's predecessor is required for all periods prior to the registrant's existence, with no lapse in audited periods or omission of other information required about the registrant. *Financial Reporting Manual*, Section 1170. The term "predecessor" is defined broadly. See Securities Act Rule 405.
- <sup>21</sup> See Form 20-F, Instruction 1 to Item 8.A.2.
- <sup>22</sup> See *id.* at Instruction 3 to Item 8.A.2; see also *Financial Reporting Manual*, Section 6410.2.
- <sup>23</sup> See Form 20-F, General Instruction G(a); see also *Financial Reporting Manual*, Section 6340.1.
- <sup>24</sup> See S-X Rule 3-06. Under this rule, the SEC will accept financial statements for periods of not less than nine, 21, and 33 consecutive months as substantial compliance with the requirement to provide financial statements for one, two, and three years, respectively. In particular, whenever audited financial statements are required for a period of one, two, or three years, a single audited period of nine to 12 months may count as a year if:
- the issuer has changed its fiscal year during the period;

- the issuer has made a significant business acquisition for which financial statements are required under S-X Rule 3-05 and the financial statements covering the interim period pertain to the business being acquired; or
- the SEC grants permission to do so under S-X Rule 3-13, provided that financial statements are filed that cover the full fiscal year or years for all other years in the time period.

See *id.* Note that historically the SEC Staff has been reluctant to grant this relief. See *Financial Reporting Manual*, Note to Section 1140.8 (issuer must show unusual circumstances). On June 29, 2017, the SEC Staff signaled that it might be willing to grant permission if an issuer is able to argue that the information is not necessary for investor protection. See Staff of the Division of Corporation Finance, *Draft Registration Statement Procedures Expanded* (June 29, 2017, updated Aug. 17, 2017) [2017 Procedures]:

While an issuer should take all steps to ensure that a draft registration statement is substantially complete when submitted, we will not delay processing if an issuer reasonably believes omitted financial information will not be required at the time the registration statement is publicly filed. In addition, we will consider an issuer's specific facts and circumstances in connection with any request made under Rule 3-13 of Regulation S-X.

See 2017 Procedures.

<sup>25</sup> See Form 20-F, Item 8.A.1, Item 8.A.3.

<sup>26</sup> See *Financial Reporting Manual*, Section 4110.5 (accounting firm must be PCAOB registered and auditor's report must refer to PCAOB standards); Section 4110.1 (citing PCAOB Rule 2100, which requires each firm to register with the PCAOB that prepares or issues any audit report with respect to any issuer, or plays a substantial role in the preparation or furnishing of an audit report with respect to any issuer).

<sup>27</sup> See *Financial Reporting Manual*, Section 4130.1 (audit reports that refer to PCAOB standards must comply with both the SEC's and PCAOB's independence rules). For the initial SEC registration by a foreign private issuer, the auditor must be independent under applicable SEC and PCAOB standards only for the most recent audited fiscal year as long as it is independent under home-country standards for all other audited periods. See S-X Rule 2-01(f)(5)(iii).

<sup>28</sup> See *Financial Reporting Manual*, Section 6820.2; see also Form 20-F, General Instruction E(c)(2) (entities other than the issuer included in the filing must be audited in accordance with applicable professional standards).

<sup>29</sup> See Form 20-F, Item 8.A.5.

<sup>30</sup> See *IFRS Reconciliation Release*, Section III.A.2. For pre-effective registration statements and post-effective amendments with annual financial statements less than nine months old, published interim financial statements need not be reconciled to US GAAP if audited annual financial statements included or incorporated by reference for all required periods are prepared in accordance with IASB IFRS. For pre-effective registration statements and post-effective amendments with annual financial statements more than nine months old, reconciliation is not required for an interim period where the issuer complies with and explicitly states compliance with IAS 34, and audited annual financial statements are prepared in accordance with IASB IFRS. See *Financial Reporting Manual*, Section 6330.

<sup>31</sup> See Form 20-F at Items 17(c), 18; see also *Final Rule: First-Time Application of International Financial Reporting Standards*, Release No. 33-8567 (Apr. 12, 2005) (discussing the applicable exceptions).

<sup>32</sup> See generally Form 20-F, Item 8.A.5.

<sup>33</sup> See JOBS Act Sections 101(a) and (b) (adding new Securities Act Section 2(a)(19) and Exchange Act Section 3(a)(80)).

After the initial determination of EGC status, a company will remain an EGC until the earliest of:

- the last day of any fiscal year in which the company earns \$1.235 billion or more in revenue;
- the date when the company qualifies as a "large accelerated filer," with at least \$700 million in public equity float;
- the last day of the fiscal year ending after the fifth anniversary of the IPO pricing date; or
- the date of issuance, in any three-year period, of more than \$1.0 billion in non-convertible debt securities.

EGC status will ordinarily terminate on the last day of a fiscal year. However, the issuance in any three-year period of more than \$1.0 billion in non-convertible debt securities would cause an issuer to lose its EGC status immediately. *Id.*

Note however, that EGC status will be extended during the registration process even if the registrant's revenues exceed \$1.235 billion or the registrant issues in excess of \$1.0 billion of debt securities during the registration process. Any confidential submission or public filing by an EGC will lock in EGC status through the earlier of (i) the IPO date or (ii) one year after the issuer would have otherwise lost EGC status. Fixing America's Surface Transportation (FAST) Act, revising Securities Act Section 6(e)(1).

<sup>34</sup> See JOBS Act Section 102(b)(1) (adding new Securities Act Section 7(a)(2)).

<sup>35</sup> See JOBS Act Section 102(b)(2) (modifying Exchange Act Section 13(a)).

<sup>36</sup> See Regulation S-K (S-K), Item 303(b).

<sup>37</sup> See Form 20-F, Item 3.B.

<sup>38</sup> See *id.*

<sup>39</sup> SEC Division of Corporation Finance, *International Reporting and Disclosure Issues*, Section III.B.f (Nov. 1, 2004).

<sup>40</sup> See *id.*

<sup>41</sup> JOBS Act, Section 106(a), adding Securities Act Section 6(e)(1). The confidential submission is automatically exempt from disclosure under the Freedom of Information Act (FOIA). JOBS Act, Section 106(a), adding Securities Act Section 6(e)(2).

<sup>42</sup> See 2017 Procedures. Prior to the end of the twelfth month following the effective date of the initial registration statement, these issuers may also submit the first draft of a follow-on registration statement for nonpublic review. *Id.*

A foreign private issuer may choose instead to use the procedures adopted in 2011 for foreign private issuers, which are limited to a foreign private issuer that is filing with the SEC for the first time that:

- qualifies as an emerging growth company under the JOBS Act (which would be treated as a confidential submission as described above);
- is listed or is concurrently listing its securities on a non-US securities exchange – i.e., a foreign private issuer that is not solely listing in the United States;
- is being privatized by a foreign government; or
- can “demonstrate that the public filing of an initial registration statement would conflict with the law of an applicable foreign jurisdiction.”

See Staff of the Division of Corporation Finance, *Non-Public Submissions from Foreign Private Issuers* (Dec. 8, 2011, updated May 30, 2012) [2012 Procedures].

Nonpublic submissions are not automatically exempt from FOIA, and issuers are advised to request confidential treatment under SEC Rule 83. 2017 Procedures, at n.1. Making a Rule 83 request does not guarantee that the information will be protected from public disclosure; the issuer simply puts the SEC on notice that it wants the information kept confidential. The SEC will resolve whether to honor a confidentiality request only when disclosure of the information is requested under FOIA. See *Confidential Treatment Procedures Under the Freedom of Information Act*, 17 C.F.R. 200.83.

- <sup>43</sup> FAST Act Section 71003, adding new JOBS Act Sections 102(d)(1) and (2); FAST Act Compliance and Disclosure Interpretations (C&DIs), Question 1. See also Securities Act Forms C&DIs, Question 101.04 (Aug. 17, 2017).
- <sup>44</sup> See 2017 Procedures; SEC Division of Corporation Finance, Voluntary Submission of Draft Registration Statements – FAQs (June 30, 2017), Question 7. See also Securities Act Forms C&DIs, Question 101.05 (Aug. 17, 2017). A non-EGC must publicly file its registration statement and all previous nonpublic submissions at least 15 days before commencing any road show or, absent a road show, 15 days prior to effectiveness. 2017 Procedures. The 15-day requirement does not apply to submissions made under the 2012 Procedures by a non-EGC or by an EGC that has chosen not to take advantage of any of the accommodations available to an EGC under the JOBS Act. However, the public filing must be made prior to the start of the road show. See 2012 Procedures; see also Staff of the Division of Corporation Finance, *Jumpstart Our Business Startups Act Frequently Asked Questions Generally Applicable Questions on Title I of the JOBS Act* (Apr. 16, 2012, updated May 3, 2012, Sept. 28, 2012, and Dec. 15, 2015) [JOBS Act Title I FAQs], Question 9. In the case of a follow-on offering, the public filing must be made at least 48 hours prior to effectiveness. 2017 Procedures.
- <sup>45</sup> FAST Act C&DIs, Question 2 (Dec. 10, 2015). The SEC Staff has signaled a more flexible approach in reviewing requests to omit financial information under S-X Rule 3-13, based on an issuer’s specific circumstances. See 2017 Procedures.
- <sup>46</sup> See *Financial Reporting Manual*, Section 1210. Section 1210 was updated in October 2020 to clarify that the SEC Staff will “not delay processing if an issuer reasonably believes omitted financial information will not be required at the time the registration statement is publicly filed.” See also 2017 Procedures (“While an issuer should take all steps to ensure that a draft registration statement is substantially complete when submitted, we will not delay processing if an issuer reasonably believes omitted financial information will not be required at the time the registration statement is publicly filed.”).
- <sup>47</sup> See Form 20-F, Instruction 1 to Item 8.A.4. The rules regarding the age or “staleness” of the required financial statements for foreign private issuers vary a great deal from those applicable to US domestic issuers. Generally speaking, the financial statements for US domestic issuers go stale at a much faster rate.
- <sup>48</sup> See Form 20-F, Item 8.A.4.
- <sup>49</sup> See Form 20-F, Item 8.A.4. (requiring IPO issuers to provide audited financial statements “as of a date not older than 12 months at the time the document is filed” and noting that the audited financial statements in such cases “may cover a period of less than a full year”).
- <sup>50</sup> See *Financial Reporting Manual*, Section 6220.3.
- <sup>51</sup> See Form 20-F, Instruction 2 to Item 8.A.4; see also *Financial Reporting Manual*, Section 6220.3.
- <sup>52</sup> See Form 20-F, Instruction 2 to Item 8; see also *Financial Reporting Manual*, Section 6220.2.
- <sup>53</sup> See Form 20-F, Item 8.A.5. This requirement applies to any publication of financial information that includes, at a minimum, revenue and income information, even if that information is not published as part of a complete set of financial statements. See Form 20-F, Instruction 3 to Item 8.A.5.
- <sup>54</sup> See *Financial Reporting Manual*, Section 6220.6.
- <sup>55</sup> See Form 20-F, Item 5. The MD&A requirements for US issuers are set out in S-K Item 303.
- <sup>56</sup> See Instruction 10 to S-K Item 303(b).
- <sup>57</sup> See Form 20-F, Item 5.A. See also, Instruction 9 to S-K Item 303(b).
- <sup>58</sup> See Form 20-F, Item 5.B.
- <sup>59</sup> See Form 20-F, Item 5.C.
- <sup>60</sup> See Form 20-F, Item 5.D.
- <sup>61</sup> See Form 20-F, Instruction 5 to Item 5 (“In responding to this Item 5, an issuer need not repeat information contained in financial statements that comply with IFRS as issued by the IASB.”). See also Final Rule: Management’s Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information, Release No. 33-10890 (Nov. 19, 2020), at n.243 (“These proposed [critical accounting estimate] requirements are similar to those found in IFRS.”); n.344 (“Certain IFRS standards require some disclosures that substantially overlap with the requirements of Item 5.E. [Critical Accounting Estimates] of Form 20-F.”)
- <sup>62</sup> See Form 20-F, Item 5.E.

- <sup>63</sup> See *Final Rule: Management's Discussion and Analysis, Selected Financial Data, and Supplementary Financial Information*, Release No. 33-10890 (Nov. 19, 2020); *Commission Guidance on Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33-10751 (Jan. 30, 2020); *Commission Guidance on Presentation of Liquidity and Capital Resources Disclosures in Management's Discussion and Analysis*, Release No. 33-9144 (Sept. 17, 2010); *Interpretation: Commission Guidance Regarding Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33-8350 (Dec. 19, 2003); *Commission Statement about Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33-8056 (Jan. 22, 2002); and *SEC Interpretation: Management's Discussion and Analysis of Financial Condition and Results of Operations; Certain Investment Company Disclosures*, Release No. 33-6835 (May 18, 1989).
- <sup>64</sup> See IFRS Reconciliation Release; *Financial Reporting Manual*, Section 6310.1.
- <sup>65</sup> See Form 20-F, Item 17(c); *Financial Reporting Manual*, Section 6310.2.
- <sup>66</sup> See Form 20-F, Instructions 3 and 4 to Item 8.A.5; *Financial Reporting Manual*, Sections 6330.1 and 6330.2.
- <sup>67</sup> See *Financial Reporting Manual*, Section 6120.6.
- <sup>68</sup> See Form 20-F, Item 17(c).
- <sup>69</sup> See IFRS Reconciliation Release.
- <sup>70</sup> See Form 20-F, Item 17(c).
- <sup>71</sup> See *Financial Reporting Manual*, Section 6410.2.
- <sup>72</sup> See Form 20-F, Instruction 2 to Item 5. See also Instruction 10 to S-K Item 303(b).
- <sup>73</sup> See *id.*
- <sup>74</sup> See Form 20-F, Item 8.A.1; Item 8.A.3 (noting audit reports must cover each period of required disclosure).
- <sup>75</sup> See Form 20-F, Instruction to Item 8.A.3. See also SAB 103, Topic 1.E.2 (financial statements on which the auditors' opinions are qualified because of a limitation on the scope of the audit do not meet the requirements of S-X Rule 2-02(b); financial statements for which the auditors' opinions contain qualifications relating to the acceptability of accounting principles used or the completeness of disclosures made are also unacceptable); *Financial Reporting Manual*, Section 4220 (discussing qualified audit reports generally).
- <sup>76</sup> See *Financial Reporting Manual*, Section 6820.2; see also Form 20-F, General Instruction E(c).
- <sup>77</sup> See *Financial Reporting Manual*, Section 4110.1 (citing PCAOB Rule 2100).
- <sup>78</sup> AS 3101. The Auditor's Report on an Audit of Financial Statements When the Auditor Expresses an Unqualified Opinion and Related Amendment to PCAOB Standards, Note to 05(b).
- <sup>79</sup> See Pub. L. 116-222, 134 Stat. 1063 (Dec. 18, 2020), adding Section 104(i) to Sarbanes-Oxley; see also *Final Rule: Holding Foreign Companies Accountable Act Disclosure*, Release No. 34-93701 (Dec. 2, 2021) [HFCAA Release]. For a list of PCAOB-identified accounting firms see Public Company Accounting Oversight Board, *HFCAA Determination Report Issued Pursuant to 15 USC § 7214(i)(2)(A) and PCAOB Rule 6100, Board Determinations Under the Holding Foreign Companies Accountable Act* (Dec. 16, 2021), available at <https://pcaob-assets.azureedge.net/pcaob-dev/docs/default-source/international/documents/104-hfcaa-2021-001.pdf>.
- <sup>80</sup> Available at <https://www.sec.gov/hfcaa>.
- <sup>81</sup> See HFCAA Release, at 21-21. "If the Commission agrees with the registrant's analysis, the Commission will notify the registrant and will remove the registrant from the provisional identification list... [I]f the Commission does not agree..., the determination that the registrant is a Commission-Identified Issuer will be conclusive. .If the registrant does not contact the Commission to dispute the provisional identification, the determination that the registrant is a Commission-Identified Issuer will be conclusive 15 business days after the provisional identification."
- <sup>82</sup> See Exchange Act Rule 3b-4. A "foreign issuer" means any issuer that is a foreign government, a national of any foreign country, or a corporation or other organization incorporated or organized under the laws of any foreign country.
- <sup>83</sup> See Section 3 of the HFCAA.
- <sup>84</sup> See Holding Foreign Companies Accountable Act – PCAOB Determination Update (last updated Feb. 1, 2023), at <https://www.sec.gov/hfcaa>.
- <sup>85</sup> See S-X Rule 3-20(a).
- <sup>86</sup> See *Financial Reporting Manual*, Section 6610.1.
- <sup>87</sup> See S-X Rule 3-20(b).
- <sup>88</sup> See *id.*; see also S-K Item 301, Instruction 5.C (noting if equity securities are being registered, a five-year summary of dividends per share stated in both the currency in which the financial statements are denominated and US dollars must be included, based on the exchange rates at each respective payment date).
- <sup>89</sup> See S-X Rule 3-20(b) (providing that "[i]f the reporting currency is not the US dollar, dollar-equivalent financial statements or convenience translations shall not be presented, except a translation may be presented of the most recent fiscal year and any subsequent interim period presented using the exchange rate as of the most recent balance sheet included in the filing, except that a rate as of the most recent practicable date shall be used if materially different").
- <sup>90</sup> See *id.*; see also *Financial Reporting Manual*, Section 6600 (discussing reporting currency generally).
- <sup>91</sup> Disclosure requirements for Investment companies (including business development companies) that were formerly included in S-X Rule 3-05, have been moved to new Rule 6-11, which covers financial reporting in the event of a fund acquisition.



- <sup>92</sup> See Form S-1, Item 11(e); see also Form S-3, Item 11(b)(i). This requirement does not apply to annual reports. See Form 10-K, Item 8(a). See generally S-X Rule 3-05(b)(4). Also, when securities are registered on Form S-4 or F-4 in connection with a stock-for-stock acquisition, somewhat different requirements apply for the financial statements of the company being acquired. Finally, in the case of a takedown from an already effective shelf registration statement, the SEC Staff has confirmed that guidance in *Financial Reporting Manual* Section 2045.3 and Section 2050.3, which indicates that financial statements of an acquired business that is greater than 50% significant would be required to be filed prior to the offering (except in certain limited types of offerings specified in *Financial Reporting Manual* Section 2050.3), does not apply to a probable business acquisition unless management determines that the probable business acquisition constitutes a fundamental change. See *The Center for Audit Quality SEC Regulations Committee Highlights* (Oct. 21, 2015).
- <sup>93</sup> See S-X Rule 11-01(d). The question whether an acquisition is of a “business” should be evaluated in light of the facts and circumstances involved and whether there is sufficient continuity of the acquired entity’s operations prior to and after the transactions so that disclosure of prior financial information is material to an understanding of future operations. A presumption exists that a separate entity, a subsidiary, or a division is a business. However, a lesser component of an entity may also constitute a business. Among the facts and circumstances to consider in evaluating whether an acquisition of a lesser component of an entity constitutes a business are:
- whether the nature of the revenue-producing activity of the component will remain generally the same as before the transaction; or
  - whether any of the following attributes remain with the component after the transaction: (i) physical facilities, (ii) employee base, (iii) market distribution system, (iv) sales force, (v) customer base, (vi) operating rights, (vii) production techniques, or (viii) trade names.
- See *id.*
- <sup>94</sup> However, a different conclusion may be reached depending upon the customary practice for an industry or a particular issuer. For example, an issuer may be submitting a letter of intent as one of many parties in a bidding process, or a roll-up entity may routinely sign letters of intent to further its due diligence investigations of multiple potential targets, but with the acquisition of only a minority of those companies becoming probable.
- <sup>95</sup> See *Financial Reporting Manual*, Section 2005.4.
- <sup>96</sup> S-X Rule 1-02(w)(1)(i)(A).
- <sup>97</sup> S-X Rule 1-02(w)(1)(ii).
- <sup>98</sup> By “pre-tax income” we mean the income from continuing operations. S-X Rule 1-02(w)(1)(iii)(A)(1). Absolute values should be used for the net income component.
- <sup>99</sup> S-X Rule 1-02(w)(1)(iii)(A)(1).
- <sup>100</sup> S-X Rule 1-02(w)(1)(iii)(A)(2).
- <sup>101</sup> See S-X Rule 3-05(b)(2).
- <sup>102</sup> S-X Rule 1-02(w)(1).
- <sup>103</sup> S-X Rule 1-02(w)(1)(i)(A)(3).
- <sup>104</sup> See S-X Rule 3-05(b)(3) referring to Rule 11-01(b)(3) and (4). The tests may not be made by “annualizing” data, and may only include Transaction Accounting Adjustments.
- <sup>105</sup> See S-X Rule 3-05(b)(3) referring to Rule 11-01(b)(3) and (4).
- <sup>106</sup> See S-X Rule 3-05(a)(3) (governing whether businesses are “related”); S-X Rule 11-01(d) (governing whether an acquisition involves a “business”).
- <sup>107</sup> See S-X Rule 3-05(b)(2)(ii). A comparative interim period for the prior year is not required when only one year of audited Rule 3-05 Financial Statements is required.
- <sup>108</sup> See S-X Rule 3-05(b)(2)(iii).
- <sup>109</sup> See S-X Rule 3-05(b)(2).
- <sup>110</sup> See S-X Rule 3-05(b)(2)(iv). See also *Final Rule: Amendments to Financial Disclosures About Acquired and Disposed Businesses*, Release No. 33-10786 (May 20, 2020), p.79. “Individually insignificant businesses” include any: (a) acquisition consummated after the acquiror’s audited balance sheet date whose significance does not exceed 20%; (b) probable acquisition whose significance does not exceed 50%; and (c) consummated acquisition whose significance exceeds 20%, but does not exceed 50%, for which financial statements are not yet required because of the 75-day grace period.
- <sup>111</sup> See S-X Rule 3-05(a)(1) (financial statements of acquired businesses must be prepared and audited in accordance with S-X).
- <sup>112</sup> Although the staleness date for an acquired company’s financial statements is determined based on the status of the acquired company (e.g., as an accelerated or non-accelerated filer), an interesting wrinkle may emerge where the acquiring company is on a faster track than the acquired company. In that fact pattern, the separate requirement to include pro forma financial information under S-X Article 11 can effectively accelerate the need for the acquired company’s financial information. The acquiring company will need to produce financial statements for the acquired business if the acquiring company wants to go to market with “LTM” pro forma financials after the date on which its own year-end financials are due but before the due date for the acquired company’s financials.
- <sup>113</sup> See S-X Rule 3-05(b)(4)(i). The date of an offering will be deemed to be the date of the final prospectus or prospectus supplement filed pursuant to Rule 424(b). See *id.* By analogy, the pricing date would be the date of an offering in a Rule 144A transaction.
- <sup>114</sup> “Foreign business” is defined in S-X Rule 1-02(l) as a business that is majority owned by persons who are not citizens or residents of the United States and is not organized under US law, and either:
- more than 50% of its assets are located outside the United States; or
  - the majority of its executive officers or directors are not US citizens or residents.



In determining the majority ownership of a business, the SEC Staff will consider the ultimate parent entity that would consolidate the business under US GAAP (or IFRS for IASB IFRS issuers) and the parent's controlling shareholders. See *Financial Reporting Manual*, Section 6110.4. The implication of this is that a non-US subsidiary of a US company would likely not be considered a "foreign business."

- 115 See S-X Rule 3-05(c) (financial statements of an acquired foreign business can meet Item 17 of Form 20-F); Form 20-F, Item 17(c)(2)(v) (financial statements of an acquired business may omit reconciliation below the 30% significance level).
- 116 See S-X Rule 3-05(d).
- 117 See S-X Rule 3-05(c) Accommodations in Item 17(c)(2) that would be inconsistent with IASB IFRS may not be applied, but IFRS 1 *First Time Adoption of International Financial Reporting Standards* may be applied.
- 118 See *Financial Reporting Manual*, Section 4110.5. However, an acquired company that uses US GAAP will likely meet the definition of a public business entity as defined in the FASB Accounting Standards Codification.
- 119 See S-X Rule 1-02(w).
- 120 See S-X Rule 3-14(a)(2)(i). (defining a real estate business as a "business that generates substantially all of its revenues through the leasing of real property").
- 121 See S-X Rule 3-14(b)(2). Where the acquiror does not have publicly traded securities, the acquiror's investment in the real estate operation should include any debt secured by the real property that is assumed by the acquiror in connections with the acquisition compared to the acquiror's total assets. Significance for blind pool offerings must be computed by comparing the issuer's investments in the real estate operations or other acquired business to the sum of its total assets as of the date of the acquisition and the proceeds (net of commissions) in good faith expected to be raised in the registered offering over the next 12 months. After the distribution period for the offering ends and until the next Form 10-K is filed, significance is based on the issuer's total assets as of the date of acquisition or disposition, except that for acquisitions total assets must exclude the acquired real estate operations. After that next Form 10-K is filed, the issuer can determine significance using total assets as of the end of the most recently completed fiscal year included in the Form 10-K. See S-X Rule 11-01(b)(4).
- 122 See S-X Rule 3-14(c). The additional disclosure includes: (i) material factors considered by the issuer in assessing the property, including sources of revenue (including, but not limited to, competition in the rental market, comparative rents, occupancy rates) and expense (including, but not limited to, utility rates, ad valorem tax rates, maintenance expenses, and capital improvements anticipated), and (ii) an indication that, after reasonable inquiry, the issuer is not aware of any material factors relating to the property other than those discussed in (i) that would cause the reported financial information not to be necessarily indicative of future operating results. See S-X Rule 3-14(f).
- 123 Securities Act Rule 408 states that "In addition to the information expressly required to be included in a registration statement, there shall be added such further material information, if any, as may be necessary to make the required statements, in the light of the circumstances under which they are made, not misleading."
- 124 See S-X Rule 3-05(b)(iv)(A) and S-X Rule 3-14(b)(2)(i)(C)(1).
- 125 See S-X Rule 11-01(a)(1) (noting pro forma financial information required for a "significant" business acquisition); S-X Rule 11-01(b)(1) (noting a "significant" acquisition means an acquisition above the 20% significance level); S-X Rule 11-01(c) (noting no pro forma financial information is needed if separate financial statements of the acquired business are not included and the aggregate impact of the acquisition of these multiple businesses does not exceed the 50% significance level).
- 126 See S-X Rule 11-02(a)(1).
- 127 See S-X Rule 11-02(c)(1). The pro forma condensed balance sheet should be prepared as if the transaction had occurred on the date of the latest historical balance sheet.
- 128 See S-X Rule 11-02(a)(1).
- 129 See S-X Rule 11-02(c)(2)(i). The pro forma condensed statements of comprehensive income should be prepared as if the transaction had taken place at the beginning of the latest fiscal year included in the filing.
- 130 See S-X Rule 11-01(a)(4). A "significant" disposition for these purposes is one where the business would be a "significant subsidiary" under S-X Rule 1-02(w) at the 20% significance level. See S-X Rule 11-01(b)(2).
- 131 See S-X Rule 11-01(a)(1) and *Financial Reporting Manual*, Section 3110.1.
- 132 See S-X Rule 11-01(a)(8).
- 133 See generally S-X Rule 11-02.
- 134 This information is expressly protected by the safe harbor provisions for forward-looking information of Rule 175 under the Securities Act and Rule 3b-6 under the Exchange Act. See *Final Rule: Amendments to Financial Disclosures About Acquired and Disposed Businesses*, Release No. 33-10786 (May 20, 2020), p. 115. See also, S-X Rule 11-01 Instruction to paragraph (a)(7).
- 135 See S-X Rule 11-02(c)(3).
- 136 See *id.* This updating could be accomplished by adding subsequent interim period results to the most recent fiscal year-end information and deducting the comparable preceding year interim period results. See *id.* Another common approach is to use the acquired company's most recent quarterly information.
- 137 See Section 2(a)(1) of the Securities Act.
- 138 See S-X Rule 3-10(a). In the case of a foreign private issuer, these would be the financial statements required by Item 8.A of Form 20-F. Note that S-X Rule 3-10 typically does not apply to credit enhancements that are not guarantees. However, in certain cases the financial condition of the party providing the credit enhancement could be material to investors and subject to disclosure. See *Final Rule: Financial Statements and Periodic Reports for Related Issuers and Guarantors*, Release No. 33-7878 at n.50 (Aug. 15, 2000).
- 139 S-X Rule 3-10(a).

- <sup>140</sup> S-X Rule 3-10(b)(2) defines a security as “debt” or “debt-like” if: “(i) The issuer has a contractual obligation to pay a fixed sum at a fixed time; and (ii) Where the obligation to make such payments is cumulative, a set amount of interest must be paid.”
- <sup>141</sup> S-X Rule 13-01(a)(6)-(7). In some situations, this may require the parent company to include separate summarized financial information for the issuers and guarantors to which that additional information applies. For instance, where a subsidiary guarantee is not full and unconditional and the guarantor is not wholly owned by the parent company, the parent may be required to disclose separate summarized financial information for the guarantor, as well as additional information about the terms of the guarantee and the rights of minority interests in the subsidiary.
- <sup>142</sup> S-X Rule 13-01(b). The parent company may decide to include the Alternative Disclosures in the notes to the consolidated financial statements, which would then subject the information to audit and with possible delay and expense. If not included in the consolidated financial statements or in the MD&A, the parent company must include the disclosures in its prospectus immediately following “Risk Factors” or, if there are no risk factors, immediately following pricing information.
- <sup>143</sup> S-X Rule 13-01(a). For instance, if there were fewer than 300 holders of record of the subject securities, the reporting obligation would be automatically suspended after the first annual report on Form 10-K following the issuance. See Exchange Act Section 15(d)(1).
- <sup>144</sup> S-X Rule 13-01(a)(1).
- <sup>145</sup> S-X Rule 13-01(a)(2).
- <sup>146</sup> S-X Rule 13-01(a)(3).
- <sup>147</sup> See S-X Rule 3-10(b)(1) the “parent company” is the entity that (i) is an issuer or guarantor of the guaranteed security; (ii) is, or as a result of the subject Securities Act registration statement will be, an Exchange Act reporting company; and (iii) consolidates each subsidiary issuer and/or subsidiary guarantor of the guaranteed security in its consolidated financial statements.
- <sup>148</sup> S-X Rule 13-01(a)(4)(v).
- <sup>149</sup> S-X Rule 13-01(a)(4), referring to the definition of “summarized financial information” in S-X Rule 1-02(bb), required for other note disclosures (e.g., equity investees). There is no requirement to present cash flow information, but the required disclosures include current and non-current assets, preferred stock, non-controlling interests, net sales or gross revenues, income/loss from continuing operations, and net income/loss.
- <sup>150</sup> S-X Rule 13-01(a)(4)(iv).
- <sup>151</sup> S-X Rule 13-01(a)(4)(iv).
- <sup>152</sup> S-X Rule 13-01(a)(5). An acquired business is significant for these purposes if it exceeds 20% on any of the Asset, Investment, or Income Tests discussed above in “Recent and Probable Acquisitions.”
- <sup>153</sup> S-X Rule 13-01(a)(4)(vi).
- <sup>154</sup> S-X Rule 13-01(a)(4)(vi)(A).
- <sup>155</sup> S-X Rule 13-01(a)(4)(vi)(B).
- <sup>156</sup> S-X Rule 13-01(a)(4)(vi) defines a “finance subsidiary” as a “a subsidiary that has no assets or operations other than those related to the issuance, administration and repayment of the security being registered and any other securities guaranteed by its parent company.”
- <sup>157</sup> S-X Rule 13-01(a)(4)(vi)(C).
- <sup>158</sup> S-X Rule 13-01(a)(4)(vi)(D).
- <sup>159</sup> S-K Item 601(b)(22).
- <sup>160</sup> S-X Rule 3-16 will continue to apply to any secured offering registered before January 4, 2021 where the registrant has not been providing S-X Rule 3-16 financial statements. This extension of the S-X Rule 3-16 regime for the remaining term of securities that meet these criteria is designed to ensure that collateral release provisions in the related indentures are not unintentionally triggered and holders’ rights impaired.
- <sup>161</sup> S-X Rule 13-02(a)(6)-(7).
- <sup>162</sup> S-X Rule 13-02(b).
- <sup>163</sup> S-X Rule 13-02(a).
- <sup>164</sup> See ASC 323, *Investments – Equity Method and Joint Venture*; see also *Financial Reporting Manual*, Section 5210.
- <sup>165</sup> See SAB 103, Topic 6.K.4.
- <sup>166</sup> See *Financial Reporting Manual*, Section 4110.5.
- <sup>167</sup> See S-X Rule 3-09(a).
- <sup>168</sup> Note this test is derived from S-X Rule 1-02(w)(1)(i).
- <sup>169</sup> Note this test is derived from S-X Rule 1-02(w)(1)(iii).
- <sup>170</sup> See S-X Rule 3-09(a).
- <sup>171</sup> See S-X Rule 3-09(b).
- <sup>172</sup> *The Center for Audit Quality SEC Regulations Committee Highlights* (Mar. 19, 2013) (EGC may include only two years of financial statements of the Rule 3-09 investee, even in situations where an EGC voluntarily provides a third year of financial statements).
- <sup>173</sup> See Note to paragraph (w) of S-X Rule 1-02(w); see also *Financial Reporting Manual*, Section 6350.2.
- <sup>174</sup> See generally S-X Rule 4-08(g).
- <sup>175</sup> See Form 20-F, Item 17(c)(vi).

<sup>176</sup> See S-X Rule 3-09(d).

<sup>177</sup> See Form 20-F, Item 17(c).

<sup>178</sup> See *id.*

<sup>179</sup> See *Financial Reporting Manual*, Note to Section 6410.6.

<sup>180</sup> See S-K Item 303(a).

<sup>181</sup> ASC 280 uses the term “chief operating decision maker” to identify a function rather than a specific person; the “chief operating decision maker” could be the CEO, CFO, or a group of senior managers, depending upon the circumstances. IFRS 8 (“Operating Segments”) uses similar language: “The term ‘chief operating decision maker’ identifies a function, not necessarily a manager with a specific title. That function is to allocate resources to and assess the performance of the operating segments of an entity. Often the chief operating decision maker of an entity is its chief executive officer or chief operating officer but, for example, it may be a group of executive directors or others.”

<sup>182</sup> In practice, there is a great variety of ways in which management may view its business and there is no one right answer within a given industry.

<sup>183</sup> See ASC 280-10-50-12 (quantitative thresholds).

<sup>184</sup> Under ASC 280, the details provided in reporting a “measure of profit or loss” depend upon the information that is actually reviewed by the chief operating decision maker and may include revenues from external versus internal customers, interest revenue and expenses, depreciation and amortization, and unusual items, among others.

<sup>185</sup> See *generally* S-X Rule 5-04(c).

<sup>186</sup> Where restrictions on the amount of funds that may be loaned or advanced differ from the amount restricted as to transfer in the form of cash dividends, the amount least restrictive to the subsidiary may be used. Redeemable preferred stocks and non-controlling interests are deducted in computing net assets for purposes of this test. See S-X Rules 5-04 and 1-02(dd).

<sup>187</sup> See *generally* S-K Item 801.

<sup>188</sup> See *Interpretive Release: Modernization of Oil and Gas Reporting*, Release No. 33-8995 (Dec. 31, 2008).

<sup>189</sup> The rules define a “qualified person” to mean:

- a mineral industry professional with at least five years of relevant experience in the type of mineralization and type of deposit under consideration and in the specific type of activity that person is undertaking on behalf of the company; and
- an eligible member or licensee in good standing of a recognized professional organization at the time the technical report is prepared.

<sup>190</sup> See *Final Rule: Modernization of Property Disclosures for Mining Registrants*, Release No. 33-10570 (Oct. 31, 2018).

<sup>191</sup> See *Final Rule: Update of Statistical Disclosures for Bank and Savings and Loan Registrants*, Release No. 33-10835 (Sept. 11, 2020).

<sup>192</sup> See *Financial Reporting Manual*, Section 6510 (Item 17), Section 6520 (Item 18).

<sup>193</sup> Compare Form 20-F, Item 17(b) (financial statement must disclose information “substantially similar” to financial statements complying with US GAAP and S-X) with *id.* at Item 18 (an issuer must provide all Item 17 information plus all other information required by US GAAP and S-X unless those requirements do not apply to foreign private issuers, subject to certain exceptions).

<sup>194</sup> See SAB 103, Topic 1.D.1.

<sup>195</sup> See *id.*

<sup>196</sup> See Form 20-F, General Instruction E.(c)(2).

<sup>197</sup> See S-X Rule 3-05.

<sup>198</sup> See S-X Rule 3-09.

<sup>199</sup> See S-X Rule 3-16.

<sup>200</sup> See S-X Rule 3-10 and S-X Rule 13-01.

<sup>201</sup> See Regulation G, Rule 100(a).

<sup>202</sup> See Form 8-K, Item 2.02, Instruction 2 (requirements of S-K Item 10(e)(1)(i) apply to Item 2.02 disclosures).

<sup>203</sup> See Regulation G, Rule 101(a)(1).

<sup>204</sup> See *id.* at Rule 101(b).

<sup>205</sup> See *id.* at Rule 101(a)(2).

<sup>206</sup> See *id.* at Rule 101(a)(3).

<sup>207</sup> See *id.* at Rule 100(a).

<sup>208</sup> See *id.* at Rule 100(a)(2). In the case of forward-looking non-GAAP measures, a quantitative reconciliation need only be provided to the extent available without unreasonable efforts. *Id.*

<sup>209</sup> See *id.* at Rule 100(b).

<sup>210</sup> See *id.* at Rule 100(c).

<sup>211</sup> See S-K, Items 10(e)(2), 10(e)(4), and 10(e)(5).

<sup>212</sup> See *id.* at Item 10(e)(1)(i), including in an earnings release furnished under Form 8-K Item 2.02.

<sup>213</sup> See *id.* at Item 10(e)(1)(ii), but not in an earnings release furnished under Form 8-K Item 2.02.

<sup>214</sup> See *id.* at Item 10, Note to Paragraph (e).

- <sup>215</sup> See generally Non-GAAP Financial Measures C&DIs (last updated Dec. 22, 2022).
- <sup>216</sup> See Form 20-F, Instruction 1 to Item 15 (providing a “transition period” for “newly public companies” pursuant to which the management’s assessment and the auditor’s attestation is not required until the company “either had been required to file an annual report pursuant to Section 13(a) or 15(d) of the Exchange Act for the prior fiscal year or had filed an annual report with the Commission for the prior fiscal year”); see also *Final Rule: Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers and Newly Public Companies*, Release No. 33-8760 (Dec. 15, 2006) (adopting the transition period codified in Form 20-F).
- <sup>217</sup> See Form 20-F, Item 15. Under Exchange Act Rule 12b-2, a “large accelerated filer” is an issuer that, as of the end of its fiscal year:
- has an aggregate worldwide market value of voting and non-voting common equity held by non-affiliates (*market capitalization*) of \$700 million or more (measured as of the last business day of the issuer’s most recently completed second fiscal quarter);
  - has been subject to SEC reporting under the Exchange Act for a period of at least 12 calendar months;
  - has filed at least one annual report under the Exchange Act with the SEC; and
  - is not eligible to be a “smaller reporting company” and had annual revenues of less than \$100 million in the most recent fiscal year for which financial statements are available.
- In addition, under Exchange Act Rule 12b-2, an “accelerated filer” is an issuer meeting the same conditions, except that it has a market capitalization of \$75 million or more but less than \$700 million (measured as of the last business day of its most recently completed second fiscal quarter). See *Final Rule: Accelerated Filer and Large Accelerated Filer Definitions*, Release No. 34-88365 (Mar. 12, 2020). See also *Final Rule: Smaller Reporting Company Definition*, Release No. 33-10513 (July 10, 2018).
- <sup>218</sup> See *Final Rule: Internal Control over Financial Reporting in Exchange Act Periodic Reports of Non-Accelerated Filers*, Release No. 33-9142 (Sept. 21, 2010). This rule implemented Section 989G of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which added Section 404(c) to Sarbanes-Oxley. Under Section 404(c), the requirements of Section 404(b) do not apply to any audit report prepared for an issuer that is neither an accelerated filer nor a large accelerated filer.
- <sup>219</sup> JOBS Act Section 103 (revising Sarbanes-Oxley Section 404(b)); JOBS Act Section 101(a) and (b) (adding new Securities Act Section 2(a)(19) and Exchange Act Section 3(a)(80)).
- <sup>220</sup> See *Final Rule: Interactive Data to Improve Financial Reporting*, Release No. 33-9002 (Jan. 30, 2009).
- <sup>221</sup> See *Final Rule: Inline XBRL Filing of Tagged Data*, Release No. 33-10514 (June 28, 2018). In addition, any electronic filer that is required to submit interactive data files in Inline XBRL format must also tag all of the information required on the cover page of Forms 10-K, 10-Q, 8-K, 20-F, and 40-F. The requirement applies to Forms 20-F and 40-F only if they are being used as annual reports and not as registration statements. See *Final Rule: FAST Act Modernization and Simplification of Regulation S-K*, Release 33-10618 (Mar. 20, 2019) (adding new Rule 406 to Regulation S-T, new Item 601(b)(104) to S-K, new paragraph 104 to the “Instructions as to Exhibits” of Form 20-F, and new paragraph B.17 to the “General Instructions” of Form 40-F).
- <sup>222</sup> See S-K Item 601(b)(101)(i).
- <sup>223</sup> See *id.*
- <sup>224</sup> Final Rule: Interactive Data to Improve Financial Reporting, Release No. 33-9002, p. 1 (Jan. 30, 2009).
- <sup>225</sup> Under the relevant Rule 10b-5 case law, a plaintiff must show more than a simple misstatement or omission. A showing of scienter or recklessness is also required to establish liability.

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